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HOW COPYRIGHT LAW MAY AFFECT POP MUSIC WITHOUT OUR KNOWING IT

Peter K. Yu*

I. INTRODUCTION

When copyright law is linked to the creation of music—the focus of this Symposium—interesting questions arise. In the context of classical music, for example, why could Johann Sebastian Bach “recycle” in his Concerto for Four Harpsichords the opening phrase in Antonio Vivaldi’s Concerto for Four Violins, Strings and Harpsichord Continuo?¹ Why could Peter Ilyich Tchaikovsky include in his *1812 Overture* repetitive fragments of *La Marseillaise* and the anthem *God Save the Tsar!* to portray the clash between the French and Russian armies?² Would copyright protection in musical works help Wolfgang Amadeus Mozart avoid poverty and the fate of dying penniless? Or would such protection instead lead him to behave more like Johannes Brahms and Giuseppe Verdi, whose creativity slowed down significantly following the introduction of copyright protection?³

* Copyright © 2014 Peter K. Yu. Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School. The Author is grateful to Brandon Clark, Kristelia García, K.J. Greene, and Eric Priest for valuable comments and suggestions, and La'Cee Groetken, Jeffrey Kappelman, Nicholas Krob, and Brooke Yang for excellent research and editorial assistance. He is also indebted to Al and Bob Kohn and Donald Passman, whose frequently updated books have been indispensable guides to understanding the music business.

¹ As Ronald Rosen observed:

These two concertos are scored for different solo instruments and are in different keys (Vivaldi in B minor and Bach in A minor). The pitch (or note) sequence and the context in which each is used, with each pitch having the same duration, and with the trills occurring at the same times and places, are not merely “substantially similar” as that term is used in the copyright law, but (except for the transposition from one key to another) are also virtually identical.

RONALD S. ROSEN, MUSIC AND COPYRIGHT 4 (2008) (footnotes omitted); see also *id.* at 161 (“[C]opyright laws had been enacted in the early eighteenth century, and Vivaldi, in his infringement action against J.S. Bach would have been successful because Bach lifted virtually the entire contents of Vivaldi’s Concerto for Four Violins—note for note, rhythmically and essentially, harmonically the same, and used it in his Concerto for Four Keyboards.”).

² See *id.* at 314–15 (“During the course of its twenty-plus minutes, Tchaikovsky quotes portions of the ‘Marseillaise,’ before that stirring anthem symbolizing the French army and nation is overwhelmed by the Russian victory over Napoleon, as the Overture concludes with the ‘Czar’s Anthem.’”).

³ See WILLIAM F. PATRY, HOW TO FIX COPYRIGHT 36 (2011) (“[A]fter Italian [copyright] laws were passed, Verdi was able to amass a considerable fortune. . . . Verdi made so much money he stopped composing. Johannes Brahms also made considerable sums as a result of the passage of copyright laws that enabled his publisher to prevent free-riding, and as a result retired early.”); F.M. SCHERER, QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES 179–80 (2003) (“Obtaining substantial revenues from score sales and performance fees, Verdi observed that he no longer needed to be a ‘galley slave’

Outside classical music, one can also ask important questions about the appropriate boundaries for digital sampling—the practice of copying and remixing sounds into a new musical work, usually in the hip-hop genre.⁴ In *Bridgeport Music, Inc. v. Dimension Films*,⁵ for instance, the United States Court of Appeals for the Sixth Circuit found infringing the copying of a “three-note P-Funk guitar riff” by way of sampling of a sound recording.⁶ The recording at issue was “Get Off Your Ass and Jam” by George Clinton, Jr. and the Funkadelics. As Judge Ralph Guy explained:

Get a license or do not sample. We do not see this as stifling creativity in any significant way. It must be remembered that if an artist wants to incorporate a “riff” from another work in his or her recording, he is free to duplicate the sound of that “riff” in the studio. Second, the market will control the license price and keep it within bounds. The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording. Third, sampling is never accidental. It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had heard before. When you sample a sound recording you know you are taking another’s work product.⁷

Since the mid-1990s, copyright litigation relating to digital sampling has sent shock waves across the hip-hop industry, unleashing profound changes to both hip-hop music and copyright licensing.⁸ Under Judge Guy’s highly restrictive approach in *Bridgeport*, many of those musical works created during

and to compose at a frantic pace. Between 1840 and 1849 (he was thirty-six years old in 1849), Verdi composed 14 operas. During the 1850s he composed 7, in the 1860s he produced 2, and he wrote 1 in each of the succeeding three decades.”).

⁴ For discussions of digital sampling, see generally JOANNA TERESA DEMERS, *STEAL THIS MUSIC: HOW INTELLECTUAL PROPERTY LAW AFFECTS MUSICAL CREATIVITY* 71–110 (2006); KEMBREW MCLEOD & PETER DiCOLA, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* (2011).

⁵ *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

⁶ KEMBREW MCLEOD, *FREEDOM OF EXPRESSION®: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY* 112 (2005).

⁷ *Bridgeport Music*, 410 F.3d at 801.

⁸ See MCLEOD & DiCOLA, *supra* note 4, at 141 (“[*Bridgeport*] marked, for sound recordings, a return to the no-exceptions, no-nuance approach of *Grand Upright [Music Ltd. v. Warner Bros. Records, Inc.]*, at least in the jurisdiction of the Sixth Circuit. And since most samples implicate the sound recording copyright in the song being sampled (if not always the music composition copyright, as *Newton v. Diamond* shows), the stark rule of *Bridgeport* could profoundly affect the legal environment for sampling.”); see also *id.* at 14–44 (discussing *Bridgeport*’s effect on digital sampling and creativity).

what Kembrew McLeod and Peter DiCola referred to as “The Golden Age of Sampling”⁹ could not have been commercially released.¹⁰ As Chuck D, the leader of Public Enemy, lamented: “[The limitations imposed by copyright law] changed how we had to approach music to the point where we couldn’t use fragments in a song. That’s what changed overnight. It would take maybe a hundred different artists to construct a Public Enemy song, though they are all unrecognizable.”¹¹ Walter Leaphard, the group’s manager, concurred: “We just flat-out say, ‘From now on, no samples.’ We don’t have the man power or the legal power or the money to deal with those issues. I’m still fighting and cleaning up sampling issues from 1991.”¹²

To help us better understand the role of copyright law in the music business and popular music, this article explores five specific questions: Why do popular songs usually last for less than five minutes? Why are professional songwriters dissatisfied with Pandora and Spotify? Why can we bring European CDs back to the United States? Why can’t YouTube videos be created with blanket licenses offered by the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”)? Are digital

⁹ *Id.* at 19. According to Paul Miller, a.k.a. DJ Spooky, “some of the key albums and artists from the golden age include De La Soul’s *3 Feet High and Rising*, Pete Rock & C. L. Smooth’s *Mecca and the Soul Brother*, and Public Enemy’s *It Takes a Nation of Millions to Hold Us Back*, among others.” *Id.*

¹⁰ As Kembrew McLeod observed:

You can hear the increasing limitations imposed on mainstream hip-hop stamped on Public Enemy’s music. Between 1988 and 1990, Public Enemy released what are considered to be two of hip-hop’s greatest albums, *It Takes a Nation* and *Fear of a Black Planet*. Public Enemy’s production team, the Bomb Squad, took sampling to the level of high art while still keeping intact its populist heart. But by the time the group’s *Apocalypse 91* came out, even the casual listener could hear a dramatic change. Gone were the manic collages that distinguished their previous two albums, where they fused dozens of fragments to create a single song. The new sample-licensing rules didn’t differentiate between collaging small sonic chunks and using entire choruses, so by 1991 it became economically prohibitive to release a record such as *It Takes a Nation* or *Fear of a Black Planet*.

MCLEOD, *supra* note 6, at 68; see also DEMERS, *supra* note 4, at 10 (“[E]xpensive litigation has fundamentally changed Public Enemy’s sound by making the group unwilling to sample music anymore.”); *id.* at 118–19 (“When Def Jam Records first released *A Nation of Millions*, most hip-hop samples were not licensed at all. To release just one of the songs from *A Nation of Millions* today, Public Enemy would have to pay advance licensing fees exceeding half of the amount the group expected to earn from sales of the entire album.”).

¹¹ MCLEOD, *supra* note 6, at 68. As Hank Shocklese, Public Enemy’s producer, elaborated: [Unlike the taking of a chunk of a song, as in looping a measure] the kind of things we were doing . . . we were just taking a horn hit here, a guitar riff there; we might take a little speech, part of a speech over here, a kick snare from somewhere else. It was all bits and pieces.

Id. at 78.

¹² DEMERS, *supra* note 4, at 119.

downloads sales or licenses? And as a bonus, this article includes a rather obscure yet illuminating sixth question: Why does the royalty rate for sheet music stay at 7¢ per copy?

It is my hope that answering these questions will enable us to develop a deeper understanding of copyright law and how it can affect both the music business and popular music. The copyright debate has been repeatedly and frequently framed as one between different stakeholders. In the area of popular music, these stakeholders include record labels, music publishers, professional songwriters, recording artists, individual users, retail stores,¹³ online service providers, and other third-party intermediaries. Because the laws we include in Title 17 of the United States Code will affect these stakeholders—both directly and indirectly—they will ultimately affect our music. Thus, the more we understand the copyright law's impact on the music business—and, by extension, our culture—the more we will notice the high cultural stakes involved in striking the proper balance in the copyright system.

II. WHY DO POPULAR SONGS USUALLY LAST FOR LESS THAN FIVE MINUTES?

Songs in popular music vary in length. While some begin with a segment of instrumental music and last for as long as seven minutes, others are short, repetitive, and within the range of three to five minutes. There are many reasons why songs are of a certain length. These reasons include artistic choice, historical tradition, past technological constraints,¹⁴ increased radio play, reduced production costs, practical constraints regarding live performances, and, of course, the audience's limited attention span (especially for the Twitter generation). One reason not widely discussed, however, is the role copyright law may have played in determining the length of a sound recording.

Section 114 of the 1976 Copyright Act, the current U.S. copyright statute,¹⁵ covers what is generally referred to as the “mechanical reproductions” of copyrighted music—or, as the statute puts it, the “duplicat[ion of] the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”¹⁶ Such reproductions now take place in a wide range of media, from vinyl albums to cassette tapes and from digital tracks to online streams.

¹³ Instead of Tower Records and Sam Goody (or f.y.e.), today's key retail stores include Amazon, Best Buy, Target, Walmart, and, of course, the iTunes Store.

¹⁴ See ANDRE J. MILLARD, *AMERICA ON RECORD: A HISTORY OF RECORDED SOUND* 128 (2005) (“The standard Edison cylinders at the turn of the century could play for only about 2 minutes, while 7-inch discs could play a little longer.”).

¹⁵ Since its adoption in 1790, the Copyright Act has undergone major revisions in 1831, 1870, 1909, and 1976.

¹⁶ 17 U.S.C. § 114(b) (2012).

The provision on mechanical reproductions dates back to Section 1(e) of the 1909 Copyright Act, which prohibited for the first time the unauthorized mechanical reproduction of a copyrighted work.¹⁷ As stated in the provision:

[A]s a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit¹⁸

Section 1(e) was enacted in response to the United States Supreme Court case of *White-Smith Music Publishing Co. v. Apollo Co.*¹⁹ In this celebrated case, the Court found that the manufacture of player piano rolls did not result in the creation of a “copy” of the copyrighted work.²⁰ As a result, the manufacturer did not need to obtain a license from the relevant copyright holders. As Justice William Day reasoned:

It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies, as that term is generally understood, and as we believe it was intended to be

¹⁷ Copyright Act of 1909 § 1(e), ch. 320, 35 Stat. 1075 (repealed 1976).

¹⁸ *Id.*

¹⁹ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

²⁰ *See id.* at 18.

understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which others can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.²¹

In the end, the Court declared: "These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act."²²

To overturn *White-Smith*, Congress enacted Section 1(e) of the 1909 Copyright Act and extended coverage to the mechanical reproductions of a copyrighted work. Nevertheless, it feared that the Aeolian Company, the most dominant manufacturer of piano rolls at the time, would have a quasi-monopoly over mechanical reproductions.²³ Congress therefore introduced compulsory licenses for making such reproductions.²⁴ The rate for these licenses, or "mechanicals" for short, was set at 2¢ per mechanical copy—"the then approximate equivalent of 5 percent of the manufacturer's selling price."²⁵ This rate remained unchanged for nearly seven decades until 1978, when the 1976 Copyright Act entered into effect.

During the Congressional hearings on this yet-to-enact statute, many copyright experts, in particular those supporting the music industry, questioned

²¹ *Id.* at 17.

²² *Id.* at 18.

²³ Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 219–20 (2010) ("Eighty-seven members of the Music Publishers Association controlling 381,598 compositions had agreed to give the Aeolian Company exclusive rights to manufacture piano rolls of their copyrighted compositions in return for a royalty of ten per cent of the retail selling price of the piano rolls. . . . The Aeolian Company was the dominant manufacturer of player pianos.").

²⁴ See generally STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 5: THE COMPULSORY LICENSE PROVISIONS OF THE U.S. COPYRIGHT LAW 47 (Comm. Print 1960) (study by Harry G. Henn) (providing an excellent study on the mechanical royalty provision of the 1909 Copyright Act).

²⁵ *Id.* at 55; see also *id.* at 78 ("In 1909, a buyer of records paid anywhere from \$1.50 to \$7 for 2 to 4 minutes of music. In 1956, a buyer paid 85 cents for 3 minutes and \$3.98 (Federal excise tax and the cost of the album included) for 46 minutes of music." (comments from Ernest Meyers, general counsel of the Recording Industry Association of America)).

the fairness of having such a low flat rate.²⁶ As Sydney Kaye, chairman of BMI's board, declared in his testimony:

The present 2 cents per composition per part of instrument payment is outmoded for works of long duration. The trade practice is to pay for such works if included on longplaying records at the rate of 1 cent for each 4 minutes with one-quarter of a cent for additional minutes or fractions thereof and a minimum royalty of 2 cents.²⁷

Sidney Wattenberg, the general counsel for the Music Publishers' Protective Association (now the National Music Publishers' Association), concurred:

The 2-cent royalty provided for in the statute applies to all compositions and today with the development of the long-playing record, it seems to me to be so unfair as to shock the conscience of a reasonable man that a mechanical company under the compulsory license provision can record a work such as George Gershwin's "Rhapsody In Blue" for the same 2-cent royalty as he is called upon to pay for let us say Elvis Presley's "Hound Dog."²⁸

When the 1976 Copyright Act finally entered into effect in 1978, the rate was raised from 2¢ to the greater of "2.75 cents or 0.5 cent per minute of playing time or fraction thereof."²⁹ This 2.75¢ rate was further increased to 4¢ in 1981, 4.25¢ in 1983, 4.5¢ in 1984, 5¢ in 1986, 5.25¢ in 1988, 5.7¢ in 1990, 6.25¢ in 1992, 6.6¢ in 1994, 6.95¢ in 1996, 7.1¢ in 1998, 7.55¢ in 2000, 8¢ in 2002, and 8.5¢ in 2004.³⁰ The current rate, which took effect on January 1, 2006, is the greater of "9.1 cents or 1.75 cents per minute of playing time or fraction thereof."³¹ Although record labels rarely pay this statutory rate,³² owing to their

²⁶ See *id.* at 55 ("Whether such royalty rate, assuming it was reasonable in 1909, remains reasonable today, would appear worthy of reexamination in view of the decreased purchasing power of money, the subsequently developed types of recordings (assuming the compulsory license provision be applicable to them), and the substantially increased manufacturer's selling prices.").

²⁷ *Id.* at 70–71.

²⁸ *Id.* at 76.

²⁹ *Copyright Royalty Rates: Section 115, the Mechanical License*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/carp/m200a.html> (last visited Sept. 23, 2014).

³⁰ *Id.*

³¹ *Id.*

³² As Al and Bob Kohn explained:

[B]ecause of the burdensome procedures required by the compulsory license provision—such as the requirement of monthly, rather than quarterly[,] accounting to copyright owners and notice conforming to strict regulation—the

ability to negotiate for voluntary licenses, this rate has been used as the benchmark, and often the maximum rate, for most recording and songwriter agreements.³³

Under the current calculation of 1.75¢ per minute of playing time, 9.1¢ equals the mechanical royalty rate for five minutes and twelve seconds. Thus, if a song lasts for more than five minutes and twelve seconds, the record label, and more likely the recording artist, will be required to pay a higher rate for mechanicals. To be certain, Section 114 of the Copyright Act only allows for the “duplicat[ion of] the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”³⁴ The provision therefore does not govern the situation when the sound recording was recorded for the first time. In reality, however, the rate for first use is not that different from the rate for later uses. As noted music lawyer Donald Passman observed: “Customarily, the publisher doesn’t charge more than the statutory rate, but there’s no reason it can’t, other than industry custom (and the fact that no one will pay any more than that).”³⁵

To complicate matters, many recording artists do not have a full budget to pay for the statutorily stipulated mechanicals for *all* the songs included in their album. Oftentimes, recording contracts will include a so-called controlled composition clause—or “controlled comp clause” for short.³⁶ Although this clause was introduced to limit the record label’s spending per album and to facilitate the acquisition of a discounted rate for mechanicals,³⁷ it has the perverse

compulsory license is hardly used. The vast majority of mechanical licenses issued today are negotiated or *voluntary licenses*, not true compulsory licenses. The terms of these voluntary mechanical licenses are given effect, regardless of whether those licenses strictly reflect the terms of the compulsory license provision of the Copyright Act.

AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 771 (4th ed. 2010); DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 217 (8th ed. 2012) (stating that “compulsory license is almost never used”); *see also* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 682 n.38 (2003) (“The preference for obtaining licenses from Harry Fox instead of utilizing the statutory license is largely due to the reduction of transaction costs offered by Harry Fox. Harry Fox does not require monthly reports and royalty payments as required by the Copyright Office, using instead quarterly or semi-annual reports and payments.”).

³³ *See* PASSMAN, *supra* note 32, at 228–38 (discussing the maximum rate per song and per album in record deals); *id.* at 287 (noting the potential requirement in songwriter agreements of the delivery of “a minimum percentage of [the] statutory rate”).

³⁴ 17 U.S.C. § 114(b) (2012).

³⁵ PASSMAN, *supra* note 32, at 217.

³⁶ *See id.* at 227–28 (discussing controlled composition clauses).

³⁷ *See* KOHN & KOHN, *supra* note 32, at 787 (“Because many recording artists now tend to write most of the songs they record, record companies take the opportunity to address the issue of mechanical licensing directly in the artist’s recording contract. These contracts invariably contain a provision, called a *controlled composition* clause, which effectively limits the amount of money the record company is required to pay in mechanical royalties for each album produced by the artist under the contract.”); *see also id.* at 781 (discussing the practice of “asking for a rate”).

effect of reducing the income recording artists will earn from their own compositions.

Consider, for example, a recording contract that sets the maximum mechanical royalties paid for all controlled compositions at seventy-five percent of the statutory rate.³⁸ Because the current statutory rate is the greater of 9.1¢ or 1.75¢ per minute, the discounted rate for each controlled composition is 6.825¢ if no song exceeds five minutes and twelve seconds. If the recording contract further provides that the record label will only provide for a budget of ten times the rate for controlled compositions—known generally as a “cap” at the “ten times rate”³⁹—the artist’s total budget for mechanicals will be 68.25¢ per album.

Assume that the artist is to record only ten three-to-five-minute songs (as opposed to twelve, which is increasingly common).⁴⁰ Assume further that she wrote only five of these songs herself. Under this hypothetical, the artist will have to allocate 45.5¢ (9.1¢ times five) of the budget to paying the copyright holders of those five songs she did not write. The amount she receives for her own compositions will be the remaining 22.75¢—in other words, 4.55¢ per song (as opposed to 9.1¢ under the copyright statute). If two of those songs she did not write last for seven minutes, the extra two minutes from these songs will increase her allocation of the mechanical royalty budget from 18.2¢ to 24.5¢ (assuming the record label does not have a contractual arrangement to limit the rate to a maximum of 9.1¢ per song). Because the artist now has to pay an additional 6.3¢ for the longer songs, the budget for her own compositions will be further reduced to 16.45¢—that is, a meager 2.35¢ per song (a little more than a quarter of what she would have received under the copyright statute).

To be certain, the artist will always have economic incentives to write longer songs, considering the larger sum of mechanical royalties the extended length will entitle her to receive. This larger sum will, in turn, compensate for the reduced royalties she receives owing to the controlled composition clause in her recording contract. Nevertheless, because other artists and record labels may be reluctant to record songs that last for more than five minutes and twelve seconds, it remains debatable whether the additional royalties, as opposed to creative preferences, would motivate her to write longer songs.⁴¹ In fact, many artists may not even have thought through the complexities surrounding mechanical royalties and controlled composition clauses.

³⁸ See PASSMAN, *supra* note 32, at 228–32 (discussing the maximum rate per song in record deals).

³⁹ See *id.* at 232–38 (discussing the maximum rate per album in record deals).

⁴⁰ If the artist records more than ten songs, the amount allocated to each song will be even lower.

⁴¹ Thanks to Brandon Clark and Eric Priest for pushing me on this point.

III. WHY ARE PROFESSIONAL SONGWRITERS DISSATISFIED WITH PANDORA AND SPOTIFY?

Through a low monthly subscription fee or the willingness to be inundated with advertisements, Pandora, Spotify, and other online streaming services have enabled individual users to listen to music—both songs they like and those they have not yet discovered.⁴² These services not only have helped increase diversity in consumer choice, but also seek to respond to the ever-changing consumer lifestyle, habits, and preferences. Although this Part lumps the discussions of Pandora and Spotify together, they offer different types of services and pay royalties at disparate rates.⁴³

From the standpoint of professional songwriters, however, it is unclear whether Pandora and Spotify are attractive services. This is particularly true for those songwriters who do not perform or who prefer to spend more time in the studio.⁴⁴ On the recent fortieth anniversary of the Swedish group ABBA's victory in the Eurovision competition, Björn Ulvaeus, the group's former songwriting member, "voiced serious doubts that they would have had the same success if they started out today."⁴⁵ As *The Guardian* reported:

He and his co-writer Benny Andersson were more interested in writing great songs than going on tour, but did not start out as fully formed hit songwriters It took years of trial and error, fine-tuning and studying other songwriters. And, once they became successful, they'd still write every day, nine to five—and only end up with 12 songs a year.

Ulvaeus said he doubted spending all that time on writing songs would be possible in a world where Spotify is the main source of income . . . , as they would have had to spend much more time touring in order to make a living.⁴⁶

⁴² See Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, N.Y. TIMES (Jan. 28, 2013), <http://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html>.

⁴³ While the former is largely a non-interactive webcaster, whose rate is set by the Copyright Royalty Board, the latter is a commercial on-demand streaming service. See PASSMAN, *supra* note 32, at 140–41 (distinguishing between interactive and non-interactive webcasting).

⁴⁴ See Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 901–07 (2011) (explaining why alternative compensation models that are based on live performances and merchandise sales will not work for all artists).

⁴⁵ Helienne Lindvall, *The Music Industry Is Divided Over Streaming—and Heading for a Collision*, GUARDIAN (Apr. 30, 2014), <http://www.theguardian.com/media/media-blog/2014/apr/30/music-streaming-revenue-pandora-spotify>.

⁴⁶ *Id.*

Since the arrival of iTunes, Pandora, and Spotify, record labels and songwriters alike have complained about how the revenue these services provide is not comparable to what they used to earn through album sales.⁴⁷ As Robert Levine, the former executive editor of *Billboard*, lamented, the digital transition has forced record labels and songwriters to “trade analog pennies for digital pennies.”⁴⁸ With the arrival of Pandora and Spotify, “the river of nickels” from iTunes has now been further transformed into “a torrent of micropennies.”⁴⁹

On its website, Spotify claims that it “distribut[es] nearly 70% of all the revenues that [it] receive[s] back to rights holders.”⁵⁰ Combining the free and premium tiers of service, “an average ‘per stream’ payout to rights holders [is] between \$0.006 and \$0.0084.”⁵¹ These figures are similar to those reported by *The New York Times*: “according to a number of music executives who have negotiated with the company, [Spotify] generally pays 0.5 to 0.7¢ a stream (or \$5,000 to \$7,000 per million plays) for its paid tier, and as much as 90 percent less for its free tier.”⁵²

Nevertheless, musicians remain dissatisfied with Spotify, as well as Pandora and other online streaming services. For instance, Taylor Swift recently removed her entire back catalogue from Spotify, just as her new album *1989* was released and was on its way to sell more than 1 million copies in the first week.⁵³ Thom Yorke of Radiohead, who released *In Rainbows* over the Internet using a name-your-price model,⁵⁴ also withdrew his independent work from the service

⁴⁷ See ROBERT LEVINE, *FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK* 229 (2011) (“I don’t see how you’d get the consumer to agree to pay a sum that would match what we have at present.” (quoting Frances Moore, CEO, International Federation of the Phonographic Industry)); Sisario, *supra* note 42 (“No artist will be able to survive to be professionals except those who have a significant live business, and that’s very few.” (quoting Hartwig Masuch, CEO, BMG Rights Management)). But see Sisario, *supra* note 42 (reporting that “a Google executive [saying] . . . that Psy’s viral video sensation ‘Gangnam Style’ had generated \$8 million from YouTube, where it had been watched 1.2 billion times, yielding a royalty of about 0.6 cent a viewing”).

⁴⁸ LEVINE, *supra* note 47, at 145.

⁴⁹ Sisario, *supra* note 42.

⁵⁰ *Spotify Explained*, SPOTIFY, <http://www.spotifyartists.com/spotify-explained/> (last visited Sept. 29, 2014).

⁵¹ *Id.*

⁵² Sisario, *supra* note 42.

⁵³ Hannah Ellis-Petersen, *Taylor Swift Takes a Stand Over Spotify Music Royalties*, *GUARDIAN* (Nov. 5, 2014), <http://www.theguardian.com/music/2014/nov/04/taylor-swift-spotify-streaming-album-sales-snob>.

⁵⁴ See Patrik Wikström, *THE MUSIC INDUSTRY: MUSIC IN THE CLOUD* 110 (2009) (providing an estimate from an Internet market research firm that “the album was downloaded approximately 1 million times and 40 per cent of the downloading fans paid on average \$6 for the download”); see also Greg Kot, *RIPPED: HOW THE WIRED GENERATION REVOLUTIONIZED MUSIC* 233–40 (2009) (discussing Radiohead’s name-your-price experiment).

in protest,⁵⁵ although he did launch a new competing streaming service a couple of days after the withdrawal.⁵⁶

In a candid blog post published on *The Guardian*, English musician Sam Duckworth declared:

4,685 Spotify plays of my last solo album equated to £19.22 (that's 0.004p per album stream). The equivalent to me selling two albums at a show. I think it's fair to say that at least two of those almost 5,000 listeners would have bought the album from me if they knew the financial disparity from streaming.⁵⁷

Damon Krukowski of Galaxie 500 also compared his recent Pandora and Spotify payouts with the sales of his band's very first single in the late 1980s: "Pressing 1,000 singles in 1988 gave us the earning potential of more than 13 million streams in 2012."⁵⁸ Finally, Bette Midler complained in a tweet that "Pandora paid her slightly more than \$114 for more than 4 million song spins over a three-month period."⁵⁹

On top of these frustrated remarks, "publishers and songwriters [have] question[ed] why record labels should get five to 12 times as much as the writers when a track is streamed," considering the limited costs incurred by the labels.⁶⁰ Although the disagreement between music publishers and record labels over how to divide the royalties pie is not new, it is worth looking into why Pandora, Spotify, and other online streaming services have thus far failed to satisfy either record labels or professional songwriters. This section will focus on the latter.

In his well-argued book, *Free Ride*, Robert Levine explained the economics behind music disseminated through Spotify and other online streaming services:

⁵⁵ Tim Worstall, *Spotify Royalties Appear to Be Awfully High Despite What Thom Yorke Says*, FORBES (July 17, 2013), <http://www.forbes.com/sites/timworstall/2013/07/17/spotify-royalties-appear-to-be-awfully-high-despite-what-thom-yorke-says/>.

⁵⁶ Tim Worstall, *Thom Yorke Launches Music Streaming Service Mere Days After Criticizing Spotify*, FORBES (July 18, 2013), <http://www.forbes.com/sites/timworstall/2013/07/18/amaazing-thom-yorke-launches-music-streaming-service-mere-days-after-criticising-spotify-the-music-streaming-service/>.

⁵⁷ Sam Duckworth: *Thom Yorke's Right—Artists Can't Survive on Spotify Streams*, GUARDIAN (July 16, 2013), <http://www.theguardian.com/music/musicblog/2013/jul/16/thom-yorke-spotify-ban-right-sam-duckworth>.

⁵⁸ Damon Krukowski, *Making Cents*, PITCHFORK (Nov. 14, 2012), <http://pitchfork.com/features/articles/8993-the-cloud/>.

⁵⁹ Andy Gensler, *Bette Midler Critiques Pandora, Spotify: "Impossible for Songwriters to Earn a Living"*, HOLLYWOOD REP. (Apr. 6, 2014), <http://www.hollywoodreporter.com/earshot/bette-midler-critiques-pandora-spotify-693961>.

⁶⁰ Lindvall, *supra* note 45.

[A] service like Spotify could hurt labels if users who don't subscribe choose to buy fewer CDs. As an example, let's imagine a million music fans who spend \$60 a year on CDs and iTunes songs—representing \$60 million in retail revenue—but might cut that amount by a third once they start using Spotify. If the company can sell subscriptions to 10 percent of its users for \$10 a month, it would generate \$12 million in fees; those 100,000 customers would spend another \$4 million a year buying music, for a total of \$16 million. But the other 900,000 customers using the service for free will spend only another \$36 million. That adds up to \$52 million—only \$8 million less than before—except that the first users of Spotify will be the consumers who now spend the most on music.⁶¹

Although Levine believes that the record labels' revenue will eventually increase with the growth of these services, he forecasted that the labels would have to see a severe drop in revenue before seeing the revenue rising again:

Consider a streaming music service that charges \$5 per month. Its first customers would be dedicated fans, the consumers who might now spend \$100 or so a month on music. Once they buy a subscription, they might spend less. In the long run, this might not matter, because other subscribers—the consumers who now buy one or two CDs a year—will spend much more than they did before. The problem is that they might not buy a subscription for some time.⁶²

Indeed, Roger Entner of Recon Analytics estimated that “streaming music services should be sustainable when they reach 10 million paying users.”⁶³ Until then, however, professional songwriters are likely to remain dissatisfied with these services.

To be certain, the decline in songwriters' royalties can be attributed to both the decline of the music industry and massive unauthorized copying on the internet. However, one should not overlook the dramatic impact the shift from the album model to the singles model has on the songwriting business.⁶⁴ Even if

⁶¹ LEVINE, *supra* note 47, at 77–78.

⁶² *Id.* at 229–30.

⁶³ Joshua Brustein, *Spotify Hits 10 Million Paid Users. Now Can It Make Money?*, BLOOMBERG BUSINESSWEEK (May 21, 2014), <http://www.businessweek.com/articles/2014-05-21/why-spotify-and-the-streaming-music-industry-cant-make-money>.

⁶⁴ Although this Part focuses primarily on economic impact, one can also notice some non-economic impact. For example, “[f]ans of the Beatles' classic *Sgt. Pepper's Lonely Hearts Club* lamented that the iPod, with its irresistible song-shuffling function, would eliminate the album as

it remains debatable how much of the recent decline in music sales was caused by massive online file-sharing,⁶⁵ there is no denying that such unauthorized copying has forced the music industry to embrace distribution models that, at least for now, have resulted in a significant reduction in income. As Robert Pittman, cofounder of MTV, declared: "Stealing music is not [what's] killing music. When I talk to people in the music business, most of them will admit the problem is they're selling songs and not albums. I mean, you do the math."⁶⁶

To a large extent, the new singles model Apple iTunes ushered in a decade ago has turned a "high-margin, high revenue model" of \$15-to-\$18 transactions into a low-margin model of multiple 99¢ sales.⁶⁷ As Peter Mensch, who works with Metallica, the Red Hot Chili Peppers, and others acts, declared: "When they let Steve Jobs roll over us, that was the end. They thought, 'It's another way to sell music.' But now I'm selling singles when I should be selling albums."⁶⁸ A 2007 consulting study funded by the U.K. music industry also found that "18 percent of the labels' 2004-2007 revenue loss stemmed from piracy, while the rest was the result of selling music by the track."⁶⁹

To make things worse, the early days of the iTunes Music Store did not allow for so-called variable pricing. As a result, all songs, regardless of their genre or popularity, were sold at the same 99¢ price.⁷⁰ The lack of control over prices, to some extent, has created market distortion that ultimately harms the record labels' business models. While fixed pricing undoubtedly provides simplicity and convenience to consumers—the preference of the late Steve Jobs⁷¹—it ignores the fact that some songs (and albums) are worth more, and sometimes significantly more, than others. Before the arrival of iTunes, for example, record labels frequently differentiated among the different classes of

an art form." STEVE KNOPPER, *APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* 178 (2009).

⁶⁵ See SIVA VAIDHYANATHAN, *THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM* 47-48 (2004) (observing that Eminem, Limp Bizkit, Britney Spears, and NSYNC had all sold more than one million albums in the first week after release in the height of online file-sharing through Napster); WIKSTRÖM, *supra* note 54, at 150 ("There has been, and still is, a relatively polarized debate as to whether it is the copyright infringement enabled by P2P networking and other similar technologies which has caused the downturn of the recorded music industry."); Felix Oberholzer-Gee & Koleman S. Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007) (showing that file sharing has only had a limited effect on record sales); Yu, *Digital Copyright and Confuzzling Rhetoric*, *supra* note 44, at 893 ("[W]ithout empirical proof, it is hard to know whether downloads actually lead to lost sales. In fact, some evidence seems to suggest otherwise.").

⁶⁶ KNOPPER, *supra* note 64, at 181.

⁶⁷ LEVINE, *supra* note 47, at 44-45 (quoting the observation of Hank Barry, Napster's former interim CEO).

⁶⁸ *Id.* at 68.

⁶⁹ *Id.* at 70.

⁷⁰ See KNOPPER, *supra* note 64, at 179-80 (discussing the problems created by the lack of variable pricing on iTunes).

⁷¹ See *id.* at 180.

music: singles, albums, compilations, “greatest hits,” mid-price records, budget releases, record clubs, box sets, all of which were subject to different royalty rates.⁷² Although the fixed 99¢ rate was eventually replaced in 2009 by a variable pricing scheme of 69¢, 99¢, and \$1.29,⁷³ the prices of most best-selling songs were soon raised to the current price of \$1.29, leaving again limited price variations amongst songs of different genres and popularity.

To make the life of professional songwriters even more difficult, publishing agreements usually require the output for a specified term to be delivered in exchange for an advance against royalties.⁷⁴ The term is set up to enable songwriters to generate enough songs for an album. It is usually based on either a specified period or a specified number of songs, including those that have to be recorded and released. If the concerned songwriter fails to deliver enough songs under the specified term, the output she produces for the next album will still count toward the yet-to-complete term. It is therefore no surprise that Donald Passman cautioned songwriters about the term, lest they deliver “two albums for the price of one.”⁷⁵

Because of the importance for songwriters to obtain an advance, music lawyers are eager to negotiate for contracts featuring language that will allow the specified term to move forward—for instance, when the advance has been recouped or when enough songs have been recorded. They may further negotiate for the songwriter to receive an additional advance at the beginning of a new term, especially if the contract for the previous term has already been recouped.⁷⁶ Advances are attractive because they are rarely returnable, even when they are recoupable—that is, the songwriter will not be contractually required to return the advance even if she may not receive additional monies from the publisher for the songs she has composed during the term.⁷⁷

⁷² See PASSMAN, *supra* note 32, at 151–53, 158–62, 230.

⁷³ Andrew Edgecliffe-Johnson, *Apple Brings in Variable Pricing on iTunes*, FIN. TIMES (Jan. 6, 2009), <http://www.ft.com/intl/cms/s/2/bccbeed0-dc1f-11dd-b07e-000077b07658.html>.

⁷⁴ See PASSMAN, *supra* note 32, at 282 (discussing the “term” in songwriter agreements).

⁷⁵ *Id.* at 287.

⁷⁶ See *id.* at 286 (“[I]f you have clout, you can sometimes get the publisher to move the term forward if you’re recouped, even if you haven’t delivered all the songs you promised.”).

⁷⁷ As Al and Bob Kohn observed:

Though the advance is recoupable, it is not *returnable* (i.e., if the advances turn out to be greater than the amount of royalties ever earned from sales, the writer will not have to pay the unearned balance of the advance back to the person who paid it, unless of course he is otherwise in breach of the agreement . . . , however, the advance may be *returnable* in certain circumstances at the option of the writer, such as when the writer exercises a reversion of rights provision). Thus, an advance is more accurately referred to as a “non-returnable, recoupable advance.”

KOHN & KOHN, *supra* note 32, at 111; PASSMAN, *supra* note 32, at 85 (stating that “[w]ith very rare exceptions, advances are nonreturnable”).

In recent years, the privileging of the singles model over the album model has greatly changed the dynamics of the songwriting business. To begin with, songwriter agreements for single songs rarely exist, and it is hard to know in advance whether a particular song will succeed commercially. Even if the songwriter manages to obtain a contract for single songs, the advance provided by such a contract is likely to be very limited—in the range of hundreds of dollars as opposed to tens, or even hundreds, of thousands of dollars.⁷⁸ Moreover, for contracts featuring specified terms, it remains unclear when the specified term will move forward (assuming that the contract allows for such a move). For example, if the contract requires recording by an artist from a major label, success via independent labels or user-generated content may not suffice even if the song has gone viral.⁷⁹

Obviously, it is hard to generalize the impact of the shift from the album model to the singles model on professional songwriters. Some songwriters, for instance, will work better under the singles model, because they are not interested in writing many songs and have no urgency to move the term forward. Some are also very talented, and the singles model could be quite beneficial if they manage to negotiate for a higher rate in exchange for benchmarks that are tied to commercial success. Meanwhile, other songwriters get used to having a high volume of production in an effort to move the term and to get additional advances. Oftentimes, the push for high volume of output has resulted in the production of a large number of songs with mixed success. Such a push would therefore work better with the old album model, which bundles one or two popular songs together with other mediocre—or, worse, filler—tunes.⁸⁰

⁷⁸ Compare PASSMAN, *supra* note 32, at 281 (“The advance for a single-song agreement is usually not very significant. It ranges anywhere from nothing (the most common) to \$250 or \$500, if we’re talking about unknown songwriters and no unusual circumstances (such as a major artist who’s committed to record the song, which of course changes the whole ball game). Major songwriters rarely sign single-song agreements other than for films . . .”), with *id.* at 283 (“[N]ew writers signing to a major publisher might get an advance in the range of \$18,000 to \$100,000 per year, and less if you sign to a smaller publisher. . . . If you are an established writer, the advances . . . can range from \$2,000 to several thousand dollars per month, and up. Some superstar writers get hundreds of thousands of dollars per year.”).

⁷⁹ See *id.* at 287 (“[I]f you’re not [a recording] artist but agreed that a certain number of your songs must be released on a major label, you could be stuck in the first period, despite giving the publisher hundreds of unrecorded songs. Or if you’re getting songs released digitally only, or outside the United States only, or on indie labels.”).

⁸⁰ See KNOPPER, *supra* note 64, at 106 (“By the late 1990s, the record business had boiled down much of the business to a simple formula: 2 good songs + 10 or 12 mediocre songs = 1 \$15 CD, meaning billions of dollars in overall sales.”).

IV. WHY CAN WE BRING EUROPEAN CDS BACK TO THE UNITED STATES?

Copyright is territorial by nature.⁸¹ There is no unitary protection throughout the world, and U.S. and Canadian copyright holders often do not have rights in Europe. While some European rights holders are part of a large United States-based global conglomerate—Warner Music France being part of Warner Music Group, for example—the creation of separate companies for tax, business, and other reasons have resulted in the existence of territorially based rights holders.

The geographical constraints on the use of copyrighted works are sometimes counterproductive. Although distribution rights are regionally exhausted within the European Union, there is no guarantee that legally purchased music can be portable across state lines. The Union does not have unitary copyright titles,⁸² and many different collective management organizations (“CMOs”) exist.⁸³ As the European Commission lamented in *A Digital Agenda for Europe*:

Consumers expect, rightly, that they can access content online at least as effectively as in the offline world. Europe lacks a unified market in the content sector. For instance, to set-up a pan-European service an online music store would have to negotiate with numerous rights management societies based in 27 [now 28] countries. Consumers can buy CDs in every shop but are often unable to buy music from online platforms across the EU because rights are licensed on a national basis. This contrasts with the relatively simple business environment and

⁸¹ See Berne Convention for the Protection of Literary and Artistic Works art. 5(3), Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris July 24, 1971) [hereinafter Berne Convention] (“Protection in the country of origin is governed by domestic law.”).

⁸² See FREDERICK M. ABBOTT, PARALLEL IMPORTATION: ECONOMIC AND SOCIAL WELFARE DIMENSIONS 5 (2007), available at http://www.iisd.org/pdf/2007/parallel_importation.pdf (“Under a ‘regional’ exhaustion policy, the IP holder’s right is extinguished when a good or service is put onto the market within any country of a defined region, such as the European Union. ‘Parallel imports’ are permitted, but only with respect to goods first placed on the market within the regional territory.”); Irene Calboli, *Market Integration and (the Limits of) the First Sale Rule in North American and European Trademark Law*, 51 SANTA CLARA L. REV. 1241, 1256–58 (2011) (explaining the differences among national, international, and regional exhaustion); Ryan L. Vinelli, Note, *Bringing down the Walls: How Technology Is Being Used to Thwart Parallel Importers amid the International Confusion Concerning Exhaustion of Rights*, 17 CARDOZO J. INT’L & COMP. L. 135, 148–51 (2009) (same).

⁸³ For discussions of CMOs, see generally COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel J. Gervais ed., 2d ed. 2010) [hereinafter COLLECTIVE MANAGEMENT]; Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996).

distribution channels in other regions, notably the US, and reflects other fragmented markets such as those in Asia⁸⁴

The existence of multiple CMOs, indeed, has led to the creation of “thickets” and high transaction costs that make it difficult for rights to be exploited.⁸⁵ As William Patry observed:

In order to have a music service offered to the public, all possible rights holders must sign off. It does no good to get the right to stream performances of sound recordings unless you have the right to also stream the underlying musical composition. Unless you get both rights, you can’t offer the service. Given that you want to offer as wide a service as possible, you have to obtain licenses from everyone. If a single important licensor says no, you’re sunk.⁸⁶

In Canada, for example, the Copyright Board of Canada had to use the pressure of issuing a single tariff to bring together different CMOs under “shotgun marriages.”⁸⁷ In the words of Daniel Gervais:

[T]he Copyright Board of [Canada] has essentially forced CMOs to work together to offer a single fee license to users who need multiple right fragments. This allows them to pay a single fee and it allows the Board to determine the entire value of the copyright bundle (all of the fragments) needed by the user. The bundle must then be split for distribution purposes (as the Board

⁸⁴ *A Digital Agenda for Europe*, at 7, COM (2010) 245 final (Aug. 26, 2010); see also PATRY, *supra* note 3, at 186 (“[M]any tens of millions of dollars are left on the table in Europe alone because of the inability to get pan-European licenses. Instead, licensees have to negotiate on a country-by-country basis with national collecting societies, music publishers, and record labels (to name only the top three groups), to say nothing of countries where there are no collecting societies. Authors lose because deals aren’t done; the public loses because there is a dearth of authorized, complete services; copyright law as a system loses for both these reasons.”).

⁸⁵ See MCLEOD & DiCOLA, *supra* note 4, at 13 (noting the problems in the area of digital sampling caused by the legal and bureaucratic pressures of licensing). For excellent discussions of “thickets” in the intellectual property area in general and biomedical research in particular, see generally MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 49–78 (2010); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998).

⁸⁶ PATRY, *supra* note 3, at 185.

⁸⁷ Mario Bouchard, *Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia*, in COLLECTIVE MANAGEMENT, *supra* note 83, at 307, 320.

did) between the various CMOs representing different groups of right holders. But that is of no concern to the user.⁸⁸

In the past few years, the European Commission introduced efforts to make it easier for EU nationals to obtain music online. From December 2013 to March 2014, the Commission held a consultation on the modernization of the EU copyright regime. A key focus of this consultation was “to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.”⁸⁹ This consultation built on the practical industry-based solutions explored in the recently concluded “Licences for Europe” Stakeholder Dialogue, which the Commission launched in February 2013.⁹⁰ To facilitate the cross-border portability of subscription services, the consultation also explored the need for the development of region-wide unitary copyright titles.⁹¹

To some extent, the recent EU effort dovetails with the call by Francis Gurry, the director general of the World Intellectual Property Organization (“WIPO”), for the creation of “a seamless global digital marketplace” during the 2013 WIPO General Assembly.⁹² As he recently explained in an interview with the *Intellectual Property Watch*:

For as long as it is easier to get content illegally than it is to get it legally, there is an encouragement to piracy. We have to make the conditions to get it legally better than illegally and that is the global digital marketplace.

⁸⁸ Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, in COLLECTIVE MANAGEMENT, *supra* note 83, at 1, 13.

⁸⁹ COMM’N EUROPEAN COMMUNITIES, PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT RULES 8 (2013), available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf [hereinafter EU CONSULTATION DOCUMENT].

⁹⁰ See *Licences for Europe: Ten Pledges to Bring More Content Online*, EUROPEAN COMMISSION (Nov. 13, 2013), available at http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

⁹¹ As the consultation document stated:

The idea of establishing a unified EU Copyright Title has been present in the copyright debate for quite some time now, although views as to the merits and the feasibility of such an objective are divided. A unified EU Copyright Title would totally harmonise the area of copyright law in the EU and replace national laws. There would then be a single EU title instead of a bundle of national rights. Some see this as the only manner in which a truly Single Market for content protected by copyright can be ensured, while others believe that the same objective can better be achieved by establishing a higher level of harmonisation while allowing for a certain degree of flexibility and specificity in Member States’ legal systems.

EU CONSULTATION DOCUMENT, *supra* note 89, at 36.

⁹² Francis Gurry, *Address by the Director General*, WORLD INTELL. PROP. ORG. (Sept. 23, 2013), http://www.wipo.int/about-wipo/en/dgo/speeches/a_51_dg_speech.html.

Let me give you [an] example: if one of the HBO series comes out in a new season in, for example, the US but is not available in the new season in certain other countries. What do people do? Do they wait patiently for three months? No, because they are addicted! So this is where I think our objective ought to be a seamless global legal digital marketplace and I think everyone has agreed on this.⁹³

Although Gurry did not believe the creation of this new marketplace should be “a legislative exercise,” he noted the need to establish “a multi-stakeholder dialogue” to facilitate such creation.⁹⁴

Given the territorial nature of copyright law and the complications raised by state borders, one has to wonder why U.S. tourists can bring back books, CDs, computer software, and other copyrighted works from Europe.⁹⁵ After all, Section 602(a)(1) of the Copyright Act, which focuses on “infringing importation or exportation of copies or phonorecords,” expressly provides:

Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501.⁹⁶

Section 602(a)(2) further states:

Importation into the United States . . . without the authority of the owner of copyright under this title, of copies or phonorecords, the making of which either constituted an infringement of copyright, or which would have constituted an infringement of copyright if this title had been applicable, is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under sections 501 and 506.⁹⁷

⁹³ Catherine Saez, *WIPO Director Gurry Speaks on Naming New Cabinet, Future of WIPO*, INTELL. PROP. WATCH (May 8, 2014), <http://www.ip-watch.org/2014/05/08/wipo-director-gurry-speaks-on-naming-new-cabinet-future-of-wipo/>.

⁹⁴ *Id.*

⁹⁵ Let's ignore, for now, the potential additional complications from territorially based lockout codes, which have been widely deployed to protect movies, television shows, music, computer software, and online games. See Peter K. Yu, *Region Codes and the Territorial Mess*, 30 CARDOZO ARTS & ENT. L.J. 187, 257 (2012).

⁹⁶ 17 U.S.C. § 602(a)(1) (2012).

⁹⁷ *Id.* § 602(a)(2).

The answer to this question is simple. Section 602(a)(3) contains three exceptions to these two sections.⁹⁸ Section 602(a)(3)(B) specifically provides:

[I]mportation . . . for the private use of the importer . . . and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States . . . with respect to copies or phonorecords forming part of such person's personal baggage⁹⁹

This provision covers what is generally known as the exception for “private use,” “personal luggage,” or “de minimis importation.” This exception allows individuals traveling with goods purchased from abroad to bring these goods back to the United States even if they have not received authorization from the relevant copyright holders.

During the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA),¹⁰⁰ the potential removal of this exception sparked quite a controversy. From the standpoint of combating piracy and counterfeiting, such removal is understandable because many rights holders viewed the exception as an unnecessary loophole.¹⁰¹ They also feared that the exception would send a wrong

⁹⁸ *Id.* § 602(a)(3)(A)–(C).

⁹⁹ *Id.* § 602(a)(3)(B).

¹⁰⁰ Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011) [hereinafter ACTA]. ACTA is a plurilateral intellectual property agreement negotiated by the United States and ten other developed or likeminded countries. For the Author's earlier discussions of this agreement, see generally Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1 (2011); Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA 239 (2012); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011) [hereinafter Yu, *Six Secret Fears*].

¹⁰¹ See TIMOTHY P. TRAINER & VICKI E. ALLUMS, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS § 6:50, at 703 (2008) (“Although it might be viewed as draconian, one way to close a loophole when there is no uniform standard is to eliminate the exemption altogether. The de minimis exemption is one that, perhaps, should be eliminated and subject all trade in counterfeit and pirate products to the enforcement measures.”). As Timothy Trainer, the former president of the International AntiCounterfeiting Coalition, declared in his testimony before the U.S.-China Economic and Security Commission:

[I]f we do not wish to impose penalties [on buyers of counterfeit goods], perhaps we should, at least, eliminate the personal use exemption in the Customs law and regulations that allow individuals to keep the counterfeit goods purchased abroad. The Customs law and regulation could be changed to require the confiscation of any counterfeit product and impose an administrative fine on persons entering the United States and in personal possession of any counterfeit or pirated product, including in their luggage.

Timothy Trainer, Testimony Before the U.S.-China Economic and Security Commission, Hearing on Intellectual Property Rights Issues and Dangers of Counterfeited Goods Imported into the

message that in turn would slow down efforts to combat piracy and counterfeiting.¹⁰² In addition, the removal of the personal luggage exception was supported by those countries that had already prohibited the possession of counterfeit goods, such as France and Switzerland, or had other similarly stringent requirements.¹⁰³ If possession of counterfeit goods was illegal, it was only logical that travelers were disallowed to carry these goods in their personal luggage.

Nevertheless, many considered the personal luggage exception commonsensical. In their view, the removal of this exception was onerous, unnecessary, and draconian. The exception was also consistent with international standards. Article 60 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") of the World Trade Organization specifically provides: "Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in *travellers' personal luggage* or sent in small consignments."¹⁰⁴

Moreover, tourists are not in the best position to assess whether proper authorization has been obtained for intellectual property goods. A seemingly legitimate product could easily have infringed on the rights of others. The

United States 8-9 (June 8, 2006) [hereinafter Trainer's USSC Testimony], available at http://www.uscc.gov/sites/default/files/06_06_7_8_trainer_tim.pdf (written testimony of Timothy Trainer, President, Global Intellectual Property Strategy Center).

¹⁰² See Michael Geist, *Canada's ACTA Briefing, Part Five: The Fight Over a De Minimis Exception*, MICHAEL GEIST'S BLOG (Apr. 6, 2009), <http://www.michaelgeist.ca/content/view/3834/125/> ("[S]ome groups [are] concerned that it would send a signal that purchasing counterfeit products for personal use is acceptable or that it could lead to the importation of counterfeit medicines."); *Global Organizations Provide Governments with Recommendations on Anti-Counterfeiting Trade Agreement*, BUS. ACTION TO STOP COUNTERFEITING & PIRACY (June 25, 2010), <http://www.iccwbo.org/News/Articles/2010/Global-organizations-provide-governments-with-recommendations-on-anti-counterfeiting-trade-agreement/> (stating in the joint recommendations and comments on ACTA submitted by Business Action to Stop Counterfeiting and Piracy and the International Trademark Association the belief that "making an explicit exception that permits travelers to bring in goods for personal use sends a wrong message to consumers that buying counterfeits is accepted by the government").

¹⁰³ See Trainer's USSC Testimony, *supra* note 101, at 8 ("France and Italy have been extremely aggressive in imposing fines on consumers of counterfeit merchandise."); see also TRAINER & ALLUMS, *supra* note 101, § 6:50, at 703 ("Because of the growing trade in counterfeit and pirate products, there are some governments, notably France, that have decided to take stringent measures by targeting tourists who may have only one counterfeit item. Switzerland appears to be following France's example." (footnote omitted)).

¹⁰⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 60, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement] (emphasis added); see also Council Regulation 1383/2003, of 22 July 2003 Concerning Customs Action Against Goods Suspected of Infringing Certain Intellectual Property Rights and the Measures to Be Taken Against Goods Found to Have Infringed Such Rights, art. 3(2), 2003 O.J. (L 196) 7 ("Where a traveller's personal baggage contains goods of a non-commercial nature within the limits of the duty-free allowance and there are no material indications to suggest the goods are part of commercial traffic, Member States shall consider such goods to be outside the scope of this Regulation.").

removal of the personal luggage exception might also have appeared worse than it seemed when such removal was viewed against a background of highly secretive, unaccountable, and undemocratic negotiations.¹⁰⁵ Given the highly unappealing nature of the ACTA negotiations, it is no surprise that many inferred from these negotiations that something shady had been going on. As Cory Doctorow declared, tongue in cheek, “What’s in ACTA? Well, it kind of doesn’t matter. If it were good stuff, they’d be negotiating it in public where we could all see it.”¹⁰⁶

In the end, because of the wide public protests against ACTA, the removal of the personal luggage exception was made only optional, similar to the TRIPS Agreement.¹⁰⁷ Although it may never be publicly known whether the optional exception was retained as a compromise—and if so, how this compromise was reached—countries were expressly allowed to retain the personal luggage exception under the joint consolidated draft, which was released after the eighth round of negotiations in Wellington, New Zealand.¹⁰⁸ The final text of ACTA, which was adopted on April 15, 2013, also retains this optional requirement. Article 14(2) of ACTA now provides: “A Party may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travellers’ personal luggage.”¹⁰⁹

V. WHY CAN’T YOUTUBE VIDEOS BE CREATED WITH ASCAP/BMI LICENSES?

Although YouTube videos consist of mostly audiovisual content, they have created a unique challenge for the protection of copyrighted music compositions and sound recordings. This challenge was indeed the reason why the National Music Publishers’ Association and other music publishers jointly

¹⁰⁵ For discussions of the lack of transparency in the ACTA negotiations, see generally David S. Levine, *Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105 (2012); David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, 26 AM. U. INT’L L. REV. 811 (2011); Yu, *Six Secret Fears*, *supra* note 100, at 998–1019.

¹⁰⁶ Cory Doctorow, *Big Entertainment Wants to Party Like It’s 1996*, INTERNET REVOLUTION (Apr. 21, 2009), *quoted in* Yu, *Six Secret Fears*, *supra* note 100, at 976.

¹⁰⁷ See Yu, *Six Secret Fears*, *supra* note 100, at 1000 (“To alleviate [public] concern, ACTA negotiators . . . quickly reached a consensus on the de minimis provision, notwithstanding the negotiating parties’ initial disagreement over the scope of such a provision, as well as some lingering concerns from selected industry groups—most notably INTA and the U.S. Chamber of Commerce” (footnote omitted)).

¹⁰⁸ See Anti-Counterfeiting Trade Agreement art. 2X, *opened for signature* May 1, 2011 (Apr. 2010 draft), *available at* http://www.ustr.gov/webfm_send/1883 (“Parties may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travelers’ personal luggage [or sent in small consignments.]”).

¹⁰⁹ ACTA, *supra* note 100, art. 14(2).

filed a putative class action lawsuit against YouTube for copyright infringement in *Football Association Premier League Ltd. v. YouTube, Inc.*¹¹⁰

For recorded popular music, there are usually two different layers of copyright: one for the sound recording and the other for the underlying musical composition, which includes both the musical notes and the lyrics.¹¹¹ While the former was not protected until the passage of the Sound Recording Act of 1971,¹¹² which entered into effect on February 15, 1972, the latter has been protected for almost two centuries since the 1831 Copyright Act.¹¹³ Because the 1976 Copyright Act allows for the divisibility of copyright,¹¹⁴ copyright holders can freely transfer their reproduction, adaptation, distribution, public display, public performance, and digital audio transmission rights.¹¹⁵ Section 201(d)(2) specifically states:

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.¹¹⁶

¹¹⁰ *Football Association Premier League Ltd. v. YouTube, Inc.*, 633 F. Supp. 2d 159 (S.D.N.Y. 2009).

¹¹¹ See 17 U.S.C. § 102(a)(2), (7) (2012) (separating “musical works, including any accompanying words” from “sound recordings” in the categories of copyrightable subject matter); see also *Newton v. Diamond*, 349 F.3d 591, 592–93 (9th Cir. 2003) (“Sound recordings and their underlying compositions are separate works with their own distinct copyrights.”).

¹¹² Pub. L. No. 92-140, 85 Stat. 391 (1971).

¹¹³ Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

¹¹⁴ See generally STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 11: DIVISIBILITY OF COPYRIGHTS (Comm. Print 1960) (study by Abraham L. Kaminstein) (providing an excellent study on the divisibility of copyright). As Abraham Kaminstein, a future Register of Copyrights, explained:

When copyright consisted solely in the right to multiply copies, transfers were generally of the entire copyright; as long as the rights and the uses of copyright material remained few, the problems incident to transferring one of a bundle of rights were of little consequence. The present difficulty arises from the fact that a theory enunciated during the period of a limited number of rights and uses of copyright material has been applied to the great proliferation of rights and uses which have developed since the turn of the century. The concept of indivisibility tends to force all sales or transfers of copyrights or rights in copyrights into one of two molds, (a) assignment, a complete transfer of all rights, or (b) license, a transfer of any portion of those rights. An assignment carries all rights; a license is really a contract not to sue the licensee, and the licensee cannot fully enforce his rights against third parties.

Id. at 1.

¹¹⁵ 17 U.S.C. § 106 (2012) (stipulating these rights).

¹¹⁶ *Id.* § 201(d)(2).

The ability to transfer these various exclusive rights has therefore made monitoring and collection of royalties especially cumbersome and time-consuming. The need for monitoring and royalty collection, in turn, necessitates the assistance of CMOs.

As far as music in the U.S. market is concerned, there are three different groups of CMOs, each handling different types of rights and beneficiaries. The Harry Fox Agency, a wholly owned subsidiary of the National Music Publishers' Association, handles the wide majority of mechanical and synchronization licenses on behalf of music publishers.¹¹⁷ Meanwhile, ASCAP, BMI, and the Society of European Stage Authors and Composers (SESAC) collect public performance royalties for publishers and songwriters. Out of these three performing rights organizations, ASCAP is "the oldest and by far the largest in terms of billings," while BMI is the largest when "measured by [the] number of 'affiliates.'"¹¹⁸ Together, they "collect over 95% of all U.S. performance royalties, with [SESAC] receiving the remainder."¹¹⁹ Finally, SoundExchange was created in the early 2000s to collect digital performance royalties on behalf of recording artists and record labels.¹²⁰ Among the royalties collected were those originating from "Pandora, SiriusXM, webcasters and cable TV music channels."¹²¹

The origin of ASCAP as a CMO began with the frustration a group of songwriters had over their inability to collect royalties for the performance of their music compositions.¹²² Such frustration eventually led to the formation of ASCAP in 1914,¹²³ which was quickly followed by the now-famous United States Supreme Court case of *Herbert v. Shanley*.¹²⁴ In this case, the Court determined whether the performance of a copyrighted musical work in a restaurant or hotel without admission charges infringed on the right to perform publicly for profit. Writing for a unanimous court, Justice Oliver Wendell Holmes declared:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with

¹¹⁷ See HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 255 (8th ed. 2011).

¹¹⁸ *Id.* at 254.

¹¹⁹ *Id.*

¹²⁰ See Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 230 (2012).

¹²¹ *About Digital Royalties*, SOUNDEXCHANGE, <http://www.soundexchange.com/artist-copyright-owner/digital-royalties/> (last visited Sept. 30, 2014).

¹²² See KOHN & KOHN, *supra* note 32, at 1247–48. Among this group were Irving Berlin, Gene Buck, Nathan Burkan, Victor Herbert, John Philip Sousa, and Jay Witmark. *Id.* at 1248.

¹²³ See *id.* at 1249.

¹²⁴ *Herbert v. Shanley*, 242 U.S. 591 (1917).

and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.¹²⁵

As a result, restaurants, hotels, and other similar businesses that performed music in public (such as concert halls, dance halls, theaters, cabarets, and night clubs) had to pay performance royalties to copyright holders even when they did not charge admission fees for the performances.¹²⁶

In the late 1930s, backed by court decisions that deemed broadcasting a "for-profit" public performance, ASCAP became more aggressive, raising its fees repeatedly and substantially. As David Bollier recounted:

At the time, ASCAP required artists to have five hits before it would serve as a collection agency for them, a rule that privileged the playing of pop music on the radio at the expense of rhythm and blues, jazz, hillbilly, and ethnic music. Then, over the course of eight years, ASCAP raised its rates by 450 percent between 1931 and 1939—at which point, ASCAP then proposed doubling its rates for 1940.¹²⁷

In protest to these ever-increasing fees, many radio stations boycotted ASCAP and turned to Latin music as well as musical works that did not belong to ASCAP members.¹²⁸ In addition, they formed BMI as their own CMO.¹²⁹ This

¹²⁵ *Id.* at 594–95.

¹²⁶ See KOHN & KOHN, *supra* note 32, at 1249.

¹²⁷ DAVID BOLLIER, *VIRAL SPIRAL: HOW THE COMMONERS BUILT A DIGITAL REPUBLIC OF THEIR OWN* 156 (2008).

¹²⁸ See JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 455 (3d ed. 2010) ("[O]n January 1, 1941, radio stations began a boycott of ASCAP music, instead broadcasting almost exclusively Latin music, which ASCAP had thus far ignored."); K.J. Greene, "Copynorms," *Black Cultural Production, and the Debate Over African-American Reparations*, 25 *CARDOZO ARTS & ENT. L.J.* 1179 (2008) (noting that black artists were excluded from ASCAP).

new organization “sought to break the ASCAP monopoly by offering free arrangements of public-domain music to radio stations. [It] also charged lower rates than ASCAP for licensing music and offered better contracts for artists.”¹³⁰

Although ASCAP and BMI had greatly reduced the transaction costs incurred by obtaining licenses to perform songs in the covered repertoire, concerns arose over their potential to abuse their dominant position—for example, when they pooled together thousands of copyrighted musical works and offered blanket licenses on an all-or-nothing basis.¹³¹ As Glynn Lunney observed:

In the United States, these CMOs are viewed as something of a necessary evil. By reducing the transaction costs entailed in enforcing and licensing the public performance of musical works, they create a market in which otherwise there would be only infringement. But they do not merely reduce the transaction costs associated with the public performance right, they also eliminate competition between the individual copyright owners over public performance licensing terms and pricing. Because of this anti-competitive potential, copyright collectives in the United States have faced recurring litigation over whether their licensing practices violate the anti-trust laws.¹³²

Following antitrust litigation launched by the United States Department of Justice in the early 1930s and then the 1940s, both ASCAP and BMI now abide by consent decrees.¹³³ Under these decrees and their subsequent amendments,¹³⁴ “a potential licensee may apply to a federal court for a binding

¹²⁹ See KOHN & KOHN, *supra* note 32, at 1250 (“[I]n anticipation of a breakdown in negotiations with ASCAP over the rates to be charged for the following year, a group of broadcasters, including the major radio networks and nearly 500 independent radio stations, established an organization called Broadcast Music Incorporated . . .”).

¹³⁰ BOLLIER, *supra* note 127, at 156.

¹³¹ See Loren, *supra* note 32, at 685 (“The practice of pooling thousands of copyrighted musical works and then offering blanket licenses did not go unnoticed by the Antitrust Division of the U.S. Justice Department.”).

¹³² Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience*, in COLLECTIVE MANAGEMENT, *supra* note 83, at 339, 340.

¹³³ As Professor Lunney recounted:

The first such lawsuit was initiated by the Department of Justice in the early 1930s. In the lawsuit, the Department of Justice alleged that ASCAP was an unlawful combination, in the vein of Standard Oil. In the 1940s, the Department of Justice initiated a second set of lawsuits against both BMI and ASCAP, alleging that the collectives’ licensing practices unreasonably restrained trade. The parties settled the litigation in 1941 and entered into consent decrees that have governed the licensing practices of ASCAP and BMI ever since.

Id. at 340 (footnote omitted).

¹³⁴ As Professor Lunney elaborated:

determination of 'reasonable' fees in the event that the licensee and the CMO cannot come to an agreement on the fee to be paid."¹³⁵

Since the mid-1990s, the growing popularity of the internet has led to further complications with respect to copyrighted works disseminated over the internet. In addition to challenges concerning copyright enforcement in the digital environment, dissemination over this new medium has implicated many different rights protected under Section 106 of the 1976 Copyright Act. Thus, while ASCAP, BMI, or SESAC may own the performance right, the right to make mechanical reproductions may belong to record labels or the Harry Fox Agency. The new medium of the internet has also generated considerable uncertainty over the act of making content available. Does this act involve the distribution right, the performance right, the right of communication to the public as protected by the Berne Convention for the Protection of Literary and Artistic Works (of which the United States is a member),¹³⁶ or the right of making available as recognized in the 1996 WIPO Internet Treaties (of which the United States is also a member)?¹³⁷

Even more troubling, many of these rights overlap with each other, making their control highly uncertain in the new digital environment. As Mark Lemley observed in relation to overlapping rights in the early days of the World Wide Web:

Consider the licensing of rights to musical works. ASCAP controls and licenses the right to publicly perform most musical compositions, while a different group (the publishers or record labels) generally controls the right to reproduce such works. These groups will likely fight vigorously over who has the right to license the network transmission of musical compositions (and to receive revenue from that transmission). The answer cannot be found in the license agreement, nor is it likely to be found in some presumed "intent" of the parties. The question will have to be answered as a policy matter, by courts or by Congress.¹³⁸

Over the years, the terms of the consent decrees have been adjusted to reflect the developments of new technologies and new markets. Yet, although their precise terms have varied over time, their thrust has remained consistent. In essence, the consent decrees validate the essential role of the collectives in creating a workable market in the public performance right, and then attempt to regulate their pricing and licensing terms in order to limit the collective's anti-competitive potential.

Id. at 340-41.

¹³⁵ Loren, *supra* note 32, at 685.

¹³⁶ Berne Convention, *supra* note 81, arts. 11, 11*bis*, 11*ter*, 14.

¹³⁷ WIPO Copyright Treaty arts. 6, 8, Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 1 (1997); WIPO Performances and Phonograms Treaty arts. 8, 10, 12, 14, Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 18 (1997).

¹³⁸ Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 574 (1997); *see also* Gervais, *supra* note 88, at 10 ("Right fragments such as 'reproduction' or

Part of the reason why overlapping rights have presented such a major challenge is the tendency for rights holders to view the use of copyrighted works through their own lens (not to mention the significant mismatch between historically developed rights and new production, distribution, and consumption models). As Donald Passman observed:

If you're a performing rights society, everything looks like a performance. If you're the Harry Fox Agency, which collects mechanicals, everything looks like a mechanical. For instance, if you stream a song on demand, ASCAP argues that it's a performance, just like hearing the song on a radio. No one really disputes that. However, Fox thinks it's also a mechanical use, which is a much trickier question. They say you need a license to reproduce the song on the server of the company doing the streaming, and that your personal computer has to make a copy in its cache for you to hear it, both of which are true. Since the right to duplicate a copyrighted work is separate from the performance right, they argue that you need a license from them.¹³⁹

Also complicating the digital licensing arrangement are the divergent business models behind the licensing of musical works. Consider the different approaches taken by music publishers and record labels. As Patrik Wikström observed more than five years ago:

Music licensing has always been an integral and lucrative part of the music business, but it has often created a tension in the relationship between music publishers and record labels. Although music is the essential factor to both of them, their aims and their business models differ. To the music publisher or the

'public performance' are complex and increasingly a source of frustration for users because they no longer map out discrete uses, especially on the Internet. Put differently, a single use of a copyright work or object of a related right (e.g. performance, recording) often requires multiple authorizations (right fragments) from several different rights holders. The way in which right fragments are expressed no longer matches who does what, and for what purpose, with a work or object of a related right.").

¹³⁹ PASSMAN, *supra* note 32, at 253; see also *Reforming Section 115 of the Copyright Act for the Digital Age: Hearings Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 110th Cong. (2007) (statement of Marybeth Peters, U.S. Register of Copyrights), available at <http://www.copyright.gov/docs/regstat032207-1.html> ("[L]icensors have rarely turned down the opportunity in the digital age to seek royalties, even when the basis for their requests is weak at best. Online music companies rightly complain that they need certainty over what rights are implicated and what royalties are payable so that they can operate without fear of being sued for copyright infringement.").

licensing department of a full-service music firm, licensing opportunities . . . are the bread and butter of their business. There is simply no other kind of income besides the royalties paid by the licensees. From the record labels' point of view, the licensing has a completely different purpose, and that purpose is to promote an act. The licensing fee paid by the licensee is only the icing on the cake, since the record label's core business is the selling of audio recordings (primarily CDs) to consumers. In a competition to have a song included in a film etc., the record label might be inclined to waive the fee in order to win the competition and achieve the much desired presence.¹⁴⁰

Although music publishers and record labels used to have wider differences in their approaches, the significant reduction of music sales in recent years has led the latter to pay greater attention to licensing revenue. As Donald Passman observed: "Nowadays, all of the major record companies have what's called a *special markets* or *catalog* division, whose job is to take existing recordings and come up with ways to squeeze money out of them."¹⁴¹ Moreover, as music fans migrate from physical albums to digital singles and now to licensed performances via Pandora, Spotify, and other online streaming services, the differences between the two groups have considerably narrowed.

As if these complications were not challenging enough, no U.S. CMO has thus far been established to grant synchronization licenses to audiovisual contents, such as MTV or YouTube videos.¹⁴² Synchronization licenses, or "synch licenses" for short, are similar to performance licenses except for their tailoring to the specific use of the relevant copyrighted content—for example, in motion pictures, television programs, commercials, or video games.¹⁴³ Thus, although individual users do not always time the visual images to the licensed music,¹⁴⁴ the "synchronization" label notwithstanding, it is understood that a synchronization license granted for Video A may not be used for Video B. Given the lack of preexisting synchronization licensing arrangements—compulsory or otherwise—copyright holders of audiovisual works are free to

¹⁴⁰ WIKSTRÖM, *supra* note 54, at 97.

¹⁴¹ PASSMAN, *supra* note 32, at 138.

¹⁴² *See id.* at 259 ("[T]here's no central place for the YouTubes of the world to make a deal for all their music (Fox doesn't represent all the publishers). It also means the publishers who don't use Fox have to do tons of licenses for tiny money."); *see also id.* at 326 ("There's no compulsory license for video streaming, whether it's interactive or not. So the companies can charge whatever they can extort.").

¹⁴³ *See id.* at 248–53 (discussing synchronization and transcription licenses).

¹⁴⁴ *See KOHN & KOHN, supra* note 32, at 368 ("Technically, the music is not always 'synchronized' or recorded, as some licenses say, 'in timed-relation with' the motion picture, but these terms convey the notion that the permission to make reproductions of the music is strictly limited to copies embodying the specified motion picture together with the music.").

negotiate their own licenses. Such freedom, in turn, has greatly increased the transaction costs incurred in securing these licenses. As the need for performance and synchronization licenses in the digital environment continues to grow,¹⁴⁵ transaction costs are likely to substantially increase.

In the early 2010s, after years of copyright litigation, YouTube (and Google) finally reached agreements with music publishers and record labels.¹⁴⁶ Although these agreements vary, the agreement between YouTube and the Harry Fox Agency, which is publicly available, provided an instructive example of how YouTube's advertising revenue is to be divvied up:

- a. If it's a user-created video that includes a commercial recording of the song (remember, this doesn't include record company-created videos, where the record company pays the publisher), the video streaming service pays the publisher 15% of net ad revenues.
- b. If it's a new recording of the song . . . , the publisher gets 50% of net ad revenues. But if the uploader gets some of the ad revenue . . . , YouTube deducts whatever it pays [the uploader] from the publisher's 50%. However, this deduction is subject to a limit of 15%, meaning the publisher never gets less than 35% of net ad revenue.¹⁴⁷

Notwithstanding the licenses YouTube negotiated with both music publishers and record labels, it remains unclear whether these licenses would allow individual users to create so-called "user-generated content," such as remixes, mash-ups, cut-ups, spoofs, parodies, satires, caricatures, pastiches, and machinimas. This ambiguity was indeed the reason why internet user groups have actively pushed for the adoption of exceptions for non-commercial user-generated content,¹⁴⁸ such as Section 29.21 of the recently adopted Canadian Copyright Modernization Act.¹⁴⁹

¹⁴⁵ See WIKSTRÖM, *supra* note 54, at 93 ("While mechanical royalties have diminished along with the physical sales of recorded music, both performance and synchronization royalties have increased since the turn of the millennium."); Brustein, *supra* note 63 ("[In 2003], digital music downloads decreased for the first time, with sales of digital tracks falling 5.7 percent. Streaming consumption increased 32 percent, to 118 billion songs, . . . according to Nielsen.").

¹⁴⁶ The agreement the National Music Publishers' Association and the Harry Fox Agency reached with YouTube is available at <http://youtubelicensingoffer.biz/>.

¹⁴⁷ PASSMAN, *supra* note 32, at 259–60.

¹⁴⁸ For the Author's discussions of the exception for non-commercial user-generated content, see generally Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. 177 (2014); Peter K. Yu, *The Confuzzling Rhetoric Against New Copyright Exceptions*, 1 KRITIKA (forthcoming 2015).

¹⁴⁹ Copyright Modernization Act, S.C. 2012, c. 20, § 29.21 (Can.).

VI. ARE DIGITAL DOWNLOADS SALES OR LICENSES?

The “sale versus license” debate has been ongoing since copyright issues involving computer software began to attract legislative and policy attention.¹⁵⁰ There is also a raging debate about the scope and limits of the first sale doctrine in the digital environment.¹⁵¹ Codifying this doctrine, Section 109(a) of the 1976 Copyright Act provides:

Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.¹⁵²

Although the first sale doctrine is available to all copyrighted works, it does not apply if the content is disseminated under a license, as opposed to sold as a good. As a result, we can lend books to friends or sell them on eBay (books, not friends), but we may not be allowed to sell computer software online.

The same issue arises with respect to iTunes tracks. The question of “whether a digital music file, lawfully made and purchased, may be resold by its owner . . . under the first sale doctrine” was recently addressed in *Capitol Records, LLC v. Redigi Inc.*¹⁵³ In this case, a record label sued Redigi Inc. for copyright infringement based on its provision of a virtual marketplace for internet users to sell pre-owned iTunes tracks. As the United States District Court for the Southern District of New York declared:

[T]he first sale doctrine does not protect ReDigi’s distribution of Capitol’s copyrighted works. This is because, as an unlawful reproduction, a digital music file sold on ReDigi is not “lawfully made under this title.” Moreover, the statute protects only distribution by “the owner of a particular copy or phonorecord . . . of that copy or phonorecord.” Here, a ReDigi user owns the phonorecord that was created when she purchased and downloaded a song from iTunes to her

¹⁵⁰ See Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1290 (2001) (“Several federal courts have held that the first sale doctrine does not apply to software users who have licensed the software, because they have not acquired title to a particular copy.”).

¹⁵¹ For discussions of the first sale doctrine in the digital context, see generally U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 78–105 (2001); Liu, *supra* note 150; Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011); Aaron Perzanowski & Jason Schultz, *Legislating Digital Exhaustion*, 28 Berkeley Tech. L.J. (forthcoming 2015); R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577 (2003).

¹⁵² 17 U.S.C. § 109(a) (2012).

¹⁵³ *Capitol Records, LLC v. Redigi Inc.*, 934 F. Supp. 2d 640, 648 (S.D.N.Y. 2013).

hard disk. But to sell that song on ReDigi, she must produce a new phonorecord on the ReDigi server. Because it is therefore impossible for the user to sell her “particular” phonorecord on ReDigi, the first sale statute cannot provide a defense.¹⁵⁴

Apart from *Redigi*, there is the now-famous discussion about whether Bruce Willis should be able to leave the tracks he lawfully purchased to his children.¹⁵⁵ Whether he can do so based on the first sale doctrine will depend on whether digital downloads constitute sales or licenses. The doctrine will apply if the downloads are goods sold, but will not if they are mere licensed contents. If the doctrine does not apply, whether Willis can transfer ownership will depend on the terms of the iTunes license, which currently does not allow for such a transfer.

Disturbingly, as much as record labels want to consider iTunes tracks licensed contents in the context of the first sale doctrine, they refuse to do so in the context of royalty calculation. Under most recording contracts, artists will get only a small percentage of the sales as royalties—usually ten to twenty percent.¹⁵⁶ By contrast, these same artists will get a much higher percentage of the licensing revenue—usually under a fifty-fifty split.¹⁵⁷ This different treatment of sales and licensing revenue makes sense, considering that the licensing arrangement does not require record labels to make further investments (although these labels have noted the various expenses incurred in online distribution¹⁵⁸). Thus, if revenues from iTunes tracks are considered license fees, as opposed to sales, record labels will have to provide artists with a substantially larger sum of royalties. As William Patry pointed out:

¹⁵⁴ *Id.* at 655 (citations omitted).

¹⁵⁵ See Brandon Griggs, *Can Bruce Willis Leave His iTunes Music to His Kids?*, CNN (Sept. 4, 2012), <http://www.cnn.com/2012/09/03/tech/web/bruce-willis-itunes>.

¹⁵⁶ As Harold Vogel observed in regard to royalty rates for recording artists:

Rates for new artists signed to independent companies might range from 9% to 13% of [the suggested retail price], while rates for new artists signing with a major label might be 13% to 14%, and rates for superstars 18% to 20%. Yet for Internet downloads, such rates will often be 20% to 50% less.

VOGEL, *supra* note 117, at 264.

¹⁵⁷ See PASSMAN, *supra* note 32, at 138 (“Historically, when masters were licensed by a record company for motion pictures, television shows, and commercials, the company credited the artist’s account with 50% of the company’s net receipts . . .”).

¹⁵⁸ As Donald Passman explained:

[In addition to the usual mechanicals and union charges, record labels] argue that they have expenses for digitizing product, adding *metadata* . . . , storing digital files, setting up SKUs [Shop Keeping Units] for each title [which keep track of who gets paid] . . . as well as monitoring the sales and licensing of millions of micro-transactions. In addition, they need to allocate some portion of the cost of their staff that does marketing, sales, etc.

Id. at 146.

It has been estimated . . . that artists might receive \$2.15 billion if they are successful in their current disputes with record labels over whether to categorize the deals with iTunes as involving a license (where 50 percent royalties are typically paid) rather than as a sale of copies (where royalties of 10–15 percent are typically paid).¹⁵⁹

How digital downloads should be treated was under heavy dispute in the early days of iTunes. A leading case in this area is *F.B.T. Productions, LLC v. Aftermath Records*.¹⁶⁰ At issue was whether the permanent digital downloads and mastertones¹⁶¹ of songs performed by the chart-topping rap artist Eminem constituted records sold or master licenses. The royalty rate was twelve to twenty percent for the former, but fifty percent for the latter.¹⁶² While the United States District Court for the Central District of California found for the record label, the United States Court of Appeals for the Ninth Circuit reversed the case. As Judge Barry Silverman declared:

It is easily gleaned from these sources of federal copyright law that a license is an authorization by the copyright owner to enable another party to engage in behavior that would otherwise be the exclusive right of the copyright owner, but without transferring title in those rights. This permission can be granted for the copyright itself, for the physical media containing the copyrighted work, or for both the copyright and the physical media.

When the facts of this case are viewed through the lens of federal copyright law, it is all the more clear that Aftermath's agreements with the third-party download vendors are "licenses" to use the Eminem master recordings for specific purposes authorized thereby—i.e., to create and distribute permanent downloads and mastertones—in exchange for periodic payments based on the volume of downloads, without any transfer in title of Aftermath's copyrights to the recordings. Thus, federal copyright law supports and reinforces our conclusion that Aftermath's agreements permitting third parties to use its sound

¹⁵⁹ PATRY, *supra* note 3, at 8.

¹⁶⁰ *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010).

¹⁶¹ Mastertones are ring tones or ring-back tones involving master recordings.

¹⁶² *Id.* at 961; see also Eriq Gardner, *Leaked Audit in Eminem Royalty Suit Highlights Huge Stakes for Record Industry*, HOLLYWOOD REP. (Feb. 22, 2012), <http://www.hollywoodreporter.com/thresq/eminem-royalty-lawsuit-aftermath-records-fbt-productions-293881> (suggesting that "the plaintiffs believe that the difference in treating digital music as a 'sale' instead of a 'license' during [the period between July 1, 2005 and December 31, 2009] is worth \$3,810,256").

recordings to produce and sell permanent downloads and mastertones are licenses.¹⁶³

Although the Ninth Circuit remanded the case to the lower court, and a new trial was set to assess proper damages, the dispute was eventually settled.¹⁶⁴

F.B.T. Productions generated a lot of attention and sparked additional individual and class action lawsuits.¹⁶⁵ Nevertheless, Donald Passman noted that the case involved a short-form contract and therefore might have been an outlier.¹⁶⁶ In most other—usually lengthier—contracts, the terms are spelled out in greater detail even though some gray areas may invariably exist. More importantly, record labels have since managed to renegotiate most of their recording contracts—through new contracts, settlement, or otherwise.¹⁶⁷ According to Passman, the current royalty arrangement for digital download is as follows:

For iTunes-type *permanent downloads*, the record companies get what they call a “wholesale price” of 70% of the retail price, meaning they get around 70¢ for a 99¢ download. In the case of downloads, the record companies get the money for both themselves and the songwriters [or publishers], then turn around and pay [them].¹⁶⁸

¹⁶³ *F.B.T. Prods.*, 621 F.3d at 965–66.

¹⁶⁴ See Eriq Gardner, *UMG Reaches Settlement in Trendsetting Suit Over Digital Revenue from Eminem Songs*, HOLLYWOOD REP. (Oct. 30, 2012), <http://www.hollywoodreporter.com/thresq/umg-reaches-settlement-trendsetting-lawsuit-384381> (reporting the settlement).

¹⁶⁵ As observed in the *Hollywood Reporter*:

Other musicians continue to fight to apply the 9th Circuit ruling on “licenses” to their own contracts. Class actions from the likes of The Temptations and Rob Zombie are still being litigated. Other artists such as REO Speedwagon, Kenny Rogers, Sister Sledge, James Taylor and on and on have brought a barrage of lawsuits on this front. Some entities in the music business such as Sony Music have made class action settlements.

Id.

¹⁶⁶ See PASSMAN, *supra* note 32, at 145.

¹⁶⁷ As Donald Passman observed:

[M]ost of the bigger artists have renegotiated their deals in the last five to ten years, and when that happened, the companies stuck in clauses that specified what they got for digital exploitations, regardless of whether it was a sale, a license, or a horned toad. . . . [E]ven if the artist didn’t renegotiate, the successful artists have *audited* their record companies When the artists settled these audits . . . , most companies fixed the digital royalty rate from the end of the audit period into the future. And even if they didn’t do that, they settled all the claims for the past, so there isn’t a lot of back money sitting out there.

Id.

¹⁶⁸ *Id.* at 144.

VII. BONUS QUESTION: WHY DOES THE ROYALTY RATE FOR SHEET MUSIC STAY AT 7¢ PER COPY?

One surprising development (or its lack thereof) in music law concerns the royalty rate for sheet music, which stays at 7¢ per copy¹⁶⁹ and only reaches 10–12¢ per copy for a very rare minority.¹⁷⁰ Interestingly for us—and disappointingly for songwriters—this rate did not increase with inflation. While one was able to buy something with 7¢ in the early days of rock 'n roll, one certainly cannot buy much today with the same amount. Even the statutory rate for mechanical reproductions has been increased from 2¢ per mechanical copy in 1978 to 9.1¢ or more today, thanks to the periodic adjustments by the Copyright Arbitration Royalty Board and now the Copyright Royalty Board.¹⁷¹

The answer to this bonus question has to do with what have been termed “most favored nation” (“MFN”) clauses.¹⁷² Similar to their counterparts in international agreements,¹⁷³ these clauses allow beneficiaries to obtain preferential treatments that have been granted to third parties in other agreements. As a result of these MFN clauses, an increase in royalty rate for one songwriter will have to be immediately and unconditionally extended to all other songwriters whose contracts include an MFN clause—an extension that is highly costly and, for some publishers, unaffordable. The rate for sheet music has

¹⁶⁹ An example of this clause is as follows:

Seven cents (\$.07) per copy for each copy of sheet music in standard piano-vocal notation of the Composition printed, published and sold in the United States and Canada by Publisher or its affiliates, for which payment has been received by Publisher, or been finally credited to Publisher's account in reduction of an advance after deduction of reasonable returns. (Wherever the terms “paid,” “received,” or the equivalent appear in this agreement, they shall be deemed to include such final credit.)

KOHN & KOHN, *supra* note 32, at 113.

¹⁷⁰ See PASSMAN, *supra* note 32, at 278 (“Historically, sheet music royalties have hovered in the range of 7¢ per copy. Occasionally some superstars got as high as 10¢ to 12¢ . . .”); see also KOHN & KOHN, *supra* note 32, at 114 (“Only writers with a high degree of bargaining leverage should expect to negotiate more than 10 or 12 cents per copy, but not much more.”).

¹⁷¹ See 17 U.S.C. §§ 801–805 (2012) (providing for the proceedings of the Copyright Royalty Board); see also Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (replacing Copyright Arbitration Royalty Panels with the Copyright Royalty Board).

¹⁷² See PASSMAN, *supra* note 32, at 278 (attributing the practice to “favored nations (meaning a contract that says its rate goes up if anyone ever gets more) [music publishers have] with a number of old writers” and noting that “raising the pennies for the new guys would cost them a fortune on the older deals”).

¹⁷³ See TRIPS Agreement art. 4 (“With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”).

therefore remained more or less the same despite inflation, new uses, and new markets.

The discussion of MFN clauses in music contracts is particularly timely. Only recently, independent labels complained about how they had been forced into accepting the same deals YouTube offered to major record labels. In their view, such an arrangement had generated the opposite of MFN treatments—"least favored nation" (LFN) treatments, perhaps.¹⁷⁴ Of particular concern was a clause that gave Google the right to reduce the rates for independent labels when any major record label or publisher agreed to a lower rate.¹⁷⁵

To some extent, LFN treatments for indie labels make sense in the current market. Given the significantly greater leverage the majors have vis-à-vis YouTube, what bargaining advantage would independent, and often weaker, labels have if the majors could not even negotiate for a higher rate? Nevertheless, the contracts negotiated by the majors may not fully reflect their bargaining power. With a large number of works in play, and therefore substantial revenue at stake, the majors may be more reluctant than the indies to drag out the negotiation process or become holdouts in the negotiations. Moreover, if the current rate is unfavorable, the majors will be powerful enough to renegotiate this rate in the near future. Thus, unlike the rate for the indies, the lower rate given to the majors would result in only a short-term loss that may be offset by later gains. The same unfortunately may not be said of the indies.

Admittedly, this bonus question is somewhat obscure, considering that sheet music is not as important in the commercial market as it used to be (although the demand for sheet music in the digital environment seems to have rejuvenated recently).¹⁷⁶ The question is also somewhat outdated as many publishers have moved away from paying the penny rates, as opposed to a percentage of the license fees they have received.¹⁷⁷ The latter is particularly

¹⁷⁴ *Independent Music Labels Want EU to Intervene in YouTube Row*, REUTERS (June 26, 2014), <http://www.reuters.com/article/2014/06/26/us-eu-youtube-impala-idUSKBN0F12DJ20140626>; see also Ed Christman, *Disgust*, in *Digest: The Top Five Reasons Indies Are Mad at YouTube*, BILLBOARD (June 23, 2014), <http://www.billboard.com/biz/articles/news/indies/6128773/top-five-reasons-indies-are-mad-at-youtube> (alluding to the "negative most-favored-nation" clause).

¹⁷⁵ See Christman, *supra* note 174 ("Several indie Billboard spoke with are furious at a 'negative most-favored-nation' clause, which favors the majors. Meaning: If any major label or publisher agrees to rates that are lower than the indies' rates set forth in the YouTube contract, then Google will have the right to reduce the indie labels' analogous rate accordingly.").

¹⁷⁶ See Bill Briggs, *Musicnotes Trumpets 25% Digital Sheet Music Growth*, INTERNET RETAILER (Jan. 28, 2011), <http://www.internetretailer.com/2011/01/28/musicnotes-trumpets-25-digital-sheet-music-growth> (reporting about the growth of sales in digital sheet music); *Frozen Sheet Music Breaks Sales Records*, MUSICNOTES BLOG (Feb. 24, 2014), <http://blog.musicnotes.com/2014/02/24/news-frozen-sheet-music-breaks-sales-records/> (reporting that sheet music for the song "Let It Go," from Disney's animated feature *Frozen*, "has sold more than 25,000 copies since it was added to the Musicnotes catalogue early this year").

¹⁷⁷ As Donald Passman observed:

common in international and digital publishing.¹⁷⁸ Moreover, as Donald Passman pointed out: “[T]here are only three major manufacturers of secular printed music in the United States these days, namely Hal Leonard, Alfred, and Music Sales. That means that, unless [the] publisher is one of these companies, it will be licensing print rights to one of them.”¹⁷⁹

Nevertheless, this bonus question is quite important from the standpoint of understanding copyright law and the music business. The answer illustrates the archaic and path-dependent nature of some music business practices. It also reminds us of the need to understand both the laws governing music compositions and sound recordings as well as the business established around these laws. In addition, it shows, somewhat paradoxically, that the old can be new again. As shown in the contracts YouTube recently offered to the indie labels, LFN, or negative MFN, treatments are still alive and well in the digital environment.

VIII. CONCLUSION

In his widely used book on entertainment industry economics, Harold Vogel observed:

[M]usic is the most easily personalized and accessible form of entertainment, and it readily pervades virtually every culture and every level of society. Indeed, prior to the advent of recording technology, music was an integral and inseparable part of the social fabric. As such, music may be considered the most fundamental of all the entertainment businesses.¹⁸⁰

Music is undeniably an essential part of our culture, but it is also a major business. As with all twenty-first century businesses—a multi-billion one no less—the music industry is heavily affected by copyright law. The more we know about this law, the more we will know about the operation of the music business. Such knowledge, in turn, will allow us to better understand the link between copyright law and the music (and culture) we now have.

Except for one major publisher, the penny terms now only apply to sheet music actually manufactured and distributed by the publisher. . . . [M]ost every publisher now licenses out their print rights, meaning the writer gets 50% of the money paid by the printer to the publisher, and not these stupid penny rates. In fact, some publishers are doing away with the penny rates altogether and splitting the licensed incomes, or paying the same royalty as they pay on folios

....

PASSMAN, *supra* note 32, at 279.

¹⁷⁸ See *id.* (“With respect to digital print rights, the publishers treat the income just like any other licensed income, and the writer gets 50%.”).

¹⁷⁹ *Id.* at 278.

¹⁸⁰ VOGEL, *supra* note 117, at 244 (footnotes omitted).

In recent years, there have been extensive discussions about the need for copyright law reform. Such reform is important because it affects the different stakeholders within the field—be they record labels, music publishers, professional songwriters, recording artists, individual users, retail stores, online service providers, or other third-party intermediaries. The reform is also important because it will not only affect our creative experience, but also the culture we end up with. In examining six questions concerning copyright law and the music business, this article shows how copyright law reform could affect the music we pay for and listen to. It not only illustrates the unintended, and oft-unexpected, reach of copyright law, but also why the public at large, including individual users, have high stakes in copyright law reform.

