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Technology, the Internet and the Evolution of Webcasters – Friends or Foes of Musicians and Their IP?

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1. Florida International University College of Law (2012). I would like to thank Hannibal Travis, my professor, adviser and role model in the fields of intellectual property and cyberlaw, for his unwavering support and guidance.

I. INTRODUCTION

Musicians have a new technological medium to use in experimenting with novel and alternative means to share their music with audiences across the globe via the World Wide Web. “It’s a fundamental human need to pass music around, and however the technology evolves, the music keeps moving.”² The death of the CD as the primary medium of music distribution has finally come, particularly with the success and innovation achieved by webcasters.³ The giants of the music industry will be forced to accept this brave new technological world, though the consequences and corresponding impact upon musicians and their intellectual property are far from clear.⁴

This article discusses how the music industry has been transformed by the Internet via digital music distribution and explores the music industry’s hostility toward a digital age. It will examine specific examples of webcasters, some of which have thrived and others of which have struggled to make this digital transition. Who wins in this battle of the music platforms?

II. BACKGROUND: TECHNOLOGY AND THE MUSIC INDUSTRY

As technology rapidly advances, new legal obstacles likewise unfold in many fields of the law. Moreover, because “the population of [the] virtual community continues to grow exponentially . . . areas in which the law is more settled will also face disruption as they come into contact with this new environment.”⁵ This has been precisely the path of the Copyright Act – it “has evolved as a sort of legal crazy quilt, pieced together over time with the development and use of various new media.”⁶ The purpose of the Copyright Act “is to encourage a vibrant, accessible public culture, as well as incentivize artists to create, and reward them for their work.”⁷ However, the problem with some industries, including the music industry, is that they “sometimes progress too

2. Megan M. Carpenter, *Space Age Love Song: The Mix Tape in a Digital Universe*, 11 NEV. L.J. 44, 78 (2010), available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1152&context=nlj> (quoting Rob Sheffield, LOVE IS A MIX TAPE: LIFE AND LOSS, ONE SONG AT A TIME 24 (2007)).

3. Ben Sisario, *Adele Album Resists the Streaming Trend in Music Sales*, N.Y. TIMES (Jan. 5, 2016), <http://nyti.ms/1Z6PyHU> [hereinafter Sisario, *Adele*] (reporting that “CDs, once the music industry’s most powerful profit engine, declined to just 125.6 million units [in 2015], a decline of 11[%] from 2014 and 82[%] from their peak in 2001.”).

4. Richard S. Reisberg, *Now What? The Digital Dilemma*, 9-8 MEALEY’S LITIG. REP. CYBER TECH & E-COM. 28 (2007) (noting that “technology, once developed, can’t be ignored or litigated out of existence. Rather, it must be incorporated into the existing business model or the business model revisited and perhaps revised to include the technology.”).

5. John J. Brogan, *Speak & Space: How the Internet is Going to Kill the First Amendment As We Know It*, 8 VA. J.L. & TECH 56, 67 (2003), available at http://www.vjolt.net/vol8/issue2/v8i2_a08-Brogan.pdf.

6. Carpenter, *supra* note 2, at 51.

7. Shane Wagman, *I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace*, 17 J. INTELL. PROP. L. 95, 98 (2009); see generally 17 U.S.C. §§ 101-1332.

swiftly for the laws governing them to keep up.”⁸ Congress has attempted to align the law with the times through the enactment of the Digital Performance Right in Sound Recordings Act (DPRA) in 1995⁹ and the Digital Millennium Copyright Act (DMCA) in 1998.¹⁰ Together, the DPRA and the DMCA “were explicitly designed to stimulate the development of new Internet distribution methods and thereby facilitate the delivery of sound recordings to consumers.”¹¹

Nonetheless, in this “rapidly changing society . . . modes of communication bear scant resemblance to the prior analogs”¹² and Congress will continue to face challenges in attempting to keep pace with technology. In a supporting opinion of *ACLU v. Reno*, Judge Dalzell set forth four distinguishing characteristics of the Internet as compared to “traditional mass media”:

First, the Internet presents very low barriers to entry. Second, these barriers . . . are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and ever creates a relative parity among speakers.¹³

The fields of entertainment and intellectual property law must address considerable issues that arise as a result of the expansion of the Internet. Specifically, the introduction of webcasters and other means of digital distribution into the music realm has shaken “[t]he bedrock of the entertainment industry [of] ownership and control of content.”¹⁴

8. Tyler Hardman, *Webcasting and Interactivity: Problems and Solutions*, 17 B.U. J. SCI. & TECH. L. 290, 291 (2011).

9. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995); see also Wagman, *supra* note 7 (explaining the DPRA “added a sixth exclusive right – a public performance right for ‘digital audio transmissions’ of sound recordings.”); see also S. Rep. No. 104-128 (1995) (noting the DPRA’s purpose to “ensure that performing artists, record companies and others . . . will be protected as new technologies affect the ways in which their creative works are used.”).

10. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998), codified at 17 U.S.C. §§ 1201-1205 (1999); see also *Webcaster Alliance, Inc. v. Recording Indus. Ass’n of Am.*, 2004 U.S. Dist. LEXIS 11993, at 2 (N.D. Cal. Apr. 1, 2004) (citing 17 U.S.C. § 114(d)(2)) (explaining the DMCA “establishes a statutory right for webcasters to be eligible for a license for copyrighted sound recordings.”).

11. Karen Fessler, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L.J. 399, 402 (2003), available at <http://scholarship.law.berkeley.edu/btlj/vol18/iss1/27>; see also John Ribeiro, *MP3tunes Wins Some, Loses Some in EMI Suit*, TECHHIVE (Aug. 22, 2011), <http://www.pcworld.com/article/238625/article.html> (referencing the holding in *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011) that “MP3tunes may claim safe harbor protection under the [DMCA] . . . for works from music label EMI that were stored on its site, or were linked to Sideload.com, its second website that allows users to find and download free song files on the Internet.”).

12. Brogan, *supra* note 5, at 1.

13. *Id.* at 62 (citing *ACLU v. Reno*, 929 F. Supp. 824, 877 (E.D. Pa. 1996) (Dalzell, J., supporting opinion)).

14. Reisberg, *supra* note 4.

III. THE MUSIC INDUSTRY AS TRANSFORMED BY THE INTERNET

The landscape of music distribution has shifted from terrestrial radio to vinyl records to cassette tapes to CDs to digital MP3s and now streaming with Internet radios, or webcasters.¹⁵ As soon as the Internet exploded onto the scene, the music industry was bombarded by “the floodgates of MP3 technology bursting open.”¹⁶ So, “[w]hat happens when the base human desire to share music personally meets a digital universe?”¹⁷ Shawn Fanning introduced Napster to the world via the Internet in 1999 and “[i]n that moment, the business paradigm that had driven the modern music industry since the early twentieth century was forever changed.”¹⁸ From that point on, “Internet-based companies [have been] plastering the Web with downloadable music files.”¹⁹ Music-seeking consumers no longer have a need to purchase a tangible copy of an album – they can simply get the digital equivalent,²⁰ which is more cost effective for all actors in the marketplace.²¹ This “revolution” of MP3 technology gives musicians the power to promote themselves.²² On the flip side, the music industry has faced severe obstacles in its attempt to overcome Internet piracy-related issues. The technological ease with which millions of Internet users can share free copies of music appears to have presented a major challenge to the music industry’s ability to protect its copyrighted intellectual property.

Digital music manifested itself “as a viable distribution medium” in the 1990s and has since become an increasing trend for music transmission.²³ Yet, “[t]he emergence of the Internet has been both a blessing and a curse for the recording industry.”²⁴ The most significant factor that appears to threaten the music industry is the overwhelming abundance of peer-to-peer file sharing services, through which the Internet has made digital material considerably more capable of being accessed and shared.²⁵ Technology “makes it possible for more and more people to participate in the creation and distribution of . . . new

15. Raffi Zerounian, *Bonneville Int’l v. Peters*, 17 BERKELEY TECH. L.J. 47, 54, n.48 (2002) (noting webcasters have been commonly referred to as “celestial jukebox[es].”).

16. Karen M. Lee, *The Realities of the MP3 Madness: Are Record Companies Simply Crying Wolf?*, 27 RUTGERS COMPUTER & TECH. L.J. 131, 143 (2001).

17. Carpenter, *supra* note 2, at 46.

18. Wagman, *supra* note 7, at 96.

19. Lee, *supra* note 16, at 131; *see also* Wagman, *supra* note 7, at 100 (defining a download as “a complete transfer of audio content from the [I]nternet onto a computer hard drive, where it can then be listened to on demand.”).

20. *See* Alexandra Alter, *An Art Form Rises: Audio Without the Book*, N.Y. TIMES, (Dec. 1, 2014), at A1 (exemplifying how the trend toward new art mediums is not happening solely with music. With audiobooks, “[s]ome see the current audio renaissance as a modern version of the Golden Age of radio drama – a rare instance when technology is driving the evolution of an art form, rather than quashing it.”).

21. Hardman, *supra* note 8.

22. Lee, *supra* note 16, at 150.

23. Fessler, *supra* note 11, at 402.

24. *Id.* at 399.

25. *See Digital Television At Issue In New Report From CRS*, 8-5 MEALEY’S LITIG. REP. CYBER TECH & E-COM. 10 (2006).

forms of art, and new expressions of creativity.”²⁶ However, this is exactly what the music industry fears: “cultural appropriation – individual riffs on mass media digital products shared with others.”²⁷ And this viable fear paves the path to “the problem in the digital age” – “the importance of letting ordinary people engage in appropriation and innovation rather than mere consumption.”²⁸

A. The Pros of Webcasters

Webcasters present several advantages that traditional radio cannot offer. One, “Internet radio provides airtime for new and little-known performers.”²⁹ This ability to provide opportunities to many individual performers who are seeking venues to market themselves and distribute their music promotes the notion of creation, expression and art.³⁰ Two, “Internet radio broadens the public’s access to music.”³¹ The more people using the Internet, the greater potential of those people listening to music online³² and with that “comes increased profits in the form of payments for downloads of songs, subscription fees for subscription services, and advertising fees for non-subscription services such as webcasters.”³³ The IFPI Digital Music Report showed that by 2014 the recording industry reached global digital revenues of \$6.85 billion.³⁴ Of those digital sales, 23% come from music subscription revenue, accounting for \$1.57 billion.³⁵ Furthermore, increased exposure to music has the potential to increase sales by giving eager, music-loving consumers the opportunity to sample music before purchasing. For instance, according to one study, “consumers who use

26. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 12 (2004).

27. *Id.* at 39.

28. *Id.*

29. Andrey Spektor, *How ‘Choruss’ Can Turn Into a Cacophony: The Record Industry’s Stranglehold on the Future of Music Business*, 16 RICH. J.L. & TECH. 3, 53 (2009).

30. See David Byrne, *The Internet Will Suck All Creative Content Out of the World*, THE GUARDIAN (Oct. 11, 2013), <http://www.theguardian.com/music/2013/oct/11/david-byrne-internet-content-world> (noting that some members of the music industry support webcasters for this reason, such as Daniel Glass of Glassnote Records stating: “I think the fear of holding it back is worse than letting it go. Opening up the faucet and letting people hear it, stream it and all that stuff is definitely very healthy.”).

31. Spektor, *supra* note 29, at 54.

32. See 2015 NIELSEN U.S. MUSIC YEAR-END REPORT (2015), available at <http://www.nielsen.com/us/en/insights/reports/2016/2015-music-us-year-end-report.html> [hereinafter 2015 NIELSEN MUSIC REPORT] (finding on-demand audio music streams increased 83.1% from 79.1 billion streams in 2014 to 144.9 billion in 2015).

33. Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 443 (2008).

34. IFPI DIGITAL MUSIC REPORT 2015, at 6 (2015), <http://www.ifpi.org/digital-music-report.php> [hereinafter IFPI REPORT 2015]; see also *id.* at 9 (noting in the United States digital music sales reached over \$3.5 billion, accounting for 71% of the recorded music market).

35. *Id.* at 6; see also *id.* at 7 (finding ad-supported services accounted for 9% of global digital revenues in 2014).

streaming media bought more than 1.5 times the number of CDs . . . than the average American.³⁶ Three, “unlike terrestrial radio stations, webcasters’ channels can afford to retain their unique flavors,” not bound to play top Billboard charts hits to secure a high number of listeners nor by what genres are popular in any given location.³⁷ Additionally, “webcasters have come up with their own unique features that benefit the public and the artist.”³⁸ For example, Pandora Internet Radio entered into an agreement to purchase Ticketfly to incorporate concert tickets with its music service.³⁹

Because of the opportunities created by the Internet, webcasters appear to be the future of the music industry.⁴⁰ It is nearly impossible to deny the fact that “the Internet [is becoming] music’s primary medium”⁴¹ with 119 million people listening to Internet radio for an average of nearly thirteen hours weekly by 2015.⁴² According to Nielsen’s 2015 U.S. Music Year-End Report, total album sales dropped 6.1% from 2014.⁴³ The 241.4 million albums sold in 2015 included CD, cassette, vinyl and digital albums.⁴⁴ Additionally, individual digital track sales dropped 12.5% to 964.8 million, “dipping below one billion for the first time since 2007.”⁴⁵ Statistics have also shown “the number of paying subscribers globally has increased by more than five-fold to 41 million users” further exemplifying the trend away from digital downloads toward music streaming services.⁴⁶

Internet radio has been described as a “vibrant” media form for music enjoyment, and it has been forecasted that “Internet radio would be a \$20 billion advertising market by 2020.”⁴⁷ Just as the music industry has found a reasonable way to support and benefit from its relationship with radio broadcasters, it should be feasible to develop a successful means of working together with

36. Fessler, *supra* note 11, at 413.

37. Spektor, *supra* note 29, at 54.

38. *Id.* at 56.

39. See Ben Sisario, *Pandora Buys Ticketfly, a Competitor to Ticketmaster*, N.Y. TIMES (Oct. 7, 2015), <http://nyti.ms/1OkY26R>.

40. See IFPI REPORT 2015, *supra* note 34, at 5 (emphasizing the expansion of digital music distribution with over 400 licensed music services in approximately 200 countries).

41. Joshua Keesan, *Let it Be? The Challenges of Using Old Definitions for Online Music Practices*, 23 BERKELEY TECH. L.J. 353 (2008), available at <http://scholarship.law.berkeley.edu/btlj/vol23/iss1/15/> (citing Shaun Assael, *Online and on the Edge*, N.Y. TIMES (Sept. 23, 2007), at Arts 32).

42. Chris Leo Palermino, *Who’s the King of Online Radio? New Report Crowns the Winner*, DIGITAL TRENDS (Mar. 5, 2015), <http://www.digitaltrends.com/music/who-is-the-most-popular-online-radio-service/> [hereinafter Palermino, *The King of Online Radio*] (citing EDISON RESEARCH AND TRITON DIGITAL: THE INFINITE DIAL (2015), available at <http://www.edisonresearch.com/the-infinite-dial-2015/>) (noting further that of those 119 million people, 45% of them were “primarily using Pandora”).

43. 2015 NIELSEN MUSIC REPORT, *supra* note 32.

44. *Id.*

45. *Id.*; Sisario, *Adele*, *supra* note 3.

46. IFPI REPORT 2015, *supra* note 34, at 5.

47. Spektor, *supra* note 29, at 60.

webcasters in order to benefit all parties involved.

B. The Music Industry's Hostility Toward, and Fear of, The Digital Age

The music industry, despite its historical strength, will need to concede to the influence stemming from today's influx of technological advancements and adapt accordingly, despite its "fear that showing one bit of flexibility will summon Napster back from the grave to destroy what's left of their business."⁴⁸ Due to the immense increase web-based music services, the music industry is no longer "commanded by a powerful few [but] is now being ripped open by a consumer hunger driven by innovations in technology."⁴⁹ Societal norms may play a fundamental role in how the pressures are shaped and resolved between the market place and the music industry's desire to control access to its product.⁵⁰ The main question the music industry must answer is how do you market and sell something that is widely available for free?⁵¹ The recording industry argues that "the marriage of music and the Internet . . . has facilitated digital music piracy,"⁵² however, "the conflict produced by the digital age is not simply a conflict about copying and piracy" – the element of control plays a huge role.⁵³ The music industry is "concerned about the ability of consumers to alter or even refuse the conditions under which digital content is delivered and offered,"⁵⁴ thereby taking away the control it has traditionally held over the prod-

48. Steven Levy, *Steven Levy on Facebook, Spotify and the Future of Music*, WIRED (Oct. 21, 2011), http://www.wired.com/magazine/2011/10/ff_music/all/1; see Lee, *supra* note 16 (quoting Jim Hu, *Music Group Sues Over MP3 Device*, CNET (Oct. 9, 1998), http://news.cnet.com/Music-group-sues-over-MP3-device/2100-1023_3-216534.html (quoting Michael Robertson, founder of MP3.com: "The music industry is crashing into the Internet . . . they don't want to go into the Digital Age, and MP3 is dragging them there.")).

49. Lee, *supra* note 16, at 131; see also *id.* at 146 (recognizing the power dynamic has changed; the "[p]ower [has shifted] from the Big Five record companies to consumers."); see also Spektor, *supra* note 29, at 33 (quoting Lynn Hirschberg, *The Music Man*, N.Y. TIMES MAGAZINE (Sept. 2, 2007), <http://nyti.ms/1SWqEDR>) (finding "[e]ven the chairperson of Columbia Records, Rick Rubin, admits that the recording industry is a 'dinosaur.'").

50. See Marc Hogan, *Gang of Four's Dave Allen Is #TeamSpotify, Calls Out David Byrne and Thom Yorke*, SPIN (Oct. 14, 2013), <http://www.spin.com/articles/gang-of-four-dave-allen-david-byrne-thom-yoke-spotify/>; see also David Hyland, *Article Roundup: Peek At New Johnny Cash Biography, Musicians Debate Online Streaming*, WIS. PUB. RADIO SOUNDBYTES (Oct. 14, 2013), <http://www.wpr.org/article-roundup-peek-new-johnny-cash-biography-musicians-debate-online-streaming> (quoting Dave Allen, who "has responded in support of streaming. He likens what's happening to the industry as akin to 'societal shifts.'"); see also Lina Lecaro, *Brandon Boyd on Art, Cat Videos, And Incubus' Return to KROQ Almost Acoustic Christmas*, LA WEEKLY (Dec. 11, 2014), <http://www.laweekly.com/music/brandon-boyd-on-art-cat-videos-and-incubus-return-to-kroq-almost-acoustic-christmas-5274987> (quoting Brandon Boyd: "I think the rock music scene . . . does seem to be on the cusp of another major shift . . . I think these aesthetic shifts happen with more frequency in our day and age. Thank you, Internet.").

51. Ben Sisario, *Rare Music Videos, for a Price*, N.Y. TIMES, MEDIA DECODER (Nov. 21, 2011), <http://nyti.ms/1RiQZvL>.

52. Spektor, *supra* note 29, at 3.

53. Balkin, *supra* note 26, at 15.

54. *Id.* (explaining "businesses . . . want consumers to experience digital products in ways that will encourage consumption and increase profits, and they want to structure the digital envi-

uct – the sale of music. Nevertheless, human nature, norm development and the public’s desire for free music will generate overwhelming pressures on the industry.

C. Royalty Payments and Licensing Requirements

The music industry’s best chance to regain control over its product is through royalty payments⁵⁵ and licensing fees;⁵⁶ thus, the music industry, in particular the Recording Industry Association of America (RIAA) has instead attempted to harness file sharing as a means to generate profits.⁵⁷ This tactic is problematic, however, because its “request for unbridled power in establishing webcasting rates bordered on the inequitable,”⁵⁸ and these extraordinary rates “have sent many webcasters spinning out of business or, at the very least, depressed about their prospects for survival.”⁵⁹ As such, the astronomical royalty rates and licensing fees may prove to be webcasters’ ultimate weakness, and if ultimately forced out of the market, as some fear, it would “[put] an end to the promise of webcasting and [close] a key outlet for many performing artists.”⁶⁰ These constraints would not only hamper webcasters’ ability to function, but would impede upon individuals’ abilities to enjoy the panoply of benefits, features, and wide variety of on-demand music webcasters strive to offer.

ronment accordingly.”).

55. Under the DMCA, there are two ways for royalty rates to be set. *See Webcaster Alliance, Inc.*, 2004 U.S. Dist. LEXIS 11993, at 2-3 (citing 17 U.S.C. § 114(f)(2)(A), (B)) (listing the methods: “[F]or the copyright owners and webcasters to voluntarily negotiate the rates . . . during a statutorily prescribed period,” or “for the Librarian of Congress, upon the recommendation of a Copyright Arbitration Royalty Panel . . . to establish the rates.”); *see also* Ben Sisario, *Streaming Royalties Rise, But Not As High As Music Industry Wanted*, N.Y. TIMES (Dec. 16, 2015), <http://nyti.ms/1YiPDYB> (deciding in December 2015, the Copyright Royalty Board “increased the royalty that free Internet radio services like Pandora will pay record companies for the next five years” from 14 cents to “17 cents for every 100 times they play a song when they stream music to listeners who do not pay for subscriptions.”).

56. *See* Wagman, *supra* note 7, at 100-01 (explaining digital music services that employ streaming technologies “must obtain public performance licenses from both the sound recording copyright owner and the musical composition copyright owner. . . . [and a] digital music service must obtain separate licenses depending on the means of distribution it facilitates.” In order for a music service to offer downloading, it is required to “obtain mechanical licenses from the musical composition copyright owner and master use licenses from the sound recording copyright owner.”).

57. *See MusicCity.com Invokes Betamax Defense In Suit With Entm’t Industry*, 3-12 MEALEY’S LITIG. REP. CYBER TECH & E-COM. 8 (2002) (quoting *MGM Studios Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197 (C.D. Calif. 2007) (citing the argument of MusicCity.com, a peer-to-peer file sharing network, that “media interests have attempted to eliminate new technologies, until those interests learned to adapt to the new technologies and, in turn, to profit from them.”).

58. Spektor, *supra* note 29, at 62.

59. *Id.* at 10.

60. Fessler, *supra* note 11, at 412; *see id.* at 410 (pointing out “webcasters who transmit fifteen songs to an audience that averages 25,000 listeners would have to pay record companies a fee of \$262.50 . . . [that] has the potential of reaching into the millions of dollars over time as the transmissions . . . add up.”).

IV. ANALYSIS

Digital music is taking over and replacing traditional means of obtaining music.⁶¹ The Internet is here to stay, and, as a result, the music industry and the music market have evolved, and continue to evolve, to react to the threats and opportunities created by the Internet. As downloading music becomes the prevailing practice, the bizarre irony that becomes apparent of this digital age, enmeshed with both advantages and risks, is such that:

The very same features . . . that empower ordinary individuals also lead businesses continually to expand markets for intellectual property and digital content. Yet . . . they must deal with features of the digital age that empower consumers and give them new abilities to copy, distribute, and manipulate digital content.⁶²

According to Jack Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School, four primary aspects of a flourishing democratic society have increased in relevance by the rise of digital technology:

- (1) the right to publish, distribute to, and reach an audience;
- (2) the right to interact with others and exchange ideas with them, which includes the right to influence and to be influenced, to transmit culture and absorb it;
- (3) the right to appropriate from cultural materials that lay at hand, to innovate, annotate, combine, and then share the results with others; and
- (4) the right to participate in and produce culture, and thus the right to have a say in the development of the cultural and communicative forces that shape the self.⁶³

It follows that the innovators who create webcasters and the musicians and audiences who support their services should all be afforded the opportunity to live in such a democratic culture without the music industry attempting to halt such technological advancements. Yet while some Internet music services have done well, many have been struggling, facing a variety of obstacles set by the dominant players of the music industry. The public policy issue that presents itself, while taking into consideration any licensing, distribution or other contractual rights granted, is that “Congress should [not] be quick to compensate a struggling recording industry at the expense of the two constituents with which copyright law is concerned, the artist and the public.”⁶⁴ Instead, a potential solution may be to create a simplified licensing system to reduce the extraordinary costs imposed upon Internet radios, which “would allow innovators to lawfully enter into the digital music marketplace and either rise or fall on their own merits.”⁶⁵ It is essential to support and aid the innovation and creativ-

61. See 3-12A Nimmer on Copyright § 12A.10 (2011).

62. Balkin, *supra* note 26, at 13.

63. *Id.* at 43.

64. Spektor, *supra* note 29, at 53.

65. Wagman, *supra* note 7, at 108.

ity necessary to rethink how music is distributed and shared with the world. As Ayn Rand said, “one cannot give that which has not been created. Creation comes before distribution – or there will be nothing to distribute.”⁶⁶

A. Which Webcaster Will You Choose To Fulfill Your Music Fix?

Countless services provide means to stream music over the Internet. Each of these constitute “music initiative[s] . . . of the neo-Napster transformation in which music is streamed from a collection of servers, rather than stored on local hard drives.”⁶⁷ Internet companies both large and small have “ramped up a streaming music service, each one an attempt to reinvent the way we purchase and listen to music.”⁶⁸ In assessing the current state of various music-streaming services, Sasha Frere-Jones has said:

We’re living in an era of music-biz polytheism. Corporate sponsorship, major-label investment, family money – there are no substitutes for these deep advantages, sure, but there are a thousand alternatives to them which can be cobbled together into something you can leverage, and every paradigm creates its own backlash which in turn offers up another possibility.⁶⁹

Webcasters are this possibility – the possibility of a new future for the music industry.

B. Pandora

With 70% of the streaming music market, Pandora is the largest webcasting service in the United States⁷⁰ and has over “[seventy-six] million listeners tuning in at least once a month and more than a million songs in its collection.”⁷¹ Pandora plays music based on the users’ selection of a musician, song, or genre, and is known for its feature of clicking a thumbs-up or thumbs-down.⁷² Through Pandora’s Music Genome Project (MGP), once users make their primary selection, the Internet radio proceeds to stream music that is simi-

66. Spektor, *supra* note 29, at 64 (quoting AYN RAND, *THE FOUNTAINHEAD*, 712 (Penguin Group 1994) (1943)).

67. Levy, *supra* note 48.

68. *Id.*

69. Sasha Frere-Jones, *Cash on the Pinhead*, *THE NEW YORKER* (Aug. 9, 2013), available at <http://www.newyorker.com/culture/sasha-frere-jones/cash-on-the-pinhead>.

70. *Broad. Music, Inc. v. Pandora Media, Inc.*, 2015 U.S. Dist. LEXIS 69002, at 11 (S.D.N.Y. May 27, 2015).

71. Andrew Adam Newman, *A Thumbs-Up Brings Favorite Artists to Life For Pandora Listeners*, *N.Y. TIMES* (Sept. 21, 2014), <http://nyti.ms/1ubQI4X> (reporting “revenues of \$413.2 million in the first six months of 2014, an increase of 54[%] over the first half of 2013”); see also Palermino, *The King of Online Radio*, *supra* note 42 (reporting Pandora having “the highest brand awareness (75[%]) and highest monthly usage [of] 45[%]”); see generally ABOUT PANDORA, <http://www.pandora.com/about> (last visited Feb. 14, 2015).

72. See Newman, *supra* note 71 (explaining: “Thumbing up a song . . . cues an algorithm to play more songs with similar elements like tempo, instrumentation and lyrics, while thumbing down prevents the song from being played again. Since Pandora introduced its radio service in 2005, smartphone and computer listeners have clicked the icons more than 40 billion times.”).

lar to that initial selection, as modified only by a thumbs-up, thumbs-down or skip function.⁷³ However, users are only permitted to utilize the skip function a limited number of times per hour and lack the ability to “fast-forward.”⁷⁴ Most importantly, users cannot choose the exact songs that will be streamed.

Pandora has been a main target of the music industry’s attempt to bring down webcasters, and much of the concern centers around Pandora’s level of user interactivity. Despite the limited user interaction, Pandora is nonetheless characterized as a non-interactive service, akin to traditional radio broadcast, which is transmitted “to the public at large, without interaction from individual consumers.”⁷⁵ Regarding a similar service and a similar issue in *Arista Records, LLC v. Launch Media, Inc.*, the Second Circuit Court of Appeals held that LAUNCHcast⁷⁶ was not an “interactive service” as defined in the DMCA.⁷⁷ The Second Circuit reasoned that the two factors required by the DMCA were not met because LAUNCHcast users “cannot request and expect to hear a particular song on demand” and secondly, users do not “[receive] a transmission of a program specifically created for them.”⁷⁸ The decision of Pandora’s interactivity should fall within the same line of reasoning that the court found with Launch Media, Inc. – “interactivity is not brought about merely by tailoring a non-interactive, non-on-demand stream to the tastes of the user, but rather designed to prevent users from being able to pick or predict the particular song they want to hear”⁷⁹ and this is precisely what Pandora’s MGP ensures.

73. See *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 327 (S.D.N.Y. 2014) (describing MGP’s method through which “[a] Pandora customer creates a station by ‘seeding’ it with a song, artist, genre, or composer. That seed serves as a starting point to which Pandora then applies the information in its MGP database to match that seed with other songs that Pandora’s algorithms predict that the listener is likely to enjoy.”).

74. Sofia Ritala, *Pandora & Spotify: Legal Issues and Licensing Requirements for Interactive and Non-Interactive Internet Radio Broadcasters*, 54 IDEA 23, 27 (2013).

75. Conley, *supra* note 33, at 431-32.

76. See generally YAHOO! MUSIC RADIO, http://en.wikipedia.org/wiki/Yahoo!_Music_Radio (last visited Mar. 30, 2016) (detailing LAUNCHcast was bought by Yahoo! in 2001 and operated as Yahoo! Music Radio from 2001 to 2009 when Yahoo joined with CBS Radio from 2009 to 2012. From 2013 to 2014, Yahoo! Music Radio was powered by iHeartRadio. “Although Yahoo!’s current deal with iHeartRadio continues, sometime in late 2013/early 2014 Yahoo! Music’s radio page has been discontinued without an announcement, redirecting visitors to the main Yahoo! Music page. This signifies Yahoo! Music’s end of its [I]nternet radio services.”).

77. *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2nd Cir. 2009); see *Digital Millennium Copyright Act*, 112 Stat. 2860, 2898 (defining an interactive service as one “that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.”).

78. *Webcasting Service Not Interactive, 2nd Circuit Says In Copyright Case*, 8-8 MEALEY’S LITIG. REP. COPYRIGHT 1 (2009) (citing *Arista Records, LLC*, 578 F.3d 148) (reasoning “the unique nature of the playlist helps Launch [Media, Inc.] ensure that it does not provide a service so specially created for the user that the user ceases to purchase music.”).

79. In the Matter of Music Licensing Study: Notice and Request for Public Comment: Docket No. 2014-3 Before the Copyright Office Library of Congr. (May 23, 2014) (Comments of Sirius XM Radio, Inc.), available at

Pandora, along with its competitors, have each faced this same obstacle: “webcasters pay way too much for the right to stream music online, more than traditional or satellite radio.”⁸⁰ And just like its competition, Pandora has been subject to litigation. In a lawsuit against the American Society of Composers, Authors and Publishers (ASCAP), Pandora alleged that ASCAP “[had] not negotiated in a manner that would lead to fair and reasonable terms for the licensing deals of musical works.”⁸¹ Pandora and ASCAP had a licensing agreement that ran from 2005 until 2010, when Pandora terminated the agreement in order to negotiate new licensing terms.⁸² When negotiations proved fruitless in its application for a blanket license, “Pandora requested on November 5, 2012 that [the] Court set a rate for that licensing fee.”⁸³ Pandora referenced ASCAP’s agreement with “Radio Music Licensing Committee (RMLC), the terms of which [were] more favorable to RMLC than ASCAP [was] willing to grant to Pandora” – making specific mention that “one of the biggest broadcasters in RMLC is ClearChannel . . . [which] operates one of Pandora’s competitors, iHeartRadio.”⁸⁴ The court held 1.85% to be the reasonable rate of the license.⁸⁵

Despite the conclusion of its proceedings with ASCAP, Pandora lost the battle when it “square[d] off against the giant licensing agency BMI in the latest fight over music royalties in the digital age.”⁸⁶ This lawsuit “determine[d] how much Pandora . . . [must pay] BMI’s songwriters and music publishers to stream their songs.”⁸⁷ The interactivity issue, as mentioned above, has been a

http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Sirius_XM_%20Radio_Inc_MLS_2014.pdf; see *Arista Records, LLC*, 578 F.3d 148.

80. Greg Sandoval, *Pandora’s PR Problem: How the Web Radio Titan Became Music’s Big Villain*, THE VERGE (July 9, 2013), <http://www.theverge.com/2013/7/9/4475102/pandoras-pr-problem-why-the-company-cant-win-in-washington> (quoting Tim Westergren, co-founder of Pandora).

81. Ritala, *supra* note 74, at 39; see *Pandora Media, Inc. v. Am. Soc’y of Composers, Authors, and Publishers*, 2013 U.S. Dist. LEXIS 133133 (S.D.N.Y. Sept. 17, 2013).

82. *Pandora Media, Inc.*, 2013 U.S. Dist. LEXIS 133133, at 5.

83. *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 320.

84. Ritala, *supra* note 74, at 40 (citing Brief for Petitioner ¶ 9, *United States v. Am. Soc’y of Composers, Authors and Publishers*, 2001 U.S. Dist. LEXIS 23707 (S.D.N.Y. Nov. 5, 2012) (quoting at ¶ 14 and ¶ 16 Pandora’s argument that “this discrimination is not only ‘unreasonable and particularly harsh,’ but also contrary to the court’s decisions that ‘there is no basis for discriminating amongst licensees offering the same or substantially similar programming.’”)).

85. *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 355, *aff’d*, 2015 U.S. App. LEXIS 7484 (2d Cir. N.Y. May 6, 2015) (reasoning “ASCAP [had] carried its burden of demonstrating that its rate proposal of 1.85% [was] reasonable for the years 2011 and 2012 [and that it had] failed to carry its burden of demonstrating that its rate proposal of 2.50% and 3.00% for the years 2013 and 2014-2015, respectively, [were] reasonable.” The court further reasoned “Pandora [had] failed to show that it [was] entitled to the 1.70% RMLC rate as the result of being similarly situated . . . to the RMLC member radio stations.”).

86. Ben Sisario, *Pandora Readies for Another Royalties Battle, This Time With BMI*, N.Y. TIMES (Feb. 6, 2015), <http://nyti.ms/1EMfrlf> [hereinafter Sisario, *Pandora Readies for Battle*]; Chris Leo Palermino, *Songwriters and Publishers Score a Big Win in Court Case Against Pandora*, DIGITAL TRENDS (May 15, 2015), <http://www.digitaltrends.com/music/pandora-will-now-have-to-pay-bmi-songwriters-42-percent-more/>.

87. Sisario, *Pandora Readies for Battle*, *supra* note 86.

recurring one, and again, here, Pandora's classification was a key issue.⁸⁸ BMI argued an increased rate of 2.5% was reasonable for streaming services today whose main source of revenue is from the music, whereas its original license at 1.75% was first offered in 1995 intended for websites whose use of music was not as prevalent.⁸⁹ Pandora argued for a rate between 1.7% and 1.85%.⁹⁰ Although this lawsuit was extremely similar to that of the prior ASCAP case, the result this time did not favor Pandora – the court ordered the revenue rate to be set at 2.5%.⁹¹ On June 26, 2015 Pandora filed its notice of appeal,⁹² however, in December 2016 Pandora agreed to drop the appeal due to the execution of a new agreement with BMI.⁹³ Cases such as these reinforce the notion that despite the music industry's aversion to the digital age, ASCAP and BMI and webcasters must work together to mutually thrive.⁹⁴

C. Spotify

Spotify “has come to symbolize the growth of streaming music around the world.”⁹⁵ The Swedish company was introduced in the United States in 2011 and now has well over fifty million users world-wide.⁹⁶ Spotify, with over twenty million songs in its music catalog, has been successful since its inception and now extends to over fifty markets.⁹⁷ As of 2015, Spotify is worth \$8 billion, out-valuing its rival Pandora.⁹⁸

88. *Broad. Music, Inc.*, 2015 U.S. Dist. LEXIS 69002, at 9.

89. *Id.* at 15-17.

90. *Id.* at 61; see Sisario, *Pandora Readies for Battle*, *supra* note 86 (reiterating while “[t]he difference between what the two sides are proposing may be minuscule . . . music executives say that the intensity of the fight underscores the importance of every percentage point in royalties as overall media consumption shifts online.”).

91. *Broad. Music, Inc.*, 2015 U.S. Dist. LEXIS 69002, at 68-69.

92. See *Broad. Music, Inc. v. Pandora Media, Inc.*, 2015 U.S. Dist. LEXIS 69002 (S.D.N.Y. May 27, 2015), *appeal docketed*, No. 15-2060 (2d Cir. June 29, 2015).

93. *BMI Signs New Licensing Agreement With Pandora; Benefits Songwriters, Composers and Publishers*, BMI NEWS (Dec. 22, 2015), http://www.bmi.com/news/entry/bmi_signs_new_licensing_agreement_with_pandora_benefits_songwriters (quoting BMI President and CEO, Mike O’Neill: “Not only is our new agreement comparable to the other direct deals in the marketplace, but it also allows us to amicably conclude our lengthy rate court litigation and focus on what drives each of our businesses – the music.”).

94. Sisario, *Pandora Readies for Battle*, *supra* note 86 (noting ASCAP and BMI fear “the threat of large publishers quitting those organizations entirely.”).

95. Ben Sisario, *As Music Streaming Grows, Spotify Reports Rising Revenue and a Loss*, N.Y. TIMES (Nov. 25, 2014), <http://nyti.ms/1rcVpeZ>.

96. SPOTIFY, <http://en.wikipedia.org/wiki/Spotify> (last visited Jan. 11, 2015); SPOTIFY EXPLAINED, <http://www.spotifyartists.com/spotify-explained/#spotify-progress-so-far> (last visited Jan. 11, 2015); see also Ben Sisario, *Spotify Is Said to Have Reconsidered Its Free Access Policy for Big Acts’ New Albums*, N.Y. TIMES (Dec. 8, 2016), <http://nyti.ms/21Ny4iS> [hereinafter Sisario, *Spotify Free Access*] (breaking it down to “20 million paying users and another 55 million who use its free version.”).

97. *In re Pandora Media, Inc.*, 6 F. Supp. 3d at 325; SPOTIFY PRESS, INFORMATION, <https://press.spotify.com/us/information> (last visited Jan. 17, 2016).

98. See Ulrich Bachman, *Music Streaming Wars Are Heating Up as Spotify Bag Another Successful Funding Round to Fuel Its Expansion Plans*, TECH NEWS TODAY (May 1, 2015),

Spotify offers a variety of music services once a user creates an account.⁹⁹ Spotify Radio operates essentially the same as Pandora by creating a new station through the selection of an artist or a song, for example, and customizing the station through similar thumbs-up and thumbs-down features.¹⁰⁰ A key difference, however, is that Spotify users have the ability to create playlists – a function that distinguishes and characterizes Spotify as an interactive service. Interactive Internet music services provide the means for a listener “to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording . . . selected by or on behalf of the recipient.”¹⁰¹ Any of the songs available on Spotify can be added to an infinite number of playlists,¹⁰² and users can share their playlists with other Spotify users or Facebook friends.¹⁰³ Another key distinction is that while basic Spotify users must be connected to the Internet, Premium users have the benefit of listening to their playlists offline.¹⁰⁴

As mentioned previously, one advantage webcasters have is the ability to create unique features to benefit musicians and consumers, while setting themselves apart from competition in doing so. Such true innovation proves to be a difficult task due to technology permitting all webcasters alike to implement

<http://www.technewstoday.com/23367-spotify-goes-big-with-350-million-funding-to-beat-tidal-and-pandora/>.

99. John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend Or Its Foe?*, THE NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/revenue-streams> (offering the option to “pay a monthly subscription fee (\$9.99), or get served an ad every few songs. . . on the free tier.”).

100. SPOTIFY, LEARN MORE, SPOTIFY RADIO, <https://support.spotify.com/us/learn-more/guides/#!/article/Spotify-Radio> (last visited Feb. 15, 2015); see also Farhad Manjoo, *Spotify Wants Listeners to Break Down Music Barriers*, N.Y. TIMES (June 3, 2015), <http://nyti.ms/1FT4xsH> (explaining Spotify’s expansion endeavor “to program for moods and activities rather than merely certain kinds of musical tastes” in order to “make Spotify more of a ritual . . . to use it for a set of habits.”).

101. Conley, *supra* note 33, at 431 (quoting 17 U.S.C. § 114(j)(7) (2007)); see *id.* at n.154 (explaining interactive transmission services also include those where “songs transmitted ‘substantially consist’ of songs picked by listeners and transmitted either to the entire audience or directly to the selecting individual . . . [or] to listeners at times pre-designated by listeners.”).

102. SPOTIFY, LEARN MORE, PLAYLISTS, <https://support.spotify.com/us/learn-more/guides/#!/article/Save-your-music-with-Playlists> (last visited Feb. 15, 2015).

103. SPOTIFY, LEARN MORE, SHARING MUSIC, <https://support.spotify.com/us/learn-more/guides/#!/article/sharing-music> (last visited Feb. 15, 2015); see Carpenter, *supra* note 2, at 72 (quoting Eliot Van Buskirk, *8 Best Ways to Share ‘Mix Tapes,’* WIRED (Oct. 26, 2009), <http://www.wired.com/epicenter/2009/10/best-8-ways-to-share-mix-tapes/>) (comparing digital playlists to “the ‘olden days,’ when ‘boys and girls used to spend hours using double cassette decks to carefully craft mix tapes to share in order to express their innermost longings in an artsy way. It sometimes led to loe and inadvertently increased record sales by sharing a little taste of previously undiscovered bands.”); see Tom Cheredar, *New Details About Facebook’s Service Set to Debut at F8*, VENTUREBEAT (Sept. 11, 2011), <http://venturebeat.com/2011/09/11/facebook-may-debut-music-service-at-f8-event/> (describing Facebook’s ‘scrobbling’ function: Any time a Facebook user listens to a song of any of its partner music services, it will be “automatically recorded on [the user’s] profile.”).

104. SPOTIFY, LEARN MORE, LISTEN OFFLINE, <https://support.spotify.com/us/learn-more/guides/#!/article/Listen-offline> (last visited Feb. 15, 2015).

similar features. For instance, where Pandora acquired online music analytics company Next Big Sound, Spotify responded by purchasing competitor, Echo Nest.¹⁰⁵ In further attempting to maintain its dominant position against competitors, Spotify has endeavored to build industry partnerships. For instance, Spotify has partnered with Sony to be front and center to all PlayStation gamers through Sony's "new streaming music platform – called PlayStation Music – [which] will require a paid Spotify premium membership."¹⁰⁶ This exemplifies yet another innovative webcaster tactic and marks the entrance of a new type of valuable partnerships among video games and streaming music services.

Despite Spotify's remarkable success, it, just as other webcasters, "has been cast as both hero and villain in the music industry's [ongoing] debate over streaming music."¹⁰⁷ The primary objection has been that the majority of music services pay less than one cent per stream, and even for the most widely played songs the musician would likely earn more through the sale of a digital download.¹⁰⁸ Some artists, such as Thom Yorke of Radiohead, have resorted to removing their music from Spotify "over complaints that the service pays too little in royalties to musicians."¹⁰⁹ Spotify has defended against such accusations by noting that in 2015 it had paid over \$3 billion in royalties.¹¹⁰ Some artists, on

105. Ben Sisario, *The Sweet, Streaming Sound of Data*, N.Y. TIMES (Mar. 6, 2014), <http://nyti.ms/1gdNlck> (noting that Spotify and Pandora "are part of a broad category of online services that rely on technology to crowdsource recommendations [and] use complex algorithms to comb through their users' activity to suggest new purchases"); see also Ben Sisario, *Pandora Buys Next Big Sound to Track Popular Music*, N.Y. TIMES (May 19, 2015), <http://nyti.ms/1Fm8Vjw> (following suit, Apple similarly purchased Semetric, which "[gathers] information of music's popularity online.").

106. Patrick O'Rourke, *Sony Closing Music Unlimited, Forges Partnership With Spotify*, FINANCIAL POST (Jan. 28, 2015), http://business.financialpost.com/fp-tech-desk/personal-tech/sony-closing-music-unlimited-forges-partnership-with-spotify?_lsa=442c-af6b#_federated=1; Ben Sisario, *Sony Terms With Spotify Uncovered in Contract*, N.Y. TIMES (May 24, 2015), <http://nyti.ms/1HE8O6z> (listing some of Spotify's minority stakeholders: Sony Corp., "the second-largest record company in the world," as well as "the other big labels, Universal and Warner.").

107. Ben Sisario, *Chief Defends Spotify After Snub by Taylor Swift*, N.Y. TIMES (Nov. 11, 2014), <http://nyti.ms/1uZzFUo>; see also Sisario, *Spotify Free Access*, *supra* note 96 (showing Spotify's attempt to appease the music industry by, for example, agreeing to "restrict access for [Coldplay's] new album . . . to the service's paid version and keep it off its free tier for a limited time." This tactic, known as windowing, "is something that record labels have long been lobbying for." Despite its willingness, "Coldplay and its record label, Warner Music, decided not to split the album's availability on Spotify.").

108. See Ben Sisario, *Thom Yorke Pulls Songs From Spotify*, N.Y. TIMES (July 15, 2013), <http://nyti.ms/1CP9LDB> [hereinafter Sisario, *Thom Yorke Pulls Songs*].

109. *Id.*; see also Steve Knopper, *Taylor Swift Abruptly Pulls Entire Catalog From Spotify*, ROLLING STONE (Nov. 3, 2014), <http://www.rollingstone.com/music/news/taylor-swift-abruptly-pulls-entire-catalog-from-spotify-20141103> (noting Taylor Swift and her label, Big Machine Music, have also "abruptly yanked her entire catalog from Spotify."); see also Sisario, *Adele*, *supra* note 3 (noting "the most popular album of the year by far was one that was not made available for streaming" – Adele's "25").

110. Jeff Price, *The More Money Spotify Makes, The Less Artists Get Paid*. . . , DIGITAL MUSIC NEWS (June 11, 2015), <http://www.digitalmusicnews.com/2015/06/11/the-more-money-spotify-makes-the-less-artists-get-paid>.

the other hand, are satisfied with Spotify's format.¹¹¹

There will not likely be a unified consensus on what is best for every musician, and all musicians should have the freedom to choose how their music reaches the world. This freedom should also exist for webcasters to have the opportunity to thrive, so long as they comply with the intellectual property laws of the land. Spotify continues to emphasize and boldly stand by its mission "to grow a service which people love, ultimately want to pay for, and which will provide the financial support to the music industry necessary to invest in new talent and music"¹¹² and continues toward reaching its goal "to help artists connect with their fans, find new audiences, grow their fan base and make a living from the music we all love."¹¹³

D. Apple Music and Beats

In January 2014, a new online streaming service called Beats was introduced to the market,¹¹⁴ and, shortly thereafter, in May 2014, Apple bought Beats for \$3 billion.¹¹⁵ Although Beats aspires to distinguish its brand and its model from other music streaming sites, it is nonetheless late in entering this game.¹¹⁶ Dr. Dre and Jimmy Iovine, the co-founders of Beats, have stated that this new arrangement was "inspired by Apple's unmatched ability to marry culture and technology."¹¹⁷ Beats may have difficulty proving unique in comparison to its competitors as a new entrant to the market, although it may not have to because Beats has Apple. Beats is similar to competing services in terms of its music catalog offerings, except Beats is solely available via a paid monthly subscription.¹¹⁸ Even its subscription fee mirrors that of the other streaming services. Despite its attempts, Apple was unsuccessful in negotiating with record labels when it sought "lower licensing costs that would have let Apple sell subscriptions to its streaming service for \$8 a month — a discount from the \$10

111. Sisario, *Thom Yorke Pulls Songs*, *supra* note 108 (providing examples of Spotify supporters: Metallica, who "had struck a deal with Spotify" as well as Pink Floyd, who "added its catalog to the service.").

112. *Id.*

113. *Id.*

114. See generally BEATS MUSIC, <https://beatsmusic.com> (last visited Jan. 11, 2015).

115. See Ben Sisario & Brian X. Chen, *Months After Buying Beats, Apple's Plans for its Music Service Remain Unclear*, N.Y. TIMES (Sept. 22, 2014), <http://nyti.ms/1uf59F1>.

116. See Ellis Hamburger, *Beats Music Hands-On: Dr. Dre Has a Playlist For You*, THE VERGE (Jan. 20, 2014), <http://www.theverge.com/2014/1/20/5319322/beats-music-vs-spotify-dr-dre-streaming> (noting Beats contends it "doesn't want to be like Spotify"); see also Ben Sisario and Brian X. Chen, *Apple and Beats Developing Streaming Music Service to Rival Spotify*, N.Y. TIMES (Mar. 25, 2015), <http://nyti.ms/1GneMXg> [hereinafter Sisario & Chen, *Music Service to Rival Spotify*] (quoting financial analyst Toni Sacconaghi: "They're used to being a shaper rather than a responder . . . This is one of the few times where Apple is playing catch-up and not necessarily coming from a position of strength.").

117. Chris Welch, *Apple Confirms It's Buying Beats for \$3 Billion*, THE VERGE (May 28, 2014), <http://www.theverge.com/2014/5/28/5700530/apple-confirms-beats-acquisition>.

118. Hamburger, *supra* note 116.

that has become standard for services like Spotify [and] Rhapsody.”¹¹⁹

Next, Apple introduced Beats 1 into the market as “an experiment, of sorts, to reinvent live radio . . . – a high-tech twist on one of the oldest forms of electronic media.”¹²⁰ Apple declared: “We believe true innovation must consider everything.”¹²¹ And then, on June 30, 2015 Apple released Apple Music, their new streaming service.¹²² Apple announced it would pay royalties of 71.5% from its streaming service, which is only slightly more than the 70% paid by most music services.¹²³ Apple will now offer streaming of over thirty million tunes for a \$9.99 monthly subscription fee.¹²⁴

Setting aside any similarities to or distinctions from other streaming services, the most significant factor is quite simply that each of these new services has Apple.¹²⁵ Beats and Apple Music are each a part of Apple’s plan to saturate the online music market, and this is what puts any service collaborating with Apple at a colossal advantage from the outset.¹²⁶ Apple has been an overwhelming and seemingly unstoppable force in the digital music market and having now caught up with streaming, we can be certain that Apple will continue to take great strides to maintain its dominant foothold. Despite the fact that “Steve Jobs famously hated the subscription model of online music,” Ap-

119. Sisario & Chen, *Music Service to Rival Spotify*, *supra* note 116.

120. Ben Sisario, *Zane Lowe, the D.J. Scratching Out Beats 1 for Apple*, N.Y. TIMES (June 25, 2015), <http://nyti.ms/1SMTKpV> (describing Beats 1 as “a fully programmed radio station, broadcasting with a complement of live D.J.s and even sponsors. But since it will be baked into every Apple mobile device as part of a new music app, it has the potential for a huge and instantaneous global reach.”); *e.g.*, James Rettig, *St. Vincent Made a Mixtape For An 11-Year-Old On Her First Beats 1 Show*, STEREOGUM (July 1, 2015), <http://www.stereogum.com/1812774/st-vincent-made-a-mixtape-for-an-11-year-old-on-her-first-beats-1-show/mp3s/>.

121. APPLE, <http://www.apple.com> (last visited Apr. 21, 2015 7:02AM) (homepage).

122. Ben Sisario, *Apple Music Streaming Service Terms Dismay Indie Record Companies*, N.Y. TIMES (June 17, 2015), <http://nyti.ms/1H0062O>.

123. *Id.*

124. APPLE MUSIC, <https://www.apple.com/music/> (last visited July 18, 2015); *see also* Sisario & Chen, *Music Service to Rival Spotify*, *supra* note 116 (noting that Apple made failed attempts to secure an \$8 monthly subscription fee to gain a competitive edge against rival streaming services. “That \$2 markdown may be small, but Apple’s failure to secure it reflects a shift in the company’s relationship with the music industry.”); *see generally* APPLE MUSIC, MEMBERSHIP, <https://www.apple.com/music/membership/> (last visited July 18, 2015).

125. *See* Sam Mattera, *Apple Just Gave Beats Music a Big Advantage Over Spotify*, THE MOTLEY FOOL (Oct. 6, 2014), <http://www.fool.com/investing/general/2014/10/06/apple-just-gave-beats-music-a-big-advantage-over-s.aspx> (exemplifying how Apple “is using its ownership of the [Apple TV] platform to give Beats Music a leg up over Spotify” as well as any other non-Apple competition that tries to keep in the game); *see also* APPLE TV – MUSIC AND PHOTOS, <https://www.apple.com/tv/music-and-photos/> (last visited Jan. 12, 2016) (enabling Apple users to listen to any music they have purchased on their iTunes accounts, iTunes radio and now Beats and Apple Music via the Apple TV).

126. *See* Vlad Savov, *The Epic Visual History of Beats by Dre*, THE VERGE (May 9, 2014), <http://www.theverge.com/2014/5/9/5699032/beats-by-dre-visual-history> (noting “Beats Music is a highly ambitious, subscription-based service setting out to battle an army of free alternatives. . . . but in the hands of Apple, it could morph into something altogether more compelling.”).

ple has now entered into this realm and “could rapidly eclipse all competitors.”¹²⁷

E. Amazon Music

Another example of the increasing number of Internet music services is Amazon Music. On Amazon Music, users can purchase music from the Amazon Music application, which offers a catalog of more than twenty-eight million songs, music storage on the Amazon Cloud Drive, and the option to listen from the Amazon Cloud Player.¹²⁸ Purchased music can be downloaded onto an individual’s music or Android device.¹²⁹

One way in which Amazon Music is ahead of its competition is through its pricing, offering its music “often [at] the lowest [prices] across all of the major music stores, especially for popular artists and new releases.”¹³⁰ Additionally, Amazon now offers music streaming for its Amazon Prime members: “Prime Music is Amazon’s latest attempt to shake up an industry with entrenched competition.”¹³¹ While Amazon Prime’s available one million songs to stream is small in comparison to its competitors, given its position in the market, it has already succeeded in establishing itself as a major competitor among streaming services.¹³²

F. BitTorrent

A new means of music distribution was pioneered by Thom Yorke of Radiohead.¹³³ On September 26, 2014 Yorke revealed that his next solo album

127. Casey Newton, *What Apple Is Really Buying with Beats*, THE VERGE (May 9, 2014), <http://www.theverge.com/2014/5/9/5698158/what-apple-is-really-buying-with-beats>; see also Ben Popper, *Apple Didn’t Want Beats, It Needed Beats*, THE VERGE (May 29, 2014), <http://www.theverge.com/2014/5/29/5760886/why-apple-needed-beats-as-music-downloads-dwindle-streaming-is-the> (indicating Beats’ “monthly price is still on par with the competition, but if Apple wanted to, it could easily afford to undercut Spotify in order to steal market share.”).

128. GOOGLE PLAY, ANDROID APPS, AMAZON MUSIC WITH PRIME MUSIC, <https://play.google.com/store/apps/details?id=com.amazon.mp3&feature=top-free> (last visited Jan. 2, 2015); see generally AMAZON MUSIC, http://en.wikipedia.org/wiki/Amazon_Music (last visited Jan. 4, 2015).

129. *Id.*

130. Alan Henry, *Google Music vs Amazon MP3 vs iTunes: Which Online Music Store Is the Best for You?*, LIFEHACKER (Nov. 18, 2011), <http://lifehacker.com/5860817/google-music-vs-amazon-mp3-vs-itunes-which-online-music-store-is-the-best-for-you>.

131. Chris Welch, *Amazon Prime Music is No Spotify Killer, But It Doesn’t Need To Be*, THE VERGE (June 12, 2014), <http://www.theverge.com/2014/6/12/5802810/amazon-prime-music-hands-on>.

132. *Id.*; see also Chris Welch, *Amazon Reportedly Prepping Music Streaming Service for Prime Customers*, THE VERGE (May 29, 2014), <http://www.theverge.com/2014/5/29/5762494/amazon-reportedly-launching-music-streaming-for-prime-customers> (indicating this new feature “put[s] Amazon, which until now has focused on digital music sales over streaming, in direct competition with Spotify, Beats Music, and Google Play Music All Access.”).

133. Alex Young, *Thom Yorke Adds to the Hype By Tweeting Radiohead Lyrics From Inside Radiohead’s Studio*, CONSEQUENCE OF SOUND (Sept. 23, 2014),

was available on BitTorrent.¹³⁴ Yorke is known for conceiving of ways to bring his music, beloved by so many, to the public through alternative channels. Some musicians, like Yorke, do not support the trend of Internet music streaming services and want to create other options for music dissemination. BitTorrent, Yorke believes, “could revolutionize the music industry.”¹³⁵ With technology rapidly changing and listening and distribution customs being challenged, Yorke states, “[i]t’s an experiment to see if the mechanics of the system are something that the general public can get its head around.”¹³⁶

The process is relatively simple, even for an average Internet user. A user simply follows a link to purchase the album and pay online as one would for any other digital MP3 purchase.¹³⁷ The only additional step with this medium is that in order to download the “Bundle,”¹³⁸ the user must download the BitTorrent client, which in practice is as simple as downloading any other type of software.¹³⁹

The argument appears compelling – to purchase music from a source that seems to be most beneficial to the musicians themselves. This grants artists the freedom to upload their music, decide upon the most favorable terms, and easily distribute to the public.¹⁴⁰ Furthermore, unlike traditional digital distributors, with BitTorrent Bundle “the artist [receives] a vast majority of the revenue from the sale.”¹⁴¹ Yorke proclaims:

If it works well it could be an effective way of handing some control of

<http://consequenceofsound.net/2014/09/thom-yorke-adds-to-the-hype-by-tweeting-radiohead-lyrics/> (anticipating the announcement of his new plan for BitTorrent, Yorke, “calculated in his ways, fully aware of the hype [he was] generating . . . turned the world on its head by simply posting a photograph of a mysterious white vinyl record, fueling speculation that a new release . . . could be imminent.”).

134. Alex Young, *Thom Yorke Releases New Album Tomorrow’s Modern Boxes Through BitTorrent*, CONSEQUENCE OF SOUND (Sept. 26, 2014), <http://consequenceofsound.net/2014/09/thom-yorke-releases-new-album-tomorrows-modern-boxes-through-bittorrent/> [hereinafter Young, *Tomorrow’s Modern Boxes*] (reiterating Yorke had “carried out a similarly innovative release with [Radiohead’s] 2007 album, *In Rainbows*, introducing the industry to the pay-what-you-want format.”).

135. *Id.*

136. *Id.*

137. BITTORRENT BUNDLE, TOMORROW’S MODERN BOXES, <https://bundles.bittorrent.com/bundles/tomorrowsmodernboxes> (last visited Mar. 30, 2016) (selling the eight tracks for \$6).

138. BITTORRENT BUNDLE HELP CENTER, ABOUT BUNDLES, <http://bundle-help.bittorrent.com/customer/en/portal/articles/1572173-what-is-a-bundle-> (last visited Jan. 12, 2016) (defining a Bundle as a “pack of content published in collaboration between the Artist and BitTorrent. The content may be any kind of media”).

139. BITTORRENT, <http://www.bittorrent.com> (last visited July 18, 2015).

140. See BITTORRENT BUNDLE HELP CENTER, WHAT IS THE ARTIST GETTING OUT OF A BUNDLE?, <http://bundle-help.bittorrent.com/customer/portal/articles/1572175-what-is-the-artist-getting-out-of-a-bundle-> (last visited July 18, 2015).

141. BITTORRENT BUNDLE HELP CENTER, WHY IS BUNDLE DIFFERENT?, <http://bundle-help.bittorrent.com/customer/portal/articles/1572174-why-is-a-bundle-different-> (last visited July 18, 2015).

[I]nternet commerce back to the people who are creating the work. Enabling those people who make either music, video or any other kind of digital content to sell it themselves. Bypassing the self elected gate-keepers.¹⁴²

Most importantly, provided it is a rightful owner who uploads files, BitTorrent Bundle is in full compliance with intellectual property laws as the music owners grant express permission for this means of distribution.¹⁴³ Therefore, if the public can accept Yorke's non-traditional proposal, BitTorrent could prove to be a viable alternative to music distribution and consumption.

G. What Happened to Grooveshark?

Grooveshark, like Spotify, was an on-demand streaming music service that provided anyone connected to the Internet the ability to listen to what was once "an unmatched catalog,"¹⁴⁴ and like most on-demand services, Grooveshark offered a free tier as well as a premium subscription-based tier. Users had the ability to share music with friends and create unlimited playlists, although users could not download songs directly onto their computers or devices – "quick access to one's favorite music [were] ever the fundamentals of Grooveshark's offering."¹⁴⁵ Grooveshark rocketed to success with over fifteen million songs and reached over thirty million users, which made it "one of the largest on-demand music services on the Internet."¹⁴⁶ What the public did not know until nearly ten years after its inception was that Grooveshark failed to obtain licenses from the copyright holders for the majority of its music.¹⁴⁷

Grooveshark was created by three undergraduates at the University of Florida. Two of the founders, Josh Greenberg and Sam Tarantino, "started in 2006, working on improvised desks of cardboard boxes."¹⁴⁸ Grooveshark moved from cardboard boxes to Time Magazine, and in 2010 was listed as one of the top fifty best websites, having "one of the most complete libraries of any

142. Young, *Tomorrow's Modern Boxes*, *supra* note 134.

143. See BITTORRENT BUNDLE HELP CENTER, IS BITTORRENT BUNDLE LEGAL?, <http://bundle-help.bittorrent.com/customer/portal/articles/1573021-is-bittorrent-bundle-legal-> (last visited July 18, 2015).

144. *Mogreet and Grooveshark Partner to Create "Virtual DJ" Mobile Campaign for Corona Light's Beach Getaway Campaign*, PR NEWSWIRE (May 26, 2011), <http://www.prnewswire.com/news-releases/mogreet-and-grooveshark-partner-to-create-virtual-dj-mobile-campaign-for-corona-lights-beach-getaway-campaign-122650343.html>.

145. *Id.*

146. ABOUT GROOVESHARK, <http://www.grooveshark.com/about> (last visited Dec. 31, 2014). As discussed below, Grooveshark is no longer in business, and, thus, its website and related pages are no longer available on the internet. The discussion here is based on information that was available in 2014, when the company still existed.

147. Andrew Unterberger, *Music Streaming Site Grooveshark Shuts Down Amidst Legal Issues*, SPIN (May 1, 2015), <http://www.spin.com/2015/05/grooveshark-shut-down-lawsuit/>.

148. Meredith Rutland, *Grooveshark Creators Seek To Help Young Entrepreneurs*, THE INDEPENDENT FLORIDA ALLIGATOR (Aug. 30, 2011), http://www.alligator.org/news/local/article_7dc999e4-d2cb-11e0-8aaf-001cc4c03286.html.

music site.”¹⁴⁹ Grooveshark was a collaboration of “a team of dedicated music lovers . . . on a mission to bring music to the masses.”¹⁵⁰ They strived to meet everyone’s needs – “to provide music for [their] users, enhance exposure for artists, and maintain [their] role as pioneers of the open music revolution.”¹⁵¹

1. Consequences of Apple’s Rejection of Grooveshark

One of Grooveshark’s biggest obstacles, like many of the smaller webcasters, was determining how to co-exist with Apple. Grooveshark “offer[ed] a downloadable version of its software for smart phone brands such as Android and Blackberry,”¹⁵² however, Apple refused to approve an application for Grooveshark on iPhones.¹⁵³ Apple is the dominant force in the online music market, holding at least an 83% share of the market.¹⁵⁴ Therefore, Apple, with all of its vast financial resources, yields broad power in determining which webcasters will and will not survive since the majority of music is purchased through Apple’s iTunes Store.

In Apple’s commercial advertisements, it “instruct[ed] users of its iPod to ‘[R]ip, mix, and burn. . . . After all, it’s your music.’”¹⁵⁵ But it does not appear that Apple believes music lovers deserve the same opportunities from its competitors, such as Grooveshark. Grooveshark struggled, and urged Apple and any other giants blocking its path to “embrace the spirit of competition and do right by users in making [their] applications available to consumers.”¹⁵⁶

2. What Went Wrong

On April 30, 2015, after years of litigation, Grooveshark surrendered and Internet users found the following letter of apology when trying to access Grooveshark: “Dear music fans, Today we are shutting down Grooveshark. . . . [D]espite best of intentions, we made very serious mistakes. . . . We apologize. Without reservation.”¹⁵⁷ It went on to say: “At the time of our launch, few mu-

149. *50 Best Websites 2010*, TIME MAGAZINE (Aug. 25, 2010), http://www.time.com/time/specials/packages/article/0,28804,2012721_2012728_2012745,00.html.

150. GROOVESHARK, THE TEAM, <http://grooveshark.com/#!/about/team> (last visited Dec. 31, 2014).

151. *Id.*

152. Hardman, *supra* note 8, at 304.

153. See GROOVESHARK MOBILE, IPHONE, <http://mobile.grooveshark.com/phones/iphone> (last visited Dec. 31, 2014).

154. *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090, 1094, 1098 (N.D. Cal. 2006) (defining the online music market as one “for digital music delivered to the consumers by way of Internet download.”).

155. Balkin, *supra* note 26, at 39 n.68 (citing LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001)).

156. Letter from Paul Geller (Grooveshark) to the music industry, *Get Ready: Grooveshark Promises a Fight to the Finish* . . . (Apr. 18, 2011), <http://blisstunes.com/2011/04/18/get-ready-grooveshark-promises-a-fight-to-the-finish/>.

157. Sean Fitz-Gerald, *Say Good-by To Grooveshark*, VULTURE (May 1, 2015),

sic services provided the experience we wanted to offer – and think you deserve. Fortunately, that’s no longer the case.”¹⁵⁸

Prior to its admissions and apologies, Grooveshark had claimed that the company legally complied with all applicable intellectual property laws, and “[a]s the foremost supporter of open music across the globe, Grooveshark was established to provide a legal alternative to piracy.”¹⁵⁹ Grooveshark had contended “it [was] legal under the [DMCA], . . . [which] gives ‘safe harbor’ to Web sites that use third-party content as long as they remove infringing material whenever copyright holders ask them to.”¹⁶⁰ Grooveshark provided musicians and labels with a DMCA complaint form, and upon receipt of notification that uploaded music was infringing upon copyright owners’ rights it promptly removed the infringing files.¹⁶¹ In addition to the removal of infringing content from its site, Grooveshark’s stated policy was to take further action – “Any user account responsible for uploading infringing material [would] have his or her upload privileges immediately and permanently revoked.”¹⁶²

Unfortunately, Grooveshark ultimately did not comply with intellectual property laws and did not escape legal attack.¹⁶³ “[I]ts story is not much different from the innumerable Web start-ups that over the last decade . . . have run afoul of the big record labels; most either lose in court or go out of business.”¹⁶⁴ Grooveshark settled with the major players in the music industry, “agree[ing] to cease operations immediately, wipe clean all of the record companies’ copyrighted works and hand over ownership of [their] website, [their] mobile apps

<http://www.vulture.com/2015/04/say-goodbye-to-grooveshark.html#>.

158. *Id.*

159. GROOVESHARK, LEGAL OVERVIEW, <http://grooveshark.com/#!/legal> (last visited Jan. 1, 2015).

160. Ben Sisario, *Grooveshark Wins a Battle, But Can It Win the War?*, N.Y. TIMES, MEDIA DECODER (July 11, 2012), <http://nyti.ms/1H2wYo5> [hereinafter Sisario, *Grooveshark Wins a Battle*].

161. GROOVESHARK, LEGAL OVERVIEW, *supra* note 159 (claiming that it maintained “a zero tolerance policy for users who violate[d] [their] Terms of Service, which clearly state[d] that they must have the right to distribute any content they upload.”); *see also* GROOVESHARK, DMCA COMPLAINT FORM, http://www.grooveshark.com/dmca_form (last visited Jan. 1, 2015).

162. GROOVESHARK, LEGAL OVERVIEW, *supra* note 159.

163. *See* UMG Recordings, Inc. v. Escape Media Group, Inc., 964 N.Y.S.2d 106 (App. Div. 1st Dep’t 2013); *see also* Ben Sisario, *Judge Rules Against Grooveshark in Copyright Infringement Case*, N.Y. TIMES (Sept. 29, 2014), <http://nyti.ms/1rGxlza> (stating Grooveshark has been “long vilified by the major record companies” and “[l]ike Napster, LimeWire, Grokster and other online outlets before it, Grooveshark came under fierce attack from the recording industry” – referencing UMG Recording, Inc. v. Escape Media Group, Inc., 2014 U.S. Dist. LEXIS 137491 (S.D.N.Y. Sept. 29, 2014)).

164. Sisario, *Grooveshark Wins a Battle*, *supra* note 160 (noting “Michael A. Carrier . . . interviewed 31 music and technology executives, and found widespread suspicion that the labels use litigation as a weapon against services they find objectionable or uncontrollable. Those suits, the study found, cost \$150,000 to \$200,000 a month to defend, prompting many start-ups to simply expire before their cases are settled.”); *see* Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891 (2012), available at <http://ssrn.com/abstract=2099876>.

and intellectual property, including [their] patents and copyrights.”¹⁶⁵

Ironically, it was the heavy copyright infringements of the site’s own employees, rather than those of its users, which led to Grooveshark’s eventual demise.¹⁶⁶ Since Grooveshark employees’ jobs were conditioned on uploading as many music files to the site that they could,¹⁶⁷ the United States District Court for the Southern District of New York found that Escape Media, Grooveshark’s parent company, “engaged in purposeful conduct with a manifest intent to foster copyright infringement.” The results would be devastating as nearly 5,000 recordings were at issue with statutory damages capped at \$150,000 *per* work.¹⁶⁸

With an apology signed “Yours in music, Your friends at Grooveshark,”¹⁶⁹ they urged: “If you love music and respect the artists, songwriters and everyone else who makes great music possible, use a licensed service that compensates artists and other rights holders.”¹⁷⁰ Rising small webcasters would be wise to view Grooveshark’s departure as an opportunity and a challenge to legally and properly use technology in the ongoing battle against the industry giants attempting to keep newcomers out.

H. Exit Grooveshark, Enter TIDAL

In a market where free music reigns, subscription-based digital music platforms face a real challenge in convincing consumers to shift from free streaming to paying monthly fees. Accordingly, such companies must offer something significantly novel to convince users to alter their habits. The founders of TIDAL thought they had developed a novel concept – but TIDAL’s lack of success suggests otherwise.

Much hype and anticipation surrounded the introduction of TIDAL, with fervent support from industry moguls like Alicia Keys, who proclaimed TIDAL as the “first ever artist-owned global music and entertainment platform.”¹⁷¹ The

165. Fitz-Gerald, *supra* note 157.

166. See *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 2015 U.S. Dist. LEXIS 53734, at 2 (S.D.N.Y. Apr. 23, 2015); see also *id.* at 22 (referencing *Capitol Records, LLC d/b/a/EMI Music N. Am. v. Escape Media Group, Inc.*, 12 CIV 6466 (noting that court’s comments that “Grooveshark was a ‘technological Pez dispenser’ of infringing works, and that Escape ‘purposefully’ failed to keep records of infringement.”).

167. *UMG Recordings, Inc.*, 2015 U.S. Dist. LEXIS 53734, at 3-4 (citing *UMG Recording, Inc.*, 2014 U.S. Dist. LEXIS 137491, at 53-56) (further finding Sam Tarantino and Josh Greenberg “liable for direct infringement based on their own infringing uploads” and that additionally they acted “‘in bad faith’ and ‘with a culpable state of mind’” due to their “willfully deleting relevant upload data and records”).

168. *Id.* at 4, 9.

169. Fitz-Gerald, *supra* note 157 (ending the apology with: “It has been a privilege getting to know so many of you and enjoying great music together. Thank you for being such passionate fans.”).

170. *Id.*

171. Press Conference Video: Daniel D’Addario, *How Jay Z’s Tidal Press Conference Showed He’s Out of Touch*, TIME (Mar. 31, 2015), <http://time.com/3765268/tidal-music-jay-z->

press conference announcing TIDAL's launch on March 30, 2015 showcased artist-owners, including Alicia Keys, Win Butler and Régine Chassagne from Arcade Fire, Beyoncé, Calvin Harris, Chris Martin of Coldplay, Daft Punk, Jack White, Jason Aldean, J. Cole, Jay Z, Kanye West, Deadmau5, Madonna, Nicki Minaj, Rihanna and Usher.¹⁷² Such vast artist support suggested confidence that TIDAL would provide the business structure that would finally satisfy creators and users alike. Some distinguished artists, however, are not on board with TIDAL, such as Thom Yorke.¹⁷³ Other artists who have previously spoken out against streaming services, such as Prince and Taylor Swift, have warmed to TIDAL, leaving their music on the site while removing it from other services.^{174,175}

TIDAL, acquired for \$56 million by Jay Z,¹⁷⁶ offers two monthly subscription-based options: \$9.99 for standard digital audio quality, or \$19.99 for "high-fidelity sound."¹⁷⁷ TIDAL emphasizes high-definition content quality and exclusivity. With its subscription service, TIDAL seeks to distinguish itself by offering "experiments like giving fans early access to concert tickets."¹⁷⁸ Importantly for artists, TIDAL claims to pay royalty rates of 75%, which is higher than the royalties paid by Apple Music and amounts to nearly double of what Spotify pays out per stream.¹⁷⁹ But for TIDAL to achieve success among consumers – it needs more.¹⁸⁰ One way TIDAL has attempted to lure users is

beyonce/.

172. *Id.*; see also TIDAL | #TIDALforALL, YouTube (Mar. 30, 2015), <https://www.youtube.com/watch?v=cYYGdcLbFkw>.

173. See James Cook, *Jay Z's New Streaming Site Has Already Been Accused of Ripping Off a Musician*, BUSINESS INSIDER (Mar. 31, 2015), <http://www.businessinsider.com/jay-z-streaming-site-tidal-accused-of-ripping-off-haxan-cloak-and-radiohead-2015-3> (noting Radiohead's song 'National Anthem' was playing in the background as the artist-owners lined up to sign the TIDAL Declaration, but was later removed from the uploaded press conference video).

174. See Scott T. Sterling, *The TIDAL Promo Video Is So Illuminati It Hurts*, RADIO.COM (Mar. 30, 2015), <http://radio.com/2015/03/30/tidal-promo-video-illuminati-wake-up-sheep/> (noting TIDAL was "able to acquire the rights to Taylor Swift's album catalog, minus her most recent release, 1989. Swift famously denied Spotify access to her digital catalog"); see also Chanel Adams, *Why Taylor Swift's '1989' Is Still Not Available On TIDAL*, INQUISITR (June 22, 2015), <http://www.inquisitr.com/2195008/why-taylor-swifts-1989-is-still-not-available-on-tidal> (suggesting the reason Swift's music is on TIDAL is because it does not offer a free tier: "As Taylor Swift and her reps have said, she doesn't believe in giving out her music for free.").

175. Ben Sisario, *Prince Removes Music From Most Subscription Streaming Services*, N.Y. TIMES (July 2, 2015), <http://nyti.ms/1LG0Udt>.

176. Ben Sisario, *Jay Z Counters Reports of Struggles at Tidal Music Streaming Service*, N.Y. TIMES (Apr. 26, 2015), <http://nyti.ms/1JtUuOy> [hereinafter Sisario, *Jay Z*]; see generally TIDAL, <http://tidal.com/us> (last visited Jan. 18, 2016).

177. TIDAL SUBSCRIPTION, <https://support.tidal.com/hc/en-us/articles/201745891-How-much-does-TIDAL-cost-> (last visited Jan. 18, 2016).

178. Sisario, *Jay Z*, *supra* note 176.

179. Ben Kaye, *So Far, TIDAL's Royalty Payouts Nearly Double Spotify's*, CONSEQUENCE OF SOUND (May 3, 2015), <http://consequenceofsound.net/2015/05/so-far-tidals-royalty-payouts-nearly-double-spotifys/>.

180. See Sisario, *Jay Z*, *supra* note 176 (noting TIDAL "had fallen below 700 in the Apple's app store rankings" within its first month).

by lowering its monthly subscription fees to \$4.99 and \$9.99 for students.¹⁸¹ In April 2015, Jay Z “asked for patience” when he told the public, “[w]e are here for the long haul . . . [p]lease give us a chance to grow [and] get better.”¹⁸² But only six months later, when asked, “[y]ou have a music streaming service, don’t you?” – his response was: “Yeah, yeah. Forget about that.”¹⁸³ Nonetheless, in recent months, TIDAL has shown signs of success, especially when Kanye West released his newest album exclusively on TIDAL for one week before it became available for purchase elsewhere.¹⁸⁴ Therefore the question remains of whether TIDAL’s exclusivity perks, 40 million songs and 130,000 high quality videos are worth the fees when consumers can still access music via the free streaming services to which they have grown so loyal.¹⁸⁵

V. CONCLUSION: EVOLUTION

From iTunes to webcasters to BitTorrent, what is the current state of affairs of music and the Internet? It is still evolving, and “[t]he real fun is about to begin.”¹⁸⁶ As the volatile landscape of webcasters and online services continues to grow, each new entrant should strive to absorb as much knowledge as possible about why its predecessors either failed or thrived.

Evolution cannot be controlled. We live in an ever-evolving digital age and advancements in technology arise far faster than the law can handle.¹⁸⁷ Just as the music industry struggles to arrive at solutions to regain control over the new distribution mediums saturating the Internet, so too does the law struggle with crafting appropriate means to control Internet conduct.¹⁸⁸ The architecture of the Internet itself is problematic, leading to legal obstacles such as jurisdiction. The World Wide Web easily facilitates the relocation of an Internet host site, therefore “those deemed illegal in one jurisdiction can relocate to a more

181. The Associated Press, *Streaming Service Tidal to Offer Discounts to Students*, CNS NEWS (June 3, 2015), <http://www.cnsnews.com/print/news/article/streaming-service-tidal-offer-discounts-students>.

182. Sisario, *Jay Z*, *supra* note 176.

183. Jon Caramanica, *Review: Tidal X Concert Proves a Thudding Marathon at Barclays*, N.Y. TIMES (Oct. 21, 2015), <http://nyti.ms/1GSzL5W>.

184. Fitz Tepper, *Tidal Tops U.S. App Store After Landing Exclusive Rights to Kanye West’s New Album*, TECHCRUNCH (Feb. 14, 2016), <http://techcrunch.com/2016/02/14/tidal-tops-the-app-store-after-landing-exclusive-rights-to-kanyes-new-album/>.

185. TIDAL MUSIC/CONTENT, <https://support.tidal.com/hc/en-us/articles/201167102-How-much-music-is-available-in-TIDAL-> (last visited Mar. 30, 2016).

186. Levy, *supra* note 48 (reiterating that “[t]aken together, all of this activity is shaking up an industry that has stubbornly resisted change. The music world has barely managed to process the revolution wrought when songs became files. But streaming subscription services hasten an even bigger upheaval”).

187. Carpenter, *supra* note 2.

188. In *Recording Indus. Ass’n of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) the court acknowledged “that legislating for technology and innovation is a much more difficult task than the legislature had [ever] previously faced (or anticipated).” Lee, *supra* note 16, at 158.

accepting jurisdiction.”¹⁸⁹ Alternatively, site relocation may be used to evade the law altogether. For example, when Grooveshark was shut down in May 2015, a clone website became available almost immediately at a “.io” instead of a “.com.”¹⁹⁰ As such, the clone site attempted to move out of U.S. jurisdiction to a domain assigned to the British Indian Ocean Territory.¹⁹¹ Over a week later, despite a “brutal takeover,” the site simply moved to a “.vc – the country code for Saint Vincent and the Grenadines.”¹⁹² It was not until December 2015 that the RIAA won a lawsuit against Grooveshark’s clone and was granted over “\$13 million in piracy damages plus another \$4 million for willful counterfeiting,” yet, the clone owner-operator remains unidentified.¹⁹³

The global nature of digital media and webcasters makes it that much more difficult to control, begging the question whether it should be controlled.¹⁹⁴ If so, is it time for an updated solution.¹⁹⁵ A persuasive proposed solution centers around the argument that the legal system simply will not be able to provide sufficient regulation for the Internet. Instead, it is society that may need to exert some control. Lawrence Lessig argues, “in cyberspace, code is law.”¹⁹⁶ The argument is “that computer code, the architecture of cyberspace, works as a powerful regulator of behavior.”¹⁹⁷ From this perspective, “a potential future for intellectual property on the web, is that code can govern behavior completely.”¹⁹⁸

189. DONALD E. LIVELY ET AL., *FIRST AMENDMENT LAW: CASES, COMPARATIVE PERSPECTIVES, AND DIALOGUES* 481 (Anderson Publishing Co. 2003).

190. Jacob Kastrenakes, *A New Grooveshark Is Online and Streaming Music*, THE VERGE (May 5, 2015), <http://www.theverge.com/2015/5/5/8555327/grooveshark-clone-revives-music-streaming-site>.

191. See IANA DELEGATION RECORD FOR .IO, <https://www.iana.org/domains/root/db/io.html> (last visited Mar. 30, 2016).

192. Marc Schneider, *Grooveshark Clone Taken Offline, Replaced: ‘You Will Not Stop Us,’* BILLBOARD (May 15, 2015), <http://www.billboard.com/articles/business/6568433/grooveshark-clone-taken-offline-replaced-you-will-not-stop-us>.

193. Ernesto Van der Sar, *RIAA Defeats Grooveshark “Clone” in Court, Wins \$17 Million*, TORRENTFREAK (Dec. 14, 2015), <https://torrentfreak.com/riaa-defeats-grooveshark-clone-in-court-wins-17-million-151214>.

194. “Trying to control sharing through music is like trying to control an affair of the heart – nothing will stop it.” Carpenter, *supra* note 2, at 80 (quoting Thurston Moore of Sonic Youth).

195. David Boies, Napster’s lawyer, stated, “[n]o industry, and no government, can control the Internet. . . . [A]s long as services are free to consumers, there is nothing the R.I.A.A. can do about it.” Daniel B. Levin, *Building Social Norms on the Internet*, 4 YALE J. L. & TECH. 97, 129-30 (2001-2002), available at <http://digitalcommons.law.yale.edu/yjolt/vol4/iss1/2> (quoting Matthew Mirapaul, *Is it Theft or Is it Freedom? 7 View of the Web’s Impact on Culture Clashes*, N.Y. TIMES (Sept. 20, 2000)).

196. *Id.* at 99-100 (quoting LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999)) (explaining that it would be “the decisions of programmers about software design [who] set the rules of the game.” For example, it is their decisions that control “how you receive and send e-mail, view web pages, or conduct business in cyberspace.”).

197. *Id.* at 115.

198. *Id.* (describing the concept of “trusted systems” where “authors through code can control who has access to their works, how and when they can copy the intellectual property” –

In a digital age with many uncertainties, what we can be certain of is “that the future of music distribution is online.”¹⁹⁹ Musician Daryl Palumbo has stated, “[y]ou’re never going to be able to stop it, so you have to make it work for you.”²⁰⁰ After all, change, innovation and creativity should *not* be stopped. Sasha Frere-Jones speaks eloquently to the idea of freedom in the world of music:

[A] great musical experience exceeds any monetary value you could assign it precisely by immersing you in a world where worth is created in radically different ways than the market teaches us – that’s the freedom . . . If it were otherwise, these sounds we’re all chasing would be a lot less beautiful.²⁰¹

Everyone involved in the making and sharing of music deserves the freedom to create, to have their creations protected, and to share their creations with the public. As competition continues to grow in the digital music streaming industry, so too will new players continue to offer services destined to “forever change the course of music history.”²⁰² And is that not the purpose of our Copyright Act? Creativity will thrive; innovation will thrive; and so will music.

therefore, “computer systems that use encryption [can] control intellectual property rights online.”); *see also* CYBERSPACE LAW: CENSORSHIP AND REGULATION OF THE INTERNET (Hannibal Travis ed., London: Routledge) (2013), *available at* http://works.bepress.com/hannibal_travis/24 (referencing the argument that “[l]aw as code is the start to a perfect technology of justice.”) (quoting Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1408 (1996)).

199. Wagman, *supra* note 7, at 97; *id.* at 119 (acknowledging “[d]espite possible pitfalls, the future of music is bright. The [I]nternet has allowed unprecedented levels of access, exposure, and collaboration between musicians and fans. Music has never been more in demand, and it has never been easier for the public to experience art.”).

200. Heather Huff, *An Interview with Daryl Palumbo of Head Automatica, Glassjaw, EARVOLUTION* (June 7, 2005), http://www.earvolution.com/2005_06_01_archive.asp (quoting Palumbo: “It’s a tool. It’s not something that will ever stop. . . . So what am I going to do? It’s the trading of an mp3 file.”).

201. Frere-Jones, *supra* note 69; *see also* Balkin, *supra* note 26, at 44 (defining freedom: “Freedom is participation. Freedom is distribution. Freedom is interaction. Freedom is the ability to influence and to be influenced in turn. Freedom is the ability to change others and to be changed as well. . . . Freedom is appropriation, transformation, promulgation, subversion, the creation of the new out of the old.”).

202. Press Conference Video, *supra* note 171 (quoting Alicia Keys).