



Financing Music Labels in the Digital Era of Music: Live Concerts and Streaming Platforms

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In the age of iPods, YouTube, Spotify, social media, and countless numbers of apps, anyone with a computer or smartphone readily has access to millions of hours of music. Despite the ever-increasing ease of delivering music to consumers, the recording industry has fallen victim to “the disease of free.”¹ When digital music was first introduced in the late 1990s, industry experts and insiders postulated that it would parallel the introduction and eventual mainstream acceptance of the compact disc (CD). When CDs became publicly available in 1982,² the music industry experienced an unprecedented boost in sales as consumers, *en masse*, traded in their vinyl records and cassette tapes for sleek new compact discs.³ However, the introduction of MP3 players and digital music files had the opposite effect and the recording industry has struggled to monetize and profit from the digital revolution.⁴ The birth of the file sharing website Napster⁵ in 1999 was the start of a sharp downhill turn for record labels and artists.⁶ Rather than pay

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¹ See David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNN MONEY (Feb. 3, 2010), available at http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

² See *The Digital Era*, RECORDING HISTORY: THE HISTORY OF RECORDING TECHNOLOGY, available at <http://www.recording-history.org/HTML/musicbiz7.php> (last visited July 28, 2015).

³ See Goldman, *supra* note 1.

⁴ *Id.*

⁵ Napster was a website that facilitated downloading and sharing MP3 audio files for free. See Tom Lamont, *Napster: The Day the Music was Set Free*, THE GUARDIAN (Feb. 23, 2013), available at <http://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing>.

⁶ Alex Suskind, *15 Years After Napster: How the Music Service Changed the Industry*, THE DAILY BEAST, <http://www.thedailybeast.com/articles//06/06/15-years-after-nap>

the traditional \$14.00 for a CD,⁷ Napster provided the means for consumers to obtain a high-quality copy of a CD free of charge. At the height of its popularity, Napster boasted over 60 million active users.⁸ Even though Apple's iTunes music store is largely credited with reintroducing the concept of paying for music, the four-year gap between the launch of Napster and the debut of iTunes "is where the music industry lost the battle."⁹ As music analyst Sonal Gandhi explained, the recording industry "lost an opportunity to take consumers' new behavior and really monetize it in a way that nipped the free music expectation in the bud."¹⁰ Rather than vehemently fight against and lobby Congress to introduce legislation to block file sharing services when Napster and analogous websites were first launched, the music industry took a lackadaisical approach and initially refused to take action.¹¹ As a result, digital music file sharing websites and apps that offer free music are now permanent fixtures. Even more problematic for the music industry is the shift in society's attitudes about paying for music. A staggering seventy percent of Americans between the ages of eighteen and twenty-nine actively pirate media and only thirty-seven percent of Americans under the age of thirty support punishing file sharers.¹² As a result, the music industry has had to scramble to find a new means to turn a profit.

Live music concerts are one of the oldest and most revered ways musicians make a profit.¹³ Nevertheless, the innovation of smartphones and advanced recording technology has quickly desecrated this once-robust means

ster-how-the-music-service-changed-the-industry.html ("Hundreds of download programs have come and gone since 1999 (Limewire, Kazaa, BitTorrent, to name a few). Napster deserves credit not just for being the first, but for revolutionizing a new frontier in music consumption. Even today, its legacy and its effect on the industry are still very much in play.").

⁷ See Benj Edwards, *The CD Player Turns 30*, PCWORLD (Oct. 1, 2012), available at <http://www.pcworld.com/article/2010810/the-cd-player-turns-30.html>.

⁸ Suskind, *supra* note 6.

⁹ Goldman, *supra* note 1 (internal quotations omitted).

¹⁰ *Id.* (internal quotations omitted).

¹¹ See *id.* Artists and the recording industry did not wait forever, and in 2000 Metallica, Dr. Dre, and the RIAA sued Napster. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001).

¹² Jason Mick, *Nearly Half of Americans Pirate Casually, But Pirates Purchase More Legal Content*, DAILY TECH (Jan. 21, 2013), <http://www.dailytech.com/Nearly+Half+of+Americans+Pirate+Casually+But+Pirates+Purchase+More+Legal+Content/article29702.htm>.

¹³ Paul Michael, *How Much?! A Breakdown of Concert Ticket Prices*, WISEBREAD (July 5, 2011), available at <http://www.wisebread.com/how-much-a-breakdown-of-concert-ticket-prices> (illustrating how, on average, 74% of ticket prices are paid directly to artist).

for performers to earn a living. Additionally, increasingly popular streaming services have a love-hate relationship with artists: in exchange for providing countless artists unprecedented access to a global audience of music lovers, streaming services pay fractions of pennies per stream of a song.¹⁴ While streaming music could have proven extremely fruitful for the major recording companies and unsigned musicians, the lack of a statute dictating what streaming platforms must pay artists (which exists for streaming's analog corollary, the radio) has proven to be disastrous for the music industry as a whole and many artists are averse to offering their music on such services.¹⁵

This Note will first examine the obstacles music companies have been forced to face in light of the development of music infringing websites and the types of remedies and alternative measures record labels can take to ensure that they are adequately compensated for live concerts. Second, this paper will explore the origins of music streaming websites and examine what types of measures need to be taken for record companies and musicians to profit from streaming services.

LIVE CONCERTS

Although concerts have historically proven to be a reliable means for artists to earn a living, the introduction of smartphones with recording capabilities has spurred new hurdles for the recording industry.¹⁶ Virtually every concertgoer today brings a smartphone with audio-visual recording capabilities to music festivals and shows and many subsequently post footage they recorded online and on social media platforms. Seeking to monetize on the vast array of "free" footage, countless Internet applications and websites have emerged that pirate the recordings of live music concerts online for anyone to see and hear.¹⁷ Such apps scour through the Internet for

¹⁴ Paul Resnikoff, *A Quick Summary of What Streaming Services Are Paying Artists*, DIGITAL MUSIC NEWS (Dec. 13, 2013), available at <http://www.digitalmusicnews.com/2013/12/13/> (illustrating how artists have to have their records streamed hundreds of times before they earn \$1.00 USD).

¹⁵ *Id.*

¹⁶ See Steve Knopper, *Nine Ways Musicians Actually Make Money Today*, ROLLING STONE (Aug. 28, 2012), available at <http://www.rollingstone.com/music/lists/9-ways-musicians-actually-make-money-today-20120828>.

¹⁷ Helienne Lindvall, *How Record Labels Are Learning To Make Money From YouTube*, THE GUARDIAN (Jan. 4, 2013), available at <http://www.theguardian.com/media/2013/jan/04/record-labels-making-money-youtube> (Unlike YouTube, which has ad partnership deals and allows record labels to make upwards of \$5,000 per million views, the apps in question do not pay the record labels or artists anything).

bits and segments of footage of a live show, place them in chronological order, and allow anyone on their site to stream or download the concert, often free of charge. Evergig is one such example. With the motto “every concert, at your fingertips,”¹⁸ Evergig is “the ultimate platform for collaborative on-demand concert video – by the fans and for the fans, all around the globe.”¹⁹ The website works by hunting the Internet for the best audio and visual footage of a concert shot by concert-goers, enhances it by filtering out any and all excess noises and distortions, and then posts the entire concert on its website, often within minutes of the show’s conclusion.²⁰ Deemed “the new venue for live-music fans,” within four months of the site’s launch date, over one million concerts had been uploaded and the number of users has doubled each month since its launch date.²¹ The two founders have explained that their objective was:

to make use of the web to allow a maximum number of people to experience exceptional musical moments which are today still far too inaccessible. From now on, an internet [sic] user can experience a concert as if it were live at Madison Square Garden, or relive the New Year countdown show on Copacabana Beach.²²

While such websites are extremely enticing for music lovers who could not attend the live show or did not want to pay the ticket price, these websites and apps do not pay the artists or the artists’ record labels for such footage and have proven extremely costly to the music industry. While the record labels have found some success blocking recordings of concerts from being posted on the Internet and uploaded to various smartphone and Internet applications on copyright infringement grounds when the artist is lip-syncing and the master recording is heard,²³ this has not been the case for shows where the artist is performing live without the master recording. The copyright act does not apply to live music performances²⁴ and record labels have been forced to find alternative sources of support to justify blocking footage of live performances uploaded by concertgoers to the Internet.

¹⁸ Evergig.com, available at <http://blog.evergig.com> (last visited Sept. 13, 2015).

¹⁹ *Evergig Hits ONE MILLION Concerts!*, PRWEB (Oct. 9, 2014), available at <http://www.prweb.com///10/prweb12233163.htm>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See, e.g., *Broad. Music, Inc. v. McDade & Sons, Inc.*, 928 F. Supp. 2d 1120, 1129 (D. Ariz. 2013); see *The Law*, RIAA, available at http://www.riaa.com/physical_piracy.php?_=&piracy_online_the_law (last visited Sept. 4, 2015).

²⁴ See 17 U.S.C. § 102 (2015) (a performance must be fixed in some non-transient form to qualify for copyright protection).

WHY EVERGIG AND RELATED SITES OUGHT TO BE BANNED

When an artist goes on tour, there are multitudes of expenses that incur, and the artist's label must pay the bill. Hundreds of people, from the artists to their managers, promoters, road crew, lighting and sound engineers, security, and bus drivers, upheave their lives for the duration of the tour, which often extends for months, and all must be compensated. With respect to venue, arenas often require an upfront payment of \$20,000 per night and amphitheaters often charge \$10,000 per night.²⁵ Moreover, when artists are touring outside of their home area, they either must sleep on their tour bus or pay to stay in a hotel, and pay for catering and other food expenses. With respect to transportation, artists must pay for their flights, a tour bus, a driver, gas, insurance, and big rig to carry their stage, instruments, and all other necessary equipment. Accordingly, producing a single show can easily cost tens, if not hundreds, of thousands of dollars and record labels rely on ticket sales to pay for all expenses. Therefore, when people stream concerts for free from sites such as Evergig, they are stealing directly from the record labels, which cuts their profits and makes it difficult for them to continue producing concerts and worldwide tours while paying the artists and additional personnel, transportation, and arenas.

"Freemium" services like Evergig are plaguing the recording industry, as the public has grown accustomed to hearing music and seeing their favorite concerts for free. Without legal redress under the copyright act for live music concerts,²⁶ nothing is preventing a proliferation of Evergig-type sites, which would severely curtail an artist's ability to sell enough concert tickets at a price that allows them to pay for all of their expenses. Therefore, some form of redress that adequately and effectively prevents sites such as Evergig from stealing from artists and their labels is necessary.

HOW TO PROTECT LIVE CONCERTS FROM ILLEGAL UPLOADING

Musicians and music producers have traditionally enjoyed copyright protection in two separate formats: since 1831, musical compositions have

²⁵ Ryo Vie, *The Price Of A Concert: Breaking Down Where The Money Goes*, THE ROCK AND ROLL GURU (March 30, 2011), available at <http://rockandrollguru.blogspot.com/2011/03/price-of-concert-breaking-down-where.html>.

²⁶ §102(a) of the Copyright Act states that copyright protection extends to "works of authorship fixed in any tangible medium of expression" and § 102(a)(3) protects "dramatic works, including any accompanying music." However, because live concerts are not in a tangible medium, the Copyright Act affords them no protection. 17 U.S.C. § 102 (2015).

been safeguarded under US copyright law²⁷ and in 1971 Congress further extended the scope of the Copyright Act to incorporate sound recordings when it enacted the Sound Recording Act.²⁸ The expansion of the statute meant “persons who made unauthorized reproductions of records or tapes, which is known as ‘piracy,’ could be prosecuted or face civil liability for copyright infringement.”²⁹ Nevertheless, a void remained: live, unrecorded music concerts and performances did not fall under the purview of US copyright law.³⁰ Even with the enactment of the Sound Recording Act, anyone could record a live musical performance and distribute copies of the recording without violating US copyright law.³¹ This loophole was increasingly exploited as technology progressed and people became more adept at recording high-quality unauthorized copies of live concerts or performances. At the same time, record companies, artists, and music producers were left both without compensation from such recordings and without a means of recourse. After numerous campaigns and vigorous lobbying efforts to expand the law to offer protection for live music, Congress created the anti-bootlegging statute.³² The statute prohibits the unauthorized fixation of, and trafficking in, sound recordings and music videos of live musical performances and subjects; those who violate the statute to the same penalties as copyright infringers.³³

Shortly after the passage of the anti-bootlegging statute, questions about its constitutionality arose, specifically with regards to whether it was fundamentally at odds with the Copyright Clause. While there is relatively little legislative history with respect to the passage of the anti-bootlegging statute, the insight that is available suggests that it was Congress’ intent to enact the statute in accordance with its authority under the Copyright Clause.³⁴ However, this action proved problematic. The Copyright Clause empowers Congress “[t]o promote the Progress of Science and useful Arts,

²⁷ See *id.* at § 102(a)(2) (stating that copyright protection extends to “musical works, including any accompanying words”).

²⁸ *Id.* at § 102(a)(7) (stating that copyright protection extends to sound recordings).

²⁹ *U.S. v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999).

³⁰ *Id.* at 1272.

³¹ *Id.*

³² *Id.* (the civil provision of the anti-bootlegging statute is found in 17 U.S.C. § 1101 and the criminal provision is embodied in 18 U.S.C. § 2319A).

³³ See 17 U.S.C. § 1101 (2012).

³⁴ See 140 Cong. Rec. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes) (“There are a number of changes in copyright that will advance our interests in the area of bootlegging, which is going to basically protect our country.”).

by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁵ The term “writings” in the clause encompasses the concept that works that are copyrightable must be “fixed,” meaning that a work must be capable of being “reduced to some tangible form.”³⁶ Although “writings” has been interpreted broadly to include things such as choreographic works and pantomimes,³⁷ and not merely literary works,³⁸ there are limitations. In his eponymous treatise, Nimmer explains, “[i]f the word ‘writings’ is to be given any meaning whatsoever, it must, at the very least, denote some material form, capable of identification and having a more or less permanent endurance.”³⁹ Accordingly, and despite the expansion of the types of works that are considered “fixed” under the Copyright Act, live performances remain exempt. Congress may only exercise powers granted to it by the Constitution,⁴⁰ and it is the duty of the courts to determine if Congress acted within its constitutionally granted powers when it enacted the statute in question. With respect to the constitutionality of the anti-bootlegging statute, numerous courts and scholars have established that the statute does not fall within the scope of the Copyright Clause and therefore Congress lacks the authority to legislate live performances under the Copyright Clause.⁴¹ However, rather than dismiss the statute as unconstitutional, a federal court in *Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc.* found that “the Commerce Clause grant[ed] Congress the power to enact the Statute.”⁴² The Supreme Court “noted that legislation that could not be permitted under the Copyright Clause could nevertheless pass muster under the Commerce Clause—if the independent requirements of that clause were met.”⁴³ The court in *U.S. v. Lopez* explained that the test of constitutionality under the Commerce Clause is “whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.”⁴⁴ With respect to live musical performances, modern case

³⁵ U.S. CONST. art. I, § 8, cl. 8.

³⁶ See *United States v. Moghadam*, 175 F.3d 1269, 1273 (11th Cir. 1999).

³⁷ See 17 U.S.C. § 102(a)(4) (2006).

³⁸ See 17 U.S.C. § 102(a)(1) (2006).

³⁹ MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 1.08[C][2], at 1–66.30 (internal quotation marks omitted).

⁴⁰ See U.S. CONST. art. I, § 8.

⁴¹ See, e.g., *Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc.*, 405 F. Supp. 2d 1169, 1174 (C.D. Cal. 2005).

⁴² *Id.* at 1173 (explaining that KISS Catalog, Ltd. is the owner of trademarks relating to the band KISS).

⁴³ *Id.* at 1174 (analyzing the Supreme Court’s decision in *Trade-Mark Cases*, 100 U.S. 82 (1879)).

⁴⁴ 514 U.S. 549, 551 (1995).

law reflects the current trend of expanding how the Commerce Clause is interpreted “and modern cases upholding trademark protection are based on the Commerce Clause.”⁴⁵

Despite falling under the powers conferred in the Commerce Clause, the anti-bootlegging statute bestowed a type of quasi-copyright protection to live musical performances in a way that embraced the underlying idea of the Copyright Act. As the court in *Kiss Catalog* explained, “the [Anti-Bootlegging] Statute complements, rather than violates, the Copyright Clause by addressing similar subject matter, not previously protected—or protectable [*sic*]—under the Copyright Clause.”⁴⁶ Even when defendants have attempted to argue that their recordings of live performances constitute a derivative or entirely new work due to the performer changing or altering part of a song during a live performance, the courts have dismissed their logic on grounds often found in copyright infringement cases. Further, the court in *Broad. Music, Inc. v. McDade & Sons, Inc.* explained that *even if* during a live performance the performer changes or alters a word of their original song, such a change does not create a new composition that comments on the original author’s works, so as to support a fair use or parody defense to copyright infringement.⁴⁷

WHAT CAN CONGRESS DO?

Even though record labels and artists currently must sue under the Commerce Clause if website and app developers stream recordings of their live concerts without paying royalties, change is likely to come in the near future. While courts have the ability to judicially expand the scope of copyright protection, they will likely defer to Congress instead.⁴⁸ In *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Supreme Court explained that rather than change the Copyright Act itself,

[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.⁴⁹

⁴⁵ *Kiss Catalog*, 405 F. Supp. 2d at 1175.

⁴⁶ *Id.* at 1176.

⁴⁷ *Broad. Music, Inc. v. McDade & Sons, Inc.*, 928 F. Supp. 2d 1120, 1131 (2013).

⁴⁸ See Wendy M. Pollack, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 *FORDHAM L. REV.* 2445, 2460 (2000).

⁴⁹ 464 U.S. 417, 431 (1984).

Congress has the ability to amend the Copyright Act so as to incorporate and protect recordings of live concerts, and such a change in reaction to advancements in Internet technology would not be not unprecedented. President Clinton signed the Digital Performance Right in Sound Recordings Act (“DPRSA”) into law in 1995 in response to the new challenges artists faced as a result of advancements in computer technology. Therefore, if the music industry continues to lose revenue as more and more Evergig-like websites are created, the major and independent labels need to persuade Congress members of the need for a statutory means of recourse.

STREAMING SERVICES

With respect to music streaming services such as Pandora and Spotify, artists and record labels have had a tempestuous relationship. While streaming music platforms provide an ever-increasing number of artists an efficient and effective way to reach a global music audience, such artists are often not paid or are paid so little that they cannot make a living simply from the profits they make from streaming music. There currently is no statute or case law that explicitly delineates what rate such services must pay artists or record labels, and streaming companies have readily taken advantage of the fact.⁵⁰ The issue is further complicated by the fact that artists are not directly paid per stream of their music by streaming services and “[h]ow much money artists ultimately are paid for streams or purchases depends on a number of factors such as royalty rates, ownership and contractual terms.”⁵¹ Without regulatory guidance, even popular and successful streaming services such as Spotify⁵² pay an average of only \$0.007 per song play.⁵³ Even though artists have zealously protested such practices by refus-

⁵⁰ See Glenn Peoples, *Business Matters: How Much Do Streaming Services Pay Artists? Ask the Labels*, BILLBOARD (Oct. 27, 2011, 4:30 PM), available at <http://www.billboard.com/articles/news/business-matters-how-much-do-streaming-services-pay-artists-ask-the-labels>; Stuart Dredge, *Streaming music payments: how much do artists really receive?*, THE GUARDIAN (Aug. 19, 2013, 6:03 AM), available at <http://www.theguardian.com/technology/2013/aug/19/zoe-keating-spotify-streaming-royalties>.

⁵¹ Peoples, *supra* note 50.

⁵² See Yinka Adegoke, *Spotify Now Has 10 Million Paid Subscribers, 3 Million In U.S. (Exclusive)*, BILLBOARD (May 21, 2014), available at <http://www.billboard.com/biz/digital-and-mobile/6092226/spotify-now-has-10-million-paid-subscribers-3-million> (stating that as of May 2014, Spotify had over 40 million active users, 10 million of which were paid subscribers).

⁵³ *Spotify Reveals Artists Earn \$0.007 Per Stream*, BBC (Dec. 4, 2013), available at <http://www.bbc.com/entertainment-arts-25217353>.

ing to have their work available on such platforms,⁵⁴ the popularity of streaming music continues to expand because it is both legal and based on a simple, user-friendly concept: for a small monthly fee⁵⁵ customers have access to a virtually limitless library of music.⁵⁶ Thus, in exchange for receiving mere cents on the dollar per stream of a song, by placing their music on streaming services, artists can reach a broader audience and gain unprecedented exposure which they hope will inspire their fans to legitimately purchase their merchandise and tickets to their live shows.

Streaming music is a relatively recent phenomenon and the music industry had been slow to adapt. Sony Music, Warner Music Group, and Universal Music Group, also known as the “Big Three” record companies, traditionally controlled upwards of eighty percent of the music industry.⁵⁷ For decades, the Big Three delivered music directly to paying consumers through “their tried and true physical business model”⁵⁸ which consisted of three components: 1) finding, signing, and recording an artist; 2) marketing, advertising, and promoting the artist’s recording; and 3) manufacturing and distributing a physical copy of the recording as a CD, vinyl, or tape.⁵⁹ However, the rise of digital music distribution and dissemination uprooted this established system and severely undermined the record labels’ profits.⁶⁰

⁵⁴ Jack Dickey, *Taylor Swift’s Spotify Paycheck Mystery*, TIME (Nov. 12, 2014), available at <http://time.com/taylor-swift-spotify-borchetta/> (explaining how pop singer Taylor Swift and rock singer Thom Yorke of the band Radiohead have pulled their music from Spotify “to protest the size of its payouts.”).

⁵⁵ Ben Taylor, *By the Numbers: The Streaming Music War (and Who’s Winning)*, TIME (Aug. 14, 2014), available at <http://time.com/3109273/streaming-music-services-compared/> (explaining that Streaming services are generally marketed as costing between \$0.00/month and \$10.00/month).

⁵⁶ Nick Pino, *Spotify, Apple Music and More: Which is the Best Music Streaming Service?*, TECH RADAR (July 27, 2015), available at <http://www.techradar.com/news/internet/music-streaming-showdown-which-service-is-best-for-you-1173743> (explaining that as of July 2015 Spotify, Apple Music, and Rdio have over 20 million tracks in their music catalogues).

⁵⁷ William Sloan Coats et al., *Streaming Into the Future: Music and Video Online*, 20 LOY. L.A. ENT. L. REV. 285, 286-87 (2000).

⁵⁸ Patrick Fogarty, *Major Record Labels and the RIAA: Dinosaurs in a Digital Age*, 9 HOUS. BUS. & TAX L.J. 140, 144 (2008-2009).

⁵⁹ *Id.*

⁶⁰ The most noteworthy “industry-transforming technology” was the MPEG-1 Audio Layer 3, commonly referred to as the MP3. The MP3 was groundbreaking in that it enabled CD-quality “audio data, which previously occupied a large amount of space, to be compressed into files that are easily transferred across the Internet and downloaded onto a personal computer.” Moreover, the MP3 truly began rattling the music industry to its very core when faster modems and processors became the standard for personal computers, which decreased the time it took for people to

With respect to the first and second prongs of the traditional business model, record labels are no longer the sole means for artists to share their work with the public, as “the Internet offers a low-cost method to upload music files and instantly disseminate them worldwide.”⁶¹ Starting with the Internet Underground Music Archive (IUMA) and followed by the rise of YouTube, any artist around the world with Internet access has the ability to create her own website or YouTube channel where she can market and sell her music and merchandise to anyone without the backing of a major record label.⁶² The loss of the monopoly over music distribution put record labels at a competitive disadvantage as they were, for the first time ever, forced to compete with indie labels and unsigned artists for distribution on a national and international scale.⁶³ Additionally, the third prong of the record labels’ traditional business model has been rendered null and void. When most consumers previously purchased CDs or music tapes, “[a]pproximatley half of the gross sales price of a physical product (for example, \$7.70 of a \$17.00 CD) [went] back to the label for production, distribution, and packaging costs.”⁶⁴ With digital music, on the other hand, there is no physical production or distribution component to delivering digital music, and therefore the labels lose the vast majority of the \$7.70 they used to make, which severely stripped away their profits.

Another key aspect of the unprecedented loss of revenue the record companies experienced in the 1990s and early 2000s was the emergence of digital music, specifically “MP3 technology, broadband access, and file-sharing software” that “resulted in widespread music piracy”⁶⁵ that crippled the music industry for years. Even after the launch of iTunes in 2003 and other similar digital music stores, which were initially “believed to be the record industry’s savior after years of [illegal] piracy,”⁶⁶ the music industry failed to match the profits made prior to the digital revolution. By 2013, digital music sales were in sharp decline: single-track sales were down six percent and album sales fell eight percent.⁶⁷ Rather than purchase CDs or digital singles or albums from online retailers such as iTunes, the public

download a song from hours, to minutes, to seconds. Pollack, *supra* note 48, at 2449-50.

⁶¹ Coats et al., *supra* note 57, at 287.

⁶² *See id.* at 287-88.

⁶³ Fogarty, *supra* note 58, at 145.

⁶⁴ *Id.* at 144.

⁶⁵ *Id.* at 145.

⁶⁶ Steve Knopper, *Digital Music Takes a Dive as Record Sales Slip Again in 2013*, ROLLING STONE (Jan. 8, 2014), available at <http://www.rollingstone.com/music/news/digital-music-takes-a-dive-as-record-sales-slip-again-in-2013-20140108>.

⁶⁷ *Id.*

started to rely on alternative means of disseminating music via the Internet, the most popular of which is “streaming,”⁶⁸ much to the chagrin of music labels and recording artists.

Defined as “the live distribution of music . . . online in which no permanent copy is created on the downloader’s system,”⁶⁹ streaming is a relatively recent phenomenon that requires a fast running Internet broadband connection that can play data in “real time.”⁷⁰ If the Internet connection is lost or interrupted, the computer or smartphone automatically stores a limited “buffer” of the data to ensure that the music will continue to play until the Internet connection is reestablished.⁷¹ However, if the Internet connection is down for an extended period of time and there is no more stored data in the buffer, the music will cease until a new Internet connection is subsequently established.⁷²

Streaming music has forever shattered the once-robust business practice record companies relied on for revenue, and the evidence is in the numbers: as of August 2014 there were over 102 individual streaming service providers that cost between \$0 and \$10 per month.⁷³ David Bakula, Senior Vice President of Industry Insights at Nielsen Entertainment, stated in January 2015 that on-demand streaming experienced a 54% growth compared with the previous year, and over 164 billion songs were played in 2014 alone.⁷⁴ At the same time streaming became ever more popular, music sales suffered; only one song in 2014 sold more than 5 million individual tracks, whereas three songs in 2013 surpassed that mark.⁷⁵

Despite providing anyone with Internet capability access to a virtually unlimited music catalogue, the rise of streaming has come at the severe expense of the Big Three record companies and has forever shattered the once-robust “traditional physical business model.” Although music artists across all genres have unprecedented ability to advertise and circulate their product to consumers, streaming has not been a major source of income for

⁶⁸ *See id.*

⁶⁹ Coats et al., *supra* note 57, at 288.

⁷⁰ *What is Streaming*, BBC (Oct. 10, 2012), *available at* <http://www.bbc.co.uk/webwise/guides/about-streaming>.

⁷¹ *Id.*

⁷² One advantage streaming offers to music labels, as compared to music downloads, is that it decreases unauthorized dissemination of music as “no permanent copies are made on the user’s system.” Pollack, *supra* note 48, at 2449.

⁷³ Taylor, *supra* note 55.

⁷⁴ Christopher Morris, *Album Sales Continue Decline, Music Streaming Rises in 2014*, VARIETY (Jan. 6, 2015), *available at* <http://variety.com/2015/music/news/album-sales-continue-decline-music-streaming-rises-in-2014-1201394229/>.

⁷⁵ *Id.*

either the record labels or artists. At its peak and prior to the digital music revolution, the music industry garnered approximately \$38 billion a year, a far cry from the \$16.5 billion it earned in 2012.⁷⁶ The primary reason for the sharp decline in revenue is that there is no statute that universally establishes how much streaming services are required to pay artists or their labels.

The struggles of musician Zoë Keating illustrate the vast differences in how streaming and music downloading services pay artists. Spotify paid Ms. Keating \$808 for 201,412 streams of her tracks, which averages out of \$0.004 per stream; Rhapsody paid her \$54.40 for 7,908 plays, which is approximately \$0.69 per stream; and she earned \$13.38 from 387 plays of her music on Microsoft's Xbox services, which is an average of \$0.035 per play.⁷⁷ The lack of stability and regularity in how much money artists will garner depending on which streaming platform their music is made available is extremely troublesome, especially for artists trying to get their "big break" in the industry. Yet many artists, from those who are well established to those just beginning their careers, comply with such terms and continue to put their new music on such services because streaming services provide them with a worldwide audience that otherwise would not be possible to reach. The *quid pro quo* between artists and streaming services is simple: musicians theorize that, in exchange for essentially giving away their music, the exposure they receive from such platforms will prompt their new fans to legitimately purchase their songs and albums on music stores such as iTunes, pay for tickets to their live shows, and purchase their merchandise.

While streaming has become mainstream, record labels have failed to stay abreast of the changes within the industry, and their lack of innovation and initiative has cost them severely. Even when the digital evolution of music was starting to be accepted as a permanent fixture within the recording industry in the early 2000s, many artists began to see the fault the Big Three record companies were making by continuing to invest and rely upon outdated business practices. For example, Sir Paul McCartney, who had been a signature figure of the music label EMI since 1962 when he signed with the Beatles, switched to the new Hear Music label in 2007, "hoping to

⁷⁶ Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES (Feb. 26, 2013), available at http://www.nytimes.com/2013/02/27/music-industry-records-first-revenue-increase-since-1999.html?_r=0.

⁷⁷ Stuart Dredge, *Streaming Music Payments: How Much Do Artists Really Receive?*, THE GUARDIAN (Aug. 9, 2013), available at <http://www.theguardian.com/technology/2013/zoe-keating-spotify-streaming-royalties>.

draw on the eagerness and energy of an upstart label.”⁷⁸ McCartney further elaborated on his decision to leave EMI by explaining that,

I have left the family home, but it doesn't feel bad. I hate to tell you — the people at EMI sort of understood. The major record labels are having major problems. They're a little puzzled as to what's happening. And I sympathize with them. But . . . the major labels these days are like the dinosaurs sitting around discussing the asteroid.⁷⁹

IS STREAMING MUSIC ANY DIFFERENT THAN STEALING MUSIC?

Some artists have paradoxically stated that they prefer their fans to download their music illegally than to stream their songs via Spotify or other streaming platforms.⁸⁰ The reason is that illegal downloading implies that the transaction literally takes money away from an artist, but with streaming, the listener's conscience is clear because she is either pays a nominal monthly fee or is forced to endure advertisements. Thus when listeners stream music content, they feel that they are adequately paying their favorite artist for access to their music catalogue. However, artists and record companies do not receive any meaningful revenue, as there is virtually no discernable difference between earning mere fractions of a penny per stream of a song and giving it away for free. Moreover, it is a common misconception that comparing iTunes to Spotify is like comparing apples to oranges; the two entities offer the same benefits to artists, with the key difference being that artists can actually turn a profit from their songs being sold on iTunes or other digital music stores.

While many argue that streaming has liberated artists from the clutches of major record labels because they now can publish their own work online to a global audience, the same is true for artists who put their music on iTunes, Amazon Music, or any other legitimate digital music storefront. The key difference between digital music stores and streaming services from an artist's perspective is that artists are actually fairly compensated when people buy their music rather than stream an album. All of the benefits of Spotify and Pandora in terms of discovery and access to artists' recordings

⁷⁸ Allan Kozinn, *Still Needing, Still Feeding the Muse at 64*, N.Y. TIMES (June 3, 2007), available at http://www.nytimes.com/2007/06/03/arts/music/03kozi.html?_r=1&.

⁷⁹ *Id.* (internal quotation omitted).

⁸⁰ Derek Webb, *Giving it Away: How Free Music Makes More Than Sense*, TUMBLR.COM (last visited Sept. 25, 2015), available at <http://derekwebb.tumblr.com/post/giving-it-away-how-free-music-makes-more-than>.

are true of iTunes and Amazon Music. There are no benefits to streaming music compared to purchasing music either in a record store or online; artists are not able to better connect or establish rapport with their fan base. “[M]usic readily available on Spotify for little to no payment completely poaches the record sales upon which middle-class musicians are depending for survival,”⁸¹ and “Spotify refuses to pay the same amount to independent artists as they pay major labels, unlike iTunes.”⁸²

WHY RECORD COMPANIES’ SURVIVAL IS IMPERATIVE

With artists able to sell their works directly to the public on Spotify, iTunes, Amazon, and other digital platforms, the question that arises is: are record labels still necessary? In short, yes. The major labels are still a quintessential aspect of the music industry. They do far more than distribute their artists’ music to the public, and much of their work is done away from the public eye. The purpose of record companies is to transform a person into an artist that can make songs and generate revenue for the label. Streaming services lack the expertise to make an artist into a household name: they do not invest in the artist; they do not contribute to the costs incurred on artists’ tours; they do not have a marketing department devoted to artist promotion; they do not pay for lyricists, composers, sound engineers, producers, sound mixers, backup singers, or instrumentalists to create a song. Rather, streaming services and other online platforms that offer music to the public for free profit from the labor of the labels without compensating them.

Labels are still necessary because they “offer artists the security they need to produce their best work.”⁸³ Jake Gosling, the producer for popular English pop-folk singer Ed Sheeran, explained that while Sheeran had managed to record numerous EP’s, climb to number two on the iTunes best-seller chart, and gain millions of hits on his YouTube site without the aid of a label as an unsigned artist, he signed to a division of Warner Music Group.⁸⁴ Gosling explained that while Sheeran had proven to the labels that he could “make it big” on his own, the label provided the type of support and financial resources that Sheeran could never achieve independently. Elaborating on the importance of labels, Gosling explained,

⁸¹ *Id.*

⁸² *Id.*

⁸³ Helienne Lindvall, *Behind The Music: What Do Record Labels Actually Do? You’d Be Surprised*, THE GUARDIAN (Feb. 2, 2012), available at <http://www.theguardian.com/music/musicblog/2012/feb/02/behind-music-record-labels>.

⁸⁴ *Id.*

You still need labels. You've got to remember they've got marketing teams, press teams, radio pluggers, accounts departments and when you get bigger you need help with that stuff. You need a good team around you. OK, maybe you could hire those people yourself and set up your own label, but there's something to be said for deciding that you want to make music and be creative, and I don't want the hassle. You can be really creative but not very good at business and marketing.⁸⁵

Even musician Neil Young, who is notorious for having an anti-corporate attitude, sang praises for his label by explaining that they “present and nurture artists,” which is something that is not offered by online music stores.⁸⁶ Accordingly, with all of the resources, time, and money that the labels invest to simply be able to record one song track, services like Evergig that offer music to fans free of charge and streaming services that pay fractions of a penny per stream are stealing from the labels and rendering it unsustainable for them to continue their business of making music. Sites like Spotify, Pandora, and Evergig are not redistributing resources; rather, they are reaping where they have not sown. They depend on the resources that the labels devote to the development and promotion of their artists. When a popular album is released, streaming sites make it available on their websites or apps, and rather than pay the labels for their work creating the product, they require a song to be streamed millions of times before the record labels earn a single dollar. Sites like Evergig fail to compensate the labels, the artist, or any of the thousands of people who devoted countless hours to perfecting an album or song. It is a form of stealing and the labels need a way to rectify this increasingly costly problem.

THE FUTURE

Digital music and streaming are the new norms of the music industry and record labels must adapt to this change or perish in their wake. The old, time-honored, and established business models that the record labels could consistently depended upon to keep them afloat are gone. Therefore, in order to remain relevant and entice artists to sign to their labels, the Big Three need to make digital music work in their favor. The current business models and practices the Big Three have used for decades are no longer sufficient in today's digital age, and even when they have attempted to litigate against streaming services for their meager payouts,⁸⁷ their efforts have

⁸⁵ *Id.* (internal quotations omitted).

⁸⁶ *Id.* (internal quotations omitted).

⁸⁷ Sony, Universal, and Warner Music, along with the independent label ABKCO, which has the rights to some of the earliest Rolling Stones' songs, sued

not proven fruitful. Rather than depend on the courts to resolve their issues, it will ultimately be up to Congress to amend the Copyright Act to incorporate live music under its purview as well as determine a universal per-stream payout rate that streaming services must pay musicians and their labels.

Pandora Media for copyright infringement. The labels argued that they were owed royalties for songs produced prior to 1972. Ben Sisario, *Big Labels Take Aim at Pandora on Royalties*, N.Y. TIMES (Apr. 17, 2014), available at <http://www.nytimes.com/2014/04/18/business/media/lawsuit-against-pandora-seeks-royalties-for-golden-oldies.html?hpw&rref=technology>.

