Streaming Moguls are Biting the Hand that Feeds Them: Artists Beg for a Change in Intellectual Property Laws

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STREAMING MOGULS ARE BITING THE HAND THAT FEEDS THEM: ARTISTS BEG FOR A CHANGE IN INTELLECTUAL PROPERTY LAWS

By: Alyssa Goldrich*

I. INTRODUCTION

Long before the genesis of the iPod, music was the center of many cultural festivities and celebrations. Music experts have stated that societies around the world have been enjoying music since the prehistoric times.¹ The mediums used to produce music have changed drastically over time, transforming listening to music from a rare luxury to an integral part of the world. As technology evolves, one thing remains consistent - billions of people around the world continue to engage in the universal culture of music consumption. The prevalence of this culture can be understood through an analysis of the progression of music and its evolution from a pastime to an industry.

In the Middle Ages, the purpose of music was to improve upon a society that lacked in both elegance and refinement, due to the violence of the previous era.² During this time, medieval music could only be heard via a live recital, and typically consisted of "religious or secular music of the church."³ As decades passed, music became increasingly prevalent in the world, bringing a variety of people together for events such as: coronations, operas, gatherings, and prayer.⁴ It was not until the introduction of the phonograph in 1877, when people were able to record music on a tangible medium and play it back at their leisure.⁵ Thus, the phonograph completely revolutionized the music industry, which created a domino effect for millenniums to come.⁶

Within the past decade, Apple⁷ has capitalized on the innovation brought on by the phonograph, which took accessing music to a whole new level.⁸ As a direct result of Apple's

¹ J.D. Candidate, Maurice A. Deane School of Law at Hofstra University, 2017. I would like to thank the staff of the Journal of International Business & Law, for giving me this opportunity and for their extremely diligent work in preparing this note for publication. I would also like to thank my father, Judd, and my brothers, Jesse and Sean, for their unwavering love and support throughout this process. They inspire me every day and none of this would have been possible without them.
² Albright, supra note 1.
⁵ Id.
⁶ Albright, supra note 1.
⁷ About Pandora Radio, PANDORA, https://www.pandora.com/about. After the phonograph was introduced to the world, inventors continued to be innovative constantly improving upon previous inventions. As seen in a recent example, when Pandora penetrated the music scene with their digital radio, many other companies caught on, such as Spotify and Tidal. Id.
novelty efforts, music listeners worldwide can pay a monthly fee to have instant access to a
database of over 25 billion songs to take with them anywhere they go. This phenomenon is
known as music streaming and the world has taken a liking to its efficiency. Competitors of
Apple, such as Spotify, Pandora, YouTube, and Tidal, have also contributed to the frenzy
surrounding streaming by introducing their own streaming services. Although there are
numerous streaming services available to consumers, this Note will only discuss the most
popular options, which are listed above.

The availability of a multitude of streaming services for consumers to choose from
has had a substantial impact on business competition that is not all positive. While
streaming services continue to fight tirelessly to remain competitive in the “new” music
industry, the artists who have made it possible for these services to exist are seeing lower
revenues from their work product than ever before. One reason for this decline is that
intellectual property laws, both domestic and international, are not keeping up with the
rapidly changing industry to provide adequate protection for artists. Throughout the years,
music technology has significantly developed, making it hard to imagine a time where any
particular song could not be accessed at the click of a finger. This is a far cry from the days
where music was only available through live performance or a tangible medium. As a result,
protecting an intangible work that is being delivered all over the world through cyberspace is
much more difficult than protecting ones physical property. Such protection would essentially
require one who is attempting to preserve a work to be present in thousands of different
places in order to physically remove the digital file from computers and mp3 devices that
have accessed it.

Although the arrival of streaming services brings about much excitement for
consumers and streaming providers, it has created a number of economic and legal problems
for aspiring and veteran artists. For example, services that offer new members a free trial

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13 Id.
14 What is Copyright?, RIGHTSDIRECT, www.rightsdirect.com/international-copyright-basics/ (discussing how copyright laws have been typically geared to protect physical manifestations of a work, which have since been transformed with the introduction of the internet because physical music files can now be transmitted digitally, which makes protection of copyrights much more difficult).
16 Such as: CD, 8-track tape, and vinyl records.
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typically do not pay independent artists during this period.\textsuperscript{18} Given that revenue is so low during the trial periods, the streaming companies focus their efforts on well-known artists in order to retain their music catalogs for their service, thus enticing more users.\textsuperscript{19} In the past decade, the decline of revenue from music streaming services has become a major topic of discussion. Correspondingly, a three-judge panel at the Copyright Royalty Board ("CRB") is now involved in regulating rates and percentages at which artists are paid in order to increase artist payouts.\textsuperscript{20} The CRB felt it necessary to intervene for fear that artists, big and small, would become unhappy with the current compensation rates and pull their music from streaming services all together.\textsuperscript{21} Concurring with this interference, an article featured in Forbes Magazine stated, "without a sustainable rate structure, innovation and investment will be driven out of the marketplace."\textsuperscript{22} However, this Note does not provide a comprehensive list of the legal issues related to music streaming, nor does it touch upon each issue. Instead, the purpose of this Note is to explore how the evolution of the music industry has diminished artists ability to be fairly compensated for their works, as well as examining how this unfairness may be rectified through an amendment to current intellectual property law. While a majority of this Note will discuss artists revenue reduction in relation to the intellectual property laws of the United States, the issue will also be considered on an international scale, specifically addressing the laws of India, China, and the United Kingdom.

Following the introduction in Part I above, Part II of this Note will briefly discuss the history of music sales before it goes on to highlight the various platforms used to stream music worldwide and examine the way each company provides compensation to its artists. Part III will set forth the relevant intellectual property laws of the four countries discussed in this Note and address substantive differences between them. Part IV will elaborate on the economic impact these music-streaming services have brought about. Finally, Part V suggests minor modifications in legislation that will better effectuate intellectual property laws and help resolve the unfairness currently surrounding Artist royalty payments.

II. EVOLUTION

A. History of Music Sales

In the past one hundred years, the world has adapted to a variety of innovations in music technology ranging from the phonograph, the vinyl record, the 8-track tape, and the compact disc.\textsuperscript{23} While these mediums vary in shape, size, and material, the process by which a consumer acquires them remains intact.\textsuperscript{24} After an artist recorded their music and embedded the composition onto one of these mediums, a consumer could physically go to the store and

\textsuperscript{18} Id.  
\textsuperscript{19} Id.  
\textsuperscript{21} Resnikoff, supra note 12.  
\textsuperscript{22} Id.  
\textsuperscript{23} Albright, supra note 1.  
\textsuperscript{24} Id.
purchase the artist’s music. Once purchased, playback of the track typically required an
external device, making listening to music difficult when not at home.\footnote{Id.}

In 2006, purchasing an album would set a consumer back roughly $19.95.\footnote{Keif, Record Sales: Where Does the Money Go?, BANDZOOGLE, (Jun. 9, 2006), https://bandzoogle.com/blog/record-sales-where-does-the-money-go.} From that expense, royalties would be divided to pay the people involved in producing that album.\footnote{Id.} Artists would typically receive 6.6%, producers 2.2%, songwriters 4.5%, distributors 22%, manufacturers 5%, and retailers and record labels each 30%.\footnote{Id.} While these numbers are only an approximation, they illustrate how little artists make through the physical sales of their albums.

In order for artists to make a living via album sales, they would need to sell a significant number of albums just to break even. For example, an artist such as Taylor Swift, may make a meaningful profit if they sell millions of records, but this is not a possibility for many of the smaller, less acknowledged artists.\footnote{Id.} The reality for less prominent artists that generate a smaller fan base, and in turn have less people consuming their music, results in profit margins for the artist falling well below the average percentages stated above.\footnote{Id.} Streaming services attempted to resolve this problem by making music readily available to a broad range of consumers.

In 2003, music lovers welcomed iTunes, the first online music-streaming platform that allowed listeners to download music directly to their computers without ever having to leave their home.\footnote{See generally, Brandon Griggs and Todd Leopold, how iTunes changed music, and the world, CNN TECHNOLOGY, (April 26, 2013), http://money.cnn.com/2013/04/25/technology/itunes-music-decline/}. The birth of iTunes sparked a domino effect in the music industry, forever changing the way consumers purchase music.\footnote{Adrian Covert, A Decade of iTunes Singles Killed the Music Industry, CNN MONEY, (Apr. 25, 2013), http://money.cnn.com/2013/04/25/technology/itunes-music-decline/}. Its rapid popularity was driven by the introduction of a unique feature that allowed consumers to purchase single songs for 99 cents, as opposed to entire albums.\footnote{Id.} As millions of consumers caught on to this cheap and efficient means of acquiring music, the world said goodbye to the music industry as it was.\footnote{Id.} In a little over a decade, Apple gifted the world with the iPod, a compact MP3 player that made music portable; the iPhone, which combined the capabilities of an MP3 player and a cellphone; and the iCloud, which provided a digital database to store user information.\footnote{Id.} The demand for music skyrocketed when nearly 800 million users incorporated the iPod into their everyday life.\footnote{Id.} Savvy business entrepreneurs caught on to the music frenzy

\begin{thebibliography}{99}
\item Id.
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and created their own platforms for music streaming, such as Spotify and Pandora. The creation of these companies continued to revolutionize the music marketplace. By 2007 digital singles overtook CDs generating $819 million in sales, compared to just $500 million for CDs. Currently, consumers are presented with over a dozen streaming services to choose from, making the CD a thing of the past.

B. Streaming

The debut of streaming sent the music industry into a structural evolution. The birth of iTunes forced the world to adjust to a new era where people were accessing music through digital services, rather than purchasing it. Economic competition in the music marketplace made way for companies like Spotify, Pandora, Tidal, and YouTube to enter the music scene. These companies quickly recognized the popularity of music streaming and invented their own versions of digital music access. These novel platforms capitalized on the features iTunes made so successful, while providing a slightly unique spin. Consumers were now given the option to purchase a monthly subscription to each platform in return for an electronic database consisting of millions of songs accessible at any moment. However, if consumers do not want to pay for the subscription, they are still able to access the database by agreeing to listen to periodic sponsored ads. Additionally, streaming allows artists to penetrate international boarders, and expand their fan base. What once required manufacturing, packaging, and shipping, now only mandates the click of a finger. Similarly, artists who were once popular only within their own country are now being heard and shared worldwide. While these services have benefited artist’s popularity, they have diminished their ability to earn a respectable living from their works.

38 Covert, supra note 34.
40 Id.
42 Id.
43 Id.
44 Id.
46 Id.
47 See generally Nomi Prins, Spotify Racks Up A Streaming Milestone: Artists Settle In For The Fight, FORBES MAG. (May 14, 2015), http://www.forbes.com/sites/nomiprins/2015/05/14/spotify-racks-up-a-streaming-milestone-artists-settle-in-for-the-fight/ (discussing how little Artists are being paid per play for music streamed on Spotify).
Despite music demand steadily increasing, sales plummeted. According to the Recording Industry Association of America ("RIAA"), the introduction of streaming services caused revenue to be cut nearly in half, plunging from $11.8 billion in 2003 to $7.1 billion in 2013. This notable decline is directly attributed to the fact that access to these streaming services comes at a small price. For a fixed monthly fee, users can stream an unlimited amount of music. If users wish not to pay, they may take advantage of “freemium” streaming services, which rely solely on ads to bring in revenue. From these fixed rates, artists are paid per play a trivial royalty percentage, while the record companies and streaming corporations collect the remainder. As it can be seen, the benefit these fixed rates have conferred upon consumers is obvious. However, the intense demand for music, resulting in billions of streams daily with a less than fair reparation system for artists has deprived them of their right to be adequately compensated for their works. To further illustrate the notion of declining revenues for artists through streaming services, this note will later analyze the royalty amount each individual service pays its artist.

1. Spotify

When Spotify launched in 2008, the service gained instant attraction in its promise to provide labels with an alternative to piracy. The company offers music at a low monthly fee of $9.99 for unlimited music; it provides its users with less incentive to illegally download music. The service allows consumers to access millions of songs and add them to their own creative playlists. To do so, consumers can take advantage of the “freemimum” option, or pay a monthly fee to receive the benefits “ad free.” Spotify is now arguably the most popular of all the streaming services. The company has launched in 32 of the 37 countries where streaming is the top digital revenue source. As a result, Spotify holds half of the $1.5
billion global subscription streaming market. In the United States, Spotify marked a 90 percent growth in subscription revenue in 2014.60

Despite Spotify’s personal success, the company has been at the center of the streaming revenue controversy. A major source of the company’s criticism stems from the fact that they hold a substantial portion of the streaming industry’s market and revenue, and are still paying their artists next to nothing. According to Forbes Magazine, Spotify’s per stream royalties remain diminutive at $0.005 per stream. In correlation with its low royalty payments, the company’s free listening option has also attracted negative attention. The idea behind this disapproval is that allowing consumers to listen to the service for free impinges on potential artist royalties. Thus, taking away a consumers option to stream music for free, will force listeners to pay to access the music. Demanding that users pay a listening fee would result in higher revenues for the company that would then be disbursed accordingly to its artists. The contention surrounding Spotify peaked when Grammy Award winning artist Taylor Swift banned her 1989 album from being played on the company’s service. In an interview with Time Magazine, Swift stated:

In my opinion, the value of an album is, and will continue to be, based on the amount of heart and soul an artist has bled into a body of work, and the financial value that artists (and their labels) place on their music when it goes out into the marketplace. Piracy, file sharing and streaming have shrunk the numbers of paid album sales drastically, and every artist has handled this blow differently.

Swift’s modeled respect for artistry and music has many questioning why other artists do not follow suit and withdraw their music as well. The answer to this question is YouTube.

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59 Id.
60 Id.
61 Id. (discussing the controversial issues that are of central concern to artists surrounding music streaming).
62 Peoples, supra note 58. (discussing how Spotify holds half of the $1.5 billion global subscription streaming market and have marked a 90 percent growth in subscription revenue for 2014).
63 Id.
64 Id.
65 Id.
66 See generally Claire Groden, Free Spotify may be about to change dramatically, FORTUNE MAG. (Aug. 11, 2015), http://fortune.com/2015/08/11/spotify-free/.
67 Id.

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2. YouTube

YouTube is a free video sharing website that allows users to create, watch, and share videos online. The site was created in 2005, and has since gained enormous traction in the digital world calculating roughly six billion hours of video watched by its users every month. YouTube aims to promote individual creativity by allowing its users to create, watch, and share their own works, including but not limited to: remixes, covers, lyric videos, and response videos. However, by offering this loosely regulated avenue of creativity, the company inadvertently generated a new platform for music piracy.

YouTube is home to thousands of user-generated videos encompassing nearly every chart topping song. The easily accessed site allows users to play artist’s tracks for free, as many times as they want, as often as they want, so long as their internet connection endures. Even artists like Taylor Swift, who have opted out of streaming services, are not immune to YouTube’s reach. Major record labels can exercise their protections under copyright law by holding their official videos back from YouTube, but would be engaging in a virtual game of “whack-a-mole” trying to take down every fan generated lyric video that is posted. YouTube dominates the streaming industry aggregating over one billion active users. Therefore, individually attempting to police YouTube’s content is a time-consuming activity. Thus, when compared to YouTube, streaming services become the lesser of the evils. The rationale behind this idea is that it is better for artists to be paid even the most minuscule amount for their works, rather than make no profit at all.

3. Apple Music

It is no secret that Apple has been at the forefront of music innovation since the company’s inception. It seems that every year they introduce yet another sleek, user-friendly device that sends competitors into a wild frenzy attempting to duplicate their products. Accordingly, in 2015 Apple entered the music-streaming arena ahead of the game. Apple now offers it’s near one billion iTunes users a selection of music attuned to each users

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70 What is YouTube, DIGITAL UNITE, http://digitalunite.com/guides/tv-video/what-youtube, (last visited Apr. 22, 2016) (discussing that YouTube was created in 2005 and "allows billions of people to discover, watch and share originally-created videos. YouTube provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small").
72 Id.
73 Covert, supra note 34.
75 Owsinski, supra note 55.
76 Id.
77 Alba, supra note 71.
individual music taste based upon their prior listening history. Forbes Magazine noted that early reviewers of the streaming platform affirmed that the “For You” curated playlists were completely in sync with their listening habits. Additionally, Apple incorporated their personal assistant feature, better known as “Siri”, to further enhance the user listening experience. Consumers now have the option of voicing their requests to Siri for an instant playback, saving them the hassle of searching through the company’s vast library, which is comprised of more than 30 million songs.

To launch its platform, Apple offered its consumers a free three-month trial in hopes that users would take a liking to the service and opt-in to paying its $10 monthly fee. The company’s hopes of falling under the radar, when suggesting they would not be paying artists a royalty fee during their free trial period, were demolished when Taylor Swift took to Tumbler to defend her property. Swift quarreled, “[w]e don’t ask you for free iPhones, please don’t ask us to provide you with our music for no compensation.”

Apple heard Swift’s message loud and clear. Less than 24 hours later, the company vowed to pay all of its artists royalties during the three-month trial period. Additionally, Apple pledged to pay labels 0.2 cents per stream, which equals out to roughly $1 for every 500 streams. While these rates are comparable to competitor’s payouts, Apple hopes to consume the lion share of paid subscriptions in the future, thus affording to pay their artists higher premiums. The company aspires to secure roughly 100 million subscribers in order to substantially outpace its leading competitor, Spotify, by nearly 80 million.

4. Pandora Radio

Pandora Radio emerged on the music scene in 2000 and operates similarly to many of its competitors with a slightly distinct spin. Pandora offers listeners a more restrictive, but entirely free option to listen to music. The company derives a majority of its revenue from embedded advertisements, which routinely interrupt users listening experience. However, if a consumer wishes to gain access to Pandora’s music library “ad free”, they may do so by

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79 Id.
80 Id.
81 Id.
82 Id.
85 Id. (discussing Taylor Swifts incessant need to protect her artistry).
86 Id.
87 Id.
88 Heisler, supra note 83.
89 Sisario, supra note 84.
90 Heisler, supra note 83.
91 See generally About Pandora Radio, PANDORA, https://www.pandora.com/about.
92 Id.
93 Id.
purchasing “Pandora One.” TFurther, Pandora encourages their users to make note of the music they wish to hear more or less of, by choosing from their like and dislike buttons. This feature allows Pandora to cater to each of its users listening tastes. It is features such as those that tailor to consumer interests that have allowed Pandora to boast approximately 250 million users who habitually access their one million-song database. T

Unlike other streaming services, Pandora calculates its royalty payout rates by dividing each streamed song into two categories. TThe first category belongs to those songs streamed via Pandora One, Pandora’s premium service. The royalty rate for premium streams equals $.0025 per stream. TThe second category distributes royalty payments based on the company’s non-subscription users, paying rates up to $.0014 per stream. While Pandora’s royalty payments closely mirror those of its competitors, artists have nonetheless become increasingly agitated with how low that number continues to remain.

5. Tidal

As technology continues to engulf the music industry, artists are fighting back. TIn an effort to revert consumer’s view of music back to art, rap mogul Jay-Z created Tidal. Accordingly, in order to spearhead his vision, the rapper enlisted the help of fellow music icons such as Beyoncé, Rihanna, Kanye West, and Madonna in creating a platform where “love of music is the foundation.” Building upon this foundation, Tidal’s business model promises to pay artists the highest royalty percentage of all the streaming platforms offered in the market, in order to rectify the damage streaming services have conferred upon artists.

Thus far, Tidal is leading the industry in artist pay out rates, paying its artists $.0070 per play. At first glance, this amount may seem significantly low. However, Tidal actually offers musicians a rate that is five percent higher than that offered by many of the company’s competitors, such as Spotify.

Although this may be true, in order to pay artists a higher royalty per play, Tidal does not offer its users a “freemium” option, making its platform the

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96 Id.
97 Id.
98 Id.
99 Id.
101 Id.
102 Id.
103 Id.
most expensive of the options available to consumers. As a result, Tidal has a smaller user base than other streaming services, forcing artists who license exclusively to Tidal to rely on a larger percentage of a smaller group of users to play their track in order to see a substantial payout. It is evident that music-streaming services are continuing to gain popularity among consumers. In 2015, a report issued by the Next Big Sound stated one trillion songs were streamed in the first six months of the year. This report was based on data compiled from a handful of the world’s most popular streaming services, not including Apple Music, which was set to launch later that year. The quantity of streaming users has peaked and it is a direct result of the variety of platforms available to them.

This confounding popularity paved the way for streaming supporters to argue these services only seek to benefit artists by exposing their music to audiences that would not have otherwise been reached. While music listeners were once bound to the notion that the only way to become familiar with a song is to hear it playing on the radio, the new era of music is ruled by the Internet and has freed consumers from times of music solitary. Music lovers all over the world are now exposed to billions of songs from thousands of different countries and cultures all around the world. The capability to stream music has made it possible for artists that were once purely domestic to expand their reach beyond their countries boarders and gain a broader fan base.

In the midst of all the conversation surrounding streaming services, it is easy to forget there are actually laws in place enacted to combat issues such as those arising from digital music streaming. The earliest form of governmental protection of copyrights came in 1710 with the introduction of the Statute of Anne. However, in order to keep up with a continuously innovative society, new legislation was needed to maintain the security of individual property rights. Part III will discuss modern copyright laws that are currently set in place that may relate to digital music streaming and the benefits and consequences that accompany the activity.

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106 Heath, supra note 100 (explaining that Tidal costs $9.99 per month for a subscription, also offering a 50% discount for students).
107 Palermino, supra note 51.
108 Pahm, supra note 8.
109 Id.
110 Karl-Erik Tallmo, The History of Copyright: A Critical Overview With Source Texts in Five Languages, "http://www.copyrighthistory.com/anne.html (explaining that the Statute of Anne was set in place to ensure that any person who copies, reprints or publishes a work taken without the consent of its author be subject to penalties as set forth by law. This statute aimed to encourage creativity and innovation by affording those who do so protection and an avenue for remedies)."
III. INTELLECTUAL PROPERTY LAW

The concept of intellectual property law generally involves topics such as copyright, trademark, and patent. This Note will focus solely on the laws that govern copyright, specifically, copyright laws related to music streaming. A copyright is a legal device that gives the creator of a literary, artistic, musical, or other creative work, the sole right to publish and sell that work. Copyright owners have the right to control the reproduction of their work, including the right to receive payment for that reproduction. An author may allow another to temporarily use those rights or may sell those rights to others, including publishers or recording companies. A violation of a copyright is called an infringement.

A song has two copyrightable parts: the sound recording itself and the musical work, which consist of the musical composition and, if applicable, the lyrics that accompany it. Each fragment of the copyright can be registered to a different owner and each owner has the ability to obtain three different licenses to accompany their copyright protection. The first is a mechanical license for the reproduction and distribution of a song, typically seen through the sale of CDs and digital downloads. Next, a copyright owner can obtain a public performance license, which grants them the ability to digitally transmit their sound recordings via Internet radio or concerts. Finally, a copyright owner can obtain a synchronization ("synch") license, which is temporarily granted to third parties for use in commercials, movies, and video games. For example, if Spotify were attempting to obtain an artist's song for their music catalog they would need to procure both a mechanical and public performance license from each rightful owner. In addition to the many components that comprise copyright laws, both domestically and internationally, copyright law has a vast history within our world. As time progresses and technology evolves, copyright laws adjust their standards to afford protection to new subjects of works.

113 Id.
114 Id.
115 Id.
117 Id. (explaining how the copyright to a sound recording is usually owned by songwriters' or music publishing companies while the copyright in the musical work itself is typically owned by the recording Artist or their record label and these different ownerships are completely separate from one another).
118 Id.
119 Id.
120 Id.
121 Id. (Not a comprehensive list for what synch licenses are used for, these are only the most common.)
122 Chandna, supra note 116.
A. The Berne Convention

The Berne Convention is an international agreement governing copyright that was first created in Berne, Switzerland in 1886. The Berne Convention formally mandated several aspects of copyright law. For example, copyright under the Berne Convention is automatic; it is prohibited from requiring formal registration. As a result, countries began recognizing copyrights held by the citizens of other participating countries. Thus, introducing the first idea of international copyright law. As of 2014, there are 169 total countries contracting under the Berne Convention, including the United States, the United Kingdom, China, and India. The agreement compels those in its scope to treat the copyright of other citizens with the same dignity as it would those of its own country. Essentially, the purpose of the Berne Convention was to ensure that if one were to write a book in France, someone in China could not copy it and claim it as his or her own. Additionally, the agreement required participating countries to provide strong minimum standards for copyright law.

These minimum standards offer copyright owners the exclusive right: to translate, make derivative works, perform their works publicly, and broadcast. The convention also provides for "moral rights", which are the right to "claim authorship of the work and the right to object to any mutilation, deformation, or other modification that is prejudicial to the author's honor or reputation." Furthermore, the minimum standards established by the Berne Convention include the protection of one's copyright for the duration of 50 years following the author's death. If the author is unknown, the work is only shielded for 50 years after publication. The Berne Convention has a long history of amendments, which were established in many different countries in order to address novel issues that arose during the span of the Berne Convention. While the treaty was able to successfully cover a majority of issues that surrounded copyright law during its existence, the rapid growth of technology beginning in the 1960s inspired the need for the World Intellectual Property
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Organization ("WIPO"), which covered aspects of copyright law that were novel and not included by the Berne Convention.\(^{137}\)

B. World Intellectual Property Organization

In 1970, WIPO was established to tackle the issues brought upon by information technology. WIPO is a member-state led, inter-governmental organization with headquarters in Geneva, Switzerland.\(^{138}\) In 1974, WIPO became a specialized agency of the United Nations ("UN").\(^{139}\) The organization's main objectives are to promote protection of intellectual property worldwide and to ensure cooperation between the parties of the treaty.\(^{140}\) In order to attain its objectives, WIPO sets international standards for the protection and enforcement of intellectual property rights.\(^{141}\) While the criteria set in place by the Berne Convention and WIPO are an international effort to quell copyright infringement, countries such as: the United States, the United Kingdom, China, and India, are commanded by their own copyright laws.

C. United States

Congress passed America's first federal copyright act in May of 1790.\(^{142}\) Originally, the act did not provide express protection for musical works, but was later amended in 1831 to ensure federal copyright protection shielded these works from infringement.\(^{143}\) While the amendment of 1831 granted some protection to copyright owners of musical works, its protection was limited, and did not furnish the copyright owner with all the exclusive rights they have today.\(^{144}\) However, as years passed and music became increasingly prevalent, the act continued to expand to include additional exclusive rights for owners of musical compositions. Notably in 1897, the act was enlarged to incorporate the right of public performance,\(^{145}\) later followed by the right to make derivative works in 1909.\(^{146}\) Finally in 1995, Congress established a copyright owners exclusive right to distribute their musical works extends to digital deliveries, such as music streaming.\(^{147}\)


\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) Id.

\(^{142}\) Act of May 31, 1790, ch. 15, 1 Stat. 124.

\(^{143}\) Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

\(^{144}\) See Maria A. Pallante, ASCAP, 61 J. COPYRIGHT SOC'Y 545 (2014), (explaining that the act of 1831 only provided owners of musical works with the sole right to reproduce and distribute their compositions. Today copyright owners have the exclusive right to copy, distribute, perform, display and create derivative works).


\(^{146}\) Id. (i.e. the right to make mechanical reproductions of sons in "phonorecords" such as Piano rolls or modernly vinyl records and CDs).

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As stated previously, a musical recording encompasses two distinct works of authorship: the musical work and the sound recording. However, this was not historically the case in federal copyright law. Prior to 1971, Congress recognized only the musical work as copyrightable subject matter. In order to keep up with the rapid improvements in technology, Congress adjusted legislation to incorporate sound recordings, a distinct class of copyrighted works under the umbrella of federal copyright protection. Thus, sound recordings fixed on or after February 15, 1972, protected only the exclusive rights of reproduction, distribution, and preparation of derivative works.

In addition to incorporating the right to make derivative works, 1909 was the year the “compulsory license” was enacted into copyright law. Once obtained, a compulsory license allows a third party to make and distribute phonorecords of the work without the explicit consent of the copyright owner. Under section 115 of the United States Code, a party seeking a license to make and distribute reproductions of a musical work may do so by serving a notice of intent on the copyright owner, within thirty days of the creation and prior to distribution. After serving a notice of intent, the person must provide statements of account and pay the statutorily proposed royalties to the copyright owner. Statutory royalty rates are established by the CRB and are reconsidered every five years. The royalty rates adopted by the CRB were fashioned to provide a numerical maximum that is not to be exceeded by the owner of a copyright in licensing negotiations. The rates that are currently in place are the result of an industry-wide negotiated agreement that was submitted to the CRB as a settlement of the most recent rate-setting proceeding. Presently, the rates set in place for streaming services ranges from 10.5 percent to 12 percent of the services revenue, with a minimum royalty that must be met.

As noted in section B, detailing the different streaming services offered to consumers, the streaming companies are simply not paying artists the statutorily prescribed royalty rates engineered by the CRB. The streaming conglomerates are evading penalties

148 Chandna, supra note 116.
150 Id.
151 Id.
152 Id.
153 Id.
155 Id. at § 115(b)(1).
156 Id. at § 115(c)(5).
158 Id. (explaining that when establishing the royalty rate, the CRB considered the following: availability of creative works to the public, fair return of income to copyright owner under existing economic conditions, creative contribution from copyright user and minimization of disruptive impact on the structure of the industries involved).
159 Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67,938,67,939 (Nov. 12, 2013) (explaining that the rate to make and distribute permanent downloads of physical phonorecords of a musical work is 9.1 cents per copy, ringtones is 24 cents per use, and songs over five minutes is 1.65 cents per minute).
161 Miller, supra note 104.
under copyright law through the use of voluntary licensing. Voluntary licenses are negotiated between a copyright owner and a potential user that take effect in lieu of the rates and terms set by the CRB. Given that the popularity surrounding these streaming services and piracy figures at an all time high, artists are forced to agree to deals offering lower royalty payouts in an effort to present their music to the public. While United States copyright laws have yet to address the issues surrounding voluntary licensing, they have made major efforts at deterring the frequency of piracy.

1. Digital Millennium Copyright Act

In 1998, Congress passed the Digital Millennium Copyright Act ("DMCA") to implement WIPO's World Copyright Treaty ("WCT"). The DMCA encompasses the capacity to hold infringers both civilly and criminally liable for violations. The act was passed to give copyright holders enhanced remedies against the unauthorized access to their intellectual property. Section 1201(b) of the DMCA specifically states that in addition to the copyright laws currently enforced against infringers, any use or trafficking of technology "primarily designed to circumvent" copyright protected material is illegal under this law. The foundation behind this idea was built primarily on the notion that even though United States copyright laws were legislated in an attempt to protect a copyright owners intellectual property rights, infringers crafted elusive ways to avoid liability for their encroachments.

D. United Kingdom

Copyright law originated in the United Kingdom ("UK") in 1710, with the introduction of the Statute of Anne. Originally stemming from the common law, the Statute of Anne became statutory with the passing of the Copyright Act of 1911. This was the World's first copyright statute, which provided copyright protection regulated by the government and courts, rather than individuals. Much like the copyright laws of the United States and India, this law gives the creator of an original work fixed in a tangible medium, the right to control the way in which their materials are used. The current copyright law

165 Id.
166 Id.
168 Id.
169 Tallmo, supra note 110.
171 Id.
172 Id. These rights include the right to: broadcast and public performance, copying, adapting, issuing, renting and lending copies to the public. Id.
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governing the UK is known as the 1988 Copyright, Designs, and Patents Act.\textsuperscript{173} Under this law, the extent of protection granted to each copyright owner varies depending on nature of the work.\textsuperscript{174} For example, a literary, dramatic, musical, or artistic work is protected for the life of the author, plus 70 years, while a sound recording is only protected for 50 years from the time it was created.\textsuperscript{175}

Following the creation of the Statute of Anne, the UK has continued to modify its copyright laws to keep up with the developing advances in the economy. In particular, the growth of the Internet has facilitated a growth of online copyright infringement.\textsuperscript{176} In order to combat the effects of this infringement, the country launched a crime unit known as the Police Intellectual Property Crime Unit ("PIPCU"). The unit, which was launched in 2013, aims to protect legitimate businesses operating in the UK from illegal piracy and counterfeiting.\textsuperscript{177} Specifically, addressing the topic of policing online infringements.\textsuperscript{178} The UK reasoned it is especially imperative today to have specialists who are equipped to understand the technological sophistication required in investing copyright infringement in order to better combat the rise of piracy.\textsuperscript{179} Since its birth, the PIPCU has arrested 52 people, suspended over 5,000 Internet domain names, and diverted over 11 million visits from copyright infringing sites to the PIPCU suspension site.\textsuperscript{180} While the institution of the PIPCU has helped diminish infringement figures in the UK, its law enforcement capabilities can only extend so far.\textsuperscript{181} In order to completely demolish the existence of copyright infringement, the UK believes collaboration with other countries is a necessity in order to reach a common goal.\textsuperscript{182}

E. China

The first Chinese copyright law was adopted on September 7, 1990, by the People’s Republic of China and ratified on June 1, 1991.\textsuperscript{183} China is one of the last countries to adopt a form of copyright protection for its citizens, in large part because of its cultural traditions.\textsuperscript{184} Historically, China’s economy was centered on socialist and Confucian values that promote the sharing of ideas throughout the community.\textsuperscript{185} Furthermore, Chinese people believe that innovative concepts should be shared with society as a whole in order to endorse communal

\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Ros Lynch, Copyright and IP Enforcement Director, Intellectual Property Office, addressing copyright enforcement in Beijing (Aug. 21, 2015), http://www.government-online.net/uk-policy-on-copyright-in-china/.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
benefit rather than individual advances. For example, if a Chinese national were to write a song, traditionally, it was viewed as a great compliment to the author for that song to be featured in a Chinese commercial or publically performed by another. In vast contradiction to the customs of many Western countries, this type of use was not viewed as an infringement of the songwriter’s intellectual property rights because society was sharing the enjoyment. However, Western authors have been hesitant to invest in China for fear of having their ideas infringed upon. Thus, China’s liberal views on individual intellectual property rights were modified in order to stimulate a more prosperous economy.

Given that the enactment of these laws were the country’s first attempt at policing copyright infringement, China is still adapting to the idea that the use of copyright infringing goods comes with consequences. The laws protect Chinese citizens and foreigners who are published within China for a period of 50 years, or in the case of an individual author, the life of the author plus an additional 50 years. Interestingly, China’s copyright laws perpetually protect the right of accreditation, affording a copyright owner enormous security of their moral and personal rights. Publishers are allotted a ten-year term of protection for any publications that encompass their original design. This is beneficial to publishers who are not by law the copyright owner, but have contributed to the work in a significant way.

Much like the United States, China does not afford copyright protection to its laws or any legislative, judicial, or administrative materials, including their official translations. This is because, although they are fixed in a tangible medium, i.e. written down, once they are enacted, they become a fact and facts are not copyrightable. Conversely, China has chosen not to protect databases and formulas under their copyright umbrella, which are typically covered under the scope of United States Copyright laws. Given that China’s copyright laws are so novel, the country is still maintaining the highest piracy rate across all copyrighted industries, running from 90-96 percent. In an attempt to depress this astronomical percentage, China’s lawyers are continuing to educate citizens on intellectual property rights in hopes their knowledge will stop the use of infringing products.

186 Id.
187 CHINA IP REPORT, supra note 183.
188 Id.
189 Id.
190 Id.
191 Id.
192 Id.
193 Id.
194 Id.
195 Id.
196 See generally, Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983) (explaining that a computer program is subject to copyright protection because it is attributed to a literary work because of the use of letters and numbers in coding).
197 Chandna, supra note 116.
198 Id.
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F. India

In vast contrast from China’s novel copyright laws, India’s copyright laws can be traced back to the country’s colonial era under the British Empire. The earliest statute relating to copyright law in India was the Copyright Act of 1847. The current statute governing copyright laws in India is the Copyright Act of 1957. The Copyright Act of 1957 has been amended six times since its genesis, most recently in 2012. According to Indian law, an author’s work is subject to copyright protection if it is original in skill, labor, and judgment, and recorded in some tangible form. Closely mirroring the statutes that govern United States copyright laws, the 1957 act grants the owner of a copyright the exclusive right to reproduce, copy, publicly perform, and make derivative works of their creations. Original literary, dramatic, musical, and artistic works such as films and sound recordings are several of the subjects safeguarded under India’s copyright laws.

One major difference in the copyright laws of India, as compared to the United States, is that the duration of copyright protection varies depending on the type of work in question. For instance, the owner of a copyright to a literary work will be granted protection for their life plus 70 years, while the copyright holder of a sound recording only receives protection for 50 years from the end of the year of publication. In the United States, the period during which copyright owners are granted protection depends on who owns the copyright. As you will see, India’s copyright laws are similar to the United States and the United Kingdom in many aspects that encourage the creativity of authors. However, the current standards set in place lack legal deterrents for those who attempt to circumvent technological protection measures (“TPM”). TPMs encrypt files in an attempt to stonewall hackers and protect digital works from copyright infringement. Nonetheless, due to the

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199 Nandita Saikia, Indian Copyright, BLOGGER.COM (Apr. 22, 2014), http://copyright.lawmatters.in/2014/04/indias-first-1847-copyright-statute.html (noting that this statute was later modified to emulate the British copyright act of 1911, which was then referred to as the Copyright Act of 1914).


202 Id.

203 Id.

204 Id.


206 Id.


208 International Intellectual Property Alliance (IIPA), INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 64 (2012), http://www.iipa.com/rbc/2012/2012SPEC301INDIA.PDF.

209 Id.
high prices of music in India and worldwide, hackers have found a way to cross these digital boundaries.\textsuperscript{210}

In India, devices that promote digital circumvention are sold openly to those who are attempting to target entertainment software.\textsuperscript{211} Consequently, the piracy rate in India for the online marketplace is nearly 99 percent.\textsuperscript{212} As a result of digital music being so easy to acquire illegally, the music industry as a whole has suffered a significant loss in revenue. Despite the many amendments to the 1957 Indian Copyright Act, it still fails to provide any significant deterrence to users or distributors of anti-circumvention technology to defend against copyright infringement.\textsuperscript{213} Contrary to American copyright laws, the Indian Copyright Act of 1957 requires a showing of intent to prove copyright infringement, which places a significant burden on the copyright owner.\textsuperscript{214}

India would be able to significantly decrease its piracy statistics by strengthening its copyright laws to include penalties for those involved in the sale or consumption of anti-circumvention technologies. Implementing stricter anti-circumvention laws in India would open the doors to price discrimination. Price discrimination is the practice by which impenetrable digital codes that act as locks that restrict access to copyrighted materials.\textsuperscript{215} This is beneficial because streaming companies can charge lower prices for the use of their services given that their revenue loss due to piracy is annually less significant.

Even with United States and international copyright laws set in place, the music industry is still seeing a rapid decline in music sales and a vast degree of frustration among artists.\textsuperscript{216} Capabilities of digital transmission contributed to the rise of piracy and lower royalty payments for artists. Essentially, these miniscule payouts fall well below minimum wage requirements with no legal remedies offered to artists due to loopholes in copyright laws. Under the Berne Convention, copyright protection extends for 50 years after the authors death. Despite being granted international protection under the Berne Convention, countries are still subject to their domestic copyright laws. For example, if the Berne Convention awards longer protection of ones copyright abroad than it does locally, the copyright will be subject to the reduced duration as enforced by their home country.\textsuperscript{217}


\textsuperscript{212} Id.

\textsuperscript{213} Id.


\textsuperscript{216} Resnikoff, supra note 12.

\textsuperscript{217} Id. (discussing the rule of the "shorter term", noting that not all countries accepted this rule).
IV. ECONOMIC IMPACT

With the introduction of digital streaming services, such as Apple Music, Spotify, Pandora, and Tidal, the physical sale of music mediums continues to decline. As a result, artists are deriving less revenue from the sale of their music, forcing them to rely on income from endorsements, live concerts, and merchandise in order to break even. What many people fail to recognize is that artists often invest a large sum of their own money into the efforts it takes to put out an album. For artists who have a sizeable fan base, this issue becomes less detrimental because they spend less money on marketing campaigns. However, for artists who are newly emerging onto the music scene, they often end up falling into debt simply during the creation phase, making the possibility of advertising to their market a distant dream. Further, even if an artist manages to pull together the necessary funds to create and market their music, it will often set them back financially making it years before they can afford to create more music. Even today’s most popular artists, such as Jay-Z, Taylor Swift, and Kanye West, are seeing less money than they have previously due to the incline in music streaming. While many will argue these artists have already made such a substantial income that a decline in revenue would hardly be injurious to their livelihood, for economic purposes, it is important to view waning incomes on a broader scale. It is a well-known circumstance that those who make less money spend less money, and the less money going into our economy, the worse off the economy is as a whole.

In addition to the fiscal impact music streaming has had on the artists themselves, the rise of piracy, both domestically and internationally, has contributed to this economic decline. In 2014 it was reported that an estimated 750,000 jobs were lost due to online piracy. Typically when thinking of the music industry, what comes to mind are the entertainers. However, there are millions of people who work behind the scenes to produce these albums. When music is made available for free, it becomes so difficult to pay them that they lose their jobs. Moreover, the music industry has seen a decline in the quality of music since the birth of these streaming services.

Since these platforms have made copying, remixing, and
redistribution, such an elementary activity, the world is free to advance their creativity, or lack thereof. The job of a producer to edit individual songs to shape them into the final product can now be done by anyone in their home on their computer. Platforms, such as YouTube, have presented consumers with a decision. Music lovers are faced with the option of listening to music that is subjacent in quality, but free to access or pay for better quality and rationalize paying for something they could have obtained free.

V. SOLUTION

As music-steaming statistics continue to reflect consumer demands, it is obvious that these platforms are here to stay. Last year, 164 billion songs were streamed in America alone, which was a 54 percent growth from the previous year. As the world becomes increasingly exposed to music streaming, courts around the world will be forced to address the issues that accompany the phenomenon. While the United States has the most efficient and stringent copyright laws, the threat of declining revenue in the music industry due to digital streaming services cannot be addressed on a domestic playing field. Given that music is primarily accessed via digital platforms, a single sound recording can be in multiple countries within seconds.

Additionally, American music is in high demand, which makes it more expensive in foreign countries, and thus, more susceptible to piracy. The overwhelming prevalence of piracy today substantially diminishes not only the quality of the music we consume, but the revenues paid to those who create it. Accordingly, requiring all countries that ingest a meaningful portion of the international streaming market to enter into WIPO treaties would heighten standards for effective protection of copyrights and strengthen anti-piracy efforts to deter infringers. It is not enough to simply offer the option of following international copyright standards, such as those parented by organizations such as WIPO. Compelling every country engaged in the use of digital streaming services to adhere to the regulations of WIPO will generate clarity and uniformity in expectations of consumers. Further, this

about-the-decline-of-sound-quality/ (discussing an online documentary that talks about the decline of sound quality and how technology has changed the way we listen to music).

227 Id.
228 Id.
231 Versace, supra note 20.
232 Knopper, supra note 46.
233 Steele, supra note 163.
236 Id.
237 Id.
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certainty will extend to the sanctions imposed upon violators. If those attempting to circumvent intellectual property laws are wholly aware of the implications of their actions, it is likely to deter participation.

Next, copyright laws in the United States and internationally must be amended to impose greater penalties on those who commit violations. In modern society, if an individual steals a tangible object from a store and is caught, they are prosecuted. If it is a reoccurring offense, courts may impose more severe penalties, such as jail time. Today, the United States affords a criminal penalty to copyright infringers of imprisonment up to 5 years per offense. While this is a sufficient penalty to impose, many copyright infringement claims are filed under civil law, which only serve to make the copyright owner whole rather than deter future violations. 

Therefore, all instances of substantial copyright infringement will be subject to criminal sanctions. Conforming intellectual property laws to reflect the criminal laws of the United States when it comes to larceny, would force transgressors to be held accountable for their behavior. Correspondingly, the range of statutory damages to be paid to the copyright holder in the event of willful infringement should be increased. Currently, a transgressor may be liable to the copyright owner in amount not to exceed $150,000 for willful infringement. This number should not be capped and should be determined based on an in-depth analysis of the nature of the infringement, the type of work, and the extent of infringing uses. Placing excessive burdens upon encroachment of copyright owners rights is likely to deter violations of the law.

In addition to implementing consistent laws and stricter penalties, the music industry must establish transparency in the market. Doing so will require all streaming services to make their revenue and royalty payouts public knowledge. If streaming companies know their payouts, or lack thereof, will be released to the public and possibly hurt their reputation for underpayment, it forces them to stand behind their decisions and address any concerns from the public. Of course, not all members of society have an interest in the revenue of musical artists, but even a small amount of consumer push back regarding these services may help to increase artist payouts. With this in mind, the music industry must come to a unanimous consensus on security and revenue models.

Once unanimity has been established, statutorily requiring the fixed royalty rate to be applied to every streaming service across the board will encourage every music-streaming platform to conform to artist demands. The idea behind this solution is that if it is statutorily required that streaming services pay their artists the same percentage per stream, even the less popular artists will be more fairly compensated for their works. It has been argued if streaming services were required to pay even royalties for all artists, they would stop streaming lesser-known artists all together because they cannot afford to do so. In response to this argument, if streaming services paid artists per stream, the amount paid out

242 Id.
244 Resnikoff, supra note 12.
would only be a result of consumer demand for a specific artist’s works. This solution aims to resolve the issue that many artists feel their music is devalued, thus hindering them from creating new works. When all artists are created equal, at least financially, there develops a sense of community among the industry, which levels the playing field.

Finally, a statute that mandates streaming services begin to stray away from “freemiums” should be created.\(^{245}\) This would require every streaming company to demand consumers pay a fee in order to use their service. With this, it shall be statutorily required that streaming services offer a “window” option to artists, which allows them to keep their records from “freemium” playlists, making them only available to paying subscribers.\(^{246}\) This will create incentive for users to acquire a paid membership to these sites as well as entice artists to allow their music to be featured on these platforms.\(^{247}\) Those companies who refuse to comply will be penalized via monetary fines and potential criminal sanctions. While this solution will be an uphill battle to transform an already mature industry, minor changes over a period of time will eventually phase out free listening and pressure users to pay.\(^{248}\)

VI. CONCLUSION

Today’s society is one that continues to prosper off the innovations in technology.\(^{249}\) Technological advances have created a culture that is frenzied by instant access to information, music, and digital content. As a result, music streaming has become mainstream and more people are digitally accessing music than ever before.\(^{250}\) While these advances have benefited our world in many ways, they have also opened the doors to illegal activity, such as piracy and illicit file sharing.\(^{251}\) As a result of music being so easily and freely accessed, sales have plummeted.\(^{252}\) Thus, artists are not being appropriately compensated for their creative works.\(^{253}\) Due to the decline in revenue, artists are less willing to put out music they create because they feel as if they are working for free.\(^{254}\) Consequently, with less people buying music our economy has been impacted. Less money spent is less money going into the economy, which can be noted on a domestic and international scale. With that, the expansion of music streaming has caused the amount of copyright infringement claims to greatly increase.

An amendment to copyright law that would impose stricter penalties for infringers and mandatory registration with WIPO for all countries that stream music, is anticipated to dissuade potential infringers from committing any violating acts. Further, establishing transparency in the market is likely to hold streaming companies accountable for their decisions and force them to justify these decisions to the public. Lastly, beginning to make


\(^{246}\) Id.

\(^{247}\) Id.

\(^{248}\) Id.

\(^{249}\) Albright, supra note 1.

\(^{250}\) Covert, supra note 34.

\(^{251}\) Steele, supra note 163.

\(^{252}\) Resnikoff, supra note 12.

\(^{253}\) Id.

\(^{254}\) Id.
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Steps to clear out the Internet’s warehouse of free music will place pressure on consumers to pay a fee in order to enjoy these services.