

# IN DEFENSE OF COPYRIGHT: RECORD LABELS, CREATIVITY, AND THE FUTURE OF MUSIC

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## INTRODUCTION

There is perhaps no group more maligned in the United States (U.S.) music industry than that of the record labels and their collective trade organization, the Recording Industry Association of America. The four major record labels—Universal Music Group, Sony Music Entertainment, Warner Music Group (WMG), and EMI Music—collectively create, manufacture, and/or distribute nearly 85% of prerecorded music in the U.S. today.<sup>1</sup> Recorded music is not unlike other forms of intellectual property in the U.S., where corporate entities own and/or control the rights in works produced by creators.<sup>2</sup> Like venture capitalists, record labels provide upfront capital, and diversify their assets in an effort to recoup their expenditures and earn a profit from a small percentage of successful investments.<sup>3</sup> For this reason, record labels have become distinctly aware of consumers' music preferences in an effort to appeal to distinct music markets

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1. *Top Record Labels: Artists, Market Share*, USA TODAY (Oct. 10, 2008), [http://www.usatoday.com/tech/products/2008-10-10-367143278\\_x.htm](http://www.usatoday.com/tech/products/2008-10-10-367143278_x.htm). As of Oct. 9, 2008, the music market share was divided as follows: Universal Music Group, 35.12%; Sony Music Entertainment, 22.79%; Warner Music Group, 21.12%; EMI Group, 8.35%; all others, 12.61%. *Id.* See also *Who We Are*, RIAA, <http://riaa.com/aboutus.php> (last visited Apr. 1, 2010).

2. Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 HASTINGS L.J. 441, 442-43 (2001) (discussing the historical development and legal underpinnings of corporate ownership of intellectual property).

3. *C.f.* JOSEPH W. BARTLETT, FUNDAMENTALS OF VENTURE CAPITAL 3-4 (Madison Books 1999) (describing the role of venture capitalism as an "investment process," and explaining that "one investment . . . will return two or three hundred times one's money and justify a drab performance by the rest of the portfolio"). See also INT'L FED'N OF THE PHONOGRAPHIC INDUS., INVESTING IN MUSIC 6 (2010), [http://www.ifpi.org/content/library/investing\\_in\\_music.pdf](http://www.ifpi.org/content/library/investing_in_music.pdf) [hereinafter INVESTING IN MUSIC] ("The core mission of record companies is investing in music....No other party comes close to the levels of investment committed by record companies to developing, nurturing and promoting talent.").

and sell their recordings.<sup>4</sup> Record labels have also developed large-scale infrastructure and distribution mediums, including numerous “imprint” labels dedicated to discovering and promoting artists in both mass and niche markets.<sup>5</sup> This investment, however, comes with considerable risk. To be sure, it is estimated that only 10–20% of artists are commercially successful, and that only 5% of new artists will ever generate a profit great enough to cover the losses of all the other unsuccessful artists.<sup>6</sup>

As music production and distribution has transitioned into the digital realm, music and legal commentators increasingly contend that the record label business model is unsustainable and unnecessary.<sup>7</sup> Whereas labels were once critical to the promotion, manufacture, and distribution of physical albums, commentators suggest that recent technologies may have significantly undercut the traditional advantages enjoyed by major labels.<sup>8</sup> In a world of Pro Tools, iTunes, and MySpace, some argue that artists are fully capable of recording, promoting, and licensing their own music.<sup>9</sup>

The consequences that such theories might have upon the music industry, and upon the U.S. system of music copyright as a whole, are profound. If labels are in fact no longer

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4. See generally Katherine Hoak, *Word-of-Mouth Marketing in the Music Industry: Are Record Labels Communicating Effectively with Their Target Market?* (2006) (unpublished M.A. dissertation, University of Nottingham), available at <http://edissertations.nottingham.ac.uk/668/1/KatherineHoakDissertation2006.pdf> (discussing record labels' efforts in determining consumers' music preferences).

5. See M. WILLIAM KRASILOVSKY ET AL., *THIS BUSINESS OF MUSIC* 277–90 (10th ed. 2007) (describing the role that imprint labels serve in discovering and cultivating new artists).

6. *INVESTING IN MUSIC*, *supra* note 3, at 7 (“Estimates of the success ratio vary between one in five and one in ten.”); see also DONALD E. BIEDERMAN ET AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 709 (5th ed. 2007) (“[V]ery few of the new artists' signings break even; perhaps one in twenty.”); see also Interview with David Hughes, Senior Vice President of Technology, Recording Indus. Ass'n of Am., in D.C. (Mar. 1, 2010) (“[O]ut of twenty new artists, seventeen will lose money, two will break even, and one will earn a profit.”).

7. See, e.g., STEVE KNOPPER, *APPETITE FOR SELF DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* 243–48 (First Free Press 2009); see also Matt Rosoff, *Does the Internet Help Aspiring Rock Stars?*, Post to *Digital Noise*, CNET NEWS (Jan. 22, 2010, 1:46 PM), [http://news.cnet.com/8301-13526\\_3-10439710-27.html](http://news.cnet.com/8301-13526_3-10439710-27.html); Mike Masnick, *The Future of Music Business Models (And Those Who Are Already There)*, TECHDIRT (Jan. 25, 2010, 10:18 AM), <http://www.techdirt.com/articles/20091119/1634117011.shtml>.

8. See KNOPPER, *supra* note 7, at 243.

9. See *id.*; see also Rosoff, *supra* note 7.

necessary to sustain a healthy music market, the fundamentals of music authorship and copyright ownership in the U.S. may undergo significant transformation. Today, recording contracts between record labels and artists weave a complex web of profit-sharing, recoupment, and upfront advances.<sup>10</sup> In a post-label world, artists (and their management) would control all creative and business aspects of their music, including production, marketing, and distribution.<sup>11</sup> Most importantly, however, artists would own the copyright in the music they record, along with the rights to any and all licensing royalties received therefrom.<sup>12</sup>

This Article will evaluate the need for record labels in the digital age, and consider whether fundamental principles of copyright justify record labels' continued ownership and control over sound recording copyright. Part I provides a survey of the recorded music industry, considering the details of artist contracts, including controlled composition clauses, the work made for hire controversy, and the newly minted 360-deals. Part I also sets forth recent challenges to the traditional structure of the recorded music industry, including an analysis of the seminal "long tail" theory of music distribution and consumption online. Finally, Part II analyzes the importance of labels in the music copyright context, and concludes that record labels may be more important today than ever before.

## I. COPYRIGHT, CREATIVITY, AND RECORD LABELS, OH MY!

### A. *English Patronage and The Statute of Anne*

In seventeenth-century England, creators were compensated under a system of patronage whereby wealthy noblemen would consign works from local, and often renowned, artists and authors.<sup>13</sup> In consideration for payment, the artist would create works specifically tailored for the patron, granting full ownership over the work to the

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10. See DONALD PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 61–118 (7th ed. 2009) (presenting an overview of the structure and economics of the recording business).

11. See KNOPPER, *supra* note 7, at 243.

12. *Id.*

13. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 16–17 (Harvard Univ. Press 1993).

benefactor.<sup>14</sup> At the time, many believed that a system in which creators surrendered artistic creativity to the highest bidder was fatal to the integrity and independence of artists and detrimental to modern society.<sup>15</sup> Despite the criticism, patronage thrived and resulted in the creation of many well-known and valued pieces of literary and artistic works; Shakespeare, Da Vinci, and Mozart represent just a few of those who created lasting works of art under a patronage system.<sup>16</sup>

Patronage began to unravel in England with the passage of the Statute of Anne in 1710, which limited copyright in literary works for the first time.<sup>17</sup> By vesting ownership and control of a work with its creator, as opposed to the patron, wealthy nobles lost their power to control and shape societal art.<sup>18</sup> America's framers were not far removed from the English patronage system when they struck a balance

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14. *Id.*

15. Sir Thomas Babington Macaulay, Sec'y at War, Speech Delivered in the House of Commons (Feb. 5, 1841), in FOUNDATIONS OF INTELLECTUAL PROPERTY 309–12 (Robert Merges & Jane Ginsburg eds., 2004); see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 358 (1996) (“[I]n a world with neither copyright nor massive state subsidy, authors would likely rely heavily on private patronage, forcing them to cater to the tastes, interests, and political agenda of the wealthy, rather than seeking a broader, more varied consumer audience.”).

16. See JOHN PHILLIPS, LEONARDO DA VINCI: THE GENIUS WHO DEFINED THE RENAISSANCE 24 (Marshall ed. 2006) (“Leonardo discovered that finding a patron (employer) was no easy task, but it was vital if he wanted to survive as an artist.”); see also JOHN A. RICE, W.A. MOZART, LA CLEMENZA DI TITO 46 (Cambridge Univ. Press 1991) (“Mozart sought Leopold's patronage. One of his purposes in travelling to Frankfurt . . . was probably to impress upon the emperor his eagerness for court patronage.”). See generally PAUL WHITFIELD WHITE & SUZANNE R. WESTFALL, SHAKESPEARE AND THEATRICAL PATRONAGE IN EARLY MODERN ENGLAND (Cambridge Univ. Press 2002).

17. See Richard H. Pildes et al., Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists*, 114 HARV. L. REV. 2438, 2442–43 (2001) (“Aristocratic patronage of the arts survived into the eighteenth century but became less influential after writers acquired legal rights to their work - and the ability to deal directly with printers.”).

18. *Id.*; see Copyright Act, 1709, 8 Ann., c. 19 (Eng.). The Statute of Anne was entitled an “Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein mentioned.” *Id.* See also Laura L. Mendelson, Comment, *Privatizing Knowledge: The Demise of Fair Use and the Public University*, 13 ALB. L.J. SCI. & TECH. 593, 595–96 (“Not in common use in 1709, the Statute of Anne imbued the term ‘author’ with meaning it had not previously wielded. The patronage system . . . did not vest a property right in intellectual work . . . . These notions were the manifestations of the burgeoning market economy in England, and ‘authorship’ was a result of the linguistic and ideological progeny of ‘possessive individualism.’”).

granting authors and inventors a limited monopoly over their works.<sup>19</sup> Congress primarily sought to establish a robust and dynamic marketplace of ideas, as well as reward creativity, by granting creators the right to control and profit from their creations.<sup>20</sup>

### *B. The Development of Copyright in the United States*

The authority and scope of copyright in the U.S. emanates from Article 1, Section 8, Clause 8 of the Constitution, which provides that Congress shall have the power to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective” creations.<sup>21</sup> In *Mazer v. Stein*, the Supreme Court interpreted this clause to mean that the *primary* goal of copyright is to enrich the public domain, relegating the author’s financial compensation as a secondary purpose.<sup>22</sup> As the Court explained:

‘The copyright law, like the patent statutes, makes reward to the owner a secondary consideration’ . . . [;] it is ‘intended definitely to grant valuable enforceable rights to authors, publishers, etc., without burdensome requirements; ‘to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world.’<sup>23</sup>

The Court seemingly revised its constitutional jurisprudence in *Eldred v. Ashcroft*, when it held that the primary/secondary framework “understates the relationship between such rewards and the ‘Progress of Science.’”<sup>24</sup> Instead, the Court recognized that copyright law “celebrates” the profit motive, and that it is the “the engine that ensures

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19. See Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 116–17 (1929).

20. See HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3–6 (Comm. Print 1961) (“The enactment of copyright legislation by Congress under the terms of the Constitution . . . is not based on any natural right . . . but, because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention . . .”).

21. U.S. CONST. art. I, § 8, cl. 8.

22. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see also *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

23. *Mazer*, 347 U.S. at 219 (quoting *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30, 36 (1939)).

24. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2001).

the progress of science.”<sup>25</sup> The Court also dismissed the idea that copyright must serve public and not private ends, and held that instead, “[t]he two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.”<sup>26</sup>

Thus, in evaluating digital music copyright, the central query becomes: In the digital age, what is the best way to enrich and satisfy the public’s demand for music by encouraging creators economically?

### 1. The Legal Rights at Issue

Before turning to the substantive considerations involved, it is important to first consider the nature of music copyright in the U.S. today. The rights of the artist, record label, publisher, and songwriter vary greatly, and should be conceptualized independently of one another. Although rights-owners are distinct, their rights are in many ways dependent upon each other given the multifaceted nature of music copyright and distribution. These fundamental considerations are illustrated below.

Virtually all sound recordings embody two separate categories of copyrightable works: the sound recording itself, and the underlying musical work.<sup>27</sup> The copyright in the musical work—the lyrics and melody—belongs to the author or composer, who typically assigns his or her rights to a publisher for purposes of representation.<sup>28</sup> Statutes grant certain exclusive right to musical works, including the right to publicly reproduce, distribute, and perform.<sup>29</sup> Some of the most common licenses obtained as a part of digital music distribution are public performance and mechanical licenses.<sup>30</sup>

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25. *Id.*

26. *Id.*

27. See 17 U.S.C. § 102(a)(2) (2006) (“Works of authorship include . . . musical works, including any accompanying words . . . .”); § 102(a)(7) (“Works of authorship include . . . sound recordings.”).

28. See generally AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 107–57 (3d ed. 2002) (describing songwriter agreements with music publishers); see also PASSMAN, *supra* note 10, at 206–07.

29. 17 U.S.C. § 106(1), (3)–(4) (2006).

30. See KOHN & KOHN, *supra* note 28, at 1352 (“The form of license that [is] required for the transmission of musical works on the Internet will depend upon the specific use. It will also depend on . . . (i) whether digital downloads will require performance licenses and (ii) whether on-demand streams will require mechanical

As the name suggests, a public performance license is necessary to lawfully perform a composition publicly.<sup>31</sup> A mechanical license, on the other hand, is required when a composition is reproduced—in the form of a vinyl record, compact disc (CD), or digital delivery—and/or distributed.<sup>32</sup>

Sound recording copyright, on the other hand, protects the originality of the musical recording itself, as distinct from the underlying written lyrics or melody.<sup>33</sup> Thus, there may be several sound recordings protecting different versions or “covers” of a single musical work.<sup>34</sup> When new artists contract with a record label, they generally sign a recording agreement assigning to the label all copyright interests in the sound recordings they produce.<sup>35</sup> Further, the recording agreements usually deem the artists’ recordings “works made for hire,” thereby automatically vesting copyright ownership in the record label.<sup>36</sup> This arrangement has led to significant controversy, leading some to accuse the labels of signing struggling artists to unconscionable “contracts of adhesion.”<sup>37</sup> The issue is discussed more fully below.

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licenses.”).

31. See 17 U.S.C. § 101 (2006). (explaining that “to ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process” and to do so “publicly” means to “perform or display it at a place open to the public or at any place where a substantial number of persons . . . is gathered . . .”).

32. See PASSMAN, *supra* note 10, at 209 (“Even though devices haven’t reproduced sounds ‘mechanically’ since the 1940s, the name has stuck and the monies paid to copyright owners for manufacture and distribution are still called mechanical royalties.”).

33. KOHN & KOHN, *supra* note 28, at 1311–12.

34. *Id.*

35. KRASILOVSKY ET AL., *supra* note 5, at 27.

36. See ASCAP’s *Marilyn Bergman Speaks Out on “Work For Hire” Law*, ASCAP, <http://www.ascap.com/legislation/workforhire.aspx> (last visited Nov. 14, 2010).

37. See Ian Brereton, *The Beginning of a New Age?: The Unconscionability of the “360-Degree” Deal*, 27 CARDOZO ARTS & ENT. L.J. 167, 173 (2009).



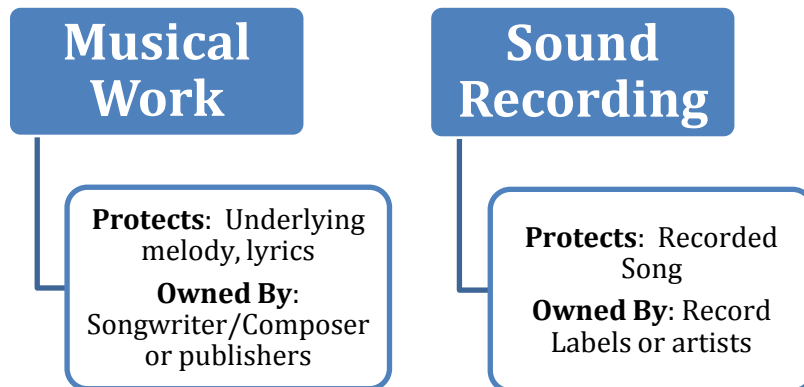


Figure 1. Music Copyright Structure

## 2. The Work Made For Hire Controversy

The Copyright Act of 1976 defines a “work made for hire” as:

- (1) [A] work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.<sup>38</sup>

Legal debate has focused on (1) whether featured vocalists are employees acting within the scope of their employment for purposes of the first prong, and (2) whether featured artist contributions are specially ordered or commissioned as part of a “collective work” or “compilation” for purposes of the second prong.<sup>39</sup> Resolution of these issues is important, because beginning in the year 2013, sound-recording-copyright-owners

38. 17 U.S.C. § 101 (2006).

39. See generally Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002) (noting the ambiguity, legislative uncertainty, and differing opinions concerning the statute’s definition); see also generally Ryan A. Rafoth, *Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-for-Hire When Artists’ Termination Rights Begin Vesting in Year 2013*, 53 VAND. L. REV. 1021 (2000) (summarizing the legal debate surrounding the definition’s application to sound recordings).

will have their first opportunity to exercise the right of termination in sound recordings.<sup>40</sup> If permitted to “terminate” the copyright in their songs, artists would recapture all of the rights they once assigned to their label, and would thereafter be free to exploit and license the works as a rights owner.<sup>41</sup> The right only exists, however, if sound recordings are *not* works made for hire.<sup>42</sup> Importantly, Congress granted termination rights for the express purpose of ensuring that authors or their heirs had an opportunity to reclaim the value in their work(s) “notwithstanding any agreement to the contrary.”<sup>43</sup>

From the record label’s perspective, the possibility that sound recording copyrights will revert to artists presents numerous logistical challenges. For one, record labels typically employ a host of creative professionals to bring an album to fruition, including sound engineers, producers, sound mixers, background vocalists, and musicians.<sup>44</sup> Additionally, dozens of record label employees work to develop the artist’s or band’s creative direction and sound.<sup>45</sup> For purposes of termination, who should be considered the “author” of a song or an album if not the label? Just as it is inconceivable to imagine any one member of a motion-picture production as the “author” of a movie for purposes of copyright termination, so too is it difficult to imagine any one contributor as the author of a sound recording.<sup>46</sup> Similarly, the idea that sound recordings are joint works of authorship presents related problems, given that under the Copyright Act a majority of joint authors must exercise termination.<sup>47</sup> Defining and locating a majority of “authors” for such purposes is both impractical and contrary to the spirit of the “work made for hire” doctrine.<sup>48</sup>

From the artist’s perspective, on the other hand,

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40. See LaFrance, *supra* note 39, at 392–94; see also Rafoth, *supra* note 39, at 1029–30.

41. See 17 U.S.C. § 203(b) (2006).

42. § 203(a).

43. § 203(a)(5).

44. See Abbott M. Jones, *Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings*, 31 HASTINGS COMM. & ENT. L.J. 127, 143 (2008).

45. *Id.*

46. *Id.*

47. § 203(a)(1).

48. See Jones, *supra* note 45, at 144.

termination rights would allow the artist to recapture value in a work that may have been assigned to a label at a time when he or she had little, if any, bargaining power.<sup>49</sup> Indeed, Congress enacted the termination provisions in large part “because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s prior value until it has been exploited.”<sup>50</sup> Considering the balance of equities at stake between the copyright owner and the underlying author, Congress further noted that, “the extended term [following termination] represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.”<sup>51</sup>

Given these competing considerations, however, it is simply not clear whether Congress intended to give featured vocalists the right to terminate record label ownership of sound recordings. Courts will likely take part in resolving this issue when artists and musicians begin to challenge the work made for hire provisions of their recording agreements in 2013 (the first time the right of termination accrues under the 1978 Copyright Act).<sup>52</sup> For purposes of this Article, however, it is important to note that the entire controversy is avoided where an artist records and registers his or her music independently. In such instances, the artist owns all rights in the sound recording copyright, and can exploit and license the works accordingly. Technically, there is nothing precluding today’s artists from owning their own musical work or sound recording copyrights. Despite that fact, however, the vast majority of artists continue to sign with record labels for the risk allocation and upfront financing that the organizations provide.<sup>53</sup> Some artists have even sought to engage in new

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49. *Id.* at 148 (“[T]he right to terminate the transfer of a copyright is arguably the most important right available to an author, especially a fledgling recording artist who has no leverage to bargain for more favorable terms in the initial recording contract.”).

50. H.R. REP. NO. 94-1476, at 124 (1976); *see also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 11.01[A] (Matthew Bender ed. 2007).

51. H.R. REP. NO. 94-1476, at 140.

52. *See* LaFrance, *supra* note 39, at 392–94; *see also* Rafoth, *supra* note 39, at 1029–30.

53. *See* John Jurgensen, *Lady Gaga’s Lessons for the Music Business*, WALL ST. J., Jan. 29, 2010, <http://online.wsj.com/article/SB10001424052748704094304575029621644867154.html> (“Underneath Gaga’s haystack wigs is a case study of what it takes to succeed in the music business today. Gaga, 23 years old, has made shrewd use of new

business relationships in which funding is obtained from non-label investors, including so-called “fan funds” and/or independent investment companies.<sup>54</sup>

### 3. The Rise of 360-Deals

After nearly ten years of declining revenues, record labels recently began adding language to recording agreements that require artists to share a percentage of their overall royalty streams—including merchandise, endorsement, and/or tour ticket sales—in return for greater capital investment.<sup>55</sup> These so-called “360-deals” are controversial because they involve record labels in areas where they have never before been involved.<sup>56</sup> Steve Greenberg, the former president of Columbia Records, defended the deals, explaining:

Say I was considering being the sole investor in a new Italian restaurant being opened by a talented chef . . . . And suppose the chef told me that in exchange for putting up all the money and doing all the work marketing the restaurant, he'd share with me the revenue from the pizza sales—but not the revenue from the sales of pasta, meat, fish, beverages, or anything else on the menu. I can't imagine anyone investing under those terms.<sup>57</sup>

Despite the opposition, 360 provisions have become standard in most new artist recording agreements over the past decade.<sup>58</sup> Some extremely successful artists, including Madonna and Jay-Z, have signed 360-deals with Live Nation, one of the largest concert promoters in the U.S.<sup>59</sup> The multi-million dollar deals not only require the artists to share a percentage of their overall revenues with the company, but also grant Live Nation exclusive touring rights with the

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digital platforms, while *still leveraging the clout of a major label, an institution deemed obsolete by many proponents of DIY culture.*” (emphasis added).

54. See Esther Bintliff, *Investment Fund Backs Singer's Album*, FIN. TIMES, Mar. 10, 2010, [http://www.ft.com/cms/s/0/9a4102b8-2bb2-11df-a5c7-00144feabdc0.html?nclink\\_check=1](http://www.ft.com/cms/s/0/9a4102b8-2bb2-11df-a5c7-00144feabdc0.html?nclink_check=1). For a discussion on these business relationships see *infra* Part II.C.4.

55. PASSMAN, *supra* note 10, at 95–100.

56. See KNOPPER, *supra* note 7, at 243 (“It’s easy to see why bands would resist [360-deals] . . . [m]y knee jerk reaction would be [to say] ‘no way,’ because [merchandise and tour royalties are] something that’s been sacred for so long.” (quoting artist manager Jordan Kurland)).

57. *Id.* at 242.

58. PASSMAN, *supra* note 10, at 95.

59. See Emily Friedman, *Record Labels Struggle to Stay Relevant*, ABC NEWS (Apr. 4, 2008), <http://abcnews.go.com/Entertainment/Music/story?id=4584564>.

artists for the duration of the contractual term.<sup>60</sup> In return, Live Nation provides the artists with stock options and enormous signing bonuses.<sup>61</sup>

Two emerging artists who have signed to the new 360-deals include Lady Gaga and British sensation Little Boots.<sup>62</sup> WMG, who signed Little Boots to a 360 recording-contract, does more than just passively collect from Little Boots's secondary income streams;<sup>63</sup> instead, the label has "specialist teams" dedicated to forming brand partnerships, creating and distributing limited edition merchandise on behalf of the artist, and establishing a global social network to enable fans to view exclusive content and merchandise.<sup>64</sup> The result of such an investment seems to have paid off. Little Boots has enjoyed significant success largely due to her agreement with WMG, topping both the British and European albums charts.<sup>65</sup>

In sum, the 360-deals provide record labels with a greater portion of artist royalties while simultaneously committing the music companies to investments that cover a wide range of an artist's professional activities.<sup>66</sup> Moreover, because artists traditionally only received royalties for album sales from their record label, the new 360-deals "benefit an artist's longevity and mean[] there is not the same pressure on an artist to go into the recording studio in order to recoup their heavy investment costs."<sup>67</sup>

Despite the increased investment, some have criticized

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60. *See id.*

61. *See* Jeff Leeds, *In Rapper's Deal, a New Model for Music Business*, N.Y. TIMES, Apr. 3, 2008, <http://www.nytimes.com/2008/04/03/arts/music/03jayz.html> ("Jay-Z plans to depart his longtime record label, Def Jam, for a roughly \$150 million package with the concert giant Live Nation . . ."); *Madonna Moves On*, N.Y. TIMES, Oct. 17, 2007, [http://www.nytimes.com/2007/10/17/arts/music/17arts-MADONNAMOVES\\_BRF.html](http://www.nytimes.com/2007/10/17/arts/music/17arts-MADONNAMOVES_BRF.html) ("Financial terms, which included \$25 million in stock, were not disclosed, but a person familiar with the arrangement said it was valued at \$120 million over 10 years.").

62. INVESTING IN MUSIC, *supra* note 3, at 18; *see also* Jurgensen, *supra* note 53.

63. INVESTING IN MUSIC, *supra* note 3, at 18.

64. *Id.*; *see also id.* at 19 (quoting a record label executive as explaining, "[we] don't offer services where we have no expertise, but we've built up teams that specialize in synch deals, brand partnerships and merchandising, which are all growth areas").

65. *Id.* at 18.

66. *Id.* at 17 ("We're helping Katy Perry build her profile outside her music work. We also work on artists' visual images, whether that be through a webisode on their social networking page or even, as recently with Iron Maiden, a full-blown film documentary.").

67. *Id.* at 19.

360-deals as adverse to artists' interests.<sup>68</sup> Greater upfront investment by the label means that it may take even longer for the artist to realize record royalties.<sup>69</sup> The labels argue, however, that the 360-deals allow for greater investment in new acts, and thus benefit the public as much as they do the artists and labels.<sup>70</sup> By sharing in the proceeds from merchandise, endorsement deals, and touring revenues, record labels are more apt to invest in acts that do not necessarily sell the most recordings.<sup>71</sup> As the chairman of Atlantic Records opined, "[i]f we weren't so mono-focused on the selling of recorded music, we could actually take a really holistic approach to the development of an artist brand . . . . What's the healthiest decision to be made, not just to sell the CD but to build the artist's fan base?"<sup>72</sup> At a time when recorded music sales have plummeted, 360-deals provide the necessary return to ensure that labels invest in a broad range of new talent, which serves the interests of artists, labels, and most importantly, the public.

#### 4. The Nature of Risk in the Recording Industry

An often overlooked aspect of the artist-label relationship is the nature of the risk undertaken by a record label when signing a new act. When a label signs a new artist, the company generally provides that artist with a large, up-front cash advance.<sup>73</sup> The cash advance is then used by the artist to create the album and pay for living expenses.<sup>74</sup> Labels also

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68. Jeff Leeds, *The New Deals: Bands as Brands*, N.Y. TIMES, Nov. 11, 2007 <http://www.nytimes.com/2007/11/11/arts/music/11leed.html> ("Many talent managers view 360s as a thinly veiled money grab and are skeptical that the labels, with their work forces shrinking amid industrywide cost cutting, will deliver on their promises of patience.").

69. See *id.* (noting one structure of a 360-deal whereby an artist receives a cash advance, but does not receive any royalties until the label recoups its expenses); see *infra* notes 73–84 and accompanying text (explaining how royalties are paid under recording agreements).

70. See Leeds, *supra* note 68.

71. *Id.* ("Rap acts, for example, might lose out, since their recordings can be expensive to produce and very few become touring successes. On the other hand, rappers can attract lucrative endorsements for products from sneakers to computers to soft drinks; many have started apparel lines. With an eye to a piece of that potential revenue, Atlantic recently signed the Brooklyn rapper Maino to a 360-style pact.").

72. *Id.*

73. PASSMAN, *supra* note 10, at 79–83.

74. *Id.*

usually agree to subsidize music-video production, a promotional tour, and all promotional, manufacturing, and distribution costs.<sup>75</sup> Should the artist achieve commercial success, the artist receives a percentage of album royalties only after her account has been fully “recouped”; this means that no royalties will accrue to an artist until all of the advances made to the artist have been repaid to the label out of the artist’s share of royalties.<sup>76</sup> In cases where the artist never achieves commercial success—as is the case with the majority of new artists—the label does not require the artist to repay its investment.<sup>77</sup> Record labels undertake significant risk in signing artists and must recoup their expenses and earn a profit on the commercial success of a few.<sup>78</sup> Record labels then use such profits to invest in the next generation of artists.<sup>79</sup>

Specifically, record labels provide a typical new artist with over \$1,000,000 in capital to promote a new album, while providing more established artists with nearly \$5,000,000 in total funding.<sup>80</sup> New artists generally receive a \$200,000 advance for personal expenses, which allows the artists to concentrate on their creative work, and an additional \$200,000 for recording costs.<sup>81</sup> On average, the label pays another \$300,000 for artist promotion and marketing, \$200,000 for music videos, and \$100,000 to fund the artist’s first promotional tour.<sup>82</sup> The impact of record label investment, however, extends far beyond the payments made to artists. The investments also provide a beneficial “ripple effect” across the economy.<sup>83</sup> “In practical terms, record labels’ investment touches an enormously broad music community. They directly purchase services from songwriters, music publishers, recording studios, video

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75. INVESTING IN MUSIC, *supra* note 3, at 10.

76. PASSMAN, *supra* note 10, at 79–83.

77. *Id.* at 81–82.

78. BIEDERMAN ET AL., *supra* note 6, at 709 (“[V]ery few of the new artists’ signings break even; perhaps one in twenty.”).

79. INVESTING IN MUSIC, *supra* note 3, at 7 (“Achieving commercial hits is the basis of the ‘circle of investment’, by which music companies plough back the revenues generated by successful campaigns to develop new talent and help fund the next generation of artists.”).

80. *Id.* at 9.

81. *Id.*

82. *Id.*

83. *Id.* at 11.

directors, PR and advertising firms. They buy advertising space on television and radio station, in newspapers and magazines and from outdoor advertising companies.”<sup>84</sup>

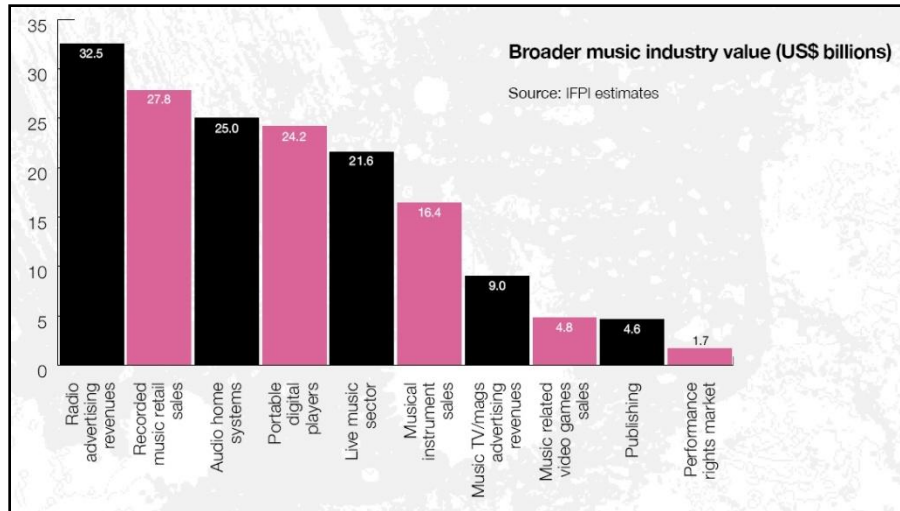


Figure 2. Broader Music Industry Value (in billions)<sup>85</sup>

To some, record label investment is akin to the early English patronage system, whereby authors and artists are paid to conform to the artistic desires of their patron.<sup>86</sup> The role of the record label, however, is better characterized as that of an investor, similar to those in other industries. Indeed, this is precisely how the venture capital firms of Silicon Valley have operated for decades, resulting in the establishment of companies such as Apple, Yahoo!, and Google.<sup>87</sup> Moreover, other creative industries similarly rely on

84. *Id.*

85. Reprinted with permission from INVESTING IN MUSIC, *supra* note 3, at 11.

86. *See supra* notes 13–15 and accompanying text.

87. *See Apple Chronology*, CNNMONEY (Jan. 6, 1998, 6:26 PM), [http://money.cnn.com/1998/01/06/technology/apple\\_chrono](http://money.cnn.com/1998/01/06/technology/apple_chrono) (discussing Apple Inc.’s early financing process); Eric Schmidt, *The Time 100: Michael Moritz*, TIME, (May 3, 2007), [http://www.time.com/time/specials/2007/time100/article/0,28804,1595326\\_1615737\\_1616199,00.html](http://www.time.com/time/specials/2007/time100/article/0,28804,1595326_1615737_1616199,00.html) (describing Sequoia Capital’s investment in Yahoo!); Verne Kopytoff et al., *For Early Googlers, Key Word Is \$\$\$*, S.F. CHRON., Apr. 29, 2004, at A.1 (“[T]he venture capital firms Sequoia Capital and Kleiner Perkins Caufield & Byers . . . invested a combined \$25 million in Google in 1998 for an estimated 40 percent stake.”); *see also supra* note 3 and accompanying text.



an investment-backed structure in which production companies finance the costs of development, promotion, and distribution of a large number of works, and earn a profit on the success of a few.<sup>88</sup>

Historically, record labels were considered crucial to the development and marketing of new artists.<sup>89</sup> The labels controlled the recording studios, producers, marketing teams, and the network of manufacturing and distribution centers located throughout the country.<sup>90</sup> With the advent of the Internet, however, new software and computer technologies have reduced or eliminated many of the traditional barriers to entry.<sup>91</sup> Whereas physical products like CDs required complex manufacturing and distribution networks, services like iTunes and Tunecore allow virtually any artist to post and sell his or her songs online.<sup>92</sup> Similarly, it is no longer necessary for artists to record in the exclusive studios owned by labels.<sup>93</sup> With the advent of low-priced recording software like Pro Tools and Garage Band, aspiring artists can record and mix high-quality recordings in the comfort of their own homes.<sup>94</sup> By permitting artists to appeal to millions of consumers in new, personalized ways, sites like YouTube, Myspace, and Facebook have significantly streamlined marketing strategies.<sup>95</sup> The combination of these factors has led many to proclaim the impending death of record labels and the emergence of an era of greater musical diversity and consumer choice.<sup>96</sup> The artist is expected to enjoy enhanced creative freedom and financial control over his or her works in

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88. See Jared Wade, *On Location: The Risks of Movie Production*, ALL BUSINESS (Dec. 1, 2004), <http://www.allbusiness.com/finance/insurance-risk-management/999145-1.html> (“At its core, producing a film is an inherent risk where millions of dollars are put into a Project that depends on the opinion of a fickle population.”); Lev Grossman, *Books Gone Wild: The Digital Age Reshapes Literature*, TIME (Jan. 21, 2009), <http://www.time.com/time/magazine/article/0,9171,1873122,00.html> (discussing the nature of risk in the book publishing industry).

89. See Friedman, *supra* note 59.

90. See *id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See John T. Holland, Note, *Making Money Instead of Excuses: A Market-based Alternative to the Digital Millennium Copyright Act that Protects Copyrights Without Diminishing Expression*, 7 GEO. J.L. & PUB. POL’Y 279, 296 n.106 (2009) (describing artists who use Garageband and ProTools to record their music).

95. See Friedman, *supra* note 59.

96. See *id.*

an industry without labels—where music can be shared and licensed in new and innovative ways.<sup>97</sup>

Despite the rise in technological innovation, however, it is estimated that the production cost of a pop-rock album is still over \$200,000, which encompasses the creative efforts of studio producers, sound engineers, and session musicians.<sup>98</sup> Furthermore, technologically advanced home-recording equipment is not able to produce the same audio quality as recording studios.<sup>99</sup> Indeed, “it is a myth that sound quality no longer matters in the digital age. On the contrary, record label executives say it is a huge issue.”<sup>100</sup> As one label executive stated:

Tracks might sound entirely different on a PC, an iPod or in a club. You have to tick all the boxes and find a way that it will sound fantastic on a portable player through cheap headphones, but also sound phat on a system in a club. It drives the track’s success if it is played in a DJ club set.<sup>101</sup>

Arguments that the costs associated with the recording industry have plummeted seem largely exaggerated given the hefty investments made by record labels today. By focusing solely on the costs of digital distribution and reproduction, commentators seemingly ignore other important (and costly) record label functions. As one record label executive describes, “[j]ust because stuff is on the internet, it doesn’t mean anyone is listening to it. You need to have something to say, to put some emotion into it, and have a team that can help you get your message across effectively.”<sup>102</sup> Record labels do not merely look for artists with talent, “but [for] people who have a vision of how they want their career to progress. They are also looking for stamina, charisma, and resilience.”<sup>103</sup>

### C. *The Long Tail Myth*

The theory of digital egalitarianism reached its zenith in 2006 when *Wired Magazine* editor Chris Anderson released

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97. *See id.*

98. INVESTING IN MUSIC, *supra* note 3, at 20.

99. *Id.* at 21.

100. *Id.*

101. *Id.*

102. *Id.* at 26.

103. *Id.* at 13.

his book *The Long Tail*.<sup>104</sup> Anderson surmised that decreased barriers to entry on the Internet allow consumers access to more music than ever before.<sup>105</sup> The traditional structure—in which commercial success is enjoyed by only a small number of hits (the “head”) while a large number of obscure independent songs are unable to achieve success due to record label market control (the “tail”)—would be turned on its head.<sup>106</sup> Anderson’s “long tail theory” posits that in the digital age, consumers will increasingly venture deeper into the tail, which will result in a shortening of the “head” of music consumption and a growth in the size of the “tail.”<sup>107</sup> Anderson predicted that the future of digital consumption would be about selling less of more.<sup>108</sup> Figures 3 and 4 represent Anderson’s interpretation of music consumption both before and after the theorized long tail digital revolution.

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104. See generally CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (Random House Bus. Books 2006).

105. *Id.* at 3–4.

106. See *id.* at 52–53.

107. *Id.*

108. *Id.*

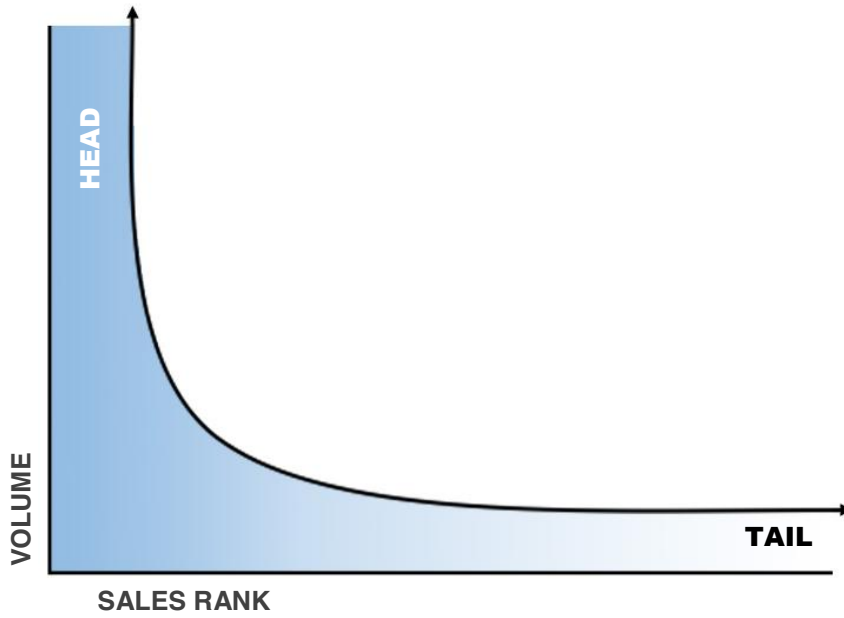


Figure 3. Traditional Long Tail Theory of Music Distribution

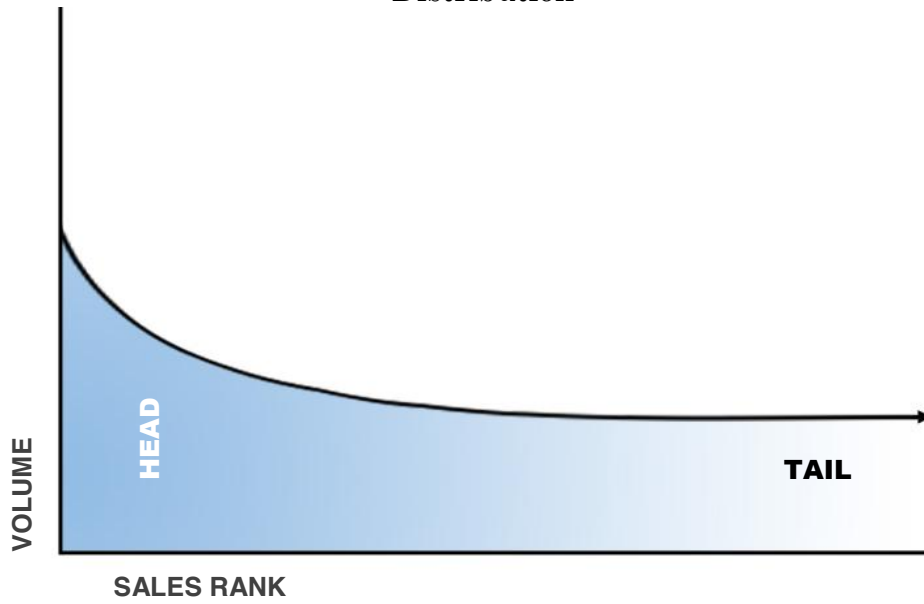


Figure 4. Anderson's Digital Long Tail Theory of Music Distribution

In his book, Anderson argues that the era of the hit-based music market has been upset by the emergence of peer-to-peer and other music distribution platforms online.<sup>109</sup> “Today,” Anderson explains, “music fans are trading more than [eight] million unique tracks, almost all of them far outside the *Billboard Hot 100*.”<sup>110</sup> Based on his research, Anderson concludes that the concept of hit songs will give way to the new “micro-hit” market, in which music fans adopt a more diverse musical appetite.<sup>111</sup> Anderson extrapolates his findings across other forms of content, including newspapers and movies, concluding that in each of these industries, the hit-driven culture is nearing an end.<sup>112</sup>

If correct, Anderson’s theory has several important implications for the recording industry and copyright law more generally. From a policy perspective, many assume that record labels provide the greatest benefit to the public by investing in artists and recordings that would otherwise be far too expensive and complex for individual artists to release and market on their own. If the Internet encourages artists to create and distribute a greater and more valuable body of works to the public, however, the traditional rationale for record labels’ ownership of sound recording copyright may no longer be justified. Such a shift could also spell the end of the work-made-for-hire and 360-deal controversies, meaning that artists could freely bequeath or alienate their sound recordings, including all associated licensing rights to their heirs and assignees for the remainder of the copyright term.

Anderson’s predictions, however, conflict with an ever-growing body of empirical evidence. The following section will consider recent studies that have tested and largely disproved Anderson’s theory, suggesting that music consumption has remained relatively unchanged during the digital transition.

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109. *Id.* at 33–34.

110. ANDERSON, *supra* note 104, at 33.

111. *Id.* at 34–35.

112. *Id.* at 37–40.

## II. THE CONTINUING NEED FOR RECORD LABELS IN THE DIGITAL AGE

### A. *Debunking the Long Tale*

In 2008, economists Will Page and Andrew Bud sought to investigate Anderson's long tail theory by analyzing one year's worth of online music sales on the Apple iTunes music service.<sup>113</sup> The results of the study directly contradict Anderson's findings and underlying theory.<sup>114</sup> Page and Bud found that 80% of digital revenues came from only 52,000 songs, or just 0.4% of all songs available.<sup>115</sup> This is roughly equivalent to the number of songs traditionally found in a record store.<sup>116</sup>

With regard to album sales, Page found that only 173,000 albums—out of a total availability of 1.3 million—were purchased.<sup>117</sup> This shows that 85% of albums online *never sold a single copy during the one year period of the study*.<sup>118</sup> Page concluded that “[t]he statistical theories used to justify [the long tail] theory were intelligent and plausible. But they turned out to be wrong. The data tells a quite different story. For the first time, we know what the true demand for digital music looks like.”<sup>119</sup> Page went on to say that he found “similarity between a digital and high-street retailer in terms of what constitutes an efficient inventory and the shape of their respective demand curves. I think there's something more going on there: a case of new schools meets old rules.”<sup>120</sup>

Anderson responded to the Page study by stating, “[there is] no doubt that [Page] has indeed found a dataset where [the long tail] doesn't work, but I'm not sure you can conclude

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113. Andrew Orłowski, *Chopping the Long Tail Down to Size*, Post to *Music and Media*, REGISTER (Nov. 7, 2008), [http://www.theregister.co.uk/2008/11/07/long\\_tail\\_debunked](http://www.theregister.co.uk/2008/11/07/long_tail_debunked).

114. See generally Chris Keall, *The 'Long Tail' Myth*, NAT'L BUS. REV. (Feb. 9, 2009), <http://www.nbr.co.nz/opinion/chris-keall/the-long-tail-myth>.

115. *Id.* (quoting Richard Webb, *Online Shopping and the Harry Potter Effect*, 2687 NEW SCIENTIST 52 (Dec. 20, 2008)).

116. Orłowski, *supra* note 113.

117. Patrick Foster, *Long Tail Theory Contradicted as Study Reveals 10M Digital Music Tracks Unsold*, TIMES ONLINE (Dec. 22, 2008), [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/music/article5380304.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article5380304.ece).

118. See *id.*

119. *Id.*

120. *Id.*

much, if anything, beyond that. If [Page is] trying to undermine the entire Long Tail Theory, he'll have to provide a lot more evidence."<sup>121</sup> If, by this statement, Anderson concedes that music sold on iTunes, the largest digital music retailer, does not conform to his Long Tail Theory, the implications may be more significant than Anderson is prepared to acknowledge.

Harvard Business School Professor, Anita Elberse, made findings similar to Page's in 2008 when she studied on-demand music streamed on the music service Rhapsody.<sup>122</sup> Elberse found that 10% of the music titles available on Rhapsody account for 78% of all songs played.<sup>123</sup> Professor Elberse also studied movie rentals on Quickflix (the Australian equivalent of Netflix) and made nearly identical findings.<sup>124</sup> The results led Elberse to conclude that "[r]ather than bulking up, *the tail is becoming much longer and flatter.*"<sup>125</sup>

The results of both Page and Elberse's studies suggest that consumer demand for music has remained fairly constant despite the digital transition, with the vast majority of sales clustered around a small group of extremely popular titles. Although it is true that the Internet has enabled some artists and bands to "jump" from obscurity to stardom (or from the "tail" to the "head"), the jump is almost always followed by a deal with a major label.<sup>126</sup> Moreover, meteoric jumps are not uncommon in the music industry, as when, for example, an unknown artist attains worldwide success after a season of *American Idol*.<sup>127</sup> Figure 5 demonstrates Page and Elberse's

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121. *Id.*

122. Anita Elberse, *Should You Invest in the Long Tail?*, HARV. BUS. REV., July–Aug. 2008, at 88, 91, available at <http://hbr.harvardbusiness.org/2008/07/should-you-invest-in-the-long-tail/ar/1>.

123. *Id.* at 91.

124. *Id.* at 91–92.

125. *Id.* at 92. (emphasis added).

126. See, e.g., Scott Colothan, *Arctic Monkeys Sign £1million Publishing Deal*, GIGWISE (Oct. 7, 2005), <http://www.gigwise.com/article.php?contentid=9106> (indicating that the Arctic Monkeys, a band that achieved Internet fame and was initially anti-label, signed a £725,000 deal with Epic Records). See *Arctic Monkeys*, WARNER BROS. + REPRIS RECS., <http://www.warnerbrosrecords.com/artists/arctic-monkeys>. It now appears that the Arctic Monkeys are represented by Warner Brothers Records, which is a subsidiary of Warner Music Group, one of the four largest record labels in the U.S.. See WARNER MUSIC GROUP, <http://www.wmg.com> (follow "recorded music" hyperlink).

127. See, e.g., *Kelly Clarkson Is Most Successful 'Idol' Contestant, Billboard Says*,

findings with respect to music consumption online.

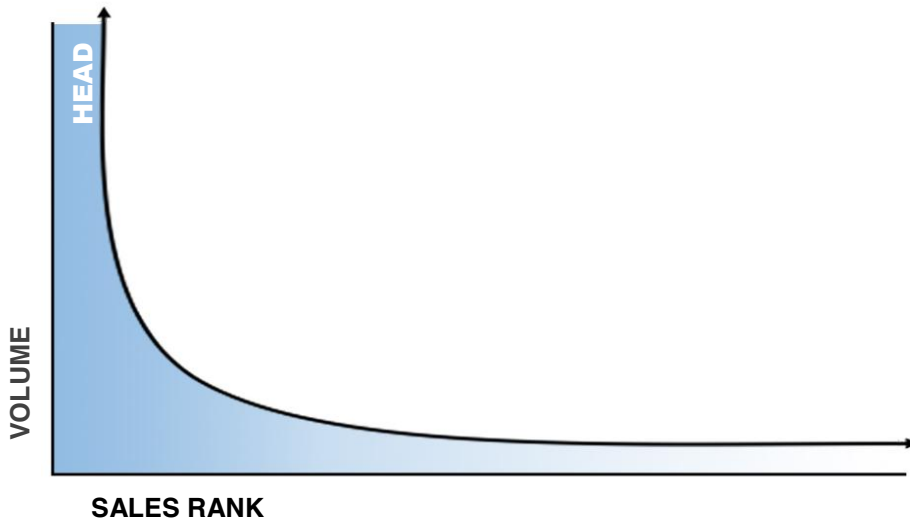


Figure 5. Elberse & Page Long Tail Theory of Music Distribution Online

Glenn Peoples of *Billboard Magazine* conducted his own analysis of music sales and concluded, “[f]rom 2004 through October 2009, the most popular tracks have steadily and consistently grabbed market share—and tens of millions in unit sales—from less popular songs . . . . The top 200 tracks—that’s just 0.002% of the nearly 9 million currently listed at Amazon—have a market share of 18.7%.”<sup>128</sup> Ultimately, Peoples rejects Anderson’s contention that the future of music is selling less of more and argues that “retailers would be wise to continue to steer consumers toward” the most popular titles.<sup>129</sup>

Finally, Tom Silverman, founder of Tommy Boy Records, found that in 2008 only *twelve* albums released by

CLEVELAND.COM (May 5, 2010), [http://www.cleveland.com/tv/index.ssf/2010/05/kelly\\_clarkson\\_is\\_most\\_success.html](http://www.cleveland.com/tv/index.ssf/2010/05/kelly_clarkson_is_most_success.html).

128. Glenn Peoples, *Don't Bury the Blockbuster Yet. The Most Popular Digital Tracks Account for More Sales Every Year*, BILLBOARD MAG., Nov. 14, 2009, at 24, 26, available at [http://www.billboard.biz/bbbiz/content\\_display/magazine/features/e3i35ed869fbd929ccdcca52ed7fd9262d3](http://www.billboard.biz/bbbiz/content_display/magazine/features/e3i35ed869fbd929ccdcca52ed7fd9262d3).

129. *Id.* at 28.



independent, unsigned artists sold more than 10,000 units.<sup>130</sup> This accounts for only 5% of the 225 albums released by artists who surpassed 10,000 units for the first time in their careers.<sup>131</sup> Commenting on Anderson's theory, Silverman reflects, "I can say with great authority that less new music is breaking now in America than any other time in history. Technology has not helped more great music rise to the top, it has inhibited it. I know this is a bold statement but it is true."<sup>132</sup>

It would seem, then, with regard to music sales, the inverse of Anderson's theory is true; namely, that music has become increasingly *more* concentrated around hits in the digital era. Thus, while the tail of consumption is in fact growing longer, it also has become much thinner overall.<sup>133</sup> One explanation for the shift may be that "popular taste tends to reinforce itself, especially in an online world."<sup>134</sup> Another influential music commentator has opined, "[t]he same way that it's easy for [an artist] to set [online music distribution] up, it's easy for *everybody* to set this up . . . . [T]here are over four million bands on MySpace, and that number is growing. How's anyone going to find your music?"<sup>135</sup> The problem is not making music available online; it is getting anyone to hear it, let alone to buy it.

Instead of a long tail theory of consumer distribution, some commentators contend that digital music consumption follows a much more traditional model.<sup>136</sup> John Goodell Brown postulated in 1957 that consumer consumption generally follows a "log-normal" distribution curve.<sup>137</sup> In log-normal

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130. *State of the Music Industry Part 3*, MUSICIAN COACHING.COM (Jan. 20, 2010), <http://musiciancoaching.com/music-business/state-of-the-music-industry-part-3> (posting an interview with Tom Silverman).

131. *Id.*

132. *Id.*

133. Peoples, *supra* note 128, at 26.

134. *Id.*; see also Daily Mail Reporter, *Following the Herd: Fear Dictates What Music Teenagers Listen To*, MAIL ONLINE, <http://www.dailymail.co.uk/news/article-1261493/Following-herd-Fear-dictates-music-teenagers-listen-to.html> (last updated Mar. 29, 2010) ("[A] new study has found that adolescents choose to listen to music that has been approved of by their peers rather than because they like it.").

135. PASSMAN, *supra* note 10, at 85. *Accord* INVESTING IN MUSIC, *supra* note 10, at 5 ("In an age where there are more than 2.5 million hip hop artists and 1.8 million rock acts registered on MySpace, discovery, development, collaboration, marketing and promotion from music companies are more crucial than they ever were.").

136. Orłowski, *supra* note 113.

137. *Id.*

distribution, consumption peaks around a discrete number of popular products in any given market.<sup>138</sup> Brown's curve is illustrated in Figure 6 below. According to one commentator, the idea that digital consumption followed a more traditional model "dismayed many early Web 2.0 evangelists."<sup>139</sup> "The Long Tail helped bolster morale—although its success owed much to sloppy thinking—and in particular, metaphorical logic."<sup>140</sup>

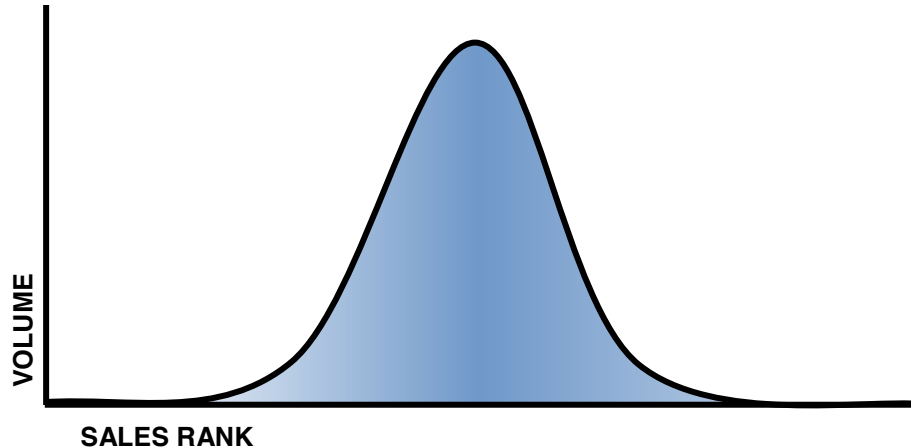


Figure 6. Brown's Log-Normal Theory of Consumption

One final contention of Anderson is worth noting. Although Anderson acknowledges the growing prevalence of illegal methods of digital music distribution, such as peer-to-peer file-sharing services, he brushes aside such concerns and concludes that based on evidence from the leading online analyst BigChampagne, there has been a "shift from hits to niche artists" on peer-to-peer file-sharing services.<sup>141</sup> In other words, Anderson suggests that the unauthorized distribution of music online has actually *benefited* the public by exposing listeners to a greater variety of music that they highly value.<sup>142</sup> Five years later, empirical evidence again contradicts Anderson's theory. BigChampagne's CEO, Eric

138. See generally LOGNORMAL DISTRIBUTIONS: THEORY AND APPLICATIONS (Edwin L. Crow & Kunio Shimizu eds., 1988).

139. Orłowski, *supra* note 113.

140. *Id.*

141. ANDERSON, *supra* note 104, at 33.

142. See *id.*

Garland, recently conducted a study where he examined the types of songs traded on peer-to-peer services.<sup>143</sup> Not surprisingly, the study found that peer-to-peer services engender “a very hit-heavy, skinny tail profile.”<sup>144</sup> The report went on to conclude, “[w]e are yet to see a big hit or wildly popular release in the pirate market *that was not also a top seller in the licensed market.*”<sup>145</sup>

### *B. Significance of the Long Tail Debate*

For decades, record labels have invested significant sums in recorded music, retaining the intellectual property in consideration for the significant and risky up-front costs they expend.<sup>146</sup> Distribution costs of music have decreased online, leading some to question whether labels are still relevant in the digital era.<sup>147</sup> These same commentators, however, seemingly fail to recognize the *increasing* importance of other areas of label involvement, including promotion, marketing, tour support, and capital funding. As Peter Fader, a marketing professor at Wharton Business School elucidated:

There’s a great and sad analogy [to newspapers] with what’s going on in the music industry, where we all figure the record labels will just go away, because they’re not savvy about digital this and that. But . . . the labels are wonderful . . . at identifying good artists and basically telling us which ones we should be listening to—and, for the most part, we pay attention to that. There always will be a few iconoclasts out there who would rather find stuff on their own. They enjoy the hunt. But for most people, they just want to have things served up to them. A lot of people go to The New York Times not only to see The New York Times’ own unique opinion on things, but just what stories they should be paying attention to in general.<sup>148</sup>

The Internet has thrown open the floodgates of music, offering consumers more selection than ever before. As the

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143. Robert Andrews, *Music Research: Legal Hits Just as Dominant on P2P*, PAIDCONTENT:UK (May 13, 2009), <http://paidcontent.co.uk/article/419-research-p2p-patterns-look-just-like-legal-music-downloads>.

144. *Id.*

145. *Id.* (emphasis added).

146. *See supra* Part II.B.4.

147. *See supra* note 7 and accompanying text.

148. Glenn Peoples, *How Will Record Labels, Newspapers Survive?*, BILLBOARD.BIZ (Feb. 22, 2010), [http://www.billboard.biz/bbbiz/content\\_display/industry/e3i5a7bc96eb52f8d101404ae277f9cc2e3](http://www.billboard.biz/bbbiz/content_display/industry/e3i5a7bc96eb52f8d101404ae277f9cc2e3).

previously discussed studies demonstrate, however, increased access to music does not suggest that consumers' appetite for music has changed or that record labels have artificially restricted musical diversity or creativity.<sup>149</sup> To the contrary, the studies demonstrate that record labels successfully satisfy consumer demand by providing *useful* art to consumers. Without record labels, the long tail would likely grow even longer, requiring consumers to sift through thousands or perhaps millions of songs in hopes of stumbling upon a hit. Labels provide expertise in determining which songs and artists will appeal to specific groups of consumers, and invest significantly to market and promote their selections.<sup>150</sup> A review of *Billboard's* Top 100 most popular songs affirms the continuing popularity of label-funded music and artists.<sup>151</sup> To say that labels are no longer necessary because of technological advances facilitating the production and distribution of music is to ignore and devalue the specialized role that the Artist & Repertoire, Promotion and Marketing, Creative Services, and Business & Legal Affairs departments provide for artists and the recordings that they produce.<sup>152</sup> The argument also overlooks the significant investment made by record labels in new artists, including living expenses, recording budget, tour support, music video funding, and more.<sup>153</sup> As discussed above, it is estimated to cost over \$1.5 million to promote a new pop act and over \$1 million to market a new rock act.<sup>154</sup>

Moreover, transitioning music to the digital realm has been an expensive undertaking. Record labels have spent hundreds of millions of dollars to create and maintain a robust digital music marketplace.<sup>155</sup> Beginning around 1999,

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149. See *supra* Part I.A.

150. INVESTING IN MUSIC, *supra* note 3, at 6.

151. See generally *The Billboard Hot 100*, BILLBOARD MAG., MAR. 14, 2009, at 46.

152. See Carrie Brownstein, *Roundtable Discussion: The Role of the Record Label*, Post to *Monitor Mix*, NPR (Nov. 16, 2009), [http://www.npr.org/blogs/monitormix/2009/11/roundtable\\_discussion\\_the\\_role\\_1.html](http://www.npr.org/blogs/monitormix/2009/11/roundtable_discussion_the_role_1.html) (quoting Indie record label owner Portia Sabin that record labels are still relevant as "a filter, a bank, a promo machine[, and a] source of contacts in the industry").

153. *Id.*

154. INVESTING IN MUSIC, *supra* note 3, at 25.

155. See Testimony of David Hughes, Adjustment of Rates & Terms for Preexisting Subscription Servs. & Satellite Digital Audio Radio Servs., No. 2006-1 CRB DSTR, 37 C.F.R. pt. 382 (Copyright Royalty Bd. Oct. 2006) [hereinafter Testimony of David Hughes], available at <http://www.loc.gov/crb/proceedings/2006-1/soundex-hughes.pdf>.

record labels spent considerable time and resources converting their analog magnetic tapes to a digital format.<sup>156</sup> In some instances, this involved the arduous process of “heat-treating” the original or “master” copy of a record in order to reduce degradation in audio fidelity.<sup>157</sup> Once the songs were converted, record labels had to create “virtual, server-based” libraries to host their enormous music catalogs which consisted of tens-of-thousands of songs.<sup>158</sup> These virtual servers still exist today and are maintained at great costs to the labels.<sup>159</sup>

Other digital music costs include metadata management—which involves linking song, artist, and cover art to a particular song or album—and development of core technologies to enable digital distribution.<sup>160</sup> Perhaps most relevant to music distribution today, however, is the highly technical and expensive contract management and royalty accounting systems, which provide a backbone to all legitimate music sales.<sup>161</sup> This “back-end” system allows for the “tracking and payment of royalties and other payments to artists, publishers, songwriters, producers . . . and other parties who have a financial interest in the relevant income streams.”<sup>162</sup> To ensure that music creators receive proper compensation, record labels created digital accounting systems to distribute royalties seamlessly and automatically to the parties involved in music creation.<sup>163</sup> The implementation of such systems not only required an enormous initial investment, but represents a continuing operating cost for the labels.<sup>164</sup> Indeed, while many of the transaction costs associated with music distribution may have decreased online,<sup>165</sup> the costly behind-the-scenes music management system ensures that our cultural music heritage will survive, and that those who brought the music to life will be justly compensated for their work.

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156. *Id.* at 4.

157. *Id.*

158. *See id.*

159. *Id.* at 5–8.

160. *Id.*

161. Testimony of David Hughes, *supra* note 155, at 8–9.

162. *Id.* at 8.

163. *Id.*

164. *See id.*

165. *See supra* notes 91–95 and accompanying text.

As this section highlights, advances in Internet technology have made record labels more relevant than ever. It is doubtful that America's musical heritage would have ever become fully available online—in a high-quality, mastered form at least—without labels' hard work and investment.

Moreover, there is still a great need for large economies of scale to cut through the growing digital cacophony. Record labels will continue to provide high-quality music that they believe will appeal to the public. To accomplish this goal, the labels invest millions of dollars in a diverse range of artists, recording equipment, and marketing campaigns.<sup>166</sup> Each of the four major labels also have dozens of "imprints" or subsidiary labels, which specialize in different musical genres that cater to diverse consumer preferences.<sup>167</sup> Like major labels, the imprint labels also take significant risk by signing new artists, and more often than not, incur losses that an artist will never have to repay. The goal of all record labels, however, remains the same—to invest in and promote artists who will appeal to an array of consumers for the benefit of the label, artist, and the public.

### *C. Alternatives to the Current Structure*

Commentators suggest that music will continue to flourish in a world without record labels.<sup>168</sup> High-quality music could be produced on home computers, distribution could be accomplished quickly and easily over the Internet, and for the first time artists would own the copyright in their sound recordings.<sup>169</sup> With their newfound rights, artists would be free to give their music away to fans, end the longstanding battle against infringement online, and generate revenues from ancillary markets like merchandise sales or concert tickets.<sup>170</sup> It sounds simple enough. The argument, however, relies on several unfounded assumptions and greatly overlooks many important collateral legal issues.

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166. Testimony of David Hughes, *supra* note 155, at 6.

167. See, e.g., SONY MUSIC ENT., <http://sonymusic.com> (follow "labels" hyperlink); UNIVERSAL MUSIC GROUP, <http://www.universalmusic.com> (follow "labels" hyperlink); WARNER MUSIC GROUP, *supra* note 126.

168. See Friedman, *supra* note 59 and accompanying text.

169. *Id.*

170. *Id.*

## 1. Intellectual Property Enforcement

The ability to effectively enforce intellectual property rights in sound recordings would likely die with the record labels. Without a central entity to collectively manage sound recording copyrights nation-wide, artists would be required to enforce their rights individually. Although it is true that some artists might choose to give up the copyright infringement fights altogether, many others might not. Given the high cost associated with infringement lawsuits,<sup>171</sup> like-minded artists would have to band together to establish an organization, like a record label, with the ability to enforce their rights both online and off. With so many vying interests, it is unlikely, however, that a focused and uniform strategy for intellectual property enforcement could be successfully implemented. Such a system would handicap the enforcement abilities of emerging artists. Without time to exploit their works, new artists would also likely be financially unable to enforce their copyrights. Record labels thus serve the important purpose of collectively enforcing intellectual property rights, which secures royalties for both the label and artist alike.

## 2. Songwriter Royalties

Songwriters, like recording artists, would also be severely affected by the absence of record labels. Although some artists are also gifted songwriters, many others require the assistance of professional lyricists and composers.<sup>172</sup> Indeed, the largest music publishers in the world are themselves divisions of record labels, which work with the labels to select the appropriate composition for new and established artists.<sup>173</sup>

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171. See Debra Cassens Weiss, *\$17M for Legal Fees Is Money Well Spent*, *RIAA Says*, ABA J. (Jul. 29, 2010), [http://www.abajournal.com/news/article/17m\\_for\\_legal\\_fees\\_is\\_money\\_well\\_spent\\_riaa\\_says](http://www.abajournal.com/news/article/17m_for_legal_fees_is_money_well_spent_riaa_says) (describing how the over \$17 million dollars was spent by the RIAA in 2008 in legal fees).

172. See Melinda Newman, *When Pubberies Act Like Labels*, *BILLBOARD*, Aug. 14, 1999, at 51 (“During the rock-dominated mid-’90s, most artists wrote their own material, but with the pendulum swinging back to non-writing pop and teen acts, it’s a boom time for both artist/songwriters and pure songwriters.”); JASON BLUME, *THIS BUSINESS OF SONGWRITING* 13–14 (Billboard Books 2006) (discussing the scope of collaboration between music publishers and record label representatives).

173. See GEOFFREY P. HULL, *THE RECORDING INDUSTRY* 65, 68–69 (Routledge 2004). See generally SONY ATV PUBLISHING, <http://www.sonyatv.com>; UNIVERSAL MUSIC PUBLISHING GROUP, <http://www.umusicpub.com>; EMI MUSIC PUBLISHING, <http://www.emimusic.com>

Without the assistance of labels and their representatives, artists would be forced to find compositions on their own. Many artists might be prompted to write their own songs or invest significant time and energy into independently seeking out songwriters. But many artists may not have the ability to write lyrics or draft melodies, know where to go or what to look for when it comes to songs, or know how to structure a licensing deal if they eventually find a composition they wish to use. To overcome such obstacles, artists could hire management, lawyers, or even establish a collective to negotiate songwriting deals on their behalf. How young and emerging artists would organize such collectives and/or afford such expenses remains unanswered by record label opponents.

Moreover, because exploitation of a sound recording necessarily exploits the underlying musical composition, a songwriter's license to the artist would require the artist to account and pay royalties for every sound recording distributed, regardless of whether payment is received from the end user. In other words, even if an artist wanted to give away her music for free, and chose not to enforce her copyright online, the songwriter would have the right to demand that royalties are paid for each and every reproduction and/or distribution of her work.<sup>174</sup> If the artist obtains a compulsory license under 17 U.S.C. § 115, for example, the statute requires that a royalty be paid "for every phonorecord made and distributed in accordance with the license."<sup>175</sup> The practical result of such a system is that in the absence of record label advances and royalties, artists would still be responsible for compensating songwriters at the statutorily prescribed (or privately negotiated) rate. Not surprisingly, many emerging artists may not have the skills or resources necessary to obtain licenses in underlying musical compositions, much less to establish an acceptable accounting procedure. Thus, while a music community without labels might encourage some artists to write their own songs, it might also have the significant effect of

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[www.emimusicpub.com](http://www.emimusicpub.com); WARNER/CHAPPELL MUSIC, <http://www.warnerchappell.com>.

174. The songwriter could, of course, waive this right as part of a private license negotiated with the artist.

175. 17 U.S.C. § 115(c)(2) (2006).



undermining songwriting as a stand-alone profession.<sup>176</sup> Indeed, when considering the effects that such an industry change might have, it is important to note that of the top five best-selling songs of all-time worldwide, only one was *co-written* by the artist.<sup>177</sup>

### 3. Tour Revenues

Another popular belief is that even without record sales, most artists will be able to survive on touring revenues alone.<sup>178</sup> This argument, however, mistakes the exception for the rule.<sup>179</sup> In 2009, North American concert revenues totaled \$2.8 billion.<sup>180</sup> Given the generous royalties that major artists take away from these concerts,<sup>181</sup> many believe that touring would provide adequate financial support to encourage artistic creation in a world without record labels.<sup>182</sup> According to Pollstar data, however, the top 100 North American music concerts comprised more than 80% of all concert revenues collected in 2009.<sup>183</sup> This means that artists like U2, Bruce

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176. See Letter from Rick Carnes, President, Songwriters Guild of Am. To Honorable Victoria A. Espinel, U.S. Intellectual Prop. Enforcement Coordinator, Office of Mgmt. & Budget (Mar. 24, 2010), available at [http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/SongwritersGuildofAmerica.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/SongwritersGuildofAmerica.pdf) (“Digital piracy has almost completely destroyed the profession of songwriting, and is slowly destroying the music industry.”).

177. See *List of Best-Selling Singles Worldwide*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_best-selling\\_singles\\_worldwide](http://en.wikipedia.org/wiki/List_of_best-selling_singles_worldwide) (including the following artists: (1) Elton John, *Candle in the Wind* 1997, (2) Bing Crosby’s *White Christmas*, (3) Bing Crosby’s *Silent Night*, and (4) Bill Haley & His *Comet’s Rock Around the Clock*; only Elton John is credited as a co-writer in his song, although the lyrics were written exclusively by Bernie Taupin).

178. See *Do Music Artists Fare Better in a World with Illegal Music Sharing?*, TIMES LAB BLOG (Nov. 12, 2009), <http://labs.timesonline.co.uk/blog/2009/11/12/do-music-artists-do-better-in-a-world-with-illegal-file-sharing> (“[G]rowth in live revenue shows no signs of slowing . . . live is by far and away the most lucrative section of industry revenue for artists themselves, because they retain such a big percentage of the money from ticket sales.”).

179. It also overlooks the valuable promotional consideration provided by labels that make it possible for artists to appeal to a national audience. See *infra* note 192 and accompanying text.

180. *Global Concert Business Healthy in 2009*, GRAMMY.COM (Dec. 11, 2009, 4:22 PM), <http://www.grammy.com/blogs/global-concert-business-healthy-in-2009>.

181. PASSMAN, *supra* note 10, at 358 (describing artist royalties as 20–60% of admission fees, depending on artist stature).

182. See Friedman, *supra* note 59 and accompanying text.

183. This number is calculated by dividing gross North American tour revenues in 2009 by the revenues for the top 100 North American tours of 2009. This figure

Springsteen, Elton John, Britney Spears, Madonna, and Cher took home the vast majority of concert revenues last year, leaving roughly \$480 million for division between *every other touring artist in the country* tracked by Pollstar.<sup>184</sup>

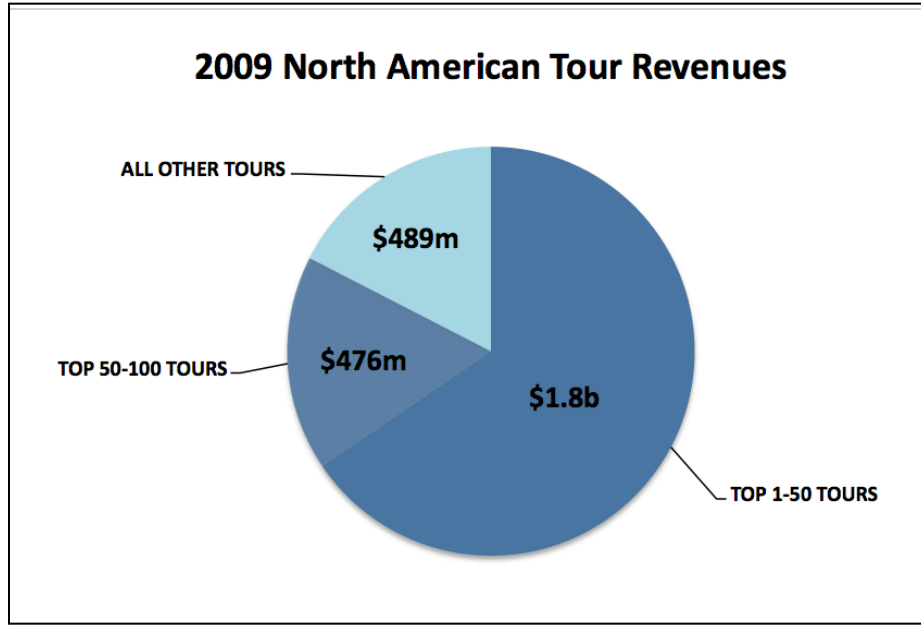


Figure 7. 2009 North American Tour Revenue Distribution<sup>185</sup>

Industry expert Donald Passman explains:

It's difficult to make much money touring until you're a major star . . . . In the beginning . . . you will most likely *lose* money on touring. You'll also get stuck in uncomfortable dressing rooms . . . [a]nd you'll be regularly humiliated, playing to half-empty concert

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excludes non-music tour revenues included in Pollstar's list (i.e., comedy tours, magic tours, etc.). *Compare Top 100 North American Tours*, POLLSTAR (2010) (on file with author), with *Global Concert Business Healthy in 2009*, *supra* note 180.

184. This figure represents only those tours Pollstar monitors. Pollstar's tour coverage, however, appears to be extensive. *See About Pollstar*, POLLSTAR, <http://www.pollstar.com/about.aspx> (last visited Oct. 3, 2010); *see also supra* note 183 and accompanying text.

185. These figures actually reflect only eighty-eight tours due to the exclusion of non-music tours as discussed above. *See supra* note 183 and accompanying text.

halls, since the audience is coming later to see someone else.<sup>186</sup>

Indeed, the entire purpose of touring for new artists is to generate enough buzz to *sell records*. Passman estimates that new artists can expect to earn about \$250 to \$1,500 per night playing at local venues for a few months of every year.<sup>187</sup> From this income, the band or artist must pay tour expenses, which even for a small band can total around \$10,000 per week.<sup>188</sup> Without tour support from a record label, Passman concludes, “you don’t need to be a math genius to see that you’re going to lose money . . . [a]nd the longer you stay out the more you’re going to lose.”<sup>189</sup> Nina Persson, lead singer of Sweden’s The Cardigans agrees that “[i]t would be very difficult for me to have made a living just from live music. I would have to travel alone with a guitar and no band or crew to make that work.”<sup>190</sup>

Simon Renshaw, manager of the Dixie Chicks, expressed similar concerns with respect to touring, noting that “[t]he live [music] industry is doing great, but without the recording industry to develop new artists and build new talent, that live industry in ten years’ time could look radically different.”<sup>191</sup> Although it is easy for artists who have built up a loyal fan base to break away from their record label and tour independently, unsigned and emerging artists “generally need the upfront financial support of a music company and the marketing and promotional muscle it can bring to the table.”<sup>192</sup> Indeed, the manager of one of the most successful touring acts of all time, U2, does not accept the proposition that touring alone can sustain an artist’s career.<sup>193</sup> Paul McGuinness, the manager of U2, explains that “[i]t is a myth that artists can build long-term careers on live music alone. In its latest tour, U2 filled huge stadiums around the world. That is because they have had parallel careers as recording artists and live performers since their inception 30 years ago.”<sup>194</sup>

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186. PASSMAN, *supra* note 10, at 356–57.

187. *Id.* at 358.

188. *Id.* at 359.

189. *Id.*

190. INVESTING IN MUSIC, *supra* note 3, at 30.

191. *Id.* at 19.

192. *Id.*

193. *See id.* at 30.

194. *Id.*

Even today's most popular stars may have difficulty making money from tours. For example, one of music's biggest pop stars, Lady Gaga, has toured nationally and internationally with the backing of a major record label.<sup>195</sup> Her most recent tour sold-out some of the largest venues in the world, including the O2 Arena in London.<sup>196</sup> But neither Lady Gaga nor her record label have seen any profits from the tour so far—in fact, at the time of writing, the tour “ha[d] been losing about \$3 million [collectively].”<sup>197</sup>

#### 4. Fan Funding

Record labels are not the only place a band can turn to raise funding for creation of an album and touring. In recent years, websites have been created where a band's friends, family, and fans can make contributions toward all aspects of the artist's career.<sup>198</sup> Kickstarter, SellaBand, and PledgeMusic are a few examples of sites where fans can chip-in to support emerging bands.<sup>199</sup> The bands set a fundraising goal—which averages around \$6,000—and offer certain “kick-backs” in return, including signed merchandise, concert tickets, or sponsorship attribution.<sup>200</sup> According to the online services, roughly 50% of bands meet their fundraising goals.<sup>201</sup>

Despite the fundraising success, however, the investment is not nearly enough to establish anything resembling long-lasting security for the emerging artists.<sup>202</sup> The group Sgt Dunbar & the Hobo Banned, for example, was only able to use the money it collected to “repair its eight-year-old van and to cover travel expenses to Austin, Tex., for the SXSW [music] festival. . . .”<sup>203</sup> As a *New York Times* article recently concluded:

Fan financing of music seems best suited to exceedingly small

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195. Vanessa Grigoriadis, *Growing Up Gaga*, N.Y. MAG., Mar. 28, 2010, available at <http://nymag.com/arts/popmusic/features/65127>.

196. Press Release, The O2, Lady Gaga Plays the O2 as only London Date, available at [http://www.theo2.co.uk/images/PDF/PR/lady\\_gaga\\_web.pdf](http://www.theo2.co.uk/images/PDF/PR/lady_gaga_web.pdf).

197. Grigoriadis, *supra* note 195.

198. Randall Stross, *You, Too, Can Bankroll a Rock Band*, N.Y. TIMES, Apr. 3, 2010, <http://www.nytimes.com/2010/04/04/business/04digi.html>.

199. *See id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

projects. While it is cheering to see the success stories at Kickstarter and other sites, it is dismaying to see just how modest are the goals of the most successful. Support that is enough for full-time pursuit of music is still nowhere in sight. *Gas money for Austin may turn out to be about good as it gets.*<sup>204</sup>

Similarly, the practice of “fan funding” may actually work against emerging artists to some extent.<sup>205</sup> As one band member who uses Kickstarter admitted, the service “makes it easier for every other band that wants to go out . . . . There are only so many clubs in each city and so many people who are interested in going out to hear live music.”<sup>206</sup> Like MySpace and similar digital distribution platforms, digital technology has fed a growing amateur music culture online—a community that now consists of tens of millions of new artists.<sup>207</sup> Fan fund sites like Kickstarter have simply transposed that community to the fundraising arena—and the modest return speaks for itself.

#### *D. Fulfilling the Constitution’s Promise*

With the business and social realities of the music industry in mind, this portion of the Article will consider how the business and legal aspects of the music industry relate, and how these aspects ultimately suggest that record labels continue to play a crucial role in today’s copyright structure.

The U.S. Constitution explains that copyright protection exists “[t]o promote the Progress of Science and useful Arts.”<sup>208</sup> The U.S. Copyright Office has interpreted this provision to mean that copyright must “foster the growth of learning and culture for the public welfare.”<sup>209</sup> In this evaluation, Congress should consider “how much will the monopoly granted be detrimental to the public,” and whether granting the exclusive right “confers a benefit upon the public that outweighs the evils of the temporary monopoly.”<sup>210</sup>

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204. Stross, *supra* note 198 (emphasis added).

205. *Id.*

206. *Id.*

207. *Id.*

208. U.S. CONST. art. I, § 8, cl. 8.

209. HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (Comm. Print 1961).

210. *Id.*

In order to ensure that copyright owners are sufficiently encouraged to create or invest in new works, however, they must be compensated in some meaningful way for the use of their sound recordings. As discussed above, the U.S. Supreme Court has explicitly provided that the copyright law “celebrates the economic motive,” and emphasized the crucial role that economic incentive plays in the American system of intellectual property.<sup>211</sup> In the context of the recording industry, one commentator has noted that without sustainable royalties, “record companies will no longer have an incentive to invest in the creation of new sound recordings or to facilitate the creative efforts of their artists because there will be no market for their prerecorded music.”<sup>212</sup> The question then becomes, how has the Internet and advancements in technology affected this basic constitutional assumption?

The argument that technology has drastically reduced the marginal costs of producing additional copies of a work is not a new contention. Indeed, skeptics of copyright protection have long assailed book prices due to the low manufacturing costs expended in the creation of individual copies of a work.<sup>213</sup> Such evaluation, however, overlooks the inherent risk of investment-backed intellectual property. As Judge Posner once observed:

In the absence of copyright protection, the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying, with the result that the book may not be produced in the first place because the author and publisher may not be able to recover their costs of creating it . . . . The problem of recoupment is magnified, however, by the fact that the author’s cost of creating the work, and many publishing costs (for example, editing costs), are incurred before it is known what the demand for the work will be. Because demand is uncertain, the difference between price and marginal cost of the successful work must not only cover the cost of expression but also compensate for the unavoidable risk of failure.<sup>214</sup>

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211. U.S. CONST. art. I, § 8, cl. 8; *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2001).

212. William O’Dowd, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 260 (1994).

213. Zechariah Chaffee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 509 (1945) (“Although the development expense is not so huge for a book as for a machine or process, it does cost a good deal to print a book and to attract buyers.”).

214. See RICHARD A. POSNER & WILLIAM M. LANDES, *THE ECONOMIC STRUCTURE OF*

Just as Judge Posner predicted, the illegal digital music marketplace has bid the cost of music down to the marginal cost of copying, which on the Internet is essentially zero.<sup>215</sup> The net result of this marketplace is that creators may not be able to recover the fixed costs associated with investing in risky, new creative works, meaning that the same diversity of music may not be produced in the first instance.<sup>216</sup> With less capital funding, record labels are unable to invest in the same broad array of new artists, resulting in an overall decline in the number of new albums and songs released to the public.<sup>217</sup> As one commentator explained, “[i]t took Bruce Springsteen eight years and five albums to achieve his first top-ten radio hit. Today on the other hand, if a band’s first album is not a hit, more often than not, that band is dropped from the label. No second chances.”<sup>218</sup>

Part of the resistance to labels and the rigorous protection of sound recording copyright seems to be driven by an anti-corporate mentality that has been empowered by the availability of peer-to-peer and similar file-sharing services.<sup>219</sup> Corporate ownership of intellectual property, however, is as old as the American copyright system itself.<sup>220</sup> Indeed, such ownership is common in the film, book, and television industry, as well as other areas of intellectual property.<sup>221</sup> Harvard Professor Zechariah Chaffee Jr. responded best to

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INTELLECTUAL PROPERTY LAW 40 (2003).

215. See Masnick, *supra* note 7.

216. See also James DeLong, *Marginalized*, Post to *TCS Daily*, IDEAS ACTION (Jul 29, 2003, 12:00 AM), [http://www.ideasinactiontv.com/tcs\\_daily/2003/07/marginalized.html](http://www.ideasinactiontv.com/tcs_daily/2003/07/marginalized.html) (discussing the misapplication and mischaracterization of marginal cost economics to the pharmaceutical and entertainment industries).

217. Nathan Harden, *The Generation That Killed Rock ‘N Roll*, HUFFINGTON POST (Feb. 1, 2010, 5:51 PM), [http://www.huffingtonpost.com/nathan-harden/the-generation-that-kille\\_b\\_444428.html](http://www.huffingtonpost.com/nathan-harden/the-generation-that-kille_b_444428.html).

218. *Id.*

219. See Johnny Firecloud, *Rock ‘N Roll is Not Dead, Put Down Your Guitar and Get the Hell Out of the Way*, ANTIQUIET (Feb. 7, 2010), <http://www.antiquiet.com/news/editorials/2010/02/rock-and-roll-is-not-dead> (“Greed, a lack of fresh ideas and stubborn reluctance to meet the rising tide of new media options are what’s killing the majors.”).

220. Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 54–55 (2006); see also Chaffee, *supra* note 213, at 510 (“A good deal of the attack on the assignee-owner of patents and copyrights seems to me based on a dislike of the whole system of private property.”).

221. See *id.* at 54 (“[T]oday more than ever, intellectual property is divorced from creators. To most employees most of the time, what matters is not that you own your patent or copyright, but that you can truthfully claim to be the inventor or author of it.”).

the general criticism in 1945 when he reflected:

A publisher may own the copyright [in a work] free and clear, and take all the gross income . . . .

Then is not the talk of helping authors just a pretense? A vigorous attack of this sort has been widely made on the patent system. Most patents are not owned by the inventors, but by manufacturers, who are often very big corporations. Consequently, it is said that we are betraying the purpose of the Constitution . . . . Big business is hiding behind the inventor's skirts. This reasoning seems to me unsound. After the inventor makes his invention *work*, an immense expenditure of money is usually necessary to make it *sell*. . . .

Similar reasoning applies to copyrights. . . .

One reason, therefore, for protecting the copyright in the hands of the publisher is to give an indirect benefit to authors by enabling them to get royalties or to sell the manuscript outright for a higher price. A second reason is, that it is only equitable that the publisher should obtain a return on his investment.<sup>222</sup>

In sum, the constitutional call for innovation and for a rich public domain is best served when artists and musicians are not only given the tools necessary to create their works, but also when they are given the creative support, promotional consideration, and funding necessary to connect with a large and diverse public. Given the alternatives, as well as the massive infrastructure set up by the labels, reports of record label irrelevancy have been greatly exaggerated; reports of their death, however, are an entirely different matter.

## CONCLUSION

Today the future of the recording industry is undoubtedly in jeopardy. What is less apparent, however, is that the *music industry's* future might also be at risk. The rise in illegal distribution of music online has resulted in declining record industry revenues for over ten years.<sup>223</sup> Reduced capital has and will continue to result in less investment in new artists.<sup>224</sup>

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222. Chaffee, *supra* note 213, at 508–09.

223. See INT'L FED'N OF THE PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 2009 § 4, at 24, <http://www.ifpi.org/content/library/dmr2009.pdf>.

224. See Jurgensen, *supra* note 53 (“Without the budget and staff to support their once overloaded artist stables, labels have slashed their rosters and doubled down on



Those critical of record labels, of the labels' relationship with their artists, and of the role that record labels play in the digital environment, often confuse the issue of "relevance" with the need to protect sound recording copyright. In reality, however, the issues are entirely distinct. If an independent artist chooses to record his or her own music and compete in the music marketplace due to reduced barriers to entry, society is undoubtedly benefited. Greater musical diversity is something that the music and recording industries welcome. It is quite a different position, however, to say that record labels are irrelevant simply *because competition exists*, and therefore, that sound recording copyright is not worth protecting. The latter argument is often not explicitly pronounced by detractors, but seemingly underlies their callous indifference. From a business and legal perspective, record labels are legitimate market participants, and should be allowed to freely and fairly compete in the music marketplace. Neither the size, nor history, nor structure of record labels undermines this fundamental principle.

Despite the evident decline of record companies, a new generation of commentators believes that without content investors, such as record labels, music and art will flourish.<sup>225</sup> Chris Anderson, for instance, has concluded that far from destroying music, peer-to-peer services are actually helping music thrive and improving consumer choice in the digital arena.<sup>226</sup> Others suggest that protection of copyright is meaningless in a world where new artists can survive on concert and merchandise sales alone.<sup>227</sup> But these faith-based theories do not withstand careful analysis. Numerous studies have considered and rejected the proposition that the proliferation of digital music has resulted in changes in consumer music preference or consumption.<sup>228</sup> Moreover, there is significant evidence to suggest that the vast majority of new artists actually *lose* money on touring and make virtually no money in merchandise sales.<sup>229</sup> Without a steady stream of income, emerging artists, professional songwriters, and other intermediaries in the recording industry will be

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acts expected to drive hits.”).

225. See *supra* note 7 and accompanying text.

226. See *supra* notes 141–142 and accompanying text.

227. See generally Masnick, *supra* note 7.

228. See *supra* Part II.A.

229. See *supra* Part II.C.3.

faced with ever-increasing hardships. Many songwriters and artists may forego a career in the music industry altogether on the basis that music is simply no longer a viable primary career.<sup>230</sup> Indeed, with decreased barriers to entry on the Internet, music proliferation may actually prohibit new artists from effectively communicating their works to the public, making it harder than ever to sustain a lasting career in the industry.

Moreover, the threat to copyright and the viability of artistic expression is not isolated to music. The motion picture, television, and book publishing industries are also at risk from acts of digital infringement. As broadband speeds continue to increase, it is only a matter of time before consumers in America's largest cities will be able to download content at a rate of 100 megabits per second.<sup>231</sup> Currently, the Federal Communications Commission is pressuring Internet service providers to make such speeds available to 100 million Americans by 2020.<sup>232</sup> At that rate, a typical 700–800 MB iTunes-quality movie will download to a user's computer in approximately seven to eight seconds.<sup>233</sup> As more and more eBook readers hit the market, the proliferation of illegally downloaded eBooks has increased exponentially.<sup>234</sup> In response, some now argue that book publishers are "irrelevant" and that authors can and should directly distribute their works to the public online.<sup>235</sup> It is not clear, however, that such arguments are accurate when applied to

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230. See Joshua Friedlander & Jonathan Lamy, *Illegal Downloading = Fewer Musicians*, RIAA MUSIC NOTES BLOG (July 19, 2010), [http://www.riaa.com/blog.php?content\\_selector=Illegal%20Downloading\\_Fewer%20Musicians](http://www.riaa.com/blog.php?content_selector=Illegal%20Downloading_Fewer%20Musicians) ("More compelling, when data from the U.S. Bureau of Labor Statistics on the number of people employed under the category of "musical groups and artists" is compared with music sales, a strong correlation is evident.").

231. See Nancy Gohring, *FCC Plans for 100M Bps to 100 Million Households*, PCWORLD (Feb. 16, 2010, 3:00 PM), [http://www.pcworld.com/businesscenter/article/189471/fcc\\_plans\\_for\\_100m\\_bps\\_to\\_100\\_million\\_households.html](http://www.pcworld.com/businesscenter/article/189471/fcc_plans_for_100m_bps_to_100_million_households.html).

232. *Id.*

233. See Jonathan Seff, *First Look: iTunes Store Movies: What You Need to Know*, MACWORLD (Sept. 21, 2006, 3:00 AM), <http://www.macworld.com/article/53017/2006/09/itunesmovies.html> (describing the typical Apple iTunes movie as between 750MB and 1.76 GB in size).

234. Matt Frisch, *Digital Piracy Hits the E-book Industry*, CNN.COM (Jan. 1, 2010, 9:52 AM), <http://www.cnn.com/2010/TECH/01/01/ebook.piracy/index.html>.

235. See, e.g., Frank Rumbauskas, *Why the Publishing Industry Is Obsolete*, INTERNET MARKETING TOOLS & TIPS (Mar. 10, 2010), <http://www.nevercoldcallbook.com/members/internet-marketing/publishing-industry-obsolete>.

the book publishing industry. Notwithstanding the ability of independent authors to compete alongside publishers online, it is important to distinguish greater market competition from the constitutional issues surrounding copyright protection.

Because copyright's primary *constitutional* purpose is to facilitate a rich public domain by means of economically compensating authors, Congress should carefully balance the needs of content holders with the rights of the public when deciding copyright policy. Record labels continue to serve a crucial role in the music industry, despite recent calls to the contrary. As with music, it is a foregone conclusion that art will continue to exist in our society notwithstanding the rise in infringement and potential collapse of artistic investment. Whether authors and artists will be sufficiently encouraged to produce the same quality and diversity in music content is uncertain at best, and is ultimately the most important question.

Given the immense popularity of label-released music today, it is no exaggeration to say that the decline of record labels may be akin to killing the goose that laid the golden egg. As one commentator opined, "the real tragedy of the illegal downloading epidemic," and the one of a world without significant investment in music, is that "we don't even know what we're missing."<sup>236</sup>

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236. See Harden, *supra* note 217.