

Spotify: Incentivizing Album Creation Through “The Facebook” of Music

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INTRODUCTION

Spotify, a Swedish-based music streaming service, hit the U.S. market in July of 2011.¹ It is quickly becoming a leading music service, allowing users to choose from over 15 million songs to listen to any time they wish.² Unlike services like Pandora, Spotify is considered an interactive service because it provides on-demand streaming of any song at any time. As a result of its interactive nature, Spotify is unable to use the compulsory music licenses provided to services like Pandora, and instead is forced to negotiate directly with record labels to gain access to their master sound recordings. Spotify has successfully negotiated licenses with every major record label, in part by selling these labels stock in its company.³ Spotify has also obtained licenses

1. Jacqui Cheng, *Spotify's US Launch: Three Tiers, Free is Currently Invite-Only*, Ars Technica, July 14, 2011, <http://arstechnica.com/media/news/2011/07/music-service-spotify-finally-to-launch-in-us-on-thursday-morning.ars>.

2. Jason Kincaid, Live Blog: The Spotify Special Event, Tech Crunch, Nov. 30, 2011, <http://techcrunch.com/2011/11/30/live-blog-the-spotify-special-event/>.

3. Seth Fiegerman *Spotify Launches in U.S.: Should You Care?*, The Street, July 15, 2011, <http://www.thestreet.com/story/11186953/1/spotify-launches-in-us-should-you-care.html>.

from the three United States' performance rights organizations, and from independent music distributors.

While licensing may have made Spotify's service legal, there are persistent complaints about its inability to reduce illegal file-sharing and its low payouts to songwriters and performers. In this note, I argue that removing the interactive/non-interactive distinction for streaming services in the Copyright Act will increase payouts to performers. The compulsory license that applies to non-interactive services provides that 45% of the per-stream revenue should go to the performer.⁴ In Spotify's licenses, however, artists are paid based on the rate determined in their contracts with the record labels, which almost always have the superior bargaining power.⁵ In contrast, non-interactive services pay songwriters via performing rights organizations.

This note begins by analyzing the legality of Spotify and then explores the changes that could be made to ensure that Spotify helps incentivize the creation of high quality music. I proceed in Part II with a general overview of how Spotify works. In Part III, I analyze the legal environment in which Spotify operates. In Part IV, I describe how Spotify meshes with applicable social norms. Finally, in Part V, I discuss complaints with Spotify and potential changes that could both resolve these complaints and further incentivize music creation.

WHAT IS SPOTIFY?

Online streaming is quickly becoming the most popular way to consume music, and Spotify is one of the leading providers of streamed music. Spotify allows users to instantly stream music on a number of devices, from laptop and desktop computers to mobile phones and tablets. Spotify's software looks and functions much like Apple's iTunes, but with Spotify, users get instant and legal access to millions of tracks for free. Every major record label has signed licensing agreements with Spotify, leading to a wide range of available music.⁶ Spotify initially launched in Europe in October of 2008. By September 15, 2010, Spotify had 10 million users and offered 10 million tracks.⁷ By comparison, as of 2010, iTunes had 11 million tracks and 160 million users.⁸ Spotify now has 15 million tracks in their catalogue.⁹

While gaining popularity in Europe, Spotify prepared for a US launch by negotiating with the four major record labels: EMI, Universal, Sony, and

4. 17 U.S.C. § 114(g).

5. John Eric Seay, *Legislative Strategies for Enabling the Success of Online Music Purveyors*, 17 UCLA Ent. L. Rev. 163, 175 (2010).

6. Chris Salmon, *Welcome to Nirvana*, THE GUARDIAN, Jan. 15, 2009, <http://www.guardian.co.uk/music/2009/jan/16/downloading-music-spotify>.

7. Duncan Geere, *Spotify Hits 10 Million Users and 10 Million Tracks*, WIRED, Sept. 15, 2010, <http://www.wired.co.uk/news/archive/2010-09/15/spotify-milestones>.

8. *Id.*

9. Kincaid, *supra* note 2.

Warner.¹⁰ After a series of successful negotiations, Spotify launched in the United States on July 14, 2011.¹¹

Spotify users can choose from three tiers of service when subscribing. The lowest tier is a free version, which gives users access to all songs in the Spotify catalogue through a highly stable desktop application. After downloading the application, users are able to pull music into the application from their iTunes library and other libraries on their computer.¹² To search for music, a user simply types the name of an artist, track, or album into a search box. Users can also create an unlimited number of playlists. However, there are some limitations to the free version. Audio advertisements appear every few tracks, and banner advertisements are displayed.¹³ Also, in Europe, after six months of using Spotify, the free version is capped at 10 hours a month and 5 plays of each track.¹⁴

Users who wish to bypass the advertisements and avoid any streaming limitations may choose an unlimited or a premium subscription. The unlimited subscription is five dollars per month, and, as the name suggests, provides an unlimited amount of advertisement-free streaming.¹⁵ The premium subscription is ten dollars per month, and offers the additional features of streaming music from your mobile device and playing tracks without an Internet connection.¹⁶ As a result, premium users are able to listen to music on their mobile devices without worrying about having a weak network signal. With the premium subscription, a limit of 3,333 songs can be stored offline, and those tracks may only be played on up to three devices.¹⁷

A key feature of Spotify is its integration with social networking, and the ability for users to “share” music via their social networks. Users may link their Spotify account to Facebook, connecting them to their friends to see what they are playing or adding to their playlists. Users can share playlists, recommend individual tracks, and even comment directly on a particular song or playlist. A comment is then immediately posted on Facebook, allowing friends to then listen to the song or playlist commented upon. However, to do so they must

10. Peter Hodgson, *EMI Split Up, Sold to Other Major Labels*, Gibson Lifestyle, Nov. 14, 2011, <http://www.gibson.com/en-us/Lifestyle/News/emi-split-sold-1114-2011> (stating that EMI’s music division has since been acquired by Vivendi and its Universal Music Group subsidiary, and EMI Publishing was acquired by a consortium comprising Sony Corporation of America, the Estate of Michael Jackson, Mubadala Development Company PJSC, Jynwel Capital Ltd, the Blackstone Group’s GSO Capital Partners LP and David Geffen).

11. Cheng, *supra* note 1.

12. Kincaid, *supra* note 2.

13. Charlie Sorrel, *Spotify Launches in the U.S at Last*, Wired, July 14, 2011, <http://www.wired.com/epicenter/2011/07/spotify-launches-in-the-u-s-at-last/>.

14. Casey Johnston, *Eager to Share, but Doesn’t Quite Know How: Hands on With Spotify*, Ars Technica, July 19, 2011, <http://arstechnica.com/gadgets/reviews/2011/07/nothing-wrong-with-free-hands-on-with-spotify.ars>.

15. Sorrel, *supra* note 13.

16. Sorrel, *supra* note 13.

17. Johnston, *supra* note 14.

have a Spotify client installed on their device. Similar processes exist with Twitter. If the Spotify client is installed, a “ticker” shows what songs friends are currently listening to through Spotify.

Users can also share music within the Spotify application itself. A list of Facebook friends with their profile pictures appears on the right side of a user interface, and a user can click on a song or playlist and drag it to a Facebook friend. That song or playlist will then appear in the friend’s inbox. Users are free to share everything they listen to, and they can also work together to create a collaborative playlist.¹⁸

A final point to reemphasize is that Spotify involves streaming, not downloading. With downloading, a file containing a copy of the original song is transmitted over the Internet from a server computer, which hosts the original file, to the user’s computer.¹⁹ That file is stored on the user’s hard drive, which allows the user to make copies of the file and to play them on various portable devices.²⁰ By contrast, streaming does not result in having a permanent copy that signifies ownership. Instead, streaming allows the real-time playing of a song by establishing a constant link between the server and client computers until the song is finished playing.²¹ If users wish to listen to the song again, they must stream the song again, because they do not have a copy of the song on their hard drive, except, as explained above, for the limited exception available on Spotify’s premium subscription.²² Streaming is similar to listening to the radio, and if a user wishes to legally own the actual file, he or she must purchase it separately from iTunes or another vendor.²³

THE LEGAL ENVIRONMENT SURROUNDING SPOTIFY

After launching in Europe, Spotify finally launched in the United States in July of 2011.²⁴ Although the major record labels had previously licensed their recordings to Spotify in Europe, the labels were reluctant to do so in the United States.²⁵ Part of the concern was disappointing advertising revenue for

18. Spotify About Page, <http://www.spotify.com/us/about/what/> (last visited Nov. 16, 2011).

19. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 441 (S.D.N.Y. 2007) *aff’d sub nom. United States v. Am. Soc. of Composers, Authors, Publishers*, 627 F.3d 64 (2d Cir. 2010)

20. *Id.*

21. *Id.* at 442.

22. *Id.* at 442.

23. Kit Eaton, Why Spotify’s Legal Music Service Could Beat the Revamped Pirate Bay, Fast Company, July 1, 2009, <http://www.fastcompany.com/blog/kit-eaton/technomix/will-spotifys-legal-p2p-music-sharing-beat-revamped-pirate-bay>.

24. Adrian Covert, *Why Did It Take So Long for Spotify to Come to the US*, Gizmodo, July 13, 2011, <http://gizmodo.com/5821056/why-did-it-take-so-long-for-spotify-to-come-to-the-us>.

25. Alex Pham, *EMI on Board with Spotify in the U.S.*, LOS ANGELES TIMES, Feb. 2, 2011, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/02/emi-on-board-with-spotify-in-the-us.html>.

Spotify's free version in Europe. Even more worrisome to the record labels was the fact that very few of Spotify's users opted to pay for premium services.²⁶ Record labels pressed Spotify to find more effective ways to increase the number of users paying for premium services, setting a goal of 15% of all users.²⁷ In Europe, the number of paying subscribers is now about 15%, and in the United States, it is about 12.5%.²⁸

The music-licensing environment is complex. Multiple licenses are required when a service like Spotify wishes to provide music. Separate copyrights must be licensed both for the underlying musical work and the sound recording containing a performance of that musical work.²⁹ Generally, a songwriter and the songwriter's publisher own the copyright in the underlying musical composition, and a record label owns the copyright in the sound recording.³⁰ Section 106 of the Copyright Act provides for the right "to reproduce the copyrighted work in copies" and the right "to perform the copyrighted work publicly."³¹ In 1995, Congress also added a performance right "by means of a digital audio transmission" through the Digital Performance Right in Sound Recordings Act (DPRA).³² Downloading and streaming invoke different rights for the underlying musical work and the sound recording, depending on what is considered copying, what is considered a performance, and whether or not a digital audio transmission is involved.

It is clear that downloading, by saving a file on a computer, creates a copy that requires compensation.³³ However, it is unsettled whether or not downloading constitutes a public performance, for which separate and additional compensation is required. Recently, the Second Circuit held that computer downloads are not a public performance.³⁴ The court stated:

The downloads at issue in this appeal are not musical performances that are contemporaneously perceived by the listener. They are simply transfers of electronic files containing digital copies from an on-line server to a local hard drive. The downloaded songs are not performed in any perceptible manner during the transfers; the user must take some further action to play the songs after they are downloaded. Because the electronic download itself involves no

26. *Id.*

27. *Id.*

28. Matthew Panzarino, *Spotify has Reportedly Converted 12.5% of its 1.4m US Users to Paying Subscribers*, Insider, Aug. 8, 2011, <http://thenextweb.com/insider/2011/08/08/spotify-has-reportedly-converted-12-5-of-its-1-4m-us-users-to-paying-subscribers/>.

29. David Balaban, *The Battle of the Music Industry: The Distribution of Audio and Video Works Via the Internet, Music and More*, 12 Fordham Intell. Prop. Media & Ent. L.J. 235, 252 (2001).

30. *Id.*

31. 17 U.S.C. § 106.

32. *Id.*

33. *United States v. Am. Soc. of Composers, Authors, Publishers*, 627 F.3d 64, 71 (2d Cir. 2010) (stating that it is undisputed that downloads create copies of musical works for which copyright owners must be compensated).

34. *Id.* at 71-72.

recitation, rendering, or playing of the musical work encoded in the digital transmission, we hold that such a download is not a performance of that work, as defined by § 101.³⁵

Streaming, on the other hand, is not a reproduction because a copy is not created on a computer's hard drive. However, it is a public performance. "A stream is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory. This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with the transmission."³⁶ Because streaming is considered a performance, and because 17 U.S.C. § 106(4) affords the owner of a copyright in a musical work the exclusive right to perform the copyrighted work publicly, Spotify must acquire multiple licenses in order to satisfy these legal requirements.

LICENSES WITH RECORD LABELS

Licenses with record labels are required because 17 U.S.C. § 106(6) grants the copyright owner of the sound recording a performance right by means of a digital transmission, and the record labels are the copyright owners for the vast majority of sound recordings.³⁷ However, the details of those licenses have largely remained secret, making it difficult for performers to determine if they are getting their fair share from the licensing agreements.³⁸ Spotify's founder, Daniel Ek, stated that "[a]s a rule we can't talk too much about the specific deals agreed with the labels. . .but, yes, the deals are similar."³⁹ Since the license for the digital performance is not compulsory, the services need permission from the owner of the copyright in the sound recording. This explains the delay in the launch of Spotify in the US market. The Copyright Act explicitly states that permission from the copyright owner is required.⁴⁰ Spotify received permission by paying the four major labels \$300 million,⁴¹ which is a large sum for Spotify, but a relatively minimal amount for

35. *Id.* at 73.

36. *Id.* at 74.

37. Balaban, *supra* note 29.

38. Ian Youngs, *Songwriters Condemn Spotify Deals*, BBC News, April 12, 2010, <http://news.bbc.co.uk/2/hi/entertainment/8615190.stm>.

39. Shane Richmond, *Spotify: Interview With Founder and CEO Daniel Ek*, Feb. 18, 2009, The Telegraph, http://blogs.telegraph.co.uk/technology/shanerichmond/8616987/spotify_interview_with_founder_and_ceo_daniel_ek_part_two/.

40. See 17 U.S.C.A. § 114(d)(3)(C) (stating that notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6), an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: Provided, That such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner).

41. Eddie Schwartz, President, Songwriters Association of Canada, Presentation at Vanderbilt University Music and Digital Copyright Class (Oct. 4, 2011).

the record labels, considering the recording industry grosses about \$10 billion a year from revenues of CDs, vinyl, cassettes, and digital downloads alone, not including merchandise and concert ticket sales revenue.⁴²

However, as a trade-off for the relatively low purchase price, the record labels also attained shares of Spotify stock, perhaps at below market value price.⁴³ One report states that eighteen percent of Spotify's shares were sold to the labels for less than 100,000 SEK, which is equivalent to \$14,000, a small amount considering that Spotify was valued at \$280,000,000 at the time.⁴⁴ However, the web publication Tech Crunch obtained an unverified capitalization table, which is reportedly based on a financial filing in Luxembourg, where Spotify was originally headquartered.⁴⁵ They have reason to believe that the labels actually did pay their fair share for the stock.⁴⁶ If Spotify ever turns out to be the "Facebook" or "Google" of music sharing, the record labels will have made a great business decision in acquiring shares of Spotify. Since the record labels usually own the copyright in the sound recording, issues arise because any payout to the artists is limited to the contracts between the performers and the record labels, and returns on equity from the stock are unlikely to filter down as payments to the performers.⁴⁷

The reason Spotify had to negotiate for licenses with the record labels, as opposed to obtaining a compulsory license, as with radio and services like Pandora, is because Spotify involves interactive streaming.⁴⁸ With non-interactive streaming at sites like Pandora, users are not permitted to request any song at any time as occurs with interactive streaming.⁴⁹ Under the DPRA, the owners of the copyright in the sound recording are subject to a compulsory

42. Wikipedia, http://en.wikipedia.org/wiki/Music_industry (last visited Nov. 26, 2011).

43. See Metro, *Spotify's secret – partly owned by record giants*, Aug. 7, 2009, <http://www.metro.se/metro-teknik/spotify-secret-partly-owned-by-record-giants/Objihg!29375/>.

44. *Id.*

45. Michael Arrington, *This Is Quite Possibly The Spotify Cap Table*, TechCrunch, Aug. 7, 2009, <http://techcrunch.com/2009/08/07/this-is-quite-possibly-the-spotify-cap-table/>.

46. *Id.*

47. Youngs, *supra* note 38.

48. See *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 150 (2d Cir. 2009) (stating that "[i]f it is an interactive service, the webcasting service would be required to pay individual licensing fees to those copyright holders of the sound recordings of songs the webcasting service plays for its users. If it is not an interactive service, the webcasting service must only pay a statutory licensing fee set by the Copyright Royalty Board").

49. See 17 U.S.C.A. § 114 (7).

(stating that an "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service).

license for the use of their music if the service is non-interactive.⁵⁰ Since the license is compulsory, companies like Pandora do not need permission to stream music. The copyright owner of the sound recording receives 50% of the royalties, the performer receives 45%, and the remaining 5% goes to administrative fees.⁵¹ Interactive services like Spotify, on the other hand, are not under a compulsory license because they are thought to be more likely to displace physical album sales.⁵²

LICENSES WITH PERFORMING RIGHTS ORGANIZATIONS

The licenses obtained directly from the record labels cover the copyright for the digital performance of the sound recording. There is a separate performance right in the actual musical work, for instance the sheet music, that is created by the songwriter under 17 U.S.C. § 106(4). Usually the publisher, which promotes the song to record labels, splits the performance income with the songwriter.⁵³ Spotify obtained licenses from performing rights organizations (PROs) to retain the performance right in the musical works. Music publishers and songwriters grant PROs such as ASCAP, BMI, and SESAC the right to license the songs that they own.⁵⁴ The PROs then monitor the performances of the music through radio, streaming, and other methods, and pay royalties accordingly.⁵⁵ The PROs pay 50% to the publisher and 50% to the songwriter.⁵⁶ The royalties come from radio stations, live performance venues, and services like Spotify, which pay the PRO a fee for a license to publicly perform any or all of the songs in each organization's repertoire.⁵⁷

Spotify reached an agreement with ASCAP which allowed streaming of ASCAP's vast music repertoire.⁵⁸ ASCAP CEO John LoFrumento stated that "Spotify understood the benefits of obtaining an ASCAP blanket license in advance of their much-anticipated launch in the U.S., creating a healthy environment for the growth of their business while recognizing that music creators should be paid fairly for their work."⁵⁹

Spotify also obtained a license from BMI, another prominent PRO. Richard Conlon, Senior Vice President, stated, "We are pleased to confirm that we have reached agreements that guarantee fair compensation for the more than

50. *Id.*

51. 17 U.S.C. § 114.

52. Balaban, *supra* note 29.

53. Steven Masur, *Collective Rights Licensing for Internet Downloads and Streams: Would It Properly Compensate Rights Holders?*, 18 Vill. Sports & Ent. L.J. 39, 48 (2011).

54. *Id.*

55. IAMusic, <http://www.iamusic.com/articles/performing-rights.html> (last visited Nov., 30, 2011).

56. Masur, *supra* note 53.

57. Masur, *supra* note 53.

58. Jim Bessman, *ASCAP Announces Licensing Agreement With New Spotify Digital Service*, The Examiner, July 14, 2011, <http://www.examiner.com/local-music-in-new-york/ascap-announces-licensing-agreement-with-new-spotify-digital-service>.

59. *Id.*

475,000 songwriters, composers and copyright owners who entrust BMI with their public performance right.”⁶⁰ According to BMI, the agreement with Spotify “points to BMI’s commitment to fostering a marketplace that rewards innovation and the fair compensation of copyright creators and owners.”⁶¹

Finally, the smallest performing rights organization, SESAC, has also entered into a deal with Spotify, which will allow its users to stream the songs from SESAC’s repertory of songwriters and publishers in the United States.⁶² As a result, Spotify has licensing agreements with all three major PROs in the United States.

LICENSES WITH OTHER MUSIC DISTRIBUTORS

Spotify also signed a deal with CD Baby, the world’s premier distributor of independent music.⁶³ CD Baby represents over 250,000 artists for whom they distribute music directly to the public.⁶⁴ The agreement provides Spotify’s users with access to over one million tracks.⁶⁵ As with the licenses with the record labels, these licenses are required under 17 U.S.C. § 106(6) when a song is streamed through Spotify. These independent artists, however, are the owners of the copyright, as opposed to the record labels. According to Spotify, CD Baby is a significant addition to the catalog because CD Baby has thousands of smaller, independent artists to which most users have not been exposed.⁶⁶ Spotify provides an opportunity for smaller acts to get noticed and to establish a fan base.⁶⁷

Finally, Spotify signed a licensing deal with Ingrooves, which is a leading provider of digital distribution to the independent music community.⁶⁸ The license gives Spotify users access to about 250,000 different tracks, including artists ranging from Dolly Parton and Andrew Bird to Too \$hort and Thievery Corporation.⁶⁹ As Spotify continues to add new songs to their catalog, they will need to obtain additional licenses similar to those with CD Baby and Ingrooves.

SPOTIFY AND SOCIAL NORMS

CD sales were down 45% in 2011 compared to 2004, and while digital

60. BMI News, *BMI Licenses Spotify & Turntable.fm*, July 21, 2011, <http://www.bmi.com/news/entry/552172>.

61. *Id.*

62. SESAC News, *SESAC Finalizes Deal With Spotify*, July 22, 2011, http://www.sesac.com/News/News_Details.aspx?id=1575.

63. Andres Sehr, *Spotify signs licensing deal with CD Baby*, Spotify, Feb. 6, 2009, <http://www.spotify.com/us/blog/archives/2009/02/06/spotify-signs-licensing-deal-with-cd-baby/>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Andres Sehr, *Spotify signs licensing deal with INgrooves*, Spotify, Feb. 20, 2009, <http://www.spotify.com/us/blog/archives/2009/02/20/spotify-signs-licensing-deal-with-ingrooves/>.

69. *Id.*

music sales are steadily increasing, they still do not compensate for the loss in profits resulting from declining sales of CDs.⁷⁰ With illegal downloading and music streaming on the rise, the music industry desperately needs a boost.⁷¹ Perhaps this boost will come from licensed streaming. Music streaming services such as Spotify are the new go-to option for finding and listening to music.⁷² Spotify is legal, and a user can hear just about any song, any time they want. But that is not the end of the story. An ideal social norm would be one that effectuates what the IP clause aims to establish: grant certain exclusive rights to incentivize the creation of more music.⁷³ Many record labels, performers, and fans would argue that to give musicians higher returns, the majority of music sales should consist of selling entire albums, as was the case prior to 2000. Those days seem to be long gone, however, with the increase in single-song downloads. To illustrate, a recent documentary called “Before the Music Dies” discussed how pop artists are created today. The documentary features a songwriter who writes a simple, catchy chord progression on the guitar, and is approached by a record label.⁷⁴ The pop artist happens to be an attractive seventeen year old girl with very little music talent.⁷⁵ However, her looks are able to attract an audience. The producers and engineers of the song are able to use technology in order to make the girl sound talented.⁷⁶ A sexy music video is then created, and a pop star is born.⁷⁷ The focus of the entire process is more on creating a radio hit and the image of the pop star.

A major reason why music is moving towards more of a focus on image and singles is that services such as iTunes and technologies that allow file-sharing tend to deliver and encourage the purchase of singles, as opposed to full-length albums, and enhancing an artist’s image will help sell more singles. Why pay for an entire album when a user only knows one song? In fact, sales of singles per year have increased from about 200,000 in 2004 to 1.2 million in 2010.⁷⁸ This statistic supports the inference that as sales of singles increase, sales of entire albums decrease.

The current system of emphasizing singles rather than albums may sound the death knell of “deep tracks.”⁷⁹ A phenomenon occurs when someone purchases an entire album and listens to it several times. A person typically knows one or two tracks from radio play. The rest of the album, at first, does

70. Seay, *supra* note 5 at 163-64.

71. Seay, *supra* note 5 at 164.

72. Spotify vs. Groovespark vs. Pandora, <http://www.thedanosphere.com/2010/03/27/spotify-vs-groovespark-vs-pandora/> (Mar. 27, 2010).

73. See U.S. Const. art. I, § 8, cl. 8.

74. BEFORE THE MUSIC DIES (2006), available at http://www.youtube.com/watch?v=irk3_p15RJY.

75. *Id.*

76. *Id.*

77. *Id.*

78. See Frederic Lardinois, *Album vs. Singles Sales*, Silicon Filter, Oct. 15, 2010, <http://siliconfilter.com/album-vs-singles-sales/>.

79. Deep tracks are the lesser known songs that are not played on the radio every day.

not sound all that great because those songs are not catchy songs played on the radio often. However, those songs become an acquired taste similar to the taste acquired by being exposed to such things as beer, caviar, olives, liquor, running, and reading.⁸⁰ People also acquire a taste for deep tracks and other music not played on the radio when they share the music with others, providing fans an opportunity to get more exposure to certain songs. This is how deep tracks get discovered and become popular. Deep tracks are the lesser known songs that are not played on the radio every day. These songs are often the songs that have withstood the test of time.

Unfortunately for artist revenues, social norms are moving further towards a focus on singles. Many of these singles will likely not stand the test of time, and the deep tracks, which artists truly put their creative effort into, may not survive in a singles environment. David Byrne, songwriter and founding member of The Talking Heads, put it succinctly when he stated, “I’ve had creative freedom, and I’ve been pressured to make hits. I have dealt with diva behavior from crazy musicians, and I have seen genius records by wonderful artists get completely ignored.”⁸¹ When record labels take away the creative freedom and place the focus solely on quick money-making hits, a certain appreciable aspect of music is taken away. One must wonder whether artists like Led Zeppelin, Bob Dylan, Jimi Hendrix, or Pink Floyd would put out the same quality of music today, given the current musical environment. Singles used to be the hits designed to sell an album, and now, singles are often the last and only stop.

Fortunately, Spotify may be a step back in the right direction. It generates money for record labels, and more money for the labels may mean more investment in talent scouting and artistic development of recording artists. More importantly, Spotify, especially with its social networking integration, has the ability to reduce piracy, increase sales, and increase payouts to performers and record labels. Whether it can use its increasing clout to sell more albums remains to be seen. It has, however, the right tools to do so. Just by viewing what their friends are listening to in Spotify’s ticker, Spotify users are exposed to many more obscure songs than they used to be. It gives Spotify users a reason to listen to a song that they normally would not hear on the radio or would not spend the money on at iTunes.

ELIMINATING PIRACY THROUGH SPOTIFY

A social norm that would facilitate high quality music creation would be a departure from unpaid, illegal file sharing. Providing lawful services that music consumers will prefer to sites like Pirate Bay to “steal” music would

80. Wikipedia, http://en.wikipedia.org/wiki/Acquired_taste (last visited Nov. 25, 2011).

81. David Byrne, *David Byrne’s Survival Strategies for Emerging Artists — and Megastars*, WIRED, Dec. 18, 2007, http://www.wired.com/entertainment/music/magazine/16-01/ff_byrne?currentPage=all.

contribute to the emergence of a social norm that encourages payment for music. Spotify has been successful in decreasing the amount of piracy in Sweden, evidenced by a report showing that the number of people who pirate music has dropped twenty-five percent in Sweden since 2009.⁸² Sweden is not just any market in that regard. It is the home of Pirate Bay, one of the top sites for illegal file-sharing. Pirate Bay even had its own political party, which convinced the Prime Minister to declare on national television that the youth should be able to download music for free.⁸³ Now, Pirate Bay is much less popular in part because Spotify is used, it seems, by almost everyone, including former Pirate Bay fans.⁸⁴ In fact, the number of Spotify users has outgrown the number of music pirates.⁸⁵ This all happened because those users found a new legal music service that they actually feel is better than the older, illegal service.⁸⁶

However, the US is a different market. Spotify has only been available in the US since July of 2011. Major studies showing Spotify's effect on piracy have not yet been published, but most likely, the number of music pirates still greatly outnumbers the number of people who use Spotify and similar services. According to the International Federation of Phonographic Industry, 95% of music downloaded online in 2010 was illegal. The Institute for Policy Innovation claims that music piracy causes \$12.5 billion in economic losses every year, although those figures seem to assume that each illegal download is the equivalent of a lost sale, which may or may not be true.⁸⁷ However, Spotify is growing quickly, and it therefore has the potential to drastically reduce pirated music online. After one month in the US, Spotify already had 1.4 million users and 175,000 paying customers.⁸⁸ Usually, services like Spotify take a while to catch on because they rely on "network effects," which is the value of the service rising exponentially with the number of people connected to it.⁸⁹ These services grow slowly at first, and then they explode quickly once they reach a certain critical point.⁹⁰ Facebook is a consummate example of the

82. Posting of Ernesto to TorrentFreak, <http://torrentfreak.com/music-piracy-continues-to-decline-thanks-to-spotify-110928/> (Sept. 28, 2011).

83. Bas Grasmayer, *Can Innovation Through Business 'Solve' Issues That Legal Repression Can't?*, Tech Dirt, July 19, 2011, <http://www.techdirt.com/articles/20110718/08554415146/can-innovation-through-business-solve-issues-that-legal-repression-cant.shtml>.

84. *Id.*

85. *Id.*

86. *Id.*

87. Eva Hart, *Illegal downloading: The real cost of 'Free' Music*, Arbitr Online, Feb. 28, 2011, <http://arbiteronline.com/2011/02/28/the-cost-of-free-music>.

88. Peter Kafka, *Spotify's U.S. Score So Far: 1.4 Million Users, 175,000 Paying Customers*, All Things D, Aug. 8, 2011, <http://allthingsd.com/20110808/spotify-u-s-score-so-far-1-4-million-users-175000-paying-customers/>.

89. *Global Swap Shops: Why Social Networks Have Grown so Fast—and How Facebook has Become so Dominant*, The Economist, Jan. 28, 2010, http://www.economist.com/node/15350972?story_id=15350972.

90. *Id.*

concept of “network effects,” as the following chart illustrates.

Source: Facebook

The integration of Spotify with Facebook should allow Spotify to ride the coattails of Facebook’s “network effects”, which in turn should decrease the amount of time required for Spotify to reach its “critical mass.”

However, Spotify is not a replacement for illegal file-sharing. Users cannot download a copy of a song to play on portable devices, except through the premium subscription. Having an actual copy of the song that can be played on an iPod or cell phone is obviously important to many people. If people are unwilling to pay ten dollars a month for the offline version of Spotify and are unwilling to purchase a CD or a download from iTunes, then they will likely still get their music illegally in a form that allows them to continue to use these devices.

However, these same people may still use services like Spotify, which will generate revenue that would otherwise not exist. Instead of solely relying on illegal file-sharing, it will become much easier for these users to create a playlist on Spotify so that when they get home, they can play their music with the click of a button. Just because a user has an illegally downloaded song does not mean he or she will not use Spotify to stream the same song. Using Spotify as a one-stop-shop is easier than switching between iTunes, Spotify, and other services to play music. This is good news because each stream has the potential to compensate for (part of) the lost revenue from the unpaid downloads. Thus, although Spotify will not eliminate piracy, it does have the ability to reduce illegal file-sharing and to make up for lost revenue caused by piracy, which means Spotify helps cultivate a beneficial social norm.

ARTISTS GET PAID VERY LITTLE THROUGH SPOTIFY

Part of Spotify’s mission is to create a win-win situation for both listeners and artists.⁹¹ Thus, Spotify should be concerned with increasing the revenue to performers. Spotify does add to the revenue stream, but data shows that the

91. Startuply Companies, http://www.startuply.com/Companies/Spotify_201.aspx (last visited Oct. 19, 2011) (stating “[w]e want to connect millions of people with their favorite songs and create a service that people love to use. We believe music should be easily accessible and that listening to music will make people live richer lives. We want to create a win win situation for people who love listening to music and people who love creating music”).

compensation is minimal. Magnus Uggla, a Swedish musician, wanted to pull his music from the service, stating that after six months he'd only earned what a street performer could earn in one day.⁹² Nevertheless, Magnus stated that Spotify was a great service and faulted the record labels, not Spotify, for the lack of payment.⁹³ Artists receive less than one-tenth of a cent per stream, which means one million streams would add up to less than one-thousand dollars.⁹⁴ The payouts that have been reported are actually much less. Lady Gaga's track "Poker Face" was streamed more than a million times in a five month period, and she received only \$167.⁹⁵ According to a report by David McCandless, an independent artist on Spotify would need over four million streams per month to earn \$1,160.⁹⁶

However, the picture may not be as bleak as it seems. Although Spotify's royalties per song streamed are small, those royalties have the potential to add up as streams multiply, and apparently that has been working in some European countries where Spotify is the single biggest source of revenue for the music industry.⁹⁷ Spotify has defended its payout structure, stating that:

Spotify does not sell streams, but access to music. Users pay for this access either via a subscription fee or with their ear time via the ad-supported service [just like commercial radio] - they do not pay per stream. In other words, Spotify is not a unit based business and it does not make sense to look at revenues from Spotify from a per stream or other music unit-based point of view. Instead, one must look at the overall revenues that Spotify is generating, and how these revenues grow over time.⁹⁸

Further, one major reason that artist compensation may not be adequate is because Spotify is currently losing money as a business. The company's accounts for 2009 showed a net loss of £16 million (\$26 million) on revenues of £11.3 million (\$17.7 million), and the company's auditors, Ernst & Young, cautioned Spotify on its ability to remain in business.⁹⁹ The report showed that Spotify made £6.8 million (\$10.7 million) from subscriptions and £4.5 million (\$7 million) in advertising revenues, but the cost of goods, which includes licensing fees paid to record labels, reached £18 million (\$28.4 million).¹⁰⁰

92. Posting of Enigmax to TorrentFreak, <http://torrentfreak.com/lady-gaga-earns-slightly-more-from-spotify-than-piracy-091121/> (Nov. 21, 2009).

93. *Id.*

94. Jeff Ward-Bailey, *Spotify: Good for Music Lovers, Bad for Musicians?*, THE CHRISTIAN SCIENCE MONITOR, July 20, 2011, <http://www.csmonitor.com/Innovation/Horizons/2011/0720/Spotify-Good-for-music-lovers-bad-for-musicians>.

95. Enigmax, *supra* note 93.

96. Wikipedia, <http://en.wikipedia.org/wiki/Spotify> (last visited Nov. 10, 2011).

97. Ward-Bailey, *supra* note 95.

98. Paul Resnikoff, *Spotify Defends Its Payout Structure*, Digital Music News, Sept. 19, 2011, <http://www.digitalmusicnews.com/stories/091911spotifydefends>.

99. Josh Halliday, *Spotify Could Launch in US Without Major Labels*, THE GUARDIAN, Nov. 23, 2010, <http://www.guardian.co.uk/technology/2010/nov/23/spotify-us-record-labels>.

100. *Id.*

Revenue grew in 2010, but expenses also increased. The net loss was £26.5 million (\$41.5 million) and the revenue was £63.2 million (about 99.1 million).¹⁰¹ However, the losses were expected, and in 2010, Spotify was not as concerned with lost revenue in its early stages because the company was focused on changing how music is experienced.¹⁰² Spotify has only been in the US since July 2011, but with increased users and subscriptions, payouts will likely improve and revenue will rise, making Spotify more viable economically.

Spotify is not the main culprit when it comes to the low payouts. The reason performers are not adequately compensated is that the law forces interactive services to integrate their contractual splits between record labels and performers, and the agreements often reflect the label's greater clout. This is because Spotify must negotiate directly with the copyright owner of the sound recording, which is usually the record label, in order to license the streaming of the song.¹⁰³

The internet is filled with articles, posts, blogs, and reports of performers being undercompensated by Spotify. However, there is unsurprisingly little to no evidence that record labels are complaining about being underpaid. The four major record labels own stock in Spotify, and the returns on the stock investment are unlikely to filter down to payments for the artists.¹⁰⁴ The record labels may already have made a large return on their investment, as Spotify was initially valued at \$280 million when the record labels invested in the company¹⁰⁵ and is now estimated at more than \$1 billion, a 350% increase.¹⁰⁶ If, as reported, the record labels own eighteen percent of the stock, they have already made about \$115 million in two years, perhaps more if they purchased the stock below the actual value.¹⁰⁷ Indeed, reports indicate that the stock may have been given away for free or sold at a major discount, leading to a much higher return.¹⁰⁸ Most likely, the performers will never partake in this income, thus artists' resentment is rightly focused on record labels rather than Spotify.¹⁰⁹

A SOLUTION: REMOVING THE INTERACTIVE DISTINCTION IN THE STATUTE

Congress should remove the interactive/non-interactive distinction that

101. Glenn Peoples, *Spotify's Big Losses in 2010 Are Evidence Freemium Models Need Time to Grow*, BILLBOARD, Oct. 10, 2011, <http://www.billboard.biz/bbbiz/industry/digital-and-mobile/spotify-s-big-losses-in-2010-are-evidence-1005397762.story>.

102. *Id.*

103. Balaban, *supra* note 29.

104. Arrington, *supra* note 45.

105. Metro, *supra* note 43.

106. Glenn Peoples, *Is Spotify Really Worth \$1 Billion?*, BILLBOARD, Feb. 22, 2011, <http://www.billboard.biz/bbbiz/industry/digital-and-mobile/is-spotify-really-worth-1-billion-1005043612.story>.

107. Metro, *supra* note 43.

108. Arrington, *supra* note 45.

109. Enigmax, *supra* note 93.

exists in the Copyright Act and instead require a compulsory license for all online music services, mirroring protections under section 115 for the making of copies of musical works on sound recordings. This solution serves three broad purposes. First, it remedies the minimal payouts to artists by giving performers 45% of the royalties. Second, it incentivizes production of higher quality music. Finally, it increases transparency in financial flows.

When copyright owners were given the exclusive right to perform a sound recording by means of digital audio transmission under the DPRA, one of the major concerns was adequately compensating and protecting recording artists.¹¹⁰ The Senate Report stated that “the Committee believes that recording artists and record companies cannot be effectively protected unless copyright law recognizes at least a limited performance right in sound recordings.”¹¹¹ Congressman John Conyers stated that he was “especially pleased that performing artists will also benefit from this legislation. One estimate is that in 1987, performing artists should have received as much as half of the \$120 million that is collected worldwide for the public performance of sound recordings; now, they stand to recover royalties when recordings of their performances are distributed digitally.”¹¹² Congressman Steny Hoyer stated, “From hip-hop to country, reggae to classical, this bill helps to ensure our talented recording artists and recording companies are fairly compensated for public performance of their work.”¹¹³ In referencing Stephen Collins Foster, who has been called the “Father of American Music,” Congressman Hoyer stated that Foster died as a pauper “because there was no system for compensating the genius that was Stephen Foster.”¹¹⁴ He also stated, “We have geniuses among us today, some of whom are incredibly well compensated, but unfortunately, some of the most creative, perhaps not the most famous or well-known, have not been fairly compensated . . . There are many areas which copyright fails to adequately compensate those who create.”¹¹⁵ From these statements, it is clear that Congress is not concerned just with record labels, but also with the performers. Indeed, statements such as those above are plentiful in the legislative history.

However, over fifteen years later, performers rightly complain about unfair compensation for interactive services. Under non-compulsory licenses, there is no guarantee that performers get a fair percentage of the revenues.¹¹⁶ With non-interactive services, on the other hand, artists do receive 45% percent

110. 17 U.S.C. § 106

111. S. REP. NO. 104-128, at 14 (1995) *reprinted in* 1995 U.S.C.C.A.N. 356, 361.

112. 141 CONG. REC. H10098-02, H10103(1995).

113. *Id.* at H10104.

114. 141 CONG. REC. H10098-02, H10104 (1995).

115. *Id.*

116. Dan Krimm, *Creating a Merit-Based Music Economy: Compulsory or Blanket Licensing for Interactive Subscription Services*, Music Unbound, Sept. 2001, <http://www.musicunbound.com/meritmusic22.htm>.

of revenues.¹¹⁷ Ridding the Copyright Act of the interactive/non-interactive distinction would assure that recording artists are more fairly and transparently compensated by Spotify and other interactive online music services. Musicians are motivated by expected earnings from recorded music, and therefore, more money provides an incentive to create more music, leading to more albums and higher quality singles and, one hopes, more risk-taking in musical creation and production.¹¹⁸ More money should lead to more creative freedom for artists, instead of just focusing on catchy radio hits.¹¹⁹

Removing the distinction would be fully consonant with the Copyright Act's purported content and technological neutrality.¹²⁰ The distinction is obsolete. It causes problems for businesses like Pandora and Spotify by forcing companies into static business "pigeonholes" in an otherwise very dynamic online environment. For example, Pandora has to limit its services to remain non-interactive and to not creep into the interactive sphere.¹²¹ Removing the distinction would eliminate these problems and likely provide for more technological innovation. Pandora, Spotify, and other companies would be able to expand into both the interactive and non-interactive sphere. For these reasons, BMI, ASCAP, SECAC, the Songwriters Guild of America and most publishers support this approach and strongly believe copyright should be technology neutral.¹²²

The proposal is not entirely new, but it is ripe for action. Removing the interactive/non-interactive distinction was first discussed in 2001 when the Music Online Competition Act (MOCA) was discussed in Congress.¹²³ The

117. 17 U.S.C. § 114(g).

118. See, e.g., Glenn Peoples, *Analysis: Are Musicians Losing the Incentive to Create?*, BILLBOARD, July 26, 2010, http://www.billboard.biz/bbbiz/content_display/industry/news/e3ic193b6eacf48409b52f1ab027d2d2b6c (stating that "[t]he last decade's drop in music sales is correlated to a drop in the number of professional musicians in the U.S., according to some number crunching by the RIAA, possibly meaning that musicians are motivated by expected earnings from recorded music"); Posting by Joshua P. Friedlander & Jonathan Lamy to Music Notes Blog, http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Illegal%20Downloading_Fewer%20Musicians&news_month_filter=7&news_year_filter=2010 (July 19, 2010) (stating that "[s]elling music is an important motivator to creating music, and that the decline in sales has correlated with fewer people making a living in music").

119. See Cameron Mizell, *Creating a Budget for Your New Album*, Musician Wages, July 20, 2010, <http://www.musicianwages.com/the-working-musician/creating-a-budget-for-your-new-album/> (discussing cost effective ways to create a quality album).

120. H.R. REP. NO. 105-551 at 25 (1998) (discussing sections 106 through 121 of the Copyright Act, which are in general, technology neutral, and as technology advances, so must the laws, and the Committee on Commerce seeks to ensure that copyright law remain technology neutral).

121. See Andrey Spektor, *How "Choruss" Can Turn into a Cacophony: The Record Industry's Stranglehold on the Future of Music Business*, 16 Rich. J.L. & Tech. 3, Fall 2009, at 4, <http://jolt.richmond.edu/v16i1/article3.pdf>.

122. Greg Sandoval, *Music publishers: "Copyright should be Technology Neutral"*, CNET, Oct. 7, 2009, http://news.cnet.com/8301-31001_3-10370513-261.html.

123. Alexander Davie and Christine Soares, *The Music Online Competition Act of 2001*:

formation of two joint ventures between record companies and online music distributors, MusicNet and PressPlay, prompted the push for the legislation, and Representative Chris Cannon sponsored the Bill.¹²⁴ MusicNet and PressPlay wanted to charge monthly fees to allow downloads *and* streams of music.¹²⁵ The bill sought to assist recording artists by mandating direct compensation for the online distribution of their music.¹²⁶ Congress was reluctant to expand the compulsory license to interactive services due to intense opposition from the Recording Industry Association of America (RIAA), the lobby representing the major labels.¹²⁷ In the end, the RIAA succeeded. However, the sponsors of the bill did not rule out the possibility of creating a compulsory license for interactive services in the future.¹²⁸ Now that society has a better understanding of online music, its pervasive nature, and the perilous lack of revenue for artists due to their contracts with record labels, Congress needs to revisit the RIAA's opposition.

Congress felt that a compulsory license for interactive services was premature in 2001.¹²⁹ The record labels agreed to allow licensing through MusicNet and PressPlay, so that the immediate need for the compulsory license was not obvious at the time. However, Representative Cannon warned that if those services changed or if other signs of anticompetitive behavior emerged, the Judiciary Committee would have to reconsider a compulsory license for interactive services.¹³⁰

That time has now come. MusicNet and PressPlay failed because they were flawed services.¹³¹ This was due in large part to restrictions on use imposed by the labels. The services also showed the record labels' inability to cope with change and technological advances, and "the services' stunningly brain-dead features showed that the record companies still didn't get it."¹³² Neither of the services could compete against software allowing for illegal file-sharing. Several billion illegal downloads later, companies like iTunes, Pandora, and Spotify have shown the record companies the right way to market digital music.¹³³

Ten years have passed since MOCA was introduced, and it is time for Congress to reintroduce a bill that would require compulsory licenses for interactive services to ensure that performing artists are adequately

Moderate Change or Radical Reform?, 2001 Duke L. & Tech. Rev. 31, 10, (2001).

124. *Id.* at 1.

125. Dan Tynan, *The 25 Worst Tech Products of All Time*, PC WORLD, May 26, 2006, http://www.pcworld.com/article/125772-3/the_25_worst_tech_products_of_all_time.html.

126. Davie and Soares, *supra* note 124, at 1.

127. Davie and Soares, *supra* note 124, at 21.

128. Davie and Soares, *supra* note 124, at 21.

129. Davie and Soares, *supra* note 124, at 21.

130. Davie and Soares, *supra* note 124, at 21.

131. Tynan, *supra* note 126.

132. *Id.*

133. *Id.*

compensated, which, as shown above, was a major consideration in the creation of the DPRA. There will be pushback from the RIAA, as with any incumbent who benefits from the status quo, but Congress should no longer allow them to have the control that they currently have. Incumbents see regulation as a shield against new entrants, and new entrants see regulation as a sword to slice into the new market.¹³⁴ Thus, policy makers need to balance these interests, protecting incumbents from new entrants by keeping the existing regulatory framework flexible enough to allow new entrants to compete with incumbents.¹³⁵ In failing to adapt to technological change, record labels, as incumbents, have clung to business practices that no longer respond to the constitutional imperative. Online services have to jump through hoops every time they wish to license a new recording or launch a new product and are always subject to the labels' veto.¹³⁶ Put differently, the record labels have total control, and if the deal is not to their liking, they may refuse a license.¹³⁷ Companies that have shown that they are ill-equipped and unwilling to adapt to the online environment decide which business models get to live, and in the wake of their decision, songwriters and artists can only wait and see. Thus, the balance between allowing competition and protecting record labels' interests is currently tipped in favor of the record labels. Online interactive services like Spotify should be licensed like radio and non-interactive services. This would do away "with the monopolies of permission that have held us back for a decade, already."¹³⁸ This could be limited to exclude single download services like iTunes, but it should allow all streaming services to launch, compete and innovate without the labels' veto.

In the meantime, the challenge for Spotify is increasing the number of paid subscriptions. One step towards monetizing consumer activity is convincing consumers that the money will end up in the pockets of the artists they love.¹³⁹ However, as has been shown, Spotify currently pays very little to creators. If the Copyright Act were changed to remove the interactive/non-interactive distinction, Spotify would be in a much better position to convince users that their subscription money is actually going to the artists, which should lead to many more paying customers.

The songwriters, who are paid via the PROs would not necessarily see their revenue increase as a result. However, if artists were getting paid more

134. Daniel Gervais, *The Regulation of Inchoate Technologies*, 47 Hous. L. Rev. 665, 679 (2010)

135. *Id.*

136. Gerd Leonhard, *Spotify rocks - but Without a Compulsory, Public Digital Music License They are Doomed*, Media Futurist, July 27, 2009, <http://www.mediafuturist.com/2009/07/i-love-spotify-but.html>.

137. *Id.*

138. *Id.*

139. Featured Artists Coalition, *FAC Submission to Hargreaves Review of Intellectual Property and Growth*, March 8, 2011, <http://www.featuredartistscoalition.com/2011/03/hargreaves/>.

adequately, they could make the case to the courts that govern the operations of ASCAP and BMI that a higher rate is justified. Collective management of a larger share of Spotify's payouts would also increase transparency, which would benefit artists and songwriters. Transparency is unlikely to happen as long as Spotify's income is buried in dividends paid to the labels.

CONCLUSION

Spotify is quickly becoming one of the most popular sources of music in the world.¹⁴⁰ It has a catalog of over 15 million recordings and allows users to legally stream any song at any time.¹⁴¹ But the ongoing issues surrounding low payouts to artists continue to plague Spotify and the music industry as a whole. Nonetheless, Spotify is a large step in the right direction. Spotify has the ability to increase the incentive to create quality albums instead of just quality singles through features such as sharing playlists and integration with Facebook.

The true source of the low payouts is legal obstacles behind licenses with record labels. The problem with the law is that it distinguishes between interactive and non-interactive services under 17 U.S.C. § 114. The interactive distinction exists to benefit the record labels and it ensures their superior bargaining power when contracting with artists, leading to reduced creative freedom. The distinction remains through lobbying efforts of the RIAA. Removing the distinction would increase the per-stream revenue to the artists to 45%. This increase would take away the superior bargaining power that record labels have when contracting with artists and increase the artists' slice of the pie, providing an increased incentive to create quality albums. Such a result will also likely lead to more paid subscribers to services like Spotify, as music fans will know their money is going to the artists and not just the labels, thereby changing the social norms around paying for online music.

140. Cheng, *supra* note 1.

141. Kincaid, *supra* note 2.