COMMENT

GOING VIRAL: HOW POPULAR MUSICIANS HAVE ADAPTED TO THE DELAYED BENEFITS OF COPYRIGHT PROTECTION*

ABSTRACT

Contrary to the strides made in the twentieth century in protecting musicians' compositions and sound recordings, technology has progressed at a sufficiently fast rate to make copyright protections a thing of the past for modern musicians. Instead of waiting for the legal system to catch up, artists of the twenty-first century, such as Chance the Rapper, have taken it upon themselves to alter their business models and succeed without the aid of copyright law. The "DIY" method of producing, distributing, promoting, and performing has allowed musicians to adapt to the shifting circumstances and remain in a profession that would otherwise be unprofitable. Therefore, no reforms to the current system of copyright law are necessary to assist musicians in the current technology-influenced climate. Artists have made the necessary reforms and will continue to adapt in the future.

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I. INTRODUCTION

Piracy is the new radio. That's how music gets around.[1]

In an age dominated by the internet and social media, the world feels smaller than ever. So, too, do the wallets of "starving artists," particularly musicians. Although gaining a small victory in protecting their work in the early and mid-twentieth century, musicians' rights to their work have slowly eroded as copyright protections for musical compositions and sound recordings have fallen by the wayside. Despite the legal system failing to protect musicians from piracy and the detrimental effects of file sharing, artists have found a way to leverage the internet, social media and file sharing to capitalize on modern technology. Musicians more than ever are able to operate as "DIY" (do it yourself) entrepreneurs with their music and persona being the products.

Contrary to suggested reforms to the current copyright regime, this comment proposes that no changes need to be made because musicians have taken it upon themselves to adapt and succeed in a climate of mass media and the internet. This comment begins with a historical timeline in Part II, mapping the

1. John Paczcowski, *Neil Young and the Sound of Music*, ALL THINGS D (Jan. 31, 2012, 10:42 AM), http://allthingsd.com/20120131/neil-young-and-the-sound-of-music/ [https://perma.cc/6FBJ-6WEE] (quoting Neil Young from a prior interview).

development of copyright protection for musicians from 1909 to the present. The shifting role of record labels is then presented in Part III, followed by a discussion of the shifting role of artists, including a case study of the biggest independent musician of the present era, Chance the Rapper, in Part IV.

II. BASICS OF COPYRIGHT PROTECTION FOR MUSICIANS

A. Development of Copyright Protection for Musicians

As early as 1790, American society began to realize the importance of copyright protection for original works and enacted a statute protecting maps, charts and books.[2] It was not until many years later that Congress extended protection to musicians through the Copyright Act of 1909.[3] Due to the limited technology available to consumers at the time, Congress deemed it necessary only to provide musicians with protection for their written works and not sound recordings.[4] As technology and radio stations continued to evolve and accommodate the massive demand of consumers, so too did copyright protection for musicians.

In 1931 the United States Supreme Court heard the case of *Buck v. Jewell-La Salle Realty Co.*,[5] holding that radio broadcasts and the "public redistribution of the broadcast in a hotel, constituted public performance."[6] Although seemingly increasing the protections afforded to musicians, the Supreme Court then limited its holding significantly in *Twentieth Century Music Corp. v. Aiken*.[7] There, the Court held that playing a radio in a small business did not constitute a public performance in violation of musicians' exclusive rights.[8] To support its ruling, the Court observed that rights under the Copyright Act are limited, providing that "[n]o license is required by the Copyright Act, for example, to sing a copyright lyric in the shower."[9] A holding

2. Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 270 (2007) (internal quotation marks omitted).

3. *Id.* at 270.

4. *Id.* However, the right to perform the work publicly was included among the composers' rights. *Id.*; *see* Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 196 (1931) ("[T]he art of radio broadcasting was unknown at the time the Copyright Act of 1909 was passed, and the means of transmission and reception now employed are wholly unlike anything then in use.").

5. *Buck*, 283 U.S. 191.

6. Perritt, *supra* note 2, at 271. In response, Broadcast Music Incorporated ("BMI") and the American Society of Composers, Authors, and Publishers ("ASCAP") formed to aid the broadcasting process by "licensing blocks of musical works to radio stations." *Id.*

7. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

8. *Id.* at 162–64.

9. *Id.* at 155.

contrary would have been both impractical to enforce and inequitable now that musicians received compensation from licensing their works to radio stations.[10]

Around the time of the *Aiken* decision, sound recording technology improved to a point where musicians began seeking protection for their sound recordings.[11] In response, Congress enacted the Sound Recordings Act of 1971.[12] This Act provided musicians with rights in "reproduction, distribution, and derivative-work[s]" of the sound recording but excluded the right of public performance.[13] Thus, the copyright holder of a sound recording received no royalties from a radio broadcast.[14] In 1995, however, as technology continued to alter the landscape of music production and distribution, Congress enacted the Digital Performance Right in Sound Recordings Act, creating a public performance right for digital sound recordings.[15]

B. Copyright Protection for Musicians in 2016

The progression of copyright for musicians has culminated in an act that explicitly extends copyright protection to both "musical works, including any accompanying words" (the composition itself) and "sound recordings," separately.[16] Copyright owners in the realm of music now have the exclusive privileges of reproduction, preparation of derivative works, distribution of copies or phonorecords to the public, public performance, public display, and public performance by digital audio transmission.[17] It must be emphasized, however, that the right of public performance for sound recordings does not extend to phonorecords,[18] only to those performed "by means of digital audio transmission."[19] Conversely,

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10. *Id.* at 162–64; Perritt, *supra* note 2, at 271; *see Buck*, 283 U.S. at 202 (answering affirmatively, the certified question of whether a radio broadcast, and public redistribution thereof, constituted a public performance for which a copyright holder deserves compensation).

11. Perritt, *supra* note 2, at 272.

12. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §102).

13. Perritt, *supra* note 2, at 272.

14. *Id.*

15. Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as various amendments to 17 U.S.C.). A musician's right to public performance of a physical sound recording, however, remained absent. Perritt, *supra* note 2, at 273.

16. 17 U.S.C. § 102(a); 17 U.S.C. § 114. *See also* ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 64 (2d Cir. 1996) (solidifying copyright protection of lyrics).

17. 17 U.S.C. § 106.

18. 17 U.S.C. § 114(c) ("This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4)").

19. 17 U.S.C. § 106(6); 17 U.S.C. § 114(a) (expressly limiting the scope of exclusive rights in sound recordings to clauses (1), (2), (3), and (6) of section 106).

musical compositions remain wholly protected from violations of both the right of public performance and the right of public display.[20] As a final note in the context of public radio, nonsubscription broadcast transmissions and retransmission of nonsubscription broadcast transmissions remain exempt from the public performance right of sound recordings,[21] though not the musical composition itself.[22]

III. THE SHIFTING ROLE OF RECORD LABELS

> I can only speak for this building, but a lot of what we're doing now is just trying to keep up with the way music streaming is affecting everything. A few years ago, we weren't necessarily caught up, we were using a lot of the same old formats, but we're beginning to evolve. . . .[23]

A. "Old School" Business Model

Prior to the boom of modern technology and the age of the internet, record labels were puppet masters of the music industry and artists merely props in the performance of business. Why? The labels performed eight major functions, without which, musicians could not produce, distribute, or perform their music on a mass scale, if at all.[24]

1. A Necessary Evil.

The functions performed by labels included recruiting the artists, providing capital, managing the recording process, manufacturing CDs, advertising and promoting CDs, distributing CDs, accounting of royalties and revenues, and enforcing copyright protections.[25] Although an artist could have attempted to perform any number of these, he would have done so to little avail due to a lack of capital and industry connections.[26] At this time "[g]etting a

20. 17 U.S.C. § 106(4)–(5).

21. 17 U.S.C. § 114(d)(1)(A)–(B). "Overall, section 114 limits the unfettered exclusive right for public performance of sound recordings to interactive digital audio services." Perritt, *supra* note 2, at 276.

22. 17 U.S.C. § 106(4).

23. Jacob Moore, *How Rae Sremmurd's "Black Beatles" Became the Soundtrack to the Mannequin Challenge*, PIGEONS AND PLANES (Dec. 1, 2016), http://pigeonsandplanes.com/music/2016/12/rae-sremmurd-black-beatles-mannequin-challenge [https://perma.cc/KD9Z-XUPY].

24. Henry H. Perritt, Jr., *New Business Models for Music*, 18 VILL. SPORTS & ENT. L.J. 63, 79 (2011). "A musician had no prayer of making a record unless he hooked up with a recording studio." *Id.* at 73.

25. *Id.* at 79.

26. *Id.* at 67 (stating that record labels "channeled capital to anonymous musicians

major record label deal was the main–perceived as the only–way a band could break through to real commercial success and celebrity status."[27] Three major limitations contributed to this necessity.

First, the limited availability of recording hardware and minimal technological advancements in the production process required artists to utilize expensive, label-owned studios "well staffed with producers, recording engineers and technicians" in order to transform their ideas into products.[28] Second, distribution of these products was almost exclusively controlled by record labels and radio stations.[29] Prior to modern streaming services and digital download capabilities, music had to be distributed either physically or through radio broadcasts.[30] Unfortunately for musicians, "radio play could not occur unless a record existed and even then it was controlled by relatively independent DJs, whom the record labels courted assiduously."[31] While musicians could use self-promotion and live performances to avoid relying on record labels and radio DJs as intermediaries, this tactic severely limited their reach to small audiences willing to attend the shows, which consequently was even more limited by the physical capacity of the venues.[32] In short, "a musician needed the mass market distribution potential of radio and records" in order to achieve celebrity status.[33] Lastly, despite the ability to perform live locally, independent musicians lacked the finances and expertise necessary to profit from touring, or fund the venture at all.[34] Even if artists were able to make money touring, the profits received paled in comparison to those gained through physical sales purely from an inability to reach large audiences. Thus, without intermediaries such as deep-pocketed, well-connected record labels, musicians were doomed to mediocrity and minimal fame.

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and enabled a handful to become famous").

27. *Id.* at 88. *See* Charlie Rose, *Diplo & Skrillex Full Interview*, YOUTUBE (Aug. 17, 2015), https://www.youtube.com/watch?v=Eb85hwOotts (contrasting the previous necessity of record labels with the ability of modern musicians to reach audiences on their own).

28. Perritt, *supra* note 24, at 80. By the 1950's recording equipment had advanced significantly but was still "expensive and only a few possessed the skills necessary to edit tape." *Id.* at 74. Even now, in the modern era of production, record labels "still budget between $300,000 and $400,000 to record an album." *Id.* at 75.

29. *Id.* at 72–74.

30. *Id.* at 74.

31. *Id.*

32. *Id.* at 73.

33. *Id.*

34. *Id.* at 188 (analyzing the average costs and revenues of a touring musician).

2. Immediate, Mutual Benefit of Copyright Protection.

With record labels playing such a crucial role in the success of musicians, how important were an artist's copyright protections? They were everything: the "golden ticket" that allowed aspiring artists access to record labels' celebrity factories.[35] Because of the need for physical distribution and radio play in reaching consumers, musicians had to trade either copyright ownership or a large royalty share up front for a record label to become their intermediary.[36] Once "in the door," record labels could then perform their primary functions and grow aspiring artists into celebrities.[37] Without copyright protection, an artist could merely tour in an attempt to reach consumers, and ultimately operate at a loss or break even.[38] Therefore, copyright was the catalyst and foundation of a musician's success.

B. The Uncertain Future of Record Labels

In an era of the internet and technological innovation, modern musicians face an entirely different landscape for production, distribution and live performances than older generations. The previous business model for musicians[39] has become obsolete and aspiring artists have "put aside dreams of being signed by a big label."[40] Now, musicians are taking a "DIY" approach, writing music, retaining copyrights, building support, independently contracting other needs and selling music through separate services.[41] Advances in the areas of production, distribution and live performances have fueled major changes over the years. In the realm of production, artists no longer need expensive studio time in order to foster a studio quality sound.[42] "[S]tudio quality audio

35. ROALD DAHL, CHARLIE AND THE CHOCOLATE FACTORY 30.

36. Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 306 (2013).

37. *See supra* notes 24–25 and accompanying text (discussing the previous functions performed by record labels).

38. *See supra* notes 34–35 and accompanying text (noting the inability of artists to profit from touring independently).

39. *See supra* notes 24–25 and accompanying text (discussing the previous functions performed by record labels); *see* Perritt, *supra* note 2, at 262 (referring to the previous business model as a "bloated system of intermediation that was designed to deal with old technologies").

40. Perritt, *supra* note 2, at 328. "New technologies profoundly change the possible ways in which the functions performed by existing intermediaries can be performed and therefore threaten the embedded capital of major record labels." *Id.* at 298.

41. Perritt, *supra* note 24, at 83–84. *See* Charlie Rose, *supra* note 27 (stating that modern artists operate in an era of "DIY").

42. *See supra* note 28 (discussing the previous need to utilize professional recording studios).

recordings can be produced in anyone's living room with equipment costing only a few thousand dollars."[43] In contrast, record labels still set aside upwards of $400,000 to record an album.[44] Furthermore, the expertise previously required to utilize studio equipment has either become unnecessary because the equipment is more user friendly[45] or, if required, easily obtainable through the internet.[46] Record labels, therefore, have lost their monopoly on music production and can no longer entice musicians to swap their copyright protections or royalties up front for production resources.

As for distribution, record labels' role as intermediaries has eroded significantly due to increasing, and now widespread, use of the internet, digital distribution and streaming services.[47] Previously, technology required the labels to match musicians with consumers through large marketing campaigns, radio broadcasts and physical distribution of records and CDs.[48] Now, however, record labels have lost control of the radio stations.[49] Artists can perform their own marketing campaigns through the internet.[50] Digital distribution has "kill[ed] the CD."[51]

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43. Perritt, *supra* note 2, at 296; Scott Wilson, *Free Music Production Software: 10 VSTs and DAWs for Making Great Tracks with No Money*, FACT MAGAZINE, (Oct. 18, 2016), http://www.factmag.com/2016/10/18/best-free-vst-plugin-daw-music-production-software/ [https://perma.cc/C658-EVXL]. For a discussion of VSTs (Virtual Studio Technology), *see* Serm Murmson, *How to Use VST for Beginners*, HOUSTON CHRONICLE, http://smallbusiness.chron.com/use-vst-beginners-63099.html (last visited Jan. 12, 2017). For a discussion of DAWs (Digital Audio Workstations), *see The 12 Best DAW Apps in the World Today*. Scott Parsons, *The 12 Best DAW Apps in The World Today*, LANDR BLOG (Feb. 14, 2016), http://blog.landr.com/every-recording-software-matters-music-today/ [https://perma.cc/6ZM3-3MUT].

44. Perritt, *supra* note 24, at 75.

45. Perritt, *supra* note 2, at 293–94.

46. *See* e.g., Recording Connection Audio Institute, *How to Master a Song*, YOUTUBE (Jun. 28, 2016), https://www.youtube.com/watch?v=TVBwSL-c9SU (providing lessons on how to produce studio quality music without the expense of a professional studio).

47. Perritt, *supra* note 24, at 75. *See* Charlie Rose, *supra* note 27 (discussing how the "distribution chain is broken," which allows artists to reach mass audiences in a few hours and potentially be catapulted to the radio).

48. *See supra* note 30 and accompanying text (discussing the necessity of physical distribution).

49. Perritt, *supra* note 24, at 74 (discussing how discretion of local DJ's has declined due to consolidation of radio ownership and the prevalence of "scientific" market research).

50. Perritt, *supra* note 2, at 298–99 (claiming that the "[i]nternet has opened up enormous possibilities for marketing music" and that musicians do not have to "deal with a record label to engage in any of these forms of advertising").

51. *Id.* at 278; Perritt, *supra* note 24, at 74, 89 (stating that digital distribution through the internet has replaced not only CD's but other physical formats as well). Some examples of digital distribution include SoundCloud, YouTube, WAVO, Bandcamp, Spotify, Tidal and Apple Music.

Most noteworthy of these three shifts in the music industry is digital distribution and its impact on record labels. Three major types of legal digital distribution have forced these entities out of the market: purchasable download content, free streaming, and subscription streaming.[52] BandCamp, for example, is a third-party direct-to-fan storefront website that allows musicians to create accounts for free and distribute digital and physical music products for only a small percentage of the sales price in return.[53] In a recent release by BandCamp, it reported 35% growth over the last year and purchase amounts of nearly 25,000 records per day for a total of $4.3 million every month.[54] As of mid-2016, nearly six million fans had purchased music through BandCamp and hundreds of thousands of artists had sold music on the site.[55] Another example is the free distribution and consumption platform, SoundCloud. Known for its "underground music community," SoundCloud boasts twelve million creators "publishing" to the platform on a monthly basis and a "treasure trove of content that ranges from emerging to top artists."[56] Lastly, in 2016, two subscription services, Spotify and Apple Music, reported 40 million and 17 million paid subscribers, respectively.[57]

While the legal methods of consumption have grown over the years, so too has illegal consumption. Music Watch, a music and entertainment market research and analysis company, reported that nearly 57 million Americans are engaging in illegal file sharing and downloading.[58] Although, on its face, this may appear toxic to both record labels and artists, later sections of this Comment discuss how these methods of consumption might actually be helpful to aspiring artists.[59]

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52. *See infra* notes 54–58 (providing examples of digital distribution).

53. BANDCAMP, http://www.bandcamp.com [https://perma.cc/ZA2G-3T9N].

54. *Bandcamp, Downloads, Streaming, and the Inescapably Bright Future*, BANDCAMP (May 19, 2016, 5:52 AM), https://daily.bandcamp.com/2016/05/19/bandcamp-downloads-streaming-and-the-inescapably-bright-future/ [https://perma.cc/U6RB-USDZ] (last visited, Oct. 30, 2016).

55. *Id.*

56. Josh McConnel, *SoundCloud Brings Subscription Music Streaming Service SoundCloud Go to Canada*, FINANCIAL POST (Oct. 19, 2016), http://business.financialpost.com/fp-tech-desk/personal-tech/soundcloud-expands-subscription-music-streaming-service-soundcloud-go-to-canada?__lsa=c4d8-2113 [https://perma.cc/JWA6-T8HQ] (quoting Alison Moore, chief revenue officer of SoundCloud).

57. *Id.*

58. Russ Crupnick, *Bad Company, You Can't Deny*, MUSIC WATCH BLOG (Feb. 22, 2016), http://www.musicwatchinc.com/blog/bad-company-you-cant-deny/ [https://perma.cc/X42D-TQW3].

59. *See infra* notes 133–45 and accompanying text (discussing how to leverage file sharing).

Finally, the landscape for live performances has become more artist friendly with the affordability of modern transportation and the ease of communication between promoters and booking managers through the internet. For example, Stubbs, a prominent and historic music venue in Austin, Texas, includes the contact information for its booking manager on the venue's website, allowing artists to reach out directly and attempt to book a live performance.[60] Thus, the three pillars of success in a musician's career–production, distribution and touring–have transformed in a manner that has eroded the necessity of record labels and facilitated more "grassroots" efforts by unsigned musicians to facilitate fame.

IV. THE SHIFTING ROLE OF ARTISTS AND COPYRIGHT PROTECTIONS

> Those artists should go by themselves. They have a choice of what they can do. Artists who want to go it alone should just do that.[61]

A. Delayed Benefits of Copyright Protection

Under the "old school" business model, copyright protections were a necessity, unlocking the doors of record labels to aspiring artists and providing a system for compensating both musicians and labels for distribution of the compositions.[62] In the age of sophisticated technology and "DIY" artists, however, the immediate benefits of copyright protection have disappeared as artists are able to perform the core tasks of production, distribution, and performance without the assistance of major record labels.[63] In fact, the high transaction costs of utilizing and enforcing copyright protections early in a musician's career can be detrimental to that artist's shot at fame.[64] With upwards of 78% of a musician's revenue merely having an indirect or no relationship to copyright and 30% to 40% of revenue stemming from live performances, musicians cannot afford the time or monetary and

60. *Locations*, STUBBS AUSTIN, http://www.stubbsaustin.com/locations [https://perma.cc/BJ38-TG93]

61. Paczcowski, *supra* note 1.

62. *See supra* notes 24–25 and accompanying text (presenting the "old school" business model).

63. *See supra* notes 41–58 and accompanying text (discussing how musicians have adopted a DIY business model).

64. Perritt, *supra* note 24, at 95 (discussing how the enforcement of copyright protections is impracticable because the costs exceed the benefits); Perritt, *supra* note 2, at 346 (discussing how "it is so expensive to defend a copyright infringement lawsuit and the penalties for losing are so great").

publicity costs of enforcing copyright against the vast number of infringing individuals.[65]

Adding to the transaction costs is the Digital Millennium Copyright Act (DMCA),[66] enacted in 1998, which spurred a steady increase in the burdens of enforcement by immunizing hosting sites that do not monitor for copyright infringing activity.[67] By doing so, the DMCA restricted enforcement to the immense number of individuals using the sites, rather than the larger, consolidated, hosting sites with deeper pockets.[68]

Aside from the numbers alone, recent judicial interpretations of the DMCA have further increased the burden placed on musicians attempting to enforce copyright protections for their works.[69] In *Lenz v. Universal Music Corp.*, the DMCA's Online Copyright Infringement Liability Limitation Act (OCILLA),[70] specifically provisions (c), (f) and (g), came under scrutiny when Stephanie Lenz filed suit under Section 512 (f)[71] after YouTube removed her 29 second home video from its website in response to a "takedown notification"[72] submitted by the publishing administrator at Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively "Universal") for artist Prince.[73] Critical to the case, and central to solidifying the delayed benefits of copyright protection, is the effort required by copyright holders to submit a takedown notification. Prior to *Lenz*, Section 512(c) required a copyright holder only to (1) identify the copyrighted work, (2) identify the allegedly infringing material and (3) include "a statement that the copyright holder believes in good faith the infringing material 'is not authorized by the copyright owner, its agent, or the law.'"[74] After the case, however, copyright holders

65. DiCola, *supra* note 36 at 324–30.

66. Signed into law by President Clinton in 1998, the DMCA's five titles amended the United States' Copyright scheme to include, among other provisions, a limitation on liability for online service providers. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (Dec. 1998).

67. 17 U.S.C. § 512; U.S. COPYRIGHT OFFICE, *supra* note 66, at 1; Perritt, *supra* note 24, at 94.

68. 17 U.S.C. § 512.

69. Lenz v. Universal Music Corp., 815 F.3d 1145 (9th Cir. 2016).

70. 17 U.S.C. § 512.

71. Provision (f) provides that "any person who knowingly materially misrepresents under this section (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification" shall be liable for damages. 17 U.S.C. § 512 (f).

72. 17 U.S.C. § 512(c).

73. *Lenz*, 815 F.3d at 1148–51.

74. *Id.* at 1151. Moreover, if the user whose content was removed then submits a "counter-notification" stating that the user has a "good faith belief that the material was

now bear the burden of considering fair use when making the statement of good faith belief that the infringing material is unauthorized.[75] This mere "consideration," though a seemingly slight increase from the basic requirements of Section 512(c), is one more straw on the copyright holders back and will become an even greater hindrance to enforcement if the dissenting opinion's strenuous view gains any traction.[76]

Thus, the rapid growth of technology, combined with new legislation and the judicial system's interpretation of it, has solidified the impracticability of enforcing or utilizing copyright protections early in a musician's career simply by increasing the burdens of doing so.[77] The major costs of time, money, and publicity show how the legislature has been unable to keep up with the rapidly changing environment of music creation, distribution and performance.[78] Moreover, *Lenz* shows how the judicial system has developed little sympathy in enforcing the outdated legislative scheme against musicians and even appears willing to increase the burdens placed on musicians and copyright holders.[79]

Though the deep pockets and sheer manpower of a record label could help mitigate these strains and increased costs, the pockets can now be reached only after a musician has achieved celebrity status on his own.[80] The value of copyright protections early in a musician's career, therefore, has dwindled to nearly nothing in contrast with the "old school" business model and only becomes a viable bargaining chip upon stardom late in a musician's career.

B. Selected Propositions to Reform Copyright Law

In response to the advances in technology and shifting roles in the music business, scholars have proposed numerous copyright law reforms to adapt the current legislative scheme to the changing circumstances, most notably pertaining to file sharing

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removed or disabled as a result of mistake or misidentification" the service provider must restore the content unless the copyright holder files suit against the user. *Id.*

75. *Id.* at 1153.

76. *Id.* at 1160 (Smith, J., concurring in part, dissenting in part). The dissent argues for a heavier burden on copyright holders, potentially to the point of in-depth fair use analyses before issuing a "takedown notice" for potentially infringing material on third party servers. *Id.*

77. *See supra* notes 66–77 and accompanying text (providing the foundation for impracticability).

78. *Id.*

79. *Lenz*, 815 F.3d at 1158 ("That this step imposes responsibility on copyright holders is not a reason for us to reject it.").

80. Perritt, *supra* note 24, at 82.

and mitigating artists' lost compensation for copyrighted works.[81] One suggested reform entails a public subsidy for copyrighted music, which in turn would provide consumers with access to the recordings free of charge.[82] Subsequently, the majority of restrictions on reproduction, distribution, and performance would be repealed and file sharing would no longer be an eroding factor in artist compensation.[83] Another suggested reform involves a "blanket license for widespread file sharing" with government agency enforcement and compensation.[84] In conjunction with this license would be the creation of a distinct file format that clearly designates music as subject to copyright protections.[85] Thus, normal copyright laws would not necessarily be reformed as much as supplemented with an additional compensation scheme. Lastly, and most closely aligned with the proposition of this paper, is transitioning to a simple honor system.[86] An honor system, although seemingly outdated and impractical, is one of the few suggested reforms that actually conforms to artists' newly formed roles within the music business and their compensation strategies. Contrary to all of the aforementioned propositions, however, this Comment suggests that no reforms need be made to the existing copyright statutory scheme because musicians have reformed their business models rather than waiting for the copyright statutory scheme to adapt. Artists, rather than the legislature or judicial system, have taken it upon themselves to adapt to the rapidly changing environment and thrive in a society of file sharing and "going viral."

C. Shifting to a DIY Business Model

Unlike the previous, label-focused model for success in the music industry, artists have discovered an independent method of achieving celebrity status. The process as a whole can be broken into four steps: 1) self-produce, 2) self-distribute and market to "go viral," 3) leverage viral fame to tour and sign with a label, and 4) capitalize on persona.

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81. Perritt, *supra* note 2, at 344–48.

82. WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 202 (2004).

83. *Id.*

84. Perritt, *supra* note 2, at 346; Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 37 (2004).

85. *Id.* at 46.

86. Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 862–63 (2001).

1. Self-Producing.

To begin, modern technology has diminished the barriers to entry in the production process.[87] Artists must no longer enter an expensive, professional recording studio to achieve the studio quality sound sought by aspiring musicians.[88] Furthermore, production professionals, such as audio engineers, are no longer necessary to create chart-topping tracks due to the vast amount of information available on the internet and through other resources.[89] Aspiring musicians can simply produce quality tracks on a laptop from the comfort of their own home.[90] For example, Rae Sremmurd, a popular rap duo, stated that all of their hits are recorded in their home studio.[91] If, however, an artist happens to have sufficient funds to produce from a studio, the option remains available in addition to the cheaper alternatives.

2. "Going Viral".

After a track, multiple tracks, or an entire album has been produced, an artist must then distribute and self-promote his work in order to reach a large enough audience to continue with the process.[92] This begins with releasing tracks on one of the aforementioned platforms.[93] To do so, an artist can utilize host sites such as BandCamp, SoundCloud, YouTube or Spotify to release the music, receiving either minimal compensation from paid services, such as BandCamp or Spotify, or none at all, as is the case with the free sites SoundCloud and YouTube.[94] Contrary to the previous model requiring record labels to act as intermediaries,[95] the artists now control who consumes their music based on the particular platform chosen.[96] Upon releasing

87. *See supra* notes 42–47 and accompanying text (discussing the alternative opportunities afforded musicians for production).

88. *Id.*

89. *Id.*

90. *Id.*

91. Brittany Spanos, *Rae Sremmurd on Paul McCartney's Mannequin Challenge: 'It Blew Our Minds,'* ROLLING STONE (Nov. 17, 2016), http://www.rollingstone.com/music/features/rae-sremmurd-talk-paul-mccartney-mannequin-challenge-w450930 [https://perma.cc/LD7T-5K4D].

92. Perritt, *supra* note 24, at 126 ("The quickest way for a band to build context around its music is by focusing its promotional efforts towards developing internet-based music community.").

93. *See supra* note 52 (providing examples).

94. *Id.*

95. *See supra* notes 24–25 and accompanying text (providing record labels' functions as intermediary).

96. Perritt, *supra* note 2, at 327 ("Creators of music and other information goods benefit from making it easy for consumers to find them.").

the tracks to the internet, artists have one goal in mind: "going viral."[97] By doing so, the musical work, often through official music videos and additional user generated content, quickly reaches vast audiences across the world, immediately bolstering an artist to celebrity status.[98] Four examples help illustrate the benefits of "going viral."

To begin, in 2012, an artist out of South Korea under the name Psy released the viral hit "Gangnam Style" on the internet.[99] Within a month, the official music video for his work received over 49 million views on YouTube.[100] One month later, the number of views exceeded 167 million.[101] To date, the video has more than three billion views on the host website.[102] This staggering and steady influx of views over the past four years has allowed Psy to "succeed[] where the K-pop entertainment-industrial-complex and its superstars have failed so many times before . . . in America."[103]

Around the same time as the release of "Gangnam Style," American artist Baauer produced and released the track "Harlem Shake" on the internet.[104] Unlike "Gangnam Style," Baauer's track did not go viral because of an official music video. Instead, it was the copyright-infringing homemade videos[105] created by fans nearly a year after the song's initial release that caused "Harlem Shake" to spread like wildfire across the internet.[106] According to

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97. Elise Moreau, *What Does it Mean to Go Viral Online?*, LIFEWIRE (Oct. 5, 2016), https://www.lifewire.com/what-does-it-mean-to-go-viral-3486225 [https://perma.cc/8D8D-Y7CT].

98. Perritt, *supra* note 2, at 327 ("Artists can now let consumers and their friends do the work of getting the word out.").

99. Steve Knopper, *Breaking Down Psy's 'Gangnam Style'*, ROLLING STONE (Sept. 14, 2012), http://www.rollingstone.com/music/videos/breaking-down-psys-gangnam-style-20120914 [https://perma.cc/TH7W-9QCM]; officialpsy, *Gangnam Style*, YOUTUBE (Jul. 15, 2012), https://www.youtube.com/watch?v=9bZkp7q19f0.

100. Max Fisher, *Gangnam Style, Dissected: The Subversive Message Within South Korea's Music Video Sensation*, THE ATLANTIC (Aug. 23, 2012), http://www.theatlantic.com/international/archive/2012/08/gangnam-style-dissected-the-subversive-message-within-south-koreas-music-video-sensation/261462/ [https://perma.cc/7CAP-TW6T].

101. Knopper, *supra* note 99.

102. officialpsy, *supra* note 99.

103. Fisher, *supra* note 100.

104. Mad Decent, *Baauer - Harlem Shake [Official Audio]*, YOUTUBE (Aug. 23, 2012), https://www.youtube.com/watch?v=qV0LHCHf-pE.

105. These videos present similar copyright violations to Lenz's homemade video featuring a Prince song. *See supra* notes 71–72 and accompanying text (discussing Lenz's video).

106. *See*, *e.g.*, DizastaMusic, *Do the Harlem Shake (Original)*, YOUTUBE (Feb. 2, 2013), https://www.youtube.com/watch?v=8vJiSSAMNW; Ruben Alencastre, *Top 10 – Best Harlem Shake Versions*, YOUTUBE (Feb 9, 2013), https://www.youtube.com/watch?v=3R8HGsbI4QY. One possible impetus of the explosion of videos, and the most commonly cited was posted by a YouTube user named SunnyCoast Skate. Kevin Allocca, *The Harlem Shake has Exploded (Updated)*, YOUTUBE TRENDS BLOG (Feb. 12, 2013),

YouTube trends manager, Kevin Allocca, in February of 2013 around 40,000 "Harlem Shake" videos had been uploaded to the hosting site and procured over 175 million views.[107]

Although the phrase "copyright-infringing" carries a negative connotation, the homemade, non-compensating videos were ultimately accepted with welcome arms by Baauer because the videos fostered the free and far-reaching "advertising" necessary to make him famous.[108] The internet fad even "advertised" Baauer to more than just his target audience of music enthusiasts and college kids.[109] "Harlem Shake" entered the work place after Maker Studios posted its viral video which had procured over six million views by mid-February of 2013.[110] As a product of the fame, Baauer was able to create more original content, collaborate on new singles with other famous artists, and most importantly, begin performing live in order to profit from his musical works.[111]

Later, in 2014, a now-famous electronic dance music duo named The Chainsmokers produced and released the single "#Selfie" along with its infamous music video.[112] Despite the ultimate success of the track, the artists actually had no intention of achieving fame from the song.[113] Member Drew Taggart stated: "We made it as something funny for our fans that just went viral."[114] This statement shows the true power of "going viral,"

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http://youtube-trends.blogspot.com/2013/02/the-harlem-shake-has-exploded.html [https://perma.cc/6PF7-WEE9]; TheSunnyCoastSkate, *The Harlem Shake v1 (TSCS Original)*, YOUTUBE (Feb. 2, 2013), https://www.youtube.com/watch?v=384IUU43bfQ. Other sources cite a clip by video blogger Filthy Frank for creating the first video, though not the most viewed. Chris Taylor, *YouTube: Here's How 'Harlem Shake' Went Viral*, MASHABLE (Feb. 12, 2013), http://mashable.com/2013/02/12/youtube-harlem-shake/#9ks8qh4iLZqV [https://perma.cc/L5NT-GU4W]; DizastaMusic, *supra* note 108.

107. Allocca, *supra* note 108.

108. Derek Thompson, *The Guy Who Wrote 'Harlem Shake' Says He Didn't Make a Dime Off the Song*, THE ATLANTIC (Aug. 20, 2013), http://www.theatlantic.com/business/archive/2013/08/the-guy-who-wrote-harlem-shake-says-he-didnt-make-a-dime-off-the-song/278855/ [https://perma.cc/U3PE-42XS]; *see supra* note 97 (discussing the implications of "going viral").

109. Allocca, *supra* note 106.

110. *Id.*; Taylor, *supra* note 106. Other notable companies participating in the viral sensation include College Humor, The Chive, and Break. Allocca, *supra* note 106.

111. Thompson, *supra* note 108.

112. *The Chainsmokers,* #Selfie, YOUTUBE (Jan. 29, 2014), https://www.youtube.com/watch?v=kdemFfbS5H0.

113. Shazam, *The Chainsmokers Interview: "#Selfie was Something That Got Out of Our Control,"* YOUTUBE (Apr. 8, 2016), https://www.youtube.com/watch?v=DJAAIetPclg.

114. *Id.*; *see also* Ryan Mac, *Meet The Chainsmokers, The DJs that Survived American Idol,* FORBES (Aug. 16, 2016, 9:55 AM), http://www.forbes.com/sites/ryanmac/2016/08/16/meet-the-chainsmokers-the-djs-that-survived-american-idol/#7b620e147861 [https://perma.cc/8W2Q-4BNG] (stating that the duo's breakthrough "came as a complete joke"). The music video now boasts an impressive 515 million views on YouTube. The Chainsmokers, *#SELFIE (Official Music Video) The Chainsmokers*, YOUTUBE (Jan. 29,

even if unintentional, the ultimate consequences of fame and popularity that can ensue. The Chainsmokers are now headlining festivals and releasing song after song that quickly "dominate pop radio."[115] According to one Las Vegas promoter, "[n]ot many people have had the record of commercial success that [The Chainsmokers have] had. They've blown past everyone."[116] Thus, The Chainsmokers, though reluctant to do so, can attribute their rise to stardom to a single, viral track, "#Selfie."

Moving to a more recent example, the power of "going viral" presented itself at a slightly different time in two musicians' careers. Unlike the aforementioned artists who leveraged the fame of "going viral" to jumpstart their careers, the rap duo Rae Sremmurd experienced the phenomenon's effects upon a release later in their already successful careers. Having achieved moderate fame from tracks such as "No Flex Zone," "Throw Sum Mo" and "No Type" in 2014, Rae Sremmurd continued to release popular music culminating in the recent viral hit, "Black Beatles."[117] Similar to Baauer,[118] it wasn't the track itself, or the official music video, that infected the internet. Instead, the track "suddenly spiked because of its ties to the viral #MannequinChallenge," a popular internet video trend in which participants appear frozen like mannequins as music plays in the background.[119] Just a few weeks after its release, and one week after the popular video trend became associated with the song,[120] "Black Beatles" jumped from number nine in the country to number one atop the Billboard Hot 100,[121] remaining there for several weeks and hitting "50 million streams in consecutive

2014), https://www.youtube.com/watch?v=kdemFfbS5H0.

115. Mac, *supra* note 114.

116. *Id.*

117. RAE SREMMURD, http://www.raesremmurd.com/music [https://perma.cc/SAC3-VNZ4] (last visited Jan. 17, 2018).

118. *See supra* notes 104–13 and accompanying text (discussing Baauer's viral fame).

119. Moore, *supra* note 23; Mark Malloy, *What is the Mannequin Challenge? The Best Videos so far,* THE TELEGRAPH (Dec. 3, 2016, 8:17 AM), http://www.telegraph.co.uk/news/2016/11/05/what-is-the-mannequin-challenge-bizarre-freezing-craze-among-tee/. Other notable tracks "boosted by organic user generated content on social media" include "Juju On That Beat (TZ Anthem)" and "Watch Me (Whip/Nae Nae)." Joe Coscarelli, *How Rae Sremmurds' 'Black Beatles' Rode the #MannequinChallenge to No. 1*, THE NEW YORK TIMES (Nov. 16, 2016), http://www.nytimes.com/2016/11/17/arts/music/black-beatles-rae-sremmurd-mannequin-challenge-meme.html?_r=0.

120. The use of "Black Beatles" with the internet craze began when a student at Colony High School in Ontario, CA, Joseph Day, filmed a Mannequin Challenge video with the song playing in the background. Coscarelli, *supra* note 119; Spanos, *supra* note 91.

121. In keeping pace with shifts in the music industry and advances in technology, Billboard began altering its ranking formulas in 2013 to factor in YouTube views, digital streams and downloads. Coscarelli, *supra* note 119.

weeks."[122] The explosion of the track mirrors that of both the "'Harlem Shake,' which was also closely associated with a popular meme"[123] and Psy's "Gangnam Style," which alternatively achieved viral fame from its official music video.[124] The ultimate fame of this track, however, was no accident. Instead, it was the product of a marketing collaboration between Gunner Safron of Interscope Records and a former music-blogger-turned-internet-culture-specialist, Pizzaslime.[125] Writer Jacob Moore of "Pigeons and Planes" states:

> From the outside looking in, this is one big stroke of luck, but behind the scenes, the team around Rae Sremmurd was facilitating this movement. And while it was ultimately up to the fans to help create their own content and spread it on a massive scale, a few key players were making sure that all the pieces were in place.[126]

After seeing the #MannequinChallenge gaining steam on the internet without a particular song attached to it, Interscope quickly positioned Rae Sremmurd to attach "Black Beatles" as the soundtrack of the movement.[127] The night following Colony High School's #MannequinChallenge,[128] which was actually the first video content to feature the rap duo's single, Rae Sremmurd performed its own version of the meme at a live performance, "earning nearly 60,000 retweets of the video and inextricably linking 'Black Beatles' to the challenge."[129] Following the performance and video, Pizzaslime and Interscope "service[d] it out to as many people as possible [to] make sure that the association with that challenge was with the music."[130] In short, this collaboration represents a major shift in the position of record labels' role in an artists' career and the "forward-thinking marketing in the music industry of 2016."[131] Moreover, both Interscope Records and Pizzaslime solidified the understanding

122. Moore, *supra* note 23; Coscarelli, *supra* note 119. Streams of the track "nearly tripled" and "paid downloads shot up even more, reaching 144,000." Coscarelli, *supra* note 119.

123. Moore, *supra* note 23; *see supra* notes 104–13 and accompanying text (showing Baauer's use of viral fame). A meme is "an image, video, piece of text, etc., typically humorous in nature, that is copied and spread rapidly by internet users, often with slight variations." OXFORD DICTIONARY, English Oxford Living Dictionaries (2018), https://en.oxforddictionaries.com/definition/meme [https://perma.cc/4DZK-VVB9].

124. Coscarelli, *supra* note 119.

125. Moore, *supra* note 23.

126. *Id.*

127. *Id.*

128. Coscarelli, *supra* note 119.

129. *Id.*

130. Moore, *supra* note 23.

131. *Id.*

that topping the charts quickly requires sacrificing copyright protections to create a viral movement.[132]

3. Leveraging Viral Fame.

Because the cost of viral fame early in a musician's career is compensation from copyright enforcement, musicians have shifted from producing as recording artists to performing as touring artists in order to make money.[133] As was the case with Baauer, an aspiring music celebrity producing music in the basement of his home, his viral hit "Harlem Shake" pulled him out of the studio and onto the road.[134] This shift from producing and selling records to performing live stems not only from the voluntary sacrifice of copyright enforcement to "go viral" but from avoiding the costs of properly enforcing copyright protections.[135] In contrast to recorded music, live performances are "not threatened by digital technology's erosion of copyright protections"[136] and ultimately add to the already growing internet fan community by "build[ing] up a loyal grass-roots fan base."[137] Thus, after achieving viral fame, artists must leverage their celebrity status to book shows, tour, continue growing their fan base and ultimately reap the financial benefits of selling tickets to the performances.

Not only can a musician leverage internet success to begin touring, he can also leverage it to gain access to the deep-pocketed, heavy-manpowered record labels, although unnecessary under the modern DIY business model.[138] Despite the rapidly changing role of labels in the music industry, access to a label late in a musician's career can provide several key benefits. First, an artist that signs with a label gains access to its "deep-pockets," providing heavy monetary investment in continued marketing campaigns as well

132. *Id.*

133. Perritt, *supra* note 2, at 307 (stating that the "business model for musicians favors live performances over recording"). Conversely, "compositions have much greater importance to the top percentile of estimated music income relative to the other income groups. Those who make less money from music tend to earn a greater proportion of their revenue from live performances." DiCola, *supra* note 36, at 328. Copyright can constitute approximately one-quarter of these musicians' revenue. *Id.* at 330.

134. Thompson, *supra* note 108.

135. *See supra* notes 63–66 and accompanying text (presenting the shift to focusing on live performances); Perritt, *supra* note 2, at 333 (discussing how changes in technology have made it difficult to collect revenue from musical works and control its distribution).

136. Perritt, *supra* note 24, at 85.

137. *Id.* at 127.

138. Contrast this method of accessing record labels through celebrity status with the previous model of early access through copyright protections. *See supra* note 41 and accompanying text (stating that record labels are unnecessary under a "DIY" model).

as efficient touring plans, transportation and management.[139] Second, labels are heavily staffed in order to meet the needs of its signed artists. Inherently, these needs include copyright enforcement and management, a task too daunting for a solo musician to tackle alone.[140] The transaction costs discussed above can be absorbed into the label and artists can begin reaping profits, though relatively small until superstardom, from copyrighted works.[141] In short, an artist that ultimately signs with a label is able to shift his focus back to producing music, while the label manages the business aspects of his career.[142] After achieving internet fame, touring successfully, and signing with a label, an artist with enough of a following can then profit from avenues beyond his producing and performing his recorded works.

4. Capitalizing on Persona.

Supplementing the existing streams of revenue from both touring and sales, a musician with a large enough fan base can capitalize on his persona through merchandise sales, guest appearances, and spin-off projects including books or clothing lines.[143] Reciprocally, as fans' desire to associate with the artist grows, so does their desire to buy the artists' music.[144] Although discussed last within this Comment, some scholars believe this

139. Moore, *supra* note 23 (discussing Interscope's marketing investments for Rae Sremmurd); Helienne Lindvall, *Behind the Music: What Do Record Labels Actually Do? You'd be Surprised*, THE GUARDIAN (Feb. 2, 2012, 8:12 AM), https://www.theguardian.com/music/musicblog/2012/feb/02/behind-music-record-labels (discussing the "help and support and finance" provided by record labels).

140. Lenz v. Universal Music Corp., 815 F.3d 1145, 1148–51 (9th Cir. 2016) (discussing the actions taken by a publishing administrator at "Universal" who oversaw enforcement of copyright protections for the artist Prince). *See supra* notes 64–68 and accompanying text (stating the high transaction costs of enforcement by solo musicians).

141. Perritt, *supra* note 24, at 128 (stating that "once a musician achieves celebrity status, his income usually explodes").

142. Lindvall, *supra* note 139 (discussing how artists would prefer to be creative rather than deal with the hassle of business management). Contrast outsourcing the business management of a musician's career to a record label with that of someone like Chance the Rapper, who refuses to sign with a label and instead outsources his business management to independent parties. *See infra* notes 172–74 and accompanying text (discussing Chance's management team).

143. Perritt, *supra* note 24, at 147 ("A significant portion of demand is driven by consumer desire to associate with musicians."); Caryn Rousseau, *Fall Out Boy Bassist Brands Emo*, THE VIRGINIAN-PILOT (May 12, 2016), http://pilotonline.com/entertainment/music/fall-out-boy-bassist-brands-emo/article_828824aa-4917-5910-84e4-a1f9597fe723.html [https://perma.cc/M7DC-KX5Y] ("When young people align themselves with a band they need more than just music. They're buying into a whole lifestyle.").

144. Perritt, *supra* note 2, at 259.

aspect of an artist's business model, the protection of visual symbols and persona with trademark, to be the most important.[145]

In the early 2000s, bassist Pete Wentz of the punk band Fall Out Boy brilliantly displayed how to capitalize on his and his band's persona to not only profit in the short term but long term as well.[146] At the time, Wentz noted that "[t]he culture of Fall Out Boy won't be there forever, so you find what you want to do between now and then."[147] And that is exactly what he did. As of 2007, Wentz not only participated as bassist and lyricist for the band, he also headed his own record label, founded a clothing line, became part owner of a New York night club, and was producing a reality TV series.[148] Most notably, and closely tied to the persona of both Fall Out Boy and Wentz himself, was the formation of Clandestine Industries, a clothing brand tied to the punk image of the music group.[149] As of 2007, the brand's website brought in $100,000 a month, with Wentz retaining a one-third cut of the revenue stream.[150] Eventually, the brand became big enough to partner with the DKNY clothing line and migrate into mainstream fashion.[151]

Aside from the monetary benefits, capitalizing on one's image and persona prevents imposters and "phonies" from tarnishing an artist's reputation or worse, profiting at the artist's expense.[152] As a recent example, a famous electronic dance music artist called Marshmello, known not only for his music but for his marshmallow-shaped helmet used during performances,[153] caught wind of a phony performance in Asia and took to Twitter to clear

145. Perritt, *supra* note 24, at 147.

146. Amanda Schupak, *Fall Back Boy*, FORBES (June 15, 2007, 11:20 PM), http://www.forbes.com/forbes/2007/0702/104.html [https://perma.cc/V6DS-NGDL]. This Article also notes several other business connoisseurs who leveraged their fame in areas outside of the music industry including 50 Cent, Sean (Diddy) Combs and Jay-Z. *Id.*

147. *Id.*

148. *Id.* Wentz even self-published an illustrated book based on his nightmares that sold around 10,000 copies in 2004. *Id.*

149. *Id.*

150. *Id.*

151. *Pete Wentz and DKNY Jeans Launch Clandestine Industries for DKNY Jeans*, PRNEWSWIRE (Aug. 31, 2007, 1:00 AM), http://www.prnewswire.com/news-releases/pete-wentz-and-dkny-jeans-launch-clandestine-industries-for-dkny-jeans-58646852.html [https://perma.cc/N3S7-EGSX].

152. Travis McGovern, *Zouk Singapore has Fake Marshmello Play Club After Ultra*, YOUREDM (Sept. 13, 2016), http://www.youredm.com/2016/09/13/zouk-nightclub-fake-marshmello-play-club/ [https://perma.cc/P259-S73R].

153. Another artist in the electronic dance music sphere, Deadmau5, also uses a similar helmet display during his performances in order to build and solidify his persona. Eriq Gardner, *Why Deadmau5' Trademark Battle with Disney has Cost Him Dearly*, BILLBOARD (Sept. 12, 2014), http://www.billboard.com/articles/news/6251375/why-deadmau5-trademark-battle-with-disney-has-cost-him-dearly [https://perma.cc/93BU-9Y7N].

the air.[154] The performance occurred at Zouk night club and either stemmed from the imposter attempting to rip-off the night club or, more probable, the night club attempting to rip-off Marshmello by using his image and music without compensation.[155]

D. Case Study: Hip-Hop's Biggest Independent Icon, Chance the Rapper

In order to more clearly portray the "DIY" business model adopted by many modern musicians, a case study of the artist Chance the Rapper (Chance), the "most successful fully independent musician of our era" follows.[156] Humbly beginning his career in Chicago distributing CDs and mixtapes by hand, Chance the Rapper quickly exploded into the nation's rap scene with the release of his debut album "10 Day" in 2012.[157] Recorded in his home during a ten day suspension from high school, the free, self-released album quickly received over 400,000 downloads on DatPiff, a popular music-sharing website, and garnered Chance the viral "cult following" necessary to skyrocket his internet fame.[158] Soon after, Childish Gambino, a popular rap artist at the time, featured Chance on his song "They Don't Like Me" and solidified Chance's path to stardom.[159]

Following the fame, record labels from across the country began courting the high school rapper, though to no avail.[160] Chance had immediately capitalized on his internet success and not only sold out a 500-person venue in Chicago, but received an invitation to tour with his former collaborating partner, Childish Gambino.[161] Despite tempting deals from major labels, Chance decided to refuse the offers as he "learned on the fly about how deals actually work[ed]."[162] It was not long before Chance

154. McGovern, *supra* note 152.

155. *Id.*

156. Jacob Shamsian, *A 23-year-old Rapper who Refuses to Sign a Record Deal is Tearing up the Hip-Hop World all by Himself*, BUSINESS INSIDER (Jun. 23, 2016, 10:24 AM), http://www.businessinsider.com/chance-the-rapper-refuses-to-sign-a-record-deal-2016-6/#chance-the-rapper-calls-his-albums-mixtapes-he-recorded-his-first-one-in-his-senior-year-of-high-school-1 [https://perma.cc/QH94-YTDW].

157. *Id.*

158. *Id.*

159. *Id.*

160. Dan Rys & Ben Austen, *How Chance the Rapper Turned Down Leading Labels, then Teamed with Apple Music*, BILLBOARD (Aug. 11, 2016), http://www.billboard.com/articles/columns/hip-hop/7469373/chance-the-rapper-manager-interview [https://perma.cc/9TWK-YH7A].

161. *Id.*

162. *Id.*

"discovered that going with a label wasn't for [him]."[163] Instead, the rapper chose a "DIY" business model for controlling his music ventures and cultivating success.[164] Regarding his decision to not join a major deal, Chance states:

> Label deals suck, that's just the truth of it . . . People believe you have to be discovered by a higher power, who hires you and takes a percentage, but in reality, you have to garner a fan base on your own.[165]

Slowly but surely, as Chance continued to tour in response to his first release, the young celebrity substituted the signing offers from major labels with a support team that would ultimately foster his status as an "indie hero"[166] and "2016's most highly praised rapper."[167] The team began with Pat Corcoran, his manager, Dan Weiner, his publicist, and Cara Lewis, his agent.[168] Now the team operates under a self-created company, Chance the Rapper LLC[169] and has grown from a just a handful, to 15,[170] to a now staggering 32-person team to handle the business aspects of his career including marketing, merchandising, and booking.[171]

As for the music itself, Chance stayed true to the freedom of his first release and adopted the "viral fame" methodology of reaching the top of the charts and promoting the profitable aspects

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163. *Id.*

164. Marc Hogan, *Charting Chance the Rapper's Unsigned Success*, PITCHFORK (May 17, 2016), http://pitchfork.com/thepitch/1150-charting-chance-the-rappers-unsigned-success/ [https://perma.cc/8ASV-HJ4M].

165. Neil Shah, *Chance the Rapper's Independent Course; Chance the Rapper has Built his Fame Through Grass-roots Marketing and Social Media and Hasn't Committed to a Major Label*, WALL ST. J. (Oct. 7, 2015), http://www.wsj.com/articles/chance-the-rappers-independent-course-1444235576.

166. Andrew Friedman, *Why Chance the Rapper is not a Truly Independent Artist*, FACT (May 20, 2016), http://www.factmag.com/2016/05/20/chance-the-rapper-independent/ [https://perma.cc/4HWT-DP7L].

167. Ben Austen, *The New Pioneers: Chance the Rapper is One of the Hottest Acts in Music, has a Top 10 Album and His Own Festival – All Without a Label or Physical Release*, BILLBOARD (Aug. 11, 2016), http://www.billboard.com/articles/news/magazine-feature/7468570/chance-the-rapper-coloring-book-labels-grammys [https://perma.cc/C83J-4AN2].

168. Reggie Ugwu, *How 20-Year Old Chance the Rapper has Nearly Every Major Label Chasing Him*, BILLBOARD (May 1, 2013, 1:40 PM), http://www.billboard.com/biz/articles/news/indies/1560132/how-20-year-old-chance-the-rapper-has-nearly-every-major-label [https://perma.cc/CMJ9-UP7Y].

169. Ogden Payne, *Three Marketing Takeaways from Chance the Rapper's 'Coloring Book' Roll-Out*, FORBES (May 30, 2016, 12:43 PM), http://www.forbes.com/sites/ogdenpayne/2016/05/30/three-marketing-takeaways-from-chance-the-rappers-coloring-book-roll-out/#6de3b87e638e [https://perma.cc/HAS6-ZA98].

170. Shah, *supra* note 165 (stating that Chance's team included 15 members as of 2015).

171. Austen, *supra* note 167 (stating that Chance's team includes 32 members as of 2016).

of his career, touring and merchandising.[172] To date, Chance has released all of his music for free, growing his fan base through the internet and touring more vastly.[173] He depends mostly on "word of mouth and his SoundCloud account for distribution."[174] In 2013, Chance released his next free project, "Acid Rap" and garnered numerous "best-of" accolades along with over a million downloads.[175] Two years later, the now-renowned "DIY" artist joined a collaborative music group called "Donnie Trumpet & The Social Experiment" for a short stint, releasing yet another free album titled "Surf."[176] Instead of releasing the music all on one account, however, the group took an alternative approach: releasing different songs "on the SoundCloud accounts of different musicians," a tactic unlikely to have been approved by a commercial record label.[177] Riding his previous success and the critical acclaim of this new venture, Chance became the first unsigned artist to appear on Saturday Night Live in December of 2015, performing two tracks from "Surf."[178]

Shortly thereafter, a long-time hero of the young musician, musical artist Kanye West, included Chance in the production of his upcoming album, "The Life of Pablo," leading to a second appearance for the unsigned artist on Saturday Night Live in February of 2016 to perform "Ultralight Beam" with West.[179] Within three months of the performance, Chance released his most recent and most successful project, "Coloring Book," yet again with no purchasable content.[180] As expected, the album was incredibly successful, not only as "streaming-only" but in comparison to other artists' conventional albums as well.[181] The statistics include: 1) achieving a number eight spot on the Billboard 200 chart, 2) being the first-ever streaming-only album to even reach the chart, 3) receiving 338 million streams, the equivalent of 226,000 albums sold, and 4) grossing $2.13 million in streaming revenues within

172. Shah, *supra* note 165.

173. The Tonight Show Starring Jimmy Fallon, *Chance the Rapper Doesn't Sell His Music*, YOUTUBE (Oct. 4, 2016), https://www.youtube.com/watch?v=YlwNzIf1GmE.

174. Shamsian, *supra* note 156. His latest release, "Coloring Book," however, was not technically free with its initial streaming release exclusively with Apple Music followed by releases on other streaming sites such as Spotify and Tidal. Friedman, *supra* note 166.

175. Shamsian, *supra* note 156.

176. Hogan, *supra* note 164.

177. Shamsian, *supra* note 156.

178. *Id.*

179. Payne, *supra* note 169.

180. Austen, *supra* note 167. Although not technically "free," the album was not released for purchase, only streaming. *Id.*

181. Austen, *supra* note 167.

three months.[182] In fact, the album proved to be so successful, and Chance so influential on the internet,[183] that the Grammy's altered its eligibility requirements to allow streaming-only albums to qualify for nominations.[184] By the announcements on December 6, 2016, Chance and his album "Coloring Book" had earned seven Grammy nominations.[185]

Lastly, Chance has leveraged his musical fame to not only tour across the globe, but capitalize on his persona as well. Large portions of his income have stemmed from merchandising, participating in meet-and-greets, and deals with companies from Apple to Bud Light to Citibank, each "eager to reach his many young, savvy fans."[186] Chance even created a music festival in his hometown of Chicago called Magnificent Coloring Day.[187] With over 50,000 tickets being sold to attend, the festival shattered Cellular Field's[188] previous attendance record of 47,609.[189] In return, the festival grossed approximately $3.8 million.[190] Furthermore, Chance strengthened his growing impact on the city of Chicago by designing a line of "specialty caps" for the city's baseball team, the White Sox.[191]

Thus, Chance the Rapper has truly earned his title as "the most talented rapper of his generation and a pioneer in the music industry."[192] Not only has his talent procured a cult following, his business acumen has allowed him to break the traditional mold of a profitable musician and forge a new path in the industry. Beginning as a humble self-producer and artist in his home, Chance chose to reach his target audience through the internet in

182. *Id.*

183. Chance utilized his twitter account by asking fans to sign a petition urging the National Academy of Recording Arts and Sciences (NARAS) to consider free music in its Grammy nominations. Hogan, *supra* note 164. The rapper even became a short-lived internet meme when he "freaked out" upon Beyoncé disrupting his backstage interview at the 2016 MTV Video Music Awards. Crystal Bell, *Chance the Rapper is All of Us Meeting Beyoncé Backstage at the VMAs*, MTVNEWS (Aug. 29, 2016), http://www.mtv.com/news/2925689/beyonce-surprise-chance-the-rapper-2016-vmas-video/ [https://perma.cc/5NQG-KJJC].

184. Austen, *supra* note 167.

185. Peter A. Berry, *Chance the Rapper Says it Wasn't Easy Turning Down Kanye West's Signing Offer*, XXL (Dec. 22, 2016), http://www.xxlmag.com/news/2016/12/chance-the-rapper-wasnt-easy-turning-down-kanye-offer/ [https://perma.cc/99H8-X4QE].

186. Austen, *supra* note 167.

187. *Id.*

188. Cellular Field is the baseball stadium for the Chicago White Sox. *Id.*

189. Austen, *supra* note 167. The festival proved to be so popular that more seats were made available to satisfy fans who were unable to purchase tickets during the initial sale. *Id.*

190. *Id.*

191. *Id.*

192. Shamsian, *supra* note 156.

search of viral fame, without fear of the losses associated with releasing free music. His DIY mindset produced a negative attitude toward record labels and ultimately led him to operate as an independent artist. In short, the young rapper's career choices have clearly displayed the irrelevance of legal protections afforded copyright owners in the music industry and proven the viability of utilizing unconventional methods to capitalize on musical talent.

V. CONCLUSION

Contrary to the strides made in the twentieth century in protecting musicians' compositions and sound recordings, technology has progressed at a sufficiently fast rate to make copyright protections a thing of the past for modern musicians. Instead of waiting for the legal system to catch up, artists of the twenty-first century, such as Chance the Rapper, have taken it upon themselves to alter their business models and succeed without the aid of copyright law. The "DIY" method of producing, distributing, promoting, and performing has allowed musicians to adapt to the shifting circumstances and remain in a profession that would otherwise be unprofitable. Therefore, no reforms to the current system of copyright law are necessary to assist musicians in the current technology-influenced climate. Artists have made the necessary reforms and will continue to adapt in the future.

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