

LOOK WHAT YOU MADE HER DO: HOW SWIFT, STREAMING, AND SOCIAL MEDIA CAN INCREASE ARTISTS' BARGAINING POWER

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ABSTRACT

Music and technology have always been intertwined and recently the developments of streaming and social media have opened the door for artists to elevate their place in the music industry. The growth of social media engagement is undeniable and in 2016 streaming platforms led to the music industry's first earnings increase in fifteen years, with double digit gains each year since—a change to the status quo that cannot be ignored. The technological moment provided by streaming and social media gives lesser-known artists, especially when they are backed by superstars, a unique opportunity to challenge traditionally label friendly record deals. These technologies provide artists with the ability to grow their fanbase and increase their bargaining power before reaching the negotiation table with a label—giving them more leverage to maintain ownership of their music and receive more artist friendly contracts.

I. INTRODUCTION TO THE MUSIC INDUSTRY (TAYLOR'S VERSION)

It is difficult to make it very long without hearing news about the Artist of the Decade: Taylor Swift.¹ Swift became a household name in the 2010s, and over the last decade, Swift topped music charts, influenced the music industry and pop culture, ruled social media, and packed stadiums full of adoring fans.² With a star this big, all of her major industry moves

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¹ Christopher Rosa, *Taylor Swift Is the Artist of the Decade—Whether You Like It or Not*, GLAMOUR (Dec. 24, 2019), <https://www.glamour.com/story/taylor-swift-is-the-artist-of-the-decade>.

² See, e.g., *id.* (“No singer affected music and pop culture in the 2010s quite like she did.”); *Chart History: Taylor Swift*, BILLBOARD, <https://www.billboard.com/music/taylor-swift/chart-history> (last visited Mar. 15, 2020) (listing Swift's 97 chart appearances, 25 Top 10 Hits, and 5 No. 1 Hits); Devin Leonard, *Taylor Swift IS the Music Industry*, BLOOMBERG (Nov. 13, 2014 9:02 PM EST) <https://www.bloomberg.com/news/articles/2014-11-12/taylor-swift-and-big-machine-are-the-music-industry>; Jem Aswad & Chris Willman, *Taylor Swift*

make headlines. This includes her November 2018 transition from Big Machine Records (“BMR”), the Nashville-centered independent label that originally signed her, to Universal Music Group (“UMG” or “Universal”), one of the “Big Three” music labels in the industry.³

While this signing initially made news because of Swift’s stardom and advocacy for other artists, it faded from headlines until many months later.⁴ In the summer of 2019, Scooter Braun purchased Big Machine Label Group, the parent organization of BMR, with the backing of the Carlyle Group and Ithaca Holdings, Braun’s company.⁵ In response to this seemingly normal business move, Swift proclaimed that this was her

Signs Landmark New Deal with Universal Music Group, VARIETY (Nov. 19, 2018, 7:06 AM PT), <https://variety.com/2018/music/news/taylor-swift-news-alert-1203032124/> (“[Swift was] the youngest-ever recipient of the Grammy for Album of the Year — and the first female solo artist to win the award twice — is the only artist in history with four albums with sales of more than one million copies in their first week of release.”); Mark Savage, *Grammys 2021: Beyoncé and Taylor Swift Make History*, BBC (Mar. 15, 2021), <https://www.bbc.com/news/entertainment-arts-56397324> (“Taylor Swift [] made history at Sunday’s ceremony, by becoming the first female artist ever to win album of the year three times.”); *Person of the Year*, TIME, <https://time.com/vault/subject/person-of-the-year/> (last visited Mar. 15, 2020) (featuring Swift on Time’s Person of Year Cover in 2017 among four other women calling them “The Silence Breakers” for their influence on the MeToo movement); Jason Lipshutz, *Billboard Woman of the Decade Taylor Swift: ‘I Do Want My Music to Live On,’* BILLBOARD (Dec. 11, 2019 9:56AM EST), <https://www.billboard.com/articles/columns/pop/8545822/taylor-swift-cover-story-interview-billboard-women-in-music-2019> (naming Swift Billboard’s Woman of the Decade for her unprecedented rise to stardom using her star power to advocate for artists’ rights); *The Most Followed Instagram Profiles*, trackalytics, <https://www.trackalytics.com/the-most-followed-instagram-profiles/page/1/> (last modified Mar. 15, 2020) (ranking Swift as the fourteenth most followed Instagram account with over 142 million followers); *Taylor Swift*, YOUTUBE <https://www.youtube.com/user/taylorswift/about> (last visited Mar. 15, 2020) (documenting the nearly 19 billion views on Swift’s YouTube videos); Eric Frankenberg, *Taylor Swift’s Reputation Stadium Tour Breaks Record for Highest-Grossing U.S. Tour*, BILLBOARD (Nov. 30, 2018), <https://www.billboard.com/articles/columns/chartbeat/8487606/taylor-swift-reputation-stadium-tour-breaks-record-highest-grossing-us-tour> (discussing that Swift’s Reputation Stadium Tour became the highest grossing tour in the U.S. while pulling in over \$345 million internationally).

³ Kathryn Rosenberg, *Restoring the Seven Year Rule in the Music Industry*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 275, 277 (2015) (“[T]he “Big Three,”—Sony Music Group (“Sony”), Universal Music Group (“UMG”), and Warner Music Group (“WMG”)—represent a large share of the music market; many well-known, though seemingly smaller, regional record labels actually fall under the corporate umbrella of one of these three players.”).

⁴ See Aswad & Willman, *supra* note 2.

⁵ Ed Christman, *Scooter Braun Acquires Scott Burchetta’s Big Machine Label Group, Taylor Swift Catalog For Over \$300 Million*, BILLBOARD (Jun. 30, 2019), https://www.billboard.com/articles/business/8518119/scooter-braun-acquires-big-machine-label-group-scottburchetta?utm_campaign=20190630&utm_source=Sailthru&utm_medium=email&utm_term=biz_breakingnews.

“worst case scenario.”⁶ While Swift’s reaction was initially perplexing to some, diving into Swift’s former deal with BMR and her past relationship with Braun reveals just how personally taxing this purchase was for her. Swift signed with BMR at just fifteen years old and released her first six albums with the label.⁷ BMR retained the rights to her sound recordings, or masters, for these first six albums after Swift left for UMG.⁸ Besides the true he-said-she-said of Swift’s ability to purchase her masters from BMR before her departure to UMG, the fact is her masters remained with BMR and even accounted for a reported 50–80% of BMR’s revenues.⁹

Swift and Braun have a tumultuous relationship and his purchase of BMR put him in charge of Swift’s past art.¹⁰ While Swift was able to start re-recording her albums released under BMR after her exclusivity clause expired in November 2020 and released her first re-recorded album *Fearless (Taylor’s Version)* on April 9, 2021, her original masters currently remain under Braun’s control.¹¹ As this article will discuss in Section II, *infra*, owning one’s own master recordings is the key to

⁶ Taylor Swift (@TaylorSwift), TUMBLR (Jun. 30, 2019), <https://taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my>.

⁷ Ashley Cullins, “*She Has No Legal Recourse*”: *Why Taylor Swift Won’t Sue Scooter Braun to Get Her Masters*, HOLLYWOOD REP. (July 2, 2019 2:14 PM PT), <https://www.hollywoodreporter.com/thr-esq/why-taylor-swift-wont-sue-scooter-braun-get-her-masters-1222082>.

⁸ Christman, *supra* note 5.

⁹ Dominic Rushe, *Why Taylor Swift and Scooter Braun’s Bad Blood May Reshape the Industry*, GUARDIAN (Nov. 23, 2019 1:00 AM EST), <https://www.theguardian.com/music/2019/nov/23/taylor-swift-scooter-braun-amas-old-music-masters> (citing Chris Willman, *Taylor Swift Stands to Make Music Business History as a Free Agent*, VARIETY (Aug. 27, 2018 4:18 PM PT), <https://variety.com/2018/music/news/taylor-swift-stands-to-make-music-business-history-as-a-free-agent-1202918336/>). *See generally*, Cullins, *supra* note 7 (providing that Don Passman, Swift’s attorney, claimed BMR “never gave Taylor Swift an opportunity to purchase her masters”); M.H., *The Relationship Between Musicians, Masters Recordings and Record Labels*, ECONOMIST (Jul. 8, 2019), <https://www.economist.com/prospero/2019/07/08/the-relationship-between-musicians-master-recordings-and-record-labels> (discussing the possibility of Swift earning back her masters through signing a second contract with BMR).

¹⁰ Brittany Spanos, *Taylor Swift vs. Scooter Braun and Scott Borchetta: What the Hell Happened?*, ROLLING STONE (July 1, 2019 1:22 PM), <https://www.rollingstone.com/music/music-news/taylor-swift-scooter-braun-scott-borchetta-explainer-853424/>.

¹¹ Tim Ingham, *Taylor Swift Plans to Re-Record Her Hits. Here’s What She Might Be Facing*, ROLLING STONE (Dec. 9, 2019 11:20 AM), <https://www.rollingstone.com/music/features/taylor-swift-plans-to-re-record-her-hits-heres-what-she-might-be-facing-923019/>; Jon Caramanica et al., *Taylor Swift Remade ‘Fearless’ as ‘Taylor’s Version.’ Let’s Discuss.*, N.Y. TIMES (Apr. 9, 2021), <https://www.nytimes.com/2021/04/09/arts/music/taylor-swift-fearless-taylor-version.html> (discussing the release of Swift’s first re-recorded album); Joe Coscarelli, *Taylor Swift’s Rerecorded Album Releases Begin With ‘Fearless’ in April*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/arts/music/taylor-swift-rerecord-fearless.html>.

controlling one's artistic fate.¹² Masters are the original sound recordings of songs; they embody “a recording artist's life's work and musical legacy” and constitute an “irreplaceable primary source of recorded music.”¹³ Indeed, the master recordings are “essential to releasing remixed and re-mastered versions of previously released material in new configurations; creating new releases from previously-unreleased tracks, outtakes, and alternative versions from recording sessions; and generating new sources of revenue as technology evolves.”¹⁴ Further, owning the masters of a work means owning the sound recording copyright—which has significant control and financial implications.¹⁵ For Swift, seeing her work in the hands of a man who famously bullied her was a devastating turn of events.¹⁶ The internet rallied around the popstar but in the end the tension was “a personal issue, not a legal one.”¹⁷ Swift likely did not have a case. She signed a contract at a young age releasing ownership of her masters to BMR, which then eventually led to the potentially unforeseeable and unhappy scenario where a personal enemy legally gained ownership through the sale of the label.¹⁸ Without a clause in her contract restricting the sale of her masters to third parties, there was not much she could do at the time except bring publicity to the issue and then move on.¹⁹

Fast-forward to November 2019, when Swift versus Braun was once again on front pages—this time for a dispute over Swift's ability to perform her old songs at the American Music Awards (“AMAs”) where

¹² *Why Owning Your Master Recordings Means Everything*, AWAL (Sept. 19, 2018), <https://www.awal.com/blog/maintaining-ownership-rights-as-an-artist>; Anastasia Tsioulcas, *Artists File \$100 Million Suit Against Universal Music Over 2008 Fire*, NPR (June 22, 2019 1:13 PM), <https://www.npr.org/2019/06/22/734973029/artists-file-100-million-suit-against-universal-music-over-2008-fire>.

¹³ Class Action Compl. for Breach of Contract, *Soundgarden v. UMG Recordings, Inc.*, No. 2:19-cv-05449-JAK-JPR, 2020 U.S. Dist. LEXIS 64545, 20 (2020) [hereinafter Class Action Complaint].

¹⁴ *Id.*

¹⁵ See *Copyright 101: What Artists Need to Know to Protect Their Work*, STEM (June 21, 2018), <https://stem.is/music-copyrights-artist-rights/> [hereinafter *Copyright 101*].

¹⁶ Taylor Swift (@TaylorSwift), TUMBLR, *supra* note 6; see Lisette Voytko, *Here's Why Taylor Swift Hates Scooter Braun So Much*, FORBES (July 1, 2019), <https://www.forbes.com/sites/lisettevoytko/2019/07/01/heres-why-taylor-swift-hates-scooter-braun-so-much/?sh=2c1e858e2084> (explaining Swift's allegations that Braun bullied her through his clients Justin Bieber and Kanye West).

¹⁷ Cullins, *supra* note 7.

¹⁸ See *id.* (quoting Derek Crownover, Nashville-based entertainment and music lawyer, who said of this situation, “I don't see any legal ramifications that could come of this, unless there were restrictions on the sale of the masters to third parties.”).

¹⁹ See *id.* However, James Sammataro, an artist and company representative in the music industry, says that “there may be a confidentiality provision that could have been breached when Borchetta posted the proposed deal terms online,” which could give Swift some type of legal recourse against Braun and Borchetta. However, “it's just as likely that [Braun] could argue Swift breached it first by posting on Tumblr.” *Id.*

she was set to be honored as the Artist of the Decade.²⁰ In a post on social media, Swift announced that Braun would not allow her to perform her old songs “on television because [he] claim[ed] that would be re-recording [her] music before [she was] allowed to.”²¹ While Swift was ultimately able to perform her songs at the AMAs, this situation brought the issue of artists’ ownership and rights back into the mainstream media conversation.²² Swift’s particular position, as not only the performer but also as the writer of her songs, gives her the ability to re-record her works after the exclusivity clause in her original BMR expires.²³ However, since this exclusivity lasted until November 2020, Braun and BMR relied on a relatively unique argument that because Swift’s AMAs performance was set to be televised then it could be considered a recording and therefore a violation of the exclusivity clause of her contract.²⁴

Beyond the back and forth and overall media circus, this very public dispute brought many serious issues of the current artist-label

²⁰ See, e.g., Dan Alder, *Just in Time: Scooter Braun Breaks His Silence on Taylor Swift Ahead of the American Music Awards*, VANITY FAIR (Nov. 22, 2019), <https://www.vanityfair.com/style/2019/11/scooter-braun-taylor-swift-statement>; Riya Bhattacharjee et al., *Taylor Swift Accuses Scott Borchetta and Scooter Braun of ‘Tyrannical Control,’ Blocking Her from Performing Her Old Music at AMA*, CNBC (Nov. 14, 2019, 8:06 PM), <https://www.cnbc.com/2019/11/14/taylor-swift-accuses-scott-borchetta-and-scooter-braun-of-blocking-her-from-performing-her-old-music-at-ama.html>; Reid Nakamura, *Taylor Swift Says Scooter Braun Won’t Let Her Play Her Old Songs at the American Music Awards*, WRAP, (Nov. 15, 2019, 10:33 AM), <https://www.thewrap.com/taylor-swift-says-scooter-braun-wont-let-her-play-her-old-songs-at-the-american-music-awards/>; Amy X. Wang, *Can Taylor Swift Really Be Banned From Performing Her Old Albums?*, ROLLING STONE (Nov. 15, 2019, 2:35 PM ET), <https://www.rollingstone.com/pro/news/can-taylor-swift-be-banned-from-performing-amas-big-machine-913150/>.

²¹ Taylor Swift, *Don’t Know What Else to Do*, TUMBLR (Nov. 14, 2019), <https://taylorswift.tumblr.com/post/189068976205/dont-know-what-else-to-do>.

²² See Jon Blistein, *Taylor Swift Allowed to Perform Old Songs at AMAs, Says Former Label*, ROLLING STONE (Nov. 18, 2019, 3:37 PM), <https://www.rollingstone.com/music/music-news/taylor-swift-amas-big-machine-914127/>; Tatiana Cirisano, *Taylor Swift Cleared by Big Machine to Perform Old Songs at AMAs*, BILLBOARD (Nov. 18, 2019), <https://www.billboard.com/articles/business/8544038/taylor-swift-amas-cleared-perform-old-songs>.

²³ Travis M. Andrews, *Can Taylor Swift Really Rerecord Her Entire Music Catalogue*, WASH. POST (Aug. 22, 2019, 7:44 PM), <https://www.washingtonpost.com/arts-entertainment/2019/08/22/can-taylor-swift-really-rerecord-her-entire-music-catalogue/>.

²⁴ See Bhattacharjee et al., *supra* note 20 (“While an agreement would not restrict Swift from performing any of her songs, it would prevent her from performing them at an event that would be recorded, like the American Music Awards or in a Netflix documentary, Alter said. However, it is unusual that a label would restrict an artist from doing this. The restriction is usually put in place so an artist cannot record with another label or on their own in a way that would be competitive to the first label, she said.”) *Id.*; Ingham, *supra* note 11.

dichotomy into the general public's consciousness.²⁵ Even as one of the most powerful artists in the world, Swift was locked into a "bad deal" that she made at a young age. If Swift and her current team of high-powered attorneys are powerless against an unfair contract, it begs the question of how exploitative labels can be over the less powerful players in the industry.

While owning one's masters means everything for artists, traditionally the power imbalance between artists and labels has prompted new talent to sign away their rights for a label's help to make it in the industry.²⁶ Despite Swift's lack of legal claims in her battle with Braun, she was "wrestl[ing] with [one of] the tectonic shifts in the music market: the shift to digital."²⁷ As the technological landscape continually shifts and creates ease of access and exposure for artists, artists will hopefully be able to increase their negotiation power and decrease their dependence on the traditional label friendly record deal. While exploitative record deals may be legally permissible if the artist signs on the dotted line, "legal doesn't mean moral or ethical" and the industry structure ought to change.²⁸

This Note calls for a change to the status quo in the artist-label relationship. Since a complete rejection of major labels is likely not feasible (and would likely be devastating for many artists and industry employees), in the alternative, this Note examines the importance of power in an artist's initial contract negotiation with a record label and concludes that artists ought to try to leverage technology to increase their negotiation power to best avoid the pitfalls of modern recording contracts. Section II starts by exploring the rise of the artist-label relationship and provides a broader view of the battles between labels and top artists over the decades to highlight the pervasive problems of this inherently exploitative relationship. Section III provides a brief overview of the current status of relevant aspects of music rights and ownership as it pertains to the dynamic between artists and labels. Section IV considers the shortcomings of the current dynamic from an artist's perspective. Building off this understanding, Section V will discuss the opportunity that technology presents for artists to take more control of their career without having to sign away their rights to major labels. Section VI will highlight some ways in which powerful artists have utilized this framework to help blaze a new path and how they can aid new artists in an effort to further shift the power imbalance. Numerous changes are needed to better ensure the fair

²⁵ Scott Borchetta, *So, It's Time for Some Truth . . .*, BIG MACHINE LABEL GROUP (June 30, 2019), <https://www.bigmachinelabelgroup.com/news/so-its-time-some-truth>; Quinn Keaney, *Big Machine Denies Blocking Taylor Swift from Singing Hits, Calls Threats "Calculated,"* POPSUGAR (Nov. 15, 2019), <https://www.popsugar.com/entertainment/big-machine-records-statement-about-taylor-swift-amas-feud-46904752>.

²⁶ *Why Owning Your Master Recordings Means Everything*, *supra* note 12.

²⁷ Dominic Rushe, *Why Taylor Swift and Scooter Braun's Bad Blood May Reshape the Industry*, GUARDIAN (Nov. 23, 2019, 1:00 AM EST), <https://www.theguardian.com/music/2019/nov/23/taylor-swift-scooter-braun-amas-old-music-masters>.

²⁸ Halsey (@Halsey), TWITTER (Nov. 15, 2019, 11:16 AM), <https://twitter.com/halsey/status/1195374934207254528>.

treatment of young artists in initial artist-label record transactions, and this Note seeks to provide a blueprint to help bring about this important industry change.

II. I'M ONLY ME WHEN I'M WITH YOU: THE HISTORIC RELATIONSHIP BETWEEN ARTISTS AND LABELS AND THE RESULTING OWNERSHIP BATTLES

While “[a]rtists and labels have fought from the early days of labels,” the relationship began because it was mutually beneficial.²⁹ Since the advent of Thomas Edison’s phonograph, those that could afford recording technology saw an opportunity to sell vinyl records to those willing to pay—but they needed desirable material to create demand.³⁰ The performers themselves did not generally have the means or access to press records themselves so they would be limited to in person performances if left to their own devices.³¹ The partnership between artists and labels was therefore natural and mutually beneficial from the start—the creative and the industrial production elements were better when paired than either of them could be alone. The first record deal was struck in 1904 with relatively generous terms for the performer.³² This deal, and those that followed after, were typically pursued because the artist and label had something the other side needed. Labels need talent to produce chart toppers and reap big profits. Artists need someone to take a chance on them to cover the upfront expenses faced when launching a career since many performers could not finance themselves.

Even when both parties benefited, however, these were not equal partnerships. In fact, today “[r]ecord contracts are notoriously slanted in the favor of labels.”³³ Labels often have the upper-hand when negotiating contracts because of their deep-pockets and deep-rooted connections to the industry.³⁴ These strong incentives, alongside the typical asymmetry in the parties’ sophistication in and familiarity with contract law, allow labels to write their initial contracts with artists in very favorable terms for themselves.³⁵

Signing a contract with a resource-laden label is typically very appealing for new artists. Labels’ deep-pockets allow them to offer artists large sums of cash—called an “advance”—upon signing. Since most

²⁹ Bhattacharjee et al., *supra* note 20 (quoting Lisa Alter, a music attorney).

³⁰ *Decoded: The History of Record Deals*, AWAL (Apr. 30, 2019), <https://www.awal.com/blog/history-of-record-deals>.

³¹ *Id.*

³² This deal awarded the artists a \$4,000 flat fee and about 40¢ of each record sold which is roughly equivalent to \$115,000 flat and \$11 per record. *Id.*; Morgan Friedman, *The Inflation Calculator*, WEST EGG, <https://westegg.com/inflation/> (last visited Oct. 23, 2020).

³³ Jody Rosen, *The Day the Music Burned*, N.Y. TIMES MAG. (June 11, 2019), <https://www.nytimes.com/2019/06/11/magazine/universal-fire-master-recordings.html>.

³⁴ See Heather McDonald, *The Record Label’s Role in the Music Industry*, BALANCE CAREERS (Oct. 28, 2019), <https://www.thebalancecareers.com/what-is-a-record-label-2460614>.

³⁵ *Id.*

artists do not have the personal wealth to launch their careers independently, the advance is crucial to beginning their career. Advances are like a loan that an artist can use toward their work and living expenses while they develop as an artist and write and produce their music.³⁶ An artist's record deal, which usually includes the label owning their masters, serves as the guarantee for these loans and if the artist succeeds, their first earnings go toward paying the advance off in recoupment payments.³⁷ However, an advance is very different from a typical bank loan in that if the artist fails, they do not owe the label.³⁸ This lopsided deal, where the artists only have to recoup their advance if they are successful, is extremely appealing to artists because they cannot walk into a typical lender and secure a deal that would forgive them in a similar manner.³⁹ This opportunity, to have someone—and not just anyone, but a big player in the industry—take a chance on an artist and assume all of the risk makes signing with a label extremely appealing to new artists who are struggling to earn a living or are not financially secure enough to dedicate themselves to their art without a cash influx.

Labels also create an alluring opportunity for new artists because the labels are known players with ingrained industry relationships. When an artist signs with a label, that label's connections with distributors, producers, publicists, marketers and other industry players suddenly become accessible to that artist. Not only do labels know the players, but because of their frequent repeat business, they are able to negotiate credit agreements and reduced rates that an artist without a label would never be able to receive for themselves—even if they did find their own initial access to these business relationships.⁴⁰ Even established and extremely successful artists do not have the bargaining power of a label against industry resources because one artist can only provide so much business volume to a manufacturer or public relations firm.⁴¹ Beyond these external connections and reduced-price agreements, many labels have plenty of

³⁶ Helienne Lindvall, *Behind the Music: What Do Record Labels Actually Do? You'd Be Surprised*, GUARDIAN (Feb. 2, 2012, 8:12 AM), <https://www.theguardian.com/music/musicblog/2012/feb/02/behind-music-record-labels>; see David Andrew Wiebe, *How Much Advance Do Record Labels Give, and How Much Should You Try and Get?*, MUSIC INDUS. HOW TO, <https://www.musicindustryhowto.com/how-much-advance-do-record-labels-give-and-how-much-should-you-try-and-get/> (explaining that advances typically range from \$50,000 to \$350,000) (last visited May 8, 2020).

³⁷ *Recording Contracts - Getting Started in the Music Business*, TEX. MUSIC OFFICE, https://gov.texas.gov/music/page/tmlp_contracts (last visited May 10, 2020).

³⁸ Lindvall, *supra* note 36.

³⁹ *See id.* (“I can only imagine walking into a bank asking for a £100,000 loan, saying: ‘I’d like to use it to pay my living and work expenses for the next four years, so that I can develop my craft by being able to write full-time and work with songwriters all over the world. You’ll make it back from the royalties the songs I write during those years will accumulate. And if you don’t, I don’t have to pay that money back. What? You need some kind of guarantee? Just listen to these new songs I’ve written.’ They’d laugh me straight out of the door.”).

⁴⁰ McDonald, *supra* note 34.

⁴¹ *Id.*

internal teams that can complete a myriad of essential tasks for a successful artist.⁴² An artist needs a good team, and labels provide accounting departments, press and marketing teams, and radio pluggers amongst others.⁴³ Like their ability to negotiate down terms with external partners in the industry, the major labels' ability to share these costs across all of their artists allows them to more easily cover the expenses than if an artist had to cover these costs alone.

These financial and industry advantages often allow labels to negotiate extremely favorable terms for themselves. Label friendly terms often include control over an artist's direction,⁴⁴ ownership of an artist's masters, and a large share of the artist's profits.⁴⁵ Typically, when a new artist signs with a label, their lack of bargaining power enables the label to use contracts to extract control over sound, style, and even lyrics from the artist.⁴⁶

Labels take a large percentage of the profits generated by an artist's sales and even own the masters a majority of the time.⁴⁷ While it is true that record labels take the risk of the upfront costs of production, recording, talent development, promotion, distribution, etc. and need to ensure they recoup their expenses, labels often go much further than simply earning a percentage on top of their expenditures.⁴⁸ Typically, the initial profits an artist earns will go directly into the label's pocket as the recoupment for their advance. Eventually, after paying off their debts to the label, artists will begin to see royalties as profit from their work—however, most artist royalty rates in recording contracts are as low as 10–20%.⁴⁹ This means that even after an artist completely repays the label, the label still often makes more than the artist from each additional sale of the recording.⁵⁰

⁴² See Lindvall, *supra* note 36 (quoting Jake Gosling, Ed Sheeran's producer: "You still need labels . . . they've got marketing teams, press teams, radio pluggers, accounts departments and when you get bigger you need help with that stuff. You need a good team around you.").

⁴³ *Id.*

⁴⁴ Commercially satisfactory delivery requirements give the label the power make acceptance contingent on its determination that the recording is "satisfactory for commercial exploitation" which gives the label broad discretion over what types of songs will fulfill an artist's contractual obligations. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 117 (10th ed. 2019).

⁴⁵ See *infra* notes 48–50 and accompanying text.

⁴⁶ McDonald, *supra* note 34.

⁴⁷ Rosen, *supra* note 33.

⁴⁸ *Online Entertainment and Copyright Law: Coming Soon to a Digital Device Near You: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 154 (2001) (statement of Richard D. Parsons, Co-Chief Operating Officer, AOL Time Warner).

⁴⁹ Marshall Brain, *How Recording Contracts Work*, HOWSTUFFWORKS (May 22, 2003), <https://entertainment.howstuffworks.com/recording-contract2.htm>.

⁵⁰ *Id.*; Chris Vinson, *Record Sales: Where Does The Money Go?*, BANDZOOGL (June 9, 2006), <https://bandzoogle.com/blog/record-sales-where-does-the-money-go> (explaining that record labels usually take a 30% royalty on top of the other

For most artists signing their first deal, the label is typically able to negotiate a contract where the label owns the master recordings as well. The master is separate from the underlying composition itself but is the “original sound recording of a piece of music.”⁵¹ Owning this recording gives the owner broad power to control how the recording is used.⁵² Often, the most important control that the master’s owner has is the ability to control who can get third-party licenses for the recording.⁵³ Third-party licenses can be granted to services like streaming platforms, for use in film and television, and public performances. The owner of the master splits the proceeds of these licensing agreements with the composition’s copyright holder.⁵⁴ So, not only is the label profiting off the sales, but it also has control over where the recording shows up and what it can be used to promote.⁵⁵ Understandably, many artists want to regain this control for themselves if they can gain the power to do so.

As artists grow more successful, they typically gain more bargaining power because they present a strong and established revenue stream for the label without as much of the initial risk. Artists can often use their success to renegotiate more favorable terms in their subsequent contracts.⁵⁶ However, even some of the most famous artists of their time, and in history, have had great difficulties getting out from under the control of their labels.

Global superstars like Prince, Jay-Z, and Janet Jackson “have publicly complained about not owning the physical manifestation of their work.”⁵⁷ One of the most newsworthy ownership battles was between Prince and Warner Brothers Records (“WBR”).⁵⁸ WBR released Prince’s first 18 albums, but as Prince began to lose his artistic control, he very

fees that go directly into their pockets before calculating and paying the artist’s royalty rate).

⁵¹ Chris Eggertsen, *What Are Masters and Why Do Taylor Swift & Other Artists Keep Fighting for Them?*, BILLBOARD (July 3, 2019), <https://www.billboard.com/articles/business/8518722/taylor-swift-masters-artists-ownership-labels-rights-prince>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* But, the owner of the master “pays out a previously agreed-upon percentage of that revenue to the artist.” *Id.*

⁵⁵ For voluntary licenses, the owner of the masters has the ability to license the sound recordings but cannot unilaterally allow a production to utilize the song or recording because the owner of the composition copyright also needs to license the underlying composition. The owner of the composition, often the publisher or songwriter, can unilaterally block sync licenses for her song and therefore a specific recording of that song and control how it is used in television, films, commercials, video games, etc. PRACTICAL LAW INTELLECTUAL PROPERTY & TECHNOLOGY, ET AL., *Music Licensing Chart*, PRACTICAL LAW CHECKLIST, W-015-7676 (2021) [hereinafter *Music Licensing Chart*].

⁵⁶ McDonald, *supra* note 34.

⁵⁷ Cullins, *supra* note 7; see Eggertsen, *supra* note 51 (providing brief overviews of Janet Jackson, Jay-Z, Courtney Love, Metallica, U2, Rihanna, Frank Ocean, and others’ battles with their labels over ownership of their music catalogues).

⁵⁸ Eggertsen, *supra* note 51.

publicly tried to get out of his contract.⁵⁹ In 1993, Prince changed his name to ♣ in an act of defiance against WBR and “in order to signal a fundamental severance from an identity he saw as a wholly owned commodity of Warner.”⁶⁰ Since Prince’s name change was unsuccessful in making his contracts unenforceable, he continued his public campaign against WBR. Further, Prince saw his dispute “in profoundly racialized terms” and was not merely fighting to renegotiate his contract but fighting for his “freedom and his own artistic agency” as a black artist under white label executives.⁶¹ In fact, Prince wrote “Slave” on his face in protest to his WBR contract and also famously said that “[i]f you don’t own your masters, your master owns you,” referring to the label as a slave master over himself and other artists.⁶² In 1996, once out of his WBR contract, Prince released an album entitled *Emancipation* through his own label, and used the album to rebel against the artistic limits he was under with WBR.⁶³ Prince fought for total control of his music and his art, and even when he could not achieve it at the negotiating table, he then fought “risky public battles for it” which paved the way for future artists to follow.⁶⁴

Many artists are still publicly waging these battles for control. In 2019, a group of artists and their estates filed a class action against UMG seeking \$100 million for damages from the destruction of masters in the 2008 fire on the lot of Universal Studios.⁶⁵ Dubbed “the biggest disaster in the history of the music business,” an unknown number, but reportedly thousands, of master recordings burned.⁶⁶ For unreleased songs or less popular artists, these sole copies are now lost to oblivion.⁶⁷ The plaintiffs

⁵⁹ *Id.*

⁶⁰ August Brown, *What Today’s Artists Learned From Prince’s Approach to the Industry*, L.A. TIMES (Apr. 22, 2016, 2:43 PM), <https://www.latimes.com/entertainment/music/posts/la-et-ms-prince-imaginative-legacy-music-business-20160422-story.html>; Eggertsen, *supra* note 51 (explaining that the symbol was called Love Symbol (#2) and forced journalists as well as WBR to jump through hoops and even create a new font to refer to the artist).

⁶¹ Brown, *supra* note 60.

⁶² *Id.*; Eggertsen, *supra* note 51; Jon Pareles, *A Re-Inventor of His World and Himself*, N.Y. TIMES, (Nov. 17, 1996), <https://www.nytimes.com/1996/11/17/arts/a-re-inventor-of-his-world-and-himself.html>.

⁶³ Dan Weiss, *Prince’s 20-Year-Old ‘Emancipation’ Wasn’t Just an Industry Kiss-Off, It Was a Going-Away Party*, BILLBOARD (Nov. 18, 2016), <https://www.billboard.com/articles/columns/pop/7581348/prince-emancipation-anniversary-review>.

⁶⁴ Brown, *supra* note 60.

⁶⁵ Rosen, *supra* note 33; Colin Stutz, *Universal Music Group Hit With Class Action Lawsuit by Tupac Estate, Soundgarden & More Over 2008 Vault Fire*, BILLBOARD (June 21, 2019), <https://www.billboard.com/articles/business/8517081/universal-music-group-class-action-lawsuit-2008-vault-fire>.

⁶⁶ Rosen, *supra* note 33. Notably, A U.S. District Judge dismissed the class action suit against UMG in April 2020 after the credibility of this NEW YORK TIMES report on which the parties based their claims was challenged for overstating the damage and loss in the fire. Jem Aswad, *Judge Dismisses Soundgarden Litigation in Universal Fire Lawsuit*, VARIETY (Apr. 6, 2020), <https://variety.com/2020/music/news/judge-dismisses-soundgarden-litigation-in-universal-fire-lawsuit-1234572488/>.

⁶⁷ *Id.*

contended that UMG hid the impact of this loss through false public statements stating that they had “only lost a small number of tapes and other material by obscure artists from the 1940s and 50s.”⁶⁸ In its motion to dismiss, UMG argued that since it had full ownership over the masters it had no obligation to split any insurance proceeds with the artists whose music was destroyed nor did it “violate any good faith term in their contracts with artists to keep those recordings safe for the mutual benefit of musician and label.”⁶⁹ Essentially, UMG argued that when it owns the masters, the label can do whatever it wants, including destroy them.⁷⁰

III. EVERYTHING HAS CHANGED: THE CURRENT STATE OF THE LAW ON MUSIC CONTRACTS AND OWNERSHIP

The world is an entirely different place now than it was at the beginning of recorded music. There have been developments in law, technology, and society that have significantly impacted the artist-label relationship. While copyright protection has existed in the United States since the first Copyright Act was passed in 1790,⁷¹ developments leading to modern copyright ownership have critically underlaid many of the current tensions between labels and artists. Relatedly, recording contracts have changed significantly since the first one was signed in 1904. This Section will explore the developments in these areas which have led to the current state of music ownership and recording contracts. An understanding of this background provides important contextual knowledge behind the artist-label dichotomy.

The Copyright Clause of the United States Constitution states that “Congress shall have the power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁷² Through this Clause, Congress enacted the main source of copyright law today: the Copyright Act of 1976.⁷³ The Copyright Act includes protection for

⁶⁸ Class Action Complaint, *supra* note 13, at 9; Anastasia Tsioulcas, *Artists File \$100 Million Suit Against Universal Music Over 2008 Fire*, NPR (June 22, 2019, 1:13 PM), <https://www.npr.org/2019/06/22/734973029/artists-file-100-million-suit-against-universal-music-over-2008-fire>.

⁶⁹ Tsioulcas, *supra* note 68; Jon Blisten, *Universal Music Group Files Motion to Dismiss Class Action Suit Over 2008 Fire*, ROLLING STONE (July 17, 2019, 8:22 PM ET), <https://www.rollingstone.com/music/music-news/universal-music-group-files-motion-to-dismiss-class-action-suit-2008-fire-860370/>.

⁷⁰ Blisten, *supra* note 69 (“UMG’s position ‘is the same as Donald Trump during his campaign — that he could shoot someone on 5th Avenue with impunity. And they think they can set fire to those master recordings on 5th Avenue with impunity.’”).

⁷¹ Timeline of Copyright Law in the United States: Eighteenth Century, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Apr. 16, 2021).

⁷² U.S. CONST. art. I, § 8, cl. 8.

⁷³ Copyright Act of 1976, 17 U.S.C. §§ 101–1401 (2020).

original, creative “musical works, including any accompanying words” fixed in a tangible medium of expression.⁷⁴

For every recorded song there are two copyrights: the musical composition copyright and the sound recording copyright, also referred to as the master or master rights.⁷⁵ The musical composition copyright covers the underlying song, which consists of the music itself, meaning the lyrics, melody, chords, and other components that would appear on sheet music.⁷⁶ The owner of the musical composition copyright is typically the songwriter or publisher.⁷⁷ The sound recording copyright covers the actual recording of a performance of a song (not the underlying composition).⁷⁸ The owners of the sound recording copyright are the performers of the song.⁷⁹ However, labels often try to contract to own all of a performer’s sound recording copyrights via “work made for hire” provisions or gain the rights through assignment when they sign the artist to a record deal.⁸⁰

Ownership of the musical composition copyright comes with five exclusive rights: to reproduce the work, to distribute copies of the work, to perform the work publicly, to make a derivative work, and to display the work publicly.⁸¹ The sound recording copyright excludes the public display or public performance rights but includes one additional exclusive

⁷⁴ Copyright Act of 1976, 17 U.S.C. § 102(a)(2) (2020); *Copyright Registration for Musical Compositions*, U.S. COPYRIGHT OFFICE, 1, <https://www.copyright.gov/circs/circ50.pdf> (last visited May 8, 2020).

⁷⁵ *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/register/pa-sr.html> (last visited May 8, 2020).

⁷⁶ *Id.*; Berklee College of Music Online, *How Copyright Works with E. Michael Harrington*, YOUTUBE (Aug. 30, 2018), https://www.youtube.com/watch?v=pOVIkoi_8FI&list=PL1wHeEmBdcWTbxL2yqQZ2EmwmnEbvFD4b&index=8 [hereinafter *How Copyright Works*].

⁷⁷ *How Copyright Works*, *supra* note 76.

⁷⁸ PASSMAN, *supra* note 44, at 329.

⁷⁹ *Copyright 101*, *supra* note 15.

⁸⁰ *Copyright 101*, *supra* note 15. A “work made for hire” by an artist under one of these contracts is treated, for all legal intents and purposes, as a work authored by the label—it is as if the person that actually performed or composed the work does not exist in the eyes of copyright law. This attempt to define sound recordings made while an artist is under contract as works for hire has further significance because works made for hire are not subject to the termination of transfers provision in the Copyright Act. The termination of transfer provision is an inalienable pro-artist provision that provides artists the opportunity to get their rights back after 35 years. Fortunately, because of the requirements for something to be considered a “work for hire,” this attempt to grab copyright ownership from an artist under contract does not typically succeed. However, while master recordings typically are not successfully captured under the “works for hire” category (despite its continued inclusion in the deals in the hope that it will be enforceable), labels still achieve ownership over sound recording copyrights through more simple assignment of ownership rights. Copyright Act of 1976, 17 U.S.C. § 101(2) (2020); PASSMAN, *supra* note 44, at 307–09; Phillip W. Hall Jr., *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189, 215 (2002).

⁸¹ Copyright Act of 1976, 17 U.S.C. § 106 (2020); PASSMAN, *supra* note 44, at 213.

right: the right to perform the work publicly via digital transmission.⁸² Beyond these rights, the most important consideration for most artists and interested parties is that copyrights implicate the financial gains of a song's success. In the United States, the owner of the musical composition copyright (typically the songwriter) should get paid for every use of the song whether it be from a license for a live performance, a sale of a physical copy or digital download, or a stream of the recording.⁸³ For the owner of the sound recording copyright, they will be paid when their specific recorded performance of the song is purchased or streamed.⁸⁴

Copyright owners earn money on their songs through royalties and licensing fees.⁸⁵ The four main types of royalties for the composition copyright owner are mechanical, public performance, synchronization, and print.⁸⁶ For the sound recording, there are also revenue streams that come through both compulsory and voluntary licenses which have set royalty rates and wide ranging negotiated licensing fees, respectively.⁸⁷ Generally, copyright owners will transfer some of their exclusive rights by licensing or assigning their rights to another party and will then receive royalties in return.⁸⁸ Royalty distribution between involved copyright owners, like co-writers or a songwriter and a publisher, are determined in their own contracts.⁸⁹ So, when a composition is licensed, the songwriters

⁸² Copyright Act of 1976, 17 U.S.C. §§ 106, 114(a) (2020).

⁸³ *How Copyright Works*, *supra* note 76. While artists have the exclusive rights, which would entitle them to payment for uses of their composition, in reality there are likely many uses that can go uncompensated.

⁸⁴ *Id.*

⁸⁵ Rory PQ, *How Music Royalties Work in the Music Industry*, ICON COLLECTIVE (last updated May 3, 2020), <https://iconcollective.edu/how-music-royalties-work/#19-the-breakdown-of-copyright-and-licensing>.

⁸⁶ *See id.* (explaining that mechanical rights allow a party to physically or digitally reproduce and distribute the copyrighted work; public performance rights allow a party to perform or play the copyrighted work in any public place; synchronization rights allow a party to sync the copyrighted work with visual media like television, advertisements, music videos, video games, etc.; print rights allow a party to distribute sheet music of the copyrighted work); *see Music Licensing Chart* *supra*, note 55 (explaining composition sample and karaoke licenses—two other revenue streams for composition rights holders).

⁸⁷ *Music Licensing Chart* *supra*, note 55. This provides that the non-interactive digital public performance license is compulsory, and rights owners received the set royalty rate as determined by the Copyright Royalty Board. Further, there are a collection of voluntary licenses—master use license, digital public performance license, reproduction and distribution license, and the sound recording sample license—which can range in license fees based on many factors, like the popularity of the recording artist, due to its voluntary nature. *Id.*

⁸⁸ U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 25 (2015), <https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

⁸⁹ *Id.* at 19. For example, the common split between a songwriter and publisher will be 50/50 on the copyright ownership. However, when there are many songwriters working together to compose a song the division can get quite complicated as the songwriters will have to negotiate a contract to divide copyright ownership amongst themselves and then each songwriter will also have to negotiate what portion of their share of the copyright will go to their publisher.

and publishers will split the royalties and when a sound recording is licensed the performers and copyright owner (typically the label) will split the royalties.⁹⁰ However, arrangements on royalty splits can grow extremely complicated based on the number of parties and the specific contractual terms drawn between those parties.⁹¹

While federal copyright law provides many protections for creators, the contracts between artists and their labels, as well as other industry players, can have the most significant impact on what an artist's career looks like. The artist-label contract plays a significant role in a musician's career and financial bottom-line, so understanding some of the basics of a major label deal will help to contextualize this discussion.

Record labels traditionally made a lot of their income on the large royalty percentages they received from each record sold by their signed artists. However, as streaming has replaced physical record sales as the "dominant revenue source for recorded music," labels have had to begin looking elsewhere to recoup their investments and profit off of representing artists.⁹² The industry has "increasingly moved to so-called 360 deals that place far less emphasis on an artist's album sales in favor of taking a cut" from the artist's other revenue streams like touring, songwriting, merchandising, endorsements, acting engagements, and licensing.⁹³ The defining characteristic of a 360 deal is all the "income from revenue streams outside of recordings" in which the labels stake a claim.⁹⁴ These deals were a product of desperation for record labels as traditional music sales continued to dwindle year after year.⁹⁵ While the first hundred years of the artist-label relationship were marked by pure record deals, now, the standard contract with a major label merely includes a record deal that is only "one part of the 360 package" that labels compel artists to sign.⁹⁶

These contracts are called 360 deals because "record companies . . . want to share in the total pie of an artist's income" far beyond just their recorded music.⁹⁷ Donald Passman, a leading music attorney (and no coincidence, one of Swift's lawyers), describes the labels' rationale behind 360 deals as allowing the label that "rocket launch[ed]" an artist's career

⁹⁰ *Copyright 101*, *supra* note 15.

⁹¹ PQ, *supra* note 85.

⁹² PASSMAN, *supra* note 44, at 1.

⁹³ *Id.* at 102; Nilay Patel, *Taylor Swift Doesn't Understand Supply and Demand*, VOX (July 7, 2014, 6:59 PM EDT), <https://www.vox.com/2014/7/7/5878603/taylor-swift-doesnt-understand-supply-and-demand>; *see also* Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES (Nov. 11, 2007), <https://www.nytimes.com/2007/11/11/arts/music/11leed.html> (discussing how these 360 deals have created some interesting income sources for record labels, like Interscope Record's income from a Pussycat Dolls themed Las Vegas nightclub).

⁹⁴ Leeds, *supra* note 93.

⁹⁵ *Id.*

⁹⁶ Lee Marshall, *The 360 Deal and the "New" Music Industry*, 16(1) EUR. J. CULTURAL STUD. 77, 84 (2012).

⁹⁷ PASSMAN, *supra* note 44, at 101; Sara Karubian, Note, *360° Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. CAL. INTERDISC. L.J. 395, 422 (2020).

to more fully capture its share of the total profits the artist generates.⁹⁸ Passman has explained that many see the 360 contract as “a land grab, arguing that the company brings no value to the party beyond their record business expertise.”⁹⁹ This is becoming the industry standard, which an artist is almost powerless to fight against if they want that coveted advance and record label backing their name.¹⁰⁰ As an artist’s bargaining power increases, the artist might be able to reduce the amount of revenue streams a label insists upon profit sharing. However, today it takes superstar status to get just a pure record deal from a major label.¹⁰¹

There is no uniform industry custom governing how 360 deals work, however, it is seemingly common for labels to require a proportion of the artist’s net income.¹⁰² There are typically negotiations of precise percentages for each type of right (songwriting, merchandising, etc.) but most record labels want a cumulative “10% to 25% of the artist’s net income from non-record sources.”¹⁰³ Labels want to use the highest total calculation of net-income, typically using the language “gross receipts less customary, third-party, arm’s length expenses” to ensure that artists cannot artificially lower their net-incomes.¹⁰⁴ Labels further their goal of keeping net-incomes high by putting limitations on the total commissions an artist can pay to their representatives for the purposes of calculating their net-income.¹⁰⁵ The unique nature of touring results in labels wanting a percentage of the gross touring income but that often results in a smaller percentage, typically 5% to 10%.¹⁰⁶ Such a structure makes it possible for an artist to have to pay the record label even when the artist themselves loses money on tour.¹⁰⁷ Labels sometimes offer new artists some protections by “not taking their percentage for monies under a certain dollar amount,” which is called a shelter.¹⁰⁸ However, as soon as an artist

⁹⁸ PASSMAN, *supra* note 44, at 102.

⁹⁹ *Id.* However, Passman does admit that “record companies are the only ones spending substantial money to break an artist’s career, so their argument has some merit.” *Id.*

¹⁰⁰ *Id.* (“[F]rom the major labels down to the independents, virtually all the companies are insisting on some kind of 360 rights. Meaning, if you want to sign a record deal, you gotta live with it.”).

¹⁰¹ *Id.* at 102–03 (“With enough bargaining power, you may be able to trim back the 360 pie. Sometimes (actually, it’s becoming ‘rarely’) you can get a ‘180 deal,’ meaning the company only gets a share of one other income stream (songwriting, touring or merchandising . . .) or two of the three streams (called a ‘270’). Sometimes, for real superstars or other extremely hot artists, it’s just a record deal. Or a minimal 360 participation. But it’s getting harder and harder.”).

¹⁰² *Id.* at 103; Marshall, *supra* note 96.

¹⁰³ PASSMAN, *supra* note 44, at 103.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 103–04 (stating that the cap is typically around 30% to 35% of an artist’s gross earnings, however, some labels set this same percentage cap based on net earnings which makes it a much tighter squeeze for artists to pay their team under this cap).

¹⁰⁶ *Id.* at 104–05.

¹⁰⁷ *Id.* at 104.

¹⁰⁸ PASSMAN, *supra* note 44, at 104.

earns more than this shelter amount, the record company's percentage kicks in and the artist must share from her gross income.¹⁰⁹

IV. I KNEW YOU WERE TROUBLE: SHORTCOMINGS OF CURRENT LABEL CONTRACTS

Besides the major percentage of profits that labels skim off of artists' record sales and their frequent ownership of artists' masters,¹¹⁰ the current dynamic between major labels and recording artists contains a multitude of other restrictions and dangers for artists. Label contracts can stifle creativity, limit financial incentives reaching the artist, and potentially even disrespect an artist's control of her art.

Working under a major label can stifle creativity for artists in the form of censorship or controlled decision-making. Labels can interfere with an artist's ability to make poignant political or social commentary. In fact, Billie Holiday was forced to find a specialty label to release "Strange Fruit," which protested the lynching of Black Americans in the Southern United States, since her main record label would not allow her to record the track.¹¹¹ Ice-T went as far as leaving WBR in 1993 over "creative differences" in the wake of having to pull the song "Cop Killer" off of his heavy metal band's album due to label pressure after a wave of protests against the song began.¹¹² In 2007, Sara Bareilles felt pressured by her label to put out a radio-friendly hit so she wrote a passive aggressive retort to their demands called "Love Song" to push back against their demands to her to conform to a specific mold of writing pop love songs.¹¹³

Ideally, artists would not be stifled by labels since the United States values the arts and seeks to incentivize creation and investment by granting copyright ownership for those who invest themselves in the arts.¹¹⁴ While there is debate over who is meant to be the primary beneficiary of copyright law (e.g., either the creator or the public), the means of providing the benefit indisputably comes through financial incentive for the creator through a copyright.¹¹⁵ Given the complex

¹⁰⁹ *Id.* at 105.

¹¹⁰ See discussion *supra* Section II.

¹¹¹ Gabriella Landman, *Banned Music: 21 Artists Censors Tried to Silence*, BILLBOARD (Aug. 17, 2012), <https://www.billboard.com/articles/list/513610/banned-music-21-artists-censors-tried-to-silence>.

¹¹² Shiela Rule, *Ice-T and Warner Are Parting Company*, N.Y. TIMES, Jan. 29, 1993, at A1.

¹¹³ Genghis Cohen, *Sara Bareilles: The Sweet Author of Tough Songs*, CBS NEWS (Jan. 5, 2014, 9:33 AM), <https://www.cbsnews.com/news/sara-bareilles-the-sweet-author-of-tough-songs/>.

¹¹⁴ See U.S. CONST. art. I, § 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

¹¹⁵ See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'"); see Mike Masnick, *Yes, Copyright's Sole Purpose Is*

representation and ownership structures that recording contracts typically create, often the artist is not the owner, or at least not the sole owner, of their sound recording copyright, or masters.¹¹⁶ So, financial enticements must be provided through other avenues to continue incentivizing the arts when copyright law cannot achieve this goal of motivating creation on its own. However, in the music industry, the monetary incentives that would typically flow to a creator of a product do not always follow this usual economic pattern. In fact, in 2010, for every \$1,000 artists had in album sales, the average musician only saw \$23.40 go into her pocket.¹¹⁷

For example, a member of TLC, dubbed “one of the biggest and most influential R&B groups of the ‘90s” by Billboard, once said “a lot of people have made money off of us, and we haven’t.”¹¹⁸ Despite having one of the decade’s best-selling albums by a girl group, the members of TLC filed for bankruptcy in the 1990s after receiving only 56 cents for each album sold—which then had to be divided between the three members.¹¹⁹ TLC’s “bad contracts” with their manager and associated labels, which led to the members’ bankruptcy, exemplify the problem of letting labels, rather than creators, profit off the creator’s art.¹²⁰ Indeed, when the label, or any intermediaries, reaps the benefit of the creator’s investment and hard work, this undermines the very purpose of copyright law and impedes on the incentive structure that the Constitution established.

to Benefit the Public, TECHDIRT (Apr. 10, 2012, 10:07 AM), <https://www.techdirt.com/articles/20120407/00171418416/yes-copyrights-sole-purpose-is-to-benefit-public.shtml> (arguing that copyright is to benefit the public and not to benefit or incentivize creators); Scott T. Okamoto, *Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free*, 37 U. S.F. L. REV. 783, 785–86 (2003) (discussing the purpose of copyright law).

¹¹⁶ Sher Hann Chua & Payton Hoff, *Ownership of Master Recordings in the Music Industry: Swift Winds of Change?*, TILLEKE & GIBBINS (Sept. 11, 2019), <https://www.tilleke.com/resources/ownership-master-recordings-music-industry-swift-winds-change> (saying that “[i]t is common for artists to not own their master recordings.”).

¹¹⁷ Justin Wm. Moyer, *Five Problems with Taylor Swift’s Wall Street Journal Op-ed*, WASH. POST (July 8, 2014), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/07/08/five-problems-with-taylor-swifts-wall-street-journal-op-ed/?arc404=true>.

¹¹⁸ *TLC Chart History*, BILLBOARD, <https://www.billboard.com/music/tlc> (last visited May 8, 2020); Carol Cooper, *TLC’s T-Boz: ‘A lot of people have made money off of us, and we haven’t’*, GUARDIAN (July 8, 2015, 7:00 AM EDT), <https://www.theguardian.com/music/2015/jul/08/rocks-back-pages-tlc-rolling-stone-1995-t-boz-chilli-left-eye>.

¹¹⁹ Keith Caulfield, *Rewinding the Charts: 20 Years Ago, TLC’s ‘Creep’ Crowned the Hot 100*, BILLBOARD (Jan. 28, 2015), <https://www.billboard.com/articles/columns/chart-beat/6451114/rewinding-the-charts-20-years-ago-tlcs-creep-crowned-the-hot-100>; *The Dark Tale of TLC Going Bankrupt in the ‘90s*, BEAT, <https://www.beat.com.au/the-dark-tale-of-tlc-going-bankrupt-in-the-90s/> (last visited May 8, 2020).

¹²⁰ See *The Dark Tale of TLC Going Bankrupt in the ‘90s*, *supra* note 119 (explaining how TLC’s bankruptcy resulted from “bad contracts” with Laface Records).

When new artists approach major labels to negotiate, there is a very real imbalance of power and labels have been able to use this to trap more vulnerable parties into nonlucrative and unconscionably one-sided contracts.¹²¹ The rejection of this manipulative control in other areas could carry through to the music industry and create a wave of support for artist's rights—especially as Swift draws attention to many of the perceived injustices she faced that many lay persons are shocked to find are rather commonplace and acceptable in the industry. This heightened public awareness of the uneven playing field and the impacts it has on people's favorite artists could open up an era of opportunity for artists to gain more in their label negotiations as labels look to avoid public scorn.

V. READY FOR IT?: THE OPPORTUNITY TECHNOLOGY PRESENTS

The relationship between labels and artists has long been rocky, but with the advent and prominence of social media, artists have the “ability to really take the dispute to the fan base in a way that was not [always] possible.”¹²² Taylor Swift posted about both of her key conflicts with Scooter Braun on her social media accounts and set the platforms ablaze with conversation. This phenomenon is not rare either. The current technological age creates the perfect storm for artists to take control of their careers and launch themselves. The combination of social media, streaming platforms, low-cost high-quality recording and production programs, and simple online song licensing programs all work together to put many of the valuable tools that were traditionally only accessible through record labels within the reach of unsigned artists.

Social media has ways of igniting, influencing, and destroying careers that likely could not even be imagined at the turn of the century. Some of the biggest names in music right now launched their careers with loyal followers and fans that found them through the internet. Justin Bieber was discovered by Usher and Scooter Braun on YouTube.¹²³ Shawn

¹²¹ See Patricia Tsai, *Discovering the Full Potential of the 360 Deal: An Analysis of the Korean Pop Industry, Seven-Year Statute, and Talent Agencies Act of California*, 20 UCLA ENT. L. REV. 323, (“There has been a lot of discussion about how 360 deals are ‘slave’ deals and how they are unfair. Some talent managers think that 360 deals are a ‘thinly veiled money grab’ and are skeptical that labels will ‘deliver on their promises of patience.’”); Ian Brereton, *The Beginning of a New Age: The Unconscionability of the 360-Degree Deal*, 27 CARDOZO ARTS & ENT. L.J. 167, 168 (2009) (“However, despite such pervasive feelings in the industry, most struggling musicians still believe that a major label record deal is the only viable avenue to commercial success. As a result, new artists have been forced to accept recording agreements that are arguably unconscionable as a matter of law.”); Todd M. Murphy, *Crossroads: Modern Contract Dissatisfaction As Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 806 (2002) (“Both artists and publishers can have a contract nullified through a decision of a court [C]ommon assertions by parties seeking to nullify a contract are unconscionability, undue influence,⁷⁹ and unequal bargaining power at the time of contract formation.”).

¹²² Bhattacharjee et al., *supra* note 20 (quoting Lisa Alter, a music attorney).

¹²³ *Justin Bieber: From YouTube to Global Superstar*, CNN (Sept. 3, 2019, 10:40 AM ET), <https://www.cnn.com/2019/03/26/entertainment/gallery/justin-bieber>

Mendes was discovered on Vine after posting a six-second clip of himself singing a Justin Bieber song.¹²⁴ Chance the Rapper was the first streaming-only artist to ever win a Grammy, all after his start on SoundCloud without a label.¹²⁵ Halsey leveraged Tumblr, YouTube, and SoundCloud to kickstart her career before becoming an international superstar.¹²⁶ While these levels of success cannot be expected by all new artists, these success stories do exemplify the vast potential these sites can create for some artists.

Social media does not only offer an opportunity for fans to find artists, but it also allows artists real opportunities to directly reach out and connect with their fans en masse. Swift is notoriously active on social media—particularly Tumblr, a microblogging site, which allowed her to develop one of the largest, loudest, and most devoted fan networks in the music industry.¹²⁷ This type of mass communication has the ability to also foster deep connections. Swift is known for personal lyrics and often treats her lyrics like a diary, but this emotional vulnerability and connection does not stop there—she shares her thoughts and feelings online as well which helps her foster deep connections with her fans.¹²⁸ Swift's interactions with fans, including using social media to reward some of her most loyal or most vulnerable fans, has created a unique community that has only grown more invested in her next career moves as she feeds into the fandom's inside jokes and quirks.¹²⁹

/index.html; Gail Mitchell, *Usher Introduces Teen Singer Justin Bieber*, BILLBOARD (Apr. 28, 2009), <https://www.billboard.com/articles/news/268791/usher-introduces-teen-singer-justin-bieber>.

¹²⁴ Brittany Spanos, *Shawn Mendes: How a Toronto Teen Became the Superstar Next Door*, ROLLING STONE (Apr. 13, 2016, 4:05 PM), <https://www.rollingstone.com/music/music-news/shawn-mendes-how-a-toronto-teen-became-the-superstar-next-door-237177/>.

¹²⁵ Lyndsey Havens, *Chance the Rapper's 'Coloring Book' Is First Streaming-Only Album to Win a Grammy*, BILLBOARD (Feb. 13, 2017), <https://www.billboard.com/articles/news/grammys/7686341/chance-the-rapper-coloring-book-first-streaming-only-album-grammy>.

¹²⁶ Deepa Lakshmin, *Thank You Halsey, For Being a Fan Girl Just Like Me*, MTV (Dec. 4, 2015), <http://www.mtv.com/news/2618129/thank-you-halsey-fangirl/>; Paula Mejia, *How Halsey Went from Viral Sensation to America's Buzziest New Pop Star*, ROLLING STONE (Aug. 31, 2015, 5:26 PM), <https://www.rollingstone.com/music/music-features/how-halsey-went-from-viral-sensation-to-americas-buzziest-new-pop-star-60861/>.

¹²⁷ Avery Blank, *Why Taylor Swift is So Influential (And How You Can Increase Your Influence)*, FORBES (Nov. 18, 2019, 8:20 AM), <https://www.forbes.com/sites/averyblank/2019/11/18/why-taylor-swift-is-so-influential-and-how-you-can-increase-your-influence/#11672aeb1020>; Abeni Tinubu, *Taylor Swift Feels Like Tumblr Is the Last Place She 'Can Still Make a Joke'*, CHEAT SHEET (Dec. 15, 2019), <https://www.cheatsheet.com/entertainment/taylor-swift-tumblr.html/>.

¹²⁸ Blank, *supra* note 127.

¹²⁹ See Mark Beach, *Taylor Swift, Dolly Parton Donate to Fight COVID-19 As Music Industry Appeals for Government Action*, FORBES (Apr. 2, 2020, 2:21 PM EDT), <https://www.forbes.com/sites/markbeech/2020/04/02/taylor-swift-dolly-parton-donate-to-fight-covid-19-as-music-industry-appeals-for-government>

With all the opportunities social media presents, it is “one of the best weapons in an unsigned act’s arsenal.”¹³⁰ Given this, it is even more useful to starting, growing, or even established artists because most platforms are free and some even provide successful users with the opportunity to profit directly off of their follows and streams on the platform.¹³¹ The top platforms have a staggering number of active users (Facebook: 2.7 billion; YouTube: 2.0 billion; Instagram: 1.16 billion; TikTok: 689 million; Reddit: 430 million; Twitter: 353, million; Snapchat 433 million).¹³² This reach, all for free and constantly accessible to artists, enables artists to create the types of connections that helped build and solidify Swift’s army of supporters. Artists can create a brand, share their day, their artistic process, inside jokes, or where their next gig will be played which can all help artists promote themselves without paying for a team to do it for them. The internet loves talent and it does not always take a social media manager desk at one of the major labels behind the keyboard to help the internet find an artist’s personal page.

As followings begin to form online, artists can turn to other technological tools in their arsenal to continue positioning themselves for success. While technology is not equally accessible to all individuals, the growing prevalence of personal computers and smart phones in the United States makes the ease of access to cheap software a much more common reality for the majority of artists in recent years.¹³³ An artist can kickstart

action/?sh=1a6fb5ea255a (referencing Swift’s direct donations to fans struggling to pay bills, her support and donations to Feeding America, and her donation to a Nashville record shop and its employees struggling during the COVID-19 shutdown); De Elizabeth, *Taylor Swift Hosts First “Lover” Secret Session in London*, TEEN VOGUE (Aug. 3, 2019), <https://www.teenvogue.com/story/taylor-swift-first-lover-secret-session-london> (discussing Swift’s Secret Sessions, a tradition where she and her team invite fans to listen to and discuss her upcoming albums with Swift before they are released); Glenn Rowley, *All of the Easter Eggs in Taylor Swift’s Video for ‘The Man’*, BILLBOARD (Feb. 27, 2020), <https://www.billboard.com/photos/9324175/taylor-swift-video-the-man-easter-eggs-cameos> (serving as an example of the many Swift pieces that features Easter Eggs and clues for her fandom to interact with and interpret); Aly Weisman, *Taylor Swift Had an Incredible Response to a Tumblr Meme About Herself*, BUSINESS INSIDER (Sep. 26, 2014, 11:10 AM), <https://www.businessinsider.com/taylor-swift-no-its-becky-tumblr-2014-9> (highlighting Swift’s interactions with fans online and extending her fandom’s inside jokes into the real world).

¹³⁰ Mark Haldon, *A Guide To Releasing Your Music Without a Label*, BRITISH & IRISH MODERN MUSIC INST. (July 3, 2017), <https://blog.bimm.co.uk/a-guide-to-releasing-your-music-without-a-label>.

¹³¹ See Thomas Smale, *How to Make Money with Social Media*, ENTREPRENEUR (Apr. 27, 2016), <https://www.entrepreneur.com/article/274687> (discussing the opportunities to make money on social media).

¹³² J. Clement, *Global Social Networks Ranked by Number of Users 2020*, STATISTA (Nov. 24, 2020), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>.

¹³³ See Camille Ryan, *Computer and Internet Use in the United States: 2016*, U.S. CENSUS (Issued Aug. 2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf> (“Among all households in 2016, 89 percent had a computer, which includes smartphones, and 81 percent had a broadband Internet subscription.”).

her own music career with nothing more than a computer, audio software, and a microphone.¹³⁴

After recording and production are complete, artists have a variety of options to stream their music to fans. Artists can return to social media and let their dedicated fanbases preview their songs or simply promote their new works by posting a link. That link could lead to some of the many leading streaming sites like Spotify, Apple Music, YouTube, Amazon Prime, and TIDAL.¹³⁵ Unsigned artists do not need to worry about having industry ties or have any insider knowledge to release their music on these major platforms—meaning artists do not need a label backing them to achieve stardom online.¹³⁶ Artists simply need to find a music online aggregator (there are many competing free options) and their music will be distributed to all of that aggregator’s streaming partners.¹³⁷ Before uploading, there is one more step for artists that plan on releasing something not entirely their own, like a cover, remix, or an original song including samples—getting the required licenses for these underlying works.¹³⁸ This can be a bit more difficult or expensive than some of the earlier steps if the artist decides to sample popular songs that will charge a large licensing fee or more obscure or older records in which the rights holder is difficult to identify and track down.¹³⁹ However, just like all the steps before, this can also be achieved online without a label in some cases.¹⁴⁰ Once on the streaming platform, an artist will begin collecting royalties for each of their streams.¹⁴¹

Getting on a streaming site is not the finish line though. In fact, in 2013, there were over four million songs on Spotify that had never been played.¹⁴² While streaming sites create ease of access, they generally do not promote an artist’s music for them as a label’s traditional marketing

¹³⁴ Rory Seydel, *Why You Don’t Need a Record Label*, LANDR (Aug. 21, 2015), <https://blog.landr.com/dont-need-record-label/>.

¹³⁵ *But see* discussion *supra* Section VI for some of the criticisms to streaming platforms artists like Swift have raised and the development of those policies over time.

¹³⁶ Haldon, *supra* note 130.

¹³⁷ *See id.*; *see also* *Free Music Distribution: 7 Best Aggregator Services for Spotify*, MASTRNG (Feb. 12, 2020), <https://www.mastrng.com/free-music-distribution/>.

¹³⁸ Haldon, *supra* note 130 (explaining that Mechanical Licenses are required in the U.S., that remixes require a Master Use License around the globe, and that samples require both a Master Use and Mechanical License for worldwide distribution).

¹³⁹ *See* PETER DICOLA & KEMBREW MCLEOD, *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 155–63 (2011) (explaining the complexity of the “institutions, processes, and terms involved in sample licensing”).

¹⁴⁰ Haldon, *supra* note 130.

¹⁴¹ *See* Henry Schoonmaker, *How Spotify Streams Turn into Royalties*, SONGTRUST, <https://blog.songtrust.com/how-spotify-streams-turn-into-royalties> (last updated Jul. 20, 2020) (explaining how the process of streams turns into royalties for artists).

¹⁴² Mario Aguilar, *More Than 4 Million Spotify Songs Have Never Been Played*, GIZMODO (Oct. 14, 2013), <https://gizmodo.com/more-than-4-million-spotify-songs-have-never-been-playe-1444955615>.

plan would. Generally, streaming services create a place for listeners to find a song they are already searching for. However, Spotify Playlists, Pandora, and Apple Music algorithms can highlight new music and promote it to the users that will appreciate it the most.¹⁴³ As an example, Spotify offers two types of curated playlists that can result in decent exposure for new artists—personalized playlists and editorial playlists.¹⁴⁴ Personalized playlists, like Discover Weekly or Release Radar, are created by algorithms that track listener preferences and habits and highlight targeted selections to fit a user’s taste.¹⁴⁵ Editorial playlists are, on the other hand, created by music and genre specialists and the Spotify for Artist page allows artists to submit unreleased music to be considered for these types of playlists.¹⁴⁶ So, despite not serving as an equivalent for a promoter, Spotify and other streaming services still provide some opportunities for new artists to be discovered by interested listeners. As listeners enjoy the music, artists collect their royalties from the popular streaming services. In fact, as of 2020, royalties from streaming companies made up 83% of the music industry’s revenue.¹⁴⁷

While the plays are racking up on streaming services, an artist’s recognition will continue to rise on the charts as well. With music metrics like Billboard Charts and RIAA Certifications reacting to and incorporating the new ways audiences listen to music, listening to songs on a streaming site or even on YouTube will aid a song’s performance on the charts and help raise its status for recognition during awards season.¹⁴⁸ Not all streams are equal; an on-demand stream counts more than a programmed stream and a paid stream counts more than a free one, but all

¹⁴³ See Vox Creative, *Man-Made Machine Music*, VERGE (Sept. 23, 2019, 5:25 PM), <https://www.theverge.com/ad/20880077/fairness-for-musicians-artists-music-streaming-algorithms> (discussing how streaming platforms make use of collaborative filtering and audio processing models to make personalized song recommendations for users based on their tastes).

¹⁴⁴ See *Spotify for Artists: FAQ*, SPOTIFY, <https://artists.spotify.com/faq/promotion#how-can-i-promote-my-music-on-spotify> (last visited May 10, 2020). There is also a third type of playlist, one created by the user. Even through this method Spotify algorithms will suggest similar songs to what is already comprising the playlist and can put new songs in front of a listener who is already searching out a specific genre or feel. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Anne Steele, *Recorded Music Revenue Hits \$12 Billion in 2020 Amid Pandemic Streaming Boom*, WALL ST. J. (Feb. 26, 2021 1:31 PM ET), <https://www.wsj.com/articles/recorded-music-revenue-hits-12-billion-in-2020-amid-pandemic-streaming-boom-11614364260#:~:text=Streaming%20accounted%20for%2083%25%20of,app%20use%20on%20the%20rise>. *But see* Blake Montgomery, *Fans Are Spoofing Spotify with “Fake Plays,” and That’s A Problem for Music Charts*, BUZZFEED NEWS (Sept. 13, 2018, 2:00 PM), <https://www.buzzfeednews.com/article/blakemontgomery/spotify-billboard-charts>.

¹⁴⁸ *Billboard 200 to Include Official Video Plays From YouTube, Streaming Services*, BILLBOARD (Dec. 13, 2019), <https://www.billboard.com/articles/business/chart-beat/8546247/billboard-200-changes-youtube-video-data-streaming-album-charts>.

of them now count toward the top charts.¹⁴⁹ Streaming also equates to an album sale, with every 1,250 streams counting as if a physical album was purchased.¹⁵⁰ The Recording Industry Association of America (“RIAA”) gives album certification awards (Gold, Platinum, Multi-Platinum), and since 2016 it has also factored streams into its calculations.¹⁵¹ Artists are now able to go Platinum without ever signing with a record label and, through their streaming accomplishments, can stand on the Grammy stage to receive some of the highest honors in the industry.¹⁵²

Artists have been grappling with technology for decades; video even killed the radio star.¹⁵³ But now technology offers a fantastic opportunity for artists to improve their positions. Leveraging social media and streaming platforms to build a fanbase, release tracks, and curate a brand can increase an artist’s bargaining power if she chooses to go knock on a major label’s door. Technology can even present the chance for artists to succeed without ever signing with a major label.¹⁵⁴ By taking advantage of either of these options, artists should be able to bypass some of the dark sides of the music industry and remain in control of their masters, their careers, and their lives.

¹⁴⁹ Marc Hogan, *Billboard Charts Change to Count Paid Streams More Than Free*, PITCHFORK (May 2, 2018), <https://pitchfork.com/news/billboard-charts-change-to-count-paid-streams-more-than-free/?verso=true> (“Under the new [July 2018] rules, paid subscription services will count for one full point per play, while free, ad-supported services will count for two-thirds of a point per play, and programmed streams will count for one-half of a point. After streaming, radio airplay is the next biggest part of the Hot 100 formula, followed by digital sales.”).

¹⁵⁰ Ben Sisario, *The Music Industry’s Math Changes, But the Outcome Doesn’t: Drake is No. 1*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/arts/music/drake-scorpion-streams-billboard-chart.html>; see also Brittany Spanos, *RIAA to Count Streaming Towards Album Certifications*, ROLLING STONE (Feb. 1, 2016, 10:50 PM), <https://www.rollingstone.com/music/music-news/riaa-to-count-streaming-towards-album-certifications-240860/>.

¹⁵¹ *RIAA Debuts Album Award with Streams*, RECORDING INDUS. ASS’N OF AM. (Feb. 1, 2016), <https://www.riaa.com/riaa-debuts-album-award-streams/> (“RIAA set the new Album Award formula of 1,500 on-demand audio and/or video song streams = 10 track sales = 1 album sale.”).

¹⁵² See *id.*; see also Havens, *supra* note 125.

¹⁵³ See Michelle Starr, *The Day That Video Killed the Radio Star*, CNET (July 31, 2016, 11:54 PM PT), <https://www.cnet.com/news/did-video-kill-the-radio-star/> (discussing the rise of MTV and how television and music videos changed music in the 1980s); THE BUGGLES, VIDEO KILLED THE RADIO STAR (Island Records 1979).

¹⁵⁴ See Melissa Daniels, *Why Independent Musicians Are Becoming The Future of the Music Industry*, FORBES (July 10, 2019, 7:08 PM EDT), <https://www.forbes.com/sites/melissamdaniels/2019/07/10/for-independent-musicians-going-your-own-way-is-finally-starting-to-pay-off/#6767519a14f2> (“For artists, technological advancements that allow them to share their work with the world fuels their ability to make music and build their career at their own pace, and with their own style.”). However, the issue of financing a tour is still rather difficult without an entity like a record label helping with the large upfront expenses. *Id.*

VI. GETAWAY CAR: A TIDAL SHIFT

Often, the difference between a “good deal” and a “bad deal” with a record company rests on how much bargaining power an artist has when they sit down at the negotiating table. While the most powerful artists have always had more success avoiding some of the major pitfalls in recording deals discussed in the sections above, there is a unique moment for the most powerful artists to help lift up those below them. Recently, artists have been stepping up to support other artists. Whether in the courtroom, on social media, in the press, on streaming sites, or within their own record label, this unity of power with the most powerful superstars leading the charge is a force that the major labels cannot ignore.¹⁵⁵ From Swift to Beyoncé, the biggest superstars are starting to disrupt the music industry and using their influence to impose their will and make a more artist friendly environment.

Swift has had no shortage of influential moments in the music industry, and many of her most influential moves are not for her sole benefit. Swift’s first such move came when she left Spotify in 2014.¹⁵⁶ On the eve of the release of *1989*, her fifth studio album, Swift pulled her entire catalogue from Spotify in response to the platform’s decision “to give full on-demand streaming to customers who weren’t paying for a monthly subscription.”¹⁵⁷ Swift also wrote an opinion piece in *The Wall Street Journal* voicing that: “Music is art, and art is important and rare. Important, rare things are valuable. Valuable things should be paid for . . . music should not be free” and “[i]n the future, artists will get record deals because they have fans—not the other way around.”¹⁵⁸ Swift pulled her

¹⁵⁵ See, e.g., Derek Eppinger, *The Many Proteges of Kanye West*, ROOBLA (Oct. 20, 2019), <https://roobla.com/69844/the-many-proteges-of-kanye-west/> (discussing the many artists West helped mentor on their path to success); Cynthia Littleton, *James Taylor to Join ‘The Voice’ as Mega Mentor*, VARIETY (Apr. 6, 2020, 6:56 AM), <https://variety.com/2020/tv/news/james-taylor-the-voice-mega-mentor-nbc-april-13-1234571850/> (reporting that Swift will serve as a mentor alongside Kelly Clarkson, John Legend, Nick Jonas, and Blake Shelton who help mentor upcoming artists on a weekly basis); Jeff Nelson, *JoJo Says Taylor Swift Sympathized with Her Over Label Lawsuits Years Before Her Own Masters Drama*, PEOPLE (May 4, 2020, 2:40 PM), <https://people.com/music/jojo-label-lawsuit-taylor-swift-sympathized/> (reporting the emotional support Swift provided to JoJo during a period of great turmoil with her label); Jason Newman, *Taylor Swift Donates \$250,000 to Kesha After Court Ruling*, ROLLING STONE (Feb. 22, 2016, 5:13 AM), <https://www.rollingstone.com/music/music-news/taylor-swift-donates-250000-to-kesha-after-court-ruling-123036/> (discussing Swift’s support of Kesha in her sexual assault suit against her producer, Dr. Luke).

¹⁵⁶ Aaron Souppouris, *Taylor Swift Shakes Off Spotify, Pulls Entire Catalog*, ENGADGET (Nov. 3, 2014), <https://www.engadget.com/2014-11-03-taylor-swift-spotify-break-up.html>.

¹⁵⁷ Billy Steele, *Spotify is Limiting Free Streaming For its Own Good*, ENGADGET (Apr. 6, 2017), <https://www.engadget.com/2017-04-06-spotify-is-limiting-free-streaming-for-its-own-good.html>.

¹⁵⁸ Taylor Swift, *For Taylor Swift, the Future of Music Is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM ET), <https://www.wsj.com/articles/for-taylor-swift-the->

music because, in her own words, she was “not willing to contribute [her] life’s work to an experiment that [she did not] feel fairly compensates the writers, producers, artists, and creators of this music.”¹⁵⁹

Similarly, Swift did not initially release *1989* on Apple Music because of Apple Music’s plan not to pay artists royalties during its three-month free trial period.¹⁶⁰ In response to this move, Swift penned an open letter to Apple and posted it on her social media accounts.¹⁶¹ While Swift would personally benefit from receiving royalties, she also emphasized that her privilege as a recognized and successful touring artist means she does not rely on royalties to fund her or her team.¹⁶² However, Swift wrote, “[t]his is about the new artist or band that has just released their first album and will not be paid for its success.”¹⁶³ The same day Swift made her letter public, Apple announced that it would change its policy to pay artists during this free trial period for users.¹⁶⁴

More recently, Swift’s switch from BMR to UMG captured the attention of the music industry because, in making her deal, Swift not only

future-of-music-is-a-love-story-1404763219. *But see* Justin Wm. Moyer, *Five Problems with Taylor Swift’s Wall Street Journal Op-ed*, WASH. POST (July 8, 2014), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/07/08/five-problems-with-taylor-swifts-wall-street-journal-op-ed/?arc404=true> (“Swift’s supply-side argument—if they come, you can build it—focuses on the power of social media, but confuses social media with society.”); Nilay Patel, *Taylor Swift Doesn’t Understand Supply and Demand*, VOX (July 7, 2014, 6:59 PM EDT) <https://www.vox.com/2014/7/7/5878603/taylor-swift-doesnt-understand-supply-and-demand>, (“the most important lesson of the internet music revolution is that the vast majority of consumers actually reward *convenience*.”).¹⁵⁹ Chris Willman, *Taylor Swift on Being Pop’s Instantly Platinum Wonder . . . And Why She’s Paddling Against the Streams*, YAHOO MUSIC (Nov. 6, 2014), <https://www.yahoo.com/entertainment/blogs/music-news/exclusive--taylor-swift-on-being-pop-s-instantly-platinum-wonder---and-why-she-s-paddling-against-the-streams-085041907.html>.

¹⁶⁰ Peter Helman, *Read Taylor Swift’s Open Letter To Apple Music*, STEREOGUM (June 21, 2015, 10:25 AM), <https://www.stereogum.com/1810310/read-taylor-swifts-open-letter-to-apple-music/news/>.

¹⁶¹ *Id.*; Taylor Swift News (@TSwiftNZ), TWITTER (June 21, 2016, 8:11 AM), <https://twitter.com/tswiftnz/status/745227588537188352?lang=en>. The letter has since disappeared from her own accounts but was documented by many others—originally published June 21, 2016.

¹⁶² *Id.* (“This is not about me. Thankfully I am on my fifth studio album and can support myself, my band, crew, and entire management team by playing live shows.”).

¹⁶³ *Id.* (continuing, Swift says, “This is about the young songwriter who just got his or her first cut and thought that the royalties from that would get them out of debt. This is about the producer who works tirelessly to innovate and create . . . but will not get paid for a quarter of a year’s worth of plays on his or her songs.”).

¹⁶⁴ Carly Mallenbaum, *Apple Music Responds to Taylor: We’ll Pay*, USA TODAY (June 22, 2015, 2:11 PM ET), <https://www.usatoday.com/story/life/music/2015/06/22/taylor-swift-apple-music/29094853/>; Chris Welch, *Apple Now Says It Will Pay Artists During Apple Music Free Trial*, VERGE (June 21, 2015, 11:51 PM EDT), <https://www.theverge.com/2015/6/21/8822369/apple-will-pay-artists-during-apple-music-trial>.

advocated for herself but also on behalf of all of UMG's artists.¹⁶⁵ Swift announced some of the terms of her deal by highlighting that she would own her own masters and that UMG will share proceeds from the expected sale of its Spotify equity with its artists. In this deal, Swift leveraged her own success to fight for her belief that “streaming was founded on and continues to thrive based on the magic created by artists, writers, and producers.”¹⁶⁶ These terms with UMG ensured that the creators and artists would receive a portion of the money, non-recoupable against their advance, if UMG ever decides to sell any of its Spotify shares.¹⁶⁷ This could make a huge impact for less financially successful artists since the value of these shares is astronomical.¹⁶⁸

Most recently, Swift began releasing the re-recordings of her first six albums which could act as a warning to record-executives going forward. Swift's position as both the songwriter and performer gives her the ability to record exact replicas of her original albums that can then shut BMR out of some of the original albums' future revenue streams.¹⁶⁹ Since labels rely on their biggest superstars to absorb the risk of signing lesser-known artists, Swift's ability to devalue BMR's ownership of her original masters through these re-recordings could motivate labels to treat their artists better.¹⁷⁰ Also, Swift's introduction of the re-recorded versions of her back catalogue provides a market alternative for productions wishing to use her songs in television, movies, and commercials. Swift's ability to grant licenses for these purposes, since she has both the sound recording and composition rights for her re-recorded versions (coupled with her ability to block BMR's licensing of the original versions through her

¹⁶⁵ Cullins, *supra* note 7.

¹⁶⁶ Joe Coscarelli, *Taylor Swift Announces New Record Deal with Universal Music*, N.Y. Times (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/arts/music/taylor-swift-record-deal-universal-republic.html>; Taylor Swift (@TaylorSwift), *My New Home*, TUMBLR (Nov. 19, 2018), <https://taylorswift.tumblr.com/post/180277025530/my-new-home>.

¹⁶⁷ Rachel England, *Taylor Swift Ensures UMG Artists Will Profit from Spotify Shares*, ENGADGET (Nov. 20, 2018), <https://www.engadget.com/2018-11-20-taylor-swift-umg-artists-profit-spotify-shares.html>.

¹⁶⁸ *Id.* (“Some context. Earlier this year, Sony sold around half of its 5.7 percent stake in Spotify for \$768 million, while Warner Brothers sold 75 percent of its five percent stake for \$504 million.”).

¹⁶⁹ See Chris Willman, *Taylor Swift Fans Share Notes on How to Make the Old ‘Fearless’ Disappear*, VARIETY (Apr. 8, 2021 2:50 PM PT), <https://variety.com/2021/music/news/taylor-swift-fans-fearless-big-machine-disappear-1234947206/> (discussing the efforts of Swift's fans to avoid streaming the original version of *Fearless* in an effort to limit BMR's revenue).

¹⁷⁰ See Rushe, *supra* note 9 (explaining Swift's catalogue accounts for 50–80% of BMR's revenues). Theoretically, this could actually work against artists and encourage labels to demand lengthier exclusivity periods to discourage any timely re-recordings like Swift's in the future. However, any lasting impact on industry, in favor or against artists, remains to be seen. Importantly, it is possible that BMR could have avoided the financial risk presented by Swift's revenge by offering Swift with a more favorable opportunity to purchase the masters of her back catalogue for their market value rather than making the sale contingent on her producing six-more albums for BMR to “earn back” her original masters. See M.H., *supra* note 9.

composition copyright rights as the songwriter) makes her new versions a more desirable target for potential licensees.¹⁷¹ Through all these moves, Swift has used her prominence and clout to fight for artists' rights—fighting both labels and streaming services to protect herself but also to protect more vulnerable artists while highlighting the importance of artists owning their masters.

Beyoncé, another extremely influential artist, has also utilized her power and wealth to protect vulnerable artists and insulate them from the threats of major labels and other industry powerhouses. The surprise launch of Beyoncé's self-titled album, *Beyoncé*, on a Friday in 2013 might be considered her most revolutionary move “not for what it did, but for what it didn't do.”¹⁷² Beyoncé broke all the traditional rules of releasing music and, while her preexisting stardom made it possible to break this barrier so successfully, it created a roadmap for future artists.¹⁷³ To release this fifth solo album, Beyoncé forwent all the promotional tools and perks of her major label—despite the industry's perception that this promotional “machine” was necessary to successfully launch an album.¹⁷⁴ Beyoncé had “no radio promotion, no single, no advance press of any kind,”¹⁷⁵ instead her eponymous album appeared on the iTunes store to the surprise and delight of fans and debuted at number one on Billboard's 200 list.¹⁷⁶ The album sold over 617,000 copies in its first three days and her move is often credited with switching the music release date from Tuesday to Friday.¹⁷⁷

¹⁷¹ See *Music Licensing Chart*, *supra* note 55. As the songwriter of her works, Swift's rights as the composition copyright owner give her the power to prevent her old recordings use in television, movies, and commercials. These fall under synchronization rights which require the approval of both the composition and mechanical copyright holder, so Swift can unilaterally block her previous recordings for these uses while granting licenses for her re-recorded versions making them the more desirable target for licensees.

¹⁷² Zack O'Malley Greenburg, *Music Industry Winners 2013: Beyonce, Streaming, Rap DJs*, FORBES (Dec. 30, 2013, 12:49 PM EST), <https://www.forbes.com/sites/zackomalleygreenburg/2013/12/30/music-industry-winners-2013-beyonce-streaming-rap-djs/#4e587ab9458f>.

¹⁷³ Boogie Bousins, *Beyonce Changes the World with Her Surprise Album*, STILL CREW (Dec. 13, 2018), <https://stillcrew.com/beyonce-five-year-anniversary-surprise-album-b7dda0b7fa0a>; Henry Knight, *Why Beyoncé Speaks for a Generation*, BBC (Apr. 15, 2015), <https://www.bbc.com/culture/article/20150415-beyonc-voice-of-a-generation>.

¹⁷⁴ O'Malley, *supra* note 172.

¹⁷⁵ *Id.*

¹⁷⁶ Keith Caulfield, *It's Official: Beyonce Makes History With Fifth No. 1 Album*, BILLBOARD (Dec. 17, 2013), <https://www.billboard.com/articles/news/5840086/its-official-beyonce-makes-history-with-fifth-no-1-album>.

¹⁷⁷ Andrew Flanagan, *Industry Sets Friday as Global Record Release Day*, BILLBOARD (Feb. 26, 2015), <https://www.billboard.com/articles/business/6487289/friday-global-record-release-day-ifpi>; Clarisse Loughrey, *Adele's New Album 25 is No. 1 on iTunes in Almost Every Country in the World*, INDEPENDENT (Nov. 26, 2015, 15:29), <https://www.independent.co.uk/arts-entertainment/music/news/adeles-album-is-no1-in-almost-every-country-in-the-world-a6749626.html>; Kelsey McKinney, *New Albums Will Come Out on Fridays Instead of Tuesdays Now. Blame Beyoncé.*, VOX (Feb. 26, 2015, 2:50 PM EST), <https://www.vox.com/2015/2/26/8116201/friday-new-albums-beyonce>.

With Beyoncé’s defiance of industry norms, many artists can now question the necessity of perks that major labels claim to offer and evaluate just how important those tools are going to be for their career and success. Beyoncé showed artists there are alternatives to the traditional route and opened the door for future artists to follow her path.

Beyoncé and Jay-Z, her husband and a music mogul, took their business and music success in another direction as well when they acquired TIDAL, which they launched in the United States in 2015.¹⁷⁸ TIDAL was the first artist-owned streaming service and was “founded with the mission of bringing fans and artists closer together and creating a sustainable industry model that values music and artists.”¹⁷⁹ And this mission statement is not just an empty platitude, TIDAL does in fact back artists in unique ways. First and foremost, TIDAL pays its artists, producers, and songwriters more for their streams than other platforms, in part to “ensure music maintains its value.”¹⁸⁰ TIDAL also pays equal rates to artists no matter who or what type of representation they have, so an artist on a major label and an artist with no label at all will both be paid the same for each stream their music generates.¹⁸¹ Further, TIDAL gives artists the ability to connect with fans through the platforms TIDAL X and TIDAL Rising programs.¹⁸²

TIDAL X provides artists with opportunities to interact with their fans in unique ways including events, meet and greets, and exclusive tickets for events and concerts for TIDAL subscribers.¹⁸³ TIDAL X is available to artists of all notoriety but TIDAL Rising offers even more benefits to artists trying to expand their fanbases.¹⁸⁴ TIDAL Rising selects artists to support and provides them with a myriad of benefits beyond just hosting the artist’s music on the streaming service, including public relations support, music video support, and premium show placements.¹⁸⁵ One of the most important resources the service offers is Tour Support. Tour Support is “a fund for TIDAL Rising artists that never has to be recouped or paid back” which can help cover the variety of expenses that

¹⁷⁸ Sam Sanders, *Jay Z’s Music Service, Tidal, Arrives with a Splash, and Questions Follow*, NPR (Mar. 31, 2015, 5:31 PM ET), <https://www.npr.org/sections/therecord/2015/03/31/396634244/jay-zs-music-service-tidal-arrives-with-a-splash-and-questions-follow>.

¹⁷⁹ *Id.*; *What is TIDAL?*, TIDAL, <https://tidal.com/whatistidal> (last visited Nov. 15, 2020) (noting that other owners include Alicia Keys, Nicki Minaj, Rihanna, Jason Aldean, Coldplay, Lil Wayne, and Usher).

¹⁸⁰ *What is TIDAL?*, *supra* note 179 (explaining that TIDAL pays more than other streaming services to streaming artist).

¹⁸¹ *Id.* (“Our artist-owners developed our model so that TIDAL pays the highest ratio of royalties vs. revenues to music creators of any streaming service, and equal rates are paid to artists regardless of whether they’re signed to a major label, an indie label, or not signed to a label at all.”).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

arise from touring.¹⁸⁶ This type of angel investment provides a lot of the help that young artists seek from labels without the harsh strings and terms of a contract with one of the major labels.

Beyond Swift and Beyoncé, there are many big-name artists who have started to give back to younger artists. Big artists do this in a variety of ways—like serving as a mentor or inspiration, running a streaming service, voicing support during important moments, or signing young artists to their own label. The brotherhood of artists in the industry only helps bolster the opportunity created by technology right now to put the power in the hands of the artists rather than the traditionally powerful labels.

VII. IN CONCLUSION, WE ARE NEVER EVER GETTING BACK TOGETHER

Taylor Swift's feud with Scooter Braun has left the internet buzzing over artist's rights because "[a]ny time Taylor brings attention to an issue it gets magnified."¹⁸⁷ Given the current environment, the technological resources, and the trend of big stars supporting less powerful artists, now is the perfect time for new and less powerful artists to leverage all these opportunities. Artists can use these tools to either launch their careers without label assistance or to at least raise their bargaining power before approaching the major labels.¹⁸⁸

The power struggle between labels and artists has existed for decades. As Swift brought attention to her disputes with BMR, the general population's consciousness began to consider what artist's rights should look like going forward. Artist dependence on major labels is deeply ingrained in industry practice and these labels offer many real financial and exclusive opportunities. So, the artist-label dichotomy will never disappear overnight.¹⁸⁹ The allure of an advance, the draw of industry expertise and access, and even the appeal of "making it" by signing a deal cannot be erased instantaneously. But, the era of oppressive label friendly contracts ought to be behind us. As big artists continue to express their dissatisfaction and leverage their experience, brand, and connections into opportunities for new artists, it is time for artists to reap their fair share of the profits they generate.

The transformation of these artist-label relationships will take time, but the current technologic and social moment gives rising artists a

¹⁸⁶ *Id.* (explaining how TIDAL will finance artists for touring expenses from hotel rooms, equipment rental, vans, gas, food, to any other expense that arises from being on the road).

¹⁸⁷ Cullins, *supra* note 7 (quoting James Sammataro, who represents both artists and companies in the music industry).

¹⁸⁸ Katie Shonk, *The Importance of Power in Negotiations: Taylor Swift Shakes It Off*, HARVARD L. SCH.: PROGRAM ON NEGOTIATION DAILY BLOG (Nov. 18, 2019), <https://www.pon.harvard.edu/daily/dispute-resolution/dispute-resolution-with-spotify-taylor-swift-shakes-it-off/>.

¹⁸⁹ It is notable that despite many of the issues Swift highlighted and her existing star-power, she still saw it worthwhile to sign with UMG. *See* discussion *supra* Section I.

fantastic opportunity to ride the wave of this turning tide. Negotiations are all about power and who holds the right cards—since labels historically had the money, security, and connections they have been able to tip exchanges in their favor. If a label thinks an artist is a safe bet and it will easily recoup its investment in them, then the need for overly oppressive contract terms diminishes. New artists can now hopefully avoid oppressive terms by using the opportunities around them to stack their hand as much as possible, by creating more certainty in their value, before entering the contract negotiation process with a major label.

The current landscape allows young artists to prove themselves before they sign recording contracts and demonstrate that they are not a risk. This is where the opportunities created by technology, social media, streaming, and superstar mentors can make a world of difference. Building up a large fan following, having a lot of streams and followers, and becoming part of the existing music scene will give young artists the ability to negotiate better contracts with labels, potentially avoid labels at all, and remain in control of their artistic integrity by retaining ownership of their masters.