

Notes:

Addressing the Value Gap in the Age of Digital Music Streaming

ABSTRACT

This Note analyzes a global music industry problem known as the value gap. The value gap represents the disparity between the value that music-streaming platforms extract from musical content and the revenue generated by those who create and invest in the creation of such content. The international rise in digital music streaming has contributed greatly to the expansion of the value gap. This is largely because outdated laws like the Digital Millennium Copyright Act in the United States and other similar statutes around the globe contain safe harbor provisions that shield certain music-streaming services from copyright-infringement liability. Safe harbor protection provides these services with a powerful bargaining chip during licensing negotiations with music copyright holders. After exploring the origins of the value gap, this Note advocates for a two-step legislative solution to the problem. The first step involves revising the World Intellectual Property Organization (WIPO) Copyright Treaty in a manner that obligates member states to comply by narrowing the scope of domestic safe harbor provisions. The second step recommends an alteration to the current music-licensing framework in an effort to ensure adequate remuneration for music rightsholders.

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I. INTRODUCTION

“Dear Congress: The Digital Millennium Copyright Act is broken and no longer works for creators.”¹ This is the opening of a June 2016 petition to reform the Digital Millennium Copyright Act (DMCA).² Over 170 artists, including music superstars such as Sir Paul McCartney, Taylor Swift, Kings of Leon, and Jack White, signed the petition asserting that the DMCA is outdated and in dire need of legislative reform.³ Other signers of the petition included legacy artists such as Billy Joel, Sting, U2, and individual members of the Eagles.⁴ In an infamous June 13, 2016 interview with *Billboard Magazine*, Trent Reznor of the band Nine Inch Nails expressed frustration with the DMCA by calling out YouTube, claiming that the video sharing platform was “built on the backs of free, stolen content.”⁵

The DMCA was enacted on October 28, 1998.⁶ Title II of the Act limits copyright-infringement liability of online service providers that

1. Alex Young, *180 musicians sign petition asking congress to end YouTube’s copyright loopholes*, CONSEQUENCE OF SOUND (June 20, 2016, 2:34 PM), <https://consequenceofsound.net/2016/06/180-musicians-sign-petition-asking-congress-to-end-youtubes-copyright-loopholes/> [https://perma.cc/3NYE-ZDBY] (archived Jan. 19, 2019).

2. *Id.*

3. *Id.*

4. Daniel Kreps, *Jack White, Pearl Jam, U2, Trent Reznor Sign DMCA Petition*, ROLLING STONE (June 22, 2016), <http://www.rollingstone.com/music/news/jack-white-pearl-jam-u2-trent-reznor-sign-dmca-petition-20160622> [https://perma.cc/Z6X4-FBWK] (archived Jan. 19, 2019).

5. Shirley Halperin, *Apple’s Brain Trust—Iovine, Reznor, Cue and Kondrk—on Streaming’s New World Order and Why ‘We All Should Be’ Worried*, BILLBOARD (June 14, 2016), <http://www.billboard.com/articles/news/7401446/apple-brain-trust-streaming-new-world-order-youtube-wwdc> [https://perma.cc/SF88-CYY8] (archived Jan. 19, 2019).

6. See U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: SUMMARY 1 (1998), <http://www.copyright.gov/legislation/dmca.pdf> [https://perma.cc/TVL2-6Y8M] (archived Feb. 17, 2019) [hereinafter DMCA Summary] (discussing the DMCA legislative process).

offer statutorily prescribed services.⁷ More specifically, the DMCA added § 512 to the U.S. Copyright Act (Copyright Act), which implements liability-shielding safe harbors for online service providers that store information posted by users.⁸ Although the DMCA was originally enacted in 1998, it has caused recent uproar among musicians, songwriters, and other music copyright holders.⁹ What explains this sudden outcry? The petition to amend the DMCA explains that the “law was written and passed in an era that is technologically out-of-date compared to the era in which we live.”¹⁰ The petition goes on to explain that “[t]he tech companies who benefit from the DMCA today were not the intended protectorate when it was signed into law nearly two decades ago.”¹¹ Those opposed to the law contend that technology titans such as Google and its subsidiary, YouTube, are exploiting the DMCA’s safe harbor provisions to establish unfair negotiating leverage in music-licensing deals.¹² This leverage allows streaming services that qualify for safe harbor protection to generate immense profits at the expense of content creators and other copyright owners.¹³

The safe harbor provisions in the DMCA and similar laws in various countries around the world have had a detrimental impact on the global music industry.¹⁴ Due to the global rise in digital music streaming, issues surrounding the remuneration of artists are not confined to US borders.¹⁵ According to the International Federation for the Phonographic Industry’s (IFPI) 2017 Global Music Report (2017 Global Music Report), digital music streaming is “the most prevalent and significant format in the modern music industry.”¹⁶ In

7. *Id.*

8. *Id.* at 8.

9. See Kreps, *supra* note 4.

10. Young, *supra* note 1.

11. *Id.*

12. See Micah Singleton & Ben Popper, *The music industry cranks up the volume in its fight against YouTube*, THE VERGE (June 3, 2016, 12:48 PM), <https://www.theverge.com/2016/6/3/11852146/music-industry-fighting-youtube-dmca> [<https://perma.cc/Q9EZ-22V5>] (archived Jan. 19, 2019) (explaining that YouTube maintains leverage in deal negotiations because labels and other copyright owners must choose between getting some revenue way below market value or getting no revenue and spending time policing the site for infringing content).

13. INT’L FED’N FOR THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT 2017: ANNUAL STATE OF THE INDUSTRY 25 (2017), <http://www.ifpi.org/downloads/GMR2017.pdf> [<https://perma.cc/XZ5B-BL5K>] (archived Jan. 19, 2019) [hereinafter 2017 GLOBAL MUSIC REPORT].

14. See *id.*; Gregor Pryor et al., *European Copyright Reform—Safe Harbour and the Value Gap* (June 6, 2017), REED SMITH CLIENT ALERTS <https://www.reedsmith.com/en/perspectives/2017/06/european-copyright-reform-safe-harbour-and-the-value-gap> [<https://perma.cc/QL22-JQ7V>] (archived Jan. 19, 2018).

15. See 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 16 (discussing the widespread growth of streaming in all major markets and even some developing territories).

16. *Id.*; see also INT’L FED’N FOR THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT 2018: ANNUAL STATE OF THE INDUSTRY 10 (2018),

short, the shift to music streaming has made adequate remuneration a primary concern for industry stakeholders, including songwriters, musicians, publishing companies, and record labels.¹⁷

The remuneration problem is often referred to as the value gap.¹⁸ The IFPI's 2018 Global Music Report (2018 Global Music Report) explains that the value gap "describes the growing mismatch between the value that user upload services, such as YouTube, extract from music and the revenue returned to the music community—those who are creating and investing in music."¹⁹ The 2017 Global Music Report considers the value gap to be "the biggest threat to the future sustainability of the music industry."²⁰ The value gap poses such a large threat because without adequate compensation, songwriters and musicians are discouraged from investing in the creation of new music.²¹ Further, the value gap dissuades record companies from investing in the development of new artists.²² The creation of new music and the development of new artists are essential to the long-term sustainability of the music industry. Ultimately, the safe harbor provisions in laws like the DMCA place the future success of the global music industry in jeopardy.²³

The rapid expansion of the value gap can be largely attributed to the popularity of music streaming on YouTube and similar user upload services.²⁴ The widespread popularity of streaming is exemplified by hip hop artist Chance the Rapper's 2016 album, *Coloring Book*, which could not be purchased in stores and was only available through various streaming services.²⁵ Despite this unconventional release, the album earned Chance the Rapper three

<http://www.ifpi.org/downloads/GMR2018.pdf> [<https://perma.cc/SGZ3-PLHM>] (archived Jan. 19, 2019) [hereinafter 2018 GLOBAL MUSIC REPORT] (noting that digital revenues now account for 54 percent of the global recorded music market).

17. See 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 26.

18. 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 25.

19. *Id.*

20. *Id.*; see also 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 27 (describing the value gap as the "biggest policy challenge facing the music industry").

21. 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 25; see also 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 27.

22. 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 25; see also 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 26.

23. 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 25.

24. See *id.* (explaining that the value gap arose as a result of the "mismatch between the value that user upload services, such as YouTube, extract from the music and the revenue returned to the music community"); see also 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 26 ("Inconsistent applications of online liability laws have emboldened certain digital platforms to claim they are not liable . . . services such as YouTube, which have developed into sophisticated on-demand music platforms, use this as a shield to avoid licensing music like other digital services do . . .").

25. 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 25.

Grammy awards—an achievement symbolizing the new norm for music consumption.²⁶

Some of the major players in the streaming-services industry include Spotify, Apple Music, Tidal, iHeartRadio, Amazon, and Deezer.²⁷ Each of these companies offers a similar service, charges a similar subscription fee, and provides access to virtually the same catalog of music.²⁸ In contrast to subscription-based models, pure ad-supported platforms like YouTube generate all revenue through advertisements.²⁹ Notably, the IFPI's 2018 Music Consumer Insight Report reveals that 47 percent of time spent listening to on-demand music is on YouTube.³⁰

In addition to YouTube's pure ad-supported platform, the company introduced a subscription-based platform called YouTube Music Premium on May 17, 2018.³¹ Like other subscription-based services such as Spotify and Apple Music, YouTube Music Premium allows users to pay a subscription fee to avoid having to listen to advertisements.³²

On January 23, 2018, YouTube implemented Official Artist Channels.³³ These channels are designed to make it easier for

26. See *id.*; see also Lyndsey Havens, *Chance the Rapper's 'Coloring Book' Is First Streaming-Only Album To Win a Grammy*, BILLBOARD (Feb. 13, 2017), <http://www.billboard.com/articles/news/grammys/7686341/chance-the-rapper-coloring-book-first-streaming-only-album-grammy> [<https://perma.cc/93YP-67R3>] (archived Jan. 19, 2019).

27. Randall Roberts, *Distinguishing between music streaming options*, TIMES FREE PRESS (Feb. 12, 2017), <https://www.timesfreepress.com/news/life/entertainment/story/2017/feb/12/digital-deluge-distinguishing-between-music-s/412090/> [<https://perma.cc/RJ6W-B7T6>] (archived Feb. 4, 2019).

28. See *id.*

29. See Andre Paine, *'Nowhere Near': RIAA Responds to Lyor Cohen's Claim on YouTube Streaming Rate*, MUSIC WEEK (Aug. 20, 2017, 8:17 PM), <https://www.musicweek.com/digital/read/nowhere-near-riaa-responds-to-lyor-cohen-s-claim-on-youtube-streaming-rate/069516> [<https://perma.cc/C6DP-79VN>] (archived Jan. 19, 2019).

30. See INT'L FED'N FOR THE PHONOGRAPHIC INDUS., MUSIC CONSUMER INSIGHT REPORT 2018 at 13 (2018), <https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf> [hereinafter MUSIC CONSUMER INSIGHT REPORT]; see also 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 27. The Music Consumer Insight Report further noted that video streaming makes up 52 percent of on-demand music streaming time, while only 28 percent is on paid audio streaming. This report also estimates that the annual revenue generated per user on YouTube was less than \$1, while the annual revenue generated per user on Spotify was approximately \$20. See MUSIC CONSUMER INSIGHT REPORT, *supra*.

31. See Josh Katzowitz, *What Happened to YouTube Red?!*, THE DAILY DOT (Mar. 26, 2018, 9:38 AM), <https://www.dailydot.com/upstream/youtube-red-vs-youtube-premium/> [<https://perma.cc/7BJL-AHLH>] (archived Mar. 9, 2019) (explaining that Google launched YouTube Music Premium as an "overhaul and rebranding" of its October 2015 subscription-based platform called YouTube Red).

32. *Id.*

33. Colin Stutz, *YouTube Unveils Plans to Benefit Artists and Songwriters: Consolidating Content, Implementing ID System*, BILLBOARD (Jan. 23, 2018), <https://www.billboard.com/articles/business/8095869/youtube-official-channels-isni-id-system-artist-songwriters> [<https://perma.cc/9Q3F-97K3>] (archived Jan. 20, 2019).

listeners to find music by their favorite bands and artists in one consolidated location.³⁴ The change is specifically tailored for users who “treat YouTube like a jukebox.”³⁵ Of course, this is troubling for artists and musicians concerned with the value gap because it makes it even easier for consumers to operate YouTube like a free digital interactive streaming service.³⁶

One final aspect of YouTube’s model relevant to the value gap analysis is its video recommendation system.³⁷ As the name suggests, the system’s goal is to “provide personalized high quality video recommendations to its users.”³⁸ The system first uses data-mining techniques to identify “a set of related videos that a user is likely to watch after viewing a seed video.”³⁹ Once the system identifies the set of related videos, or “recommendation candidates,” it ranks them based on video quality, the user’s unique preferences, and diversification (a method that offers a variety of videos based on a user’s range of viewing interests).⁴⁰ In January 2018, YouTube’s Chief Product Officer Neal Mohan revealed that the company’s recommendation system drives more than 70 percent of the overall viewing hours on the site.⁴¹ This statistic demonstrates the powerful influence YouTube’s video recommendation system has on its users.⁴²

Despite the fact that music streaming is largely responsible for the emergence of the value gap, it nonetheless has some positive attributes. For instance, streaming has allowed music to break geographic borders by opening up music markets in regions that did not previously have them.⁴³ The Recording Industry Association of America’s (RIAA) 2017 midyear report expressed optimism about the future of streaming, pointing to the fact that streaming made up 62

34. *Id.*

35. Jon Fingas, *YouTube’s unified artist channels clean up its music mess*, ENGADGET (Jan. 23, 2018), <https://www.engadget.com/2018/01/23/youtube-official-artist-channels/> [<https://perma.cc/G8JT-XEXM>] (archived Jan. 20, 2019).

36. *See* Stutz, *supra* note 33.

37. *How Does the YouTube Recommendation System Work?*, TROUVUS (Jan. 12, 2015), <http://trouvus.com/how-does-the-youtube-recommendation-system-work/> [<https://perma.cc/7655-ZNZA>] (archived Jan. 20, 2019) [hereinafter TROUVUS].

38. *Id.*

39. *Id.*

40. *Id.*

41. Joan E. Solsman, *YouTube’s AI is the puppet master over most of what you watch*, CNET (Jan. 10, 2018, 10:05 AM), <https://www.cnet.com/news/youtube-ces-2018-neal-mohan/> [<https://perma.cc/57J4-LYUP>] (archived Jan. 20, 2019).

42. *See id.*; *see also* TROUVUS, *supra* note 37 (noting that over a 21-day period in 2015, the click through rate for recommended videos performed at 207 percent of the average click through rate).

43. *See 2017 Global Music Report*, *supra* note 13, at 21 (quoting Beggar Group Chairman Martin Mills, who points out that streaming has opened up markets in Russia, Brazil, and Mexico).

percent of total US music-industry revenues.⁴⁴ According to an earlier RIAA report, this uptick in US revenue from streaming represented a 29 percent increase from the revenue generated in 2015.⁴⁵ In addition, streaming revenues have increased in many other regions, including Europe, Asia, and Latin America.⁴⁶

Despite the increasing profitability of streaming overall, some streaming services pay smaller licensing fees than others.⁴⁷ In the RIAA's 2017 midyear report, former Chairman and CEO Cary Sherman pointed out that "not all streaming services are equal."⁴⁸ Sherman explained that "[t]o the fan, there is often little difference between the multitudes of services available, yet the payouts to creators are very different and vastly impacted by outdated or abused laws and regulations."⁴⁹ While subscription-based services like Spotify legally license music, other ad-supported streaming services such as YouTube argue that they are not required to obtain a license to host user uploaded content.⁵⁰ According to the 2018 Global Music Report, Spotify paid record companies an estimated \$20 per user, while YouTube paid less than \$1 per user in 2017.⁵¹ The British Phonographic Industry (BPI) also reported that in 2015, the revenue generated from pure ad-supported platforms (the category that includes YouTube) represented 4 percent of total recording-industry revenues—an amount less than the revenue generated by vinyl sales during that year.⁵² According to an RIAA study, a person would have to watch fifty-eight hours of music videos on YouTube before the content creator would receive a single dollar of revenue.⁵³ Despite pressure from the RIAA, the BPI, the IFPI, and other global music-industry forces, platforms like YouTube continue to shield themselves from copyright liability by hiding behind safe harbor provisions originally enacted to protect relatively small start-up companies operating as passive intermediaries for their users.⁵⁴

Part II of this Note discusses current safe harbor provisions in copyright laws of several countries that were originally implemented to protect start-up digital media sites from crippling copyright

44. Cary Sherman, *The State of Music Mid-Way Through 2017*, MEDIUM (Sept. 20, 2017), <https://medium.com/@RIAA/the-state-of-music-mid-way-through-2017-7e90cad298f9> [<https://perma.cc/7DKE-DT8J>] (archived Jan. 20, 2019).

45. *See id.*

46. *Id.*; *see* 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 30.

47. *See* Sherman, *supra* note 44.

48. *Id.*

49. *Id.*

50. 2017 GLOBAL MUSIC REPORT, *supra* note 13.

51. 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 27.

52. Paine, *supra* note 29.

53. Sherman, *supra* note 44.

54. *See* 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 26 (citing June 2016 letter asking the European Commission to address the value gap through legislation because the safe harbor provisions are being misapplied to protect large corporations rather than "nascent digital start-ups").

liability. Part III provides an overview of the relevant international intellectual property instruments designed to harmonize copyright laws across the globe and establish minimum standards of copyright protection. Part IV discusses the current music-licensing system imposed on streaming services and highlights some of this framework's deficiencies. After detailing the various contributing causes to the rise of the value gap, Part V discusses possible solutions to the problem, including some currently under consideration. Part VI proposes a two-step legislative effort designed to diminish the value gap. Step one involves a revision to the World Intellectual Property Organization (WIPO) Copyright Treaty to compel the treaty's signatories to comply by amending domestic safe harbor statutes in a manner that eliminates protection for streaming services that control, organize, promote, and monetize unlicensed copyrighted music. The second step of the proposed solution recommends relatively minor changes to the current music-licensing framework aimed at better serving the interests of key stakeholders engaged in music-licensing transactions.

II. THE VALUE GAP

The value gap is caused by inconsistent applications of online liability laws that provide some streaming services with safe harbor protection from copyright infringement liability, but not others.⁵⁵ Part II explores these laws in various countries and discusses how they have contributed to the expansion of the value gap.

A. *The Value Gap in the United States*

The DMCA's safe harbor provisions eliminate copyright liability "for the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider" if three requirements are met.⁵⁶

The first requirement is that the service provider cannot have actual knowledge of specific infringing content on its site.⁵⁷ Courts have found actual knowledge of infringing content when a service provider has taken affirmative steps to "willfully blind" itself of the infringing material.⁵⁸ In addition, a service provider cannot rely on safe harbor protection if facts or circumstances exist that make the

55. 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 26.

56. Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A)–(C) (2010) [hereinafter DMCA].

57. *Id.* § 512(c)(1)(A)(i).

58. *See* *Viacom Int'l, Inc. v. YouTube*, 676 F.3d 19, 35 (2d Cir. 2012).

infringing activity apparent.⁵⁹ In *Viacom Int'l., Inc. v. YouTube*, the Second Circuit equated this so-called red flag knowledge to constructive knowledge.⁶⁰ It clarified that the difference between red flag knowledge and actual knowledge is not “between specific and generalized knowledge, but instead between a subjective and an objective standard.”⁶¹ Thus, a service provider has red flag knowledge in circumstances where it is subjectively aware of facts that would have made the infringement objectively obvious to a reasonable person.⁶² Finally, if the service provider obtains actual or constructive knowledge of infringement, it may nonetheless avoid liability as long as it “acts expeditiously to remove, or disable access to, the material.”⁶³

The second requirement is that a service provider must not “receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”⁶⁴ In *Viacom*, the Second Circuit concluded that the right to control “requires something more than the ability to remove or block access to materials posted on a service provider’s website.”⁶⁵ The court ultimately determined that YouTube did not exert a degree of control over its content sufficient to lose its entitlement to safe harbor protection.⁶⁶ However, the statute’s control requirement remains ambiguous because the *Viacom* court failed to explain what type of activity constitutes “something more.”⁶⁷

The Second Circuit’s ruling in *Viacom* did not provide a clear interpretation of the word “control” as contemplated by § 512(c)(1)(B) of the DMCA. However, it suggested that inducement of copyright infringement, like that which occurred in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, may be one example of conduct that exceeds the minimal level of control required for protection under the DMCA.⁶⁸ In *Grokster*, the Supreme Court unanimously held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of

59. DMCA § 512(c)(1)(A)(ii).

60. *Viacom*, 676 F.3d at 58.

61. *Id.*

62. *Id.*

63. DMCA § 512(c)(1)(A)(iii).

64. *Id.* § 512(c)(1)(B).

65. *Viacom*, 676 F.3d at 38 (quoting *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).

66. *Id.*

67. See Elliott Alderman, *Reading the Tea Leaves: ISP Obligations After the Second Circuit’s Viacom v. YouTube Decision (2012)*, THE CONTENT LAWYER (Dec. 12, 2012), <https://www.thecontentlawyer.com/reading-the-tea-leaves-isp-obligations-after-the-second-circuits-viacom-v-youtube-decision-2012/> [https://perma.cc/5LMW-4ZHK] (archived Jan. 24, 2019).

68. *Viacom*, 676 F.3d at 38.

infringement by third parties.”⁶⁹ The *Grokster* defendants distributed software products that allowed users to share files through peer-to-peer networks.⁷⁰ Discovery revealed that 90 percent of the files made available for download on the defendants’ platforms were infringing works.⁷¹ Even though the infringing content was posted by consumers, the Court held that the defendants were not “merely passive recipients of information about infringing use.”⁷² Instead, the record showed that the defendants had the objective of serving as a platform for the distribution of unlicensed copyrighted works and, in fact, personally encouraged the infringing activity.⁷³

A year after *Viacom*, the Ninth Circuit grappled with the DMCA’s control provision in *Columbia Pictures, Inc. v. Fung*. There, the court held that the defendant’s peer-to-peer file sharing websites were ineligible for safe harbor protection because they failed to meet the requirements contained in § 512(c)(1)(B) of the DMCA.⁷⁴ The defendant in *Fung* both received a financial benefit from infringing content and had the right and ability to control it.⁷⁵ The websites generated revenue through advertisements.⁷⁶ This revenue constituted a financial benefit directly related to the infringing activity because “the revenue stream [was] predicated on the broad availability of infringing materials . . . thereby attracting advertisers.”⁷⁷ The court also found it relevant that an estimated 90–96 percent of the content on the websites was either “confirmed or highly likely copyright infringing.”⁷⁸

The court went on to determine that the service provider had the right and ability to control the infringing content because the provider did more than merely identify and terminate access to the content.⁷⁹ In addition to this activity, the defendant “organized torrent files on his sites using a program that matches file names and content with specific search terms describing material likely to be infringing.”⁸⁰ Further, the defendant offered personal assistance to users seeking content on the site that was likely to be infringing.⁸¹ The court ultimately held that the defendant was entirely barred

69. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 919 (2005).

70. *Id.*

71. *Id.* at 922.

72. *Id.* at 923.

73. *Id.* at 924.

74. *Columbia Pictures, Inc. v. Fung*, 710 F.3d 1020, 1044 (9th Cir. 2013).

75. *Id.*

76. *Id.* at 1045.

77. *Id.*

78. *Id.* at 1034.

79. *Id.* at 1046.

80. *Id.*

81. *Id.*

from relying on the safe harbor protections as a matter of law because he failed to meet the § 512(c)(1)(B) requirements.⁸²

Finally, under the DMCA's third requirement for safe harbor protection, a service provider must respond expeditiously in taking down infringing content.⁸³ However, the DMCA does not require service providers to affirmatively monitor their sites for infringing activity.⁸⁴ Instead, the statute places the duty to police infringement on copyright owners.⁸⁵ Given this duty, many copyright owners work hard to alert providers of infringing uses of their content.⁸⁶ In the month of March 2016 alone, YouTube received over 75 million DMCA "takedown requests."⁸⁷ These formal takedown requests must adhere to the strict guidelines set forth within the statute, making the removal of infringing content both costly and time consuming for copyright owners.⁸⁸ Under the notice and takedown procedure set forth in § 512(c)(3), copyright owners must, under penalty of perjury, submit a notification to the service provider, or its agent, that contains a list of statutory elements.⁸⁹ These elements include: the copyright owner's signature, identification of the work claimed to be infringed, identification of the material that is claimed to be infringing and information sufficient for the provider to locate the material, contact information of the complaining party, a statement that the copyright owner has in good faith filed the complaint, and a statement that the information is accurate.⁹⁰

The U.S. Copyright Office's summary of the DMCA explains that "[f]ailure to comply substantially with the statutory requirements means that the notification will not be considered in determining the requisite level of knowledge by the service provider."⁹¹ Even if the request satisfies the demanding statutory requirements and the infringing material is taken down, the alleged infringer has the right to respond by filing a counter notification.⁹² In response to a counter notification, the copyright owner must seek a court order against the

82. *Id.*

83. DMCA § 512(c)(1)(C).

84. *Id.* § 512(m)(1).

85. See Alderman, *supra* note 67 (explaining that under the DMCA, a service provider has no duty to take down content until it receives an "adequately detailed take-down notice" from the copyright holder).

86. See Andy, *RIAA CEO: Piracy Notices Are Costly and Increasingly Pointless*, TORRENTFREAK (Sept. 24, 2014), <https://torrentfreak.com/riaa-ceo-piracy-notices-are-costly-increasingly-pointless-150924/> [<https://perma.cc/L8SP-MCNL>] (archived Jan. 24, 2019).

87. Chris Welch, *Google received over 75 million copyright takedown requests in February*, THE VERGE (Mar. 7, 2016, 11:02 AM), <https://www.theverge.com/2016/3/7/11172516/google-takedown-requests-75-million> [<https://perma.cc/DT5N-DAJS>] (archived Jan. 24, 2019).

88. See DMCA § 512(c)(3).

89. DMCA Summary, *supra* note 6, at 12.

90. DMCA § 512(c)(3).

91. DMCA Summary, *supra* note 6, at 12.

92. *Id.*

alleged infringer.⁹³ If the copyright owner fails to do so, the service provider is required put the material back on the platform within 10–14 business days following the receipt of the counter notification.⁹⁴ Worse still, the alleged infringer may also respond to a takedown request by simply reuploading the content after the site takes it down.⁹⁵ This revolving door of infringement creates a Sisyphean task for parties seeking to enforce their copyrights.

B. *The Value Gap in Europe*

The European Commission (EC) is leading the charge to address the value gap through recent legislation, and the effort has garnered support from a number of prominent European music industry organizations.⁹⁶ Article 13 of the EC's proposed Digital Single Market Directive (DSM Directive) requires member states to hold liable peer-upload service providers for hosting unlicensed content—"effectively ending safe harbor immunity in Europe," with a few exceptions.⁹⁷ If passed, this legislation will require hosting service providers to obtain licenses for all music they distribute.⁹⁸ Under Article 13, user upload sites like Facebook and YouTube will be required to "proactively work with rightsholders to stop users uploading copyrighted content."⁹⁹

To understand the EC's approach in drafting the DSM Directive, it is necessary to explain the relevant legal backdrop. On June 8, 2000, the EC responded to the DMCA by passing the E-Commerce Directive.¹⁰⁰ Like the DMCA, the E-Commerce Directive was designed to address the issue of Information Society Service

93. *Id.*

94. *Id.*

95. See Peter Kafka, *Here's why the music labels are furious at YouTube. Again.*, RECODE (Apr. 11, 2016, 4:00 AM), <https://www.recode.net/2016/4/11/11586030/youtube-google-dmca-riaa-cary-sherman> [<https://perma.cc/SG9G-4VDT>] (archived Jan. 24, 2019). In an interview, Mr. Kafka asked Cary Sherman, former CEO of the RIAA, what single biggest change Sherman would like to see in the DMCA. His response was to change "notice and take down" to "notice and stay down." He explained that "[t]hey will not just take down all 100 copies [of infringing content]. They'll take down only the one file that we've identified. We have to find every one of them, and notice them, and then they're taken down, and then immediately put right back up." *Id.*

96. See 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 27; see also 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 29.

97. Richard Smirke, *European Union Agrees on Copyright Directive Text, Pushing Legislation Towards Final Vote*, BILLBOARD (Feb. 13, 2019), <https://www.billboard.com/articles/business/8498315/european-union-approves-deal-over-controversial-copyright-directive> [<https://perma.cc/N7Q8-VYMJ>] (archived Mar. 14, 2019); see also 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 27.

98. *See id.*

99. James Vincent, *EU approves controversial Copyright Directive, including internet 'link tax' and 'upload filter'*, THE VERGE (Sept. 12, 2018, 7:12 AM), <https://www.theverge.com/2018/9/12/17849868/eu-internet-copyright-reform-article-11-13-approved> [<https://perma.cc/SAH5-RQZ3>] (archived Jan. 26, 2019).

100. See Pryor, *supra* note 14.

Providers (ISSPs) “in circumstances where active and exhaustive monitoring by such providers of their services for copyright-infringing material was a practical impossibility.”¹⁰¹ Examples of ISSPs include web shops, search engines, and video sharing sites.¹⁰² Like the DMCA, the E-Commerce Directive places no general obligation on ISSPs to monitor their sites.¹⁰³ Further, the E-Commerce Directive provides a safe harbor for hosting services if certain conditions are met.¹⁰⁴ The portion of the E-Commerce Directive relevant to the liability of online hosting platforms mirrors the DMCA’s safe harbor provisions.¹⁰⁵ Under the E-Commerce Directive, a hosting service provider may not rely on safe harbor protections if it has actual knowledge of the infringing activity.¹⁰⁶ In addition, the service provider is not protected if it is “aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question.”¹⁰⁷ Service providers are also required to remove infringing information once subjective knowledge of infringing content is obtained.¹⁰⁸ Finally, the safe harbors in the E-Commerce Directive do not apply if the recipient is acting under the authority or control of the ISSPs.¹⁰⁹

If passed, Article 13 of the DSM Directive will apply to all ISSPs that store and provide the public with access to large amounts of works uploaded by their users.¹¹⁰ More specifically, the DSM Directive will require that such providers take additional measures to ensure that copyright holders receive proper remuneration for content posted and accessed on the sites.¹¹¹ For instance, the DSM Directive would require ISSPs falling within this description to use content-recognition technologies and to provide copyright holders with reports when the technologies present evidence of infringing content.¹¹²

On February 13, 2019, representatives from the three branches of the European Government—the EC, the Parliament, and the Council of the European Union—agreed on a definitive final text of the DSM Directive, which includes the controversial Article 13.¹¹³

101. *Id.*

102. DLA PIPER, EU STUDY ON THE LEGAL ANALYSIS OF A SINGLE MARKET FOR THE INFORMATION SOCIETY 10 (2009).

103. Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, art. 15, 2000 O.J. (L 178).

104. Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 1 (EC).

105. *Id.*; Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A)(i) (2010).

106. *Id.*

107. Case C-324/09, L’Oréal SA v. eBay Int’l AG, 2011 E.C.R. III-120 (citing Council Directive 2000/31, art. 14).

108. Council Directive 2000/31, art. 14.

109. *Id.*

110. Pryor, *supra* note 14.

111. *Id.*

112. *Id.*

113. Smirke, *supra* note 97.

The members of the European Parliament are expected to vote on this finalized text in late March or early April.¹¹⁴ Prior to this vote, rightsholders groups, publishers, record labels, Google, and a variety of other stakeholders will scrutinize the text of Article 13 and “any exceptions it makes around platform liability and for start-up digital services.”¹¹⁵ Critics contend that Article 13 will “create an incredible burden for small platforms” because it would require them to scan all uploaded data for copyright infringement.¹¹⁶ If the DSM Directive ultimately passes the final vote, individual EU member states will be responsible for implementing it.¹¹⁷ Each state’s implementation of the statute could vary based on diverging interpretations of the text.¹¹⁸

C. *The Value Gap in Asia: Focus on China*

Many Asian countries have not yet implemented effective notice and takedown provisions like those in the United States and in Europe.¹¹⁹ The countries that do not have these types of laws in place require copyright owners to challenge infringement on user upload platforms through the judicial system.¹²⁰ Still, some Asian countries have implemented notice and takedown procedures through adoption of DMCA-like laws.¹²¹ These countries include China, India, Japan, Malaysia, Mongolia, Taiwan, South Korea, Hong Kong, and Singapore.¹²² Notice and takedown laws vary from country to country in Asia, but in large part mirror the requirements contained in § 512 of the DMCA.¹²³ For instance, South Korea’s takedown laws contain identical elements to the DMCA for providing notice of infringement.¹²⁴ While Hong Kong’s statutory framework resembles the DMCA, its takedown requirements operate on a voluntary basis and merely serve as guidelines for streaming services and copyright owners to follow.¹²⁵

The prevalence of piracy in China’s online music market has substantially contributed to the rise of the value gap.¹²⁶ While China

114. *Id.*

115. *Id.*

116. Vincent, *supra* note 99.

117. *Id.*

118. *Id.*

119. Lucas S. Michels, *Enforcing Online Copyright Protections Abroad: Part II—South and East Asia*, THE IP EXPORTER (Aug. 25, 2014), <https://theipexporter.com/2014/08/25/enforcing-online-copyright-protections-abroad-part-ii-south-and-east-asia/> [<https://perma.cc/HV8S-TRY7>] (archived Jan. 24, 2019).

120. *Id.*

121. *Id.*

122. *Id.*

123. *See id.*

124. *Id.*

125. *Id.*

126. *See* 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 28.

has implemented a notice and takedown policy, many of its streaming service providers fail to take down content after receiving legitimate takedown notices.¹²⁷ Perhaps this reluctance to comply with the protocol is a remnant of China's long history of music piracy.¹²⁸ Until recently, piracy made up approximately 90 percent of the country's online music market.¹²⁹

Despite the history of online music piracy in China, the 2017 Global Music Report reflects optimism about the future of the music industry there.¹³⁰ In 2016, China experienced a 20.3 percent increase in recorded music revenue, which was largely spurred by a 30.6 percent rise in legitimate music streaming.¹³¹ This shift toward legitimate music streaming is likely due to the Chinese government's recent efforts to crack down on piracy, paired with an overall change in attitude among consumers—especially young people—related to the value of creative content.¹³² This attitude change among Chinese music consumers stems from a newfound desire to financially support artists and musicians.¹³³

China's recent shift away from piracy and toward legitimate music-streaming platforms has also been influenced by the services provided by Tencent Holdings, a massive Chinese internet company that owns the most popular streaming service in China, QQ Music.¹³⁴ In addition, Tencent owns two other popular streaming services in China known as Kugou and Kuwo.¹³⁵ Collectively, these three streaming sites make up Tencent's Music Entertainment Group, which boasts over 15 million paying subscribers.¹³⁶ Tencent has made significant steps toward diminishing the value gap by entering into licensing agreements with both Warner Music and Sony Music.¹³⁷ The 2017 Global Music Report suggests that China has potential to become one of the world's leading music markets as it continues to accept legitimate music-streaming models.¹³⁸

127. See Michels, *supra* note 119.

128. See 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 28 (discussing China's historical association with online music piracy). *But see* MUSIC CONSUMER INSIGHT REPORT, *supra* note 30, at 17 (recognizing that Chinese consumers are currently "highly engaged with licensed music").

129. 2017 GLOBAL MUSIC REPORT, *supra* note 13, at 30.

130. See *id.* at 28.

131. *Id.*

132. See *id.* at 28–29.

133. See *id.* at 29.

134. See *id.* at 28.

135. *Id.*

136. *Id.*

137. See *id.*

138. See *id.* ("Major and independent labels from all over the world, fired up by a new sense of possibility and positivity, are playing their part in building a new industry, founded on streaming and subscription.").

III. RELEVANT INTERNATIONAL INTELLECTUAL PROPERTY INSTRUMENTS

WIPO, a specialized agency of the United Nations, was established by the WIPO Convention in 1967.¹³⁹ According to the WIPO Convention, the organization's objective is "(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, (ii) to ensure administrative cooperation among the Unions."¹⁴⁰ As of March 2019, WIPO had 191 member states ranging from Australia to Zimbabwe.¹⁴¹ WIPO operates in conjunction with the World Trade Organization (WTO) in a manner that allows the two organizations to "mutually support' each other on intellectual property matters."¹⁴² The WTO is responsible for administering the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which "provides for minimum standards of intellectual property protection in relation to copyright" and other forms of intellectual property.¹⁴³ The WTO also administers a dispute-settlement process that allows members to challenge intellectual property practices and statutes in other member states.¹⁴⁴

In contrast to the WTO, WIPO administers the Berne Convention, an international agreement that "began a process of gradual harmonization of minimum standards to be enacted in national copyright laws."¹⁴⁵ The Berne Convention preceded the TRIPS Agreement and has been revised six times.¹⁴⁶ Each of these revisions occurred before the arrival of personal computers and the internet.¹⁴⁷ In 1996, the WIPO Copyright Treaty (WCT) was adopted, aimed at updating international copyright law norms in response to the advent of the digital age.¹⁴⁸ The WCT is an international agreement that exists independently of both the Berne Convention and the TRIPS Agreement.¹⁴⁹ The primary objective of the WCT is to update copyright protection "in the face of new technologies."¹⁵⁰ The

139. SUSY FRANKEL & DANIEL GERVAIS, *ADVANCED INTRODUCTION TO INTERNATIONAL INTELLECTUAL PROPERTY* 7 (2016).

140. Convention Establishing the World Intellectual Property Organization, art. 3, July 14, 1967, 828 U.N.T.S. 3.

141. See *Member States*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/members/en/> (last visited Mar. 14, 2019) [<https://perma.cc/Z8KH-XJ6T>] (archived Feb. 4, 2019).

142. FRANKEL & GERVAIS, *supra* note 139, at 9.

143. *Id.* at 28.

144. *Id.* at 11.

145. *Id.* at 16, 25.

146. See *id.* at 25.

147. See *id.* at 28, 78.

148. *Id.*

149. See generally WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121.

150. FRANKEL & GERVAIS, *supra* note 139, at 85.

WCT entered into force on March 6, 2002,¹⁵¹ and as of March 2019, it had been ratified by a total of one hundred WIPO members.¹⁵² The WCT obliges each of these members “to adopt, in accordance with its legal system, the measures necessary to ensure the application of the Treaty.”¹⁵³

Article 8 of the WCT provides a communication right that protects copyright owners when they “make their works available” on the internet.¹⁵⁴ According to a WCT-agreed statement in reference to Article 8, the “mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty.”¹⁵⁵ This international rule allows national laws like the DMCA to provide certain qualifying internet service providers immunity from copyright-infringement liability through safe harbor provisions.¹⁵⁶

Article 15 of the WCT creates an assembly capable of making revisions to the treaty.¹⁵⁷ The assembly consists of one delegate from each of the contracting parties.¹⁵⁸ The assembly meets once every two years upon convocation of the director general of WIPO.¹⁵⁹ The assembly also has the ability to call a diplomatic meeting for the revision of the treaty and is obligated to give the director general of WIPO instructions for the preparation of such a conference.¹⁶⁰

IV. US MUSIC-LICENSING FRAMEWORK

Possible solutions to correcting the value gap may be found by adjusting existing music-licensing schemes, particularly those implemented in the United States.¹⁶¹ The US music-licensing system is relevant on an international level because the primary performance

151. *Id.*

152. *See WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Mar. 14, 2019) [<https://perma.cc/6MX6-VWV9>] (archived Jan. 15, 2019) (ratifying states include the United States, Canada, the United Kingdom, Germany, Panama, Colombia, Chile, Costa Rica, Kazakhstan, Israel, Nigeria, Kenya, China, Japan, and most recently in 2019, New Zealand and Cabo Verde).

153. *Summary of the WIPO Copyright Treaty (WCT) (1996)*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited Feb. 17, 2019) [<https://perma.cc/57U4-P4L4>] (archived Jan. 15, 2019) [hereinafter *WCT Summary*].

154. WIPO Copyright Treaty, *supra* note 149, art. 8; FRANKEL & GERVAIS, *supra* note 139, at 85.

155. WIPO Copyright Treaty, *supra* note 149, art. 8 n.7; FRANKEL & GERVAIS, *supra* note 139, at 85.

156. FRANKEL & GERVAIS, *supra* note 139, at 85.

157. WIPO Copyright Treaty, *supra* note 149, art. 15.

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 133 (2015) [hereinafter MUSIC MARKETPLACE REPORT].

rights organizations (PROs) in the United States, the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI),¹⁶² have reciprocal arrangements with foreign music rights organizations in “nearly every country around the world where copyright law exists.”¹⁶³ When an artist, publisher, or other copyright owner registers a work with BMI or ASCAP, an international database allows foreign music rights organizations to identify the work and pay the necessary royalty fee.¹⁶⁴ Likewise, SoundExchange, a nonprofit organization responsible for payment and reporting of royalties for the public performance of sound recordings,¹⁶⁵ has similar reciprocal collection agreements with counterpart organizations in countries all over the world. As the SoundExchange website points out, “[t]hese agreements allow [SoundExchange] to collect and pay the artist and right holders royalties when their music is played in those countries.”¹⁶⁶ Finally, the Harry Fox Agency (HFA), the oldest and largest mechanical rights organization,¹⁶⁷ offers international monitoring of reproduction and distribution rights through its database and song management system.¹⁶⁸

A. *Musical Works Licensing*

Under the US music-licensing system, a licensing agreement for a single song must account for two different types of copyright—the sound recording and the musical work.¹⁶⁹ Under the Copyright Act, the copyright holder of a musical work has public performance rights

162. See *id.* at 20 (identifying ASCAP and BMI, along with the relatively smaller SESAC and Global Music Rights (GMR) as the only performing rights organizations in the United States).

163. *The ASCAP International Advantage*, ASCAP, <https://www.ascap.com/help/international/intadvantage> (last visited Feb. 17, 2019) [<https://perma.cc/EWT5-LP9V>] (archived Jan. 16, 2019) [hereinafter ASCAP]; see *BMI's Involvement in the International Marketplace*, BMI, <https://www.bmi.com/international> (last visited Feb. 17, 2019) [<https://perma.cc/6VU7-G2QC>] (archived Jan. 16, 2019) [hereinafter BMI] (explaining that the rightsholders represented by BMI “include individuals from the more than 90 foreign performing rights organizations with which BMI has reciprocal agreements”).

164. See ASCAP, *supra* note 163; BMI, *supra* note 163.

165. See MUSIC MARKETPLACE REPORT, *supra* note 161, at 22.

166. See *International Partners*, SOUNDEXCHANGE (2018), <https://www.soundexchange.com/about/international-partners/> [<https://perma.cc/5EPL-BRX5>] (archived Jan. 16, 2019).

167. See MUSIC MARKETPLACE REPORT, *supra* note 161, at 21.

168. See *International Monitoring*, HARRY FOX AGENCY, <https://secure.harryfox.com/public/InternationalMonitoringPublisher.jsp> (last visited Feb. 17, 2019) [<https://perma.cc/R24X-EC4P>] (archived Jan. 16, 2019); see also *BMI Member FAQs*, BMI, https://www.bmi.com/faq/entry/what_is_the_difference_between_performing_right_royalties_mechanical_r (last visited Feb. 17, 2019) [<https://perma.cc/R43-UT77>] (archived Jan. 16, 2019).

169. MUSIC MARKETPLACE REPORT, *supra* note 161, at 16.

and mechanical rights.¹⁷⁰ Mechanical rights consist of the “right to make and distribute copies or phonorecords of [a musical] work.”¹⁷¹

A musical work copyright holder (usually a songwriter or music publisher) almost always affiliates with a PRO such as ASCAP, BMI, or SESAC to license its performance rights.¹⁷² Typically, licensees obtain a blanket license from each of the PROs.¹⁷³ A blanket license permits the licensee to perform any of the musical works in the licensing PRO’s catalogue for a flat fee or percentage-of-revenue rate.¹⁷⁴ Blanket licenses are commonly obtained by bars, concert venues, restaurants, and other similar public establishments that perform musical works for patrons.¹⁷⁵

In 1941, the Department of Justice subjected ASCAP and BMI to government oversight through the implementation of consent decrees designed to address perceived antitrust concerns.¹⁷⁶ Under these consent decrees, ASCAP and BMI may only license their members’ public performance rights, must grant a license to anyone that applies, and must accept all performance rightsholders that apply to be members so long as they satisfy certain minimum requirements.¹⁷⁷

Under § 115 of the Copyright Act, mechanical rights for musical works are subject to compulsory licensing fees.¹⁷⁸ Prior to the October 2018 passage of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (MMA),¹⁷⁹ streaming services obtained mechanical licenses for musical works on a song-by-song basis.¹⁸⁰ They obtained these licenses by serving a notice of intent to each song’s copyright owner and paying a statutorily prescribed royalty fee.¹⁸¹

This cumbersome song-by-song licensing method presented administrative challenges to third-party mechanical rights administrators such as HFA.¹⁸² In 2006, these administrative

170. *Id.* at 17.

171. *Id.* at 25.

172. *See id.* at 33.

173. *See id.* (explaining that blanket licenses are the most common way obtain the right to publicly perform a musical work, but clarifying that PROs offer other types of licenses as a result of consent decrees imposed for the purpose of combatting anticompetitive behavior).

174. *Id.*

175. *Id.*

176. *Id.* at 35; *see ASCAP—BMI Consent Decrees*, FUTURE OF MUSIC COALITION (Aug. 4, 2016), <https://futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees> [<https://perma.cc/2FQY-NH5H>] (archived Jan. 16, 2019).

177. MUSIC MARKETPLACE REPORT, *supra* note 161, at 36; *see ASCAP—BMI Consent Decrees*, *supra* note 176.

178. MUSIC MARKETPLACE REPORT, *supra* note 161, at 21.

179. *Orrin G. Hatch–Bob Goodlatte Music Modernization Act*, U.S. COPYRIGHT OFFICE (2018), <https://www.copyright.gov/music-modernization/> [<https://perma.cc/8HJL-TD3A>] (archived Jan. 16, 2019).

180. MUSIC MARKETPLACE REPORT, *supra* note 161, at 28.

181. *Id.*

182. *Id.*; *see Sweeping Music Modernization Act Signed into Law*, LEXOLOGY (Oct. 12, 2018), <https://www.lexology.com/library/detail.aspx?g=80607bd4-b6d0-42bc-8f46-4b23b152a4b5> [<https://perma.cc/4PDH-SCUC>] (archived Jan. 16, 2019) (“Digital music

challenges motivated Congress to introduce the Section 115 Reform Act (SIRA).¹⁸³ The proposed SIRA legislation implemented a blanket licensing system for mechanical rights, similar to the system used for performance rights.¹⁸⁴ SIRA would have given copyright owners the ability to elect a “designated agent,” which could be one of the PROs or any other entity that represented at least 15 percent of the music publishing market.¹⁸⁵ The designated agent would be responsible for maintaining a searchable electronic database of all the musical works in its repertoire.¹⁸⁶ The Copyright Royalty Board (CRB) would set the rates for the mechanical licenses between the various designated agents and the licensees.¹⁸⁷ While SIRA offered a promising solution to the song-by-song licensing system for mechanical rights, it was never enacted.¹⁸⁸ After the failure of SIRA, HFA’s obligation to monitor royalty payments on a song-by-song basis became even more challenging with the rise of streaming.¹⁸⁹

Title I of the recently enacted MMA offers a solution to this problem.¹⁹⁰ This portion of the act, known as the Music Licensing Modernization Act, modified § 115 of the Copyright Act “to establish a new blanket license for digital music providers to engage in specific covered activities (namely, permanent downloads, limited downloads, and interactive streaming).”¹⁹¹ Under the amended § 115(d)(3), the Register of Copyrights must designate a mechanical licensing collective to administer a blanket license for mechanical rights.¹⁹² The collective is also obligated to create a database of musical works and sound recordings.¹⁹³ Ultimately, the Music Licensing Modernization Act replaces the burdensome song-by-song licensing process with a more efficient blanket licensing system akin to the system for licensing public performance rights for musical works.¹⁹⁴

providers found [the song-by-song licensing of mechanical rights] difficult and expensive to administer, and music publishers and songwriters believed that providers often did not obtain valid licenses or pay required royalties.”)

183. MUSIC MARKETPLACE REPORT, *supra* note 161, at 31.

184. *See id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See id.*

189. *See id.* at 21.

190. *See Orrin G. Hatch–Bob Goodlatte Music Modernization Act*, *supra* note 179.

191. *Id.*

192. *Id.*

193. *See id.*

194. *Id.*

B. Sound-Recordings Licensing

Streaming services must also obtain licenses for the sound-recording copyrights, which are attached to the songs they perform, reproduce, and distribute.¹⁹⁵ Neither mechanical nor public performance licensing deals for sound recordings are subject to government oversight for digital interactive streaming services.¹⁹⁶ Digital interactive streaming services include on-demand music consumption platforms, like Spotify and YouTube, which allow users to select specific songs.¹⁹⁷ Meanwhile, public performance and mechanical rights for digital noninteractive services are subject to compulsory licensing fees set by the CRB under §§ 112 and 114 of the Copyright Act.¹⁹⁸ By definition, digital noninteractive music services do not give a listener control over the particular song that plays, and include platforms like Pandora and satellite-radio companies like Sirius XM.¹⁹⁹ Thus, a streaming service's status as either an interactive or noninteractive platform determines whether its sound-recording licensing arrangements are subjected to government oversight.

Under §§ 112 and 114 of the Copyright Act, noninteractive music services are subject to compulsory public performance licensing fees set by the CRB.²⁰⁰ These services make the royalty payments to a nonprofit entity called SoundExchange.²⁰¹ Section 114 requires that 50 percent of the royalty stream goes to the copyright owner, 45 percent goes to the featured recording artist, and 2.5 percent goes to an agent representing nonfeatured vocalists.²⁰² Interestingly, the allocation of royalty payments does not allot an amount to the producer of the sound recording. Thus, the producer is responsible for contracting for a portion of these royalties through an agreement with the featured artist or the copyright owner, typically the record label.²⁰³

195. See MUSIC MARKETPLACE REPORT, *supra* note 161, at 43.

196. See *id.*

197. See 17 U.S.C. § 114(j)(7) (2018) (defining interactive service as one that allows someone to receive “a transmission of a program specifically created for the recipient,” or “a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient”).

198. MUSIC MARKETPLACE REPORT, *supra* note 161, at 46; see *Licensing 101*, SOUNDEXCHANGE, <https://www.soundexchange.com/service-provider/licensing-101/> (last visited Feb. 17, 2019) [<https://perma.cc/PX3Z-WPLJ>] (archived Jan. 16, 2019).

199. See MUSIC MARKETPLACE REPORT, *supra* note 161, at 48. Pandora may in fact fall within the statutory definition of “interactive digital service” because it creates playlists based on user music preferences. One open question is whether this type of service offers a program that is “specially created for the recipient” such that it would qualify as an active service under the statute. *Id.*

200. See *id.* at 46.

201. *Id.* at 47.

202. *Id.*

203. See *id.* at 47–48.

Section 112, 114, and 115 licenses are subject to rates set by the CRB.²⁰⁴ The CRB has a per-performance rate for internet radio, as opposed to a percentage-of-revenue rate typically used by PROs.²⁰⁵ However, Congress gave SoundExchange the authority to negotiate its own rates in place of those set by the CRB.²⁰⁶ SoundExchange has since negotiated rates with internet-radio services, which pay approximately 25 percent of gross revenues in royalty fees.²⁰⁷

C. Discount Licenses

Despite the newly improved music-licensing framework, the DMCA still provides an option for YouTube and similar user upload service providers to obtain “discount licenses.”²⁰⁸ As previously discussed, the DMCA’s safe harbors allow these service providers to offer unauthorized content without the threat of incurring liability.²⁰⁹ This safety net is a powerful bargaining chip during licensing negotiations with music rightsholders. For example, when YouTube negotiates with a rightsholder to secure music licenses, it has the ability to “demand bargain basement terms by threatening to relegate copyright owners to the futility of the notice and takedown process.”²¹⁰ This practice affects legitimate licensing deals because it creates an inevitable “race to the bottom for all licenses.”²¹¹ For instance, an RIAA analysis demonstrates that rightsholders receive approximately \$7 for every one thousand streams on Spotify, while these same rightsholders receive only \$1 from service providers employing the liability-shielding safe harbors contained in the DMCA and other reciprocal statutes.²¹² A March 2017 report by the Phoenix Study shows that this practice results in lost revenues of between \$650 million and over \$1 billion for the US music industry every year.²¹³ This significant revenue loss driven by YouTube’s discount licenses underscores the urgent need for a solution to the value gap.

204. *See id.* at 50.

205. *Id.* at 51.

206. *See id.*

207. *See id.* at 52.

208. *See* ALDEN ABBOTT, ET AL., REGULATORY TRANSPARENCY PROJECT: INTELLECTUAL PROP. WORKING GRP., CREATIVITY AND INNOVATION UNCHAINED: WHY COPYRIGHT LAW MUST BE UPDATED FOR THE DIGITAL AGE BY SIMPLIFYING IT 15 (2017), <https://regproject.org/wp-content/uploads/RTP-Intellectual-Property-Working-Group-Paper-Copyright.pdf> [<https://perma.cc/S228-YCCD>] (archived Feb. 4, 2019).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 15–16.

213. *Id.* at 16.

V. POSSIBLE SOLUTIONS

The 2018 Global Music Report recognizes the value gap as a significant policy issue facing the music industry and states that “legislative action is needed” to prevent user upload streaming services like YouTube from “free riding on the back of so called ‘safe harbor’ liability privileges.”²¹⁴ While this report points out the need for legislative action, it does not make any specific recommendations. The following subparts discuss potential legislative and judicial solutions to the value gap.

A. Judicial Action

Although many of the proposed solutions to the value gap involve legislative action in some form or another, it is worth first considering the courts’ potential role in solving the problem. YouTube’s music distribution and promotion capacities are akin to digital interactive streaming services such as Spotify.²¹⁵ The relevant difference between these services is that YouTube passively monitors the content uploaded by users of its site, while Spotify actively performs and distributes songs on its platform. Under the DMCA, a service provider that “receives a financial benefit directly attributable to the infringing activity” which it has “the right and ability to control” falls outside the ambit of the safe harbor provision.²¹⁶ The Second Circuit in *Viacom* explained that YouTube’s relatively passive involvement in the streaming process shielded the company from liability under the safe harbor provisions.²¹⁷ There, the court made clear that the “ability to remove or block access to materials posted on a service provider’s website” does not constitute “control” as contemplated by § 512(c)(1)(B).²¹⁸ Ultimately, the court held that control of the infringing activity required “something more,” but failed to expand upon what kind of conduct falls within this category.²¹⁹ The *Viacom* court merely suggested in dicta that inducement of copyright infringement, like that in *Grokster*, may be the kind of control that would disqualify a service provider from safe harbor protection.²²⁰

The more recent Ninth Circuit holding in *Fung* has provided some clarification as to the type of control that makes a user upload service provider ineligible for protection under the safe harbor

214. 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 26.

215. *See* Roberts, *supra* note 27.

216. Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(B) (2010).

217. *Viacom Int’l, Inc. v. YouTube*, 676 F.3d 19, 38 (2d Cir. 2012).

218. *Id.* (quoting *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).

219. Alderman, *supra* note 67.

220. *Viacom*, 676 F.3d at 38 (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 937 (2005)).

provisions.²²¹ In *Fung*, the defendant's decision to organize files on his peer-to-peer file sharing websites in a manner that pointed users toward infringing content, coupled with its history of directly guiding users to such content, disqualified it from the benefits of the safe harbor provision.²²²

In applying these holdings to YouTube's current conduct, a court would probably find that YouTube receives a financial benefit from infringing content.²²³ Like the ad-supported service provider in *Fung*, YouTube's revenue comes from advertising.²²⁴ Thus, its revenue is similarly "predicated on the broad availability of infringing materials."²²⁵ Furthermore, YouTube Music Premium is a subscription-based feature that provides yet another direct financial benefit derived from the infringing content available on the site.²²⁶

The more difficult question is whether YouTube exerts control over the infringing content sufficient to disqualify it from safe harbor protection. YouTube's level of control over the musical content on its site has increased considerably since the 2012 *Viacom* decision.²²⁷ Perhaps a court revisiting the issue of control in light of the company's current activities would find that YouTube's conduct constitutes "something more" than merely removing and blocking access to materials.²²⁸ For instance, YouTube's recent 2018 implementation of Official Artist Channels creates a central location for users to find all content by a specific artist or band.²²⁹ These consolidated channels make it easier for music consumers to treat YouTube like a free jukebox.²³⁰ Further, as of 2015, YouTube's video recommendation system accounted for over half of the videos viewed from its homepage.²³¹ Arguably, YouTube is like the defendant in *Fung* in that it exerts a great deal of influence over the infringing content viewed on its site.²³²

Unfortunately, there is no way to be certain that a future court revisiting the issue in *Viacom* would find that YouTube's present practices satisfy the vague "control" requirement as contemplated by

221. *Columbia Pictures, Inc. v. Fung*, 710 F.3d 1020, 1044–46 (9th Cir. 2013).

222. *Id.* at 1046.

223. *See id.* at 1044–46.

224. *Id.* at 1045; *see Paine, supra* note 29.

225. *Fung*, 710 F.3d at 1045.

226. *See id.* at 1044; Katzowitz, *supra* note 31.

227. *See, e.g., Katzowitz, supra* note 31; Stutz, *supra* note 33; TROUVUS, *supra* note 37.

228. *Viacom Int'l, Inc. v. YouTube*, 676 F.3d 19, 38 (2d Cir. 2012).

229. Stutz, *supra* note 33.

230. *See Fingas, supra* note 35.

231. TROUVUS, *supra* note 37.

232. *See Columbia Pictures, Inc. v. Fung*, 710 F.3d 1020, 1045 (9th Cir. 2013) (finding control under the DMCA in part because the defendant organized content on its site in such a manner that assisted users in finding infringing content).

§ 512(c)(1)(B).²³³ Even if a court adopted the view that the defendants' conduct in *Grokster* and *Fung* represents the type of control prohibited by the safe harbors, it is unlikely that the court will find a similar level of control with respect to YouTube's more passive activities.²³⁴ After all, 90 percent or more of the defendants' peer uploaded content in *Grokster* and *Fung* was found to be infringing.²³⁵ This is not the case for the musical content uploaded on YouTube.²³⁶ In addition, the defendants in both *Grokster* and *Fung* made affirmative statements encouraging users to view infringing content on their sites. Even though YouTube has become more actively involved with the organization and presentation of its content, a court today would probably fail to find that the site's additional control since the holding in *Viacom* places the company outside the safe harbor.²³⁷

There are also several practical and administrative problems with a judicial solution to the value gap. First, there is no guarantee that courts across the world would consistently find that YouTube's recent activities place it outside the scope of safe harbor protections contained in the wide range of DMCA-like statutes in other countries. Further, a judicial solution to the value gap would be implemented gradually across each jurisdiction because the question of control will only be evaluated as lawsuits arise. Moreover, a judicial solution will also require courts to evaluate whether other peer upload sites exert the requisite control over infringing content. Finally, a judicially implemented solution to the value gap is impractical because it would require courts around the world to individually analyze the control issue in future cases involving user upload streaming sites that have not yet been developed.

B. Opt-Out Provision for Licensing Musical Works

The U.S. Copyright Office's 2015 Copyright and the Music Marketplace Report (Music Marketplace Report) discusses potential solutions related to music licensing that would have an immediate impact on the value gap.²³⁸ The Music Marketplace Report suggests that a complete overhaul of the current licensing system may be the ideal way to solve the issue, but points out that "as tempting as it may be to daydream about a new model built from scratch, such a

233. See *Viacom*, 676 F.3d at 38.

234. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, 545 U.S. 913, 919 (2005); *Fung*, 710 F.3d at 1044–46; *Viacom*, 676 F.3d at 38.

235. *Grokster*, 545 U.S. at 919; *Fung*, 710 F.3d at 1045.

236. See Andrew Flanagan, *Google Points New Piracy Report Towards the Music Industry*, BILLBOARD (July 13, 2017), <https://www.billboard.com/articles/business/7438151/google-piracy-report-youtube-music-industry-reacts> [https://perma.cc/L3TY-GJWJ] (archived Jan. 27, 2019).

237. See *Viacom*, 676 F.3d at 38.

238. See MUSIC MARKETPLACE REPORT, *supra* note 161, at 133–37.

course would seem to be logistically and politically unrealistic.”²³⁹ Instead, it advocates for a correction of the current system “from the material we have on hand.”²⁴⁰ In other words, the solution should involve existing facets of the licensing scheme such as compulsory licensing.²⁴¹

The U.S. Copyright Office points out that these goals can be achieved through equal treatment for the use of sound recordings and musical works whenever possible.²⁴² Presently, digital interactive streaming services negotiate sound-recording licenses with rightsholders in the free market.²⁴³ Meanwhile, these same streaming services license the performance and mechanical rights for musical works according to statutory rates set by the government.²⁴⁴ This system has left many songwriters and publishers disgruntled by the fact that record companies are able to negotiate their own terms and consequently command higher licensing rates.²⁴⁵ The Music Marketplace Report proposes implementing an opt-out right that allows musical works copyright owners to elect to negotiate license agreements in the free market.²⁴⁶ If parties fail to come to an agreement, they can fall back on the rates set by the government.²⁴⁷ Given the relatively equal importance of a song’s composition and the physical recording of that composition (i.e., a consumer cannot enjoy one without the other), this proposed solution seeks to promote “equitable rates as between sound recordings and musical works.”²⁴⁸ The Music Marketplace Report clarifies that this solution does not guarantee equality of rates, but at least “encourage[s] evenhanded consideration of both rates by a single body, under a common standard, to achieve a fair result.”²⁴⁹

C. Expansion of Compulsory Licensing to Digital Interactive Streaming Services

Compulsory licenses under §§ 112 and 114 of the Copyright Act have been effective in compensating rightsholders, especially within the digital-streaming sphere.²⁵⁰ SoundExchange is responsible for

239. *Id.* at 133.

240. *Id.*

241. *See id.* at 135–36, 169.

242. *Id.* at 135.

243. *Id.*

244. *Id.*

245. *See id.* at 136. (acknowledging that “[a]t least some disparity appears to arise from publishers’ inability to negotiate free from government constraint where record companies can”).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 137.

250. *Id.* at 175.

administering these compulsory licenses to noninteractive platforms.²⁵¹ Given the success of this framework, a logical consideration would be to extend compulsory licensing to cover digital interactive streaming services such as YouTube.²⁵² SoundExchange has a particularly good reputation among rightsholders and licensees alike because it successfully identifies the owners of unmatched sound recordings and divvies out royalties according to a prescribed statutory formula.²⁵³

The Music Marketplace Report points out that some independent artists and labels lack negotiating power and prefer the compulsory license framework set forth under §§ 112 and 114.²⁵⁴ Some that fall within this category support the expansion of the compulsory license system from solely noninteractive digital services to interactive ones as well.²⁵⁵ However, the Music Marketplace Report ultimately rejects this recommendation because the U.S. Copyright Office does not believe that large record labels would be willing to give up their current freedom to negotiate their own terms.²⁵⁶ The Music Marketplace Report also justifies its rejection of this option because it fails to recognize any issues with the functioning of the current system for licensing sound recordings.²⁵⁷ Still, others have commented on the drawbacks of this kind of compulsory licensing scheme.²⁵⁸ One need look no further than well-known noninteractive online radio services like Pandora to recognize that the framework has not exactly worked flawlessly.²⁵⁹ James H. Richardson, alumnus of the UCLA School of Law, opines that the rates paid by Pandora under the compulsory licensing framework “verge on punitive.”²⁶⁰ Richardson reasons that under the current compulsory licensing framework, Pandora is required to pay a “substantial share of its revenue to owners of sound recordings.”²⁶¹

251. *Id.*

252. *Cf. id.* (explaining that the framework set forth in these provisions “is generally well regarded”).

253. *See id.*

254. *Id.* at 176.

255. *Id.*

256. *See id.* at 177.

257. *Id.*

258. *See* James H. Richardson, *Create a Compulsory License Scheme for On-Demand Digital Media Platforms*, 31 ENT. & SPORTS L. 9, 10 (2014) (arguing that the current compulsory licensing scheme encumbers internet radio providers with exorbitant royalty fees, and render their business unprofitable).

259. *Id.*

260. *Id.*

261. *Id.*

VI. SOLUTION

This Note proposes a solution to the value gap that involves concerted legislative effort in a two-step approach. First, policymakers must engage in legislative reform of the safe harbor provisions contained in outdated laws like the DMCA. A revision of Article 8 of the WCT could compel treaty signatories to comply by narrowing the application of their domestic safe harbor statutes.²⁶² This revision should be designed to instruct WCT parties to amend their safe harbor statutes in a manner that eliminates the presently available liability privileges for large-scale user upload music-streaming services such as YouTube. Once removed from the safe harbors, the displaced service providers will be unable to leverage these privileges in negotiating discounted licensing deals.²⁶³ The second step of the legislative reform calls on domestic lawmaking bodies to amend current licensing schemes to better suit the interests of various stakeholders involved in music-licensing transactions.

A. *Revision of Article 8 of the WIPO Copyright Treaty*

On May 5, 2016, the CEO of the IFPI, Frances Moore, issued a statement in which she advocated for legislative reform of safe harbor provisions.²⁶⁴ Moore opined, “[t]he value gap is not something our business can fix. It is a legislative issue caused by the misapplication of the so-called liability ‘safe harbors’ to user upload services.”²⁶⁵ Moore went on to clarify that the proposed legislative action is not “a campaign to sweep away safe harbors altogether.”²⁶⁶ She acknowledged that the safe harbor provisions continue to adequately “protect passive, neutral intermediaries that do not select, organize, promote and monetize music.”²⁶⁷ However, Moore pointed out that the application of the safe harbor provisions to services that organize and monetize the distribution and promotion of music on a large scale

262. See FRANKEL & GERVAIS, *supra* note 139, at 85–86 (acknowledging that Article 8 of the WCT provides the international rule that allows countries to enact safe harbor provisions); *WCT Summary*, *supra* note 153.

263. See ABBOTT, *supra* note 208.

264. See generally, Frances Moore, *The value gap—the missing beat at the heart of our industry*, IFPI (May 5, 2016), <http://www.ifpi.org/news/The-value-gap-the-missing-beat-at-the-heart-of-our-industry> [https://perma.cc/4EAA-NNCA] (archived Jan. 27, 2019).

265. *Id.*; see also 2018 GLOBAL MUSIC REPORT, *supra* note 16, at 25 (stating that “[l]egislative action is needed to ensure that laws on copyright liability are applied consistently, so that online user upload content services making music available must negotiate licenses to do so, instead of free riding on the back of so called ‘safe harbour’ liability privileges”).

266. Moore, *supra* note 264.

267. *Id.*

does not make sense in light of the legislative purposes of these statutes.²⁶⁸

In line with Moore's statement, this Note advocates for a legislative solution to the value gap that removes safe harbor protection for streaming services that gain a financial benefit by exerting a requisite level of control over infringing content.²⁶⁹ While the proposed legislative changes outlined below must occur at the national level, a revision to Article 8 of the WCT would be instrumental in facilitating these changes to domestic safe harbor statutes.²⁷⁰ As previously discussed in Part III, the WCT Assembly has the power to execute the proposed revision to Article 8 under Article 15 of the treaty.²⁷¹ Article 8 and the accompanying agreed statement contain the international rule that provides the scope for countries to enact safe harbor legislation in the first place.²⁷² Thus, a change to Article 8 that limits this scope will require WCT parties to enact legislation compliant with their updated treaty obligations.²⁷³

Perhaps the most straightforward way to restructure safe harbor protection on the national level is to clarify the control exception found in § 512(c)(1)(B) of the DMCA and reciprocal clauses in DMCA-like statutes implemented in other countries.²⁷⁴ Section 512(c)(1)(B) states that a service provider is not entitled to safe harbor protection if it receives "a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity."²⁷⁵ Under *Viacom*, the meaning of the control exception has remained somewhat ambiguous.²⁷⁶ The language in this clause could be clarified through legislation that redefines the statutory meaning of the word "control."²⁷⁷ Section 512(c)(1)(B) should be altered so that it denies safe harbor protection for service providers that, like YouTube, "receive a financial benefit directly attributable to the infringing activity, in a case where the service provider has" the right and ability to *control, organize, or promote such activity*.²⁷⁸

268. *Id.*

269. *See id.*

270. FRANKEL & GERVAIS, *supra* note 139, at 85.

271. WIPO Copyright Treaty, *supra* note 149, art. 15.

272. FRANKEL & GERVAIS, *supra* note 139, at 85.

273. *Id.*; *see WCT Summary*, *supra* note 153.

274. *See* Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(B) (2010) (service provider is eligible for safe harbor protection if, *inter alia*, it "does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity"); *see also* Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 1 (EC) explaining that the safe harbors in the E-Commerce Directive do not apply if the recipient is acting under the authority or control of the ISSP).

275. DMCA § 512(c)(1)(B).

276. *See Alderman*, *supra* note 67; *see also* *Columbia Pictures, Inc. v. Fung*, 710 F.3d 1020, 1044–46 (9th Cir. 2013).

277. DMCA § 512(c)(1)(B).

278. *Id.*; *see* Moore, *supra* note 264.

YouTube's ad-supported and subscription-based revenue certainly constitutes a "financial benefit directly attributable to infringing activity."²⁷⁹ Like the defendant's websites in *Fung*, YouTube generates revenue that is largely "predicated on the broad availability of infringing materials."²⁸⁰ Further, under the proposed amendment to the statute's control provision, YouTube's carefully prearranged Official Artist Channels and its highly persuasive and influential video recommendation system certainly provide the streaming service with the right and ability to control, organize, or promote infringing activity.²⁸¹ Ultimately, this tailored change to the control provision would maintain safe harbor protection for truly passive user upload sites, while imposing liability on those that maintain a more active relationship with the unlicensed content uploaded to their sites.

A revision to Article 8 will require WCT signatories to implement the change to their respective safe harbor statutes in compliance with their updated treaty obligations.²⁸² Perhaps the simplest revision to Article 8 that would accomplish the stated goals would involve altering the agreed statement concerning Article 8.²⁸³ This revision should retain the portion stating that the mere provision of physical facilities for enabling or making a communication does not amount to a violation of the communication right under the treaty.²⁸⁴ However, it must establish that a service provider's control, organization, or promotion of infringing activity does constitute a violation of the communication right when the provider receives a financial benefit directly attributable to such activity.²⁸⁵ Such a revision to the treaty will compel contracting parties to limit the scope of their domestic safe harbor statutes in a manner that removes protection for YouTube and similar large-scale user upload streaming services.

B. Legislative Changes to the Music-Licensing Framework

If the aforementioned revision to Article 8 of the WTC is executed, and conforming legislative action is taken by the WCT's one hundred member states at the national level, user upload streaming services operating like YouTube will lose safe harbor protection and will no longer be able to threaten to relegate rightsholders to the arduous notice and takedown process.²⁸⁶ The loss of this powerful

279. DMCA § 512(c)(1)(B).

280. *Fung*, 710 F.3d at 1045; see Luckerson, *supra* note 31; Paine, *supra* note 29.

281. See Stutz, *supra* note 33; TROUVUS, *supra* note 37.

282. See *WCT Summary*, *supra* note 153.

283. WIPO Copyright Treaty, *supra* note 149, art. 8, n.7.

284. See *id.*

285. See *id.*

286. See ABBOTT, *supra* note 208.

bargaining chip will lead to licensing rates that are more reflective of the market value.²⁸⁷ Although YouTube's liability shield under the safe harbor provisions is arguably the most glaring source of the value gap,²⁸⁸ there are other facets of the music-licensing framework that are problematic and worth addressing. The second step of this Note's proposed solution involves a relatively minor legislative adjustment to the current licensing system.

The compulsory licensing scheme for digital noninteractive services seeking to obtain the right to publicly perform sound recordings is considered to be a successful method for assuring adequate royalty payments.²⁸⁹ In light of this success, the same scheme should be applied to interactive streaming services as well.²⁹⁰ If this change were made, SoundExchange would be the obvious candidate for administering the licenses to interactive platforms because it is already responsible for administering them to noninteractive services.²⁹¹ Further, SoundExchange has garnered a favorable reputation, stemming from its ability to identify the owners of unmatched sound recordings and efficiently distribute royalties through the use of its prescribed statutory formula.²⁹² Finally, importing a compulsory licensing framework into the digital interactive services sphere would help combat unfair negotiations between large licensees and independent rightsholders with little negotiating leverage.²⁹³

The Music Marketplace Report rejects this option because, although it is supported by independent rightsholders, many large record labels would prefer to negotiate directly with licensees in the free market.²⁹⁴ Given the concerns of larger labels, policymakers should consider implementing an opt-out provision through which rightsholders may choose to remove themselves from the compulsory licensing scheme in favor of free-market negotiations.²⁹⁵ This compromise is akin to the opt-out provision suggested by the Music Marketplace Report in the context of licensing musical works.²⁹⁶ If a major label believes it can negotiate a better deal, it can opt-out of the compulsory licensing scheme, without forcing independent labels to fend for themselves in licensing negotiations with YouTube, Spotify, and other behemoth licensees.

287. *See id.*

288. *See* Singleton & Popper, *supra* note 12.

289. MUSIC MARKETPLACE REPORT, *supra* note 161, at 175.

290. *Id.*

291. *See id.*

292. *Id.*

293. *See id.* at 176 (observing that some independent artists and labels lack negotiating power and thus would prefer the compulsory license framework set forth under sections 112 and 114 in the digital interactive streaming sphere).

294. *Id.* at 177.

295. *Cf. id.* at 136 (suggesting an opt-out provision in the context of musical work performance rights licensing).

296. *See id.*

Still, others object to the compulsory licensing model for interactive digital services because the current rates set for noninteractive services represent too great of a percentage of some licensees' overall revenue.²⁹⁷ Individuals opposed to compulsory licensing on these grounds overlook the possibility of basing the compulsory rate on a percentage of revenue. This percentage-of-revenue rate should seem familiar because it is already employed in blanket licensing deals for public performance rights.²⁹⁸ The rate can be readily implemented because Congress has already given SoundExchange the authority to negotiate its own rates in place of those set by the CRB.²⁹⁹ A change such as this addresses the concerns voiced by those like James Richardson who believe that the rates paid by noninteractive services under the current compulsory licensing framework "verge on punitive."³⁰⁰ Ultimately, this relatively straightforward change to the music-licensing framework coupled with the change to Article 8 of the WCT would likely serve as a solid stepping-stone toward greatly reducing the remuneration problems associated with the music industry's value gap.

VII. CONCLUSION

The value gap is perhaps the largest problem facing the sustainability of the global music industry. The safe harbor provisions in the DMCA and other similar laws across the globe contribute greatly to the expansion of the value gap. The remuneration issues arising out of these statutes have in some cases discouraged would-be songwriters and artists from pursuing careers in music. Further, the statutes have allowed streaming services like YouTube to exploit music on an international scale without the risk of incurring copyright-infringement liability. Finally, the statutes' arduous notice and takedown requirements place a weighty burden on parties seeking to enforce their copyrights. While courts could correct this problem, inconsistency in rulings across borders coupled with the gradual adoption of such rulings would make judicial revision of the DMCA-like laws an impractical solution to this urgent music industry crisis.

Instead, this Note has proposed a legislative solution to the value gap that involves a two-step approach. First, it calls on the WCT assembly to revise Article 8 and its accompanying agreed statement in a manner that prevents contracting parties from providing safe harbor protection to streaming services that control, organize,

297. See Richardson, *supra* note 258.

298. MUSIC MARKETPLACE REPORT, *supra* note 161, at 33.

299. See *id.* at 51.

300. Richardson, *supra* note 258.

promote, and monetize the music on their sites. Once contracting parties amend their safe harbor statutes in compliance with this revision, streaming sites like YouTube will lose their unfair leverage in licensing negotiations. The second step of this Note's legislative solution recommends changes to the music-licensing system to ensure efficient and equitable licensing deals. It implements a compulsory licensing requirement (with an opt-out provision) for digital interactive streaming services. If adopted, the recommendations in this Note will help ensure the stability and sustainability of the global music industry in the age of digital music streaming.

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