

THE COLUMBIA JOURNAL OF  
**LAW** *&* **ARTS**  
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A QUARTERLY JOURNAL OF LAW AND THE ARTS,  
ENTERTAINMENT, COMMUNICATIONS, AND INTELLECTUAL PROPERTY

Cancelling Copyrights

*Barbara Lauriat and Robert Brauneis*

It's Not "Personal": Health Information Disclosure and the  
Physical-Mental Distinction

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The Sooner the Better? How to Optimize Bargaining Power  
When Serving Notice of Copyright Termination

*Rachel R. Altemose*

**Vol. 49, No. 3**

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## Cancelling Copyrights

Barbara Lauriat\* & Robert Brauneis†

### ABSTRACT

*In the United States, registering a claim of copyright in a work of authorship is easy. Cancelling an existing copyright registration is not. This is a problem that requires attention. This Article makes those three important points and suggests what should be done.*

*U.S. copyright registration confers important benefits and legal protections on copyright owners. In any intellectual property regime with registered rights, mechanisms for correcting the record and removing rights granted in error are integral components of a functional system. While courts have the power to cancel invalid trademark registrations and patents, they do not have the power to cancel invalid copyright registrations, and the Copyright Office has no process that would allow third parties to challenge existing registrations. Copyright registrations may only be cancelled at the discretion of the Register of Copyrights. Consequently, few registrations are ever cancelled.*

*In this Article, we show that the lack of procedures for cancelling copyright registrations has contributed to an improperly high level of inaccuracy and error on the registry. This situation compromises a fundamental purpose of the registration system and has the potential to cause real harm. Using specific case examples and an empirical study of cancellation data from the Copyright Office, we demonstrate how and why the current mechanisms for correcting the registration record at the Copyright Office are inadequate. Finally, we recommend a series of legal and practical changes that would enable registration and recordation to serve their principal aims of providing accurate information and clearing title to support markets in works of authorship.*

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\* Professor and Dean's Scholar in Intellectual Property, Texas Tech University School of Law. Both authors thank Dr. Brent Lutes, Chief Economist at the U.S. Copyright Office, for access to data on cancelled copyright registrations, and Prof. Zvi Rosen for insightful comments.

† Michael J. McKeon Professor of Intellectual Property Law and Co-Director of the Intellectual Property and Technology Program and of the GW Center for Law and Technology, The George Washington University Law School. For excellent research assistance, especially for coding thousands of Copyright Office cancellation records, Prof. Brauneis thanks Caroline (Xiaonan) Qu and Michelle Corinaldi.

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## INTRODUCTION

In the United States, registering a claim of copyright in a work of authorship is easy. Cancelling an existing copyright registration is not. This is a problem that requires attention. This Article makes those three important points and suggests what should be done.

Since 1909, registration has not been a condition of obtaining federal copyright protection.<sup>1</sup> The requirement of registration to maintain copyright protection for the maximum term was prospectively abolished in 1978, and retrospectively abolished in 1992 (affecting works published after 1963).<sup>2</sup> Nonetheless, registration of claims of copyright and recordation of documents pertaining to copyright remain important for authors, copyright owners, and the public. For authors and copyright owners, registration is necessary to obtain full protection for their works. For example, registration is required to collect statutory damages and attorney's fees.<sup>3</sup> The copyright registration certificate constitutes prima facie evidence of the validity of the copyright and the facts stated in the certificate, provided that registration is made before or within five years after first publication of the work.<sup>4</sup> While validity and ownership of copyright can still be challenged in the context of an infringement action, in practice, this prima facie evidence of ownership and validity is a powerful tool for copyright owners. For works originating in the United States, registration is even necessary to bring any infringement action.<sup>5</sup> Registration of a claim of copyright in a work is also required to gain the full benefits of recordation of documents pertaining to copyrights, which includes protection against unrecorded transactions.<sup>6</sup> Actual notice of a registration will likely trigger a three-year statute of limitations of disputing claims of ownership made in the registration.<sup>7</sup>

As the intended result of those incentives, a detailed public record of claims of copyright, and of transactions and other actions affecting the existence and ownership of works of authorship, is created and made available to the public. Over 40 million registration records have been created over the history of the U.S. registration system, and over 24 million of those have been created since 1978 (an average of over 500,000 per year).<sup>8</sup> Those records represent an even greater number of works of authorship,

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1. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, § 9 (current version at 17 U.S.C. § 409) [hereinafter "Copyright Act of 1909"]; *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30 (1939) (holding that delay in depositing copies of a work after publication does not result in forfeiture of copyright).

2. See Copyright Act of 1976, P.L. 94—553, §§ 302, 303, 90 Stat. 2541, 2573–74 (Oct. 19, 1976) (providing for unitary terms of copyright without any need for registration for works created after 1977 and for works created but not published before 1978); Copyright Renewal Act of 1992, Pub. L. No. 102–307, 106 Stat. 264 (abolishing the requirement of renewal registration, affecting all works published after 1963).

3. 17 U.S.C. § 412; see *infra* Part I.B.5.

4. 17 U.S.C. § 410(c); see *infra* Parts I.B.1, I.B.3.

5. 17 U.S.C. § 411; see *infra* Part I.B.4.

6. 17 U.S.C. § 205(c)(2); see *infra* Part I.B.6.

7. See *infra* Part I.B.2.

8. See U.S. COPYRIGHT OFF., ANNUAL REPORT FY 2024, at 20 (2024), <https://www.copyright.gov/reports/annual/2024/ar2024.pdf> [<https://web.archive.org/web/20260106014830/https://www.copyright.gov/reports/annual/2024/ar2024.pdf>]. The registration records created since

since many of them are records of group registrations for multiple works. While similar historical numbers are not as easily available for recorded documents, in Fiscal Year 2024, the Copyright Office recorded 16,971 documents pertaining to copyright, relating to 1,738,530 works of authorship.<sup>9</sup>

In theory, both the public availability of registration and recordation records, and the legal advantages of registration and recordation, facilitate markets for and use of works of authorship by providing better information about ownership, while also clearing title and strengthening that ownership.<sup>10</sup> However, the registration system provides those benefits only if registration records are accurate. Inaccurate records not only fail to provide any benefit, but they also damage markets, both by aiding particular false claims of ownership and by undermining trust in the entire system.<sup>11</sup> To be sure, the Copyright Office examines applications for registration. However, examination is necessarily limited; invalid or inaccurate claims can, and indeed do, reach the public record. When information on the registry is discovered to be invalid or incorrect, those registrations should be subject to challenge and correction, so that the copyright registry does not become littered with false claims and outdated information, thereby losing its efficacy as a source of accurate information and a support for copyright markets and use.

Unfortunately, under current law and practice, the mechanisms for challenging and correcting the copyright registry are severely limited, and they demonstrably enable false claims and information to remain on the record. Despite frequent substantive—and occasionally procedural—challenges to copyright registrations in the courts, there has been little academic attention given to the reality of cancellation procedures in the Copyright Office. In fact, some courts and commentators simply assume that the

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1978 were created in electronic form and have been searchable online for some time. Although the registration records created before 1978 were originally created in paper form, the Copyright Office has been digitizing those records and making them available online as well. As of this writing, the post-1978 records and the records from 1898–1945 are searchable in the Copyright Office’s online Public Records System. U.S. COPYRIGHT OFF. PUBLIC RECORDS SYSTEM, <https://publicrecords.copyright.gov/> [<https://web.archive.org/web/20260112151209/https://publicrecords.copyright.gov/>] (last visited Jan. 23, 2026). Other earlier registration records are available in a Virtual Card Catalog system. U.S. COPYRIGHT OFF. VIRTUAL CARD CATALOG, <https://www.copyright.gov/vcc/> [<https://web.archive.org/web/20260112214502/https://www.copyright.gov/vcc/>] (last visited Jan. 23, 2026).

9. See U.S. COPYRIGHT OFF., ANNUAL REPORT FY 2024, *supra* note 8, at 6.

10. See Stef van Gompel & Saule Massalina, *Report: Survey on Voluntary Copyright Registration Systems* 67, WIPO (Apr. 23, 2021), [https://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_crr\\_ge\\_2\\_21/wipo\\_crr\\_ge\\_2\\_21\\_report.pdf](https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_crr_ge_2_21/wipo_crr_ge_2_21_report.pdf) [[https://web.archive.org/web/20250407124516/https://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_crr\\_ge\\_2\\_21/wipo\\_crr\\_ge\\_2\\_21\\_report.pdf](https://web.archive.org/web/20250407124516/https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_crr_ge_2_21/wipo_crr_ge_2_21_report.pdf)] (“In addition to establishing a historical record of national cultural heritage, registration and recordation can be an important means for providing legal certainty to authors, rightholders and third parties.”).

11. For more detailed discussion of the harms of inaccurate registration records, see *infra* Part II.B.

Copyright Office *must* have some kind of administrative procedure for cancellation of invalid copyright registrations,<sup>12</sup> though others have noticed its absence.<sup>13</sup>

In this Article, we recommend a series of legal and practical changes that would enable registration and recordation to better serve their principal current purpose. Some of the changes, such as creating an administrative cancellation process or allowing courts to order cancellations, would require legislation. Others, such as creating a mechanism for anyone to inform the Copyright Office of possible grounds for cancellation, could be accomplished through issuing new regulations. Still others, such as recording court judgments that limit or invalidate registrations and properly indexing them by registration number, would only require the Copyright Office to comply with existing statutory mandates.

Part I of this Article explores the historical and contemporary purposes of copyright registration and identifies the principal current justification for copyright registration and recordation systems as providing accurate information and clearing title to support markets in works of authorship. Part II presents evidence that invalid and inaccurate copyright registrations still appear on the registry and explains how those inaccuracies can undermine the fundamental goals of the copyright system. Part III presents the current mechanisms for challenging and correcting inaccurate registration records and demonstrates their severe limitations. As part of our effort to understand actual Copyright Office practice in Part III, we present an empirical analysis of cancellation at the Copyright Office, based on records of all registration cancellations between 1978 and 2022. Part IV makes recommendations for improving the mechanisms for challenging and correcting registration records. We start with the easiest changes—those that the Copyright Office could make in their internal administrative procedures without needing to engage in rulemaking. We then consider changes that fall within existing statutory grants of rulemaking power to the Copyright Office. We close with changes that would require legislation. Part V concludes.

In summary, the lack of effective procedures for correcting inaccurate information and cancelling invalid copyrights in the registry creates a profound imbalance in the overall framework of U.S. copyright law and requires remedial action. We suggest the form that action should take.

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12. See Keith Stephens, *Xerox Finally Wakes Up, but Is It Too Late?*, 6 SANTA CLARA COMPUT. & HIGH TECH. L.J. 407, 414–15 (1991) (noting that “[t]he Copyright Office regulations . . . provide an express administrative remedy. A proper avenue to Federal District Court review would entail Xerox requesting an initial administrative review before the Copyright Office, and then appealing an adverse decision to a Federal District Court.” (citing 37 C.F.R. § 201.7)).

13. See Dave Fagundes & Saurabh Vishnubhakat, *Copyright’s Administrative Law*, 68 J. COPYRIGHT SOC’Y U.S.A. 417, 463 (2021) (calling for “more robust third-party involvement in the almost entirely *ex parte* system of securing and vetting rights in creative expression.”).

## I. THE HISTORICAL AND CURRENT PURPOSES AND LEGAL BENEFITS OF COPYRIGHT REGISTRATION

The purposes of a system of registering works of authorship, or of claims of copyright in those works, can be many, depending upon the way the system is constructed and the legal consequences of registration or of failure to register. Historically, registration has served, at various times, to: (1) facilitate censorship; (2) maintain a publishing oligopoly; (3) test whether copyright was needed to incentivize the creation of a particular work; (4) aid in the enforcement of other copyright formalities, such as the requirement of proper copyright notice on publicly distributed copies; (5) protect users of material that is not eligible for copyright protection from meritless infringement litigation; (6) relieve courts of the burden of litigation about uncopyrightable material and give them the benefit of expert agency opinion on copyrightability; (7) provide accurate information about the ownership and copyright status of a work, including information about limitations of ownership claims that examination of copies of the work might not make clear; (8) facilitate clearing or quieting title in a work; and (9) provide owners of copyright with enhanced remedies. We argue that the principal modern justification of copyright registration in the United States is strengthening markets in and facilitating use of works of authorship through a combination of the last three of these purposes. This part first explores the varied historical purposes of copyright registration. It then goes on to explain the current legal benefits of registration, and how registration and recordation currently serve the purpose of supporting markets in and use of works of authorship.

### A. THE VARIED HISTORICAL PURPOSES OF REGISTRATION

Registration has its distant source in the English requirement of applying to the Stationers' Company to publish a book.<sup>14</sup> Exclusive rights in all published books were held by the Stationers'—the private guild of London booksellers established in the fifteenth century—and the holders of printing patents.<sup>15</sup> There, the requirement of pre-publication registration served both the purpose of censorship—the applicant could be denied a license to publish the book if the contents were deemed objectionable—and of the maintenance of an oligopoly in publishing—only members of the Company could file such applications.<sup>16</sup> In the late sixteenth century, the Star Chamber required

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14. JOHN FEATHER, *A HISTORY OF BRITISH PUBLISHING* 38–39 (1988). For some additional history of formalities in the prehistory of copyright, see STEF VAN GOMPEL, *FORMALITIES IN COPYRIGHT LAW: AN ANALYSIS OF THEIR HISTORY, RATIONALES AND POSSIBLE FUTURE* 55–71 (2011).

15. Printing patents, where the sovereign granted an exclusive right to print a work, existed concurrently with Stationers' copyright. See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 78–113 (1968).

16. See Ian Gadd, *The Stationers' Company in England Before 1710*, in *RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW* 87, 92 (Isabella Alexander & H. Tomás Gómez-Arostegui eds., 2016); CHRISTOPHER MAY & SUSAN SELL, *INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY* 88, 90–91 (2006); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 11–16 (1993); CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY 1403–1959*, 19–23, 67 (1960).

all works to be licensed by the Stationers' before printing,<sup>17</sup> putting the Company in a powerful position, which it maintained even after the dissolution of the Star Chamber by means of various Licensing Acts.<sup>18</sup>

The first copyright act, Great Britain's Statute of Anne, separated the legal protection of literary property from the exercise of pre-publication censorship by vesting rights in the authors of books.<sup>19</sup> For authors to take advantage of its protection, however, they were required to register their works prior to publication; censorship continued, though it was no longer the responsibility of the Company.<sup>20</sup> After 1710, copyright registration continued to be based at Stationers' Hall, where the Company had kept a registry of all new publications and reprints by reason of delegated governmental authority since receiving its royal charter in 1557.<sup>21</sup>

The early U.S. copyright acts, modeled on the Statute of Anne, eschewed both censorship and enforcement of oligopoly.<sup>22</sup> In the early United States, some viewed copyright protection as a necessary component of the creation of an informed public in a democratic society.<sup>23</sup> Advocates for copyright laws in the early United States, such as Noah Webster, highlighted the need for copyright protection in order to develop a

17. *Star Chamber Decree, Westminster (1586)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds.), [https://copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_uk\\_1586](https://copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1586) [[https://web.archive.org/web/20260109052823/https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_uk\\_1586](https://web.archive.org/web/20260109052823/https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1586)] (last visited Jan. 23, 2026).

18. *An Ordinance for the Regulation of Printing, London (1643)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), (L. Bently & M. Kretschmer eds.), [https://copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_uk\\_1643a](https://copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1643a) [[https://web.archive.org/web/20260123191330/https://copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_uk\\_1643a](https://web.archive.org/web/20260123191330/https://copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1643a)] (last visited Jan. 23, 2026) (“It is therefore Ordered by the Lords and Commons in Parliament . . . Nor other Book, Pamphlet, paper, nor part of any such Book, Pamphlet, or paper shall from henceforth be printed, bound, stitched or put to sale by any person or persons whatsoever, unless the same be first approved of and licensed under the hands of such person or persons as both, or either of the said Houses shall appoint for the licensing of the same, and entred in the Register Book of the Company of Stationers, according to ancient custom, and the Printer thereof to put his name thereto.”)

19. “Act for the Encouragement of Learning (Statute of Anne),” 8 Ann., c. 19 (1710) (Gr. Brit.) [hereinafter “Statute of Anne”].

20. *Id.* at § 2; see also Stef van Gompel, *Les formalités sont mortes, vive les formalités! Copyright Formalities and the Reasons for their Decline in Nineteenth Century Europe*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 157, 194 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010).

21. BLAGDEN, *supra* note 16, at 19–23 (1960); CHRISTOPHER MAY & SUSAN SELL, INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY 88 (2006). Interestingly, Section 3 of the Statute of Anne provided for rights in a book where the “clerk of the said company of stationers for the time being, shall refuse or neglect to register, or make such entry or entries,” suggesting both that registration of eligible books was mandatory and that problems with the Company’s management of the register were, to some degree, anticipated. See Statute of Anne, § 3.

22. ROSE, *supra* note 16, at 16; see also Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*, 83 PAT. & TRADEMARK OFF. SOC’Y 769–71 (2001).

23. Stephen Wilf, *Copyright and Social Movements in Late Nineteenth-Century America*, 12 THEORETICAL INQ. L. 123, 137–38 (2011) (noting that in the nineteenth century copyright was seen as promoting the diffusion of knowledge necessary to creating informed citizenry).

national literature and clear national identity.<sup>24</sup> Copyright was a tool in the education of the voting members of a young republic; it protected the heavy investment in instructive texts, like Webster's own grammar books and dictionaries, allowing them to be published and distributed. Proponents of copyright in the early United States portrayed the legal protection of literature as necessary to achieve the goals of broader education and the development of a cohesive national culture.<sup>25</sup>

Registration in the early American copyright acts reflected these goals of free transmission of literature and development of national identity. While the acts still required pre-publication notification to the government as part of the process of obtaining federal copyright protection, the government officials who received the notification had no power to stop publication on the basis of the contents of a book, chart, or map.<sup>26</sup> (Indeed, at that time they had no opportunity to examine the contents of the work, because at the time of application no copy of the work had yet been deposited.)<sup>27</sup> Because any U.S. citizen could record the title of a book, chart, or map and claim to be its owner, registration also no longer served the purpose of maintaining an oligopoly, though, in fact, publishers were still most often the parties registering works under the first U.S. copyright acts.<sup>28</sup>

While the system of copyright registration in the early United States successfully promoted the new country's values, it would take time before registration would fulfill the modern goal of facilitating markets in, and uses of, copyright works. Burdensome formalities may have, albeit imperfectly, served the purpose of "distinguish[ing] authors whose expressive activities are motivated by copyright from authors for whom copyright was an afterthought."<sup>29</sup> However, those formalities meant that only a small

24. Noah Webster, *First Memorial to the General Assembly of Connecticut* (Oct. 24, 1782), Noah Webster Papers, Box 8 (N.Y. Pub. Libr., papers related to Webster's struggle for copyright laws) ("To . . . the whole is annexed a short account of the history of America, the time of the settlement of each State, with an epitome of their respective constitutions as established since the revolution, which is designed to diffuse a political knowledge of this grand confederation of republics among that class of people who have not access to more appropriate means of information.").

25. See Jane Ginsburg *A Tale of Two Copyrights*, 64 TUL. L. REV., 991, 1002–05 (1990).

26. See Act of May 31, 1790, ch. 15, 1 Stat. 124 (hereinafter "Copyright Act of 1790"); *Copyright Act, New York (1790)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (eds. L. Bently & M. Kretschmer, [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_us\\_1790](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1790) [[https://web.archive.org/web/20260115185734/https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_us\\_1790](https://web.archive.org/web/20260115185734/https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1790)] (last visited Mar. 2, 2026)).

27. From the first Copyright Act of 1790 through the Acts of 1831 and 1870, Congress required copyright owners to *record the titles* of their works before publication. See Copyright Act of 1790, § 1, 3; Act of Feb. 3, 1831, ch. 16, 4 Stat. 436, §§ 1, 4 [hereinafter "Copyright Act of 1831"]; Act of July 8, 1870, ch. 230, 16 Stat. 198, §§ 87, 90, 92 [hereinafter "Copyright Act of 1870"]. The district courts—and later the Library of Congress and the Copyright Office—received and granted each recordation request before they ever had a copy of the work in question to examine. In many cases, the work whose title had been recorded was never published, leading to "ghost" records of planned but never accomplished publications. See also Zvi S. Rosen & Richard Schwinn, *An Empirical Study of 225 Years of Copyright Registrations*, 94 TUL. L. REV. 1003, 1019 (2019) (presenting a chart which shows that between 1878 and 1908, between 20 and 60 percent of title recordations were not followed by deposit of copies of the works in question).

28. Rosen & Schwinn, *supra* note 27, at 1019.

29. Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 724 (2003). On the "filtering" function of formalities in granting copyright only to those works whose creation was motivated

percentage of works were registered, and the 1790 Copyright Act provided very little incentive to register some of the most popular forms of publication of the time, such as almanacs, periodicals, and pamphlets.<sup>30</sup>

Over time, the Copyright Office began to undertake substantive examination of deposit copies as part of the registration process.<sup>31</sup> In part, this helped in determining whether the deposit copy, which was supposed to be representative of published copies, displayed a copyright notice, which the law of the time required.<sup>32</sup> Copyright notice was supposed to make users of the copy aware that copyright was indeed claimed in the work embodied in the copy; to provide the user with the name of the copyright owner; and to inform the user of the year of the work's publication, which, because the copyright term was set as a fixed number of years after publication, enabled the user to determine whether that term had ended, leaving the work in the public domain.<sup>33</sup> Thus, yet another purpose of registration was to aid in the enforcement of other formal requirements of copyright law—although by now those formal requirements are greatly diminished, and copyright notice, in particular, is no longer required and has very little legal effect.<sup>34</sup>

## B. THE DEVELOPMENT OF THE CURRENT LEGAL BENEFITS OF REGISTRATION

It is now received wisdom that registration has become less important over the history of U.S. copyright law, and in one respect that is true. Registration is no longer a condition of obtaining or maintaining federal copyright protection. As mentioned above, registration has not been a condition of obtaining federal copyright protection since 1909.<sup>35</sup> The requirement of registration to maintain copyright protection for the

by copyright, see also Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 502–28 (2004); VAN GOMPEL, *supra* note 14, at 31–34.

30. Oren Bracha, *Commentary on the Copyright Act 1790*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds.) (2008), [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary\\_us\\_1790](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_us_1790) [[https://web.archive.org/web/20260105010205/https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary\\_us\\_1790](https://web.archive.org/web/20260105010205/https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_us_1790)] (“Much of the development of print culture and democratic discourse in the early republic happened outside the boundaries of copyright protection.”).

31. See generally Zvi S. Rosen, *Examining Copyright*, 69 J. COPYRIGHT SOC'Y U.S.A. 481 (2022) (providing a historical study of the development of the copyright examination process).

32. See Benjamin Kaplan, *Copyright Revision: Study No. 17, The Registration of Copyright*, in STAFF OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDIES 41, 45 (Comm. Print 1960).

33. See, e.g., Arthur J. Levine & Jeffrey L. Squires, *Notice, Deposit and Registration: The Importance of Being Formal*, 24 UCLA L. REV. 1232, 1236–53 (1976) (discussing the requirements and functions of copyright notice under the Copyright Act of 1909 and the original Copyright Act of 1976).

34. See U.S. COPYRIGHT OFF., CIRCULAR 3: COPYRIGHT NOTICE (Mar. 2021), <https://www.copyright.gov/circs/circ03.pdf> [<https://web.archive.org/web/20260105012832/https://www.copyright.gov/circs/circ03.pdf>]. As Kaplan noted, the registration process can also aid the applicant, to the extent that the examiners alert to applicant to noncompliance with formal requirements, and the applicant can act to comply. Kaplan, *supra* note 32, at 27–28, 41.

35. See *supra* text accompanying note 1.

maximum term was prospectively abolished in 1978, and retrospectively abolished in 1992 (affecting works published after 1963).<sup>36</sup> In every other respect, however, registration has become more important, gaining in legal and practical significance.<sup>37</sup> It was the Copyright Act of 1909 that created for the first time a system under which a registration application was accompanied by contemporaneous deposit of copies of the works in which copyright was claimed.<sup>38</sup> Ever since then, with a few isolated exceptions, the significance of registration has cumulatively increased.<sup>39</sup> In this section, we will review each significant legal consequence of registration and its development over time.

### 1. Registrations as Prima Facie Evidence of the Facts Stated in the Certificates

The Copyright Act of 1909 first made registration certificates prima facie evidence of the facts stated in the certificate. Courts had previously frequently raised evidentiary barriers to proving all the facts necessary to have a valid claim to federal copyright. It was hard to prove, for example, that a thirty-year-old painting had never previously been published, and thus was still eligible for federal protection,<sup>40</sup> or that a plaintiff had received a complete assignment of the U.S. copyright in a play, giving them standing to sue for infringement, rather than merely rights to perform it.<sup>41</sup> The statutory presumption was intended to provide a kind of title enhancement that would assist with those evidentiary problems. The registration certificate could be presented as evidence of whatever facts it stated, and unless there was other evidence to the contrary, the certificate would be sufficient.

Although the presumption has been in place continuously since 1909, it has gained in breadth as new facts have been added to registration certificates. In the original 1909 Act, the only facts required to be included on all certificates were the title of the work; the name and address of the claimant; and the date of deposit of the required copies.<sup>42</sup> Four years later, Congress added the name of the country of which the author was a citizen; the place of U.S. residence of a foreign author; and the date of publication of

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36. See *supra* text accompanying note 2.

37. See John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1408 (2009) (“While formalities for subsistence may have been eliminated under the 1976 Act, formalities for effective enforcement of a copyright actually increased.”).

38. Copyright Act of 1909, §§ 10, 11.

39. Exceptions include the abolition of the renewal requirement and the creation of an exception for foreign works from the requirement of registration before commencement of a civil lawsuit.

40. See, e.g., *Bosselman v. Richardson*, 174 F. 622 (2d Cir. 1909).

41. *Lederer v. Saake*, 166 F. 810 (E.D. Pa. 1909); *rev'd*, *Saake v. Lederer*, 174 F. 135 (3d Cir. 1909). See also Kaplan, *supra* note 32, at 29 (mentioning the evidentiary problem that the statutory presumption was intended to cure, and citing these cases).

42. See Copyright Act of 1909, § 55. Section 55 also required the certificate to contain “such marks as to class designation and entry number as shall fully identify the entry [in the Copyright Office record books],” and for books and the affidavit that the publicly distributed copies were manufactured in the United States. *Id.*

the work, if any.<sup>43</sup> In 1947, Congress added the name of the author.<sup>44</sup> The Copyright Act of 1976 added additional facts, such as whether or not the work was a work made for hire; the date of creation of the work; the date of death of any deceased author; a statement about how the claimant acquired copyright if the claimant was not the author; and “in the case of a compilation or derivative work, an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered.”<sup>45</sup> Thus, the information that receives the benefit of the statutory presumption has substantially expanded since its creation in 1909.<sup>46</sup>

The 1976 Act did introduce one limitation. It provided that the presumption would only apply if registration was made within five years of the publication of the work; the evidentiary weight of a registration made more than five years after publication was left to “the discretion of the court.”<sup>47</sup> As the Senate Report mentioned, this limitation was “based on a recognition that the longer the lapse of time between publication and registration the less likely to be reliable are the facts stated in the certificate.”<sup>48</sup> In practice, since the vast majority of registrations that result in litigation are filed before or within five years after publication, the five-year limit does not seriously curtail its operation.<sup>49</sup>

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43. See Act of Mar. 2, 1913, ch. 97, 37 Stat. 724–25 (current version at 17 U.S.C. § 409).

44. See Act of July 30, 1947, ch. 391, 61 Stat. 666 (current version at 17 U.S.C. § 409).

45. 17 U.S.C. § 409 (Copyright Act of 1976). The 1976 Act also empowers the Copyright Office to add other facts to the certificate, by stating that it shall include “any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.” *Id.*

46. The only change since 1976 has been the elimination of information about the place of manufacture of books, since U.S. copyright law no longer contains requirements or incentives for books to be manufactured in the United States. See Pub. L. No. 97-215, 96 Stat. 178 (1982) (extending the date of expiration of the manufacturing requirements of the Copyright Act from July 1, 1982 to July 1, 1986).

47. 17 U.S.C. § 410(c). See, e.g., *C.J. Prods. LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127, 143 (E.D.N.Y. 2011).

48. S. Rep. No. 983, at 188 (1974).

49. To test the claim that most works are registered within five years of publication, we used the dataset of copyright registrations created by Robert Brauneis and Dotan Oliar for their article *An Empirical Study of the Race, Ethnicity, Gender, and Age of Copyright Registrants*, 86 GEO. WASH. L. REV. 46 (2018). That dataset covers all original valid monograph registrations from 1978 through 2012, a total of 14,598,621 registrations. See *id.* at 52. (The dataset is available at <https://doi.org/10.7910/DVN/F6OLFG>.) It includes 6,735,542 registrations of unpublished works—works that were obviously registered within five years of publication, since they were registered before publication—and 7,820,544 registrations of works that contained enough information to calculate whether registration was made within five years of publication. (Some registration records state that they are registrations of published works, but contain no year of publication; others do contain a year of publication, but a year that is more recent than the year of registration.) Of those 7,820,544 usable registration records of published works, 7,612,075, or 97.33%, were registered within five years of publication. Add in the registrations that were made for works before publication, and 98.57% of all registrations filed from 1978 through 2012 were filed before or within five years after publication.

## 2. Registrations as Triggering a Three-Year Limitations Period on Ownership Claims

Section 507(b) of the Copyright Act requires civil actions under the Act to be brought within three years of the accrual of the claim.<sup>50</sup> Although § 507(b) seems to be directed to infringement actions, courts have consistently held that it applies to ownership claims as well. Thus, a claim to own or co-own copyright in a work may be barred if the claimant does not file suit within three years of the accrual of the claim. Filing a registration application, or obtaining a registration, may play a role in claim accrual. In general, a claim accrues when a potential plaintiff is put on notice of a repudiation of their ownership interest by a potential defendant. Some cases have language suggesting that registering a claim of copyright that was inconsistent with a potential plaintiff's ownership interest would itself be sufficient to start the three-year limitations period running. For example, in holding that a defendant's claim of co-ownership of copyright was barred, the First Circuit stated that the plaintiff's registration "put the world on constructive notice as to the [plaintiff's] ownership of the copyright and of the facts stated in the registration certificate," and accordingly the defendant "had constructive notice of [the plaintiff's] claim of exclusive ownership of the copyrights."<sup>51</sup>

However, there is also strong precedent stating that registration, by itself, will not trigger the accrual of a claim of ownership. As Judge Pierre Leval concluded in *Wilson v. Dynatone Publishing Co.*, a rule that issuance of a registration would trigger the accrual of an ownership claim:

would mean that after authoring a work, an author would need to constantly monitor the Copyright Office registry to be sure that no one has registered a spurious claim of authorship, on pain of losing their ownership of the copyright three years after the spurious registration. Defendants' interpretation would thus impose on authors an intolerable and unrealistic burden, and would open fertile opportunities for thieves to steal copyrights by simply filing baseless registrations for previously created works.<sup>52</sup>

While the weight of authority thus suggests that issuance of a registration will not by itself start the three-year limitations period running, giving actual notice of a registration to someone that excludes any ownership interest in a work on their part undoubtedly does start that period running. That raises the issue of whether obtaining a registration irrevocably places the burden of timely litigation on the person whose ownership interest is excluded by that registration.

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50. See 17 U.S.C. § 507(b).

51. *Saenger Org. v. Nationwide Ins. Licensing Assocs.*, 119 F. 3d 55, 66 (1st Cir. 1997); see *Willsea v. Theis*, No. 98 Civ. 6773, 1999 WL 595629, at \*5 (S.D.N.Y. Aug. 6, 1999) ("[O]nce an author registers his copyright, any co-author exercising reasonable diligence should be aware that another person has claimed authorship and thus know of his alleged injury.").

52. *Wilson v. Dynatone Publ'g Co.*, 908 F. 3d 843, 844 (2d Cir. 2018); see *Gaiman v. McFarlane*, 360 F. 3d 644, 654–55 (7th Cir. 2004) (registration alone does not trigger accrual of ownership claim); *Brownstein v. Lindsay*, 742 F. 3d 55, 71–72 (3d Cir. 2014) (same).

### 3. Registrations as Prima Facie Evidence of the Validity of the Copyright

The role of the registration certificate as prima facie evidence of the validity of the copyright is complex. It gained some judicial recognition under the 1909 Act and was then made explicit in the 1976 Act. “Validity of the copyright” has been taken to mean two things. First, it means that the work contains copyrightable subject matter: that it displays a modicum of creativity and has copyrightable expression that is not merely facts, ideas, or functional features. Second, it can also mean that the presumption regarding the “facts stated on the certificate” is broad enough to encompass certain legal conclusions.

#### a. *The Presumption of Copyrightable Subject Matter*

The presumption of validity regarding copyrightable subject matter is connected to the Copyright Office’s role in examining deposits submitted with registration applications. If the Copyright Office has the authority to reject registrations when it determines that the deposit does not contain copyrightable subject matter, and if it exercises that authority, then the grant of a registration certificate suggests that the registered work in fact contains copyrightable subject matter. As Zvi Rosen has explored thoroughly,<sup>53</sup> the Office’s authority to examine for copyrightable subject matter, and to reject registration applications for lack thereof, was in some doubt for the first several decades of the 1909 Act, and that doubt is reflected in Benjamin Kaplan’s 1958 Copyright Revision Study on The Registration of Copyright.<sup>54</sup> However, the Copyright Office’s substantive examination authority was confirmed by the D.C. Circuit in 1958,<sup>55</sup> and the Copyright Office produced a separate Copyright Revision Study on The Authority of the Register of Copyrights to Reject Applications for Registration, which solidified its position that the Office actually had such authority.<sup>56</sup> The Report observed, “[I]f the Copyright Office were to register claims and issue certificates without regard to the copyrightability of the material, the result would be to mislead the applicant and the public. What materials are copyrightable is a rather esoteric question on which the general public is not well informed.”<sup>57</sup>

The Copyright Office position was that a basic level of substantive examination is required to keep the record from becoming crowded and to protect the public; it proceeded to exercise its authority by rejecting a small but substantial percentage of applications. Prof. Rosen’s statistics, gathered from reports of the Office’s Examining

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53. See Rosen, *supra* note 31.

54. See Kaplan, *supra* note 32, at 27 (stating that the 1909 Act provisions “do not make it clear how far the Register is entitled to exercise judgment in issuing or refusing particular certificates or in defining by general regulations what are registrable works.”).

55. See *Bailie v. Fisher*, 258 F. 2d 425, 426 (D.C. Cir. 1958).

56. See Caruthers Berger, *Copyright Revision: Study No. 18, Authority of the Register of Copyrights to Reject Applications for Registration*, in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDIES 85 (Comm. Print 1960).

57. *Id.* at 95.

Division, show that the Office rejected about 2.5% of all registration applications over the twenty years from 1957 to 1977.<sup>58</sup> The rejection rates range widely between different types of works, from only about 1% of applications to register musical works, to 9% of applications to register works of the visual arts.<sup>59</sup> Those rejections were not all made for lack of copyrightable subject matter, but an Examining Division report from 1960 suggests that about half of them were rejected on that basis.<sup>60</sup>

The 1976 Act placed the Copyright Office's examination authority on firmer textual ground. It explicitly grants authority to the Register of Copyrights to refuse registration applications either for lack of copyrightable subject matter or for any other reason that the application is invalid, and it also explicitly extends the statutory presumption to cover "the validity of the copyright."<sup>61</sup> Since 1978, the Copyright Office's examination practice has continued, resulting, for example, in a rough average of 9,000 rejections a year from 2000–2015.<sup>62</sup> Interestingly, the number of rejections appears to have risen since 2015, with 25,000 rejections reported in 2018.<sup>63</sup>

Although the Copyright Office can now be confident in its legal authority to refuse registration of noncopyrightable subject matter, there is the question of how much deference federal courts will give to its registration decisions based on substantive legal requirements for copyright protection, such as minimum creativity or functionality. Courts have been inconsistent in the deference they have accorded to Copyright Office decisions of this kind, both across the circuits and depending on whether they are dealing with registration denials versus grants.<sup>64</sup> While some courts have highlighted Copyright Office expertise and granted *Skidmore* deference,<sup>65</sup> others have pointed out the lack of meaningful examination at the Copyright Office and reviewed its decisions accordingly.<sup>66</sup> The United States Court of Appeals for the Fourth Circuit expressed particular skepticism when it observed that the "Copyright Office's practice of summarily issuing registrations (perhaps even the day of filing the application, as in

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58. See Rosen, *supra* note 31, at 535.

59. See *id.* at 536–37.

60. See *id.* at 539. Together, the rejections for "no copyrightable matter," "blank forms," "ideas, systems, methods, etc.," "devices," and "utilitarian articles only" come to 40%. Other major categories include lack of copyright notice (34%) and lack of publication (17%). See *id.*

61. See 17 U.S.C. § 410(b) ("In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal."); 17 U.S.C. § 410(c) (providing the presumption).

62. See Rosen, *supra* note 31, at 546.

63. Regan A. Smith, *Curious Cases of Copyrightability Before the Copyright Office*, 43 COLUM. J.L. & ARTS 343, 344 (2020).

64. See 2 NIMMER ON COPYRIGHT § 7.26 (2025); see also Fagundes & Vishnubhakat, *supra* note 13, at 449–51, 472 (2024) (noting courts have applied inconsistent levels of deference and those reviewing registration denials have been unclear as to why such deference is proper).

65. Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 479 (6th Cir. 2015), *aff'd*, 580 U.S. 405 (2017) (holding that "the Copyright Office's determination that a design is protectable under the Copyright Act is entitled to *Skidmore* deference").

66. I.C. *ex rel.* Solovsky v. Delta Galil USA, 135 F. Supp. 3d 196, 212–13 (S.D.N.Y. 2015) ("The Court must accordingly make an independent determination as to whether plaintiff's design is entitled to copyright protection.").

this case) counsels against placing too much weight on registrations as proof of a valid copyright.”<sup>67</sup>

Where an application for registration is for a work of borderline copyrightability, the Copyright Office has much stronger incentives to grant the registration rather than refuse it; it is official Office policy to grant registrations when there is some doubt that a court would come to same conclusion on copyrightability.<sup>68</sup> As Thomas Field has pointed out, “[r]easons for issuing certificates are rarely available, but refusals must be explained”<sup>69</sup> to comply with the statutory requirements.<sup>70</sup> When the Copyright Office refuses to grant a registration, there is an internal procedure for disappointed applicants to request reconsideration of the decision, and they can also appeal the decision to reject under the Administrative Procedures Act (“APA”).<sup>71</sup> When the Copyright Office *grants* a registration, however, no parties have standing to challenge that decision. This fact, in addition to the presumption of validity and deference afforded to Copyright Office decisions in infringement actions (despite such actions *not* falling under the APA), where the plaintiffs usually have registrations, provide incentives to the Copyright Office to err in favor of granting registration for works when questions of substantive validity are at all uncertain.

*b. The Presumption of Legally-Infused “Facts” in the Registration Certificate*

The presumption that a registered work has copyrightable subject matter has come to be only one part of the “presumption of validity” of copyright in a work, because courts have interpreted the combined presumption of validity and presumption of facts stated in the certificate to cover other legally significant matters. For example, if a person is named as author on the certificate, there is a presumption that that person independently created copyrightable subject matter contained in the work.<sup>72</sup> Moreover,

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67. See *Universal Furniture Int’l, Inc. v. Collezione Europa LLC*, 618 F.3d 417, 428, 430 (4th Cir. 2010) (finding the plaintiff’s design process to have satisfied the low burden for originality by demonstrating “some creative spark”); cf. *Boyd’s Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661–62 (M.D. Pa. 2005) (district court in the Third Circuit giving little deference to letters from an examiner at the Copyright Office explaining the denial of registration of costumes as useful articles).

68. See U.S. COPYRIGHT OFF., COMPENDIUM OF COPYRIGHT PRACTICES § 607 (3rd ed. 2021) [hereinafter “COMPENDIUM (THIRD)”]. See also Marybeth Peters, *The Copyright Office and the Formal Requirements of Registration of Claims to Copyright*, 17 U. DAYTON L. REV. 737, 742 (1992) (“The Copyright Office will register the claim even though there is a reasonable doubt about the ultimate action which might be taken under the same circumstances by an appropriate court’ with respect to whether the material deposited for registration constitutes copyrightable subject matter.” (quoting U.S. COPYRIGHT OFF., COMPENDIUM OF COPYRIGHT PRACTICES § 108.07 (2d ed. 1984))).

69. Thomas Field, *Judicial Review of Copyright Examination*, 44 IDEA 479, 518 (2004).

70. 17 U.S.C. § 410(b) (requiring the Register to “notify the applicant in writing of the reasons” for refusing a registration).

71. 37 C.F.R. § 202.5(c), (g) (2018).

72. See *Wihtol v. Wells*, 231 F.2d 550, 552–53 (7th Cir. 1956) (holding that, although the plaintiff had admitted that he had drawn the melody of his work from an old Russian folk song, the registration certificate gave rise to the presumption that the plaintiff had created a distinguishable and copyrightable variation on that tune); *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523, 531 (D. Neb. 1944) (holding that a registration certificate that included the name of the author was prima facie evidence of the originality of the

if only one person is named as author on the certificate, there is a presumption that no other person can claim to be joint author of that work.<sup>73</sup>

*c. Registrations without Prima Facie Significance—Issued under the “Rule of Doubt”*

The Copyright Office maintains that, because it has the sole power to issue registration certificates that are prima facie evidence of the validity of the copyright and the facts stated therein, it also has the power to issue certificates that do not carry a presumption of validity.<sup>74</sup> It does so primarily when it is unable to examine the deposit copy to determine whether it contains copyrightable subject matter, because the deposit copy is, for example, a computer program in object code that is not human-readable, or because the deposit copy has been redacted to preserve trade secrets.<sup>75</sup>

#### 4. Registrations as a Prerequisite of Filing an Infringement Suit

Since 1909, obtaining a registration has been a prerequisite of filing a copyright infringement suit.<sup>76</sup> While some courts had decided that merely filing an application satisfied the prerequisite, the Supreme Court held in 2019 that filing was not sufficient; the Copyright Office must take final action on the application before an infringement suit can be filed.<sup>77</sup> As a result, the owner of any work that has been registered can sue immediately upon learning of infringement, while owners of unregistered works must first file a registration application and wait until it has been granted or denied. That final action can take months, and although expedited processing is available, the fee for such processing is (as of this writing) \$800 per claim.<sup>78</sup> From the point of view of a potential user of the work, the appearance of a work in copyright registration records means that in case of a dispute about whether the use amounts to infringement, swift legal action is more likely.

The Berne Convention Implementation Act excepted works of foreign origin from the requirement of obtaining final action on a registration application before filing an

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work, since “authorship presumptively connotes originality”), *aff’d*, 157 F. 2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947).

73. See *Jerry Vogel Music Co. v. Forster Music Publisher*, 147 F. 2d 614, 615 (2d Cir. 1945) (affirming the district court’s rejection of a claim of joint authorship and noting that the appearance on the registration certificate of a single name is prima facie evidence of sole authorship).

74. See COMPENDIUM (THIRD), *supra* note 68, at § 607.

75. See *id.* See also, Zvi Rosen, *The Future Was Then: The Recurrent History of AI Authorship*, INDIANA L. REV. (forthcoming 2026) (discussing the history and application of the Rule of Doubt at the Copyright Office).

76. See Copyright Act of 1909 § 12 (“No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.”); Copyright Act of 1976 § 411(a).

77. See *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. 296 (2019).

78. U.S. COPYRIGHT OFF., CIRCULAR 4: COPYRIGHT OFFICE FEES (Nov. 2024), at 4, <https://www.copyright.gov/circs/circ04.pdf> [<https://web.archive.org/web/20251230060107/https://www.copyright.gov/circs/circ04.pdf>].

infringement suit,<sup>79</sup> because the Berne Convention, which the United States joined in 1989, prohibits conditioning copyright protection on formalities.<sup>80</sup> However, the other advantages of registration—the presumptions of validity and of the truth of facts stated in the certificate, and the availability of statutory damages and attorneys' fees—still apply to foreign works, and there are therefore still powerful incentives to register valuable foreign works.

### **5. Registrations as a Prerequisite of Obtaining Statutory Damages and Attorneys' Fees**

If, and only if, a work is registered before infringement commences, or within three months after publication, the copyright owner is eligible for the enhanced remedies of statutory damages and attorneys' fees.<sup>81</sup> This provision was added by the Copyright Act of 1976 as a further incentive to make public records of copyright claims through registration.<sup>82</sup> Statutory damages are important because they provide a monetary recovery even when no actual damages can be proven. Attorneys' fees, though not guaranteed, will often exceed damages. Thus, the appearance of a work in registration records signals the availability of a potentially very large monetary award if a judge or a jury decides that infringement has occurred.

### **6. Registrations as a Prerequisite for Establishing a Recorded Chain of Title**

In many substantial copyright transactions, including sales and secured financing transactions, it is vital that the copyright owner be able to establish a recorded chain of title, showing that every transaction in the chain that leads to that owner's title has been properly recorded in the Copyright Office. That recorded chain of title gives constructive notice to the world of each transaction, and gains protection against other possible transactions involving those works. Under the Copyright Act of 1909, registration was not a prerequisite of the constructive-notice effect of recording a document pertaining to a copyright.<sup>83</sup> The Copyright Act of 1976 made registration of a work such a prerequisite, so that now, no recorded chain of title gives protection against other potential transactions without registration of the work in question.<sup>84</sup>

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79. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 9(b)(1), 102 Stat. 2853, 2859 (1988). Works whose country of origin is the United States continue to be subject to the requirement of registration before filing an infringement suit, since the Berne Convention does not regulate the conduct of its signatories towards their own citizens and domestically incorporated companies.

80. Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sep. 9, 1886, as revised at Paris July 24, 1971, S. Treaty Doc. No. 99-27 (1986) [hereinafter "Berne Convention"].

81. 17 U.S.C. § 412.

82. See H.R. REP. NO. 94-1476, at 158 (1976).

83. See Copyright Act of 1909, § 44.

84. See 17 U.S.C. § 205(c)(2).

## 7. Summary

From the time that recordation of title became registration in 1909, registration has incrementally gained in significance. The presumption of facts stated in the registration certificate, added in 1909, has grown in breadth as more facts have been added to the certificate and as the 1976 Act made explicit a presumption of validity that encompasses such matters as the presence of copyrightable subject matter and of independent creation by the named authors. It has also gained in power as the chance that a registration would be invalidated by inaccuracies has been limited, including by legislation in 2008 and a Supreme Court decision in 2022. The necessity of registering before filing an infringement suit, also created in 1909, hardened in 2019 when the Supreme Court held that filing an application was not sufficient, and only final action by the Copyright Office would suffice. The role of registration as qualifying a copyright owner for the enhanced remedies of statutory damages and attorneys' fees was added in the 1976 Act. The 1976 Act also added the requirement of registration to have a chain of title be protected by the Copyright Act's recording provisions.

As a number of scholars have commented, rights in a work that appears in the copyright registry are now far stronger than those in an unregistered work.<sup>85</sup> John Tehranian has argued that this creates a "cultural hierarchy," privileging the elites who know how to use the registration system over the ordinary people who do not.<sup>86</sup> Miriam Markowitz-Bitton and Emily Michiko Morris argue that both copyright and trademark registration systems create two-tiered rights systems that disadvantage women, minority, and other marginalized creators.<sup>87</sup> This Article is not focused on the problems arising from inequalities between the owners of registered copyrights and those of unregistered copyrights. Rather, our point is that when copyright registrations have so much more relative significance, as they do today, inaccuracies in registrations can do greater damage. An inaccurate registration record that overclaims property rights is much more likely to prevent public use when it shouldn't. Potential users will be concerned about the risk of losing an infringement lawsuit—heightened by the presumptions of validity and of facts stated in the certificate—and scared by the enhanced remedies available if they do lose.

### C. THE CENTRAL PURPOSE OF MODERN COPYRIGHT REGISTRATION: SUPPORTING MARKETS AND USE

The current registration system serves a variety of purposes. For example, requiring substantive examination by the Copyright Office before filing an infringement suit protects potential defendants from meritless suits. It also relieves courts from the burden of meritless litigation, and it gives courts the benefit of the Copyright Office's

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85. See *supra* Section I.B.

86. See generally Tehranian, *supra* note 37 (arguing that the copyright registration system unfairly privileges sophisticated parties).

87. See Miriam Marcowitz-Bitton & Emily Michiko Morris, *The Distributive Effects of IP Registration*, 23 STAN. TECH. L. REV. 306 (2020).

expert opinion on the copyrightability of a work.<sup>88</sup> However, the central purpose of a registration system that provides accurate information to the public, offers a method for clearing title, and grants enhanced remedies for copyright owners who register, is to support markets in and use of works of authorship.<sup>89</sup>

### 1. Providing Accurate Information

Providing accurate information about the existence and scope of copyright in a work, and about its ownership, is essential to supporting markets in and use of works of authorship. The role of registration in providing accurate information has only become more important after the abolition of the copyright notice requirement. When copies of some published works no longer contain a copyright notice, registration steps in to provide information about who the owner of copyright is, as well as who the author of the work is and when the work was published, facts that may be necessary to determine whether the work is still under copyright.

Fulfilling the purpose of providing accurate information requires easy public access to registration records; the better and more complete access of the public to those records, the better the informational purpose is served.<sup>90</sup> In that regard, the Copyright Office has, over time, provided increasing public access to registration and recordation records. It provided public access to its registration books and maintained a public card catalog of registrations from very early on, but those were only available in one place—the Library of Congress—which limited public access.<sup>91</sup> Beginning in 1891, the Copyright Office started publishing books of registration records, first under the title *Catalog of Title Entries*, and then starting in 1906 under the title *Catalog of Copyright Entries*.<sup>92</sup> Those were distributed to selected libraries around the United States, and continued publication in paper form until 1978, and in microfiche until 1982.<sup>93</sup> In 1978, the Copyright Office began keeping registration and recordation records in electronic form, and it started making those available on the internet in 1997.<sup>94</sup> In 2010, the Copyright Office began to digitize pre-1978 records and make them available online.<sup>95</sup>

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88. See, e.g., Nicole Pottinger & Brian L. Frye, *Registration Is Fundamental*, 8 IP THEORY 1, 2 (2018) (“While eligibility for registration is an issue for only a tiny minority of works, the Copyright Office has extensive experience in determining whether works qualify for registration. Courts do not.”).

89. See van Gompel & Massalina, *supra* note 10, at 67–68.

90. Many of the other historical and current purposes of registration do *not* require easy public access to registration records; censorship and oligopoly maintenance do not require public access, and neither do the goals of protecting users from meritless lawsuits or providing courts with expert opinions on copyrightability.

91. See Rosen & Schwinn, *supra* note 27, at 1018–20.

92. *Id.* at 1017, 1020.

93. *Id.* at 1024.

94. *Copyright Office Operations, Accomplishments, and Challenges: Hearing Before the Subcomm. on Courts & Intell. Prop. of the H. Comm. on the Judiciary*, 105th Cong. 5 (1998) (statement of Marybeth Peters, Register of Copyrights).

95. *Historical Public Records Program*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/historic-records/> [<https://web.archive.org/web/20251226192003/https://copyright.gov/historic-records/>] (last visited Jan. 23, 2026).

Thus, many registration records are now available in searchable form online, and that provides pretty good public accessibility, although we will have some suggestions below.

Providing good public access to registration records, however, by no means guarantees that those records cover all available works, nor their accuracy. Since registration has become voluntary, and since copyright has expanded to cover both published and unpublished works, most works under copyright are not registered. There are many incentives to register, but those incentives are not sufficient to induce registration for an uncountable number of works of modest value, and even many works of substantial value. The problem of encouraging registration is an important one, and there are many possible measures that could be taken, but they are not within the scope of this Article.

The accuracy of registration and recordation records, however, is very much the focus of this Article. In Part II, we will consider the incidence of inaccuracies in the copyright registry, and their effects on markets in and use of works of authorship. These include inaccuracies about whether materials that are the subject of the registration contain copyrightable subject matter; inaccuracies about who the owner of copyright is, and who the author of the work is; and inaccuracies about other facts that could affect the existence and term of protection, such as the publication year of a work and its country of origin. In Part III, we will address in detail the mechanisms that address accuracy, and their limitations. In particular, we consider the role and limitations of examination of registration applications; the necessary role of third-party corrections after the registration record has been published; and the barriers to correction that exist in current law and practice.

## 2. Clearing Title

While it is helpful to provide accurate information about the copyrightability, ownership, authorship, and publication of putative works of authorship, those facts are sometimes difficult to ascertain. As a result, the task of facilitating markets in and use of works of authorship cannot be accomplished merely by ensuring that the facts are available in the public record. There should also be processes for resolving open factual questions to the extent possible, thus removing uncertainties and enabling either ownership, assignment, and licensing of works—or the free use of works if they are determined not to be original or are no longer under copyright. Registration can and does serve that purpose as well.

The presumptions of validity and of the truth of facts stated in the registration certificate are part of a set of rules that serve that purpose. Those presumptions are sometimes seen as a benefit granted to encourage people to register claims of copyright, and indeed from the perspective of applicants they may have that effect (and may thereby also serve the purpose of supporting markets and use by increasing

participation in registration).<sup>96</sup> However, those presumptions are hardly unrelated benefits, as, for example, a cash payment to applicants for filing successful applications might be. Rather, the presumptions also help to solidify title, thus enabling transactions. The creation of those presumptions was motivated in part by the experience of those who probably were the owners of copyright in works, but who had lost the documentary evidence to prove that they were; the presumption helped them move forward so long as no contrary evidence surfaced.<sup>97</sup>

### 3. Providing Enhanced Remedies

Those who register their works in a timely manner also get the benefit of the enhanced remedies of statutory damages and attorneys' fees.<sup>98</sup> Like the presumptions of validity and of the truth of the facts stated in the certificate, enhanced remedies could be seen as carrots dangled to induce greater participation in the registration system, which they are. But, like the presumptions, the benefits to the copyright owner are not merely to incentivize registration. Providing the copyright owner with additional remedies is another way of hardening ownership and supporting markets; users are more likely to bargain rather than infringe if their infringement will be treated more harshly.

As we detailed above, these presumptions, conditions, enhanced remedies and other benefits have continued to gain in significance even after their initial creation, making the accuracy, completeness, and reliability of the information contained in copyright registrations even more important than it once was.

## II. INACCURACIES IN COPYRIGHT OFFICE REGISTRATIONS AND THEIR IMPACT ON THE COPYRIGHT SYSTEM

In this Part, we first provide examples of how inaccuracies have remained on the Copyright Office registry even after discovery and adjudication. We then discuss how those inaccuracies negatively impact the copyright system.

### A. INACCURATE COPYRIGHT REGISTRATIONS

The information available in the registry kept by the Copyright Office can be criticized for its lack of comprehensiveness—many copyright owners do not register their works—and for not containing useful information that would serve the aims of facilitating markets, such as up-to-date contact information for owners to allow for ease in licensing. The accuracy of registrations can also be questioned because

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96. See Rosen, *supra* note 31, at 486 (describing the presumption of validity as “the most fundamental benefit of a copyright registration in the United States”).

97. See, e.g., Edward A. Sargoy, *Comment on Study No. 17*, in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDIES 74–75 (Comm. Print 1960) (making the case for copyright registrations conferring prima facie of validity and ownership to limit the plaintiff's burden in litigation).

98. See 17 U.S.C. § 412.

applicants often get away with overclaiming the scope of their rights by failing to disclose the extent to which their works are derived from the public domain or other works. Yet, in addition to these failings, it is arguably even more troubling that the registry contains copyright registrations for works that are unprotectable or that are not owned by the party who appears on the registration. It is impossible to know exactly how many those registrations are on the registry—we cannot independently investigate the copyrightability or true ownership of millions of registrations, which is precisely what gives a registration system its power. However, we can show that even when federal courts have determined that a work is uncopyrightable or the claimed owner of the work is not the true owner, the registration often stays on the registry unaltered. This section provides a number of examples of such registrations.

In *Carol Barnhart Inc. v. Econ. Cover Corp.*, the Second Circuit Court of Appeals determined that mannequins of partial human torsos were utilitarian articles and not copyrightable, despite being registered with the Copyright Office.<sup>99</sup> The copyright registrations for the claimed works VA0000136780 and VA0000136782 still appear as registered works in the online catalog, with nothing to indicate that a federal court deemed the plaintiff's copyright claims invalid.<sup>100</sup>

In the case of *Sensory Path v. Fit and Fun Playscapes*, a jury determined that the defendant's copyright registration for a game was "erroneous and injurious" to the plaintiff. Ordering the defendant to voluntarily seek cancellation of its own registration, the district court stated:

While the authority to cancel a copyright registration resides exclusively with the Copyright Office, the Court "can issue an order directing a party in a copyright infringement lawsuit to request from the Copyright Office that the Office cancel the party's own copyright registration through the voluntary cancellation procedure dictated by the Copyright Office." Here, the Court directs Sensory Path and Holly Clay to voluntarily withdraw Copyright Registration No. VA 2-204-079.<sup>101</sup>

Although the defendant's motion for a new trial was denied and an appeal was dismissed,<sup>102</sup> Copyright Registration No. VA2204079 still appears in the online catalog.<sup>103</sup>

In *Nason Homes LLC v. Singletary Construction LLC*, the court determined that the plaintiff had not owned the copyright by means of assignment when it applied for copyright registration; therefore the court found its registration for an architectural design "The Alder" was invalid so it could not meet its burden of showing

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99. 773 F.2d 411, 418 (2d Cir. 1985).

100. See *Men's Chest*, Registration No. VA0000136780 (U.S. Copyright Office Dec. 7, 1982), [https://publicrecords.copyright.gov/detailed-record/voyager\\_18711076](https://publicrecords.copyright.gov/detailed-record/voyager_18711076); *Women's Chest*, Registration No. VA0000136782 (U.S. Copyright Office Dec. 7, 1982), [https://publicrecords.copyright.gov/detailed-record/voyager\\_18711078](https://publicrecords.copyright.gov/detailed-record/voyager_18711078).

101. No. 3:19-cv-00219-GHD, 2023 WL 2095936, at \*2 (N.D. Miss. Feb. 17, 2023) (citations omitted).

102. Memorandum Opinion at 8, *Sensory Path Inc. v. Fit & Fun Playscapes LLC*, No. 3:19-cv-00219-GHD (N.D. Miss. June 5, 2023) (Dkt. No. 355) (denying motion); Dkt. No. 364 (dismissing appeal).

103. See *The Original Sensory Path*, Registration No. VA0002204079 (U.S. Copyright Office Oct. 10, 2019), [https://publicrecords.copyright.gov/detailed-record/voyager\\_31569565](https://publicrecords.copyright.gov/detailed-record/voyager_31569565).

infringement.<sup>104</sup> The registration for “The Alder,” No. VA0001888774, still appears on the online catalog, though there is a note in the record indicating “C.O. correspondence.”<sup>105</sup>

In the extraordinary case of *Canadian Standards Association v. P.S. Knight Co., Ltd.*, the court granted the plaintiff’s request for declaratory judgment on the invalidity of the defendants’ copyright registration No. TX0008892018 because it was clearly fraudulently obtained.<sup>106</sup> The court ordered the defendants to cancel the registration TX0008892018 with the U.S. Copyright Office.<sup>107</sup> Although the defendants brought a successful appeal on other grounds, they did not appeal the cancellation order, which stood.<sup>108</sup> Nevertheless, the defendants’ registration TX0008892018 remains on the online catalog.<sup>109</sup>

According to *Patry on Copyright*, “If the holder of the certificate fails to request cancellation by the Copyright Office, that party may be held in contempt. (There is no reason to believe the Copyright Office will refuse to honor such a request.)”<sup>110</sup> Whether courts are simply failing to enforce their orders for parties to request cancellation or the Copyright Office is indeed failing to honor the court-ordered requests of copyright owners to cancel their own copyrights, these orders do not appear to be having the desired effect. Moreover, following a cancellation order from a court, the parties may settle in such a way that the adversary will not enforce the cancellation order, provided they have no liability for infringing the invalid copyright. Thus, the registration can remain on the registry, continuing to provide prima facie evidence of the validity of the copyright against third parties unaware of the nature of the legal proceedings and/or settlement.

## B. POTENTIAL HARMS OF INACCURACIES ON THE COPYRIGHT REGISTRY

The previous section sets out just a small set of examples of the kinds of inaccurate copyright registrations that remain on the registry even after litigation has made the legal status of those registrations crystal clear. But can those inaccuracies actually cause harm?

Since copyright is an intellectual property (“IP”) right that arises without the requirement of formalities, and many copyright works are never registered anyway, one might question whether inaccuracies on the registry are really a problem. The validity of copyright in a work and the validity of the copyright registration are separate

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104. *Nason Homes, LLC v. Singletary Constr., LLC*, No. 3:14-CV-1656, 2016 WL 6952257, at \*6 (M.D. Tenn. Jan. 29, 2016).

105. *The Alder*, Registration No. VA0001888774 (U.S. Copyright Office Jan. 23, 2014), [https://publicrecords.copyright.gov/detailed-record/voyager\\_26499424](https://publicrecords.copyright.gov/detailed-record/voyager_26499424).

106. 649 F. Supp. 3d 334, 355 (2023).

107. *Id.* at 356.

108. 112 F.4th 298, 302 n.7 (5th Cir.), *cert. denied*, 145 S. Ct. 1135 (2025).

109. *Canadian Electrical Code, Part One*, Registration No. TX0008892018 (U.S. Copyright Office Sep. 1, 2020), [https://publicrecords.copyright.gov/detailed-record/voyager\\_31755645](https://publicrecords.copyright.gov/detailed-record/voyager_31755645).

110. *An Action to Cancel a Registration*, 5 PATRY ON COPYRIGHT § 17:108 (Sep. 2025 update).

lines of inquiry so one might ask whether the incompleteness and inaccuracy of the registry alone can cause real harm.

In this section, we argue that these inaccuracies *can* harm the copyright system in several ways: by compromising the registration system's goal of facilitating markets, by undermining the trust in the Copyright Office upon which judicial notice, presumptions, and deference are premised, and by providing incentives and opportunities for overclaiming of rights and other rent-seeking behaviors by parties who hold invalid or overbroad registrations.

### 1. Failing to Achieve the Goals of Registration

"A database of obsolete data serves no one."<sup>111</sup>

The first way that the inaccuracies on the registry cause harm is by frustrating the main goal of the registration described above, which is to facilitate markets in, and use of, copyright works. IP registration systems are very costly for governments to maintain; they do so because of their perceived benefits. A good IP registration system can provide the benefits of public notice at the same time as it facilitates transactions in the property rights it records.<sup>112</sup> With effective notice, members of the public can determine whether or not an artifact is protected and act accordingly.<sup>113</sup> Infringement is discouraged and the information costs of licensing decrease, to the benefit of IP owners.

To serve these dual functions of a registration system, Copyright Office registration and recordation information would ideally be both complete and accurate. Unfortunately, they are neither.

The non-mandatory nature of copyright registration means that the registry cannot be comprehensive; members of the public cannot safely rely on the information it provides to conclude that a work is not protected.<sup>114</sup> Additionally, the nature of copyright protection means that the information provided by the registry gives the

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111. Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1422 (2013).

112. See Aaron Perzanowski, *The Limits of Copyright Office Expertise*, 33 BERKELEY TECH. L.J. 733, 737 (2018) (noting the benefits of maintaining a register to allow "the public to reliably determine whether a work is protected in the first place. It also facilitates transactions, making sure creators can be paid for their work.").

113. See Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J.L. ANALYSIS 1, 2 (2013) (discussing the importance of notice since IP "can be difficult to navigate because of the amorphous nature of intangible boundaries, the difficulty in determining whether an intangible resource is already 'owned,' and the complex rights associated with intangibles"); Lionel Bently, *Requiem for Registration? Reflections on the History of the United Kingdom Registered Designs System*, in 1 *PERSPECTIVES ON INTELLECTUAL PROPERTY: THE PREHISTORY AND DEVELOPMENT OF INTELLECTUAL PROPERTY SYSTEMS* 1, 35–36 (Alison Firth ed., 1997) ("A registration system operated as a functional equivalent of possession or title deeds—fixing ownership in and marking boundaries of a particular asset. Registration thus made the whole idea of intangible property much less threatening.").

114. See Sprigman, *supra* note 29, at 500 (discussing the lack of reliability of the information provided by non-mandatory copyright registration, in contrast with real estate title registries).

public little guidance in terms of what they can or cannot legally do with the registered work.<sup>115</sup> The boundaries of the claimed rights are unclear because “the subject matter of copyright is too abstract to be formulated in a representative claim, the law cannot require a copyright claimant to indicate precisely for which elements of a work he claims protection.”<sup>116</sup> The limited information in the registration increases transaction costs, but it can also work to the unfair advantage of some copyright owners. The trust placed on the applicants’ assertions, combined with a strong presumption of validity, can incentivize applicants to overclaim and/or omit information about prior works from which their own work is derived.<sup>117</sup>

The current system of copyright registration in the United States is not achieving the basic goals of providing public notice and lowering transaction costs. Thus, it is failing to achieve the main aim of a modern copyright registration system that we have identified, which is to facilitate markets in, and use of, copyright works. Under these circumstances, it is reasonable to ask whether the benefits of a registration systems are worth the public and private costs of maintaining federal copyright registration when the Copyright Office registry may be falling short of the broader goals of IP registration systems.

## 2. Effects on the Application of the Presumption of Validity

Beyond justifying its cost, one must ask whether the lack of cancellation procedures in the existing registration system at the Copyright Office causes harm. There is evidence to suggest that it does.

The presumption created by registration is inconsistently, and sometimes problematically, applied by the courts.<sup>118</sup> Supporters of the existing system are quick to point out that the owner of a copyright registration must still meet the burden of showing ownership of a valid copyright to prevail in court. Nevertheless, there is the possibility that some courts may give the presumption more weight than is reasonable based on the level of examination at the Copyright Office. To avoid harms arising from inaccurate registration information, all the interested parties—not to mention the

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115. See Tehranian, *supra* note 37, at 1413, 1426–34 (claiming “the entire notion that registration will serve a notice function to potential infringers is vastly exaggerated”).

116. VAN GOMPEL, *supra* note 14, at 37. See also Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 348 (2013) (observing “the issuance of a registered copyright certificate offers little guidance as to the extent of an author’s property rights in the work, or even if the work contains protectable expression at all”).

117. Howard B. Abrams & Tyler T. Ochoa, *The Application for Registration and the Certificate of Registration: Accuracy and Errors*, in THE LAW OF COPYRIGHT § 10:37 (2025) (“Copyrights can be extremely valuable and the registrant-created nature of the certificate of registration together with the evidentiary presumptions and remedial advantages that attach to a certificate resulting from a timely registration . . . provide incentives for claims that may be less than accurate.”); see also *Misuse*, 5 PATRY ON COPYRIGHT § 17:128 (noting that the doctrine of copyright misuse has been applied to registrations that failed to disclose the derivative nature of a work).

118. See 2 NIMMER ON COPYRIGHT § 7.26 (2025) (describing courts’ inconsistent approaches to the presumption of validity of the copyright from the Fourth Circuit’s caution that registrations should not be given too much weight to the Sixth Circuit’s application of *Skidmore* deference).

federal courts—must appreciate the realistic limitations of the presumption of validity conferred by registration.

There are compelling reasons to believe that many copyright owners, internet platforms, members of the public, and even federal courts may *not* understand the limitations of the presumption of validity. The Copyright Office engages in limited substantive examination when granting applications for registration, so it is reasonable to question whether the presumption is wholly justified.<sup>119</sup> The presumption should be easy to rebut, however, that may not always be so.<sup>120</sup> Reliance on copyright registrations as prima facie evidence of validity is particularly troubling with regard to criminal copyright infringement proceedings.<sup>121</sup>

One concern is that the federal courts do not treat the presumption of validity consistently when dealing with essentially legal questions, such as utilitarian functionality and originality. The Court of Appeals for the Second Circuit provided an example of this in *Samara Bros., Inc. v. Wal-Mart Stores, Inc.*<sup>122</sup> While the *Wal-Mart v. Samara Bros.* litigation is best known to legal scholars for reaching the U.S. Supreme Court on the issue of trademark protection for product design trade dress,<sup>123</sup> little attention has been paid to Samara Brothers' successful copyright infringement claims. In addition to federal and state unfair competition claims, Samara Brothers brought copyright claims against Wal-Mart and the other retail defendants based on thirteen federal copyright registrations related to the designs of the garments.<sup>124</sup> After a jury trial, Samara was awarded \$912,856.77 in damages for the copyright infringement alone.<sup>125</sup> The district court rejected Wal-Mart's motion for judgment as a matter of law, which claimed that several of Samara's registered copyrights were facially invalid.<sup>126</sup>

On appeal to the Second Circuit, Wal-Mart argued that Samara's copyright claims based on appliques of strawberries, daisies, hearts, and tulips lacked originality and were therefore unprotectable.<sup>127</sup> The Second Circuit rejected Wal-Mart's arguments on the basis of the prima facie evidence of validity offered by Samara Brothers' copyright

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119. See 18 C.J.S. COPYRIGHTS § 59 (“The Copyright Office need not substantively examine copyright applications to verify the originality of works.”); van Gompel & Massalina, *supra* note 10, at 28 (stating the U.S. process involves determining “whether the legal and formal requirements of the law have been met, including whether a work submitted for registration constitutes copyrightable subject matter”).

120. See, e.g., *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 430 (2010) (“[T]his presumption is fairly easy to rebut because the Copyright Office tends toward cursory issuance of registrations.”); see Rosen, *supra* note 31, at 486 (“This rebuttable presumption of validity is hardly insurmountable for a defendant with a legitimate attack on the copyrightability of the work.”).

121. See Susan M. Richey, *The Troubling Role of Federal Registration in Proving Intellectual Property Crimes*, 50 AM. CRIM. L. REV. 455, 488 (2013) (“A conclusion of validity based solely upon issuance of a copyright registration strains credulity because the process involves virtually no substantive examination of applications.”); Robert Aloysius Hyde, *A Reckless Disregard of the Ordinary Infringer? Moving Toward a Balanced and Uniform Standard for Willful Copyright Infringement*, 35 U. TOL. L. REV. 377, 393–94 (2003).

122. 165 F.3d 120 (2d Cir. 1998).

123. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000).

124. *Samara Bros., Inc. v. Judy-Philippine, Inc.*, 969 F. Supp. 895, 896 (S.D.N.Y. 1997).

125. *Id.*

126. *Samara Bros.*, 165 F.3d at 132.

127. *Id.*

registrations, citing *Folio Impressions, Inc. v. Byer California*.<sup>128</sup> According to the majority, Wal-Mart was required to produce “evidence at trial challenging the validity of the copyright registrations,” and “[s]pecifically . . . evidence to show that the works were not ‘independently created by its author, and not copied from someone else’s work.’”<sup>129</sup>

Judge Newman dissented from the majority on several issues, including the originality of five of the designs which depicted “such common items as strawberries, tulips, daisies, and hearts.”<sup>130</sup> He criticized the majority for focusing on whether the designs at issue had been copied from another’s work instead of directly addressing Wal-Mart’s argument that the designs lacked the degree of minimal creativity required for protection under *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>131</sup> At trial, Wal-Mart had indeed produced evidence to support its assertions that the designs were of commonplace, public domain shapes, presenting “exhibits depicting hearts, flowers, and strawberries in the ordinary shape and design displayed in Samara’s copyrights.”<sup>132</sup> In Judge Newman’s view, “a court could take judicial notice of the fact that the outline of an unadorned heart is sufficiently common to lack minimal originality,” even without the exhibits Wal-Mart presented at trial, but he thought they had provided “ample evidence” of the lack of originality of five of the designs.<sup>133</sup>

The Second Circuit had previously held that “the presumption of validity may be rebutted ‘[w]here other evidence in the record casts doubt on the question,’” which could include “evidence that the work had been copied from the public domain or by evidence that the work was a non-copyrightable utilitarian article.”<sup>134</sup> The Court of Appeals for the Third Circuit has also found the presumption of validity arising from registration to be “of little force . . . where the only issue is the copyrightability of a particular item that is incontestably original.”<sup>135</sup>

While the Copyright Office has established its authority to examine on minimal creativity, and it clearly does not examine on the basis of independent creation, the Supreme Court in *Feist* identified that *both* criteria are constitutionally required for copyright protection.<sup>136</sup> Yet both the presumption of validity arising from registration and the unspecified level of deference given to Copyright Office decisions to grant registrations combine to limit the willingness of some courts to address some legal aspects of validity analysis when brought before them.

The District Court and the Court of Appeals majority in *Samara Bros. v. Wal-Mart* arguably erred by failing to analyze whether or not Samara Brothers’ claimed works

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128. *Id.*; 937 F.2d 759, 763 (2d Cir. 1991).

129. *Samara Bros.*, 165 F.3d at 132.

130. *Id.* at 133.

131. *Id.* at 136 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

132. *Id.* at 136–37.

133. *Id.*

134. *Fonar Corp. v. Domenick*, 105 F.3d 99, 104 (2d Cir. 1997) (citing *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 908 (2d Cir. 1980)).

135. *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 669 n.7 (3d Cir. 1990).

136. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991).

actually did satisfy the minimal creativity requirement.<sup>137</sup> It may be appropriate to give some deference to Copyright Office expertise on the question of minimal creativity, but the Copyright Office's conclusion should not be the final word on the matter, particularly in light of its default policy to grant registration if there is legal doubt.<sup>138</sup> In order to satisfy the constitutional requirement of originality as set forth in *Feist*, there needs to be some way for a defendant to shift the burden back to the plaintiff claiming copyright protection based on a registration. While scholars have differed on the question of whether courts may infer lack of originality based on evidence of plaintiff access to works from the public domains and substantial similarity, such evidence could be used to rebut the presumption of validity.<sup>139</sup>

The inconsistent, and occasionally too weighty, application of the presumption of validity by the courts is one way that inaccurate registrations have the potential to cause harm in the broader copyright ecosystem.

### 3. Judicial Notice of Copyright Office Registration Information and the Online Catalog

Another area where inaccuracies in the Registry may cause harm arises from the fact that courts sometimes take judicial notice of information from the Copyright Office's online catalog.<sup>140</sup> Federal Rule of Evidence 201 allows courts to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."<sup>141</sup> While this is often simply a question of authenticating the copyright registration (which may or may not contain accurate information),<sup>142</sup> there have been other cases where judicial notice was taken of evidence from the Online Catalog to prove copyright ownership.<sup>143</sup>

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137. See, e.g., *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 430 (2010) ("[T]he presumption of validity may be rebutted where other evidence in the record casts doubt on the question, such as 'evidence that the work had been copied from the public domain or by evidence that the work was a non-copyrightable utilitarian article.'" (citing *Fonar Corp.*, 105 F.3d at 104)); but see *Masquerade Novelty*, 912 F.2d at 668–69 (in which the court of appeals gave the registration prima facie presumptive force on the issue of originality).

138. See *supra* Part I.B.3.c.

139. Compare Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1001–03 (1990) (arguing defendants are not entitled to an inference of the non-originality simply by showing the plaintiff had access to the public domain work), with Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 874–75 (1993) (suggesting defendants may rely on circumstantial evidence of plaintiff access to a public domain work and substantial similarity).

140. See, e.g., *Brooks-Ngwenya v. Indianapolis Pub. Schs.*, 564 F.3d 804, 808 (7th Cir. 2009).

141. FED. R. EVID. 201(b)(2).

142. *Kaseberg v. Conaco, LLC*, 360 F. Supp. 3d 1026, 1029 (S.D. Cal. 2018) (taking judicial notice of the plaintiff's printouts from the online catalog); *White v. Alcon Film Fund, LLC*, 52 F. Supp. 3d 1308, 1316 n.9 (N.D. Ga. 2014) (observing that "courts have taken judicial notice of true and correct copies of the Copyright Office's online record of registration"); *Obodai v. YouTube LLC*, 840 F. Supp. 2d 714, 715 (S.D.N.Y. 2011) (taking judicial notice of the plaintiff's online copyright registration record).

143. *Sony Music Ent. v. Cox Commc'ns, Inc.*, No. 1:18-cv-950, 2019 WL 13298888, at \*1 (E.D. Va. Oct. 18, 2019).

Given the trust that the Copyright Office places on the information provided by the applicant during the registration process, and the minimal examination, one would think that the reliability of the information would, to some extent, be dependent on the element of public assertion of the facts contained. If factual information is asserted publicly, its reliability and accuracy could be challenged by members of the public who hold the relevant information and are able to make contradictory claims. When there is no mechanism for interested members of the public to challenge the facts made in a public assertion or to make competing claims, there is little basis to trust the information it contains.

Where courts have acknowledged that “the Copyright Office has neither the facilities nor the authority to rule upon the factual basis of applications for registration or renewal,”<sup>144</sup> it may reasonably seem inappropriate for courts to judicial notice of the facts contained therein. Based on the evidence of inaccuracies described above, courts should more carefully consider whether they can safely rely on the accuracy of information taken from the online catalog without additional confirmation.

#### 4. DMCA Takedowns, Copyright Misuse, and Chilling Effects

Inaccuracies on the registry can also further exacerbate familiar, systemic problems arising from copyright over-enforcement, such as copyright misuse and chilling effects on fair/non-infringing uses of works. Where a copyright registration exists, there is a strong incentive for the party accused of infringement to settle rather than to challenge the plaintiff’s claims to copyright ownership. As discussed above, registration allows for statutory damages awards. Such awards can be extremely high, particularly in the case of digital infringement, because, for example, someone using file-sharing software or training an artificial intelligence model may have copied a very large number of works. Provided it is registered in a timely manner, a work with minimal licensing value can actually be more valuable in litigation than it would have been from legitimate licensing.<sup>145</sup> Given the risk of a significant award, an accused infringer in the digital context may be well-advised to consider settlement, even where the underlying copyright is of questionable validity, rather than face the expense of a trial and an uncertain outcome.<sup>146</sup>

In addition to the threat of statutory damages awards, the fact that the claimant is the owner of a copyright registration can make it appear more meritorious or “official” to an unsophisticated party than it truly is. Courts have suggested that promoting the speedy settlement of infringement claims is a key purpose of having a copyright

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144. *Cadence Indus. Corp. v. Ringer*, 450 F. Supp. 59, 65–66 (S.D.N.Y. 1978).

145. See Michael P. Goodyear, *A Shield or a Solution: Confronting the New Copyright Troll Problem*, 21 TEX. REV. ENT. & SPORTS L. 77, 83–84 (2020).

146. See Ben Depoorter, *Copyright Infringement in the Digital Age: When the Remedy Is the Wrong*, 66 UCLA L. REV. 400, 404, 408 (2019); Orit Fischman Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1, 2 (2011) (discussing the chilling effects of copyright protection due to parties avoiding the use of a work or seeking unnecessary license as a rational, risk-averse behavior).

registration system: “Registration promotes orderly resolution of copyright disputes because it creates a permanent record of the protected work, putting the world on constructive notice of the copyright owner’s claim.”<sup>147</sup> But successful settlements encourage plaintiffs, including those who have invalid copyrights, to continue to assert their rights against other users in future.

Copyright registrations are also powerful tools for copyright owners using the Digital Millennium Copyright Act (“DMCA”) to protect their works.<sup>148</sup> The existence of a copyright registration has significant weight in the back-and-forth of take-down procedures, particularly when used against unsophisticated parties, who may or may not actually be infringing.<sup>149</sup> In markets where individuals and businesses rely on social media platforms as their chief means of reaching their clients, overclaiming based on a copyright registration (for example, claiming rights in individual public domain photographs based on a copyright registration for a compilation of said photographs) can be abused to harm competitors and engage in rent-seeking by means of DMCA take-down procedures.

Moreover, as previously mentioned, applicants for copyright registration may fail to acknowledge prior works from which their own work is derived and overclaim their rights because they have every incentive to do so.<sup>150</sup> Some scholars have recommended sanctioning copyright registrants who overclaim in order “to preserve the integrity of the registration system and avoid improper extensions of copyright into material in which the registrant has no legitimate rights.”<sup>151</sup>

The Supreme Court may have inadvertently increased the incentive for less-scrupulous applicants to overclaim with its holding in *Unicolors*.<sup>152</sup> By protecting copyright holders from losing their registrations due to unintentional mistakes of fact or law, the consequences of “accidental” inaccuracies provided by the applicants themselves are unlikely to be serious—if they are, in fact, ever detected. Even if inaccuracies in the registry are detected, without adequate mechanisms for challenging and correcting inaccurate registrations, the effects of errors can be widespread.

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147. *Salinger v. Random House, Inc.*, 811 F.2d 90, 93 (2d Cir. 1987).

148. See 17 U.S.C. § 512.

149. See Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 177 (2010) (“The threat of secondary liability induces service providers to comply with the DMCA’s notice-and-takedown provisions, making it more difficult for speakers to post material that challenges someone who can potentially make a claim to copyright.”).

150. See Philip Abromats, *Nondisclosure of Preexisting Works in Software Copyright Registrations: Inequitable Conduct in Need of a Remedy*, 32 JURIMETRICS J. 571 (1992); Deepa Varadarajan, *The Uses of IP Misuse*, 68 EMORY L.J. 739, 771, 798 (2019) (describing how courts have identified copyright misuse where threats of litigation have been made on the basis of unprotectable elements of registered copyrights).

151. Abromats, *supra* note 150, at 572.

152. *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, 595 U.S. 178 (2022).

### III. REGISTRATION ERROR AVOIDANCE AND CORRECTION MECHANISMS—AND THEIR LIMITATIONS

We have shown how the copyright registry includes many registrations that are invalid or that contain material errors, even after courts have issued final judgments declaring them invalid or erroneous. We suspect that the registry contains many more invalid or erroneous registrations, and we have shown how the presence of those registrations undermines markets in and use of works of authorship (or of materials that don't actually qualify as works of authorship).

We now focus on *why* the registry includes invalid or erroneous registrations, by considering the current mechanisms in law and Copyright Office practice that avoid error or allow error correction, and by scrutinizing their limitations. We start with pre-issuance error avoidance tools: examination and deterring sanctions. We then continue with post-issuance correction tools: cancellations, registration of adverse claims, and the recording of litigation judgments. Each of these mechanisms turns out to have severe limitations under current law and practice.

#### A. EXAMINATION: MINIMAL CREATIVITY AND DEPOSIT COPY CONSISTENCY, BUT NOT INDEPENDENT CREATION, OWNERSHIP, OR AUTHORSHIP

The Copyright Office examines all registration applications, and when the Copyright Registration Specialists conduct their examination, they have usually both the application and the deposit copy of the work that is the subject of that application in front of them.<sup>153</sup> That means that they can decide whether the work in which copyright is claimed exhibits some minimal creativity, and they can see whether information on the deposit copy, if any, about ownership, authorship, and publication is consistent with facts stated on the application. However, they cannot determine whether the work is in part or in whole an independent creation or whether the claims about ownership and authorship are true.

##### 1. Originality—Examining for Creativity, but not Independent Creation.

The Copyright Act extends protection to “*original* works of authorship.”<sup>154</sup> The Supreme Court has held that “originality,” in that sense, includes two elements: “independent creation plus a modicum of creativity.”<sup>155</sup> Applicants must typically submit a copy of the work in which copyright is claimed.<sup>156</sup> (In limited circumstances, they can submit identifying material rather than a copy, such as a photograph of a sculpture rather than a copy of the sculpture itself, but that too can be examined.)<sup>157</sup> Copyright Registration Specialists in the Copyright Office can therefore examine the

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153. See COMPENDIUM (THIRD), *supra* note 68, at §§ 602.4(a)–(b).

154. 17 U.S.C. § 102(a).

155. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

156. See 17 U.S.C. § 408(b).

157. See 17 U.S.C. § 408(c); 37 C.F.R. § 202.21 (“Deposit of Identifying Material Instead of Copies”).

deposit copy or the substitute to determine whether the work in which copyright is claimed indeed displays a “modicum of creativity.” They can also determine whether the features that display a modicum of creativity are separable from any functional aspects of the work, or ideas presented by the work, that the Copyright Act states in § 102(b) are not protected by copyright. If, in their judgment, the work does not display a modicum of creativity that is separable from functional elements or ideas, they will reject the application.

However, the examination for copyrightable subject matter is subject to a very serious limitation. A work is “original” and hence eligible for copyright protection only if it both displays a “modicum of creativity” and was “independently created.” The creative or expressive elements that make the work eligible for copyright protection must have been chosen *by the claimed author of the work* and not copied from some other preexisting work. The Copyright Registration Specialists cannot effectively examine for independent creation. Unlike patent examiners, they have no databases of prior art—or in this case, prior authorship—to search, and even if they did, they could not conclusively determine whether the features in the work they were examining that were identical to some prior work were in fact copied from that work, rather than being independently created and coincidentally similar. Thus, in practice, the Copyright Office conducts no examination of the “independent creation” element of originality. Someone could copy some or all of a previously-created work, or works, and as long as the result appeared to contain a modicum of creativity, the Copyright Office would issue the registration. In other words, “the Copyright Office is not equipped to gauge the author’s originality versus copying, and will not reject an application, even if a strikingly similar work has been previously registered.”<sup>158</sup>

## **2. Ownership, Authorship, and Publication: Examining for Deposit Copy Consistency, but not for Truth.**

Copyright Registration Specialists also check to see whether the information submitted on the application form, including the name of the claimant (the copyright owner), the name of the author, and the date of publication, are consistent with information on the deposit copy.<sup>159</sup> Consistency is one step in an important potential mechanism for ensuring accuracy of copyright registration records. If published copies of the work make false statements about authorship or ownership, it is far more likely that the true author or owner will become aware of those false claims and will seek to correct them. Thus, checking for consistency can be a valuable part of error correction. However, it will only work if it also easy for the true author or owner to challenge the

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158. *M&D Int’l Corp. v. Chan*, 901 F. Supp. 1502, 1510 (D. Haw. 1995) (quoting *NIMMER ON COPYRIGHT*, § 12.11[B] at 12-170.1 (1994)).

159. See *COMPENDIUM (THIRD)*, *supra* note 68, at § 602.4(b) (explaining that many types of copies, such as published books, will almost always include information about authors, copyright owners, and publication dates. Many other types of copies, such as copies of photographs or other graphic works, often omit that information because there is no requirement to include it. Without it, Copyright Registration Specialists cannot check for consistency, but they will not reject applications for that reason.)

registration. The more difficult that challenge becomes, the less effective any check for consistency is. Thus, we will have to consider below how difficult it is for an author or owner who becomes aware of a false claim on a published copy to object to that claim.

Beyond checking for consistency, however, the Copyright Office does not typically engage in fact checking. As the Compendium of Copyright Office Practices puts it, “[o]rdinarily, the Office does not conduct investigations or make findings of fact to confirm the truth of any statement made in an application, such as whether a work has been published or not.”<sup>160</sup> It states one caveat: “[T]he Office may take administrative notice of facts or matters that are known by the Office or the general public, and may use that knowledge to question an application that appears to contain or be based upon inaccurate or erroneous information.”<sup>161</sup> However, that is likely to happen very rarely, and even when it does, it is not clear that the Copyright Office would reject an application if the applicant denied any falsity when questioned.

## B. DETERRING PENALTIES: NARROW AND WEAKENED OVER TIME

Another mechanism for ensuring that the copyright registry is accurate is the imposition of criminal or civil penalties on applicants for providing inaccurate information on applications and deposited copies. Sufficiently harsh penalties could significantly decrease the incidence of inaccuracies in the registry. However, penalties have always had a scienter requirement that is difficult to meet, and they have been reduced over time.

Criminal sanctions for knowingly making false statements on a registration application have in theory existed since 1909, when Congress created the penalties of forfeiture of copyright protection and a fine of up to a thousand dollars.<sup>162</sup> However, as Jason Mazzone has shown, there have rarely been prosecutions under those provisions,<sup>163</sup> and the 1976 Act narrowed the sanctions, dropping the forfeiture of copyright protection, and limiting the fine to \$2,500—far less than the inflation-adjusted value of \$1,000 in 1909 dollars in 1978, and even less today.<sup>164</sup> Given the scienter requirement, the high burden of proof for criminal conviction, and the exceeding rarity of prosecutions, the prospect of a fine of no more than \$2,500 seems

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160. See COMPENDIUM (THIRD), *supra* note 68, at § 602.4(c).

161. *Id.*

162. See Copyright Act of 1909, § 17; Act of July 30, 1947, ch. 391, 61 Stat. 658, § 18 (1974); 17 U.S.C. § 18.

163. See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1036–1037 n.57 (2006) (stating that § 506(d) and (e) are “all bark and no bite” and noting that in a four-year period from 1999 through 2002, only two prosecutions were brought for violation of § 506(e), and it is not clear that they ended in convictions).

164. See 17 U.S.C. § 506(e). According to the U.S. Bureau of Labor Statistics Inflation Calculator, \$2,500 in January 1978 had the same buying power as \$392 in January 1913 (the first available date for the calculator). Thus, the new maximum fine set in 1978 was about a third of the 1909 Act fine in inflation-adjusted dollars. \$2,500 in January 2023 has the same buying power as \$81.89 in January 1913, which means that the maximum fine today has less than a tenth of the deterrent power of the original 1909 Act maximum. See *CPI Inflation Calculator*, U.S. BUREAU LAB. STATS., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) [[https://web.archive.org/web/20260113152914/https://www.bls.gov/data/inflation\\_calculator.htm](https://web.archive.org/web/20260113152914/https://www.bls.gov/data/inflation_calculator.htm)] (last visited Jan. 13, 2026).

like a very weak guarantee that false statements will not find their way into registration records.

For many years, civil consequences took the form of a common-law “fraud on the Copyright Office” doctrine, under which a registration would be invalidated if the holder of the registration “knowing[ly] fail[ed] to advise the Copyright Office of facts which might have occasioned a rejection of the application.”<sup>165</sup> At the extreme, on one occasion a district court held that a failure to disclose that the work to be registered was derivative of another public domain work rendered the entire copyright in that work unenforceable.<sup>166</sup> However, that order was eventually rescinded,<sup>167</sup> and the more common remedy was invalidation of the registration, which could result in a dismissal of the lawsuit (with a possibility of refileing if and when a new registration could be procured) and in the loss of statutory damages and attorneys’ fees, because any new registration would bear an effective date later than the commencement of the infringement.<sup>168</sup> Pressure from copyright holders to narrow the doctrine eventually bore fruit with the passage of the PRO-IP Act in 2008, which, pertinently for present purposes, added § 411(b) to the Copyright Act.<sup>169</sup> Section 411(b) limits the legal effect of inaccuracies in registration certificates on satisfying the § 411 condition for filing an infringement lawsuit, and on obtaining statutory damages and attorneys’ fees under § 412. It also provides that such inaccuracies will render the certificate ineffective only if:

- (A) the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and
- (B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.<sup>170</sup>

As to the second condition, the statute provides that the court must ask the Register of Copyrights to opine on whether registration would have been refused if the inaccuracy would have been known.<sup>171</sup> The legal effect of inaccuracies was further narrowed in 2022 when the Supreme Court held that registration applicants’ mistakes of law, as well as mistakes of fact, were subject to the limitations of § 411(b).<sup>172</sup> As a

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165. *Russ Berrie & Co. v. Jerry Elsner Co.*, 482 F. Supp. 980 (S.D.N.Y. 1980).

166. *Ashton-Tate Corp. v. Fox Software, Inc.*, 760 F. Supp. 831, 831–832 (C.D. Cal. 1990).

167. *Id.* at 832.

168. See 17 U.S.C. § 412 (providing that statutory damages and attorneys’ fees will be awarded only if the plaintiff registered an unpublished work before the commencement of the infringement, or a published work within three months after publication).

169. See Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 101(a), 122 Stat. 4256, 4257 (Oct. 13, 2008). See also H.R. 897, 103rd Cong., § 5(b) (“Copyright Reform Act of 1993”) (proposing an amendment to § 410 that would add a statement: “Any error or omission made in good faith or upon reasonable reliance on counsel shall not affect the validity of the registration. In no case shall an incorrect statement made in an application for copyright registration invalidate the copyright.”).

170. 17 U.S.C. § 411(b)(1).

171. 17 U.S.C. § 411(b)(2).

172. See *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, 142 S. Ct. 941 (2022).

result of all of these developments, registrations have been held valid even when they mislead the public about the nature and scope of the registrant's claim. Thus, for example, the failure to state that the work being registered is a derivative work has been held on a number of occasions not to invalidate the registration.<sup>173</sup> In one case, which may be an outlier, a registration application that stated that the "Nature of the Work" was a "catalog" and the "Nature of Authorship" was "photographs and text" was held to be sufficient to cover the designs of jewelry depicted in the catalog, because the failure to include the jewelry designs was a "minor mistake."<sup>174</sup>

As a result of the relaxation of legal consequences of inaccurate statements on registration applications, there are fewer incentives to be careful about accuracy, to be careful about using limiting language when the copyright claimed is narrower than can be ascertained from the deposit copy, or to deter applicants from using properly broad language when the claim is unexpectedly broad: for example, covering items depicted in a catalog in addition to the catalog itself. Thus, the threat of sanctions is unlikely to be sufficient to keep the copyright registry reasonably accurate.

### C. CANCELLATIONS AND SUPPLEMENTARY REGISTRATIONS

While copyright registrations can contain many kinds of incorrect information—the address of the claimant might be wrong, for example—we are particularly concerned about two types of core inaccuracies. The first is inaccurate information about ownership and authorship of copyright in a work. (Because the Copyright Act empowers authors to terminate transfers under certain conditions, authorship may indicate future ownership; because the term of copyright in works authored by natural persons is measured by the life of the author, identifying the author is necessary to determine whether the work is still under copyright.) The second is information about whether a work contains copyrightable subject matter. The very existence of a registration implies that it does, but it may not. If ownership or authorship information is incorrect, or if the work does not contain copyrightable subject matter, how can the copyright registry be corrected, either by the Copyright Office, or by a federal court? This section describes Copyright Office cancellation procedures. It also covers federal court precedents on ordering cancellation or supplementation of copyright registrations. Finally, it describes actual Copyright Office practices, based on an empirical study of all Copyright Office Catalog records of cancelled registrations from 1978 through June 2021.

Copyright Office procedures turn out to be very limited. The Office asserts the power to cancel or supplement registrations itself, but it does so rarely and mostly for reasons unrelated to correcting core information about ownership, authorship, or copyrightability. Under leading federal court precedent, a court does not have the power to order the Copyright Office to cancel or correct a copyright registration.

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173. See, e.g., *Donald Frederick Evans & Assocs. v. Continental Homes, Inc.*, 785 F.2d 897, 904 (11th Cir. 1986); *Architects Collective v. Pucciano & English, Inc.*, 247 F. Supp. 3d 1322, 1339–1340 (N.D. Ga. 2017).

174. *Yurman Studio, Inc. v. Castaneda*, 591 F. Supp. 2d 471, 493–494 (S.D.N.Y. 2008).

Courts do have the power to order a claimant to cancel or correct its own registration. However, that power is not well known, is used rarely, and even when it is, is often avoided due to strategic settlements or lack of enforcement. The Copyright Office does cancel registrations from time to time, both on its own initiative and in response to requests from registrants, including court-ordered requests. However, the vast majority of cancellations are not related to validity, ownership, or authorship.

### 1. Cancellation by the Copyright Office: Authority, Procedure, and Review

Under current regulations, the Copyright Office can cancel an issued copyright registration under only three circumstances:

- (1) It is clear that no registration should have been made because the work does not constitute copyrightable subject matter or fails to satisfy the other legal and formal requirements for obtaining copyright;
- (2) Registration may be authorized but the application, deposit material, or fee does not meet the requirements of the law and Copyright Office regulations, and the Office is unable to get the defect corrected;
- or (3) An existing registration in the wrong class is to be replaced by a new registration in the correct class.<sup>175</sup>

The Copyright Office will consider a request from the registrant to cancel the registration, but it will act on that request only if it determines that the registration is invalid.<sup>176</sup> The Copyright Office provides no internal administrative means to challenge a pending application or an existing registration, or even to provide the Copyright Office with information that might lead it to question a registration.

While the Copyright Office “does not invite, and will generally not respond favorably to, requests to cancel a completed registration by a party other than the owner of the copyright,”<sup>177</sup> third parties, or their lawyers, could attempt to inform the Copyright Office of known inaccuracies in existing registrations informally.<sup>178</sup> Even if this does occur—and the evidence on this point is largely anecdotal—allowing “backdoor” notifications in a government agency would be a questionable practice. Since the published guidance from the Copyright Office clearly discourages non-owners of copyright registrations from being involved with the cancellation process, only particular parties or lawyers—those “in the know”—would have access to this informal process. A discretionary approach to *ex parte* communications, where the Register may take notice of information provided by some parties and counsel but not by others, could potentially violate due process rights of copyright owners whose registrations are subsequently cancelled.

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175. 37 C.F.R. § 201.7.

176. COMPENDIUM (THIRD), *supra* note 68, at § 1807.4(E).

177. Cancellation of Completed Registrations, 50 Fed. Reg. 33,065, 33,067 (August 16, 1985); see COMPENDIUM (THIRD), *supra* note 68, at § 1807.4(E).

178. See *An Action to Cancel a Registration*, 5 PATRY ON COPYRIGHT § 17:108 (“On a critical issue—how the Office becomes aware of facts warranting cancellation—the regulation is purposefully vague, although it does permit third parties to submit information about the validity of a registration.”).

In one case of disputed copyright registrations, the defendant's counsel met with representatives of the Copyright Office; the meeting was followed by the Office cancelling the plaintiff's registrations.<sup>179</sup> The plaintiff requested that the Copyright Office reconsider its decision to cancel the registrations; when the Office refused, the plaintiff brought a suit in federal court challenging the Office's administrative action.<sup>180</sup> Shortly after the commencement of the plaintiff's suit, the Copyright Office changed its mind and decided to reinstate the plaintiff's cancelled registrations.<sup>181</sup> The plaintiff sought attorney's fees and costs, arguing the opposing counsel's *ex parte* contacts with an Assistant General Counsel at the Copyright Office "violated Copyright Office regulations insofar as improper legal advice was extended concerning conflicting claims to a copyright" and that the Office lacked the power to cancel the registrations and had acted arbitrarily in failing to conduct examinations of the deposits before cancelling the registrations.<sup>182</sup> The court granted the plaintiff's request for attorney's fees and costs under the Equal Access to Justice Act; it was "struck by the Copyright Office's failure to examine properly the deposits of each of the works before acting to cancel them all," and found that the "[d]efendant's summary treatment of important property rights [fell] clearly outside the bounds of reasonableness."<sup>183</sup> After *Kiddie Rides*, it would be understandable if Copyright Office policy actively avoided cancelling registrations on the basis of private, third-party information due to the potential due process concerns.

Nevertheless, if the Copyright Office becomes aware of facts suggesting a registration is materially inaccurate or should not have been issued, it has a procedure for considering cancellation.<sup>184</sup> It writes to the registrant, explaining what the inaccuracy or grounds for cancellation, and gives the registrant thirty days to respond. If the Office "receives no reply to its correspondence within thirty days of the date the letter is sent, or the response does not resolve the substantive defect, the registration will be cancelled."<sup>185</sup> As the Compendium of Copyright Office practices states, "[t]he Office does not conduct interference or adversarial proceedings. Likewise, the Office does not adjudicate factual or legal disputes involving claims to copyright. If there is a

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179. *Kiddie Rides U.S.A., Inc. v. Curran*, Civ. A. No. 85-1368, 1986 WL 13452, at \*5 (D.D.C. June 23, 1986) (The defendant's counsel brought "the existence of certain registration certificates owned by the plaintiff" to the attention of the Copyright Office, following which, the "Office proceeded to examine the deposits for two of the articles, Helicopter and Goldrake. Based upon this examination, the Copyright Office then cancelled the registrations for all six of the plaintiff's works.")

180. *Id.* at \*1-3.

181. *Id.* at \*3 (stating that "the Copyright Office" had "reconsidered the procedure followed in cancelling [the] registrations and . . . reinstated the registrations.")

182. *Id.* at \*4.

183. *Id.* at \*6.

184. For example, the Copyright Office learned about the AI authorship of *Zarya of the Dawn* from statements made by the ostensible author on social media. Letter from U.S. Copyright Office to Van Lindberg, Attorney at Taylor English Duma LLP (Feb. 21, 2023), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf> [<https://web.archive.org/web/20260120042439/https://www.copyright.gov/docs/zarya-of-the-dawn.pdf>]; see also Rosen, *supra* note 75.

185. 37 C.F.R. § 201.7(c)(4).

dispute between two or more parties, it is the responsibility of each party to pursue their claims in an appropriate court.”<sup>186</sup>

The procedure for fixing errors, updating, and/or amplifying the information in existing copyright registrations through supplementary registration is also very limited.<sup>187</sup> Supplementary registration, which involves filing a form and paying a fee, allows registrants an opportunity to correct certain kinds of errors (e.g., misspellings), update basic data (e.g., contact information), and to clarify the scope of their copyright claims.<sup>188</sup> Only authors, copyright claimants, copyright owners, and their agents can file an application for a supplementary registration, and they are not meant to be used by rival claimants to bring adverse claims.<sup>189</sup> The expense and effort involved in filing supplementary registrations means that copyright owners have little incentive to update or correct the information in their registrations.<sup>190</sup> Supplementary registrations exist alongside the original registration; the original, incorrect registration is not itself cancelled or amended, though, in theory, approved supplementary registrations should be cross-referenced.<sup>191</sup>

All actions of the Copyright Office are subject to the Administrative Procedure Act (“APA”) and the judicial review attendant to the APA,<sup>192</sup> with the Register’s discretion reviewable only under an abuse of discretion standard.<sup>193</sup> Review of the Register’s discretion in the courts has arisen in cases where registration was refused and the refusal subsequently challenged, but it is difficult to see how a non-applicant would have standing to challenge the Register’s discretion *not* to cancel a copyright registration, even in the most extreme circumstances.<sup>194</sup>

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186. COMPENDIUM (THIRD), *supra* note 68, at § 1808.

187. See Rosen, *supra* note 75 (providing the example of Registration No. TX0009315600, supplement to No. TX000923593, which provided additional information about the scope of the generative AI contribution to the work).

188. COMPENDIUM (THIRD), *supra* note 68, at § 1802 (“The basic registration and the supplementary registration coexist with each other in the public record, and the supplementary registration augments—but does not supersede—the information set forth in the basic registration.”).

189. *Id.* at § 1802.7(H).

190. Robert Brauneis, *Transforming Document Recordation at the United States Copyright Office: A Report to the Register of Copyrights* 128 (2014), <https://www.copyright.gov/docs/recordation/recordation-report.pdf>

[<https://web.archive.org/web/20260120043800/https://www.copyright.gov/docs/recordation/recordation-report.pdf>] (finding supplementary registration fees discouraged copyright owners from updating their contact information with the Copyright Office).

191. U.S. COPYRIGHT OFF., CIRCULAR 8: SUPPLEMENTARY REGISTRATION (Mar. 2021), at 1, <https://www.copyright.gov/circs/circ08.pdf>

[<https://web.archive.org/web/20251219123727/https://www.copyright.gov/circs/circ08.pdf>].

192. 17 U.S.C. § 701(e) (“Except as provided by section 706(b) . . . all actions taken by the Register of Copyrights under this title are subject to the provisions of the Administrative Procedure Act.”).

193. 17 U.S.C. § 701; 5 U.S.C. § 706.

194. See Fagundes & Vishnubhakat, *supra* note 13, at 463 (observing that the cancellation process at the Copyright Office completely excludes “third parties who may often have private information that is adverse to the validity of copyright registrations, information that copyright claimants themselves may lack or may have little incentive to discover or disclose.”).

## 2. Cancellation by the Courts

Leading precedent holds that courts have no power to order the Copyright Office to cancel a registration. In *Brownstein v. Lindsay*, the U.S. Court of Appeals for the Third Circuit held that “courts have no authority to cancel copyright registrations because there is no statutory indication whatsoever that courts have such authority.”<sup>195</sup> While federal courts can invalidate underlying copyrights, they cannot force the Copyright Office to take an affirmative action to cancel a copyright registration when it is not a party to the action.<sup>196</sup> According to the Third Circuit, a determination of invalidity “is a determination of *ownership* which does not disturb the registration of a copyright.”<sup>197</sup>

What a court *can* do is order a registrant to request cancellation of their own registration.<sup>198</sup> However, that remedy is not as well-known as it should be, and some courts have even refused to recognize it as a legal remedy.<sup>199</sup> Even when courts do order registrants to request cancellation at the Copyright Office, these orders are often not followed.<sup>200</sup> Neither courts nor successful litigants may understand that a judgment declaring registered works not to be copyrightable or not owned by the registrant does not itself result in cancellation of the registration. Although, in theory, the Copyright Office does get notified of all such judgments (as we will describe below), it does not typically take action to cancel the registration under its § 201.7(c)(4) procedure. Thus, there are many cases in which courts have declared that a registered work does not enjoy copyright protection, or is not owned by the claimant, and yet the invalid or inaccurate registration remains in the copyright registry.<sup>201</sup>

For example, in *Feist Publications Inc. v. Rural Telephone Service Co.*, the Supreme Court concluded that Rural Telephone Service Co. could not protect “the names, towns, and telephone numbers” in its telephone directory because “copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.”<sup>202</sup> Rural held copyright registration TX0001005875 only on the claimed

195. *Brownstein v. Lindsay*, 742 F.3d 55, 75 (3d Cir. 2014).

196. Among its reasons for concluding that it had no authority to order the Copyright Office to cancel a registration, the Third Circuit in *Brownstein* mentioned that it had no authority “to order a legislative branch agency that is not a party to the litigation to take an affirmative action.” *Id.* at 77. This suggests that the *Brownstein* court was of the view that the Copyright Office, in exercising its authority to administer the copyright registration system, is acting as a legislative branch agency. In that respect, the court was almost certainly wrong.

197. *Id.* Other courts have determined that ordering cancellation of a copyright registration would constitute an unlawful advisory opinion. See *PK Studios, Inc. v. R.L.R. Invs., LLC*, No. 2:15-CV-389-FTM-99CM, 2016 WL 4529323, at \*10 (M.D. Fla. Aug. 30, 2016).

198. See, e.g., *Sensory Path Inc. v. Fit & Fun Playscapes LLC*, No. 3:19CV219-GHD-RP, 2023 WL 2095936, at \*2 (N.D. Miss. Feb. 17, 2023); *Chambers v. Green-Stubbs*, No. 1:19-CV-093-GHD-DAS, 2021 WL 107252, at \*5 (N.D. Miss. Jan. 12, 2021).

199. *Sellpoolsuppliesonline.com LLC v. Ugly Pools Ariz.*, No. CV-15-01856-PHX-BSB, 2017 WL6420464, at \*1, \*8 (D. Ariz. 2017) (denying the defendants’ motion for an injunction directing the plaintiff to cancel or amend its registration with the Copyright Office because the court was not persuaded that “filing a motion in the district court [was] the proper procedure to obtain their requested relief”).

200. See *infra* Part III.C.2.

201. See *supra* Part II.B.

202. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

basis of “New Matter: ‘revisions, additions, and deletions.’”<sup>203</sup> The Copyright Office reacted to this important clarification of constitutional standards for copyrightability by establishing a committee to address the impact of the case on its policies and practices.<sup>204</sup> The process resulted in the Copyright Office “no longer registering any claims limited to the white pages of telephone directories; similar works are also rejected.”<sup>205</sup> Notably, the Register of Copyrights did not take steps to cancel the existing registrations of unprotectable telephone directories. Thus, it seems that most pre-1991 registrations for white pages telephone directories still have a presumption of validity in federal court, despite Supreme Court precedent stating that sweat of the brow copyright protection is unconstitutional. This is not ideal.

Even more troublingly, when courts do order the registrant to request cancellation of a registration, it seems that more often than not, the registration *still does not get cancelled*, and remains in the catalog as a valid registration.<sup>206</sup> While that may seem incomprehensible, the truth is that such a court order does not enforce itself. If the registrant does not obey the order, it is the prevailing party that must initiate contempt proceedings, and that party has little incentive to spend additional resources on ensuring that the registration record is corrected. It has prevailed in the litigation, and the registration no longer has any force against it. Correcting the record only benefits the public, non-parties to the litigation, whom the prevailing party has no direct reason to care about. For the same reason, after the prevailing party obtains a court order directing the registrant to request cancellation, it may pursue a settlement under which it agrees not to pursue cancellation of the registration, in exchange for some other concession that benefits it more particularly and directly. At that point, the public loses, because the interests of the prevailing party diverge from those of the public. That reveals a profound weakness of judicial orders directed to a registrant to request cancellation, as compared with judicial orders directed at the Copyright Office to cancel a registration. As a disinterested government office, the Copyright Office is much more likely to routinely comply with such an order. The registrant has an interest in not complying, and the prevailing party has little incentive to expend further resources on ensuring compliance.

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203. *Agra, Kan., . . . et al. telephone directory, 1982-1983*, Registration No. TX0001005875 (U.S. Copyright Office Nov. 9, 1982), [https://publicrecords.copyright.gov/detailed-record/voyager\\_13600061](https://publicrecords.copyright.gov/detailed-record/voyager_13600061). Telephone Company’s registration still appears to be valid and on the registry. *Id.*

204. *See, e.g.*, Peters, *supra* note 68, at 743.

205. *Id.*

206. *See, e.g.*, *Canadian Standards Ass’n v. P.S. Knight Co.*, 112 F.4th 298, 302 n.7 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 1135 (2024) (court ordered the defendant to request cancellation of the registration TX0008892018, which still appears in the Catalog as a valid registration); *Sensory Path Inc. v. Fit & Fun Playscapes LLC*, No. 3:19CV219-GHD-RP, 2023 WL 2095936, at \*2 (N.D. Miss. Feb. 17, 2023) (ordering the defendant to request cancellation of registration VA 2204079, which still appears in the Catalog as a valid registration).

### 3. Cancellation Practice: An Empirical Study.

To get a better sense of cancellation practice over the history of the 1976 Copyright Act, we obtained a dataset consisting of all of the records of copyright registrations that were cancelled between January 1, 1978 and June 16, 2021, which turns out to include 52,008 records.<sup>207</sup> By way of rough comparison, from 1978 through 2021, the Copyright Office issued 23,037,726 registrations.<sup>208</sup> Thus, about one in every 450 registrations, or a little over 0.2% of registrations, were subject to cancellation for some reason. The grounds for those cancellations are memorialized in a “cancellation note” field in the dataset, which as far as we can tell did not employ consistent terminology.<sup>209</sup>

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207. We thank Dr. Brent Lutes, Chief Economist of the U.S. Copyright Office, for providing us with this data (on file with author). The electronic Copyright Office Catalog generally covers only transactions on or after January 1, 1978, the effective date of the Copyright Act of 1976, so that provides us with a starting date. June 16, 2021 is the most recent “latest transaction date” entered in MARC field 005 in this dataset.

208. See U.S. COPYRIGHT OFF., ANNUAL REPORT FY 2021, at 35. The comparison is rough because some of the registrations cancelled between 1978 and 2021 were issued before 1978, and some registrations issued between 1978 and 2021 were or will be no doubt cancelled after 2021.

209. Each cancellation record includes the number of the registration that was canceled; the number of any new registration if the claim was reregistered; the title of the work in which the claim was registered; the date of cancellation (with some complications that we will explain); and a “Cancellation Note” field in which a Copyright Office employee could enter a short note explaining the grounds for the cancellation. As we examined the cancellation notes, we began to construct a list of categories of grounds for cancellation. As far as we know, the Copyright Office did not develop standard phrases to express reasons for cancellation, at least not standard phrases that remained stable over time, although particular examiners may have developed such phrases. Thus, our coding involves some interpretation of the entries in the “Cancellation Note” field. For example, we have grouped as “non-payment” entries such as “Uncollectable check,” “Short fee,” “Registration cancelled—uncollectible funds,” “Registration cancelled—insufficient funds,” “Cancelled—uncollectible,” and so on.

Eventually, we ended up coding for twenty-one different categories of grounds for cancellation, including a category of “other” for grounds that appeared a very small number of times, and a category of “blank or unknown” for those records in which the grounds for cancellation were not explained. Those categories, their corresponding code numbers, and the number of instances of each category in the dataset are presented below in Table 1:<sup>210</sup>

Code Number	Instances in Dataset	Percentage of Total	Grounds for Cancellation
1	18523	35.62%	Non-Payment
2	3391	6.52%	Registered in Wrong Class
3	13375	25.72%	Registered as Published When Unpublished
4	11797	22.68%	Registered as Unpublished When Published
5	539	1.04%	Uncopyrightable; No Registrable Material
6	260	0.50%	Information essential to registration is missing or questionable
7	251	0.48%	Missing or defective deposit
8	170	0.33%	Applicant Requested Withdrawal
9	180	0.35%	Author/Claimant Deceased
10	46	0.09%	Court Order
11	339	0.65%	Duplicate Registration
12	8	0.02%	Not eligible national origin - 104
13	38	0.07%	Wrong registration type (e.g. not eligible for single registration)
14	422	0.81%	Wrong claimant
15	52	0.10%	Wrong author
16	124	0.24%	No transfer statement
17	127	0.24%	Renewal or original registration too late / renewal too early for 1909 Act work
18	72	0.14%	No notice on deposit copy of pre-Berne work
19	414	0.80%	Litigation settlement
20	196	0.38%	Blank or unknown
21	1683	3.24%	Other
TOTAL	52008	100%	

210. The code numbers themselves are essentially random, and reflect, if anything, the order in which we came across the first instance of a cancellation falling into that particular category.

A few things become apparent from the numbers recorded in this table. First, in practice, 90% of cancellations executed by the Copyright Office between 1978 and 2021 concerned wrong publication status (48.40%), nonpayment (35.62%), or wrong category (class) or work (6.52%). Virtually all of the registrations cancelled for wrong publication status or wrong class of work resulted in re-registrations with the publication status or class of work corrected. It is therefore in some sense a consequence of the Copyright Office registration numbering system, which uses different numbers for works in different classes (e.g., VA for Visual Arts, TX for Text), and for published and unpublished works (e.g., VA for a published Visual Arts work, VAu for an unpublished Visual Arts work), that mistakes about publication status and class of work result in cancellations, rather than annotations on registration records, or supplemental registrations, which correct mistakes.

As for the errors that we are most concerned about—errors about copyrightable subject matter, and about the identity of owners and authors—those are the subject of far fewer cancellations, although it is sometimes interesting that there are any at all. There are 539 cancellations, or 1.04% of the total, that issued because the Copyright Office determined, after issuing the registration, that the material at issue lacked copyrightable subject matter. That is a comparatively small number, but it indicates that the Copyright Office does, from time to time, have occasion to reconsider its initial determination that the deposit copy contained copyrightable subject matter. (Determinations by a court that the subject of a copyright registration was not, in fact, copyrightable would be noted as “Court Order” or possibly as “Applicant Requested Withdrawal,” which we will detail below.)

Similarly, there are 422 cancellations in the dataset because the “wrong claimant” (i.e., wrong copyright owner) was named in the registration, and fifty-two cancellations because the wrong author was named. This is unlikely to be because some third party has challenged the registrant’s claim of ownership or authorship, and the Copyright Office has decided to take the challenge seriously and ask the registrant to provide evidence rebutting the challenger. As noted above, the Copyright Office does not conduct adversarial proceedings.<sup>211</sup> Rather, the Office is likely to question ownership or authorship only on the bases of documentary evidence that was or should have been submitted with the registration application, such the deposit copy or a transfer statement.<sup>212</sup> However, because it is very difficult to access Copyright Office correspondence with applicants and registrants, these cancellations just give tantalizing hints of what the Copyright Office might occasionally be doing.

One more note about the records of cancellations in the Copyright Office Catalog: When the Copyright Office cancels a registration, it removes much of the information about the registration from the online Catalog, including the names of the claimed owner and author, and the original effective date of the registration. That removal of information may be based on the reasoning that a cancelled registration should be

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211. See COMPENDIUM (THIRD), *supra* note 68, at § 607.

212. See *id.* at § 1807(D) (providing examples of when the Copyright Office may cancel a registration for substantive defects).

treated as if it never existed, and therefore the ownership and authorship claims, and the effective date are not of any relevance. That, however, makes it more difficult to find a cancelled registration—it can only be found by registration number or the exact title of the work—and it makes it impossible to see if some claimants have a history of obtaining registrations that are later cancelled. The disadvantages of removing such information likely outweigh any advantages.

#### D. REGISTRATION OF ADVERSE CLAIMS

Another device for making the public aware of a potential problem with a registration is to file an application for a second registration regarding the same work, making a claim adverse to an existing registration. In fact, for someone who believes they own a work of authorship instead of the owner who appears on the registration, this is their *only* direct course of action because they cannot bring suit in federal court until they have, or have been denied, a registration.<sup>213</sup> Of course, if the problem is that the work contains no copyrightable subject matter, this technique will not work; you can't file a competing registration application asserting that a work is not copyrightable. By contrast, if the problem is that ownership or authorship of a work is contested, then registering an adverse claim may help. However, under current Office practices, the adverse claim may be more or less visible in the registry, and some of the legal effects of filing an adverse claim are not completely settled.<sup>214</sup>

The Compendium of Copyright Office Practices guidance about filing adverse claims leaves much to the discretion of the Copyright Office and does not ensure that the adverse claim will be easy to find or recognizable as such. "If an applicant intends to assert an adverse claim," the Compendium recommends that "the applicant should provide a brief statement in the Note to Copyright Office field or in a cover letter indicating that the exact same work has been registered by another party."<sup>215</sup> However, the resulting action by the Copyright Office is far from ideal. The Compendium states that "[t]he registration specialist *may* add a note to the certificate of registration and the public record indicating the presence of correspondence in the file or *may* add a note clarifying that the applicant has asserted an adverse claim."<sup>216</sup>

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213. See *Techniques, Inc. v. Rohn*, 592 F. Supp. 1195, 1197–98 (S.D.N.Y. 1984) ("There appears to be no provision . . . for a plaintiff not owning a Registration for the work at issue in an infringement action to challenge the validity of a Registration owned by a defendant. Indeed, it appears that the only remedy for the non-registrant is to apply for registration and if the application is denied, the applicant may seek a writ of mandamus against the Register of Copyrights.").

214. See Raymond J. Dowd, *Registering Competing Claims*, in *COPYRIGHT LITIGATION HANDBOOK* § 4:17 (2d ed. 2025) (noting that when the Copyright Office becomes aware of two claims to register the same work it "will examine each application to determine if the statutory and regulatory requirements have been met. The sequence that each application is received in the Copyright Office is irrelevant to this determination, and the Copyright Office will not conduct opposition or interference proceedings to determine whether one application should be given priority over the other.").

215. *COMPENDIUM (THIRD)*, *supra* note 68, at § 1808.

216. *Id.*

The discretion left by “may” does not inspire confidence. Even if the registration specialist always did make one of those two notes, they would provide an incomplete solution. A note merely stating that there is correspondence in the file is quite unhelpful, since the correspondence could be about a wide variety of matters, and it is expensive to retrieve the correspondence. A note that the applicant has asserted an adverse claim is a little more helpful, but that note is placed only on the registration for the adverse claim, and it does not provide a cross-reference to the *first* registration. The Office specifically states that it will not provide any cross-reference between the first registration or the public record created for that registration and the adverse registration or its public record.<sup>217</sup> Because two different works can share the same title, without any cross-reference between registration numbers, there is no way of confirming an adverse relationship between registrations without examining deposit copies, which can be difficult and expensive.

It is also unhelpful that the legal effects of filing an adverse claim are not settled. First, there is the issue of whether filing an adverse claim erases the presumption that the facts stated in the first claim are true, as to those facts that are disputed in the adverse claim. Courts tend to dance around this issue: “Where, as here, copyright registrations are used offensively and defensively by both parties for the same subject matter, ‘it might be argued that the plaintiff’s and defendant’s certificates cancel each other out with respect to either party’s right to claim a *prima facie* presumption as to originality.’ . . . In such cases, the viability of this presumption must come under close scrutiny.”<sup>218</sup> That leaves parties uncertain about what a court would do in any particular case.

Second, courts have held that actual knowledge of a claim of ownership stated in an issued registration starts a three-year statute of limitation clock running, after which an adverse claim of ownership is barred.<sup>219</sup> It is not clear whether the filing of an adverse registration application would stop the running of the clock, or whether a claimant would have to file a lawsuit within that period. Since filing a lawsuit is considerably more expensive than filing a registration application, and since the lawsuit would eventually result in clearing title in the work while the issuance of an adverse registration clouds title, the uncertainty here is important.

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217. See *id.* Those who file adverse registrations sometimes provide their own cross-reference by including the number of the registration against which they are making an adverse claim into another field in the registration application, such as “Basis for Claim.” See, e.g., *World of Taledaria*, Registration No. TXU002254794 (U.S. Copyright Office Oct. 23, 2020), [https://publicrecords.copyright.gov/detailed-record/voyager\\_32563853](https://publicrecords.copyright.gov/detailed-record/voyager_32563853) (“Basis of Claim” field states in part: “I’m filling out this standard copyright form in accordance to my lawyer in response to a false/theft form, registration # TXu002204671 published on June 21, 2020 by an ex partner of mine who copyrighted my IP to himself without my permission or knowledge.”). That is a creative misuse of the field that applicants should not have to make, and that most applicants would not know to make.

218. *M & D Int’l Corp. v. Chan*, 901 F. Supp. 1502, 1510 (D. Haw. 1995) (quoting NIMMER ON COPYRIGHT § 12.11[B] n.49).

219. See, e.g., *Wilson v. Dynatone Publ’g Co.*, 908 F.3d 843, 844 (2d Cir. 2018); Rachel Weiss, *I’m Bringing Notice Back: Registration Alone Is Not Enough to Prompt Accrual of a Copyright Claim*, 61 B.C. L. REV. E. SUPP. II. 50 (2020). The First Circuit has held that no actual knowledge of the copyright registration is needed to start the limitations period running, an even more extreme interpretation of the effect of registration. See *Saenger Org., Inc. v. Nationwide Ins. Licensing Assocs.*, 119 F.3d 55, 66 (1st Cir. 1997).

### E. SECTION 508 NOTIFICATIONS

The courts' lack of power to order the Copyright Office to cancel registrations, and the apparent disconnect between court orders to claimants to request cancellations and any actual cancellations of registration, would have less impact if § 508 of the Copyright Act were effectively implemented. That section requires courts to provide copyright litigation information to the Copyright Office and requires the Copyright Office to make that information available to the public.<sup>220</sup> Under effective implementation of § 508, judicial declarations of the invalidity, ownership, or authorship of a copyright would become part of the registration record, and collateral estoppel could be used to prevent parties who were the subject of adverse judgments from relitigating those issues.<sup>221</sup> While a copyright registration might remain in the Copyright Office Catalog, its accompaniment with a notice that the copyright had been ruled invalid would leave the registration hollow. Unfortunately, the Copyright Office stopped performing its § 508 duties decades ago.

The Patent and Trademark Office regularly receives patent and trademark litigation notices; it includes them in the online records for the patents and trademarks to which they pertain. The Copyright Office, however, does *not* make information about copyright litigation related to registered works publicly available in its online Catalog.<sup>222</sup> Section 508 requires courts to notify the Copyright Office of any copyright litigation filed and judgment rendered, and it requires the Copyright Office to make those notifications public records. It was inspired by § 290 of the Patent Act, a provision added by the Patent Act of 1952 that requires courts to notify the U.S. Patent and Trademark Office ("USPTO") of patent litigation, and requires the USPTO to make those notifications public.<sup>223</sup> Section 508 was intended "establish a method for

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220. 17 U.S.C. § 508.

221. *See, e.g.,* Whimsicality, Inc. v. Battat, 27 F. Supp. 2d 456, 463 (S.D.N.Y. 1998) (holding that collateral estoppel prevents plaintiff from asserting copyright in costumes that had been determined not to be copyrightable in another case it had litigated); Pannonia Farms, Inc. v. Re/Max Int'l, Inc., 407 F. Supp. 2d 41, 44–45 (D.D.C. 2005) (holding that collateral estoppel prevented plaintiff from enforcing copyrights that it previously had been determined not to have standing to enforce).

222. With the exception of some notices received between 1978 and 1980, as described below. *See infra* notes 229–33 and accompanying text.

223. *See* COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 140 (Comm. Print 1965) ("Section 508 of the bill. . . is to some extent patterned after a similar provision in the patent law 35 U.S.C. § 290 . . . ."). For the enactment of § 290, see Patent Act of 1952, Pub. L. No. 82-593, § 290, 66 Stat. 792, 814 (1952). The USPTO publishes the notifications in the *Official Patent Gazette* on a weekly basis, and it endeavors to add the notifications to the online record for each patent—what used to be informally called the "online file wrapper," and is now called the "Patent Center." The USPTO record on inclusion of notifications of actions and judgments in the Patent Center and its predecessor is far from perfect. A 2013 study found that only 65% of online file wrappers that were supposed to have notifications of actions or judgments actually had them, and it also noted that many patents did not have online file wrappers at all. *See* Robin Feldman, Tom Ewing & Sara Jeruss, *The AIA 500 Expanded: The Effects of Patent Monetization Entities*, 17 U.C.L.A. J.L. & TECH. 1, 64–66 (2013). However, the USPTO's record of entering about two-thirds of litigation notifications into online file wrappers is far better than the Copyright Office's record entering § 508 notifications into the Copyright Office Catalog, as we will see below.

notifying the Copyright Office and the public of the filing and disposition of copyright cases.”<sup>224</sup>

If § 508 were implemented in a way that informed the public—and, most importantly, anyone threatened with enforcement—of litigation related to registered copyright works, searchable by name and/or registration number, it would help minimize the potential harm of invalid copyrights remaining on the registry. In theory, the Copyright Office would keep records of copyright litigation claims similar to the way that court actions affecting land titles are recorded at registries of deeds. Unfortunately, § 508, as currently implemented, does not provide this valuable information to the public.<sup>225</sup>

Section 508(a) requires courts to notify the Copyright Office of any lawsuit filed under the Copyright Act, and to include information about the title and registration number of any work at issue in the lawsuit.<sup>226</sup> Section 508(b) requires courts to provide the Copyright Office with a copy of any final judgment and accompanying opinion rendered in any such lawsuit.<sup>227</sup> Most importantly for present purposes, § 508(c) requires the Copyright Office to make the notifications it receives under §§ 508(a) and (b) “a part of the public records of the Copyright Office.”<sup>228</sup> If § 508 were well implemented, anyone who did an online search of the Copyright Office records by the title or registration number of a work would learn whether the work had been the subject of litigation. They would also find any judgment holding that the registered claimant of the work was not the real owner, or that copyright in the work was invalid. Such a judgment, once it became final and no longer subject to appeal, would provide the legal equivalent of a cancellation of the registration.

Section 508, however, has not been well implemented. It was enacted as part of the Copyright Act of 1976, which became effective on January 1, 1978.<sup>229</sup> For almost three years after that date, the Copyright Office did implement § 508(c), by recording each notification under §§ 508(a) and (b) as a “document pertaining to a copyright,” just as parties to a copyright assignment can record the assignment document.<sup>230</sup> Each recorded notification was entered into the Copyright Office Catalog, and those records are now searchable online. Hard copies of the § 508 notifications were apparently kept at the Copyright Office until 2007. According to information provided by the Copyright Office in compliance with the Privacy Act of 1974,<sup>231</sup> and published in 1980, “copies of notifications of the filing of actions under sections 411 and 508 . . . and copies of final orders, judgments, and written opinions are microfilmed, but the original copies are permanently retained in the historical litigation file of the Copyright Office

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224. H.R. Rep. No. 94-1476, at 164 (1976).

225. *Id.* at 124–26.

226. *See* 17 U.S.C. § 508(a).

227. *See* 17 U.S.C. § 508(b).

228. 17 U.S.C. § 508(c).

229. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 508, 90 Stat. 2541, 2586–87 (Oct. 19, 1976).

230. 17 U.S.C. § 205 (“Any transfer of copyright ownership or other document pertaining to copyright may be recorded in the Copyright Office . . .”).

231. 5 USC § 552a (as amended).

Library.”<sup>232</sup> The original copies are no longer permanently retained, however, because the Copyright Office received the consent of the National Archives and Records Administration in 2007 to destroy all § 508 notifications three years after receipt.<sup>233</sup>

In total, a little over three thousand § 508 notification entries can be found in the online Catalog.<sup>234</sup> For example, on February 20, 1980, the Copyright Office received a § 508 notification from the U.S. District Court for the Southern District of New York, stating that it had reached a final judgment in the case of *Russ Berrie & Co. v. Jerry Elsner & Co.*,<sup>235</sup> and attaching a copy of the judgment. In that case, the court held that Russ Berrie & Co.’s copyright registration for a stuffed toy gorilla was invalid, because Russ Berrie & Co. had not disclosed to the Copyright Office that the toy gorilla was based on a public domain toy gorilla and possibly contained no copyrightable variations.<sup>236</sup> If one searches the online Catalog, Copyright Registration VA 25-275 is still included; the registration data describes a visual work titled “Beware, Gongga loves you: no. 595,” noted to be a “whimsical smiling gorilla.”<sup>237</sup> The only indication in the registration data that may lead to the previous litigation is a further note stating, “C.O. correspondence.”<sup>238</sup> If one searches the § 508 notifications, however, the Copyright Office recorded the § 508 notification of *Russ Berrie & Co.* as document V1775P487, and attached the judgment. The Copyright Office Catalog entry for that recorded document notes that the judgment concerns Copyright Registration VA 25-275,

232. OFFICE OF THE FED. REG., PRIVACY ACT ISSUANCES: 1980 COMPILATION, vol. IV, Systems of Records, Agency Rules (1980).

233. See Brauneis, *supra* note 190 at 125–26.

234. From examining a number of the Copyright Office Catalog entries for § 508 notifications, it appears that the Copyright Office practice was to include in each such entry a note that it was a recordation of a “508” document. We performed an “Advanced Search” of the Public Records System, for which we chose “Recordation” as the record type; “Notes” as the Field Heading; “As a Phrase” as the Search Type; “508” as the text to search; and “Court action” as the Recordation Document Type under Recordation Filters. (To perform such a search, see *Advanced Search*, U.S. COPYRIGHT OFF. PUBLIC RECORDS SYSTEM, <https://publicrecords.copyright.gov/advanced-search>.) That search returns 3,017 documents. The Copyright Office’s Annual Report for fiscal 1979 noted that it had processed for recordation 1,871 § 508 notifications. U.S. COPYRIGHT OFF., 82ND ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS (Libr. of Congress 1980), <https://www.copyright.gov/reports/annual/archive/ar-1979.pdf> [<https://web.archive.org/web/20250911030530/https://www.copyright.gov/reports/annual/archive/ar-1979.pdf>]. There is no mention of § 508 notifications in the Copyright Office’s fiscal 1978 or fiscal 1980 reports. See LIBRARY OF CONGRESS, ANNUAL REPORT OF THE LIBRARIAN OF CONGRESS FOR FY 1978 (Libr. of Congress 1979), <https://www.copyright.gov/reports/annual/archive/ar-1978.pdf> [<https://web.archive.org/web/20260124180208/https://www.copyright.gov/reports/annual/archive/ar-1978.pdf>]; U.S. COPYRIGHT OFF., 83RD ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS (Libr. of Congress 1981), <https://www.copyright.gov/reports/annual/archive/ar-1980.pdf> [<https://web.archive.org/web/20260124175655/https://www.copyright.gov/reports/annual/archive/ar-1980.pdf>].

235. *Russ Berrie & Co. v. Jerry Elsner Co.*, 482 F. Supp. 980 (S.D.N.Y. 1980).

236. See *id.* at 987–88 (“The knowing failure to advise the Copyright Office of facts which might have occasioned a rejection of the application constitute reason for holding the registration invalid and thus incapable of supporting an infringement action.”).

237. *Beware, Gongga loves you: no. 595*, Registration No. VA0000025275 (U.S. Copyright Office Feb. 5, 1979), [https://publicrecords.copyright.gov/detailed-record/voyager\\_18599605](https://publicrecords.copyright.gov/detailed-record/voyager_18599605).

238. *Id.*

“Stuffed Gorilla,” and a search for recorded documents mentioning that registration will return document V1775P487, among others. Anyone who wanted to learn the status of Russ Berrie & Co.’s copyright registration for the stuffed gorilla could find important information through that recorded § 508 notification, though the searcher would need to take care to look beyond the registration record alone.

However, for reasons that are unknown to us, but which probably have to do with limited resources, the Copyright Office stopped recording § 508 notifications in May 1980.<sup>239</sup> The final report of the co-chairs of the Advisory Committee on Copyright Registration and Deposit (“ACCORD”), issued in 1993, contains only a brief mention of § 508.<sup>240</sup> In their transmittal letter, the co-chairs state that § 508 “has been a failure,” and they recommend that the burden of recording litigation documents “be placed on the parties themselves.”<sup>241</sup> It seems likely that § 508 had been a failure because the Copyright Office stopped implementing § 508(c), and perhaps also because not all courts provided the required notifications under §§ 508(a) and (b).<sup>242</sup>

While information on federal district court proceedings in copyright cases may be found in other online legal databases beyond the Copyright Office, they have limited utility when searching for litigation records related to specific copyright works. A 2014 Report prepared for the Copyright Office by one of the authors of this article explained that existing digitized online resources, such as PACER, Lexis, and Westlaw and Bloomberg were ineffective substitutes for the public notice required by § 508 because they did not allow for the user to obtain reliable search results using the title or registration number of a copyright work and/or they did not provide the full record of pleadings.<sup>243</sup> An examination of the records of registrations that have been cancelled due to court orders reinforces that point. Performing Westlaw and Lexis searches for the titles and registration numbers of works that are the subjects of cancelled registrations often results in finding no opinions at all and often results in finding opinions that mention the works, but concern matters other than the validity of the registration. For the forty-six records of cancelled registrations which stated that they were cancelled due to court order, we were able to find only two opinions, concerning in total ten of those registrations, that actually addressed the copyrightability of the works.<sup>244</sup> Neither of those opinions contained an order regarding cancellation. Thus,

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239. The last three § 508 notifications were recorded on May 6, 1980. See Recorded Documents V1786P058 (available at [https://publicrecords.copyright.gov/detailed-record/voyager\\_180206](https://publicrecords.copyright.gov/detailed-record/voyager_180206)), V1786P060 ([https://publicrecords.copyright.gov/detailed-record/voyager\\_180213](https://publicrecords.copyright.gov/detailed-record/voyager_180213)), and V1786P062 ([https://publicrecords.copyright.gov/detailed-record/voyager\\_180214](https://publicrecords.copyright.gov/detailed-record/voyager_180214)).

240. See LIBRARY OF CONGRESS ADVISORY COMM. ON COPYRIGHT REGISTRATION & DEPOSIT, ACCORD (Report of Co-Chairs Robert Wedgeworth & Barbara Ringer, Comm. Print 1993), <https://www.copyright.gov/1201/accord/accord.pdf> [<https://web.archive.org/web/20250903145653/https://www.copyright.gov/1201/accord/accord.pdf>].

241. *Id.*

242. See NIMMER ON COPYRIGHT § 32.09 (2025) (stating that the requirement to file the Copyright Office’s § 508 form “is often honored in the breach.”).

243. Brauneis, *supra* note 190.

244. See *M&D Int’l Corp. v. Chan*, 901 F. Supp. 1502, 1510 (D. Haw. 1995); *R. Ready Prods., Inc. v. Cantrell*, 85 F. Supp. 2d 672, 685, 691 (S.D. Tex. 2000).

the final judgments that the courts send the Copyright Office under § 508 are typically not the opinions that make it into electronic legal databases, and recording the § 508 documents would provide important additional information about registered works.

Despite the evidence that other legal databases fail to serve the aims of § 508(c), their existence has regularly been cited as a reason for eliminating the Copyright Office's responsibilities under § 508. For example, in 2015, the Register's Report to the House Judiciary Committee proposed technical amendments to § 508 as follows:

This section should be eliminated because the paper-based Section 508 filing system has become obsolete in an era of electronic court information resources such as PACER, Lexis, and Westlaw. There is no efficient way to search the voluminous paper Section 508 filings and, perhaps not surprisingly, in recent years there has been virtually no demand to access them. In sum, the administrative costs to the courts of preparing and sending these notices, and the costs to the Office of receiving and maintaining these records, far outweigh any usefulness to the public.<sup>245</sup>

This statement is somewhat disingenuous because the § 508 notifications need not have been entirely paper-based; the 1978–1980 records have been digitized and are now searchable online by members of the public. If the Copyright Office had continued to record § 508 notifications after 1980, those records would likely also have been digitized and made available in the current online Catalog.

Congress never amended § 508 to implement the 1993 ACCORD committee's recommendations, nor did it adopt the Register's 2015 proposal to eliminate the section, and that section remains law exactly as it was originally enacted. Unfortunately, PACER, Lexis, and Westlaw still do not provide adequate public access to the information about copyright litigation that § 508 require courts and the Copyright Office to make available to the public. Moreover, as subscription services, the information in these databases is limited to individuals and organizations willing to pay for access.

## F. CONCLUSION

This Part has reviewed the mechanisms that are available for preventing false claims of, and inaccurate statements about, copyright works from ever reaching the copyright registry, and for correcting those false claims and inaccurate statements when they do mistakenly become part of registration records. It has demonstrated the severe limitations of the current mechanisms. Examination only covers one of the two elements of originality and does not extend to the substance of ownership and authorship claims. Deterrent sanctions are weak and have only become weaker over

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245. *The Register's Perspective on Copyright Review: Hearing on Copyright Review Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (Statement of Maria A. Pallante, U.S. Register of Copyrights & Director of the U.S. Copyright Office), <https://www.copyright.gov/laws/testimonies/042915-testimony-pallante.pdf> [<https://web.archive.org/web/20260124183200/https://www.copyright.gov/laws/testimonies/042915-testimony-pallante.pdf>].

time. The Copyright Office has no administrative procedure for third parties to challenge registrations, and no formal procedure for third parties even to provide information that might throw the validity of a registration into doubt. Courts do not have the power to order the Copyright Office to cancel registrations, and their power to order registrants to request cancellations is rarely used and even more rarely actually results in cancellations. Registration of adverse claims is possible, but there are no cross-references between two registrations that are adverse to each other, and the legal effect of an adverse registration is uncertain. The Copyright Office had for decades ignored its statutory mandate to provide the public with notice of lawsuits and final judgments concerning registered works. The result of all these limitations is a registry is much more likely to contain false claims and inaccurate statements than it should.

#### IV. FIXING THE CANCELLATION PROBLEM

It falls under the duties of the Register of Copyrights to “ensure that records of deposits, registrations, recordations, and other actions taken under this title are maintained, and that indexes of such records are prepared” and that those records and indexes are available for public inspection.<sup>246</sup> The term “maintained” implies that part of the role of the Copyright Office involves ensuring the completeness and accuracy of the records the Office keeps. This Article has demonstrated how and why the current system of registration is allowing inaccurate information and invalid copyright registrations to remain on the registry—in part, due to the lack of any meaningful cancellation process to allow for the record to be corrected.

In this section, we propose changes that the Copyright Office could make, some of which would not require rulemaking. We then consider changes that fall within existing statutory rulemaking powers of the Office, in the context of the Copyright Office’s constitutional status as part of an executive agency. Finally, we propose changes that would require new legislation, such as amending the Copyright Act to allow for cancellation proceedings to be brought by third parties in federal courts and directly granting courts the power to invalidate copyright registrations.

##### A. SECTION 508 IMPLEMENTATION AND PROCEDURAL SOLUTIONS

###### 1. Section 508 Implementation

We have already shown how the courts’ lack of power to order the Copyright Office to cancel registrations, and the infrequent use of the cancellation process by the Office itself, would have less impact if the Office were more diligent in implement § 508 of the Copyright Act in a way that would fulfill its aims of providing public access to copyright litigation information in conjunction with the registration information it keeps.

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246. 17 USC § 705.

We recommend that the Copyright Office makes better use of the information it receives from § 508 notifications by: 1) making the information publicly available, and 2) reviewing the information from the notifications and taking action by means of the Office's existing cancellation procedures where appropriate.

In 2020, the Copyright Office started requiring courts to file § 508 notifications electronically, rather than in paper form, as it had been requiring since 1978.<sup>247</sup> The notifications are now to be provided by filling in a fillable PDF document form, and filed by sending the completed PDF document as an email attachment.<sup>248</sup> That is certainly not the most efficient technology possible. If it had the resources, the Copyright Office could build a system that would allow courts to enter information about litigation through an online form directly into a database that could—perhaps after review—add records into the Copyright Office Catalog. However, even under the PDF email attachment system, the Office could also create an automated process to extract information from the submitted PDFs and transfer that information into the Copyright Office Catalog after review.

In its 2020 announcement of the electronic § 508 notification submission system, the Copyright Office notes that “[r]eceiving the section 508 notices electronically will also make it easier for the Office to make those forms available for public inspection electronically.”<sup>249</sup> That is true. So far, however, the Office has not actually made those forms available to the public, and neither has it created entries for those forms in the Copyright Office Catalog, so that anyone who had the title or registration number of a work could see whether it had been the subject of litigation. Since the Copyright Office “receives thousands of section 508 notices each year,”<sup>250</sup> adding them to the Copyright Office Catalog as recorded documents would substantially increase the information available to the public about many registered works. We recommend it to do so. The record would be incomplete, due to the destruction of older notifications, but it would improve upon the current system.

While simply implementing § 508 by making the notices provided by the courts available in the online Catalog would meet the Copyright Office's statutory obligations, and make far more effective use of the information in § 508 notices, there remains some concern that not all courts are as diligent in their reporting to the Copyright Office as might be hoped.<sup>251</sup> If so, the records still might not be sufficiently comprehensive and reliable to minimize the harm created by invalid copyrights remaining on the registry. The ACCORD recommendation to place the burden of reporting on the parties themselves might be a viable alternative if § 508 were amended to a) remove the explicit burden on court clerks and shift it to the parties and b) create legal consequences for the parties if they do not report court determinations to the Copyright Office. Moreover, if the lawsuit's parties were responsible for recording notifications, they

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247. See U.S. Copyright Office, Library of Congress, Email Rule for Statutory Litigation Notices, 85 Fed. Reg. 10603 (Feb. 25, 2020).

248. See *id.*

249. *Id.* at 10604.

250. *Id.*

251. Brauneis, *supra* note 190, at 126.

presumably would have to pay normal recording fees, which would provide funds to the Copyright Office to accomplish the recordation.

We also recommend that the Copyright Office adopt a policy of substantive review of incoming § 508 notices to see if they contain information that would suggest an existing registration is materially inaccurate or should not have been issued. If a § 508 notice contains facts and/or holdings that suggests the current registration information may need correction, the Office can investigate and, if necessary, use its existing procedure to pursue cancellation of the registration.<sup>252</sup>

## 2. Other Internal Copyright Office Solutions

The Copyright Office could take additional steps to ensure the accuracy and integrity of its registration information, including 1) implementing auditing procedures, and 2) creating an open and transparent mechanism for receiving information about inaccuracies in registrations from third parties. These proposals would require the Office to dedicate financial and human resources, but over time, they could reduce the number of inaccuracies on the registry in a way that would likely justify the costs.

Based on our findings, we would recommend an auditing initiative similar to the USPTO's attempts to declutter and ensure the accuracy of the Trademark Register.<sup>253</sup> Like the USPTO, the Copyright Office could first engage in an initial pilot program to assess the extent of inaccuracies in the registry and more actively pursue cancellation of invalid registrations and correction of records.<sup>254</sup> If a closer, more comprehensive examination of the Office's non-public records suggests that the problem of inaccurate registration information is not as widespread as we fear, then perhaps some of the other more costly and legally complex solutions we recommend would not be necessary.

We also recommend that the Office develop and implement regulations providing for an open and transparent mechanism for receiving information about inaccuracies in registrations from the public. This would allow for third parties to provide information voluntarily, and at their own cost, to the Copyright Office pertaining to inaccuracies in the registry. The Office could then decide whether to take action based on the information provided, without any obligation to report back to the third party. It could also follow its normal procedure of contacting the registrant, explaining why it is considering correcting or cancelling a registration, and giving the registrant an opportunity to respond before taking any action.<sup>255</sup>

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252. 37 C.F.R. § 201.7(c)(4).

253. See Changes in Requirements for Specimens and for Affidavits or Declarations of Continued Use or Excusable Nonuse in Trademark Cases, 77 Fed. Reg. 30197 (May 22, 2012) (to be codified at 37 C.F.R. pts. 2, 7).

254. See Barton Beebe & Jeanne Fromer, *Are We Running Out of Trademarks?* 131 HARV. L. REV. 945, 1034–35 (2018) (praising the results of the pilot plan and showing support for continued auditing by the USPTO to get rid of “deadwood” on the Trademark Register).

255. See *supra* note 175.

One possibility is to model this nonadversarial, information-gathering procedure on the “Letter of Protest” procedure at the USPTO, which allows third parties to bring evidence regarding a particular trademark or patent to the USPTO’s attention.<sup>256</sup> Such an open and transparent process would avoid the due process concerns raised by the “backdoor” approach that would only allow some individuals with direct agency contacts and connections to bring information about inaccuracies in registrations to the attention of the Register of Copyrights.

## B. CANCELLATION AND THE COURTS

In our view, a court that holds that a particular putative work contains no copyrightable subject matter, or that a claim of ownership or authorship in a registration is inaccurate, should be able to order the Copyright Office to cancel the registration, with a note referring to the court order for an explanation of why the cancellation was ordered. As we noted above, although courts do recognize the power to order registrants to request cancellation of their own registration, those orders seem to be avoided on a regular basis, and it is easy to understand why. The registrant has no motivation to comply with the order, and in many cases, the prevailing party in litigation has little motivation to monitor whether the registrant has made such a request and whether the Copyright Office has granted it. The registrant will no longer be bothering the prevailing party because the relationship between the two parties has been determined by the court. It is only the public that will be disadvantaged by having a seemingly valid registration remain in Copyright Office records after a court has found it to be invalid or inaccurate. A court should be able to act in the public interest by ordering the Copyright Office to cancel the registration. That will probably require legislation. Although some courts have suggested that they already have to power to order the Copyright Office to cancel registrations,<sup>257</sup> the prevailing view, as we have noted above, is that courts currently do not have that power because there is no explicit grant of such power in the Copyright Act or elsewhere in the United States Code.

The Copyright Office should have no interest in retaining the discretion to preserve an invalid or inaccurate registration. If the Copyright Office believes that the court has made a mistake—if, for example, the registration covers more than one work, and the

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256. See 37 C.F.R. § 2.149 (2024) (providing rules for the submission and consideration of letters of protest regarding pending trademark registration applications); 37 C.F.R. § 1.291 (2024) (providing rules for the submission and consideration of protests against pending patent applications). These procedures concern pending applications. Because copyright registration applications are not made public, a member of the public has no way of learning of false claims or inaccuracies in a pending application. The copyright procedure would therefore have to apply to issued registrations, rather than pending applications.

257. See, e.g., *Brooks v. Bates*, 781 F. Supp. 202, 207 (S.D.N.Y. 1991) (holding that the defendant was “entitled to a direction to the Registrar of Copyrights that the copyright registrations in KEI’s name be cancelled”), accord, *Brooks v. Knowledge Eng’g Inc.*, No. 89 Civ. 4478 (SS), 1994 WL 121851, at \*8–\*9 (S.D.N.Y. Apr. 7, 1994) (then district court judge Sotomayor, J., commenting that “invalidation of the copyrights in question is an appropriate remedy for a misrepresentation to the Copyright office,” and adding that it was “undisputed that Bates secured [the relief of cancellation of the copyrights] with the issuance of Judge Haight’s November Order”).

court only found one of the works it covers to lack copyrightable subject matter—then the Office could certainly correspond with the court and explain why it believes the order to be mistaken.

The Patent and Trademark Office is, by explicit statutory provision, subject to court orders to cancel trademark registrations.<sup>258</sup> It has received and complied with many of those orders, with no apparent damage to the agency or to the trademark registry. The Copyright Office itself is subject to court orders with respect to registration of vessel hull designs. Section 1324 of Title 17 provides:

In any action involving the protection of a design under this chapter, the court, when appropriate, may order registration of a design under this chapter or the cancellation of such a registration. Any such order shall be certified by the court to the Administrator, who shall make an appropriate entry upon the record.<sup>259</sup>

At least one court has in fact ordered the Copyright Office to cancel vessel hull registrations after finding them to be invalid.<sup>260</sup> That order was affirmed on appeal, and the Copyright Office complied with the orders without incident.

It is true that the relationship of registration to vessel hull protection is different than the relationship of copyright registration to copyright protection. Copyright protection does not rely on registration, while vessel hull protection does. Yet there is no reason to let a copyright registration remain in Copyright Office records once a court has found that the underlying copyright is invalid, or that its ownership or authorship is misrepresented in the registration. Like copyright protection, trademark protection also does not rely on registration, yet courts are granted authority to order cancellation of trademark registrations.

While the Third Circuit in *Brownstein* cited the lack of statutory authority to order the Copyright Office to cancel a registration, others have argued that there are constitutional limitations on a court's power to issue an order to the Copyright Office. *Nimmer on Copyright* concludes that courts lack power to cancel copyright registrations because "the judicial branch has no authority to order an instrumentality of the legislative branch (not a party to the litigation) to undertake the affirmative action of canceling a copyright certificate."<sup>261</sup> This is surely a mistaken view. Some of the functions of the Copyright Office do arguably qualify as legislative agency

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258. 15 U.S.C. § 1119 ("In any action involving a registered mark the court may determine the right to registration, order the cancellation of registrations, in whole or in part, restore cancelled registrations, and otherwise rectify the register with respect to the registrations of any party to the action.").

259. 17 U.S.C. § 1324; see 17 U.S.C. § 1331 ("In this chapter, the 'Administrator' is the Register of Copyrights . . .").

260. See *Maverick Boat Co. v. Am. Marine Holdings, Inc.*, Nos. 02-14102-CIV, 02-14283-CIV., 2004 WL 1093035, at \*16 (S.D. Fla. Feb. 10, 2004) (ordering the cancellation of registrations DVH 0049 and DVH 0056), *aff'd*, *Maverick Boat Co. v. Am. Marine Holdings*, 418 F.3d 1186 (11th Cir. 2005).

261. NIMMER ON COPYRIGHT § 7.20 (2025). Some legal academics, and even a former Register, have also asserted that the Copyright Office is a legislative agency. See, e.g., Peters, *supra* note 68, at 737 ("The Copyright Office . . . is one of the major departments of the Library of Congress; as such, it is in the legislative rather than the executive branch of the federal government."); Edward Lee, *Warming up to User-Generated Content*, U. ILL. L. REV. 1459, 1475 (2008).

functions, such as “[a]dvis[ing] Congress on national and international issues relating to copyright.”<sup>262</sup> However, when the Copyright Office is administering the registration system, and deciding whether or not to issue a registration certificate that provides significant legal benefits to the applicant, it is undoubtedly carrying out executive branch functions.<sup>263</sup> In this respect, it is like the Copyright Royalty Board, which sets rates under various statutory licenses created by the Copyright Act. The D.C. Circuit has held that Copyright Royalty Judges exercise “significant authority” in determining those rates and are therefore “Officers of the United States.”<sup>264</sup> In exercising her authority to grant or deny registrations, and to condition grant on disclaimers, the Register of Copyrights is exercising no less significant authority. Thus, there should be no constitutional bar to enacting legislation that empowers courts to order the Register of Copyrights to cancel registrations. Indeed, as we have noted above, the Register is already subject to court orders to cancel vessel hull design registrations and has complied with those orders. There should be no constitutional difference between cancelling a vessel hull design registration and a copyright registration.

### C. ADMINISTRATIVE CANCELLATION THROUGH THE COPYRIGHT CLAIMS BOARD

It might also be possible to use the Copyright Claims Board (CCB) more effectively to help correct inaccuracies on the registry. Currently, the CCB has jurisdiction to hear claims of non-infringement; for example, parties who have received cease and desist letters from copyright owners can file a claim asking the CCB to rule on whether their actions constitute infringement or not. The Copyright Office website specifically notes that this function “could be useful if a party is worried about continuing a project under the threat of litigation and wants clarity about the validity of the copyright owner’s rights or the application of an exception.”<sup>265</sup> It is unclear what action the CCB would actually take if it determined that a party’s rights were invalid when it held a registration, however. While CCB determinations are *inter partes*, and the CCB could not itself effect cancellations, the Office could decide to formalize a procedure whereby the CCB would be required to report inaccurate or invalid registrations to the Register for potential cancellation proceedings.

This approach would not require further legislation, but it has some serious limitations. CCB proceedings are voluntary, and a copyright owner—particularly one with a questionable claim—may be unwilling to participate in proceedings that could

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262. 17 U.S.C. § 701(b)(1).

263. See *Eltra Corp. v. Ringer*, 579 F.2d 294, 301 (4th Cir. 1978) (“It is irrelevant that the Office of the Librarian of Congress is codified under the legislative branch or that it receives its appropriation as a part of the legislative appropriation. The Librarian performs certain functions which may be regarded as legislative (*i.e.*, Congressional Research Service) and other functions (such as the Copyright Office) which are executive or administrative.”).

264. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337–39 (D.C. Cir. 2012).

265. *Claimant Information, COPYRIGHT CLAIMS BD.*, <https://ccb.gov/claimant/index.html#noninfringe> [https://web.archive.org/web/20260121052653/https://ccb.gov/claimant/index.html#noninfringe] (last visited Jan. 24, 2026).

result in invalidation of its copyright registration. Furthermore, the data on the first few years of CCB activity suggests that no claims for declarations of non-infringement have been brought.<sup>266</sup> However, creating a clear internal policy and raising public awareness of the availability of declaration of non-infringement claims through the CCB might improve the effectiveness of this strategy.

#### D. IMPLEMENTATION COSTS, AND THE ALTERNATIVE OF REDUCING THE LEGAL EFFECTS OF REGISTRATION

There are two reactions to the suggestions we have made that are common and important enough to consider here. First, when one of the authors of this article mentioned § 508 notifications to a Copyright Office staff member, they replied, “another unfunded mandate.” We acknowledge that many of our suggestions would take substantial resources to implement. It takes time to monitor § 508 notifications and then proactively pursue cancellation proceedings when appropriate, in light of judicial findings. It takes time to conduct an audit of registrations. It takes time to screen and take action on letters of protest. It would take substantial resources to run an inter partes cancellation procedure. Increased appropriations from Congress are hard to come by.

As one of us has written, the most likely solution is to follow the Patent and Trademark Office and obtain additional revenues from fees, so that the Copyright Office, like the Patent and Trademark Office, can become user-fee funded.<sup>267</sup> The key to obtaining those additional revenues is to institute maintenance fees, so that registrants who want to continue to enjoy the benefits that are conditioned for both domestic and foreign works on registration—statutory damages, attorneys fees, the presumptions of validity and of the truth of the facts stated in the registration—must from time to time renew their registrations and pay additional fees. It is only fair that those whose works of authorship have been financially successful bear a somewhat larger portion of the cost of running the copyright system that protects them. At a time when the government is considering instituting even higher maintenance fees for patents,<sup>268</sup> instituting even modest maintenance fees for copyrights could provide the chronically underfunded Copyright Office with the resources it needs to improve copyright registration.

Second, another reaction to hearing of inaccuracies in copyright registrations is to ask: Why not just eliminate the legal benefits that now come with registering a claim

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266. *Key Statistics*, COPYRIGHT CLAIMS BD. (Oct. 2024), <https://ccb.gov/CCB-Statistics-and-FAQs-Oct-2024.pdf> [<https://web.archive.org/web/20251030041744/https://www.ccb.gov/CCB-Statistics-and-FAQs-Oct-2024.pdf>].

267. See Robert Brauneis, *Properly Funding the Copyright Office: The Case for Significantly Differentiated Fees*, 64 J. COPYRIGHT SOC'Y U.S.A. 451, 453–54 (2017).

268. See Amrith Ramkumar, *Trump Administration Weighs Patent System Overhaul to Increase Revenue*, WALL ST. J., (July 28, 2025), <https://www.wsj.com/politics/policy/patent-system-overhaul-18e0f06f> [<https://web.archive.org/web/20260121053010/https://www.wsj.com/politics/policy/patent-system-overhaul-18e0f06f>].

of copyright in a work? After all, if registrations come with no presumption of validity and of truth of the facts stated in the registration, and with no statutory damages or attorneys' fees, then the person who has managed to obtain a registration for uncopyrightable subject matter, or for a work that they do not own or did not create, has fewer opportunities to commit mischief with the registration. Without the legal benefits of registration, a registration can do less damage.

That fails to recognize that the benefits of registration can accrue, not just to the registrant, but to the entire market for works of authorship, and to their uses. As we noted above, in a well-functioning registration system, in which mechanisms to ensure accuracy are working well, the presumptions and the enhanced remedies also work to make the market function better for *all* participants. The presumptions work to fill in inevitable gaps in knowledge, and to give additional solidity to copyrights that have been vetted both by examiners and by exposure to the public. Abolishing them is the first step to doing away with registration altogether. This is not the best solution to the problem we have identified—at least not before we have tried to make the current system work better.

## V. CONCLUSION

This Article has identified the lack of meaningful cancellation procedures as a small but serious crack in the U.S. copyright registration system—one which can impact the fair and efficient operation of the overall copyright regime. By exposing this flaw and proposing ways to address it head on or, at least, to reduce its harmful effects, we hope that the copyright registration system can be improved. These improvements would help it better serve the goals of facilitating markets for, and uses of, works of authorship by providing better information about ownership, while also clearing title and strengthening that ownership.

As a former Register wrote, “[i]n the registration of claims, a fundamental objective of the Copyright Office is to establish a ‘clear, accurate, easily understandable public record’ and to exclude from that record any unjustified or otherwise insufficient claims.”<sup>269</sup> The Office needs to do a better job of excluding unjustified, insufficient, and inaccurate claims from the public record—not just at the initial registration stage, but throughout the very long term that works are protected by copyright. The additional protections and presumptions that flow from registration have an important function in the Copyright system; owners who choose to register their claims of copyright, and to record further transactions, are contributors to the public record of copyright ownership. We can only accept the existence of these additional protections and presumptions, however, if we have confidence in the accuracy of the information in the Office’s registry.

History has shown that there are good reasons for having intellectual property registration systems. Outside of the United States, some legal scholars are promoting

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269. Peters, *supra* note 68, at 739 (quoting Registration Decision, 53 Fed. Reg. 21817, 21819 (June 10, 1988)).

the benefits of copyright registration and recommending the reinstatement of registration systems.<sup>270</sup> Maintaining any registration system is costly, but a complete, accurate, and functional provides an invaluable repository of data, and offers public benefits far beyond its immediate positive impacts on the marketplace.

We don't want to cancel copyright registration—we just want to cancel invalid copyright registrations.

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270. See, e.g., Dev Gangjee, *Copyright Formalities: A Return to Registration*, in *WHAT IF WE COULD REIMAGINE COPYRIGHT?* 213, 213–35 (Martin Kretschmer et al. eds., 2017).

## It's Not "Personal": Health Information Disclosure and the Physical-Mental Distinction

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### ABSTRACT

*For almost eight decades, U.S. sports leagues have disclosed information about athletes' health with the stated goal of protecting the integrity of sports from betting-related manipulations. The leagues' treatment of such information, however, has been inconsistent: When professional athletes miss games due to physical injuries, leagues usually disclose such injuries in great specificity. By contrast, when players miss a game due to mental health issues, their absence is simply attributed to "personal reasons."*

*This Article documents this disparity and situates it within existing regulatory frameworks in the areas of privacy law, disability law, and sports betting regulation. The Article's main argument is that this practice cannot be justified on either factual or normative grounds. On the factual side, we review medical research showing that a stark dichotomy between "physical" and "mental" health is incompatible with the modern recognition that the body and the mind are interrelated systems. On the normative side, we argue that treating mental health issues as "personal reasons" may exacerbate the preexisting stigma surrounding mental health, may imply that mental health issues are not "real," and may obscure the sports leagues' responsibility for such issues.*

*To address these problems, this Article proposes several alternative methods of disclosing health status, taking into account the importance of preserving athletes'*

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*autonomy in regard to their mental health reporting. We conclude by discussing how the implications of this analysis may extend beyond the sports arena.*

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## INTRODUCTION

Why didn't Andre Drummond play in the Chicago Bulls' game against the Los Angeles Lakers on March 29, 2023? The answer depends on who you ask. According to the National Basketball Association ("NBA") injury report from that day, Drummond's absence was due to "Personal Reasons."<sup>1</sup> Drummond himself, however, provided a different explanation. The day before that game, he posted on social media that it was time for him "to focus on [his] mental health."<sup>2</sup> After the game, Drummond noted that he "had to take some time away," again citing mental health.<sup>3</sup>

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1. *Injury Report: 03/29/23 05:30 PM*, NBA, (Mar. 29, 2023), [https://ak-static.cms.nba.com/referee/injury/Injury-Report\\_2023-03-29\\_05PM.pdf](https://ak-static.cms.nba.com/referee/injury/Injury-Report_2023-03-29_05PM.pdf)

[[https://web.archive.org/web/20231002172939/https://ak-static.cms.nba.com/referee/injury/Injury-Report\\_2023-03-29\\_05PM.pdf](https://web.archive.org/web/20231002172939/https://ak-static.cms.nba.com/referee/injury/Injury-Report_2023-03-29_05PM.pdf)].

2. Jaylon Thompson, *Bulls Center Andre Drummond Ruled Out of Game Against Lakers After Posting About Mental Health*, USA TODAY (Mar. 30, 2023), <https://www.usatoday.com/story/sports/nba/bulls/2023/03/30/andre-drummond-sites-mental-health-social-media-ruled-out-game/11568465002/> [

<https://web.archive.org/web/20260125011808/https://www.usatoday.com/story/sports/nba/bulls/2023/03/30/andre-drummond-sites-mental-health-social-media-ruled-out-game/11568465002/>].

3. *Andre Drummond on Missed Game: Needed Time Away to "Clear My Mind"*, ESPN (Apr. 2, 2023), [https://www.espn.com/nba/story/\\_/id/36047495/bulls-andre-drummond-missed-game-needed-away-clear-my-mind](https://www.espn.com/nba/story/_/id/36047495/bulls-andre-drummond-missed-game-needed-away-clear-my-mind)

[[https://web.archive.org/web/20260119225910/https://www.espn.com/nba/story/\\_/id/36047495/bulls-andre-drummond-missed-game-needed-away-clear-my-mind](https://web.archive.org/web/20260119225910/https://www.espn.com/nba/story/_/id/36047495/bulls-andre-drummond-missed-game-needed-away-clear-my-mind)].

The discrepancy regarding the cause of Drummond's absence was hardly an isolated incident. In recent years, there have been a number of cases in which U.S. sports leagues have invoked the "personal reasons" designation in reporting the absence of an athlete from games or practices due to mental health reasons.<sup>4</sup> Given the detail required when

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4. See, e.g., Stephen Holder, *Colts' Braden Smith Details Struggle, Recovery from Severe OCD*, ESPN (Apr. 8, 2025), [https://www.espn.com/nfl/story/\\_/id/44590173/colts-braden-smith-details-struggle-recovery-severe-ocd](https://www.espn.com/nfl/story/_/id/44590173/colts-braden-smith-details-struggle-recovery-severe-ocd) [[https://web.archive.org/web/20250804023504/https://www.espn.com/nfl/story/\\_/id/44590173/colts-braden-smith-details-struggle-recovery-severe-ocd](https://web.archive.org/web/20250804023504/https://www.espn.com/nfl/story/_/id/44590173/colts-braden-smith-details-struggle-recovery-severe-ocd)] (noting that NFL player Braden Smith, who had "missed the final five games of last season because of a personal matter," later revealed that the reason for the absence was an "obsessive-compulsive disorder that prompted him to spend forty-eight days in a treatment facility"); Dan Feldman, *Report: Kyrie Irving Took a Mental-Health Day in Missing Nets-76ers*, NBC SPORTS (Jan. 8, 2021), <https://www.nbcsports.com/nba/news/report-kyrie-irving-took-a-mental-health-day-in-missing-nets-76ers> [<https://web.archive.org/web/20240617184720/https://www.nbcsports.com/nba/news/report-kyrie-irving-took-a-mental-health-day-in-missing-nets-76ers>] (reporting that NBA player Kyrie Irving "took a mental-health day" when the official injury report stated that the absence was due to "personal reasons"); Jordan Greer, *Is Ben Simmons Playing Tonight? Why 76ers Star Remains Out and How Philadelphia Is Handling His Absence*, SPORTING NEWS (Nov. 3, 2021), <https://www.sportingnews.com/us/nba/news/is-ben-simmons-playing-tonight-76ers-philadelphia/7o4zkg9whzuszz366mxt6pzf> [<https://web.archive.org/web/20231129052402/https://www.sportingnews.com/us/nba/news/is-ben-simmons-playing-tonight-76ers-philadelphia/7o4zkg9whzuszz366mxt6pzf>] (noting that player Ben Simmons is "dealing with mental" health issues and "has been listed as out because of 'personal reasons' on recent injury reports"); Kerry Breen, *NFL Player Rejoins Team After Two-Week Absence to Address Anxiety and Depression*, TODAY (Oct. 18, 2021), <https://www.today.com/health/nfl-player-rejoins-team-after-absence-address-address-you-are-t234667> [<https://web.archive.org/web/20211117155840/https://www.today.com/health/nfl-player-rejoins-team-after-absence-address-address-you-are-t234667>] ("After missing three games, Philadelphia Eagles right tackle Lane Johnson is opening up about his struggle with depression and anxiety . . . Previously, his team had said that he was missing games for 'personal reasons.'"); Lorenzo Reyes, *Atlanta Falcons WR Calvin Ridley Stepping Away From Football to Focus on Mental Health*, USA TODAY (Oct. 31, 2021), <https://www.usatoday.com/story/sports/nfl/falcons/2021/10/31/calvin-ridley-steps-away-football-mental-health-atlanta-falcons/6226824001/> [<https://web.archive.org/web/20230310025226/https://www.usatoday.com/story/sports/nfl/falcons/2021/10/31/calvin-ridley-steps-away-football-mental-health-atlanta-falcons/6226824001/>] (reporting that "Atlanta Falcons receiver Calvin Ridley missed a game for 'personal reasons'" and that he posted on social media that he needs "to step away from football at this time and focus on [his] mental wellbeing"); *Chiefs' Willie Gay Says He's Struggling with Mental Health, Misses Practice for Personal Reasons*, NBC Sports (Oct. 8, 2021), <https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/chiefs-willie-gay-says-hes-struggling-with-mental-health-misses-practice-for-personal-reasons> [<https://web.archive.org/web/20241010005015/https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/chiefs-willie-gay-says-hes-struggling-with-mental-health-misses-practice-for-personal-reasons>] ("Chiefs linebacker Willie Gay did not practice on Friday for what the team described as personal reasons, and he revealed on social media that he is struggling with his mental health."); Michael Lee, *How the NBA Got Serious About Mental Health*, WASH. POST (Apr. 19, 2022), <https://www.washingtonpost.com/sports/2022/04/19/nba-mental-health-demar-derozan/> [<https://web.archive.org/web/20260107213007/https://www.washingtonpost.com/sports/2022/04/19/nba-mental-health-demar-derozan/>] ("Hachimura missed the first thirty-nine games of the regular season for what the team called 'personal reasons' and was welcomed back when he felt ready."); cf. Sarah Barshop, *Rams QB Stetson Bennett "Hungry" After Addressing Mental Health*, ESPN (May 28, 2024), [https://www.espn.com/nfl/story/\\_/id/40236025/rams-qb-stetson-bennett-hungry-addressing-mental-health](https://www.espn.com/nfl/story/_/id/40236025/rams-qb-stetson-bennett-hungry-addressing-mental-health) [[https://web.archive.org/web/20241009075411/https://www.espn.com/nfl/story/\\_/id/40236025/rams-](https://web.archive.org/web/20241009075411/https://www.espn.com/nfl/story/_/id/40236025/rams-)

reporting *physical* injuries, this vague reporting is puzzling. Indeed, in the case of a physical injury, sports teams must “identify a specific” injury or illness.<sup>5</sup>

Thus, the question arises: Why do sports leagues disclose athletes’ physical injuries in great specificity, while using the umbrella category of “personal reasons” in reporting mental health issues? This question lies at the core of this Article.

The stakes are higher than issues of nomenclature. Although sports leagues have operated injury reporting systems for almost eight decades, recent years have witnessed an increased attention to information about athletes’ health, in part because such information is often used for sports betting, which has become popular in most states since the Supreme Court paved the way for legalization in 2018.<sup>6</sup>

The public’s thirst for information is not limited to physical injuries. Athletes’ mental health issues are also “receiving unprecedented attention in medical and

qb-stetson-bennett-hungry-addressing-mental-health] (“Speaking for the first time since he was placed on the reserve/non-football illness list last September, Los Angeles Rams backup quarterback Stetson Bennett confirmed his time away from the team was related to his mental health.”); see also Mike D. Sykes, II, *Ben Simmons’ Reported Grievance Against the 76ers and the Huge Implications that Come with It, Explained*, USA TODAY (Apr. 2, 2022), <https://ftw.usatoday.com/lists/ben-simmons-grievance-76ers-nba-explained> [<https://web.archive.org/web/20221127133539/https://ftw.usatoday.com/lists/ben-simmons-grievance-76ers-nba-explained>] (“[P]layers have been away from their teams for mental health reasons before . . . It’s normally something that shows up on the injury report in one way or another, generally listed as ‘personal reasons.’”). There is some evidence that in some instances, sports leagues also use other categories, such as “illness,” to report absences due to mental health issues. See Adam Teicher, *Chiefs’ Clyde Edwards-Helaire Discusses Struggles with PTSD*, ESPN (Aug. 1, 2024), [https://www.espn.com/nfl/story/\\_/id/40700221/chiefs-clyde-edwards-helaire-discusses-struggles-ptsd](https://www.espn.com/nfl/story/_/id/40700221/chiefs-clyde-edwards-helaire-discusses-struggles-ptsd) [[https://web.archive.org/web/20250421170719/https://www.espn.com/nfl/story/\\_/id/40700221/chiefs-clyde-edwards-helaire-discusses-struggles-ptsd](https://web.archive.org/web/20250421170719/https://www.espn.com/nfl/story/_/id/40700221/chiefs-clyde-edwards-helaire-discusses-struggles-ptsd)] (“From time to time during his four seasons with the Kansas City Chiefs and as recently as earlier in training camp, running back Clyde Edwards-Helaire has missed practice time because of what the Chiefs called an illness. Edwards-Helaire recently posted on his X account the reason for his absences is post-traumatic stress disorder (PTSD).”).

5. *NBA Injury Report: 2025–26 Season*, NBA, <https://official.nba.com/nba-injury-report-2025-26-season/> [<https://web.archive.org/web/20260107230227/https://official.nba.com/nba-injury-report-2025-26-season/>] (last visited Jan. 24, 2026). As the National Football League (NFL) makes clear, “Listing an injury simply as ‘leg,’ ‘arm,’ ‘upper body,’ or other equally vague description, is not acceptable.” NFL, 2017 PERSONNEL (INJURY) REPORT POLICY 3 (2017), <https://operations.nfl.com/media/2683/2017-nfl-injury-report-policy.pdf> [<https://web.archive.org/web/20251026164029/https://operations.nfl.com/media/2683/2017-nfl-injury-report-policy.pdf>] (“Injuries must be identified with a reasonable degree of specificity in terms that are meaningful to coaches, other club officials, the media, and the public. For example, leg injuries must be specified as ankle, knee, thigh, or calf. Arm injuries must be identified as shoulder, elbow, wrist, hand, or muscle.”).

A notable exception is the National Hockey League (“NHL”), which allows teams to disclose general information about an athlete’s condition (e.g., “upper-body injury”) and does not require a reference to a specific body part. See Christopher R. Deubert, I. Glenn Cohen & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 89 (2017); Adam Kilgore, *Injury Secrecy Is an NHL Playoff Tradition—and a Dilemma for Bookmakers*, WASH. POST (May 9, 2022), <https://www.washingtonpost.com/sports/2022/05/09/nhl-injuries-gambling/> [<https://web.archive.org/web/20260105225053/https://www.washingtonpost.com/sports/2022/05/09/nhl-injuries-gambling/>].

6. See *infra* Part I.

research circles and among the general public.<sup>7</sup> Due to stigma and lack of reporting, exact data about the prevalence of mental health issues in professional and collegiate sports is hard to come by. It is clear, however, that a large portion of the athlete population often experiences anxiety, depression, trauma, addiction, and other mental health issues,<sup>8</sup> affecting their athletic performance and daily lives.<sup>9</sup> Most recently, in April 2025, National Football League ("NFL") player Braden Smith revealed that he had "contemplated suicide" when experiencing an episode of severe obsessive-compulsive disorder ("OCD").<sup>10</sup> Major League Baseball ("MLB") player Jarren Duran also recently revealed that he had attempted suicide after experiencing mental health issues.<sup>11</sup> And in May 2024, professional golfer Grayson Murray took his own life only one day after he had withdrawn from an official PGA Tour tournament in Texas.<sup>12</sup>

In exploring for the first time the physical-mental divide when it comes to disclosure of health information, we discuss three potential justifications for this phenomenon and rebut each of them in turn.<sup>13</sup> Ultimately, we conclude that if sports leagues disclose athletes' physical injuries in specificity, then the policy of treating mental health issues

7. See, e.g., Claudia K. Reardon, *The Mental Health Crisis in Sports: The Perfect Storm of Contemporary Factors*, 58 J. ATHLETIC TRAINING 677, 678 (2023) ("Mental health in sport is receiving unprecedented attention in medical and research circles and among the general public.").

8. Yaron Covo, *Gambling on Disability Rights*, 43 COLUM. J.L. & ARTS 237, 263–64 (2020) (citing studies).

9. *Id.* at 272–73; see also Andrew Dampf, *Shiffrin Says She's Dealing with PTSD After Crash and Won't Defend Giant Slalom Title at Ski Worlds*, AP (Feb. 10, 2025), <https://apnews.com/article/mikaela-shiffrin-ptsd-skiing-world-championships-58c85737a5dc1263bd41e4679bcd781>

[<https://web.archive.org/web/20251125074551/https://apnews.com/article/mikaela-shiffrin-ptsd-skiing-world-championships-58c85737a5dc1263bd41e4679bcd781>] (reporting skier Mikaela Shiffrin would miss a competition due to PTSD); Jonathan Abrams, *"I Can't Continue This Fight Any Longer"*, N.Y. TIMES (June 19, 2023), <https://www.nytimes.com/2023/06/19/sports/basketball/tyrell-terry-basketball-mental-health.html>

[<https://web.archive.org/web/20250724040830/https://www.nytimes.com/2023/06/19/sports/basketball/tyrell-terry-basketball-mental-health.html>] (describing basketball player Tyrell Terry's decision to retire at the age of twenty-two due to anxiety and "intrusive thoughts").

A number of athletes have noted that, while challenging, their conditions actually improved their performance by enhancing their ability to focus or concentrate. TIM HOWARD (WITH ALI BENJAMIN), *THE KEEPER* 29–30 (2014); Aimee Berg, *The Boxing Champion Who Battles O.C.D.*, N.Y. TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/sports/virginia-fuchs-boxing-ocd.html>

[<https://web.archive.org/web/20221125130325/https://www.nytimes.com/2019/07/31/sports/virginia-fuchs-boxing-ocd.html>].

10. Holder, *supra* note 4.

11. *Jarren Duran Reveals Suicide Attempt Amid Mental Health Struggles*, ESPN (Apr. 7, 2025), [https://www.espn.com/mlb/story/\\_/id/44571881/jarren-duran-reveals-suicide-attempt-amid-struggles-depression](https://www.espn.com/mlb/story/_/id/44571881/jarren-duran-reveals-suicide-attempt-amid-struggles-depression)

[[https://web.archive.org/web/20251112164049/https://www.espn.com/mlb/story/\\_/id/44571881/jarren-duran-reveals-suicide-attempt-amid-struggles-depression](https://web.archive.org/web/20251112164049/https://www.espn.com/mlb/story/_/id/44571881/jarren-duran-reveals-suicide-attempt-amid-struggles-depression)].

12. *Family Says PGA Tour Golfer Grayson Murray Died by Suicide*, ESPN (May 26, 2024), [https://www.espn.com/golf/story/\\_/id/40222743/family-reveals-pga-tour-golfer-grayson-murray-died-suicide](https://www.espn.com/golf/story/_/id/40222743/family-reveals-pga-tour-golfer-grayson-murray-died-suicide)

[[https://web.archive.org/web/20250110012730/https://www.espn.com/golf/story/\\_/id/40222743/family-reveals-pga-tour-golfer-grayson-murray-died-suicide](https://web.archive.org/web/20250110012730/https://www.espn.com/golf/story/_/id/40222743/family-reveals-pga-tour-golfer-grayson-murray-died-suicide)].

13. See *infra* Part II.

as “personal reasons” cannot be justified on either factual or normative grounds. Thus, for example, on the factual side, the artificial dichotomy between “physical” and “mental” health is incompatible with the modern medical view that the body and mind are both interrelated and one and the same.<sup>14</sup> Moreover, on the normative side, referring to mental health issues as “personal” matters may exacerbate the preexisting stigma surrounding mental health in contemporary society;<sup>15</sup> may imply that mental health issues are not “real” injuries;<sup>16</sup> and may obscure the sports leagues’ responsibility for addressing athletes’ mental health issues.<sup>17</sup>

While investigating sports leagues’ injury reports is thus important in its own right, analyzing the practice of treating physical and mental health differently can serve as a clarifying lens through which to explore the law and policy of health-information disclosure more generally.<sup>18</sup> In fact, scholars and commentators have long grappled with whether certain public figures, such as presidential candidates and CEOs of publicly traded companies, should be required to disclose information about their health.<sup>19</sup> Some argue that such disclosures are warranted, either as moral obligation to the electorate (in the case of candidates for public office)<sup>20</sup> or to satisfy securities laws’

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14. See *infra* Part II.A.

15. See *infra* Part II.B.

16. See *infra* Part II.C.

17. See *infra* Part II.C.

18. Henry T. Greely, *Disabilities, Enhancements, and the Meanings of Sports*, 15 STAN. L. & POL’Y REV. 99, 99 (2004) (“For better and for worse, sports in contemporary America sometimes serve as a model of the larger society.”); Sherman Clark, *Why Sports Law?*, 28 STAN. L. & POL’Y REV. 151, 152 (2017) (“[S]ports cases frequently require us to rethink what we think we know about law, economics, and society.”); Mitchell Berman, *Let ‘Em Play’: A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1325–26 (2011) (conceptualizing the “jurisprudence of sport”).

19. See, e.g., Patricia Sánchez Abril & Ann M. Olazábal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 HOU. L. REV. 1545, 1583–89 (2010) (arguing that publicly-traded companies should not be required to disclose information about their CEOs’ physical or mental health, pointing to “the highly intrusive and practically unworkable nature of such a regulation in relation to the value of the information it could provide to shareholders”); Teneille R. Brown, *Double Helix, Double Standards: Private Matters and Public People*, 11 J. HEALTH CARE L. & POL’Y 295, 372 (2008) (concluding that “mandated disclosure” of genetic information of presidential candidates “is not warranted in the public interest at this time”); Rebecca Green, *Candidate Privacy*, 95 WASH. L. REV. 205, 256 (2020) (arguing that privacy considerations should receive increased attention in the context of disclosure of information about candidates for public office).

20. Editorial, *Full Disclosure on Candidates’ Health*, N.Y. TIMES (Sep. 13, 2016), <https://www.nytimes.com/2016/09/13/opinion/full-disclosure-on-candidates-health.html> [<https://web.archive.org/web/20240123233530/https://www.nytimes.com/2016/09/13/opinion/full-disclosure-on-candidates-health.html>] (“Hillary Clinton and Donald Trump would be doing American voters a great service by furnishing a much clearer picture of their physical health than the abbreviated and sunny reports provided so far.”); Daniela J. Lamas, *I’m a Doctor and a Voter. Here’s How I’m Thinking About the Health of Trump and Biden*, N.Y. TIMES (June 24, 2024), <https://www.nytimes.com/2024/06/24/opinion/biden-trump-health-conditions.html> [<https://web.archive.org/web/20250804073034/https://www.nytimes.com/2024/06/24/opinion/biden-trump-health-conditions.html>] (“[W]e would benefit from pertinent medical data that is consistent among candidates.”).

materiality standard (in the case of corporate executives).<sup>21</sup> Recently, these questions have taken on increased significance in the wake of the 2024 elections<sup>22</sup> and publicity concerning health conditions experienced by prominent corporate executives.<sup>23</sup>

While previous research has focused on the disclosure dilemma as a general matter, it has largely neglected the question of what constitutes health information for the purpose of disclosure, with little attention to the division between physical and mental health.<sup>24</sup> This Article addresses that gap by analyzing the disclosure practices regarding

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21. Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 762 (2007) (arguing that, under certain circumstances, information about an executive's health "may be important to a reasonable investor" as it "may indicate the possibility that the corporation will be without the executive's services either temporarily or permanently"); Tom C.W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. PA. J. BUS. L. 383, 387 (2009) (arguing for "more meaningful, material disclosure and less privacy for executives while working within the existing regulatory framework").

22. See, e.g., The Daily, *A Reckoning over Joe Biden's Health*, N.Y. TIMES (May 20, 2025), <https://www.nytimes.com/2025/05/20/podcasts/the-daily/joe-biden-cancer-book-health.html> [<https://web.archive.org/web/20250704142049/https://www.nytimes.com/2025/05/20/podcasts/the-daily/joe-biden-cancer-book-health.html>] (discussing the level of transparency surrounding the health condition of President Joe Biden during his presidency); Steve Peoples & Lauren Neergaard, *Trump Would Be the Oldest Person to Become President. He's Not Sharing Health Details*, AP (Oct. 16, 2024), <https://apnews.com/article/trump-harris-presidential-election-age-health-medical-records-7bb8212c1024748371e43b85e137bae5/> [<https://web.archive.org/web/20251203160536/https://apnews.com/article/trump-harris-presidential-election-age-health-medical-records-7bb8212c1024748371e43b85e137bae5/>] (noting that "fundamental questions about Trump's health" remain unanswered).

23. See, e.g., Ben W. Heineman Jr., *Disclosure of Steve Jobs's Illness: Round 2*, ATLANTIC (Jan. 21, 2011), <https://www.theatlantic.com/business/archive/2011/01/disclosure-of-steve-jobs-illness-round-2/70007/> [<https://web.archive.org/web/20221001063144/https://www.theatlantic.com/business/archive/2011/01/disclosure-of-steve-jobs-illness-round-2/70007/>] (discussing CEO health disclosures with a focus on Apple CEO Steve Jobs, who had cancer); Alex Barinka, *Should Meta Disclose Mark Zuckerberg's Cage Fighting Risk?*, BLOOMBERG (Nov. 10, 2023), <https://www.bloomberg.com/news/newsletters/2023-11-10/should-meta-disclose-mark-zuckerberg-s-cage-fighting-risk> [<https://perma.cc/2CPU-NUF9>] (discussing whether Meta should disclose information about CEO Mark Zuckerberg's participation in martial arts and the attendant health risks).

24. See, e.g., Heminway, *supra* note 21, at 750 (addressing the question of disclosure of information about executives' "terminal or other serious illness and related medical treatments" without defining those terms); Lin, *supra* note 21, at 412 (noting that a diagnosis of a fatal illness is an "example" of "the type of information that should be disclosed about senior executives" without providing a definition of the term or explaining whether other medical conditions should also be disclosed); Sánchez Abril & Olazábal, *supra* note 19, at 1586 (using the following questions (left unanswered) as a rhetorical tool to argue against disclosure of health information: "What would be the parameters of a line-item disclosure requiring companies to report on their CEO's health? Would only conditions as opposed to medical procedures be important enough to disclose? If both, what types of medical conditions or procedures would merit disclosure?"); cf. Brown, *supra* note 19, at 363 ("A theoretical problem with disclosure is that the list of diseases or disorders for which testing is mandated will inevitably be both over and under-inclusive. Due to the universe of possible neurological or cardiac diseases that could debilitate the President's decision-making capacity, it would be impossible to tailor a subset of genetic tests that captures everything without including some that are less relevant."); George J. Annas, *The Health of the President and Presidential Candidates: The Public's Right to Know*, 333 LEGAL ISSUES IN MED. 945, 947-948 (1995) (arguing that in general "there should be limits on what presidential candidates should be expected to disclose about their physical and mental health," and specifically arguing against disclosure of past psychiatric episodes, abortion, HIV, and genetic tests); Drew Altman, *Risks in "Full"*

health information in the professional sports arena. While this Article does not provide a comprehensive framework to regulate the disclosure of health information in other contexts, it points to the risks of hiding mental health in otherwise detailed disclosures of public figures' health information.

To be clear, we do not propose to subject athletes to unwanted disclosure of their mental health conditions. In fact, the avenue for reform that we find most socially desirable is to put an end to sports leagues' disclosure of information about players' health—either physical or mental.<sup>25</sup> At the same time, we argue that the status quo—whereby physical conditions are reported in specificity and mental health issues are treated as a “personal matter”—cannot be fully justified.<sup>26</sup>

So, what can be done to change the status quo? Although we propose several alternative methods of reporting athletes' health status, it is highly unlikely that any of these reforms can be achieved through private litigation or state intervention. The reason has to do with the unique nature of injury reporting systems, which are subject to virtually no external regulation and governed almost exclusively by private ordering. Ultimately, we conclude that the most effective pathway for reform lies in athletes' contractual and collective bargaining rights.

Part I of this Article introduces U.S. sports leagues' injury reporting systems and explains their function, purpose, and legal status. It further explains that when it comes to mental health issues, sports leagues do not use a specific designation in reporting, but rather often resort to the “personal reasons” designation, an umbrella category that covers a variety of reasons for absences, including family-related reasons.

Part II explores possible justifications for the discrepancy between physical and mental conditions in injury reporting systems. It discusses three possible justifications: first, that physical and mental health are distinct categories that necessarily dictate different kinds of reporting criteria; second, that athletes have a privacy interest in preventing disclosure of information about their mental health—an interest that does not arise vis-à-vis their physical health; and third, that, unlike physical injuries, mental health issues are not closely related to one's engagement in professional sports.

Finding that the first justification is factually inaccurate and that the last two are, at least in part, normatively problematic, Part III offers another possible explanation for this practice by analyzing the political economy of injury reporting systems in the era of legalized sports betting. In Part IV, we turn to discuss alternative methods of reporting athletes' availability, including the option not to disclose any information that pertains to athletes' health. Part IV also analyzes possible legal pathways to advance reform, concluding that public advocacy and athletes' collective bargaining rights

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*Disclosure of Presidential Candidates' Health Records*, WALL ST. J. (Sep. 13, 2016), <https://www.wsj.com/articles/BL-WB-65429>

[<https://web.archive.org/web/20241210163836/https://www.wsj.com/articles/BL-WB-65429>] (suggesting that “serious heart disease or cancer” might warrant disclosure but not “an episode of depression years before”).

25. See *infra* Part IV.B.1.

26. See *infra* Part II.

provide the most promising avenue for change. Lastly, we conclude by situating our claims within the broader literature on disclosure of public figures' health information.

We note that, in October 2025, after work on this Article had largely been completed, federal prosecutors indicted people allegedly involved in attempts to manipulate betting on NBA games.<sup>27</sup> Part of the charges referred to the use of "medical information."<sup>28</sup> According to the indictment, such information was "non-public,"<sup>29</sup> in part because it had not yet appeared on the relevant NBA injury report.<sup>30</sup> In response to this scandal, the NBA has announced several policy changes, including requiring teams to submit more frequent injury reports.<sup>31</sup>

Although these developments do not directly pertain to the physical-mental distinction in health information disclosures, they have important implications for one dilemma explored in this Article: How to regulate the disclosure of athletes' health information in a reality where access to nonpublic information can be used to manipulate sports betting. Thus, while this Article does not discuss these recent developments at length, we believe that this alleged betting scandal and its ensuing ramifications further highlight the importance of our analysis. As policymakers consider implementing changes to sports leagues' injury reports, they should pay attention to the problematic use of the "personal reasons" designation to report mental health issues.

## I. INJURY REPORTING SYSTEMS AND THE PHYSICAL-MENTAL DISTINCTION

The majority of the prominent U.S. sports leagues, including the NBA,<sup>32</sup> NFL,<sup>33</sup> National Women Soccer League ("NWSL"),<sup>34</sup> and Major League Soccer ("MLS")<sup>35</sup>

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27. Indictment, *United States v. Earnest*, No. 25-CR-323 (E.D.N.Y. Oct. 16, 2025), <https://www.justice.gov/usao-edny/media/1416611/dl> [<https://perma.cc/H2SD-A6VM>].

28. *Id.* at ¶¶ 54–55.

29. *Id.* at ¶¶ 54–59.

30. *Id.* at ¶ 55, 58.

31. Mike Vorkunov, *NBA Outlines New Injury Reporting Rules in Effort to Curb Illegal Sports Betting*, *The ATHLETIC* (Dec. 19, 2025), <https://www.nytimes.com/athletic/6905154/2025/12/19/nba-illegal-sports-betting-gambling-injury-reporting-memo/> [<https://perma.cc/XFE9-LKHP>]; David Purdum, *NBA Outlines Injury Reporting, Prop Betting Changes in Memo to Teams*, *ESPN* (Dec. 19, 2025), [https://www.espn.com/nba/story/\\_/id/47361909/nba-outlines-injury-info-prop-betting-changes-memo-teams](https://www.espn.com/nba/story/_/id/47361909/nba-outlines-injury-info-prop-betting-changes-memo-teams) [[https://web.archive.org/web/20260110084416/https://www.espn.com/nba/story/\\_/id/47361909/nba-outlines-injury-info-prop-betting-changes-memo-teams](https://web.archive.org/web/20260110084416/https://www.espn.com/nba/story/_/id/47361909/nba-outlines-injury-info-prop-betting-changes-memo-teams)].

32. *NBA Injury Report*, *supra* note 5.

33. *NFL Injury Report*, *NFL*, <https://www.nfl.com/injuries/> [<https://web.archive.org/web/20260106185420/https://www.nfl.com/injuries/>] (last visited Jan. 25, 2026).

34. *Availability Report*, *NWSL*, <https://www.nwslsoccer.com/news/availability-report> [<https://web.archive.org/web/20260106185739/https://www.nwslsoccer.com/news/availability-report>] (last visited Jan. 8, 2026).

35. *Player Availability Report*, *MLS*, <https://www.mlssoccer.com/news/mlssoccer-com-injury-report> [<https://web.archive.org/web/20251109072604/https://www.mlssoccer.com/news/mlssoccer-com-injury-report>] (last visited Jan. 8, 2026).

employ some form of injury reporting system. Because of their prevalence and somewhat routine nature, injury reports may appear to be a technical component of the leagues' operation. Yet below the surface, questions with important normative implications lurk: Do such reports violate players' interest in their medical privacy? Should injury reports be employed in college sports, or only in professional sports? What is the scope of injury reports in terms of team personnel—should they cover executives and coaches, or only players? And lastly, how should pregnancy and mental health issues be reported, if at all?

This Part includes the necessary background for understanding the operation of injury reports in the United States. It provides an overview of how the above questions are being addressed on the ground, with a focus on the perceived distinction between physical and mental health. Section A describes the history and scope of injury reports and their contemporary role in maintaining the “integrity” of betting markets. Section B situates injury reports within the legal apparatus that pertains to disclosure of health information of professional athletes. Lastly, Section C explains how sports leagues have reported absences due to mental health issues, drawing in part on an original study of publicly-available data that pertain to missed games and practices by NFL players.

### A. INJURY REPORTING SYSTEMS: PURPOSE, FUNCTION, AND SCOPE

Even though sports betting is a worldwide phenomenon, sports leagues in other countries do not disclose athletes' injuries in the same way American sports leagues do.<sup>36</sup> Thus, in many respects, injury reports are yet another example of American exceptionalism.

In U.S. professional sports, injury reports have always been connected to sports betting. As early as 1947, then-NFL Commissioner Bert Bell directed NFL teams to disclose information about injured players who might not be able to play ahead of each game.<sup>37</sup> The stated purpose of this then-new rule was to “protect the integrity of the league.”<sup>38</sup> Specifically, Bell wanted to protect the general “public” (including “fans who bet \$10 and \$20 on games”)<sup>39</sup> from professional gamblers who used inside information about players' health to manipulate sports betting markets.<sup>40</sup> Bell referred to the NFL injury reports as a “weapon” used “to thwart gamblers.”<sup>41</sup>

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36. Steve Madeley, *Why Do Football Managers Lie About Player Injuries—And Does It Matter?*, THE ATHLETIC (Nov. 18, 2024), <https://www.nytimes.com/athletic/5925045/2024/11/18/football-managers-lie-injuries/> [<https://web.archive.org/web/20260105233746/https://www.nytimes.com/athletic/5925045/2024/11/18/football-managers-lie-injuries/>] (describing the situation in England).

37. Al Costello, *Bell Orders Teams to Keep Public Posted on Injuries*, WASH. POST, July 16, 1947, at 17; Francis E. Stann, *Bell Orders Injury News for Public*, WASH. STAR, July 15, 1947, at A-14.

38. ROBERT S. LYONS, ON ANY GIVEN SUNDAY: A LIFE OF BERT BELL 134–35 (2010).

39. *Id.* at 135.

40. *Id.* As part of Bell's attempts to monitor betting markets, he once discovered that a sudden and dramatic shift in the betting lines with respect to one team resulted from sportsbook's access to nonpublic information according to which five players of the pertinent team had the flu. *Id.* at 283.

41. Stann, *supra* note 37.

To this day, sports betting is the primary (though not the only)<sup>42</sup> reason why sports leagues disclose information about athletes' health.<sup>43</sup> This has been particularly so since May 2018, when the Supreme Court issued its decision in *Murphy v. Nat'l Collegiate Athletic Ass'n*.<sup>44</sup> In that case, the Court struck down the Professional and Amateur Sports Protection Act, which prohibited most states from sponsoring sports betting activities within their jurisdictions.<sup>45</sup> Following *Murphy*, states have advanced pertinent laws within their jurisdictions. As of writing, thirty-nine states and Washington D.C. have passed laws authorizing sports betting.<sup>46</sup> In this new era of legalized sports wagering, sports leagues have increased their attempts to prevent manipulation of betting markets, including by releasing injury reports and scrutinizing the circumstances surrounding players' availability to play.<sup>47</sup>

From the bettors' perspective, injury reports appear to be particularly relevant for "prop bets," which are "wagers on specific events or outcomes in a game."<sup>48</sup> Such betting allows gamblers to place a wager on the performance of a specific player at a certain game, such as the number of points the player would score in the first half.<sup>49</sup> Thus, the health status of every player, even those who do not play a leading role in their respective teams, becomes important for the purpose of sports betting.

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42. Other reasons are to provide information to fans who buy game tickets and to allow a team that prepares for a certain game to have an accurate picture about the availability of the players of the opposing team. Deubert et al., *supra* note 5, at 97. *But see id.* ("If neither club knows the nature of the other club's injuries, both clubs have an equal (and fair) level of uncertainty.")

43. Deubert et al., *supra* note 5, at 97; Michael K. McChrystal, *No Hiding the Ball: Medical Privacy and Pro Sports*, 25 MARQ. SPORTS L. REV. 163, 179 (2014).

44. 584 U.S. 453 (2018).

45. 28 U.S.C. § 3702 (repealed).

46. *State of Play: Sports Betting* (Interactive Map), AM. GAMING ASS'N, <https://www.americangaming.org/research/state-gaming-map/> [<https://web.archive.org/web/20260103021416/https://www.americangaming.org/research/state-of-play-map/>] (last visited Jan. 23, 2026).

47. *See, e.g.*, Official Release, *Suns Fined \$25K for Violating League Injury Reporting Rules*, NBA (Apr. 30, 2022), <https://www.nba.com/news/suns-fined-25k-for-violating-league-injury-reporting-rules> [<https://web.archive.org/web/20251229224931/https://www.nba.com/news/suns-fined-25k-for-violating-league-injury-reporting-rules>]; *NBA Fines Jazz for Violating Player Participation Policy*, ESPN (Mar. 12, 2025), [https://www.espn.com/nba/story/\\_/id/44225237/nba-fines-jazz-violating-player-participation-policy](https://www.espn.com/nba/story/_/id/44225237/nba-fines-jazz-violating-player-participation-policy) [[https://web.archive.org/web/20251230001155/https://www.espn.com/nba/story/\\_/id/44225237/nba-fines-jazz-violating-player-participation-policy](https://web.archive.org/web/20251230001155/https://www.espn.com/nba/story/_/id/44225237/nba-fines-jazz-violating-player-participation-policy)]; Mike Vorkunov, *Big Parlays, Fake Injuries, and Telegram Tips: The Betting Scandal in College and Pro Sports*, THE ATHLETIC (Apr. 16, 2025), <https://www.nytimes.com/athletic/6264822/2025/04/16/sports-betting-gambling-nba-ncaa-college/> [<https://web.archive.org/web/20251230001531/https://www.nytimes.com/athletic/6264822/2025/04/16/sports-betting-gambling-nba-ncaa-college/>].

48. Michael McCann & Eben Novy-Williams, *NCAA Push to Ban Prop Betting Is a Complex Wager*, SPORTICO (Mar. 27, 2024), <https://www.sportico.com/law/analysis/2024/ncaa-seeks-prop-betting-ban-1234772725/> [<https://web.archive.org/web/20251230224154/https://www.sportico.com/law/analysis/2024/ncaa-seeks-prop-betting-ban-1234772725/>].

49. *Id.*

The fact that injury reports play a central role in the emerging U.S. sports betting apparatus attests to their popularity.<sup>50</sup> Indeed, the information disclosed in injury reports is used by bettors wishing to improve their chances to place a winning wager in an industry that saw gamblers placing “nearly \$150 billion worth of bets” in 2024.<sup>51</sup>

Some commentators argue that the general idea of injury reports is akin to that of mandatory disclosure in the regulation of stock markets.<sup>52</sup> In the stock-market context, securities laws mandate public companies to disclose periodic and special reports with the goal “to provide equal access to the company’s most important information.”<sup>53</sup> Similarly, in the sports context, the leagues require teams to disclose the injury status of their players to “serve the interests of gamblers who rely on such information in placing bets on sports events”<sup>54</sup> while prohibiting athletes from “tipping” (disclosing material nonpublic information that may be used for sports betting).<sup>55</sup> There is at least one important difference, however: While mandatory disclosure in the stock-market context focuses on financial information that pertains to corporations, injury reporting systems disclose information that pertains to individuals’ health.

Although players are not the only members of their respective teams, they are the only ones whose health information is included in injury reports. For example, when San Antonio Spurs’ legendary coach Gregg Popovich had missed NBA games starting November 2024, his name did not appear in the league’s injury reports.<sup>56</sup> The team

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50. Thirty-seven percent of respondents in a recent poll stated that they had placed a sports bet during their lifetime, and the percentage among sports fans rose to almost fifty percent. Michael Ricciardelli & Marty Appel, *Sports Poll: Super Bowl Marks Big Week for Sports Betting, But Has the Pace Slowed?*, STILLMAN SCH. BUS. SETON HALL U. (Feb. 23, 2024), <https://www.shu.edu/business/news/sports-poll-finds-slowed-growth-for-sports-betting.html>

[<https://web.archive.org/web/20251231202723/https://www.shu.edu/business/news/sports-poll-finds-slowed-growth-for-sports-betting.html>]. Thus, even if only some of those who gamble rely on injury reports, these reports’ popularity appears to be skyrocketing.

51. Doug Greenberg, *Sports Betting Industry Posts Record \$13.7B Revenue for '24*, ESPN (Feb. 19, 2025), [https://www.espn.com/espn/betting/story/\\_/id/43922129/us-sports-betting-industry-posts-record-137b-revenue-24](https://www.espn.com/espn/betting/story/_/id/43922129/us-sports-betting-industry-posts-record-137b-revenue-24)

[[https://web.archive.org/web/20251231202933/https://www.espn.com/espn/betting/story/\\_/id/43922129/us-sports-betting-industry-posts-record-137b-revenue-24](https://web.archive.org/web/20251231202933/https://www.espn.com/espn/betting/story/_/id/43922129/us-sports-betting-industry-posts-record-137b-revenue-24)].

52. Ryan Grandeau, Note, *Securing the Best Odds: Why Congress Should Regulate Sports Gambling Based on Securities-Style Mandatory Disclosure*, 41 CARDOZO L. REV. 1229, 1231–32, 1254, 1256 (2020) (analogizing the concept of injury reports to corporate disclosure requirements).

53. James J. Park, *Insider Trading and the Integrity of Mandatory Disclosure*, 2018 WIS. L. REV. 1133, 1136.

54. McChrystal, *supra* note 43, at 179.

55. See generally Covo, *supra* note 8 (documenting and analyzing sports leagues’ “anti-tipping” rules); see also Richard Johnson, *Tulane to Require Coaches, Staff to Sign NDA as Precautionary Move Against Sports Betting*, SPORTS ILLUSTRATED (Aug. 24, 2023), <https://www.si.com/college/2023/08/24/tulane-nda-nondisclosure-agreement-insider-info-betting-gambling>

[<https://web.archive.org/web/20251231203946/https://www.si.com/college/2023/08/24/tulane-nda-nondisclosure-agreement-insider-info-betting-gambling>] (noting that Tulane University requires athletes and coaches to sign a non-disclosure agreement pursuant to which sports personnel are prohibited from disclosing “confidential information” that may be used for betting).

56. See, e.g., *Injury Report, 11/15/2024 02:30 PM*, NBA (Nov. 15, 2024), [https://ak-static.cms.nba.com/referee/injury/Injury-Report\\_2024-11-15\\_02PM.pdf](https://ak-static.cms.nba.com/referee/injury/Injury-Report_2024-11-15_02PM.pdf)

instead had publicly explained that Popovich was absent due to an “undisclosed illness.”<sup>57</sup> It took the team ten additional days to disclose that Popovich had experienced a stroke<sup>58</sup>—after which he never returned to coaching.<sup>59</sup> Reasonable minds may disagree about how the absence of a coach from a certain game may affect the team’s chances to win, but when it comes to Popovich—who won five NBA titles and holds the record for the most victories among the league’s coaches,<sup>60</sup> it is hard to argue that his absence is meaningless. And yet, neither Popovich nor any other NBA coach or team executive have appeared on the league’s injury report.

So far, injury reporting systems have only been employed by professional sports leagues. There are some indications, however, that college sports may follow suit. Specifically, the Southeastern (“SEC”), Mid-American (“MAC”), Atlantic Coast (“ACC”), and the Big Ten conferences have recently started to require teams to report the availability of their athletes for forthcoming games.<sup>61</sup> Importantly, these reports are limited to the question whether a college athlete would be available for a certain game; no details about the reasons behind a potential absence are to be provided in those reports. A number of commentators, however, have called on the National Collegiate Athletic Association (“NCAA”) to implement an injury reporting system, reasoning that disclosure of information regarding athletes’ health is essential to maintain the

[[https://web.archive.org/web/20251231203942/https://ak-static.cms.nba.com/referee/injury/Injury-Report\\_2024-11-15\\_02PM.pdf](https://web.archive.org/web/20251231203942/https://ak-static.cms.nba.com/referee/injury/Injury-Report_2024-11-15_02PM.pdf)].

57. *Spurs’ Gregg Popovich Misses Game vs. Wolves Due to Illness*, ESPN (Nov. 2, 2024), [https://www.espn.com/nba/story/\\_/id/42155705/spurs-gregg-popovich-misses-game-vs-wolves-due-illness](https://www.espn.com/nba/story/_/id/42155705/spurs-gregg-popovich-misses-game-vs-wolves-due-illness)

[[https://web.archive.org/web/20251231204305/https://www.espn.com/nba/story/\\_/id/42155705/spurs-gregg-popovich-misses-game-vs-wolves-due-illness](https://web.archive.org/web/20251231204305/https://www.espn.com/nba/story/_/id/42155705/spurs-gregg-popovich-misses-game-vs-wolves-due-illness)].

58. Michael C. Wright, *Gregg Popovich Recovering from Nov. 2 Stroke, Spurs Say*, ESPN (Nov. 13, 2024), [https://www.espn.com/nba/story/\\_/id/42369859/gregg-popovich-recovering-nov-2-stroke-spurs-say](https://www.espn.com/nba/story/_/id/42369859/gregg-popovich-recovering-nov-2-stroke-spurs-say)

[[https://web.archive.org/web/20251231204833/https://www.espn.com/nba/story/\\_/id/42369859/gregg-popovich-recovering-nov-2-stroke-spurs-say](https://web.archive.org/web/20251231204833/https://www.espn.com/nba/story/_/id/42369859/gregg-popovich-recovering-nov-2-stroke-spurs-say)].

59. Tim Reynolds, *Gregg Popovich, the NBA’s All-Time Wins Leader, Retires After Twenty-nine Seasons as San Antonio Spurs Coach*, AP (May 2, 2025), <https://apnews.com/article/spurs-gregg-popovich-retires-d721a3d62bcd3946f0c3a23b1f096d>

[<https://web.archive.org/web/20251231204907/https://apnews.com/article/spurs-gregg-popovich-retires-d721a3d62bcd3946f0c3a23b1f096d>].

60. *NBA Coaches with Most Wins in History*, NBA (Sept. 9, 2024), <https://www.nba.com/news/nba-coaches-with-most-wins-in-history>

[<https://web.archive.org/web/20251231205527/https://www.nba.com/news/nba-coaches-with-most-wins-in-history>].

61. Mark Schlabach, *SEC Starts Availability Reports for Football, Basketball, Baseball*, ESPN (Aug. 29, 2024), [https://www.espn.com/college-football/story/\\_/id/41044110/sec-starts-availability-reports-football-basketball-baseball](https://www.espn.com/college-football/story/_/id/41044110/sec-starts-availability-reports-football-basketball-baseball)

[[https://web.archive.org/web/20251231205528/https://www.espn.com/college-football/story/\\_/id/41044110/sec-starts-availability-reports-football-basketball-baseball](https://web.archive.org/web/20251231205528/https://www.espn.com/college-football/story/_/id/41044110/sec-starts-availability-reports-football-basketball-baseball)]; David Hale, *ACC to Release Availability Reports Before Conference Games*, ESPN (July 22, 2025), [https://www.espn.com/college-football/story/\\_/id/45794684/acc-start-releasing-injury-reports-conference-games](https://www.espn.com/college-football/story/_/id/45794684/acc-start-releasing-injury-reports-conference-games) [[https://web.archive.org/web/20251231205615/https://www.espn.com/college-football/story/\\_/id/45794684/acc-start-releasing-injury-reports-conference-games](https://web.archive.org/web/20251231205615/https://www.espn.com/college-football/story/_/id/45794684/acc-start-releasing-injury-reports-conference-games)].

integrity of betting markets in an era of legalized sports betting.<sup>62</sup> And given the gradual shift toward professionalization of collegiate sports,<sup>63</sup> it is likely that some policymakers will attempt to initiate robust injury reporting systems in college athletics.

Injury reports are frequently updated. The NFL, for example, requires team to release three types of injury reports each week during the season: practice report (which reports practice participation), game status report (which provides “an accurate description of a player’s availability for the club’s next game”), and in-game injury report (which provides “in-game injury information”).<sup>64</sup> In those reports, players may be designated as “questionable,” “doubtful,” or “out.”<sup>65</sup> The NFL penalizes teams that violate these rules.<sup>66</sup>

As noted above, in some leagues, periodic injury reports must be specific—including not only the specific body part but also the type of the injury.<sup>67</sup> In some instances, however, sports leagues use residual designations, such as “personal reasons.” This designation may refer to a number of situations, such as a family member’s sickness or the birth of a child.<sup>68</sup> Similarly, there is some indication that the NWSL uses an

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62. See, e.g., John Holden, *Why Are There No NCAA Injury Reports in the Age of Legal Sports Betting?*, LEGAL SPORTS REP. (Mar. 27, 2024), <https://www.legalsportsreport.com/31209/ncaa-injury-reports-legal-sports-betting/> [[https://web.archive.org/web/20260119051355/https://www.legalsportsreport.com/31209/ncaa-injury-reports-legal-sports-betting/?\\_\\_cf\\_chl\\_rt\\_tk=pgwBCry6.EPFFIAq.7uzqX5VzGG7JcPcCaayCz8cPm0-1768799635-1.0.1.1-YzWWMGJkyaVxys6G7NhCr0Sv1pZ03VNWbtq2cz0LmgQ](https://web.archive.org/web/20260119051355/https://www.legalsportsreport.com/31209/ncaa-injury-reports-legal-sports-betting/?__cf_chl_rt_tk=pgwBCry6.EPFFIAq.7uzqX5VzGG7JcPcCaayCz8cPm0-1768799635-1.0.1.1-YzWWMGJkyaVxys6G7NhCr0Sv1pZ03VNWbtq2cz0LmgQ)] (arguing that the NCAA should take “steps to protect against a scandal by doing little things like releasing NCAA injury reports”).

63. *Johnson v. Nat’l Collegiate Athletic Ass’n*, 108 F.4th 163, 182 (3d Cir. 2024) (holding that “college athletes cannot be barred as a matter of law from asserting FLSA claims simply by virtue of a ‘reversed tradition of amateurism’ in D-I athletics”); Marc Edelman, Michael A. McCann & John Holden, *The Collegiate Employee-Athlete*, 2024 U. ILL. L. REV. 1, 13 (“Aspects of the college sports industry today have truly come to resemble their so-called ‘professional’ counterparts.”).

64. Dan Treacy, *NFL Injury Report Rules, Explained: How It Works, Penalties for Violations and More to Know in 2024*, SPORTING NEWS (Sept. 10, 2024), <https://www.sportingnews.com/us/nfl/news/nfl-injury-report-rules-penalties-violations-2024/05ab0439361a73dd047fec2f> [<https://web.archive.org/web/20260104203303/https://www.sportingnews.com/us/nfl/news/nfl-injury-report-rules-penalties-violations-2024/05ab0439361a73dd047fec2f>].

65. *Id.*

66. 2017 PERSONNEL (INJURY) REPORT POLICY, *supra* note 5 (“A violation of the policy may result in Commissioner discipline, which may include a fine on the involved club, fines or suspensions of involved individuals.”); *NFL Fines Falcons, HC Arthur Smith for Violating League’s Injury Report Policy in Week Seven*, NFL (Dec. 22, 2023), <https://www.nfl.com/news/nfl-fines-falcons-hc-arthur-smith-for-violating-league-s-injury-report-policy-in> [<https://web.archive.org/web/20260104203439/https://www.nfl.com/news/nfl-fines-falcons-hc-arthur-smith-for-violating-league-s-injury-report-policy-in>].

67. See references and accompanying text, *supra* note 5.

68. *Player Participation Policy*, NBA, at 4 (Sep. 13, 2023), <https://pr.nba.com/wp-content/uploads/sites/46/2023/09/NBA-Player-Participation-Policy.pdf> [<https://web.archive.org/web/20250625080648/https://pr.nba.com/wp-content/uploads/sites/46/2023/09/NBA-Player-Participation-Policy.pdf>].

"excused absence" classification to report the absence of players who wish not to disclose early-stage pregnancies.<sup>69</sup>

## B. THE LEGAL STATUS OF INJURY REPORTS

Like other people, most athletes, too, would like to keep their health information—either physical or mental health—private.<sup>70</sup> For example, in 2016, NFL player Jason Pierre-Paul sued ESPN and reporter Adam Schefter after Schefter had posted on social media an image showing Pierre-Paul's medical charts in connection with a firework accident in which Pierre-Paul was involved.<sup>71</sup> The medical records revealed that Pierre-Paul's finger had been amputated.<sup>72</sup> One of the lawsuit's causes of action was the tort of invasion of privacy.<sup>73</sup> The parties in that case reached a settlement.<sup>74</sup>

Viewed from another perspective, sometimes athletes try to avoid exposure of their health status to maintain competitive advantage. For example, NBA player LeBron James famously played three games in the 2018 NBA Finals against the Golden State Warriors with a severe bone contusion in his right hand without disclosing the injury. James's plan worked—the Warriors' players didn't know he was injured<sup>75</sup>—but his team lost the finals. Similarly, American sprinter Noah Lyles did not disclose his COVID-19 diagnosis before running the 200m race in the 2024 Olympic Games.<sup>76</sup> Only after Lyles had completed the race—in which he finished third—he revealed that a few

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69. *United States Star Mallory Swanson Expecting Her First Child*, ESPN (May 7, 2025), [https://www.espn.com/soccer/story/\\_/id/45044299/united-states-star-mallory-swanson-expecting-first-child](https://www.espn.com/soccer/story/_/id/45044299/united-states-star-mallory-swanson-expecting-first-child)

[[https://web.archive.org/web/20260104204711/https://www.espn.com/soccer/story/\\_/id/45044299/united-states-star-mallory-swanson-expecting-first-child](https://web.archive.org/web/20260104204711/https://www.espn.com/soccer/story/_/id/45044299/united-states-star-mallory-swanson-expecting-first-child)]; Theo Lloyd-Hughes, *NWSL Matchday Five: How to Watch, Injury Updates*, SPORTS ILLUSTRATED (Apr. 17, 2025), <https://www.si.com/soccer/nwsl-matchday-5-how-to-watch-injury-updates>

[<https://web.archive.org/web/20260104204745/https://www.si.com/soccer/nwsl-matchday-5-how-to-watch-injury-updates>]. In England, where leagues do not disclose official injury reports, one team used a player's COVID-19 diagnosis to explain why the player had not been participating in games during the first few months of her pregnancy. Madeley, *supra* note 36.

70. See, e.g., Christopher R. Deubert et al., *Protecting and Promoting the Health of NFL Players: Legal and Ethical Analysis and Recommendations*, 7 HARV. J. SPORTS & ENT. L. 1, 377 (2016) (collecting evidence from public sources and interviews).

71. For the Florida federal district court's decision denying defendants' motion to dismiss, see *Pierre-Paul v. ESPN Inc.*, No. 16-21156-Civ-COOKE/TORRES, 2016 WL 4530884 (S.D. Fla. Aug. 29, 2016).

72. Deubert et al., *supra* note 70, at 377.

73. *Pierre-Paul*, 2016 WL 4530884, at \*1.

74. Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2077 n.129 (2018).

75. Josh Schrock, *Warriors Had No Idea LeBron Had Injured Hand in 2018 Finals*, NBC SPORTS (Oct. 2, 2020), <https://www.nbcsportsbayarea.com/nba/golden-state-warriors-warriors-had-no-idea-lebron-had-injured-hand-in-2018-finals/1123195/> [<https://perma.cc/LX76-2L34?type=image>].

76. Coley Harvey, *Noah Lyles Wins 200m Bronze; COVID Diagnosis Revealed After Race*, ESPN (Aug. 8, 2024), [https://www.espn.com/olympics/story/\\_/id/40780740/noah-lyles-wins-200m-bronze-covid-diagnosis-revealed-race](https://www.espn.com/olympics/story/_/id/40780740/noah-lyles-wins-200m-bronze-covid-diagnosis-revealed-race) [[https://web.archive.org/web/20260104205748/https://www.espn.com/olympics/story/\\_/id/40780740/noah-lyles-wins-200m-bronze-covid-diagnosis-revealed-race](https://web.archive.org/web/20260104205748/https://www.espn.com/olympics/story/_/id/40780740/noah-lyles-wins-200m-bronze-covid-diagnosis-revealed-race)].

days earlier he tested positive for COVID-19. Lyles further noted that he had tried to hide his condition in part because he did not want his competitors to have an “edge.”<sup>77</sup>

Although athletes have a privacy interest in their health information, and despite the fact that several laws generally prevent the disclosure of private health information, as a general matter, U.S. sports leagues are not legally barred from employing injury reporting systems. The reason has to do with two characteristics of U.S. sports leagues: (1) in team sports, athletes are employees of their respective teams;<sup>78</sup> and (2) in most U.S. professional sports leagues, including the NBA and WNBA, injury reporting systems are enshrined in the leagues’ Collective Bargaining Agreement (“CBA”) and the athletes’ individual contracts. For example, the NBA’s CBA stipulates that “[e]ach Team may make public medical information relating to the players in its employ, provided that such information relates solely to the reasons why any such player has not been or is not rendering services as a player.”<sup>79</sup> The WNBA’s CBA includes identical language.<sup>80</sup> Athletes are also “often required to waive privacy rights regarding health status” as part of their contractual relationships with their respective teams.<sup>81</sup>

Thus, the disclosure of information about athletes’ injuries is not prohibited under the Health Insurance Portability and Accountability Act (“HIPAA”) because the HIPAA’s privacy rule “excludes from protected health information employment records that a covered entity maintains in its capacity as an employer.”<sup>82</sup> Specifically, in a Final Rule issued in 2002 by the Department of Health and Human Services, the Department noted that “nothing in this Rule prevents an employer, such as a professional sports team, from making an employee’s agreement to disclose health records a condition of employment.”<sup>83</sup>

The confidentiality provisions of the Americans with Disabilities Act (“ADA”) raise more complicated questions vis-à-vis injury reports. The ADA allows employers to

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77. *Id.*

78. Jessica L. Roberts & Brittainie Zinsmeyer, *Fit to Play in the NBA? Reconciling the NBA Collective Bargaining Agreement with the Americans with Disabilities Act*, 166 U. PA. L. REV. ONLINE 149, 154 (2017).

79. NBA Collective Bargaining Agreement, art. XXII, § 4(d) (2023).

80. WNBA Collective Bargaining Agreement, art. XX, § 3 (2020).

81. Maureen A. Weston, *The Anxious Athlete: Mental Health and Sports’ Duty and Advantage to Protect*, 13 HARV. J. SPORTS & ENT. L. 1, 41 (2022).

82. Summary of the HIPAA Privacy Rule, U.S. DEP’T. HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> [<https://web.archive.org/web/2026011231941/https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>]; Stacey A. Tovino, *Artificial Intelligence and the HIPAA Privacy Rule: A Primer*, 24 HOU. J. HEALTH L. & POL’Y 77, 108 (2025) (“Even when health information is clearly individually identifiable, the HIPAA Privacy Rule does not protect such information . . . when the information meets the definition of . . . an employment record held by a covered entity in its role as an employer.”).

83. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53182, 53193 (Aug. 14, 2002). For a detailed analysis of this rule, see Barbara Osborne, *Legal and Ethical Implications of Athletes’ Biometric Data Collection in Professional Sport*, 28 MARQ. SPORTS L. REV. 37, 52–53 (2017) (“Operationally, the effect of the guidance is to affirm teams’ power to compel players to disclose health information (waive HIPAA privacy) and subsume the information into the employment record of each player. Once considered part of the employment record, the contents of the record are not viewed as protected health information.”).

conduct medical examinations under certain circumstances, but employers are generally required to treat the information obtained from these examinations as "a confidential medical record."<sup>84</sup> On the basis of this provision, one court has suggested, in dicta, that the NHL's injury reporting system may violate the ADA under some interpretations.<sup>85</sup> Other courts, however, held that disclosure of information regarding an employee's health may be allowed under the ADA as long as the information was voluntarily shared by the employee (not pursuant to an authorized medical examination by the employer).<sup>86</sup> Scholars, too, have contended that information that is obtained voluntarily is not likely to be subject to the ADA's privacy-related provisions, as well as other privacy-related statutes.<sup>87</sup>

Conversely, sports organizations do not have a legal duty to publicly disclose information about athletes' injuries. This is, at least, what the Court of Appeals for the Ninth Circuit determined in a 2019 case involving a 2015 boxing fight between Emmanuel "Manny" Pacquiao and Floyd Mayweather, in which Mayweather won.<sup>88</sup> After the fight, Pacquiao stated that he had experienced a shoulder injury a few weeks prior to the event. The plaintiffs in that case were boxing fans who alleged that they "would not have purchased tickets had they known of Pacquiao's injury."<sup>89</sup> The district court dismissed the putative class-action, and the Ninth Circuit affirmed. Holding that the plaintiffs "suffered no legally cognizable injury," the Ninth Circuit stated that "[t]aken to its logical extreme, [p]laintiffs' theory would require all professional athletes to affirmatively disclose *any* injury—no matter how minor—or risk a slew of lawsuits from disappointed fans."<sup>90</sup> The Ninth Circuit found that theory to be unworkable and incompatible with "the nature of competitive sports."<sup>91</sup>

Lastly, although there is no direct case law on point, it appears that bettors cannot sue sports teams for failing to comply with leagues' injury reporting policies—in situations where such policies are already in place.<sup>92</sup> Nevertheless, commentators and

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84. 42 U.S.C. § 12112(d)(3)–(4).

85. *In re Nat'l Hockey League Players' Concussion Inj. Litig.*, 120 F. Supp. 3d 942, 951 (D. Minn. 2015).

86. *Cash v. Smith*, 231 F.3d 1301, 1307 (11th Cir. 2000); *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1047 (10th Cir. 2011) (holding that "if an employer discloses medical information that was voluntarily offered by an employee—outside of the context of an authorized employment-related medical examination or inquiry—then the employer is not subject to liability under" the ADA's confidentiality provision).

87. Sánchez Abril & Olazábal, *supra* note 19, at 1573 (noting that voluntary disclosure of health information by corporate executives "would not be subject to the ADA's confidentiality requirement"); *cf.* Andrew K. Glenn, Note, *Disclosure of Executive Illnesses Under Federal Securities Law and the Americans with Disabilities Act of 1990: Hobson's Choice or Business Necessity?*, 16 CARDOZO L. REV. 537, 578 (1994) (noting that the "ADA does not explicitly preclude or permit an employee to waive rights of confidentiality for medical information").

88. *In re Pacquiao-Mayweather Boxing Match Pay-Per-View Litig.*, 942 F.3d 1160 (9th Cir. 2019).

89. *Id.* at 1164.

90. *Id.* at 1171.

91. *Id.*

92. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (holding that an NFL season ticket holder did not have "a legally cognizable right, interest, or injury" in connection with a violation of the leagues' internal regulations by one of the teams); *id.* at 237 ("At least in this specific context, it is not the role of judges and juries to be second-guessing the decision taken by a professional sports league purportedly enforcing its *own* rules."); *Oliver v. Houston Astros, LLC*, No. 2:20-cv-00283-APG-VCF, 2020 WL 1430382, at \*3 (D. Nev.

disgruntled bettors occasionally entertain the idea of filing class actions against teams and leagues when they suspect that a certain injury had not been properly disclosed.<sup>93</sup>

The upshot is that injury reports are regulated by the leagues' internal policies and a web of contractual relationships involving the athletes themselves. The content and structure of injury reports are determined by the leagues. Violations of injury reporting policies are also investigated and addressed by the leagues, which may result in internal disciplinary proceedings.<sup>94</sup> As long as no criminal activity is suspected, the U.S. federal government and the states generally play no role in any of these processes.

To be sure, there is some state regulation in adjacent areas. Some states, for example, impose criminal liability on gamblers who place a wager after "unlawfully" gaining access to information about the outcome of the wager.<sup>95</sup> At least in theory, this may involve nonpublic information about an athlete's health. Similarly, there are number of federal statutes that can be used to prosecute gamblers for betting manipulations that involve the use of nonpublic information about an athlete's health. For example, as noted above, in October 2025, several people were indicted for allegedly placing bets on the basis of nonpublic information about NBA players' injuries—information that had not been reported in the league's injury reports.<sup>96</sup> But these kinds of situations may be related to injury reports only indirectly; the actual injury reporting systems have so far not been subjected to external regulation.

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Mar. 23, 2020), *aff'd*, No. 2:20-cv-00283-APG-VCF, 2020 WL 2128656 (D. Nev. May 5, 2020) ("The Courts have repeatedly refused to allow judges to become replay officials for disappointed fans.")

93. Jackson Walker, *Dave Portnoy Says He's Suing Bengals and NFL Over Burrow Injury: "Refund All Bets!"*, CBS (Nov. 17, 2023), <https://cbsaustin.com/news/nation-world/dave-portnoy-suing-cincinnati-bengals-and-nfl-over-burrow-injury-refund-all-bets-national-football0league-sports-betting-joe-burrow-baltimore-ravens-thursday-night-football>

[<https://web.archive.org/web/20260113002053/https://cbsaustin.com/news/nation-world/dave-portnoy-suing-cincinnati-bengals-and-nfl-over-burrow-injury-refund-all-bets-national-football0league-sports-betting-joe-burrow-baltimore-ravens-thursday-night-football>]; Mike Florio, *NFL Doesn't Directly Comment on Recent Injury-Report Oddities*, NBC SPORTS (Nov. 14, 2024), <https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/nfl-doesnt-directly-comment-on-recent-injury-report-oddities>

[<https://web.archive.org/web/20260113003553/https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/nfl-doesnt-directly-comment-on-recent-injury-report-oddities>].

94. See *supra* note 66 and accompanying text.

95. W. VA. CODE ANN. § 29-22D-21(b)(4).

96. See *supra* notes 27–31 and accompanying text; see also Mike Vorkunov, *Jontay Porter Pleads Guilty to Conspiracy to Commit Wire Fraud, Likely Faces Prison Sentence*, THE ATHLETIC (July 10, 2024), <https://www.nytimes.com/athletic/5629647/2024/07/10/jontay-porter-pleads-guilty-betting-scandal/> [<https://web.archive.org/web/20260113004150/https://www.nytimes.com/athletic/5629647/2024/07/10/jontay-porter-pleads-guilty-betting-scandal/>] (reporting that NBA player Jontay Porter pleaded guilty to a conspiracy to commit wire fraud after investigators had found that Porter pretended to be affected by injuries as part of a scheme with other sports gamblers).

### C. THE LACK OF A MENTAL HEALTH DESIGNATION

Mental health issues among professional athletes, once a taboo topic, have become a much-discussed subject in both media and scholarship.<sup>97</sup> Though sports league officials have recognized the fact that many athletes experience mental health issues in recent years,<sup>98</sup> the leagues themselves do not use a specific reporting designation for mental health in their injury reports. Thus, as noted above, those leagues primarily use the "personal reasons" designation in situations where athletes miss games or practices for mental health reasons.<sup>99</sup>

In the NFL, the "personal matter" designation is a subset of a broader "Not Injury Related" designation.<sup>100</sup> The NFL's 2017 Injury Report Policy, the most recent injury report policy that is publicly available, defines the "Not Injury Related" category as covering "situations in which a player is withheld from his normal repetitions for reasons other than injury" such as "team discipline, jury duty, illness in family, [and] personal matter."<sup>101</sup> The policy makes clear that the use of the "Not Injury Related" designation "is prohibited if the player in question has an injury that is otherwise reportable under the policy."<sup>102</sup> The policy does not define "personal matter." Nor does it make any reference to mental health as a reason for missed practices or games.

To better understand the use of the "Not Injury Related" category, we conducted an original study analyzing publicly available data retrieved from the NFL official website.<sup>103</sup> For each season, the NFL website includes week-by-week injury reports.<sup>104</sup> We counted and analyzed all entries that include "Not injury related" over a fifteen-season period, from 2010 to 2024.<sup>105</sup>

Although the NFL has required teams to provide some more specific information under the "Not Injury Related" since as early as 2016,<sup>106</sup> the league started to provide such information on its website only beginning the 2021 season (e.g., "Not Injury Related—Personal Matter"). Before that season, the designation used was simply "Not

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97. Weston, *supra* note 81, at 6–8.

98. See, e.g., Joe Vardon, *Why the NBA Got Serious About Mental Health: "We Believe in It, But We Also Saw an Increasing Need for It,"* THE ATHLETIC (Apr. 18, 2023), <https://www.nytimes.com/athletic/4384992/2023/04/18/nba-mental-health/> [<https://web.archive.org/web/20260113004657/https://www.nytimes.com/athletic/4384992/2023/04/18/nba-mental-health/>] (describing recent actions taken by the NBA and NFL to promote mental health among athletes).

99. See references and accompanying text *supra* note 4.

100. 2017 PERSONNEL (INJURY) REPORT POLICY, *supra* note 5.

101. *Id.*

102. *Id.*

103. See Appendix A. Authors obtain a copy of full data analysis.

104. See *NFL Injury Report*, *supra* note 33.

105. See Appendix A. The data includes entries where more than one reason was listed (e.g., "Shoulder, Not injury related—personal matter").

106. NFL, 2016 PERSONNEL (INJURY) REPORT POLICY, <https://operations.nfl.com/media/2235/06-07-16-2016-injury-report-policy.pdf> [<https://web.archive.org/web/20260113013225/https://operations.nfl.com/media/2235/06-07-16-2016-injury-report-policy.pdf>].

Injury Related,” with no additional specificity. Thus, our analysis of the “personal matter” designation is limited to the 2021–2024 period.<sup>107</sup> Based on our original analysis of data published by the NFL, in each of the 2021–2024 seasons, the term “Not injury related—personal matter” appeared at least fourteen times in NFL teams’ injury reports, as Table I below demonstrates. In the most recent season analyzed (2024), that designation appeared thirty-seven times.

It is impossible to know how many of those entries were used to report absences for mental health reasons. However, our analysis allows us to point to other designations used by NFL teams under the “Not Injury Related” category, which may suggest that these situations are *not* covered under the “personal matter” designation: “resting player,” “returning from suspension,” “travel,” “coach decision,” and “discipline.”

Our analysis also reveals some degree of variation and inconsistency in the ways teams report players’ absences under the “Not Injury Related” category. For example, in 2015, there were 189 entries reporting “Not Injury Related” absences, whereas in 2017, there were only seven such entries. Moreover, during week 6 of the 2024 season, one player’s absence was reported as “Not Injury Related—Other,” whereas another player’s absence was reported as “Not Injury Reported—Personal Matter,” raising the question about the differences between these two vague designations.

These variations may suggest that teams could, in theory, refer to mental health under the “Not Injury Related” rubric. And yet, based on our analysis, over the last fifteen seasons, there has been no reference to mental health by NFL teams under the “Not Injury Related” category.

Season	Number of “Personal Reasons” Entries <sup>108</sup>	Number of Distinct Players Reporting Personal Matters
2024	37	29
2023	23	20
2022	14	12
2021	54 <sup>109</sup>	33

107. See Table I below. Note that the data reported in Table I refers to all parts of the season, including the eighteen weeks and the postseason stages. By contrast, the data reported in Appendix A is limited to the first seventeen weeks. The reason for this difference lies in the fact that the NFL extended the regular season from seventeen to eighteen weeks in 2021. Dan Graziano, *NFL Moves to Seventeen-Game Regular Season in 2021: What It Means for Teams, Players, Revenue and Fans*, ESPN (Mar. 30, 2021), [https://www.espn.com/nfl/story/\\_/id/31159686/nfl-moves-17-game-regular-season-2021-means-teams-players-revenue-fans](https://www.espn.com/nfl/story/_/id/31159686/nfl-moves-17-game-regular-season-2021-means-teams-players-revenue-fans) [[https://web.archive.org/web/20260113010150/https://www.espn.com/nfl/story/\\_/id/31159686/nfl-moves-17-game-regular-season-2021-means-teams-players-revenue-fans](https://web.archive.org/web/20260113010150/https://www.espn.com/nfl/story/_/id/31159686/nfl-moves-17-game-regular-season-2021-means-teams-players-revenue-fans)] (reporting the move to an eighteen-week season that includes seventeen regular season games for each team). Thus, for consistency, when gathering data for the 2010–2024 period, we gathered data only for seventeen weeks.

108. Based on data from the NFL official injuries website, *NFL Injury Report*, *supra* note 33.

109. The list for 2021 includes seventeen entries involving NFL player Deshaun Watson, who missed the entire 2021 season. See Ben Pickman, *Report: Texans Do Not Plan to Play Deshaun Watson in 2021*

The use of the “personal reasons” designation to report mental health issues raises the question of why leagues do not use another reporting category—“rest”—that may serve similar functions. The answer can be found in a Player Rest Policy—a policy that the NBA has instituted since 2017.<sup>110</sup> That policy restricts teams from allowing players to miss high-profile, nationally televised games, or away games to rest in the absence of a designated injury.<sup>111</sup> This restriction was made increasingly strict in the 2023–2024 season specifically targeting “star players.”<sup>112</sup> These rules seem to disincentivize star players from taking rest time in the absence of any injury, lest their teams be fined.<sup>113</sup> Put differently, the Player Rest Policy prevents players from taking “rest” days solely for mental health issues.<sup>114</sup>

A number of athletes and other stakeholders have expressed discomfort over the choice not to use a “mental health” designation in sports leagues’ injury reporting. In 2019, WNBA player Liz Cambage discussed her experiences with depression in a personal column for *The Players’ Tribune*, urging stakeholders to reckon with the intersection of mental health issues and competitive sports.<sup>115</sup> Describing how she missed a number of games to focus on her mental health, Cambage has noted that the official designation explaining why she did not play—“Rest”<sup>116</sup>—did not reflect the “truth.”<sup>117</sup> Instead, Cambage noted, the reporting should have said: “[Did Not Play] Mental Health.”<sup>118</sup>

In 2022, reporter Shams Charania broke the news that the NBA and the NBA Players Association (“NBPA”) had been negotiating the addition of a new “mental health

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Season, SPORTS ILLUSTRATED (Sep. 12, 2021), <https://www.si.com/nfl/2021/09/12/deshaun-watson-texans-not-planning-to-play>

[<https://web.archive.org/web/20260113010239/https://www.si.com/nfl/2021/09/12/deshaun-watson-texans-not-planning-to-play>].

110. Bobby Marks, *How the NBA’s New Rules on Resting Stars Will Work*, ESPN (Oct. 10, 2023), [https://www.espn.com/nba/story/\\_/id/38386013/how-nba-new-rules-resting-stars-work](https://www.espn.com/nba/story/_/id/38386013/how-nba-new-rules-resting-stars-work)

[[https://web.archive.org/web/20260113010900/https://www.espn.com/nba/story/\\_/id/38386013/how-nba-new-rules-resting-stars-work](https://web.archive.org/web/20260113010900/https://www.espn.com/nba/story/_/id/38386013/how-nba-new-rules-resting-stars-work)].

111. *Id.*

112. *Player Participation Policy*, *supra* note 68.

113. *Id.*

114. *Cf. NBA Injury Report*, *supra* note 5 (referring to potential instance of a *healthy* player resting).

115. Liz Cambage, *DNP-Mental Health*, PLAYERS’ TRIB. (Aug. 11, 2019), <https://www.theplayerstribune.com/articles/liz-cambage-mental-health>

[<https://web.archive.org/web/20260113010825/https://www.theplayerstribune.com/articles/liz-cambage-mental-health>].

116. Note that at least when it comes to the NBA, the “rest” category can no longer be used to report mental health issues, as noted above. *See supra* notes 110–14 and accompanying text.

117. Cambage, *supra* note 115.

118. *Id.*

designation” to the league’s injury reporting framework.<sup>119</sup> Charania called this an “unprecedented move.”<sup>120</sup>

One sports reporter followed up, dedicating a news article to the possibility that the official injury report would include such designation.<sup>121</sup> Referring to the move as a “landmark step,” that article included quotes from several players and coaches, as well as from William Parham, the NBPA Director of Mental Health and Wellness Program.<sup>122</sup> According to the article, one motivation behind this initiative was to afford athletes time off to “rest, recover, and decompress.”<sup>123</sup> But taking time off can also be done under the “personal reasons” category, as the above examples demonstrate, so this cannot fully explain why adding such a designation is important. (In fact, as we note below, incorporating a specific mental health designation might discourage some athletes from taking time off because they may want to avoid the stigma associated with mental health issues.) On the other hand, the news article implicitly suggested that athletes may have privacy interests in their mental health, interests that may counsel against referring explicitly to “mental health” in official injury reports.<sup>124</sup>

Beyond these suggested reasons to include a mental health designation in injury reports, however, the reporter did not dive into the arguments for and against the addition of a new mental-health designation. Moreover, the article also did not mention which reporting designation was used by teams to report athletes missing games for mental health reasons. (As noted above, that designation is often “personal reasons.”)

In any event, to the best of our knowledge, the NBA has never adopted the initiative to add a mental health designation to the league’s injury reports. Specifically, the most recent Collective Bargaining Agreement between the NBA and the NBPA, signed in July 2023, is silent on the matter.<sup>125</sup> Likewise, other sports leagues have not added a “mental health” designation to their injury reporting systems either.<sup>126</sup>

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119. Shams Charania, *Where NBA CBA Talks Stand, Plus New Issues on Players Association Agenda*, THE ATHLETIC (Sep. 19, 2022), <https://www.nytimes.com/athletic/3607549/2022/09/19/shams-nba-cba-negotiations/?source=rss> [<https://web.archive.org/web/20260113010957/https://www.nytimes.com/athletic/3607549/2022/09/19/shams-nba-cba-negotiations/?source=rss>].

120. *Id.*

121. Ron Kroichick, *Mental Health on Injury Report? NBA’s Awakening Could Spark Unprecedented Move*, S.F. CHRON. (Nov. 26, 2022), <https://www.sfchronicle.com/sports/warriors/article/mental-health-nba-injury-report-17607663.php> [<https://web.archive.org/web/20260113011636/https://www.sfchronicle.com/sports/warriors/article/mental-health-nba-injury-report-17607663.php>].

122. *Id.*

123. *Id.*

124. *Id.* (“[A]re NBA players really ready to embrace a ‘mental health’ category on the injury report, right there alongside ‘sprained ankle’ and ‘wrist soreness?’”); *see also id.* (“[A]dding a new designation on the injury report seems like a big step, even with everything that has happened in the past five years.”).

125. NBA Collective Bargaining Agreement, *supra* note 79.

126. We are aware of at least three instances in which Major League Baseball (MLB) teams used a mental-health designation, but those disclosures were part of the MLB Injured List, which serves a slightly different purpose than injury reports. Matt Geagan, *Boston Red Sox Put Pitcher Chris Martin on Injured List with Anxiety*, CBS NEWS (June 5, 2024), <https://www.cbsnews.com/boston/news/chris-martin->

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In sum, most U.S. sports leagues systematically disclose information about athletes' injuries. The leagues obtain athletes' consent to such disclosures through both collective and personal agreements, which effectively shield the leagues from liability for disclosing health information. Those injury reports, which aim to protect the competition's integrity by injecting transparency into sports betting markets, focus on physical injuries. At the same time, the reports and the official policies governing them recognize a wide array of situations that may result in a player's absence for reasons not related to physical injury: team discipline, jury duty, illness in family, and coach decision, among others. And yet, despite the wide recognition that many professional athletes experience mental health issues, athletes' absences for mental health issues have not been reported as such, but rather by using a non-specific designation: "personal reasons." If one were to learn about sports only by examining injury reports, one could easily reach the conclusion that professional athletes are immune to mental health issues, which could not be further from the truth.

## II. THREE MISGUIDED JUSTIFICATIONS

The question remains: Why do injury reporting systems lack an option to report an athlete's absence due to mental health issues while requiring disclosure of physical injuries in great specificity? This Part discusses three possible justifications for sports leagues' different treatment of physical and mental health when it comes to injury reporting systems. After analyzing these possible justifications, we conclude that one of them relies on an erroneous factual foundation, and that the other two are, at least in part, normatively problematic.

Before delving into these potential justifications, however, it is important to note that our analysis focuses on the question of *how* to report taking time off to address mental health issues, as opposed to *whether* athletes should be allowed to take time off to address such issues. For the purpose of this Article, we assume that the answer to the latter question is yes. In fact, sports teams may be obligated under the ADA to provide their players with a leave of absence to accommodate athletes with psychosocial disability.<sup>127</sup> Moreover, it seems that, in practice, the leagues already allow athletes to

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anxiety-injured-list-boston-red-sox-mlb/

[<https://web.archive.org/web/20260113011704/https://www.cbsnews.com/boston/news/chris-martin-anxiety-injured-list-boston-red-sox-mlb/>] (noting that two MLB players, Daniel Bard and Chris Martin, were placed on the Injured List due to "anxiety" in 2023 and 2024, respectively); Jason Beck, *Meadows Placed on IL as He Deals with Anxiety*, MLB (Apr. 8, 2023), <https://www.mlb.com/news/austin-meadows-placed-on-injured-list-with-anxiety>

[<https://web.archive.org/web/20260113011717/https://www.mlb.com/news/austin-meadows-placed-on-injured-list-with-anxiety>] (noting that MLB player Austin Meadows was placed on the Injured List "with what was classified as anxiety").

127. Covo, *supra* note 8, at 278–81 (applying the ADA to situations involving athletes with psychosocial impairments).

take a leave, at least in some cases.<sup>128</sup> Thus, the discussion that follows assumes that players are allowed to miss practices or games to address mental health issues. It focuses on a different question: How should teams report these absences?

#### A. FIRST MISGUIDED JUSTIFICATION: PHYSICAL HEALTH AND MENTAL HEALTH ARE EASILY DISTINGUISHABLE

A necessary explanation for the discrepancy in the way in which sports leagues treat physical injuries, on the one hand, and mental health issues, on the other, is that physical injuries and mental health issues are fully distinct categories. If these categories are distinct, the argument goes, it is much easier to justify why they deserve a different treatment in the context of reporting. There is a major problem with this explanation, however: Researchers have long pointed to the “indistinct line between the physical and the mental.”<sup>129</sup>

Once thought to be separate, mental health and physical health are becoming increasingly recognized as inextricable in the medical field. Mind-body dualism, the belief that the mind and body are separate, was well characterized by philosopher René Descartes, who described the mind and body as distinct entities.<sup>130</sup> This is an idea that has permeated throughout history, but as our understanding of the pathophysiology of psychiatric disorders has advanced, there have been many demonstrations of how difficulties with mental health have a clear neurobiological basis. One such example is the finding that psychiatric conditions such as schizophrenia and bipolar disorder have been shown to be highly heritable.<sup>131</sup>

As mental illness has been reconceptualized, the way we approach the management of these conditions is changing. In the DSM-V, the core resource for the diagnosis and management of psychiatric conditions, there is an explicit acknowledgement of the inseparable nature of physical and mental health, despite the language often used to describe mental illness. As the DSM-V recognizes, “‘mental disorder’ and ‘another medical condition’ are merely terms of convenience and should not be taken to imply that there is any fundamental distinction between mental disorders and other medical conditions, that mental disorders are unrelated to physical or biological factors or

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128. See, e.g., Thompson, *supra* note 2 (describing the Chicago Bulls’ reaction to player Andre Drummond missing a game to focus on his mental health); Abrams, *supra* note 9 (describing how player Tyrell Terry “took a leave of absence” from the NBA team Dallas Mavericks).

129. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 404, n.6 (2006) (relying on DSM-IV-TR).

130. RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY (1641), reprinted in 2 THE PHILOSOPHICAL WRITINGS OF DESCARTES 1 (J. Cottingham, R. Stoothoff & D. Murdoch eds., J. Cottingham trans., 1984); Matthias Forstmann, “*The Mind Is Willing, But the Flesh Is Weak*”: The Effects of Mind-Body Dualism on Health Behavior, 23 PSYCH. SCI. 1239, 1239 (2012).

131. Kevin S. O’Connell & Brandon J. Coombes, *Genetic Contributions to Bipolar Disorder: Current Status and Future Directions*, 51 PSYCH. MED. 2156, 2163 (2021); Simona Corina Trifu et al., *Genetics of Schizophrenia (Review)*, 20 EXPERIMENTAL & THERAPEUTIC MED., 3462, 3462 (2020).

processes, or that other medical conditions are unrelated to behavioral or psychosocial factors or processes.<sup>132</sup>

Competitive sports provide a clear example of the collapse of the body-mind distinction.<sup>133</sup> One example of the inseparability of body and mind arises from the study of pain, which is experienced by many high-intensity athletes at one or more musculoskeletal sites.<sup>134</sup> In many cases, advanced imaging cannot identify specific structural causes of pain.<sup>135</sup> Observations such as this have challenged the assumption that even "simple" musculoskeletal pain has exclusively biological causes, suggesting instead that psychological and social contributions are also critical to understand pain. Collectively, this is known as the biopsychosocial model, which forms the contemporary medical understanding of pain.<sup>136</sup> In this model, diagnosis and treatment of pain mandates addressing psychiatric comorbidities, stress, behavioral patterns, and social determinants of health such as economic security, support networks, educational attainment, and access to resources. In the context of mental health, psychiatric conditions have been shown to mediate pain perception and intensity.<sup>137</sup> Early evidence into the reasons for this phenomenon suggests that there may be neurological, developmental and genetic mechanisms at play.<sup>138</sup> These insights have also translated into clinical practice, with antidepressant medications utilized for pain control in a variety of conditions.<sup>139</sup>

132. AM. PSYCH. ASS'N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS xxv (5th ed. 2013) [DSM-V].

133. Professional athletes have pointed to the myriad ways in which the mind and the body are interconnected. Skier Mikaela Shiffrin, for example, shared in a personal column: "I've always known the mind-body connection in skiing. Always appreciated that mental element of our sport." Mikaela Shiffrin, *My Battle with PTSD*, PLAYERS' TRIB. (May 30, 2025), <https://www.theplayertribune.com/mikaela-shiffrin-skiing-ptsd-mental-health> [https://web.archive.org/web/20260113012216/https://www.theplayertribune.com/mikaela-shiffrin-skiing-ptsd-mental-health]. Towards the end of the essay, Shiffrin noted: "I can tell that, beyond a shadow of a doubt . . . what I imagine doing in my mind, the technical movements, what I'm seeing, that message, it's coming through loud and clear to my entire body. It translates to what I'm actually doing. In lockstep. To perfection. That clarity, the mind-body connection, it's present to the greatest extent possible. It's just totally synched up. I feel it with every fiber of my being." *Id.*

134. See, e.g., Pall Jonasson et al., *Prevalence of Joint-Related Pain in the Extremities and Spine in Five Groups of Top Athletes*, 19 KNEE SURG. SPORTS TRAUMATOL. ARTHROSC. 1540, 1540 (2011) ("Pain in the cervical, thoracic and lumbar spine and larger joints is a common complaint among top athletes.").

135. Chris Maher et al., *Non-Specific Low Back Pain*, 380 LANCET 736 (2017).

136. Joan W.S. Vlaeyen & Geert Crombez, *Behavioral Conceptualization and Treatment of Chronic Pain*, 16 ANN. REV. CLIN. PSYCH. 187 (2020); Nebojsa Nick Knezevic, *Low Back Pain*, 398 LANCET 78 (2021); Bart N. Green et al., *A Scoping Review of Biopsychosocial Risk Factors and Co-morbidities for Common Spinal Disorders*, 13 PLOS ONE 1 (2018).

137. Anna Ehnvall et al., *Rejection Sensitivity and Pain in Bipolar versus Unipolar Depression*, 16 BIPOLAR DISORD. 190 (2014); Diane J. Kim et al., *Altered Physical Pain Processing in Different Psychiatric Conditions*, 133 NEUROSCI. & BIOBEHAV. REV. 104510 (2022).

138. Maxim B. Freidin et al., *Insight into the Genetic Architecture of Back Pain and Its Risk Factors from a Study of 509,000 Individuals*, 160 PAIN 1361 (2019).

139. Pinky Dharmshaktu et al., *Efficacy of Antidepressants as Analgesics: A Review*, 52 J. CLIN. PHARMACOL. 6 (2012).

A more specific example of the inseparability of body and mind in the sports context is the “Yips.” Defined as “a psycho-neuromuscular impediment interfering with the execution of fine-motor skills,”<sup>140</sup> this condition involves intermittent jerks or tremors, as well as involuntary twitching, spasms, or freezing.<sup>141</sup> It is generally believed that the term “Yips” was coined in the 1960s among professional golfers who were forced into retirement by the condition.<sup>142</sup> As no other objective abnormalities are found on neuromuscular examination,<sup>143</sup> the underlying pathophysiologic basis of the Yips remains hotly debated. The condition has often been attributed to psychological factors such as anxiety.<sup>144</sup> However, a number of studies have found electrophysiological data to suggest the condition is a task-specific movement disorder, caused by abnormal contraction patterns of arm musculature.<sup>145</sup> Collectively, these studies have led to the Yips being understood as having psychological, performance, neurological, and physiological components, with ongoing need for further study.<sup>146</sup>

Anecdotally, athletes who have experienced Yips-like symptoms described them as involving both physical and mental aspects. Take, for example, Simone Biles’s account of the condition that made her withdraw from the Tokyo Olympics. Citing the “twisties,” a condition known amongst gymnasts, Biles described the feeling of “[n]ot having an inch of control over your body.”<sup>147</sup> While other commentators have associated the “twisties” with mental health issues, Biles noted that she was “not sure how true” the idea that the “twisties” are triggered by stress is.<sup>148</sup> Based on this account, one could wonder: To which reporting category do the “twisties” belong, physical injury or mental health issues?

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140. Naveed Saleh, *When Athletes Get “The Yips,”* PSYCH. TODAY (July 24, 2023), <https://www.psychologytoday.com/us/blog/the-red-light-district/202307/when-athletes-get-the-yips> [<https://perma.cc/XN7Q-6BGM>].

141. Samish Dhungana & Joseph Jankovic, *Yips and Other Movement Disorders in Golfers*, 28 MOV. DISORD. 576 (2013); Aynsley M. Smith et al., *The “Yips” in Golf: A Continuum Between a Focal Dystonia and Choking* 33 SPORTS MED. 13 (2003).

142. Larry Dorman, *Cause of the Yips Is Debated, but the Effect Isn’t*, N.Y. TIMES (June 11, 2011), <https://www.nytimes.com/2011/06/12/sports/golf/the-yips-bane-of-golfers-may-be-muscular.html> [<https://web.archive.org/web/20110614214258/https://www.nytimes.com/2011/06/12/sports/golf/the-yips-bane-of-golfers-may-be-muscular.html>].

143. Chen Hai et al., *Advances in Primary Writing Tremor*, 16 PARKINSONISM & REL. DISORD. 561 (2010).

144. Dhungana & Jankovic, *supra* note 141.

145. Charles H. Adler et al., *Abnormal Co-Contraction in Yips-Affected but Not Unaffected Golfers: Evidence for Focal Dystonia*, 64 NEUROLOGY 1813 (2005).

146. Patrick Clarke, David Sheffield & Sally Akehurst, *The Yips in Sport: A Systematic Review*, 8 INT’L REV. SPORT & EXERCISE PSYCH. 156 (2015); Koya Mine, Kenta Ono & Nobuhito Tanpo, *Effectiveness of Management for Yips in Sports: A Systematic Review*, 2 J. PHYS. THER. SPORTS MED. 17 (2018).

147. Alice Park, *Simone Biles Has the Twisties. What Are They, and Why Are They So Dangerous?*, TIME (July 30, 2021), <https://time.com/6085776/simone-biles-twisties-gymnastics/> [<https://web.archive.org/web/20260119220421/https://time.com/6085776/simone-biles-twisties-gymnastics/>].

148. Juliet Macur, *Simone Biles, Struggling with “The Twisties,” Says She Can’t “Tell Up from Down,”* N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/article/twisties-gymnastics.html> [<https://web.archive.org/web/20250930193600/https://www.nytimes.com/article/twisties-gymnastics.html>].

Moreover, so-called "physical" injuries and "mental health" issues are sometimes co-constitutive. Take, for example, chronic traumatic encephalopathy ("CTE"), the cumulative neuropsychological deficits linked to repeated concussions.<sup>149</sup> While CTE has gained mainstream attention for its high incidence among retired NFL players,<sup>150</sup> the effects of repeated concussions have been linked to cognitive impairments among active athletes as well, such as high school and collegiate football and soccer players.<sup>151</sup>

The exact mechanism causing CTE remains an active area of research, with evidence supporting a variety of putative neurodegenerative and neuroinflammatory processes.<sup>152</sup> Nonetheless, contemporary expert consensus states that abnormal protein buildup in neurons and supporting cells in the cerebral cortex is a hallmark diagnostic criterion for the condition.<sup>153</sup> Because these regions of the brain regulate both physical processes and cognitive/behavioral functions, these diverse functions are inextricable at the cellular level of CTE.

To be sure, some scholars argue that it may be helpful to distinguish between "physical" and "mental" injury for policy-related reasons.<sup>154</sup> But such a distinction depends on purpose and context. Given that the boundaries are often blurry, the discrepancy between the leagues' treatment of physical and mental health raises questions. Specifically, the failure to reject dualism and acknowledge the heavy overlap between the physical and mental can contribute to poor health practices and a barrier to the treatment of mental health issues.<sup>155</sup> Similarly, as detailed below, the dualistic perspective may create the perception that psychiatric disorders are less pharmaceutically treatable than physical health disorders.

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149. See Tracey Covassin et al., *Investigating Baseline Neurocognitive Performance Between Male and Female Athletes with a History of Multiple Concussion*, 81 J. NEUROL. NEUROSURG. & PSYCHIATRY 597 (2010); Thomas W. McAllister et al., *Cognitive Effects of One Season of Head Impacts in a Cohort of Collegiate Contact Sport Athletes*, 78 NEUROLOGY 1777 (2012).

150. See Everett J. Lehman et al., *Neurodegenerative Causes of Death Among Retired National Football League Players*, 79 NEUROLOGY 1970 (2012).

151. See Ann C. McKee et al., *Neuropathologic and Clinical Findings in Young Contact Sport Athletes Exposed to Repetitive Head Impacts*, 80 JAMA NEUROL. 1037 (2023); Erik J.T. Matser, *Neuropsychological Impairment in Amateur Soccer Players*, 282 JAMA 971 (1999).

152. See Laura Moretti et al., *Cognitive Decline in Older Adults with a History of Traumatic Brain Injury*, 11 LANCET NEUROL. 1103 (2012); Victoria E. Johnson, *Inflammation and White Matter Degeneration Persist for Years After a Single Traumatic Brain Injury*, 136 BRAIN 28 (2013).

153. See Ann C. McKee et al., *The First NINDS/NIBIB Consensus Meeting to Define Neuropathological Criteria for the Diagnosis of Chronic Traumatic Encephalopathy*, 131 ACTA NEUROPATHOL. 75 (2016).

154. See, e.g., Francis X. Shen, *Mind, Body, and the Criminal Law*, 97 MINN. L. REV. 2036, 2095 (2013) (arguing that even though neuroscience research suggests that many mental health conditions are in fact biologically-based impairments, "drawing this dualist line in the legal sand might well be good policy" in the context of criminal law); Philip Petrov, *The Physical-Emotional Distinction in Tort*, 37 CAN. J.L. & JURIS. 231, 231-32 (2024) (arguing that "tort's physical-emotional distinction is not a relic of mind-body dualism but a heuristic that judges, in their capacity as ordinary decision-makers, have used to structure and simplify the difficult but unavoidable task of drawing lines between harm that the judiciary should and should not recognize"). But see Dov Fox & Alex Stein, *Dualism and Doctrine*, 90 IND. L.J. 975, 979 (2015) (arguing that "dualism's pernicious influence should be uprooted by devising policies and rules that cast off its distorting metaphysics").

155. Forstmann, *supra* note 130.

In sum, any attempt to justify the different treatment of “physical” injuries and “mental health” issues in sports leagues’ injury reporting systems on the basis of an inherent and categorical distinction between “body” and “mind” is not persuasive.

## B. SECOND MISGUIDED JUSTIFICATION: USING THE “PERSONAL REASONS” CATEGORY BENEFITS ALL ATHLETES BY PROTECTING THEIR PRIVACY

To say that something is personal is often to say that it is “private.” This rationale may be another way to justify sports leagues’ decision to refer to mental health issues as “personal reasons” in injury reporting systems. In other words, the decision not to use a “mental health” designation in injury reporting systems may reflect a deliberate attempt to protect athletes’ privacy. Such an approach is not unique. As Professor Jasmine Harris has detailed in a recent article, across legal fields, privacy is the prevailing norm when it comes to disability disclosure, particularly so-called “invisible” impairments.<sup>156</sup> In fact, as Harris has shown, courts sometimes impose tort liability on entities that disclose information about people’s disability.<sup>157</sup> In such cases, courts tend to treat disability as a “private fact” whose disclosure results in reputational damage.<sup>158</sup>

From this perspective, there may be good policy-related reasons to distinguish between physical and mental health in injury reporting mechanisms. Indeed, in contemporary society, it is unfortunately true that mental health issues carry a significant stigma. Thus, creating a sense of ambiguity with respect to the reasons behind an athlete’s absence may help the athlete avoid the stigma associated with mental health issues.<sup>159</sup> To the very least, the argument goes, such a framework allows athletes to decide if, when, and how to disclose that they are dealing with mental health issues.<sup>160</sup>

A number of recent events in which athletes opened up about their experiences with mental health demonstrate the harsh consequences of disclosing one’s mental health issues. Recall gymnast Simone Biles, who withdrew from a competition during the Tokyo Olympics. Biles, “the most decorated gymnast in history,”<sup>161</sup> was subject to heavy criticism by some social media users, who accused her of “selfishness or fragility”<sup>162</sup> and

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156. See Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681 (2021).

157. *Id.* at 1721–25.

158. *Id.* at 1722.

159. Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 557 (2021).

160. *Id.* at 595.

161. Ashlee Buhler, *Simone Biles: Career Highlights*, NBC OLYMPICS (updated July 1, 2024), <https://www.nbcolympics.com/news/simone-biles-career-highlights#> [<https://web.archive.org/web/20260119221018/https://www.nbcolympics.com/news/simone-biles-career-highlights>].

162. Louise Radnofsky, *Simone Biles Explains Her Olympic Withdrawals on Social Media, Indicates She May Not Compete Again in Tokyo*, WALL ST. J. (July 30, 2021), <https://www.wsj.com/articles/simone-biles-olympics-tokyo-twisties-11627639363> [<https://web.archive.org/web/20260119222607/https://www.wsj.com/sports/olympics/simone-biles-olympics-tokyo-twisties-11627639363>].

referred to her as a “quitter.”<sup>163</sup> Based on these experiences, one could argue that sports leagues should not use a mental health designation in injury reporting systems.

But even after taking these considerations into account, there are still questions whether the status quo—whereby physical conditions are reported in specificity and mental health issues are not—can be fully justified. One reason is that, at least in some cases, a player’s mental health condition is not a “private fact.” Indeed, we know that in the context of professional sports, some people would actually want the public to know about their mental health experiences.

Andre Drummond’s case is illustrative: Drummond himself had posted information about his mental health issues on social media *before* the NBA issued the pertinent injury report, so it makes little sense to protect his privacy interest in this respect.<sup>164</sup> For another example, consider Liz Cambage’s personal account, in which she used the language commonly found in injury reports to share her experiences with mental health: “here’s your Liz Cambage injury update: she was day-to-day with anxiety and depression—and she still is.”<sup>165</sup> As Cambage made clear, her motivation behind writing that column was “to tell you the real truth of what’s been going on with [her].”<sup>166</sup>

In her recent article about the relationship between (invisible) disability and privacy, Professor Harris criticizes a similar situation where an organization denied an affiliated individual the opportunity to “claim” their disability through the organization’s platform.<sup>167</sup> Harris described how, a decade ago, a U.S. high school administration cited privacy rights to impede the publication of a special issue of the school’s newspaper that included essays by students about their experiences with depression.<sup>168</sup> Barred from disclosing their mental health experiences in their own school newspaper, the students turned to *the New York Times*, which published their essay.<sup>169</sup> According to Harris, that story demonstrates how privacy “can be misdirected to force people to be in the closet about their disabilities.”<sup>170</sup>

It may seem odd to speak about forced secrecy in the context of professional athletes, who can use their social media accounts or other platforms to disclose their mental health issues, as many athletes have done. In light of these alternative avenues for disclosure, the argument goes, the content of the official injury report becomes largely irrelevant. That argument, however, conflates institutional and individual

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163. Juliet Macur, *As Biles Rests After Tokyo, Gymnastics Glimpses What Could Be*, N.Y. Times (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/sports/olympics/biles-tokyo-gymnastics-future.html#https://web.archive.org/web/20210812062147/https://www.nytimes.com/2021/08/04/sports/olympics/biles-tokyo-gymnastics-future.html>].

164. See references and accompanying text, *supra* notes 1–3.

165. Cambage, *supra* note 115.

166. *Id.*

167. Harris, *supra* note 156, at 1717–19.

168. *Id.*

169. Madeline Halpert & Eva Rosenfeld, *Depressed, But Not Ashamed*, N.Y. TIMES (May 21, 2014), <https://www.nytimes.com/2014/05/22/opinion/depressed-but-not-ashamed.html> [<https://web.archive.org/web/20140524010308/https://www.nytimes.com/2014/05/22/opinion/depressed-but-not-ashamed.html>].

170. Harris, *supra* note 156, at 1718.

responsibility with respect to publicity. As Professor Harris explains, “while coming out as a person with a disability has the potential for individual and, in the aggregate, group movement-building, this alone is insufficient to solve the structural problem of institutionalized ableism and neurotypicality that is so pervasive in society.”<sup>171</sup> Thus, she concludes, “institutional actors must play” a remedial role in the context of publicity because of the collective value of publicity for identity formation.<sup>172</sup>

There are other problems with a blanket policy that treats mental health issues as private information that should not be disclosed. As Professor Harris notes, treating mental health as a private fact sometimes runs counter to the goal of destigmatizing mental health.<sup>173</sup> The problem can be described as a tradeoff between the short-term benefits and long-term harms of a privacy framing. In the short term, the privacy framing protects individuals from the stigma associated with disclosure about mental health. In the long term, however, privacy may feed this very stigma by treating mental health as something that is not supposed to be discussed in public.

This concern is particularly relevant when it comes to professional athletes who are influential actors and can shift social attitudes around stigmatized conditions. As Professor Katie Eyer argues in a recent piece, when a critical mass of people claim the label of disability they become “potentially stereotype-disrupting exemplars.”<sup>174</sup> And this is especially so if the persons “claiming disability” are “those who have the most privilege,” such as “politicians and celebrities.”<sup>175</sup>

From a different perspective, it is doubtful whether using the “personal reasons” designation can actually protect athletes’ privacy, especially when the norm is that physical injuries are disclosed in great detail. The concern is that the deviation from the norm and the use of a vague designation such as “personal reasons” may draw attention to the player who experiences mental health issues, giving rise to speculations as to the reasons behind the player’s absence.<sup>176</sup> Researchers have referred to these kinds of situations using the term the “Streisand effect,” whereby “attempts to censor,

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171. *Id.* at 1739.

172. *Id.*

173. *Id.*

174. Eyer, *supra* note 159, at 581.

175. *Id.* at 595.

176. See, e.g., Sean Deveney, *WNBA Star Rickea Jackson Reacts to Pregnancy Rumors Amid Absence from Team*, ATHLON SPORTS (Jun. 2, 2025), <https://athlonsports.com/wnba/los-angeles-sparks/wnba-star-rickea-jackson-reacts-pregnancy-rumors-amid-absence-team> [<https://web.archive.org/web/20250606005503/https://athlonsports.com/wnba/los-angeles-sparks/wnba-star-rickea-jackson-reacts-pregnancy-rumors-amid-absence-team>] (noting the circulation of an “unfounded rumor” that WNBA player Rickea Jackson was pregnant after Jackson missed a game for “personal reasons”); *Warriors’ Green: Podcast Remarks on Knicks’ Towns “What I Heard,”* ESPN (Mar. 7, 2025), [https://www.espn.com/nba/story/\\_/id/44145546/warriors-green-podcast-remarks-knicks-towns-heard](https://www.espn.com/nba/story/_/id/44145546/warriors-green-podcast-remarks-knicks-towns-heard) [[https://web.archive.org/web/20260119224829/https://www.espn.com/nba/story/\\_/id/44145546/warriors-green-podcast-remarks-knicks-towns-heard](https://web.archive.org/web/20260119224829/https://www.espn.com/nba/story/_/id/44145546/warriors-green-podcast-remarks-knicks-towns-heard)] (reporting a situation where the use of the “personal reasons” designation triggered unfounded speculation as to the reason behind an NBA’s player absence); *cf.* Madeley, *supra* note 36 (quoting a former communications chief at Premier League clubs as saying that in the case of a death in the family, “you wouldn’t advise the manager to say the player is out for ‘personal reasons’ because that leaves a void of information which people then fill with speculation”).

remove, or hide information only serves to amplify it more in the public's eye."<sup>177</sup> Of course, the problem here is not with reporting that an athlete will miss a game for undisclosed reasons. Rather, it is using the "personal reasons" designation as an exception to the norm whereby physical injuries are being disclosed in detail. It is this disparity that draws attention to the player whose reasons for absence are being kept private.<sup>178</sup>

Moreover, given the stigma surrounding mental health, including mental health issues under the residual "personal reasons" designation (which includes other reasons for missing games or practices) may push athletes who *do not* experience mental health issues to disclose their personal reasons (such as the death of a close friend or relative) in order to distance themselves from any association with mental health issues. This situation involves what Professor David Pozen calls "privacy-privacy tradeoffs" in that the attempt to protect one athlete's privacy may indirectly undermine another athlete's privacy.<sup>179</sup>

Lastly, treating mental health issues as private facts exacerbates a dearth of data about athletes' mental health.<sup>180</sup> Based on the injury reports, we can have data on how many athletes had lateral ankle sprains in the 2004–2005 basketball season,<sup>181</sup> but we can't come even close to the number of athletes experiencing depression or severe anxiety. By treating mental health as "personal," the NBA and other leagues prevent the collection of accurate data about how many athletes have missed games due to mental health issues. Collecting data about the prevalence of mental health issues among athletes is important in its own right, but it is particularly crucial for informing sports leagues' decision-making regarding a variety of issues, ranging from questions such as whether to add more games to the regular season,<sup>182</sup> whether to allow "prop" bets,<sup>183</sup> and whether to require athletes to attend post-game interviews.<sup>184</sup> Each of these

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177. Mark Travers, *A Psychologist Explains the "Streisand Effect"—When Censorship Fails*, FORBES (Aug. 24, 2024), <https://www.forbes.com/sites/traversmark/2024/08/24/a-psychologist-explains-the-streisand-effect—when-censorship-fails/> [<https://web.archive.org/web/20260119224932/https://www.forbes.com/sites/traversmark/2024/08/24/a-psychologist-explains-the-streisand-effect—when-censorship-fails/>].

178. Cf. Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 603 (2021) (describing "the significance of data's relationality" in the context of privacy and data governance).

179. David Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 229 (2016) ("[A] policy may shift privacy burdens or benefits from one group in the population to another.").

180. Harris, *supra* note 156, at 1726.

181. Mark C. Drakos et al., *Injury in the National Basketball Association: A Seventeen-Year Overview*, 2 SPORTS HEALTH 284 (2010); Garrett S. Bullock et al., *Temporal Trends in Incidence of Time—Loss Injuries in Four Male Professional North American Sports Over Thirteen Seasons*, 11 SCI. REPS. 8278 (2021).

182. See, e.g., Katherine Terrell, NFLPA on Schedule: "No One Wants to Play an Eighteenth Game," ESPN (Feb. 5, 2025), [https://www.espn.com/nfl/story/\\_/id/43706558/nflpa-schedule-wants-play-18th-game-no-one](https://www.espn.com/nfl/story/_/id/43706558/nflpa-schedule-wants-play-18th-game-no-one) [[https://web.archive.org/web/20260119225022/https://www.espn.com/nfl/story/\\_/id/43706558/nflpa-schedule-wants-play-18th-game-no-one](https://web.archive.org/web/20260119225022/https://www.espn.com/nfl/story/_/id/43706558/nflpa-schedule-wants-play-18th-game-no-one)] (reporting the NFL Players Association's opposition to a recent proposal to add an eighteenth game to the regular season).

183. McCann & Novy-Williams, *supra* note 48.

184. Weston, *supra* note 81, at 38–39 (describing "Naomi Osaka's request to modify press conference obligations due to mental health concerns.").

decisions may affect athletes' mental health and therefore should incorporate considerations that pertain to the prevalence of mental health issues among athletes. For example, a recent increase in the number of NBA players experiencing Achilles tendon injuries has led the league to convene a panel of experts that would examine the issue, including asking whether the NBA season is too long.<sup>185</sup> It is difficult to ask a similar question with respect to mental health, because there is no official data on this matter.

### C. THIRD MISGUIDED JUSTIFICATION: UNLIKE PHYSICAL INJURIES, MENTAL HEALTH ISSUES ARE NOT SPORTS-RELATED

Another possible justification for the differences in the ways in which U.S. sports leagues treat physical and mental health in injury reports has to do with the distinction between individual and structural factors affecting one's health. Sports leagues might perceive physical injuries as resulting from the "game" (that is, injuries that are sports-related) while at the same time treating mental health issues as originating from the individual (that is, issues that are not sports-related). This justification, however, is also based on erroneous foundations and raises normative concerns.

The field of sport psychology, for example, has long operated on the assumption that psychological factors affect physical performance in the context of sports.<sup>186</sup> In fact, the central role of psychology in competitive sports has gained judicial recognition by the U.S. Supreme Court. In *PGA Tour, Inc. v. Martin*, the Court justified its decision to require a golf tournament to allow a disabled golfer to use a golf cart (instead of walking the golf course), in part, by pointing to the fact that the golfer would not be able to benefit from the stress-relieving potential of walking (and hence would not gain a significant competitive advantage over the other players from using the golf cart).<sup>187</sup> The Court further explained that, in professional golf, "fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients."<sup>188</sup> Thus, it would be a mistake to argue that mental health is not "part of the game" when it comes to professional sports.

Conversely, the ways in which the competition is structured and shaped may affect an athlete's mental health. Contemporary discussions about health move from focusing on personal responsibility for one's health to the "social, economic, and environmental

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185. Tim Reynolds, *NBA Commissioner Adam Silver Says League Taking Closer Look at Achilles Tears*, NBA (June 27, 2025), <https://www.nba.com/news/nba-commissioner-adam-silver-league-researching-achilles-tears> [<https://web.archive.org/web/20260105120437/https://www.nba.com/news/nba-commissioner-adam-silver-league-researching-achilles-tears>].

186. Peter C. Terry, *Applied Sports Psychology: Beware the Sun, Icarus*, in IAAP HANDBOOK OF APPLIED PSYCHOLOGY 386, 386 (Paul R. Martin ed., 2011); Marc Lochbaum et al., *Sport Psychology and Performance Meta-Analyses: A Systematic Review of the Literature*, 17 PLOS ONE 1 (Feb. 16, 2022).

187. 532 U.S. 661, 687–88 (2001).

188. *Id.*

determinants" that affect "health behaviors and exposures."<sup>189</sup> In recent years, researchers and advocates have focused on these structural aspects of health, recognizing the role societal factors—such as access to housing or exposure to clean air—play in determining one's health and well-being. In the words of Professor Dayna Bowen Matthew, it is often a mistake to point only to an individual's "underlying biological comorbidities" or personal behavior to explain sickness or health complications; rather, the primary risk factors also include poor employment conditions, environmental toxins, and lack of access to affordable, nutritious food.<sup>190</sup> Social factors also play a role in shaping one's mental health. Indeed, a recent study notes that there is "compelling evidence that the risk of developing any mental health condition is inextricably linked to our life circumstances."<sup>191</sup>

Viewed from this perspective, professional athletes' mental health issues are not solely "personal." They are the result of an array of factors—many of which stem directly from the environment in which athletes compete: frequent air travel,<sup>192</sup> physical injuries, and career uncertainty, among other factors. Indeed, in a recent law review article, Professor Maureen Weston listed nine distinct "sports-related factors" affecting the mental health of athletes, including discrimination and verbal abuse, as well as "media, public pressure and over-exposure."<sup>193</sup> Moreover, leading NBA players and coaches recently noted that sports betting—the very reason behind the existence of injury reporting systems—is itself a source of anxiety and pressure for athletes.<sup>194</sup> For example, many athletes have received threats and been subject to harassment and insults on social media and on the field by frustrated bettors who blame the players for their losing bets.<sup>195</sup> The NCAA has recently referred to this phenomenon as a "mental health nightmare."<sup>196</sup>

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189. Lindsay F. Wiley, *The Struggle for the Soul of Public Health*, 41 J. HEALTH POL., POL'Y & L. 1083, 1087 (2016).

190. DAYNA BOWEN MATTHEW, JUST HEALTH: TREATING STRUCTURAL RACISM TO HEAL AMERICA 18–21 (2022).

191. James B. Kirkbride et al., *The Social Determinants of Mental Health and Disorder: Evidence, Prevention and Recommendations*, 23 WORLD PSYCH. 58, 58 (2024).

192. See, e.g., Michael A. McCann, *Do You Believe He Can Fly? Royce White and Reasonable Accommodations Under the Americans with Disabilities Act for NBA Players with Anxiety Disorder and Fear of Flying*, 41 PEPP. L. REV. 397, 401–402 (2014) (analyzing whether the NBA is obligated to accommodate an athlete with a "severe fear of flying").

193. Weston, *supra* note 81, at 15–27.

194. David Aldridge, *New Scene at NBA Games: Fans Screaming at Players About Their Losing Bets*, THE ATHLETIC (Apr. 2, 2024), <https://theathletic.com/5381978/2024/04/02/nba-gambling-players-fans-interactions/?source=freeweeklyemail&campaign=602288&userId=4578927> [<https://web.archive.org/web/20250913004351/https://www.nytimes.com/athletic/5381978/2024/04/02/nba-gambling-players-fans-interactions/>].

195. *Id.*

196. Saquandra Heath, *Sports Betting Culture Negatively Impacts Mental Health; NCAA Works to Support Student-Athletes*, NCAA (May 17, 2024), <https://www.ncaa.org/news/2024/5/17/media-center-sports-betting-culture-negatively-impacts-mental-health-ncaa-works-to-support-student-athletes.aspx> [<https://web.archive.org/web/20260105124023/https://www.ncaa.org/news/2024/5/17/media-center-sports-betting-culture-negatively-impacts-mental-health-ncaa-works-to-support-student-athletes.aspx>].

Against this backdrop, one can argue that, by promoting and regulating competitions, sports leagues share some of the responsibility for the development of mental health issues—similar to the way that the state bears some of the responsibility to the development of illnesses and other conditions. The use of the “personal reasons” category, however, obscures this responsibility.

The idea that mental health issues are “personal” (as opposed to sports-related conditions) should also be examined against the long history of associating mental health issues with one’s own moral deficit or personality traits.<sup>197</sup> Indeed, in part because mental health issues are not as “visible” as some physical impairments, they are “more likely than physical disabilities to be viewed as bad behavior under a fancy name.”<sup>198</sup> Specifically, among the stereotypes about people with mental health issues are the assumptions that they are “unreliable, lazy, responsible for their illness or otherwise blameworthy, faking or exaggerating their condition, or childlike and in need of supervision or care.”<sup>199</sup>

Perhaps because of this unfortunate reality, athletes who have opened up about their experiences with mental health issues found it important to point to the similarities between physical and mental health. For example, discussing the ways in which some of his teammates refused to view his experiences with anxiety the same way as a physical injury, NFL player Brandon Brooks said: “You pull your hamstring, right? And you [treat it] to get it right. Same thing with mental illness.”<sup>200</sup> Similarly, NBA player Kevin Love described the panic attack he experienced during an NBA game as being “as real as a broken hand or a sprained ankle.”<sup>201</sup>

Sports leagues’ choice to label mental health issues as “personal” (while disclosing specific information about physical health) may convey the message that there is a qualitative difference between physical and mental health for the purpose of disclosure, hindering athletes’ efforts to raise awareness to the fact that mental health issues are not less “real” than physical injuries.

In sum, because some mental health issues experienced by athletes *are* sports-related, sports leagues’ policy to report mental health issues as “personal reasons” cannot be justified by the misguided notion that such issues are fully “personal.” To be clear, we recognize that, as Professor Daniel Solove has noted, information about one’s health

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197. Adi Goldiner, *Moral Accommodations: Tolerating Impairment-Related Misconduct Under the Americans with Disabilities Act*, 54 COLUM. HUM. RTS. L. REV. 171, 236–39 (2022).

198. Elizabeth F. Emens, *Against Nature*, 52 NOMOS 293, 308 (2012).

199. Emens, *supra* note 129, at 416–17.

200. Tim McManus, *Eagles’ Brandon Brooks Brings Recognition of Battle with Anxiety*, ESPN (Nov. 25, 2019), [https://www.espn.com/blog/philadelphia-eagles/post/\\_/id/24284/eagles-brandon-brooks-brings-winning-battle-against-anxiety](https://www.espn.com/blog/philadelphia-eagles/post/_/id/24284/eagles-brandon-brooks-brings-winning-battle-against-anxiety) [[https://web.archive.org/web/20260105125500/https://www.espn.com/blog/philadelphia-eagles/post/\\_/id/24284/eagles-brandon-brooks-brings-winning-battle-against-anxiety](https://web.archive.org/web/20260105125500/https://www.espn.com/blog/philadelphia-eagles/post/_/id/24284/eagles-brandon-brooks-brings-winning-battle-against-anxiety)].

201. Kevin Love, *Everyone Is Going Through Something*, PLAYERS’ TRIB. (Mar. 6, 2018), <https://www.theplayertribune.com/articles/kevin-love-everyone-is-going-through-something> [<https://web.archive.org/web/20260105125726/https://www.theplayertribune.com/articles/kevin-love-everyone-is-going-through-something>].

is “deeply personal.”<sup>202</sup> But Solove’s statement does not pertain only to mental health; it also applies to physical health. Thus, if sports leagues want to take athletes’ privacy interest seriously, they should treat both physical and mental injuries as “personal.” As we have argued, assigning the “personal” label solely to mental health issues exacerbates the stigma associated with mental health and may revitalize obsolete misconceptions that associate mental health issues with certain personal traits.

### III. THE POLITICAL ECONOMY OF HEALTH-INFORMATION DISCLOSURE

As the preceding Part has shown, the three possible rationales discussed above cannot fully justify the status quo, whereby sports leagues report specific information about physical injuries while using an umbrella category—“personal reasons”—to report mental health issues.

If those justifications fail, why do professional sports leagues maintain this distinction? In trying to answer this question, this Part turns from a theoretical and normative analysis to a more descriptive and realistic one. We suggest that, although far from conclusive, there is some circumstantial evidence that the decision has to do with financial considerations. In other words, it can be argued that injury reports are being used by sports leagues as a way to facilitate and maintain sports betting systems and that reporting mental health issues as “personal reasons” is aligned with this purpose.

As this Part shows, this claim can be supported by two types of evidence: (1) an analysis of the evolution of sports betting and injury reports in the United States; and (2) past statements and practices by U.S. sports leagues’ leaders.

Let us begin with recent constitutional and regulatory developments in the area of sports betting and injury reports. Following the 2018 Supreme Court decision in *Murphy* that allowed states to legalize sports betting, the practice has proven to be a lucrative business. In 2024 alone, the revenue from sports betting in the United States was almost \$14 billion—an increase of more than \$2 billion compared to 2023.<sup>203</sup>

As an increasing number of states moved to legalize sports wagering within their jurisdictions, U.S. sports leagues have also begun to cut deals with a number of stakeholders operating in this area. For example, sports leagues have contracted with sportsbooks, allowing the latter to publicize and promote sports betting in stadiums and arenas,<sup>204</sup> with at least one sportsbook opening a branch inside a sports arena.<sup>205</sup> U.S. sports leagues have also collaborated with data providers with the purpose of

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202. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1011 (2003).

203. Greenberg, *supra* note 51.

204. Kyle Hightower, *Pro Leagues Balance Profit, Integrity Risks in Legal Betting Era*, AP (June 14, 2023), <https://apnews.com/article/sports-betting-nfl-nba-mlb-nhl-e05bff6f8a0153dbded66d1dd5c6cd3a> [https://web.archive.org/web/20240331125924/https://apnews.com/article/sports-betting-nfl-nba-mlb-nhl-e05bff6f8a0153dbded66d1dd5c6cd3a].

205. Kilgore, *supra* note 5.

collecting and selling data for sports betting.<sup>206</sup> In doing so, they turn “official data that is the lifeblood of in-game betting into profits.”<sup>207</sup>

Importantly, although historically U.S. sports leagues had opposed the legalization of sports betting, this approach changed during the last two decades, as the commissioners of leading sports leagues began to advocate for legalization and regulation of the practice.<sup>208</sup> The stated reason for this shift was that legalization and regulation of sports betting were needed to protect the integrity of sports amidst the rise of illegal online sports wagering. In a 2014 *New York Times* op-ed that has become famous, NBA Commissioner Adam Silver suggested that the desirable approach is to bring sports betting “out of the underground and into the sunlight where it can be appropriately monitored and regulated.”<sup>209</sup>

In accordance with this shift, injury reports are perceived today by many as a tool to promote transparency and protect the “integrity of sports.” But this and other attempts to prevent manipulation of sports betting have also been recently linked to profit-seeking endeavors on the side of sports leagues.<sup>210</sup> Moreover, the actors benefiting the most from “transparency” measures such as injury reports are sportsbooks like DraftKings and FanDuel, as well as the leagues themselves.<sup>211</sup> Indeed, sports leagues’ interest in betting-related data coincides with the leagues’ attempts to find new ways to increase fan engagement and compete over fans’ diminishing attention spans.<sup>212</sup>

206. Marc Edelman & John T. Holden, *Monopolizing Sports Data*, 63 WM. & MARY L. REV. 69 (2021).

207. Hightower, *supra* note 204.

208. John T. Holden, Marc Edelman & Keith Miller, *Legalized Sports Wagering in America*, 44 CARDOZO L. REV. 1383, 1386, 1389–404 (2023).

209. Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>

[<https://web.archive.org/web/20251120135611/https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>].

210. Holden et al., *supra* note 208, at 1438–39 (“[T]oday the sports league lobby has become a critical force in demanding ‘integrity fees,’ ‘data mandates,’ and other unnatural means of expanding their rights over sports game data as a means to ensure, for themselves, a direct share of the revenues from legalized, licensed sports wagering.”).

211. Kilgore, *supra* note 5.

212. See Andrew Brandt, *Professional Sports Leagues’ Big Bet: “Evolving” Attitudes on Gambling*, 28 STAN. L. & POL’Y REV. 273, 275 (2017) (describing an increased interest in sports betting among sports leagues as the leagues “move into a new era of fan engagement”); Silver Talks Player Anxiety, Potential NBA Changes, ESPN (Mar. 1, 2019), [https://www.espn.com/nba/story/\\_/id/26114198/silver-talks-player-anxiety-potential-nba-changes](https://www.espn.com/nba/story/_/id/26114198/silver-talks-player-anxiety-potential-nba-changes)

[[https://web.archive.org/web/20260105132113/https://www.espn.com/nba/story/\\_/id/26114198/silver-talks-player-anxiety-potential-nba-changes](https://web.archive.org/web/20260105132113/https://www.espn.com/nba/story/_/id/26114198/silver-talks-player-anxiety-potential-nba-changes)] (reporting the NBA Commissioner’s concerns about a decrease in the NBA’s television ratings and discussing a number of potential steps the league might take to address this issue, although not mentioning sports betting among those interventions); Phillip Molnar, *Can Professional Sport Leagues Reverse the Trend of Declining Younger Viewership?*, SAN DIEGO UNION-TRIB. (Oct. 1, 2021), <https://www.sandiegouniontribune.com/2021/10/08/can-professional-sport-leagues-reverse-the-trend-of-declining-younger-viewership/> [<https://web.archive.org/web/20250722173224/https://www.sandiegouniontribune.com/2021/10/08/can-professional-sport-leagues-reverse-the-trend-of-declining-younger-viewership/>] (discussing sports leagues’ reaction to declines in viewership among young fans).

As early as 2017, one year before the Supreme Court made legalized sports betting in the United States possible, Professor Andrew Brandt, who had previously worked as a sports executive, observed that professional sports “are actively assessing the best ways to react, respond, and potentially monetize the legal landscape around sports gambling.”<sup>213</sup> Demonstrating how leagues’ attempts to protect sports integrity may also promote narrow economic interests, Brandt pointed to the fact that one of the data companies hired by sports leagues to detect irregularities in betting markets is partly owned by an owner of NFL and NHL teams.<sup>214</sup> “Integrity matters to sports leagues,” Brandt concluded, “but so do monetization, licensing, and the revenue streams possible in a regulated marketplace.”<sup>215</sup> From this perspective, the content of injury reports may be guided, among other considerations, by financial and marketing considerations.

Further evidence supporting this claim can be found in U.S. sports leagues’ response to the adoption of the HIPAA “privacy rule,” described above.<sup>216</sup> In 2002, as the Department of Health and Human Services (“HHS”) was preparing to issue a Final Rule implementing HIPAA, there were some concerns among sports teams that the disclosure of injury reports may constitute a violation of the Privacy Rule.<sup>217</sup> According to contemporaneous news articles, some sports teams reacted by hiring law firms that would advocate to exempt sports organizations’ from the application of the Rule by filing comments with HHS as part of the notice and comment rulemaking.<sup>218</sup> A *New York Times* article from that time quoted one of the lawyers representing an NFL team as saying that “this is a very important issue to our clients.”<sup>219</sup> Another *Times* article stated that “[s]ome sports officials believe that the public disclosure of medical information is essential to the business of selling tickets.”<sup>220</sup>

As noted above, the rule that was eventually adopted effectively exempted sports leagues from the application of the Privacy Rule when it comes to injury reports.<sup>221</sup> Although this was the desired outcome from the perspective of the leagues, the players themselves may have favored a different application of the Privacy Rule. As one

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213. Brandt, *supra* note 212, at 275.

214. *Id.* at 294.

215. *Id.* at 301.

216. 45 C.F.R. §§ 164.500–.534.

217. Buster Olney, *Law May Forbid Leagues to Say If Player Is Hurt*, N.Y. TIMES (June 11, 2002), <https://www.nytimes.com/2002/06/11/sports/baseball-law-may-forbid-leagues-to-say-if-player-is-hurt.html>

[<https://web.archive.org/web/20200523081611/https://www.nytimes.com/2002/06/11/sports/baseball-law-may-forbid-leagues-to-say-if-player-is-hurt.html>] [hereinafter “Olney, *Law*”]; Buster Olney, *Leagues Seek Relief from Privacy Law*, N.Y. TIMES (July 4, 2002), <https://www.nytimes.com/2002/07/04/sports/leagues-seek-relief-from-privacy-law.html>

[<https://web.archive.org/web/20150527202653/https://www.nytimes.com/2002/07/04/sports/leagues-seek-relief-from-privacy-law.html>] [hereinafter “Olney, *Leagues*”].

218. Olney, *Leagues*, *supra* note 217.

219. *Id.*

220. Olney, *Law*, *supra* note 217.

221. *See supra* note 83 and accompanying text.

journalist had put it before the Final Rule was adopted: “Most players would be in favor of teams keeping their injuries quiet.”<sup>222</sup>

The aforementioned quotes, as well as the fact that sports teams and leagues invested efforts and resources to achieve this outcome, suggest that the importance of the injury reports to the leagues’ business operations outweighed the leagues’ concerns about athletes’ privacy.

To understand how this injection of financial and marketing logic into injury reporting systems has changed the purpose of injury reports over time, consider the motivation behind the NFL’s first formulation of an injury reporting system in the late 1940s. As noted above, then-NFL Commissioner Bert Bell established this rule as part of a broader attempt to protect “the public” from manipulations by bookmakers and “professional gamblers.”<sup>223</sup> According to Bell’s biography, his explanation for adopting such transparency measures was: “I can’t do anything about people betting, but I’ll make sure the public knows as much as the gamblers.”<sup>224</sup> Today, by contrast, injury reports are no longer aimed solely at leveling the playing field; they have also become part of “a data-driven form of entertainment.”<sup>225</sup> To invoke Professor David Pozen’s theory of the role transparency measures play in contemporary society, injury reports have experienced “ideological drift”—their “political valance [have] become less progressive and more libertarian.”<sup>226</sup>

What does all of this mean for the content and categories used in injury reports? It might mean that, even though sports leagues have made important progress toward raising awareness to mental health issues in recent years, they may still perceive the incorporation of a mental health designation into injury reporting systems as being detrimental to their business operation. Here again, the evidence is far from conclusive, but there is some evidence pointing in that direction.

Consider, for example, the way in which NBA Commissioner Adam Silver addressed in 2019 the rise in players’ reports of mental health issues. While Silver acknowledged that “[a] lot of players are unhappy,”<sup>227</sup> he went on to note that this is “a direct result of social media” and other generational differences affecting the relationships among the athletes themselves.<sup>228</sup> Specifically, Silver noted that whereas in the past there was a sense of camaraderie within each team that manifested in the ways in which athletes interacted with each other on the team’s bus, today “everyone on the bus wears headphones.”<sup>229</sup> Thus, Silver didn’t acknowledge that the NBA itself may have played any role in athletes’ experiences of mental health issues. According to

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222. Tyler Kepner, *Injuries Could Become Classified*, N.Y. TIMES (June 12, 2002), <https://www.nytimes.com/2002/06/12/sports/baseball/injuries-could-become-classified.html> [<https://web.archive.org/web/20260121035524/https://www.nytimes.com/2002/06/12/sports/baseball/injuries-could-become-classified.html>].

223. LYONS, *supra* note 38, at 135, 283.

224. *Id.* at 283.

225. *Id.*

226. David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 102 (2018).

227. *Silver Talks Player Anxiety*, *supra* note 212.

228. *Id.*

229. *Id.*

Silver, the reason for the increased number of players speaking up about mental health was simply because “[w]e are living in a time of anxiety.”<sup>230</sup>

While Silver’s account may be correct, it might as well be the case that athletes have *always* experienced mental health issues—they simply didn’t feel that they could speak about it in public. What has changed, on this account, is the culture surrounding disclosure of mental health issues among elite athletes—making it less stigmatizing to speak up about one’s mental health issues. Either way, including a formal designation of mental health in injury reporting systems may require sports leagues to implicitly recognize that the leagues, too, are responsible for the formation and aggravation of mental health issues, similar to the way in which the leagues see their role in addressing physical injuries.<sup>231</sup> And this may not necessarily be in the leagues’ interest.

Relatedly, when it comes to competitive sports, the prevailing culture is still one where “[c]hampions are strong not weak, and feelings of being lost and scared are not champion qualities.”<sup>232</sup> Accordingly, “the culture of sport has long inhibited disclosure” of mental health issues.<sup>233</sup> Although things have recently started to change, the leagues may still prefer not to be directly associated with mental health issues through official injury reports.

#### IV. ALTERNATIVE METHODS OF DISCLOSURE AND AVENUES FOR CHANGE

So, what steps can be taken to improve existing injury reporting systems? This Part begins by explaining why an automatic disclosure of mental health issues would not be desirable at this moment in time. Then, it turns to discuss alternative ways to address the problem identified in this Article. This Part concludes by discussing the legal strategies that reformers can use to change the status quo.

##### A. THE POTENTIAL HARMS OF UNWANTED DISCLOSURE

Thus far, we have argued against the inconsistent manner in which sports leagues disclose information about athletes’ physical and mental health. If there is indeed no justification to treat these types of information differently, then one could suggest to “level up” the playing field by disclosing both physical and mental health. However, a blanket policy under which all mental health issues are reported to the public is not socially desirable for at least three reasons: (1) automatic publicity may deter some athletes from disclosing such issues in the first place; (2) involuntary disclosures could cause players to suffer harm in terms of relationships with family, friends, and community; and (3) automatic disclosure of mental health issues may harm athletes in their post-athletic careers. In this Section, we discuss each of these reasons in turn.

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230. *Id.*

231. For example, the NBA has recently “convened a panel of experts” to examine the reasons behind a recent increase in Achilles tendon injuries among NBA players. Reynolds, *supra* note 185.

232. Weston, *supra* note 81, at 59 (quoting Dr. Hillary Cauthen, a clinical sport psychologist).

233. *Id.*

### 1. Automatic publicity may deter some athletes from disclosing mental health issues in the first place.

If automatic disclosure is the norm, players may avoid seeking diagnosis and treatment out of fear that their conditions will be disclosed. This may also prevent athletes from taking time off to address their mental health.

Importantly, sport is not the only social arena in which such concerns arise, and policymakers have taken these concerns into consideration when formulating policies that pertain to the disclosure of health information or the access to such information. In clinical practice, for example, portions of the electronic record containing psychiatric treatment records are often hidden from physicians providing direct medical care to a patient, unless the physician specifically justifies the need for accessing those records.<sup>234</sup> This level of security, entitled ‘break the glass’ (“BTG”) access, is rigorously tracked and can expose the physician to disciplinary action if their accessing BTG portions of the chart is deemed inappropriate by the healthcare organization.<sup>235</sup> One of the reasons behind this policy is the concern that the social stigma surrounding mental health would “prevent some patients from ever seeking care.”<sup>236</sup> From another perspective, scholars and commentators often cite the concern that publicity might deter people from seeking treatment as one of the reasons not to require presidential candidates and corporate executives to disclose information about their health.<sup>237</sup>

### 2. Disclosures could cause players to suffer harm in terms of relationships with family, friends, and community.

Even though there has been some progress in social acceptance of mental health issues, such issues may still be considered unacceptable because of stigma. This, in turn, may make disclosure “far less feasible or affirming” for some people and may cause certain athletes to suffer harm in terms of relationships with family, friends, and

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234. See, e.g., Jan Greene, *Behavioral Health Data in the Electronic Health Record: Privacy Concerns Slow Sharing*, 62 NEWS & PERSP. 19A, 20A (2013) (noting that mental health information sharing in Electronic Health Records “has seriously lagged behind” the sharing of other types of health information); Dana E. Kozubal et al., *Separate May Not Be Equal: A Preliminary Investigation of Clinical Correlates of Electronic Psychiatric Record Accessibility in Academic Medical Centers*, INT’L J. MED. INFORMATICS 260, 261 (2013) (“[I]t has become common practice to exclude details from psychiatric evaluations from a patient’s medical chart.”); see also William M. Tierney et al., *Provider Responses to Patients Controlling Access to their Electronic Health Records: A Prospective Cohort Study in Primary Care*, 30 J. GEN. INTERN. MED. S31, S32 (2014) (describing an information system whereby patients could choose to restrict access to specific data in their Electronic Health Records, including “mental health information”).

235. Greene, *supra* note 234, at 19; Mytilee Vemuri & Laura B. Dunn, *Ethical and Clinical Issues in Integrated Care Settings: Patient Privacy Concerns and Electronic Health Records*, 15 ETHICS COMMENT. 301, 302 (2017).

236. Vemuri & Dunn, *supra* note 235, at 301.

237. Annas, *supra* note 24, at 947–48; cf. Brown, *supra* note 19, at 309 (“[O]ne chief reason for privileged communications between a patient and her physician is to encourage individuals to seek medical care even in situations where the disease or its treatment is stigmatized.”).

community.<sup>238</sup> The concern that people would avoid disclosure for fear of stigma is particularly relevant in the context of professional sports, where the high level of publicity may intersect with other modes of social oppression—including racism, sexism, and transphobia—to discourage athletes from speaking up about their mental health issues. For example, the fact that most sports competitions are separated along sex lines may not only exacerbate mental health issues for some athletes,<sup>239</sup> but also complicate disclosure about such issues.

### 3. Disclosures may harm athletes in their post-athletic careers.

Disclosure of mental health issues may have detrimental consequences for post-athletic careers, including management and coaching positions. For many of these jobs, employers are not likely to consider a person's record of past *physical* injuries. But employers' knowledge of an applicant's past mental health issues may adversely affect the candidate's chances of getting hired as a result of prevailing stigma concerning mental health.<sup>240</sup> Unfortunately, people with mental health issues experience pervasive discrimination in the workplace and elsewhere.<sup>241</sup> For example, a 2018 systematic review found that workers with "mental illness" often lose employment opportunities for a variety of reasons, including low self-esteem and stereotypes.<sup>242</sup> Courts, too, are less likely to grant relief to people with psychosocial impairments experiencing discriminatory behaviors than they are to people with physical impairments.<sup>243</sup> To make things even more complicated, some people may not even be aware that discrimination against psychosocially disabled people is illegal.<sup>244</sup>

## B. ALTERNATIVES TO AUTOMATIC DISCLOSURE

The preceding Section suggests that automatic disclosure of mental health issues in injury reports is not desirable. On the other hand, for the reasons discussed in Part II, the current system—in which sports leagues treat mental health issues as "personal reasons" while reporting physical injuries in great specificity—is not desirable either. Thus, alternatives ought to be considered.

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238. Eyer, *supra* note 159, at 556.

239. Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue*, 40 CARDOZO L. REV. 1813, 1830 (2019).

240. Harris, *supra* note 156, at 1704–08.

241. Judith A. Cook, *Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission*, 57 PSYCH. SERVS. 1391, 1395 (2006).

242. Kayla B. Follmer & Kisha S. Jones, *Mental Illness in the Workplace: An Interdisciplinary Review and Organizational Research Agenda*, 44 J. MGMT. 325, 334, 336–37 (2018).

243. Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans with Disabilities Act*, 50 U.C. DAVIS L. REV. 1109, 1115 (2017).

244. See Sara Emily Burke & Roseanna Sommers, *Reducing Prejudice Through Law: Evidence from Experimental Psychology*, 89 U. CHI. L. REV. 1369, 1389 (2022) ("[L]aypeople generally find it plausible that such discrimination is legal.")

### 1. **Abandon the disclosure of players' health information—either physical or mental.**

The avenue for reform that we find most socially desirable is to abandon the disclosure of players' health information. As noted above, such an approach is currently employed in the context of college sports, where some conferences report the availability to play of college athletes—without providing a medical-based explanation for a possible absence.<sup>245</sup>

Under this approach, leagues would still issue “availability reports,” using the same language such as “out” or “probable” to denote the likelihood that a certain player would take part in the game. However, the report would not provide any information on the injury itself.

A variation of this approach was proposed by a group of scholars who expressed skepticism as to whether the NFL injury reporting system can be justified in light of athletes' privacy interest in their medical information.<sup>246</sup> In making proposals to the NFL, they recommended to “consider removing the requirement that clubs disclose the location on the body of a player's injury from the Injury Reporting Policy.”<sup>247</sup> These scholars, however, did not evaluate the matter from a mental-health perspective. Moreover, they stopped short of recommending that “the NFL no longer obligate clubs to report information on the status of players.”<sup>248</sup>

If sports leagues abandon their injury reporting policies and replace them with general “availability reports,” they would narrow the gap between the ways in which physical and mental health injuries are treated, thereby addressing some of the problems discussed above. Indeed, the major problem identified in this Article is the different ways in which physical and mental health issues are reported. The term “personal reasons” only becomes meaningful when it is associated with mental health and compared to other, more specific reporting designations.

Abandoning the requirement to report injuries in specificity is a promising strategy not only because it would indirectly challenge the distinction between physical and mental health, but also because it invites stakeholders to question the underlying rationales behind injury reports in professional sports and challenge assumptions about the need to disclose athletes' health in the first place. This is particularly so given the concern that injury reports may be part of a broader attempt to monetize fans' interest in sports betting. Indeed, when transparency is used for profit-seeking and for increasing corporate revenue—instead of advancing egalitarian objectives<sup>249</sup>—it might be a good idea to rethink how transparency is operationalized.

Are the social costs associated with the disclosure of athletes' injuries worth the benefits that may accrue from such reporting? And why should athletes be expected to

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245. See *supra* note 61 and accompanying text.

246. Deubert et al., *supra* note 5, at 18.

247. *Id.* at 99–100.

248. *Id.* at 18.

249. See Pozen, *supra* note 226.

regularly disclose their health information when CEOs of public companies and presidential candidates are generally not subject to similar disclosure obligations.<sup>250</sup> In developing policies that pertain to athletes' health and identity, policymakers should ask these questions, rather than assume that the status quo is desirable or inevitable.

Granted, limiting leagues' reporting system to focus only on availability (as opposed to disclosure of health information) does not mean that information about athletes' injuries would become completely confidential. As a result of social and technological developments, athletes today are constantly monitored and surveilled by their teams and media.<sup>251</sup> Similar to other public figures, it is possible that information about their health will become public as part of a media reporting or voluntary disclosures. But from the perspective of law and policy, even this reality may be preferable than the current situation, in which sports leagues' official policies create an ecosystem of widespread and systematic disclosure of health information in which mental health is treated as "personal matter" by official sports leagues' designations.

Another possible critique of our proposal to abandon health information disclosures involves the idea that there are other reasons to disclose athletes' injuries beyond sports betting, including fans' interest in knowing whether their favorite athletes are going to play in a certain game. But fans' expectations cannot justify the disclosure of information about athletes' health, if only because there is no guarantee that a certain athlete would be able to fully participate in a certain game, even if the athlete does not have an injury prior to the game. In fact, a player could get injured at any point in the game and miss the rest of it. Thus, similar to the reasons articulated by the Ninth Circuit in the 2019 boxing case,<sup>252</sup> fans' expectations cannot be a significant factor in the shaping of injury reports. Moreover, disclosing whether a player is available for a certain game may be sufficient for the purpose of providing fans with information about whether their favorite athletes are going to play.

Admittedly, removing health information from availability reports may not be a favorable avenue from the perspective of bettors and sportsbooks.<sup>253</sup> This reform may also result in bettors and other stakeholders pressuring athletes to disclose the status of their injuries, which in turn may result in athletes being subject to disciplinary or criminal liability for providing "inside information" about their health to bettors,<sup>254</sup> as well as likely invasions of privacy by individuals who attempt to gather information

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250. See Brown, *supra* note 19, at 304 ("There is no law that requires candidates for the presidency, or the presidents themselves, to disclose anything at all about their health."); Lin, *supra* note 21, at 408 ("No company has ever been held to account by the SEC for failing to disclose information about its chief executive's health[.]" (citing Joe Nocera, *Apple's Culture of Secrecy*, N.Y. TIMES (Jul. 26, 2008), <https://www.nytimes.com/2008/07/26/business/26nocera.html> [<https://web.archive.org/web/20260125202052/https://www.nytimes.com/2008/07/26/business/26nocera.html>])).

251. See *e.g.*, Matthew T. Bodie, *The Law of Employee Data: Privacy, Property, Governance*, 97 IND. L.J. 707, 740–41 (2022) ("More data is likely collected from professional athletes than any other occupation.").

252. See *supra* notes 88–91 and accompanying text.

253. William Daniel, *Leveling the Playing Field: Injury Reports, College Football, and Medical Privacy of Players*, 68 DRAKE L. REV. 185, 210–11 (2020).

254. Holden, *supra* note 62; McChrystal, *supra* note 43, at 179–80.

about athletes' injuries. But there are ways to address these concerns, for example by imposing liability for disclosure of nonpublic information only when there is evidence that the athlete in question actually intended to disclose nonpublic information for the purpose of sports betting.<sup>255</sup>

## 2. Use default rules and provide athletes with an opportunity to control disclosure.

Another avenue for reform can be found in the literature on contractual default rules.<sup>256</sup> That literature suggests that setting certain defaults in law may achieve desirable regulatory results while protecting people's autonomy to choose an alternative route. Thus, for example, if sports leagues want to protect athletes' privacy to the maximum extent possible, they can create a system whereby the default reporting category would not explicitly refer to mental health issues, while allowing athletes to "opt out" and ask to be reported under the mental health designation. Conversely, if leagues want to encourage disclosure of mental health issues, they may set the default on disclosure while allowing athletes who wish *not* to disclose mental health issues to use a different reporting category. Either way, the leagues can avoid using a blanket policy that may fit some of the athletes, but not others.

To the extent that some athletes may prefer not to be the first to include information about their mental health in the official injury reports, sports leagues can use what Professor Jasmine Harris has called "disability identity escrow."<sup>257</sup> By disability identity escrow, Harris means a mechanism that allows employees to share their disability identity with "an independent intermediary between the employer and the employee who owes fiduciary duties" to disabled employees.<sup>258</sup> Under this mechanism, an athlete would be able to provide instructions to the identity escrow agent with respect to the timing and circumstances under which the agent can disclose the information as part of injury reporting. For example, the athlete can condition disclosure only if the "mental health" designation would be used to report absence of at least three other athletes.<sup>259</sup> This mechanism, which builds on Ian Ayres and Cait Unkovic's work on "information escrows,"<sup>260</sup> may solve the "first actor problem" that may arise when athletes contemplate whether to include information about their mental health in injury reports.<sup>261</sup>

One problem with the default-rules approach is that it would still be difficult to know precisely how many athletes have missed games for mental health reasons. In fact, if "mental health" issues would be underreported under such a policy, it may

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255. Covo, *supra* note 8, at 291.

256. See Robert Gertner & Ian Ayres, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87–91 (1989) (distinguishing between "default" and "immutable" rules).

257. Harris, *supra* note 156, at 1747–48.

258. *Id.* at 1747.

259. *Id.*

260. See Ian Ayres & Cait Unkovic, *Information Escrows*, 111 *MICH. L. REV.* 145 (2012).

261. Harris, *supra* note 156, at 1746.

exacerbate the problem by painting an inaccurate picture about the prevalence of mental health in professional sports.

### 3. Replace "Personal Reasons" with a less stigmatizing reporting category.

Another way to address the dilemma identified in this Article is to report mental health issues under an umbrella category that does not treat mental health issues as "personal reasons." Thus, sports league would be able to protect athletes' privacy by maintaining some ambiguity about the reasons behind their absence, while at the same time avoiding the "expressive harms" that result from the use of the "personal reasons" category. By way of example, the Individuals with Disabilities Education Act includes a list of impairments that give rise to eligibility for special education services. Among those impairments is the umbrella category of "Other Health Impairment,"<sup>262</sup> which does not downplay or trivialize the conditions that belong to that category. Specifically, by using the words "Health Impairment," that category avoids attributing mental health issues to an individual's character or behavior. In this respect, perhaps counterintuitively, "medicalizing" mental health issues and equating such issues to physical impairments may help reduce the stigma and stereotypes that are commonly attached to mental health conditions.<sup>263</sup>

Interestingly, this approach is compatible with a proposal made by tennis player Naomi Osaka, who advocated to allow athletes to take some time off under the title of "sick days" without disclosing the exact reason. As Osaka put it: "[M]y No. 1 suggestion would be to allow a small number of 'sick days' per year where you are excused from your press commitments without having to disclose your personal reasons."<sup>264</sup>

## C. WHICH LEGAL STRATEGIES TO PURSUE

How should advocates pursue the above reforms? In theory, one way to intervene in the existing practices regarding disclosure of athletes' injuries is through governmental action. In a 2020 student note, Ryan Grandeau called on Congress to regulate sports betting markets by establishing disclosure requirements similar to those enforced by the SEC in the corporate context.<sup>265</sup> According to this proposal, sports teams would disclose athletes' injuries "to an agency, analogous to the SEC, which could act as a central repository of information and make periodic disclosures to the public."<sup>266</sup>

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262. 20 U.S.C. § 1401(3)(A)(i).

263. Cf. Emens, *supra* note 198, at 308 ("For individuals with psychiatric disabilities, the fact of a diagnosis, particularly one explained through brain chemistry, can sometimes be a relief.")

264. Naomi Osaka, *It's O.K. Not to Be O.K.*, TIME (July 8, 2021), <https://time.com/6077128/naomi-osaka-essay-tokyo-olympics/> [<https://web.archive.org/web/20260108212646/https://time.com/6077128/naomi-osaka-essay-tokyo-olympics/>].

265. Grandeau, *supra* note 52, at 1256–61.

266. *Id.* at 1260.

A number of lawmakers have expressed interest in establishing an entity that would collect data and monitor betting activities across the country, but according to their proposals, that entity would not be responsible for regulating the dissemination of information about athletes' injuries. Specifically, a 2018 federal bill includes a provision establishing "a National Sports Wagering Clearinghouse" that would "contribute to and disseminate, on a national basis, information relating to best practices and model programs and resources" that benefit betting integrity and "operate a national repository of anonymized sports wagering data and suspicious transaction reports."<sup>267</sup>

If Congress adopts Grandeau's approach and the federal government regulates disclosure of athletes' injuries for the purpose of sports betting, then the government may also have the authority to decide which information should be disclosed and how disclosure should be made.

There are several problems with this proposal, however. First, although it seems that there is an increasing willingness to regulate sports betting at the federal level,<sup>268</sup> the political feasibility of such a move is unclear at best.<sup>269</sup> Moreover, even if Congress passes a law to regulate sports betting, it is unlikely that Congress would decide to impose disclosure mandates for this purpose, in part because governmental intervention in this area is likely to face significant First Amendment challenges,<sup>270</sup> including with respect to the designations used in injury reports.<sup>271</sup>

Another route to address issues that pertain to the disclosure of health information would be to use one of the federal or state laws that aim to protect privacy. As described in Part I, however, injury reporting systems are established and regulated through private ordering involving the athletes themselves.<sup>272</sup> Specifically, athletes agree to disclose their health information in their individual contracts, as well as through collective bargaining agreements. Even though it is debatable how much of athletes'

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267. Sports Wagering Marketing Integrity Act of 2018, S. 3793, 115th Cong. (2018); *see also* Holden et al., *supra* note 208, at 1431–32 (discussing the National Sports Wagering Clearinghouse part of the bill).

268. *See, e.g.*, Supporting Affordability and Fairness with Every Bet Act of 2024, H.R. 9590, 118th Cong. (2024).

269. Holden et al., *supra* note 208, at 1433 (analyzing past attempts to regulate sports betting at the federal level and concluding that "the assumption, pre-*Murphy*, that sports betting would inevitably be a product of federal legislation seems long, long ago").

270. For an analysis of the tension between the First Amendment and mandatory disclosure in the context of corporate disclosure, *see* Heminway, *supra* note 21, at 774–80.

271. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."); *Matal v. Tam*, 582 U.S. 218, 246 (2017).

272. *See supra* notes 78–81 and accompanying text.

consent actually reflects voluntary disclosure,<sup>273</sup> the existence of those “waivers” make challenging the injury reporting systems a difficult task.<sup>274</sup>

Although some aspects of the sports betting apparatus are regulated by state laws, injury reporting systems are almost exclusively governed by a private order.<sup>275</sup> Indeed, as described above, federal and state laws currently play no role in the content and shape of injury reports. This leaves reformers with no meaningful legal avenue to challenge the ways in which injury reporting systems operate. Although injury reports may have negative externalities—for example, they may perpetuate stigma and entrench misconceptions about the causes and nature of mental health issues—individuals interested in addressing these harms have no legal vehicle to do so.<sup>276</sup>

Another hurdle for challenging the operation and designations used in injury reporting systems is the fact that some of the policies governing these systems are not publicly available, and those that are available sometimes fail to fully explain the process of disclosure or to define important terms such as “personal reasons.”<sup>277</sup> There is much irony in this lack of transparency, given that injury reports are, by their very nature, transparency measures.

Thus, the only promising avenues for reform seem to involve advocacy and athletes’ bargaining power. In recent years, a number of sports organizations have changed the names or titles of sports-related practices after facing criticism from civil rights and advocacy groups.<sup>278</sup> The closest example to the topic discussed in this Article is MLB’s decision in 2019 to rename its “disabled list” as the “injured list.”<sup>279</sup> That change came as a result of advocacy by disability rights groups, who expressed a concern that “the

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273. See Osborne, *supra* note 83, at 55 (“The choice is then not between authorization and non-authorization, but between signing with a team (or playing the sport at the professional level at all) and non-authorization.”); James Blake Hike, Note, *An Athlete’s Right to Privacy Regarding Sport-Related Injuries: HIPAA and the Creation of the Mysterious Injury*, 6 IND. HEALTH L. REV. 47, 72 (2009) (raising the question “whether a player should be allowed to waive or contract away their HIPAA rights with a contractual waiver”). See also Daryl J. Levinson & David Pozen, *Disconsents*, 126 COLUM. L. REV. 1, 4 (2026) (noting that, in recent decades, “the prospects for achieving meaningful consent in a wide range of contexts” have dimmed).

274. Cf. Levinson & Pozen, *supra* note 273, at 19 (“In the analog world as in the digital world, mandatory arbitration clauses and liability waivers became ubiquitous features of the workplace and the marketplace, and were largely upheld by courts on the basis of employee or consumer consent.”).

275. For an analysis of a similar private order in the sports context, see Suren Gomtsian et al., *Between the Green Pitch and the Red Tape: The Private Legal Order of FIFA*, 43 YALE J. INT’L L. 85 (2018).

276. In certain circumstances, courts may consider non-party interests in contract disputes, but the issue of injury reports does not seem to fall within those situations. See Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law*, 171 U. PA. L. REV. 1095 (2023).

277. See *supra* notes 100–109 and accompanying text.

278. See, e.g., Emma Bowman, *For Many Native Americans, the Washington Commanders’ New Name Offers Some Closure*, NPR (Feb. 6, 2022), <https://www.npr.org/2022/02/06/1078571919/washington-commanders-name-change-native-americans> [<https://web.archive.org/web/20260108222412/https://www.npr.org/2022/02/06/1078571919/washington-commanders-name-change-native-americans>].

279. Jeff Passan, *Major League Baseball to Rename Disabled List as “Injured List,”* ESPN (Feb. 7, 2019), [https://www.espn.com/mlb/story/\\_/id/25947020/major-league-baseball-rename-disabled-list-injured-list](https://www.espn.com/mlb/story/_/id/25947020/major-league-baseball-rename-disabled-list-injured-list) [[https://web.archive.org/web/20260108222621/https://www.espn.com/mlb/story/\\_/id/25947020/major-league-baseball-rename-disabled-list-injured-list](https://web.archive.org/web/20260108222621/https://www.espn.com/mlb/story/_/id/25947020/major-league-baseball-rename-disabled-list-injured-list)].

term ‘disabled’ for injured players falsely conflates disabilities with injuries and an inability to participate in sports.”<sup>280</sup>

Moreover, professional sports is often invoked by work-law experts as an arena where athletes “have a collective voice to negotiate the methods, manner, and scope of data collection by the teams.”<sup>281</sup> Anecdotal evidence cited throughout this Article suggests that the current formulation of injury reports, including the designation used in those reports, do not fully reflect the interests of some athletes. Some athletes have expressed an interest in using a mental health designation;<sup>282</sup> others prefer not to disclose their health information—either physical or mental.<sup>283</sup>

Thus, the fact that the NBPA addressed the issue of mental health designation in negotiating a collective bargaining agreement with the league<sup>284</sup> is a promising sign that advocacy and collective bargaining may help address at least some of the problems with the existing system.

## CONCLUSION

Over the last decade, as professional athletes have begun to speak up about their mental health in an attempt to destigmatize mental health issues in sports and elsewhere, it has become common in the sports community to say that “[the] goal is to get people thinking about mental health the same way they think about physical health.”<sup>285</sup> As this Article has shown, however, this goal is strikingly inconsistent with the ways in which U.S. sports leagues disclose athletes’ injuries: When the injury is “physical,” the report usually includes specific details about the nature of the injury and the body part involved; when the injury is “mental,” sports leagues cite “personal reasons” as the reason for the athlete’s absence. In this Article, we have argued that this discrepancy cannot be justified. The problem, we have argued, is that the current form of injury reports may convey the message that mental health issues have to do with athletes’ personal traits, as opposed to a multifaceted issue that can be affected by the leagues’ ways of operation.

Going forward, we argue that U.S. leagues should reevaluate the underlying rationales behind their injury reporting systems, as well as the designations used for reporting. Specifically, we suggest that athletes’ health information—either physical or mental—should not be disclosed at all to the public. But even if sports leagues decide to continue disclosing information about athletes’ health, they should change the ways in which mental health issues are addressed under the current system.

Exploring why sports leagues treat mental and physical conditions differently in the context of injury reporting also has the potential to generate insights that extend beyond the sporting arena. Specifically, this Article may contribute to the debate of

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280. *Id.*

281. Bodie, *supra* note 251, at 742.

282. *See supra* note 118 and accompanying text.

283. *See supra* notes 70, 222 and accompanying text.

284. *See supra* notes 119–25 and accompanying text.

285. Weston, *supra* note 81, at 51.

whether public figures—such as presidential candidates and CEOs of public companies—should disclose information about their health. Disclosure proponents argue that such information is sometimes material to voters and investors.<sup>286</sup> Disclosure skeptics, on the other hand, argue that information about one's health should be protected as private.<sup>287</sup>

In general, commentators agree that disclosure policies should strike a balance between an individual's privacy interest, on the one hand, and the public interest in disclosure, on the other.<sup>288</sup> They disagree, however, as to how to strike this balance. In this Article, we do not take sides in this debate. Nor do we offer any comprehensive framework to assess disclosure of health information in non-sports contexts. Nevertheless, our analysis may advance the debate by focusing on a question that is often not addressed in the legal literature: What is considered "health information" for the purpose of disclosure? Our key argument is that any attempt to require individuals to disclose their health information should consider the complexity of distinguishing physical from mental health issues, as well as the problematic aspects of using the "personal reasons" designation to report mental health-related issues.

To be sure, there are stark differences between disclosure of health information in the sports context and such disclosures in other contexts. For example, although a broken bone may not dramatically affect the functioning of a company's CEO (and thus should not be disclosed even on disclosure proponents' terms), it would likely force an athlete to miss several games. When it comes to policy, these differences pertain to various aspects of the disclosure dilemma, including the audience for such disclosure,<sup>289</sup> the impact on third parties,<sup>290</sup> and the frequency of disclosure, among other differences.

However, in light of recent social and technological developments, it is becoming harder and harder to draw the line between sports betting and investing.<sup>291</sup> For example, Professor Karl Lockhart has described the rise of "event contracts"—"a way of aggregating participants' beliefs about future events" (such as the outcome of the Super bowl or an election), which he referred to as having "both gambling- and investing-like features."<sup>292</sup> Against the backdrop of the rapidly expanding arena of prediction markets

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286. See sources cited *supra* note 21.

287. See Sánchez Abril & Olazábal, *supra* note 19.

288. See, e.g., Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 491 (2013) (noting the tension between disclosure and privacy); Lin, *supra* note 21, at 423 (pointing to the competing interests of disclosure and privacy); Sánchez Abril & Olazábal, *supra* note 19, at 1564 ("[D]isclosures regarding the health of top executives are particularly delicate, as they pin the CEO's personal privacy rights directly against investors' rights to information affecting the company.").

289. See generally Charles R. Korsmo, *The Audience for Corporate Disclosure*, 102 IOWA L. REV. 1581 (2017) (arguing that the content of corporate disclosure should be tailored to match the proper audience of such disclosure—sophisticated investors).

290. Brown, *supra* note 19, at 362.

291. Karl M.F. Lockhart, *Betting on Everything*, 66 B.C. L. REV. 2175, 2180–81 (2025).

292. *Id.* at 2187; see also Jake Conley, *The Gray Area Robinhood and FanDuel Are Using to Bring Sports Betting and Stock Trading Closer Together*, YAHOO! FIN. (Sep. 7, 2025), <https://finance.yahoo.com/news/the-gray-area-robinhood-and-fanduel-are-using-to-bring-sports-betting-and-stock-trading-closer-together-162615447.html> [<https://web.archive.org/web/20250902012507/https://finance.yahoo.com/news/the-gray-area->

(in which gamblers can place bets on event contracts), Lockhart concludes that “many event contracts—especially sports and politics-related ones—and many financial products—like weather futures—should likely be placed in the same category” for the purpose of regulation.<sup>293</sup>

Moreover, disclosure of information about corporate executives is becoming similar to injury reports given the rise of “superstar CEOs”—CEOs who are perceived to have “the vision, charisma, superior leadership, or other exceptional qualities that make them uniquely valuable to their corporations.”<sup>294</sup> Indeed, in the context of publicly traded companies, Professor Joan Heminway argues that disclosure of corporate executives’ health information may be warranted in situations where “the executive has unique attributes that benefit the corporation independent of his or her overall service availability and capabilities.”<sup>295</sup> Such information may be particularly important, Heminway explains, when “the executive’s identity effectively is the corporation’s brand” or when the executive is “iconic.”<sup>296</sup> In line with Heminway’s account, in Meta’s annual report for 2023, filed with the SEC, the company stated that its CEO Mark Zuckerberg participated in “various high-risk activities,” including combat and extreme sports, “which carry the risk of serious injury and death.”<sup>297</sup> It further acknowledged that “[i]f Mr. Zuckerberg were to become unavailable for any reason, there could be a material adverse impact on our operations.”<sup>298</sup> This report, which focused on an executive’s participation in sports, fits the above description of superstar CEOs and brings to mind the MVP (Most Valuable Player) title, often assigned to exceptional athletes.

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robinhood-and-fanduel-are-using-to-bring-sports-betting-and-stock-trading-closer-together-162615447.html ] [ (“The worlds of sports betting and stock trading have never been more closely connected. And bringing these two industries together is one key product: event contracts.”); TY Rush, *FanDuel Will Soon Allow Stock Betting—As Line Between Wall Street and Sportsbooks Blurs*, FORBES (Aug. 21, 2025), <https://www.forbes.com/sites/tylerroush/2025/08/21/fanduel-will-soon-allow-stock-betting-as-line-between-wall-street-and-sportsbooks-blurs/> [<https://web.archive.org/web/20251227223448/https://www.forbes.com/sites/tylerroush/2025/08/21/fanduel-will-soon-allow-stock-betting-as-line-between-wall-street-and-sportsbooks-blurs/>] (“Bettors will soon be able to wager on market movements, inflation, the price of gas and gold on FanDuel as part of a partnership between the popular sports betting platform and the derivatives exchange CME Group, further narrowing the gap between sportsbooks and Wall Street.”); Deborah North, Brian Morris & Leila Mgaloblishvili, *Cleary Gottlieb Discusses Election Betting and Its Implications for Future Event Contracts*, CLS BLUE SKY (Nov. 18, 2024), <https://clsbluesky.law.columbia.edu/2024/11/18/cleary-gottlieb-discusses-election-betting-and-its-implications-for-future-event-contracts/> [<https://web.archive.org/web/20251227224027/https://clsbluesky.law.columbia.edu/2024/11/18/cleary-gottlieb-discusses-election-betting-and-its-implications-for-future-event-contracts/>].

293. Lockhart, *supra* note 291, at 2236.

294. Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. U. L. REV. 1353, 1356 (2023).

295. Heminway, *supra* note 21, at 763.

296. *Id.*

297. Meta Platforms, Inc., Annual Report (Form 10-K), at 38 (Feb. 1, 2024), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/c7318154-f6ae-4866-89fa-f0c589f2ee3d.pdf> [<https://perma.cc/F9MQ-T55Y>].

298. *Id.*

Thus, while there are good reasons to design different disclosure regimes for different contexts, our analysis in this Article may have important policy implications for other social arenas. To the very least, we believe that the sports context may serve as a case study for examining how, if at all, to require public figures to disclose their health information.

**APPENDIX A: “NOT INJURY RELATED” ENTRIES IN NFL INJURY REPORTS  
(2010–2024)**

<b>Season</b>	<b>Number of “Not Injury Related” Entries<sup>299</sup></b>
2024	46
2023	37
2022	27
2021	68 <sup>300</sup>
2020	57
2019	17
2018	26
2017	7
2016	10
2015	189
2014	187
2013	91
2012	71
2011	83
2010	31

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299. Based on data from the NFL official website. Authors obtained a copy of full data analysis.

300. The list for 2021 includes 17 entries involving NFL player Deshaun Watson, who missed the entire 2021 season. See *supra* note 109.

## The Platformization of Music

Ramsay Eyre\*

### ABSTRACT

*The story of the twenty-first century music industry has been one of platformization. While musical records were formerly sold as discrete physical units, or alternatively heard on the radio, listeners' primary mode of engagement with recorded music has become almost completely replaced by online streaming platforms, which offer access to entire catalogs of recorded music for a subscription fee or for free with advertisements.*

*This Article argues that recorded music is now a platform industry. This transformation has had significant consequences. Long-standing problems in the music industry have been magnified, including determining fair compensation through the copyright system and the consolidation of copyright ownership in both recording and publishing. They have also been supplemented by new problems stemming from the platform model of distribution: discriminatory, opaque, and declining compensation for musicians; user surveillance; the discriminatory treatment of musicians through platform placement; and new implications for the heterogeneity of musical culture.*

*Addressing the challenges of the music industry's platformization will require adapting and applying tools from the law of networks, platforms, and utilities ("NPU"), including rate regulation, nondiscrimination rules, and structural separations. These policies, some of which already govern parts of the music industry but are limited in scope, could help counter the harmful effects of platform power in music. Public options and cooperative governance also provide promising avenues and may be preferable to the regulation of private streaming platforms alone. Viewing music streaming as a platform industry suggests well-established legal and policy tools that advocates can use to build a healthier and fairer system of commerce to support musical culture.*

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## INTRODUCTION

The story of the twenty-first century music industry has been one of platformization. In the twentieth century, musical records were sold as discrete physical units or alternatively heard on the radio. The music industry supported by these distribution methods had significant problems, including the fair disbursement of payments to artists and other individuals and firms in the music industry via the copyright system;<sup>1</sup> the concentration of firms and the consolidation of copyright ownership in both recording<sup>2</sup> and publishing;<sup>3</sup> and the problem of “payola,” or pay-to-play, on the radio.<sup>4</sup>

In the last two decades, however, online streaming platforms have almost completely replaced physical media and terrestrial radio as listeners’ primary mode of engagement with recorded music.<sup>5</sup> These platforms—of which Spotify, Amazon Music, and Apple Music dominate in the U.S. market<sup>6</sup>—offer access to entire catalogs of recorded music for a subscription fee or for free with advertisements.<sup>7</sup> Combined, the leading three services have nearly 200 million annual users in the United States.<sup>8</sup> Meanwhile, only 32.9 million CDs were sold

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1. See, e.g., 3 Russell Sanjek, *AMERICAN POPULAR MUSIC AND ITS BUSINESS* (1988) (discussing the history of the American music industry in the twentieth century and its frequent battles over copyright and musician compensation).

2. RICK SANJEK, *AMERICAN POPULAR MUSIC AND ITS BUSINESS IN THE DIGITAL AGE* 172 (2024) (listing the “Big Six” oligopoly of record labels that came to dominate the recording industry by the last decades of the twentieth century).

3. 3 SANJEK, *supra* note 1, at 508 (“The rush of amalgamations and mergers in the early 1960s was a mere ripple when contrasted with those being made by big venture capital in the last years of the decade. . . . [M]usic publishers were becoming record manufacturers, and record companies sought to add music publishers to their holdings.”).

4. *Id.* at 439–92; Christopher Buccafusco & Kristelia García, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. Irvine L. Rev. 805, 811–821 (2022); CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, *STAY TUNED: A HISTORY OF AMERICAN BROADCASTING* 368 (Lawrence Erlbaum, 3d ed. 2002); KERRY SEGRAVE, *PAYOLA IN THE MUSIC INDUSTRY: A HISTORY, 1880–1991* (1994).

5. JULIE L. ROSS & MICHAEL J. HUPPE, *MUSIC LAW: CHANGING LANDSCAPES IN THE MUSIC INDUSTRY AND THE LAW THAT GOVERNS IT* 8–11 (2021).

6. *Number of Active Users of Major Music Streaming Services in the United States from 2016 to 2025*, STATISTA, <https://www.statista.com/statistics/293749/spotify-pandora-number-active-users/> [<https://web.archive.org/web/20251228011950/https://www.statista.com/statistics/293749/spotify-pandora-number-active-users/>] (last visited Dec. 28, 2025).

7. Vaishali Varu, *A Guide to Music Streaming Services*, KIPLINGER (Apr. 9, 2025), <https://www.kiplinger.com/personal-finance/a-guide-to-music-streaming-services> [<https://web.archive.org/web/20260126212349/https://www.kiplinger.com/personal-finance/a-guide-to-music-streaming-services>].

8. *Number of Active Users of Major Music Streaming Services*, *supra* note 6.

in the United States in 2024.<sup>9</sup> Music streaming has, in effect, transformed the recorded music industry into a platform industry, characterized not by discrete commodity units but by “large-scale, centralized places—physical or virtual—that allow people to interact or transact.”<sup>10</sup>

This transformation has had significant consequences. The music industry’s long-standing problems—those of fair compensation, concentration, and payola—have been magnified. They have also been supplemented by new problems stemming from the platform model of distribution. Since the early 2010s, when streaming platforms reached scale, musicians have consistently reported low and declining payment for their recorded output,<sup>11</sup> and at least one major streaming platform has halted all payments for tracks with under 1,000 streams, which make up over 60 percent of the music it offers.<sup>12</sup> Recent

9. RECORDING INDUS. ASS’N OF AM., RIAA 2024 YEAR-END REVENUE REPORT 3 (Mar. 2025), <https://www.riaa.com/wp-content/uploads/2025/03/RIAA-2024Year-End-Revenue-Report.pdf> [<https://perma.cc/78QV-CVCW>].

10. MORGAN RICKS ET AL., NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY 1 (2022) (defining “platforms”). Platform industries are distinct from trade in ordinary commodities, though they may govern the exchange of commodities, as music streaming platforms do.

11. See, e.g., Damon Krukowski, *Making Cents*, PITCHFORK (Nov. 14, 2012), <https://pitchfork.com/features/article/8993-the-cloud/> [<https://web.archive.org/web/20251228015337/https://pitchfork.com/features/article/8993-the-cloud/>]; Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html>

[<https://web.archive.org/web/20260119210042/https://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html>]; Daniel Sanchez, *I’m an Award-Winning Cellist and Composer. Want to See My Royalties?*, DIGIT. MUSIC NEWS (Apr. 18, 2018), <https://www.digitalmusicnews.com/2018/04/18/zoe-keating-royalties/>

[<https://web.archive.org/web/20251228020052/https://www.digitalmusicnews.com/2018/04/18/zoe-keating-royalties/>]; Evet Jean, *Streaming Platforms Aren’t Helping Musicians—And Things are Only Getting Worse*, GUARDIAN (Nov. 13, 2020), <https://www.theguardian.com/culture/2020/nov/14/streaming-platforms-arent-helping-musicians-and-things-are-only-getting-worse>

[<https://web.archive.org/web/20251228020839/https://www.theguardian.com/culture/2020/nov/14/streaming-platforms-arent-helping-musicians-and-things-are-only-getting-worse>]; David Dayen, *Islands in the Stream*, AM. PROSPECT (Mar. 22, 2021), <https://prospect.org/power/islands-in-the-stream-spotify-youtube-music-monopoly/>

[<https://web.archive.org/web/20251228021142/https://prospect.org/2021/03/22/islands-in-the-stream-spotify-youtube-music-monopoly/>]; Ben Sisario, *Musicians Say Streaming Doesn’t Pay: Can the Industry Change?*, N.Y. TIMES (May 10, 2021), <https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html>

[<https://web.archive.org/web/20260119211912/https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html>].

12. Elizabeth Aubrey, *Spotify Has Now Officially Demonetised All Songs with Less than 1,000 Streams*, NME (Apr. 5, 2024), <https://www.nme.com/news/music/spotify-has-now-officially-demonetised-all-songs-with-less-than-1000-streams-3614010>

reporting suggests that every rights holder on that same platform—Spotify—receives a different royalty payment,<sup>13</sup> raising concerns about not only declining pay, but also monopsonistic price discrimination.<sup>14</sup> Streaming platforms also engage in surveillance of the users and artists that depend on them,<sup>15</sup> in turn fueling their power to discriminate between similarly situated artists and users through their hyper-targeted placement of music on the platform.<sup>16</sup> Together, these dynamics pose qualitatively new implications for the heterogeneity of recorded musical culture. As streaming increasingly dominates popular music consumption, downstream effects also occur in other industries, including ticketing and live events,<sup>17</sup> thereby affecting consumers, workers, and firms throughout the culture industries.

This Article argues that addressing the problems of music's platformization requires treating music streaming—and the music industry more broadly—as a public utility or platform industry.<sup>18</sup> To some extent, the regulation of the music industry is already a public utility regime. This is not often noticed because the public utility regime operates through the copyright system and antitrust consent decrees. But functionally, it is a public utility regime because its central regulatory tools bear the hallmarks of classic public utility regulations: rate-setting,<sup>19</sup> nondiscrimination rules,<sup>20</sup> and structural

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[<https://web.archive.org/web/20251228021755/https://www.nme.com/news/music/spotify-has-now-officially-demonetised-all-songs-with-less-than-1000-streams-3614010>].

13. LIZ PELLY, MOOD MACHINE: THE RISE OF SPOTIFY AND THE COSTS OF THE PERFECT PLAYLIST 149 (2025) (quoting a Spotify employee as saying in an internal chat that “[e]ach product-market-licensor combo has a unique royalty calculation”).

14. See JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 224–28 (2nd ed. 1969) (analyzing price discrimination in monopsony and oligopsony markets). “Monopsony” refers to a monopoly on the buy side. See *id.*

15. Arnt Maasø & Anja Nylund Hagen, *Metrics and Decision-Making in Music Streaming*, 18 POPULAR COMM’N 18, 18 (2019) (“Music streaming enables the tracking of listening behavior in more detail than any previous music-distribution format.”); PELLY, *supra* note 13, at 137–47 (discussing the surveillance conducted by streaming platforms).

16. PELLY, *supra* note 13, at 92–105.

17. See Rouven Seifert et al., *Conversion in Music Streaming Services*, 59 J. INTERACTIVE MKTG. 201 (2024); Finn Christensen, *Streaming Stimulates the Live Concert Industry: Evidence from YouTube*, 85 INT’L J. INDUS. ORG. 1 (2022).

18. In the sense that they denote enterprises with structural dynamics that invite utility-style regulation, the terms “platform” and “utility” may be used interchangeably.

19. 17 U.S.C. § 115(a)(1)(F) (empowering the Copyright Royalty Judges to set rates for licenses to mechanically reproduce musical works). See RICKS ET AL., *supra* note 10, at 25 (“Perhaps the most distinctive feature of [public utility] law is rate setting, whereby regulators directly determine the prices that certain [utility] enterprises can charge for their services.”).

20. United States v. Am. Soc’y of Composers, Authors & Publishers, No. 41-1395, 2001 WL 1589999, at \*3 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., No. 64 Civ. 3787, 1994 WL 901652

separations.<sup>21</sup> It is, however, an incomplete public utility regime. It governs some elements of the music industry, while leaving other elements up to the dictates of private corporations and individuals alone. This Article argues that the answer to many of the music industry's problems is to accept that music streaming is a platform industry, and to organize it as such.<sup>22</sup> This can be done through expanding the public utility regulations governing music streaming, through creating public options, or through establishing models of cooperative governance inside streaming firms. In the era of music's platformization, the case for exploring these options has only gotten stronger.

To understand how music's platformization originated, it is essential to understand the property system governing music, the basic structures of which have existed for much of the last century. As Part I describes, the music industry is governed by an incomplete public utility regime, which functions through the copyright system and antitrust consent decrees. Though the laws governing the music industry are treated in an extensive literature,<sup>23</sup> reinterpreting this familiar territory as a partial utility regime sheds light on the source of problems which plagued the music industry before the rise of streaming services. Important elements of this regime—including compulsory licensing for mechanical rights in musical works, rate-setting by the Copyright Royalty Board, and the nondiscrimination rules to which performance rights organizations (“PROs”) are subject under the terms of their Department of Justice-administered consent decrees—function akin to public utility regulations, while others do not, which has implications for the governance of

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(S.D.N.Y. Nov. 18, 1994) (requiring that ASCAP and BMI must grant licenses to any songwriter on equal terms to similarly situated licensees, and accept all songwriters who meets certain minimum requirements); see also KEVIN J. HICKEY & DANA A. SCHERER, CONG. RSCH. SERV., IF11463, MUSIC LICENSING: THE ASCAP AND BMI CONSENT DECREES (2020). See RICKS ET AL., *supra* note 10, at 24 (“One of the oldest elements of [public utility] law is nondiscrimination rules, which require providers to serve all prospective users on equal terms.”).

21. *ASCAP*, 2001 WL 1589999, at \*3; *BMI*, 1994 WL 901652, at \*1–\*2 (prohibiting ASCAP and BMI from offering any license other than that for performance rights). See Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 980 (2020) (“Structural separations place clear limits on the lines of business in which a firm can engage.”).

22. Describing music streaming as a platform or utility industry is, consciously, both a descriptive and a normative move. It not only assists in properly understanding music's industrial organization and the purposes behind many of its governing mechanisms but also points towards avenues for reform. See *infra* Part IV.

23. See, e.g., ROSS & HUPPE, *supra* note 5; DANA SCHERER, CONG. RSCH. SERV., R43984, MONEY FOR SOMETHING: MUSIC LICENSING IN THE 21ST CENTURY (2021); BOB KOHN, KOHN ON MUSIC LICENSING (5th ed. 2018); HICKEY & SCHERER, *supra* note 20; U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE (2015).

streaming platforms.

Recorded music transformed into a platform industry with the rise of streaming services in the 2000s and 2010s, a history which Part II recounts. The reason for this transformation was the threat of recorded music's decommodification, commonly denoted by industry analysts as the threat of piracy.<sup>24</sup> As the marginal cost of posting audio files online approached zero, internet-enabled file-sharing promised to make recorded music essentially free for consumers, leaving record labels, publishers, and many musicians unable to derive much revenue. The streaming business model was proposed and adopted in reaction to this threat. The result of its adoption was that the basic structure of the music industry and its problems were preserved, with the addition of a new layer of power over the music industry: that of the streaming platforms. Part II proceeds to discuss how these streaming platforms work today. Streaming platforms are, first, hosts of music. They contract with copyright holders to offer music to listeners, acquiring the necessary licenses for both musical works and sound recordings. Generally, they compensate rights holders through a pro-rata system, paying each rights holder a percentage of the platform's net revenues each month. This baseline process is, however, highly irregular in practice, given the availability of lower royalty payments in exchange for platform promotion, and through the variability of other contractual terms that frequently differ on a case-by-case basis, including the definition of the platform's "net revenue" itself.<sup>25</sup> Second, streaming platforms are data collectors and data assigners. They both collect data on user behavior and assign metadata tags to musical tracks that they use to make complex—and often suspect—inferences. Third, they are music recommenders. Both through their proprietary playlists made by in-house curators and through various algorithmic recommendation features, streaming platforms exercise great power over what users see and hear on the platform.

Given these functions, streaming services are best treated as platforms, as Part III argues. Streaming services exhibit network effects, high capital costs, economies of scale, lock-in effects, and resultant power as economic middlemen, each of which also characterize industries the law has historically treated as platforms or utilities. Part III proceeds to detail the consequences of

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24. See, e.g., Heidi Purtzer, Comment, *Music Streaming Services: The Inequitable Solution to Piracy*, 5 ARIZ. ST. SPORTS & ENT. L.J. 426, 426 (2016).

25. PELLY, *supra* note 13, at 150–51.

music's platformization, which, though they are highly interrelated, can be sorted into at least four distinct groups. The first group consists of problems with musician compensation. These problems both continue and surpass the compensation-related problems of the twentieth-century music industry. For one, compensation on streaming platforms is discriminatory. While streaming platforms publicly depict their compensation systems as consistent and rational,<sup>26</sup> reporting indicates that they are not in practice, with several different contractual mechanisms resulting in variable payments to different rights holders based on their relative bargaining power.<sup>27</sup> In other words, the platforms engage in price discrimination.<sup>28</sup> Internal Spotify communications suggest that every individual unit on the platform requires a different royalty calculation,<sup>29</sup> indicating that music streaming may even approach *perfect* price discrimination between rights holders. The compensation system is also opaque, with musicians often a step removed from contractual negotiations between their labels (or other representatives) and streaming platforms, and with enormous imbalances in information between parties undermining the functioning of an effective market system. This system of compensation has resulted in declining pay for many musicians, who are forced to turn to touring and non-artistic labor in increasing amounts to make up the difference.<sup>30</sup>

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26. See, e.g., *Understanding Spotify Royalties*, SPOTIFY FOR ARTISTS, <https://support.spotify.com/us/artists/article/royalties/> [<https://perma.cc/86EN-Q55C>] (last visited June 13, 2025).

27. These include “promotional rates,” or lower royalty payments accepted by rights holders and artists in exchange for promotion on the platform’s curatorial or algorithmic recommendation features; and different definitions per contract of what constitutes the platform’s “net revenues,”—in other words, what remains after Spotify’s overall cut—which render the proportional payment due to artists highly variable. PELLY, *supra* note 13, at 149–51.

28. See RICKS ET AL., *supra* note 10, at 15–16 (defining “price discrimination” as “charging different prices to different users based not on differing costs of service but rather on the users’ different willingness to pay”); See also Robinson, *supra* note 14. There is a legitimate debate to be had as to whether the type of monopsonistic discrimination streaming platforms engage in is primarily one of prices or of wages. Under the current framework, the answer to this question ultimately hinges on one’s characterization of copyright licenses and musicians’ relationship to them. While copyright law has traditionally treated copyright licenses as assets that are owned by creators and sold, making musicians proprietors and the value of licenses *prices*, they may equally be characterized as an income-generation mechanism for musicians functionally the same as *wages*. This is only supported by a strong ethic among musicians of self-identification as creative workers. Ultimately, what is important for the purposes of this analysis is not what type of discrimination occurs, but rather that the discriminatory treatment of counterparties contributes to and reinforces platform power.

29. PELLY, *supra* note 13, at 149.

30. *Id.* at 154; GREATER NASHVILLE MUSIC CENSUS: SUMMARY REPORT 8 (2024), <https://www.greaternashvillemusiccensus.org/results> [<https://web.archive.org/web/20260103033643/https://www.greaternashvillemusiccensus.org/results>].

A second major consequence of music's platformization is the practice of user surveillance on streaming platforms, which is problematic for several reasons. First, it violates the privacy of users and the artistic integrity of musicians, through the tracking of user behavior and the assignment of suspect metadata tags to music on the platform, which misrepresents and devalues musical creativity. Second, it reinforces the platforms' power. Surveillance contributes to platforms' lock-in effects, as users who build up data on one platform over time are more reluctant to leave.<sup>31</sup> It also creates valuable troves of data that streaming platforms can exploit in negotiations with advertisers and rights holders, further entrenching the informational imbalance between the platform and contractual counterparties and thus the power of the platforms themselves. Additionally, surveillance fuels a discriminatory system of platform placement, whose problems are covered subsequently.

The third major consequence Part III discusses is that the platforms' function as recommenders of music puts them in a position to discriminate between artists through platform placement. This occurs in two ways: curatorial and algorithmic. Streaming platforms possess power as curators through their proprietary playlists, which highlight new releases or serve as samplers for various genres, moods, or activities. Placement on these human-made playlists are understood to make or break artists, granting streaming platforms power to decide what music is heard by a broad audience on the platform and thus which rights holders make money. Algorithmic features like Spotify's Smart Shuffle and Discovery Mode use the data collected and assigned on the platform to make real-time recommendations to listeners, within which platform engineers can raise or lower the "weights" of particular tracks or establish specific links within algorithmic networks. Even when the algorithm simply works on its own, it may naturally give preferential treatment—even if slight—to tracks that require lower royalty payments of the platforms or otherwise are financially advantageous. This power creates incentives that orient the business of music recommendation to platform profit incentives or suspect musical signifiers, rather than the interests of musicians or the listening public.

Fourth, music platforms pose threats to musical diversity and cultural

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31. See Brian J. Hraes & Jack Webster, *From Selling Songs to Engineering Experiences: Exploring the Competitive Strategies of Music Streaming Platforms*, 41 J. CULTURAL ECON. 240, 252 (2021); Gary Sinclair & Julie Tinson, *Psychological Ownership and Music Streaming Consumption*, 71 J. BUS. RSCH. 1 (2017).

heterogeneity. Cultural heterogeneity is desirable for several reasons, including its benefits for free expression, social education, and cultural innovation. Streaming platforms stand opposed to musical heterogeneity in at least three ways. First, by squeezing artist pay, they depress the profitability and respect of music as a profession and thereby discourage investment in musical careers.<sup>32</sup> Second, their platform power degrades the quality of the service they offer, resulting in what observers have termed a “flattening” of the cultural production mediated by the platforms.<sup>33</sup> Over time, this effect may make music more homogenous, both as a whole and at the level of specific genres and traditions.<sup>34</sup> Third, they may trigger spillover effects in related industries, including ticketing and live events,<sup>35</sup> extending their impact not only to the recorded music industry, but to the commerce of musical culture on a larger scale.

Part IV offers policy proposals to address these issues. First, it recommends applying tools from the law and policy of networks, platforms, and utilities (NPU)<sup>36</sup> to streaming platforms—in other words, regulating music streaming as a public utility. This would involve an extension of the NPU tools currently in effect to more fully complete the public utility regime of music industry regulation. Policymakers could expand rate regulation to cover not only the license to mechanically reproduce musical works, as is the case today, but all other licenses which streaming platforms must obtain from rights holders. They could apply nondiscrimination rules to streaming platforms, requiring them to offer equal prices and terms to similarly situated artists and users and to publicly post their pricing schedules. They could implement structural separations between music companies like labels and publishers and streaming platforms, eliminating conflicts of interest created by common ownership. They could also apply additional behavioral regulations to minimize the data collected and assigned on platforms and require interoperability between certain platform features to lower switching costs. Second, Part IV

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32. PELLY, *supra* note 13, at 154 (reporting that a study in the United Kingdom found that 44 percent of respondents saw low pay from streaming as a barrier to embarking on a musical career).

33. See, e.g., KYLE CHAYKA, *FILTERWORLD: HOW ALGORITHMS FLATTENED CULTURE* 9 (2024).

34. Journalist Liz Pelly describes the homogenized sound that streaming platforms incentivize as “streambait.” PELLY, *supra* note 13, at 82.

35. Intermodal effects occur both for artists and for listeners. See, e.g., Seifert et al., *supra* note 17; Christensen, *supra* note 17; GREATER NASHVILLE MUSIC CENSUS, *supra* note 30.

36. RICKS ET AL., *supra* note 10.

recommends the creation of a public option music streaming service at the Library of Congress (“LOC”). The LOC could use its resources as the parent entity of the U.S. Copyright Office and the designated receiver of copyright-registered works and recordings<sup>37</sup> to offer a streaming platform that could compete with private offerings and which, done right, users and musicians might consider a preferable service. This can draw on and supplement the streaming services piloted at local library systems in cities across the country,<sup>38</sup> and it can extend a long American tradition of public options in the arts and culture into the twenty-first century.<sup>39</sup> Finally, Part IV concludes with a proposal for a model of musician-owned cooperative governance within music streaming platforms. A musician-owned cooperative streaming platform could ensure that musicians directly profit from streaming revenue and could help direct the business of recorded music distribution towards the benefit of musicians and of the listening public, rather than the profit incentives of private corporations. A brief conclusion follows.

A few caveats are worth noting up front regarding the scope of the present project. First, while streaming services are divided into two categories—“interactive” referring to services that host online libraries of music of which users select specific tracks, such as Spotify and Apple Music, and “non-interactive” referring to services which function more like traditional radio broadcasters without specific listener selections, such as Pandora and iHeart<sup>40</sup>—this Article will deal only with the *interactive* category. Non-interactive services have their share of problems that are worthy of analysis.<sup>41</sup> But given the format of such services, these problems are more analogous to

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37. See 37 C.F.R. § 202.20 (2022) (requiring deposit copies for copyright registration); U.S. COPYRIGHT OFF., CIRCULAR 56: COPYRIGHT REGISTRATION FOR SOUND RECORDINGS (2021).

38. PELLY, *supra* note 13, at 224–25; MONEY ON THE LEFT: *Making Digital Public Spaces w/ MUSICAT* (Spotify, Jan. 1, 2023).

39. See, e.g., SHARON ANN MUSER, DEMOCRATIC ART: THE NEW DEAL’S INFLUENCE ON AMERICAN CULTURE (2015) (on the New Deal’s public programs in music, art, and other culture industries).

40. See 17 U.S.C. § 114(j)(7) (defining “interactive service”); *Arista Recs., LLC v. Launch Media, Inc.*, 578 F.3d 148, 149 (2d Cir. 2009) (distinguishing a “webcasting” service offering users “stations” of genres or of music with similarity to an artist or song the user selects from “interactive” services, which require that users choose the music they hear). Some industry observers, including the World Intellectual Property Organization (WIPO), view these as subsidiary components of a larger digital music marketplace, which also includes downloads and podcasting. World Intell. Prop. Org. (WIPO), 41st Sess., *Study on the Artists in the Digital Music Marketplace: Legal and Economic Considerations*, at 6, SCCR/41/3 (June 28, 2021).

41. See, e.g., Alexander Reed Speer, Note, *Internet Killed the Radio Star: Preventing Digital Broadcasters from Exploiting the Radio Music License Committee Rate to the Detriment of Songwriters*, 23 J. INTELL. PROP. L. 357 (2016) (on one such policy issue regarding non-interactive streaming services).

those of traditional distribution technologies like radio, and do not include the much broader range of concerns posed by interactive services. In several cases, they are also governed by different rules within the copyright system than those that govern interactive services.<sup>42</sup> For these reasons, this Article will use “streaming platforms” to refer only to interactive streaming services.

Though the scope of the analysis to which this Article devotes itself is mostly limited to interactive streaming services, its more general conceptual framework—that of treating firms in music’s streaming economy as platforms or utilities—may, in fact, extend much farther. Music streaming services are not the only firms in the music industry that have become platforms: So, too, have major record labels, publishers, and other corporate copyright owners of musical works and recordings.<sup>43</sup> The platformization of each of these lines of business has contributed to the broader process of music’s platformization which this Article diagnoses in streaming, and the remedies this Article suggests might well apply in their own way to such firms.

In addition to documenting music streaming platforms and offering tools to govern them, this Article makes two other contributions. First, it contributes to a revival of the field of NPU law and policy, a revival which is connected to the law and political economy (“LPE”) movement in legal scholarship.<sup>44</sup> Second, it continues scholarly work done on the connections between NPU law and intellectual property.<sup>45</sup> This work suggests that property systems are often governed as utility-like regimes, as this Article notes in its analysis of musical copyright law as a partial, yet incomplete, utility regime. Viewing intellectual property systems in this way may help us recognize harms posed by the structure of intellectual property markets and suggest avenues for

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42. Compare 17 U.S.C. §§ 112 and 114 (governing licenses for non-interactive streaming services), with 17 U.S.C. § 115 (governing licenses for interactive streaming services).

43. For a discussion, see Matt Stoller, *How Record Labels Came Back from the Dead and Turned into Tech Platforms*, BIG (May 26, 2025), <https://www.thebignewsletter.com/p/how-record-labels-came-back-from> [https://web.archive.org/web/20260110222114/https://www.thebignewsletter.com/p/how-record-labels-came-back-from].

44. See, e.g., Jedidiah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020); Amy Kapczynski, *The Political Economy of NPU Law*, YALE J. REG.: NOTICE & COMMENT (Jan. 26, 2023), <https://www.yalejreg.com/nc/symposium-networks-platforms-utilities-09/> [https://web.archive.org/web/20260103175157/https://www.yalejreg.com/nc/symposium-networks-platforms-utilities-09/] (connecting NPU to LPE).

45. See Laura Dolbow, *Public Patent Powers*, 123 MICH. L. REV. 599 (2025); Laura Dolbow, *The Public Franchise Tradition as a Limit on Patent Takings*, 111 CORN. L. REV. (forthcoming 2026) (offering an NPU-inspired analysis of the patent system).

reform to promote their underlying public purpose.

## I. COPYRIGHT LAW AND MUSIC'S PROPERTY SYSTEM

Copyright law establishes the property system that governs the music industry.<sup>46</sup> It defines and regulates the industry's basic units of ownership and exchange: the licenses firms and individuals must obtain from creators or other rights holders to distribute recorded music.<sup>47</sup> Within the copyright system, these licenses come in two basic forms: those for musical *works*—that is, for musical compositions—and those for sound *recordings*—that is, for audio recordings, not tied to the underlying work. While much of this material is familiar territory for students and practitioners of copyright law, it nonetheless requires some fairly technical explanation, as understanding this legal and practical distinction is foundational for understanding the music industry, its regulation, and the problems of its platformization. Key to its interpretation is understanding that some elements of the copyright system that governs these licenses—which also includes antitrust consent decrees—function akin to public utility regulations, while others do not, making the property system governing music an incomplete public utility regime. This incompleteness has led to problems in music's political economy throughout its modern history, which have been accentuated by the rise of streaming platforms.

### A. WORKS AND RECORDINGS

Musical works, in the context of copyright law, refer to musical

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46. My denotation of musical copyright as a “property system” is not to suggest that copyright ought to be considered analogous to real or personal property, whose relationship to the category we now call “intellectual property” was initially suggested by scholars affiliated with the law and economics movement in an attempt to reframe copyright, along with patent and trademark law, around a certain normative conception of efficiency and price signaling. See Britton-Purdy et al., *supra* note 44, at 1802; Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, *passim* (2012). It simply intends to signify copyright's mediation of the relationship between musicians and other people who might possess licenses to use their music in various ways. Cf. Morris R. Cohen, *Property and Sovereignty*, 13 CORN. L. REV. 8, 12 (1927) (“Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things.”).

47. For overviews of the copyright system in music, from which this section heavily draws, see U.S. COPYRIGHT OFF., *supra* note 23, and SCHERER, *supra* note 23. The standard treatise is KOHN, *supra* note 23.

compositions or songs—not to any particular recordings of such works.<sup>48</sup> The owners of these works—which may be songwriters and composers, publishers, or other asset-holders<sup>49</sup>—possess the exclusive rights to use and distribute them in several ways,<sup>50</sup> including two that are especially relevant to music streaming platforms. One is called the “mechanical right”—the right to reproduce a musical work in some external medium.<sup>51</sup> The other is called the “performance right”—the right to publicly perform a work, including the public playing of a recording of the work.<sup>52</sup> Streaming services must acquire licenses for both mechanical and performance rights to offer musical works on their platforms.

Mechanical rights are subject to a system of compulsory licensing,<sup>53</sup> meaning that any time a work’s creator outsources its reproduction to a third-party licensee, the owner of the right must similarly license the work to any other third party, whether for a fee set by the government or by a privately negotiated fee.<sup>54</sup> Originally, the Copyright Act of 1909 set the statutory rate for mechanical licenses at 2 cents per copy.<sup>55</sup> Today, the “statutory rate”<sup>56</sup> is set by the Copyright Royalty Board (“CRB”), a panel of three administrative law judges appointed by the Librarian of Congress.<sup>57</sup> Since the passage of the Music

48. U.S. COPYRIGHT OFF., *supra* note 23, at 18.

49. In recent years, some legacy artists have sold all or percentages of their publishing catalogs—including their mechanical rights—to large asset holders, some of which even facilitate direct consumer investment in those catalogs. *See, e.g.*, Simon Read, *Neil Young Sells Song Rights in “\$150m” Deal*, BBC (Jan. 6, 2021), <https://www.bbc.com/news/business-55557633> [<https://web.archive.org/web/20260103185819/https://www.bbc.com/news/business-55557633>].

50. For a fuller list, see U.S. COPYRIGHT OFF., *supra* note 23; KOHN, *supra* note 23.

51. U.S. COPYRIGHT OFF., *supra* note 23, at 26, 28; Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995) (expanding the mechanical right to include “digital phonorecord deliveries”); 17 U.S.C. § 115(e)(10); SCHERER, *supra* note 23, at 13–15.

52. SCHERER, *supra* note 23, at 13–15. Importantly, this includes the public performance of a *recording* of a work—though, critically, it is not a right to the recording *itself* (because it is still a right held by the owner of the underlying *work*).

53. *See* KOHN, *supra* note 23, at 700–47.

54. Copyright law allows for privately negotiated exceptions to set government rates. *See, e.g.*, 17 U.S.C. § 115(2)(a)(i) (“License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license . . . shall be given effect in lieu of any determination by the Copyright Royalty Judges.”). But it is unclear whether rights holders may also accept lower royalty rates than government in exchange for preferable terms.

55. KOHN, *supra* note 23, at 704; SCHERER, *supra* note 23, at 29.

56. As of this writing, the rate for physical copies and permanent downloads is set at 13.1 cents per copy or 2.52 cents per minute of playing time, whichever is larger. 37 C.F.R. § 385.11. Rates for interactive streams are calculated via a multi-step process established by the CRB, based on set percentages of service provider revenues and costs. *See* 37 C.F.R. § 385.21.

57. SCHERER, *supra* note 23, at 29. This body is sometimes referred to as, simply, the “Copyright Royalty Judges.” *See, e.g.*, LIBR. OF CONG., FISCAL 2025 BUDGET JUSTIFICATION, at 123 (2024),

Modernization Act of 2018, the CRB must set the compulsory license rates periodically at a price which a “willing buyer” and a “willing seller” would transact for them in a fair, competitive market.<sup>58</sup>

Performance rights, likewise, include streams. Indeed, it is part of the very definition of “stream” in the Code of Federal Regulations that it is subject to licensing as a public performance of a musical work.<sup>59</sup> Licenses for these rights are administered by organizations known as performance rights organizations (“PROs”), which connect distribution channels (like streaming services) to rights holders by processing huge volumes of royalty payments. The two largest such organizations, of which most publishers and songwriters are members, are the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”), which are governed by antitrust consent decrees.<sup>60</sup> Typically, licensees will pay the PROs a negotiated rate to license all the songs in their catalog, called a “blanket license.” Each PRO will then distribute the royalties from those payments to its members, typically songwriters and publishers. If the licensee and the PRO cannot reach agreement on a rate, they enter the docket of the Southern District of New York’s “rate court,” which is directed to resolve disputes by requiring the PRO to prove that its proposed rates are “reasonable.”<sup>61</sup> ASCAP’s consent decree expressly prohibits it from administering any licenses other than those for performance rights.<sup>62</sup> Both ASCAP and BMI must also offer equal access to all songwriters and publishers who wish to join them and offer licenses to all applicants on nondiscriminatory terms.<sup>63</sup> Critically, though, these requirements are not incumbent upon other PROs not covered by the consent decrees. Today, some smaller PROs—including Society of European Stage Authors and Composers (“SESAC”) and Global Music Rights (“GMR”)—invite only the most successful and lucrative songwriters in the industry as their

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<https://www.loc.gov/static/portals/about/reports-and-budgets/documents/budgets/fy2025.pdf>  
[<https://web.archive.org/web/20251202162229/https://loc.gov/static/portals/about/reports-and-budgets/documents/budgets/fy2025.pdf>].

58. SCHERER, *supra* note 23, at 30.

59. 37 C.F.R. § 385.2.

60. *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001); *United States v. Broad. Music, Inc.*, No. 64 Civ. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994). For a history with relevant cases and documents, see ROSS & HUPPE, *supra* note 5, at 109–47.

61. SCHERER, *supra* note 23, at 20.

62. *Id.* at 19.

63. *Id.*

members and thus exercise significant power to set terms for those members, unrestrained by the terms of ASCAP and BMI's consent decrees.<sup>64</sup>

Separate from rights in musical works are rights in sound recordings, not tied to the underlying musical composition. Like for works, the owners of sound recordings possess several constituent rights, including a mechanical right.<sup>65</sup> Unlike for works, though, mechanical rights in recordings are not subject to compulsory licenses with set rates. Instead, licenses to mechanically reproduce recordings are obtained through negotiations between creators and prospective licensees. How much artists are paid in this arrangement is left to the dictates of their contracts with record labels or other entities performing the functions of record production and distribution, the nature and terms of which depend on the relative bargaining power between the parties. Additionally, while there is a public performance right for musical works—the right administered by the PROs—there is no corresponding performance right for sound recordings,<sup>66</sup> except in some limited cases.<sup>67</sup> Therefore, the public performance of a sound recording typically does not result in any royalty payment to the owner of that sound recording.<sup>68</sup>

## B. AN INCOMPLETE UTILITY REGIME

The key difference between property rights in musical works and in sound recordings is the degree to which they are subject to utility-style regulation. Musical works are subject to several such regulations. Mechanical license fees are set directly by the government—a form of rate regulation, a classic public utility tool.<sup>69</sup> Licenses for performance rights, while not rate-regulated, are

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64. SCHERER, *supra* note 23, at 20 (“While the rates charged by ASCAP and BMI are subject to oversight by the federal district court judges, pursuant to their respective consent decrees, the rates charged by SESAC and GMR are based on marketplace negotiations.”).

65. For a fuller list, see U.S. COPYRIGHT OFF., *supra* note 23; KOHN, *supra* note 23.

66. U.S. COPYRIGHT OFF., *supra* note 23, at 43–45.

67. While there is a performance right for the licensing of sound recordings by non-interactive streamers, it exempts interactive streaming platforms such as those that are the subject of this Article. *See id.*

68. Though record labels and artists have repeatedly called for the creation of an across-the-board performance right for sound recordings—including the recent introduction of the American Music Fairness Act, H.R. 861, 119th Cong. (2025), which would create such a right—the lack thereof has survived because of the promotional value ascribed to public performances for record sales. *See, e.g., American Music Fairness Act*, AM. FED. OF MUSICIANS, <https://www.afm.org/what-we-are-doing/american-music-fairness-act/> [https://web.archive.org/web/20260105230153/https://www.afm.org/what-we-are-doing/american-music-fairness-act/] (last visited July 11, 2025); U.S. COPYRIGHT OFF., *supra* note 23, at 43–46.

69. RICKS ET AL., *supra* note 10, at 25.

subject to the terms of ASCAP and BMI's consent decrees, which require equal access to all prospective licensees and members<sup>70</sup>—a form of nondiscrimination rule, another classic public utility tool.<sup>71</sup> ASCAP's consent decree also prohibits it from offering licenses for any right other than the performance right<sup>72</sup>—a form of structural separation, yet another tool of utility regulation which “places clear limits on the lines of business in which a firm can engage.”<sup>73</sup>

In each of these instances, the motivation behind the policy was the need to check the monopoly or oligopoly power of powerful intermediaries, one of several frequent justifications for regulating industries as public utilities.<sup>74</sup> In 1909, Congress established the first statutory rate for mechanical licenses out of a concern about the growing power of the Aeolian Company.<sup>75</sup> Aeolian was a manufacturer of piano rolls, a music distribution technology that reproduced popular songs using holes on sheets of paper which would operate mechanical player pianos.<sup>76</sup> By negotiating exclusive contracts with songwriters and other rights holders, Aeolian was able not only to forestall competition in its own industry—the manufacture of piano rolls—but also to exert power over the songwriting and music publishing industries, by determining what works could and could not be mechanically reproduced and distributed.<sup>77</sup> By requiring rights holders to license their works to all prospective licensees at a set rate, Congress effectively prohibited these exclusive contracts and thus Aeolian's exercise of intermediary power over the music industry.<sup>78</sup> Similarly, the nondiscrimination rules in performance rights today are enforced via antitrust consent decrees, which originated from a concern that the PROs were using

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70. SCHERER, *supra* note 23, at 19.

71. RICKS ET AL., *supra* note 10, at 24.

72. U.S. COPYRIGHT OFF., *supra* note 23, at 37 (noting also that BMI operates similarly, though without an explicit requirement).

73. Khan, *supra* note 21, at 980; *see also* RICKS ET AL., *supra* note 10, at 28.

74. RICKS ET AL., *supra* note 10, at 13–17.

75. KOHN, *supra* note 23, at 700.

76. U.S. COPYRIGHT OFF., *supra* note 23, at 26; KOHN, *supra* note 23, at 700. For a demonstration of a player piano, see JÜRGEN HOCKER, *Conlon Nancarrow, Study for Player Piano No. 1* (YouTube, May 19, 2010), <https://www.youtube.com/watch?v=1mKfQYzfdUy> [<https://web.archive.org/web/20260112064839/https://www.youtube.com/watch?t=6&v=1mKfQYzfdUy&feature=youtu.be>]. Player pianos are also notable as the namesake of Kurt Vonnegut's first novel, which depicts a dystopian future of entirely automated industry. *See* KURT VONNEGUT, *PLAYER PIANO* (1952).

77. U.S. COPYRIGHT OFF., *supra* note 23, at 26, 146; KOHN, *supra* note 23, at 700.

78. U.S. COPYRIGHT OFF., *supra* note 23, at 26, 146; KOHN, *supra* note 23, at 700.

their concentrated power to restrain trade.<sup>79</sup> These concerns about regulating powerful intermediaries echo those that led to the regulation of many other industries as public utilities: electricity, water, banking, insurance, trash, natural gas, telephones, the telegraph, and railroads among them.<sup>80</sup>

There are important exceptions to the utility-style regulations that govern rights in musical works. First, for mechanical licenses, the law allows for exceptions to the statutory rate, so long as parties agree to them by contract.<sup>81</sup> Second, for performance licenses, the PROs' consent decrees require that the PROs allow alternatives to the blanket licenses, including the ability to acquire licenses by direct negotiations with rights holders.<sup>82</sup> This means that, though the norm for many licensors is to acquire the blanket license to ASCAP's or BMI's full catalog, they may instead choose to negotiate rates for performance rights individually with each songwriter or publisher.<sup>83</sup> There are also the smaller, invitation-only PROs who represent some of the music industry's most successful songwriters, which are not governed by the terms of ASCAP's and BMI's consent decrees.<sup>84</sup>

Sound recordings, however, are not subject to public utility regulations of the sort that govern musical works. Though streaming services and other distributors must acquire licenses to offer sound recordings, there is no system of rate regulation to determine how much the owners of those recordings

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79. 15 U.S.C. § 1 (prohibiting combinations and conspiracies in restraint of trade); *U.S. v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395, 2001 WL 1589999, at \*3, \*4 (S.D.N.Y. Jun. 11, 2001); *U.S. v. Broad. Music, Inc.*, No. 64 Civ. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

80. See RICKS ET AL., *supra* note 10.

81. 17 U.S.C. § 115(2)(a)(i) ("License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license [. . .] shall be given effect in lieu of any determination by the Copyright Royalty Judges.")

82. See, e.g., *ASCAP*, 2001 WL 1589999, at \*3 ("ASCAP is hereby enjoined and restrained from . . . [l]imiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performance rights organization, non-exclusive licenses to music users for rights of public performance."); see also U.S. Dep't of Just., Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Remarks of Assistant Att'y Gen. Makan Delrahim) (Jan. 15, 2021), <https://www.justice.gov/atr/page/file/1355391/dl?inline> [<https://web.archive.org/web/20250714052546/https://www.justice.gov/atr/page/file/1355391/dl?inline>] ("The crux of the decrees is to encourage competition between ASCAP, BMI, and other PROs for members and music users, and between ASCAP, BMI, and their respective members to license copyrighted works to music users. The decrees prohibit exclusive licensing and protect the ability of ASCAP and BMI members to license works directly if they wish.")

83. See, e.g., *ASCAP*, 2001 WL 1589999, at \*6; U.S. Dep't of Just., *supra* note 82.

84. SCHERER, *supra* note 23, at 20.

should be paid.<sup>85</sup> Nor is there any nondiscrimination rule like that which governs the PROs governing how streaming services and record labels pay out royalties to recording artists. There are also no regulations limiting the licenses that can be administered by firms (i.e., record labels) that manage rights in sound recordings, as evidenced by the high degree of common ownership between major record labels (which deal in sound recordings) and publishers (which deal in musical works).<sup>86</sup> Therefore, the prices and terms of access to these distribution channels are highly dependent on the bargaining power of the parties to individual contracts.

Given the differences in this respect between sound recordings and musical works—and the regulatory exceptions made even in the case of musical works—the regulation of the music industry through copyright and antitrust law is an incomplete public utility regime. Lawmakers and courts have recognized that elements of the music industry resemble public utilities in their tendency towards monopoly or oligopoly, such as early music manufacturers<sup>87</sup> and PROs.<sup>88</sup> But they have not extended that logic to other elements of the industry. This incompleteness has led to problems in music's political economy, including some present well before the rise of streaming platforms.<sup>89</sup>

### C. TWENTIETH CENTURY PROBLEMS

In the twentieth century, well before the rise of streaming services, the recorded music industry's structure was the product and source of fierce contestation between industry participants, which arose from its thorny collision of art, technology, and commerce. Many of these debates revolved around three themes, the first of which was the problem of compensation. Determining the compensation due in monetary terms to each of the actors involved in the creation and distribution of a piece of recorded music is an

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85. There is, however, a compulsory license for ephemeral copies of sound recordings on *non*-interactive streaming services. SCHERER, *supra* note 23, at 24.

86. U.S. COPYRIGHT OFF., *supra* note 23, at 23 ("One notable feature of the modern music marketplace is the extent of common corporate ownership of major record labels and major music publishers: UMPG is owned by UMG [. . .]; the Sony Corporation owns SME and half of Sony/ATV; and Warner/Chappell Music is a division of WMG." (citations omitted)).

87. KOHN, *supra* note 23, at 700.

88. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 1 (1979).

89. Cf. W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 869–97 (2007) (discussing the presence of large, powerful intermediaries in the music industry and its implications for music's copyright system).

inherently complicated task. The history of the twentieth-century music industry is filled with high-stakes, zero-sum legal, political, and business battles to answer precisely this question.<sup>90</sup> Different dynamics emerged from each of these protracted struggles. While payments for songwriters could be somewhat stable and consistent, thanks to the presence of rate regulation, the payment levels for recording artists could be highly variable, left up to privately negotiated contracts between labels and distribution channels, on the one hand, and between labels and artists on the other. Differences in bargaining power were affected by the presence or absence of rate regulation, as well as the integration of record labels and publishers.

Second was the problem of concentration. Over the course of the twentieth century, an oligopoly of six major record labels dominated the American recording industry: Bertelsmann Music Group (“BMG”), Sony Music, EMI (a British firm), Universal Music Group, Warner Music Group, and PolyGram.<sup>91</sup> Through a series of mergers in the late 1990s and 2000s, this oligopoly further consolidated into the so-called “Big Three” major record labels that dominate the music industry as of this writing: Warner Music Group, Universal Music Group, and Sony Music Entertainment.<sup>92</sup> While the core business of these firms was for many years in recording, they also came to acquire major publishers beginning in the 1960s, as venture capitalists encouraged integration between publishers and record companies, as well as the conglomeration of smaller labels as subsidiaries of the majors.<sup>93</sup> Since that time, the common ownership of publishers and record labels—nominally separate industries

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90. See generally 3 SANJEK, *supra* note 1; Joey La Neve DeFrancesco, *When Musicians Went on Strike—and Won*, JACOBIN (Mar. 6, 2022), <https://jacobin.com/2022/03/1940s-musicians-strike-american-federations-of-musicians-afm-labels-streaming> [<https://web.archive.org/web/20260112214508/https://jacobin.com/2022/03/1940s-musicians-strike-american-federations-of-musicians-afm-labels-streaming>] (on labor organizing in music). Business difficulties between recording artists and their labels are so commonplace in the music industry as to have become stereotypical. See, e.g., Ann Powers, *Songs Against the Suits*, NPR (Nov. 15, 2019), <https://www.npr.org/2019/11/15/779753813/songs-against-the-suits> [<https://web.archive.org/web/20260112214606/https://www.npr.org/2019/11/15/779753813/songs-against-the-suits>] (on songs by popular artists about business disputes with their record labels).

91. SANJEK, *supra* note 2, at 172. The names of these firms changed often throughout the period of their dominance, from the late 1920s through the late 1990s. The names given here were those in use as of 1998, when Polygram merged with Universal. See Eben Shapiro, *Seagram Plans PolyGram Charge, Designates Noncore Assets for Sale*, WALL ST. J. (Dec. 15, 1998), <https://www.wsj.com/articles/SB913670897536416000> [<https://web.archive.org/web/20260215125549/https://www.wsj.com/articles/SB913670897536416000>].

92. SANJEK, *supra* note 2, at 171–204 (charting this period of consolidation).

93. 3 SANJEK, *supra* note 1, at 508.

within the framework of copyright law—has become a defining characteristic of the music industry's structure.<sup>94</sup> The administrators of royalty payments for musical works were also highly concentrated, with ASCAP and BMI enjoying a virtual duopoly over performance rights administration<sup>95</sup> and the Harry Fox Agency ("HFA") a virtual monopoly over mechanical rights administration.<sup>96</sup> The concentrated power of these firms was and is managed to different degrees by antitrust enforcement. As discussed in Part I, ASCAP and BMI are governed by consent decrees administered by the Department of Justice ("DOJ"), which have been upheld by the Supreme Court and repeatedly reaffirmed by DOJ officials.<sup>97</sup> However, no such decrees exist for governing the activities of conglomerated record labels and publishers; nor do they exist for the more routine yet structurally essential functions of mechanical rights administrators like the HFA.<sup>98</sup> Over the course of the twentieth century, the overall effect of unregulated concentration in the music industry was to maximize the bargaining power of the conglomerated label-publishers relative to atomized musicians and to entrench their power in the recorded music industry.

A third problem was discrimination between musicians on the radio. Unlike physical media, which could be sold in discrete units with supply theoretically only limited by demand, radio broadcasting was an inherently scarce resource. This was a direct result of its technology: There were only a limited number of radio frequencies that could be transmitted within a geographic area at any given time to prevent congestion and interference; and for each of these frequencies, there were only twenty-four hours in a day.<sup>99</sup> These physical realities made the question of how to fairly allocate airwaves and broadcast time one of elemental importance for broadcasters, the record

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94. U.S. COPYRIGHT OFF., *supra* note 23, at 23.

95. 3 SANJEK, *supra* note 1, at 175–82 (on BMI's founding). LARRY WAYTE, PAY FOR PLAY: HOW THE MUSIC INDUSTRY WORKS, WHERE THE MONEY GOES, AND WHY 256 (2023).

96. U.S. COPYRIGHT OFF., *supra* note 23, at 21; 3 SANJEK, *supra* note 1, at 136.

97. U.S. v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. Jun. 11, 2001); U.S. v. Broad. Music, Inc., No. 64 Civ. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979); U.S. Dep't of Just., *supra* note 82.

98. See Michelle Arnold, *A Matter of (Anti)Trust: The Harry Fox Agency, The Performance Rights Societies, and Antitrust Litigation*, 81 TEMP. L. REV. 1169 (2008).

99. PHILIP T. ROSEN, THE MODERN STENTORS: RADIO BROADCASTERS AND THE FEDERAL GOVERNMENT, 1920–1934 3 (1980) (“[I]t was inherent in the technology of the medium that it could not be left unregulated, for the cacophony of competing voices on the airwaves would have made development impossible.”).

industry, lawmakers, and regulators.<sup>100</sup> In the 1950s and 1960s, investigations by Congress and the Federal Communications Commission (“FCC”) uncovered pay-for-play schemes in the radio sector, wherein record labels would compensate influential radio disc jockeys (“DJs”) for preferential treatment and access.<sup>101</sup> This practice came to be known as payola.<sup>102</sup> The revelations created public outcry,<sup>103</sup> and Congress and the FCC reacted by banning undisclosed payola—in other words, requiring DJs to disclose on the air whether a song was to be played as the result of compensation from an interested third party.<sup>104</sup> Despite this policy action, it is universally recognized that record labels continued to devote significant resources towards influencing radio programming through more informal means,<sup>105</sup> much in the same way that while the bribery of public officials is nominally illegal,<sup>106</sup> many industries and the wealthy nonetheless exercise influence over public policy through lobbying, campaign contributions, and social capital.<sup>107</sup>

## II. THE RISE OF MUSIC STREAMING SERVICES

Understanding how music streaming services created new problems for law and policy requires recalling how they gained traction in the first place. With the rise of the internet in the late 1990s and early 2000s came the rise of online file-sharing, which threatened to de-commodify recorded music and render the traditional structure of the recorded music industry obsolete. The streaming business model was pitched as a technocratic solution to this

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100. See Radio Act of 1912, Pub. L. 264, 37 Stat. 302; Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1064, 1085, § 309(a) (requiring broadcast licenses to be granted for the “public interest, convenience, and necessity”).

101. STERLING & KITROSS, *supra* note 4, at 368–69, 394–95; ROSS & HUPPE, *supra* note 5, at 737–39.

102. STERLING & KITROSS, *supra* note 4, at 368–69, 394–95; ROSS & HUPPE, *supra* note 5, at 737–39. For a history of payola in the U.S. and its regulation, see SEGRAVE, *supra* note 4.

103. President Eisenhower remarked in a press conference that payola was an issue of “public morality.” Dwight D. Eisenhower, *The President’s News Conference*, AMER. PRES. PROJ. (Feb. 11, 1960), <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-215> [<https://web.archive.org/web/20260112221019/https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-215>].

104. 47 U.S.C. § 317; 47 C.F.R. § 73.1212. Radio stations had been subject to this requirement under the Communications Act, but the focus of the new revelations was not on stations in general, but their DJs.

105. STERLING & KITROSS, *supra* note 4, at 396.

106. 18 U.S.C. § 201(b).

107. See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED (2014).

problem.<sup>108</sup> With the assistance of special terms offered to major labels, whose catalogs streaming services needed to operate, streaming services gained buy-in from industry participants and came to enclose and dominate recorded music distribution. This process—music’s platformization—created a new layer of power in the music industry, as streaming services began to funnel music to listeners while preserving the industry’s oligopolistic structure. This section will provide a historical overview of this process and consider the economic, cultural, and political effects of the new layer of power it created.

#### A. THE REASON: THE THREAT OF MUSIC’S DECOMMODIFICATION

The streaming model of music distribution was initially proposed as a solution to an existential threat faced by the recorded music industry’s traditional structure: that of recorded music’s decommmodification.<sup>109</sup> This problem is often denoted as the problem of piracy.<sup>110</sup> The piracy of musical works—their unauthorized and uncompensated reproduction—has been a challenge for the music industry for as long as the reproduction of musical works has been possible.<sup>111</sup> The piracy of recordings in the form of “bootlegs” has also had a long-standing impact on the record industry, with recording artists maintaining varying attitudes towards their existence and distribution.<sup>112</sup> But this new piracy was of a different order, as it was on a scale that could not be effectively policed by simply enforcing copyright law.<sup>113</sup> The rise of the

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108. PELLY, *supra* note 13, at 11–23.

109. For a definition, see SUSAN MAYHEW, A DICTIONARY OF GEOGRAPHY (6th ed., 2023) (“Given that a commodity is an artefact, symbol, or idea that can be exchanged, usually for money, decommmodification would indicate that a commodity no longer has a status as such. . . . Deccommmodification is also any cultural, political, or social, process that reduces the scope and influence of the market in everyday life.”).

110. See, e.g., Purtzer, *supra* note 24, at 426; PELLY, *supra* note 13, at 1–10.

111. 3 SANJEK, *supra* note 1, at 563 (“The piracy or counterfeiting of printed music had been one of the music publishers’ paramount problems from the day that mass duplication of music first became practicable.”).

112. For a discussion of the cultural impact of one particularly notable set of twentieth-century bootleg recordings, see GREIL MARCUS, INVISIBLE REPUBLIC: BOB DYLAN’S BASEMENT TAPES (1997).

113. See Christophe Geiger, *Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach*, in RESEARCH HANDBOOK ON CROSS-BORDER ENFORCEMENT OF INTELLECTUAL PROPERTY 704, 704–05, 707 (2014) (“What is probably different at present is the extent of the phenomenon [of piracy], due to the facility of reproducing copyrighted works in the digital environment—in a quality now equal to the original—and the possibility of disseminating these works at zero cost via the Internet. [ . . . ] [T]he strategy adopted by legislators, with a strong encouragement from the cultural industries, has been to enhance the set of copyright rules [ . . . ] and to increase the range of penalties applicable. [ . . . ] Nevertheless, it must be admitted that these strategies, mainly based on repression and fear of sanctions, did not achieve the expected results.”).

internet made piracy possible on an unprecedented scale: The marginal cost of posting audio files on the internet was essentially zero, which posed an existential threat to record sales. File-sharing services like Napster upended the basic business model of record companies: If listeners could simply find free audio files online uploaded by a single user from physical copies, they would be less likely to purchase additional physical copies.<sup>114</sup> The challenge to long-predominant paradigms in recorded music distribution was obvious and enormous—and it was the threat to make recorded music into an essentially free-to-consume public good, whose status as a commodity from which revenue could be derived was in jeopardy.

This situation created an opportunity for entrepreneurs, who looked to market new inventions that would allow the music industry—particularly the major record labels—to continue generating profit from online music distribution and thus retain their market position. One such innovation was digital rights management (“DRM”) software, which when installed on users’ devices—often packaged with commercial audio downloads—prevented the unauthorized copying or distribution of downloaded audio files from online marketplaces like iTunes.<sup>115</sup> While holding promise for record labels, DRM technology was roundly criticized by other industry participants who argued that it was invasive for users and burdensome for distributors.<sup>116</sup>

Entrepreneurs initially proposed music streaming as another technocratic solution to the problem of decommodification—one that would be highly profitable for the music industry to move towards.<sup>117</sup> This was inherent in its reliance not on users downloading files but on them listening to “streams,” digital audio data instantaneously communicated via the internet and housed on servers owned or contracted by the platform, rather than a user’s personal device.<sup>118</sup> By allowing access to streams via a subscription fee or interspersing

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114. The record labels took immediate note of this threat and sued Napster for copyright infringement. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th. Cir., 2001).

115. SCHERER, *supra* note 23, at 23.

116. In 2007, Apple CEO Steve Jobs offered a characteristically snappy analysis of DRM technology to shift blame for the lack of interoperability on DRM-accompanied iTunes downloads away from Apple and onto record labels: “[I]f the music companies are selling over 90 percent of their music DRM-free [on physical media], what benefits do they get from selling the remaining small percentage of their music encumbered with a DRM system? There appear to be none.” Steve Jobs, *Thoughts on Music*, APPLE (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/> [<https://web.archive.org/web/20070907215836/http://www.apple.com/hotnews/thoughtsonmusic/>].

117. PELLY, *supra* note 13, at 11–23.

118. For an intricate yet workable regulatory definition of “stream,” see 37 C.F.R. § 385.2.

them with revenue-generating ads, centralized music streaming platforms promised to combine the convenience for users of accessing entire catalogs of recorded music for a nominal fee with the benefit to record labels—and purportedly also recording artists, publishers, and composers—of continued revenue streams in the digital age.

The firm that emerged as the principal innovator of this business model was Spotify. Founded in Sweden in 2006 by a group of entrepreneurs well-versed in the technology of search engine optimization and online advertising—importantly, not in music distribution<sup>119</sup>—Spotify rapidly attracted attention at first from venture capitalists and later from record labels, which recognized the value inherent in an online library of music that would replicate the user experience of file-sharing networks like Napster but ensure that money would continue to flow through the channels maintained by copyright law for musical works and sound recordings.<sup>120</sup>

Major labels bought into this new form of commercial infrastructure, literally. In their initial round of licensing deals with Spotify, the majors received ownership shares in the platform,<sup>121</sup> as well as several other important concessions: guaranteed minimum monthly payments, advances, most-favored-nation (“MFN”) clauses to stipulate that no other label would get better terms, and, critically, a subscription tier, which was understood by labels to be a more consistent source of revenue than advertisements.<sup>122</sup> According to the designs of its ad-tech founders, Spotify was initially envisioned as a solely ad-funded service.<sup>123</sup> But securing major label buy-in required constructing a platform with two tiers of access: one offered to users for free with ads, and a

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119. PELLY, *supra* note 13, at 11, 13 (“[Spotify’s founders] knew a lot about search engine optimization, metadata, and selling ads. But they were by no means music guys.” As Spotify’s chief technology officer Andreas Ehn put it, “[i]t wasn’t even clear back then that we were going to do music at all, or that music would be the focus.”).

120. As one Spotify founder put it, “[t]he benchmark we set for ourselves wasn’t existing music services. It was the file-sharing networks.” *Id.* at 14.

121. SVEN CARLSSON & JONAS LEIJONHUFVUD, *THE SPOTIFY PLAY: HOW CEO AND FOUNDER DANIEL EK BEAT APPLE, GOOGLE, AND AMAZON IN THE RACE FOR AUDIO DOMINANCE* 62 (2021).

122. PELLY, *supra* note 13, at 17–18; *see also* Micah Singleton, *This Was Sony Music’s Contract with Spotify*, VERGE (May 19, 2015), <https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract> [<https://web.archive.org/web/2025112190550/https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract>].

123. PELLY, *supra* note 13, at 17 (“Spotify was committed to its initial business model, which paired a free service with advertising, and paid rights-holders a percentage of ad revenue.”).

premium tier without ads accessed by a recurring subscription fee.<sup>124</sup> Key to this strategy was steering users away from the free service towards the paid one, a task to which Spotify has since devoted considerable investment.<sup>125</sup> Soon after deals with the major labels established Spotify as a leading platform for music distribution, independent labels were also convinced to license their catalogs. They did so via the intermediation of the Merlin Network—a London-based nonprofit formed to collectively negotiate digital licensing deals on behalf of independent labels.<sup>126</sup> Merlin also received ownership shares in Spotify, the returns from which it would pay out to its independent label members.<sup>127</sup> Thereafter, nearly all recorded music from both major and independent labels became available on Spotify, and later other streaming platforms.

These deals heralded the adoption of the streaming business model as the music industry's preferred strategy to maintain recorded music's status as a profitable commodity. Its promise was such that music streaming was thought to be an innovation that literally saved the music industry as it existed.<sup>128</sup>

#### B. THE RESULT: A NEW LAYER OF POWER

The net result of streaming's adoption was that the essential structure of the music industry—one dominated by the consolidation of rights holders in publishing and recording,<sup>129</sup> frequently with common ownership between the two<sup>130</sup>—remained intact following the threat of recorded music's piracy-driven decommodification. It added to this pre-existing structure a new layer of power in the music industry: that of the streaming platforms. This new layer of oligopolistic power has since demonstrated economic, cultural, and political effects.

In economic terms, the leading music streaming platforms have become behemoths. In the nearly twenty years since Spotify's founding, music streaming has grown into a nearly \$50 billion industry worldwide.<sup>131</sup> Spotify

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124. *Id.* at 17–18.

125. *Id.* at 17.

126. *Id.* at 19–20.

127. *Id.*

128. *Id.* at 11–23.

129. SANJEK, *supra* note 2, at 172.

130. U.S. COPYRIGHT OFF., *supra* note 23, at 23.

131. *Music Streaming Market (2025–2030), Report Summary*, GRAND VIEW RSCH., <https://www.grandviewresearch.com/industry-analysis/music-streaming-market>

alone has 100.6 million individual listeners in America;<sup>132</sup> Amazon Music has upwards of 50 million,<sup>133</sup> and Apple Music follows with over 40 million users.<sup>134</sup> Spotify's most recent round of disclosures to the Securities & Exchange Commission reports over \$12 billion in assets,<sup>135</sup> and it is valued at \$124 billion in global market capitalization.<sup>136</sup> While neither Apple Music nor Amazon Music are isolatable from their parent companies' financial disclosures, analysts estimate they earned \$9.2 billion and \$4 billion in revenue in 2023, respectively.<sup>137</sup> Other streaming platforms operate as well: YouTube, the video streaming app owned by Alphabet (the parent company of Google), is perhaps the largest music streaming service of them all, as many of its videos are functionally audio tracks of musical artists. However, the business of YouTube differs markedly from other streaming platforms: It is primarily an ad-funded service, while other streaming services' revenue mostly comes from subscription fees.<sup>138</sup> The only way to listen to music without keeping the video on is by purchasing a subscription to YouTube Music or YouTube Premium, of which there were 27.9 million users in the United States as of 2024.<sup>139</sup> Other

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[<https://web.archive.org/web/20260201162154/https://www.grandviewresearch.com/industry-analysis/music-streaming-market>] (last visited July 8, 2025).

132. *Number of Active Users of Major Music Streaming Services*, *supra* note 6.

133. *Id.*

134. *Id.*

135. Spotify Technology S.A., Annual Report, 106 (Form 20-F for FY ending Dec. 31, 2024), [https://s29.q4cdn.com/175625835/files/doc\\_financials/2024/q4/8afe1e0f-192e-43ad-b8d1-aa947b389577.pdf](https://s29.q4cdn.com/175625835/files/doc_financials/2024/q4/8afe1e0f-192e-43ad-b8d1-aa947b389577.pdf)

[[https://web.archive.org/web/20250703110017/https://s29.q4cdn.com/175625835/files/doc\\_financials/2024/q4/8afe1e0f-192e-43ad-b8d1-aa947b389577.pdf](https://web.archive.org/web/20250703110017/https://s29.q4cdn.com/175625835/files/doc_financials/2024/q4/8afe1e0f-192e-43ad-b8d1-aa947b389577.pdf)].

136. Mandy Dalugdug, *Spotify Market Cap Tops \$124bn—As Stock Price Hits Record High After Posting First Full Year of Profit*, MUSIC BUS. WORLDWIDE (Feb. 5, 2025), <https://www.musicbusinessworldwide.com/spotify-market-cap-value-tops-124bn-as-stock-price-hits-record-high-after-posting-first-full-year-of-profit/>

[<https://web.archive.org/web/20260103020059/https://www.musicbusinessworldwide.com/spotify-market-cap-value-tops-124bn-as-stock-price-hits-record-high-after-posting-first-full-year-of-profit/>].

137. David Curry, *Apple Music Revenue and Usage Statistics (2025)*, BUS. APPS (Jan. 22, 2025), <https://www.businessofapps.com/data/apple-music-statistics/>

[<https://web.archive.org/web/20260103020120/https://www.businessofapps.com/data/apple-music-statistics/>]; David Curry, *Amazon Prime Music Revenue and Usage Statistics (2025)*, BUS. APPS (Jan. 22, 2025), <https://www.businessofapps.com/data/amazon-prime-music-statistics/>

[<https://web.archive.org/web/20260103020135/https://www.businessofapps.com/data/amazon-prime-music-statistics/>].

138. Rohit Shewale, *YouTube Revenue 2024–2025: Complete Report and Alphabet Impact*, RESOURCERA (Apr. 5, 2025), <https://resourcera.com/data/social/youtube-revenue/> [<https://web.archive.org/web/20251228225940/https://resourcera.com/data/social/youtube-revenue/>].

139. Christy Tila, *Number of YouTube Premium Subscribers in the United States from 2020 to 2024*, STATISTA, <https://www.statista.com/statistics/1261865/youtube-premium-subscribers/>

players include Tidal, which has under 1 million U.S.-based users and competes by offering listeners higher audio quality (for a higher price than the other services),<sup>140</sup> and Deezer, a French firm which is popular in Europe but has not achieved significant scale in the United States.<sup>141</sup> Despite the activities of these marginal competitors, music streaming is an oligopolistic industry—with Spotify leading the pack as a result of its first-mover advantage.<sup>142</sup>

As for the cultural impact of streaming platforms on musicians and listeners, little evidence is needed: They are ubiquitous. From billboards in Times Square of artists with new releases sponsored by the streaming platforms, to pleas from artists to fans to “pre-save” their upcoming releases on one or more streaming platforms, we see signs of the degree to which the streaming economy has changed not only the music industry, but the very experience of listening to music and engaging in musical culture. Unit sales and revenue figures for different formats reflect this shift: Compared to Spotify’s over 100 million listeners at the beginning of 2025<sup>143</sup>—each of whom may listen to many different songs, albums, and artists—only 32.9 million CDs were sold in the U.S. in 2024.<sup>144</sup> Scholars of media and culture have noted the ways in which the rise of streaming platforms has changed the experience of engaging in music, including through forming new lines of class distinction.<sup>145</sup>

[<https://web.archive.org/web/20260114034353/https://www.statista.com/statistics/1261865/youtube-premium-subscribers/>] (last visited July 10, 2025).

140. Tom Triggs, *Is This the End of Tidal?*, SOUNDGUYS (Mar. 10, 2025), <https://www.soundguys.com/the-end-of-tidal-132265/>

[<https://web.archive.org/web/20251104232613/https://www.soundguys.com/the-end-of-tidal-132265/>].

When it was originally launched, Tidal was partly owned by musicians—though it did not resemble models of cooperative governance, as it did not invite other musicians to join as owner-members, while it did carry their music. See Sam Sanders, *Jay Z’s Music Service, Tidal, Arrives with a Splash, and Questions Follow*, NPR (Apr. 1, 2015), <https://www.npr.org/sections/therecord/2015/03/31/396634244/jay-zs-music-service-tidal-arrives-with-a-splash-and-questions-follow>

[<https://web.archive.org/web/20190815170804/http://www.gpb.org/news/2015/04/01/jay-zs-music-service-tidal-arrives-splash-and-questions-follow>].

141. Daniel Thomas, *French Music Streamer Deezer Breaks Even for First Time*, FIN. TIMES (Mar. 18, 2025), <https://www.ft.com/content/0128384e-dabe-4788-89bb-63a33e78c77f>

[<https://web.archive.org/web/20260103030505/https://www.ft.com/content/0128384e-dabe-4788-89bb-63a33e78c77f>].

142. See CARLSSON & LEIJONHUFVUD, *supra* note 121.

143. *Number of Active Users of Major Music Streaming Services*, *supra* note 6.

144. RIAA, *supra* note 9.

145. See, e.g., Jack Webster, *Taste in the Platform Age: Music Streaming Services and New Forms of Class Distinction*, 23 INFO, COMM. & SOC’Y 1909, 1909 (2020) (“Music streaming services, such as Spotify, have the potential to transform the social dynamics of music consumption in ways not previously encountered.”).

Streaming platforms' power also has political ramifications. Each platform has prodigious lobbying operations, which they deploy to influence public policy in various jurisdictions on topics including intellectual property and data privacy.<sup>146</sup> Private investments by major streaming executives often involve matters of public policy, including national security, as in the case of Spotify CEO Daniel Ek's investments in European defense technology companies manufacturing weapons for the Russo-Ukrainian War and, potentially, other global conflicts.<sup>147</sup> Jeff Bezos, the CEO of Amazon Music's parent company, owns the *Washington Post*, whose opinion journalists he has personally directed to write "in support and defense of two pillars: personal liberties and free markets."<sup>148</sup> While platform executives do not always exercise their power within the confines of the music industry alone, the power the platforms hold in the music industry adds to and reinforces the power accrued by these figures in general.

### C. HOW MUSIC STREAMING SERVICES WORK

Today, music streaming services perform three essential functions—which, while interrelated, are distinct. First, they are hosts of music: They carry recorded music from its creators to its listeners, who can engage with the music

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146. Tripp Mickle, *Apple Keeps Losing Patent Cases. Its Solution: Rewrite the Rules*, N.Y. TIMES (Mar. 19, 2024), <https://www.nytimes.com/2024/03/19/technology/apple-patents-lobbying.html> [<https://web.archive.org/web/20250623051154/https://www.nytimes.com/2024/03/19/technology/apple-patents-lobbying.html>]; Caitlin Oprysko, *Spotify, Music Publishers Lobby Up Amid Royalties Fight*, POLITICO (Aug. 14, 2024), <https://www.politico.com/newsletters/politico-influence/2024/08/14/spotify-music-publishers-lobby-up-amid-royalties-fight-00174062> [<https://web.archive.org/web/20240820184357/https://www.politico.com/newsletters/politico-influence/2024/08/14/spotify-music-publishers-lobby-up-amid-royalties-fight-00174062>]; Jeffrey Dastin, Chris Kirkham & Aditya Kalra, *Amazon Wages Secret War on Americans' Privacy, Documents Show*, REUTERS (Nov. 19, 2021), <https://www.reuters.com/investigates/special-report/amazon-privacy-lobbying/> [<https://web.archive.org/web/2025111201725/https://www.reuters.com/investigates/special-report/amazon-privacy-lobbying/>] (on the lobbying efforts of Jay Carney, the former White House Press Secretary and current Amazon executive, to defeat consumer privacy regulations).

147. Tim Bradshaw & Ivan Levingston, *Spotify's Daniel Ek Leads €600mn Investment in German Drone Maker Helsing*, FIN. TIMES (June 16, 2025), <https://www.ft.com/content/cdc02d96-13b5-4ca2-aa0b-1fc7568e9fa0?shareType=nongift> [<https://web.archive.org/web/20260103020457/https://www.ft.com/content/cdc02d96-13b5-4ca2-aa0b-1fc7568e9fa0?shareType=nongift>].

148. Mandy Taheri, *Bezos Makes Big Change to Washington Post Opinion Focus, Endorsed by Musk*, NEWSWEEK (Feb. 26, 2025), <https://www.newsweek.com/bezos-makes-big-change-washington-post-opinion-focus-endorsed-musk-2036618> [<https://web.archive.org/web/20251101213937/https://www.newsweek.com/bezos-makes-big-change-washington-post-opinion-focus-endorsed-musk-2036618>].

in a variety of ways. Second, they are data collectors and assigners. Some data collection is inherent in the host function: To carry a track, a service must record its name, its artist, its rights holders, and various other basic information; for listeners to make playlists, the service must retain the contents of that playlist. But streaming platforms collect and assign data far beyond this basic level, creating detailed portraits of listener behavior and assigning an enormous variety of labels to music, creating a valuable resource for the service to exploit. Third, streaming services are music recommenders. Both through curating playlists and through recommending music to users algorithmically based on the data they collect and assign, streaming services steer each user towards certain music they host. Within each of these functions, streaming services work with all the quintessential characteristics of platform enterprises.<sup>149</sup> Each of these dynamics invites consideration to better understand how streaming services work and why the law should treat them as platforms.<sup>150</sup>

### 1. As Hosts

Streaming services are, at their most basic level, hosts of music. To host music, streaming services negotiate licenses to offer music with various rights holders for musical works and recordings. The process for obtaining licenses for musical works is fairly straightforward. For mechanical rights, they must calculate and pay the statutory rate per work to the Mechanical Licensing Collective, which pays it out to individual rights holders such as publishers and songwriters.<sup>151</sup> For performance rights, the streaming platforms negotiate deals with the PROs, under which they receive blanket licenses to play the works in the PROs' catalogs in exchange for royalty payments that the PROs subsequently distribute to publishers and songwriters.<sup>152</sup>

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149. See RICKS ET AL., *supra* note 10, at 8–10 (listing these characteristics).

150. While this description of how streaming services work will, in part, survey dynamics that this Article goes on to argue are themselves problems of music's platformization, it is intended that this section should be purely descriptive.

151. Before 2021, when the Mechanical Licensing Collective began operation, these licenses were administered by the Harry Fox Agency, as they still are for physical media. See U.S. COPYRIGHT OFF., *supra* note 23, at 21; SCHERER, *supra* note 23, at 16–17.

152. However, these deals may not always follow the prices and terms set by the government or the PROs, as the law allows the option of privately negotiated rates in lieu of publicly set or blanket rates. See 17 U.S.C. § 115(c)(2)(a)(i) ("License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory

For sound recordings, however, the streaming platforms must negotiate deals in a private marketplace with the relevant rights holders. These rights holders include the major labels, the Merlin Network representing independent labels, and other counterparties—labels, distributors, and independent recording artists—as necessary. Streaming platforms typically pay the rights holders of sound recordings on a pro-rata basis: They calculate the platform’s total pool of net revenues and make monthly payments to rights holders proportional to the percentage of the platform’s total streams—defined as tracks played for over thirty seconds—consisting of that rights holder’s tracks. Several elements of this formula are, importantly, subject to the terms of each individual licensing contract. For example, how the platform calculates its “net revenues” may be stipulated differently in each individual contract.<sup>153</sup> Rights holders may also be offered lower royalty payments in exchange for promotion on the platform via its function as a music recommender. In some cases, they may also include guaranteed minimum total payments—as they were for the major labels upon initially signing. Importantly, though, these contracts are mostly not public, except for those that have leaked to the press.<sup>154</sup> Following these payouts to rights holders—largely labels—the distribution of royalties to recording artists is then left up to the dictates of their individual contracts with their labels.<sup>155</sup> Each of these layers of contractual alteration to the standard pro-rata formula results in highly variable payments to rights holders.

To be sure, not all music on streaming services is licensed from record labels. Artists without a label may offer music on streaming services through a third-party distributor, such as DistroKid, a company in which Spotify owns a

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license [...] shall be given effect in lieu of any determination by the Copyright Royalty Judges”); *see also* United States v. Am. Soc’y of Composers, Authors & Publishers, No. 41-1395, 2001 WL 1589999, at \*3 (S.D.N.Y. June 11, 2001) (“ASCAP is hereby enjoined and restrained from [...] [l]imiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performance rights organization, non-exclusive licenses to music users for rights of public performance.”).

153. In some circumstances, it may also be affected by whether platform subscription packages bundle access to music and other forms of content, such as audiobooks, thereby diluting the royalty pool for musicians. This has been an issue of bipartisan concern for lawmakers. Audrey Gibbs, *Senators Blackburn, Lujan Request FTC Investigate Spotify Subscription Bundle Practices*, TENNESSEAN (Jun. 23, 2025), <https://www.tennessean.com/story/entertainment/music/2025/06/20/tennessee-marsha-blackburn-ben-ray-lujan-spotify-subscriptions/84290158007/> [<https://web.archive.org/web/20260103020510/https://www.tennessean.com/story/entertainment/music/2025/06/20/tennessee-marsha-blackburn-ben-ray-lujan-spotify-subscriptions/84290158007/>].

154. *See* Xiyin Tang, *Privatizing Copyright*, 121 MICH. L. REV. 753 (2023) (on the confidentiality of major copyright contracts with digital platforms).

155. PELLY, *supra* note 13, at 151 (on the variation among artists’ label contracts, including advances and other remuneration mechanisms).

partial stake.<sup>156</sup> Streaming platforms also directly commission music from producers, often in exchange for lower royalty payments.<sup>157</sup> These discounts have been exploited as a business strategy by Spotify to boost margins, including through a category of recordings known internally as “perfect fit content,” or PFC.<sup>158</sup> Noting that listeners of certain proprietary playlists were often passive rather than active listeners, who would keep playlists on in the background regardless of the specific tracks they included, Spotify made deals with individual record producers to offer low royalty payments in exchange for music that could be comfortably interspersed into such playlists.<sup>159</sup>

Once they have obtained these licenses, they offer the licensed music to users on a virtual interface, which functions as a library of recorded music that also incorporates features of social networking, like the ability to create and share playlists. From the perspective of users, music streaming platforms appear as libraries of music, with a search bar that one can use to navigate to artists, albums, and songs. These interfaces may be accessed either on computers or through mobile apps. On them, users can save artists, albums, and tracks to their own individual libraries. They can follow artists and other users to get updates about new releases and see other users’ listening activity across the platform. They can also make playlists, which involves collecting and sequencing musical tracks from across the platform.

The services also host several other features that resemble or are directly

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156. Jem Aswald, *Spotify Acquires Stake in Distrokid, Tightening Squeeze on Indie Distributors*, YAHOO! ENT. (Oct. 17, 2018), <https://www.yahoo.com/entertainment/spotify-acquires-stake-distrokid-tightening-135856486.html> [<https://perma.cc/F5U6-AQYD>]. Though Spotify has since sold shares in the enterprise, it is not clear that it has divested from it entirely or that it does not retain a continued interest in independent music distribution. See Paul Resnikoff, *Spotify Quietly Sells Two-Thirds of Its Distrokid Stake for \$167 Million. Is This the End of Spotify’s “Disintermediation” Dream?*, DIGIT. MUSIC NEWS (Oct. 27, 2021), <https://www.digitalmusicnews.com/2021/10/27/spotify-sells-distrokid/> [<https://web.archive.org/web/20251230045109/https://www.digitalmusicnews.com/2021/10/27/spotify-sells-distrokid/>].

157. Liz Pelly, *The Ghosts in the Machine*, HARPER’S (Jan. 2025), <https://harpers.org/archive/2025/01/the-ghosts-in-the-machine-liz-pelly-spotify-musicians/> [<https://web.archive.org/web/20260105192310/https://harpers.org/archive/2025/01/the-ghosts-in-the-machine-liz-pelly-spotify-musicians/>] (documenting this practice).

158. *Id.*

159. Reports of this practice resulted in a scandal that described Spotify as contracting with “fake artists” to maximize its revenue. Whether the artists were actually “fake” or not—the difference being in the contractual mechanism at play, rather than the humanity of the musicians—Spotify was nonetheless incentivized to give PFC tracks preferential treatment on their playlists—which are important revenue- and attention-generating channels for non-PFC artists—because they had directly commissioned those tracks for relatively lower royalty payments. *Id.*; see *infra* Parts III.B, D (on the consequences of this type of commission for music’s political economy).

integrated with those of traditional social networks. On Spotify, users can collaborate on playlists, including some that are generated algorithmically called “blends.” They can follow other users and set up a feed that shows, in real time, what the users they follow are listening to. They can share songs, playlists, and albums with connections on other platforms including social media like Instagram and X. They can also participate in Spotify’s famous annual marketing campaign, “Spotify Wrapped,” which collects information on the user’s listening habits over the course of a year into a package meant to be shared on social media. Despite the preponderance of these social features, data from different streaming platforms are not interoperable with each other: A playlist housed on Apple Music, for example, cannot be heard by a Spotify user unless that user also has an Apple Music account. This restricts the social networking features on the services themselves to the closed ecosystem of each individual streaming platform.

From the musician’s perspective, streaming platforms typically offer an additional interface that is specific to the musician’s role as producers, rather than consumers, of music. On Spotify, this interface is known as Spotify for Artists (“S4A”). Introduced in 2013, S4A offers artists access to a host of metrics related to their performance on the platform: which songs are receiving the most streams, in what contexts and placements listeners are hearing them (i.e., on the artist’s albums or singles or on specific playlists), and even what qualities of the artist’s music most resonate with listeners.<sup>160</sup> Apple Music and Amazon Music each possess analogous interfaces for artists.<sup>161</sup>

Third, the services earn revenue from user subscription fees and advertisements, some of which they pay to rights holders in the form of royalties after taking a cut. Some services, including Apple Music, are subscriber-only. Others, such as Spotify, operate under the “freemium” model, deriving revenue from both subscribers and ads. The breakdown may vary widely between services: Only around 13 percent of Spotify’s revenue comes from advertisers,<sup>162</sup> while most of YouTube’s revenue comes from advertisers,

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160. Pelly, *supra* note 13, at 162.

161. The music streaming platforms that carry advertisements—currently, of the major platforms, only Spotify and YouTube—also offer an interface for advertisers. YouTube, as a subsidiary of Alphabet, uses Google’s advertising technology platform. Spotify aggressively markets itself to advertisers, offering them an interface to create audio ads. *Spotify Advertising*, SPOTIFY, <https://ads.spotify.com/en-US/> [<https://perma.cc/4YL5-UNWP>] (last visited Apr. 23, 2025).

162. PELLY, *supra* note 13, at 139.

its premium subscriber base being relatively small.<sup>163</sup> That said, the prices charged for each service are relatively uniform. As of January 2026, Spotify charged \$12.99 per month for its basic individual user subscription, “Spotify Premium,”<sup>164</sup> while Apple Music, Amazon Music, and Tidal each charged \$10.99 (though some variation exists when taking into account bundle deals with related lines of business offered by these competitors).<sup>165</sup> On each, payment of these fees grant users access to over 100 million individual songs, collected in singles, albums, and compilations (as packaged by record labels), as well as in playlists which are generated both by users and the platform itself. These revenues—from subscriptions and ads—form the basis from which the platform’s “net revenues” are calculated, which are in turn used to calculate the payments due to each individual rights holder under the pro-rata system as it is specified per contract.<sup>166</sup>

Streaming services also often offer subscription packages that bundle access to music streaming with other types of content, including audiobooks and podcasts (in the case of Spotify)<sup>167</sup> and video or e-commerce discounts (in the case of Amazon Music’s integration with Amazon Prime subscriptions).<sup>168</sup> These bundles may then affect the calculation of the total royalty pools from

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163. Shewale, *supra* note 138.

164. As of this writing, Spotify has raised its subscription prices in each of the last three years. See Jordan Valinsky, *Spotify Raises Its Prices Again*, CNN (Jun. 3, 2024), <https://www.cnn.com/2024/06/03/tech/spotify-price-increase/index.html> [<https://web.archive.org/web/20260105193954/https://www.cnn.com/2024/06/03/tech/spotify-price-increase/index.html>]; *Upcoming Changes to Spotify Premium Subscriptions*, SPOTIFY (Jan. 16, 2025), <https://newsroom.spotify.com/2026-01-15/premium-pricing-update/> [<https://web.archive.org/web/20260227191021/https://newsroom.spotify.com/2026-01-15/premium-pricing-update/>].

165. *Subscription Costs of U.S. Music Streaming Offers 2024*, STATISTA (May 20, 2025), <https://www.statista.com/statistics/1551188/music-streaming-monthly-subscription-cost-us/> [<https://web.archive.org/web/20260105194019/https://www.statista.com/statistics/1551188/music-streaming-monthly-subscription-cost-us/>].

166. PELLY, *supra* note 13, at 150–51.

167. Jem Aswad & Todd Spangler, *Spotify’s Music-Audiobook Bundle Means a Lower Royalty Rate for U.S. Songwriters, but Company Promises Record Payouts*, VARIETY (Apr. 18, 2024), <https://variety.com/2024/digital/news/spotify-music-audiobook-bundle-lower-royalty-for-songwriters-1235974942/> [<https://web.archive.org/web/20260105194121/https://variety.com/2024/digital/news/spotify-music-audiobook-bundle-lower-royalty-for-songwriters-1235974942/>].

168. Dave Johnson, *How Much Does Amazon Music Cost?*, ABOUT AMAZON (Feb. 27, 2025), <https://www.aboutamazon.com/news/entertainment/amazon-music-price>. [<https://web.archive.org/web/20260105194019/https://www.aboutamazon.com/news/entertainment/amazon-music-price>].

which artists are compensated.<sup>169</sup>

## 2. As Data Collectors and Assigners

Streaming services collect vast amounts of data on user engagement.<sup>170</sup> These interactions line up to those that streaming services facilitate on their host interfaces, and they can be ascertained through individual user downloads of their data. Spotify, for example, retains the contents of user playlists, as well as every query one has ever plugged into the interface's search engine, along with the date and time the query was made.<sup>171</sup> They retain a user's entire listening history—a record of every track the user has streamed on the platform—up to the number of milliseconds a track was streamed, where it was heard, whether it was intentionally chosen, and whether it was paused or skipped.<sup>172</sup> This is all in addition to other information collected by the services, including users' names, email addresses, phone numbers, and location information.

Crucially, streaming platforms also *assign* data to the material they host, creating an extensive network of metadata associated with each individual track.<sup>173</sup> The platforms may tag tracks according to conventional<sup>174</sup> musical identifiers such as key or tempo, but they do not stop there. While the relationship between empiricism and genre classifications has always presented a conceptual challenge—these classifications themselves being socially contingent<sup>175</sup>—streaming platforms go far beyond these already subjective classifications to include metadata that are much more suspect, including both

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169. The question of whether bundle subscriptions dilute payments for musicians has been a subject of concern from a bipartisan group of Senators. See Letter from Senators Marsha Blackburn and Ben Ray Lujan to FTC Chair Andrew Ferguson (June 20, 2025), <https://www.blackburn.senate.gov/services/files/42F8C53C-F248-45A3-8E37-EC4A6BEEA994> [<https://web.archive.org/web/20260227191732/https://www.blackburn.senate.gov/services/files/42F8C53C-F248-45A3-8E37-EC4A6BEEA994>].

170. As one former Spotify employee put it, "You should be under the assumption that any interaction you have within the Spotify app is going to be recorded." PELLY, *supra* note 13, at 137.

171. *Id.*

172. *Id.* at 137–38. These examples come from Pelly's download of her own user data, but they are replicable by this author's own efforts.

173. *Id.* at 94–95, 122–24; MARIA ERIKSSON ET AL., SPOTIFY TEARDOWN 73–74 (2019).

174. Conventional, at least, in Western systems of musical analysis.

175. See, e.g., Franco Fabbri, *A Theory of Musical Genre: Two Applications*, in D. HORN & P. TAGG, EDS., POPULAR MUSIC PERSPECTIVES 52, 52 (1981) (defining a musical genre as "a set of musical events (real or possible) whose course is governed by a definite set of socially accepted rules").

emotional and cultural descriptors.<sup>176</sup> “Valence,” for example, is an attribute tracked by Spotify on a scale from 0.0 to 1.0, described by the platform as the “musical positiveness conveyed by a track.”<sup>177</sup> To further quote the platform’s public statements, “tracks with high valence sound more positive (e.g. happy, cheerful, euphoric), while tracks with low valence sound more negative (e.g. sad, depressed, angry).”<sup>178</sup> Other descriptors on Spotify include a track’s “energy,”<sup>179</sup> its “danceability,”<sup>180</sup> and its “acousticness,” which seems to be the degree of an acoustic guitar’s presence on a track—a key signifier of music that might fit on certain platform playlists.<sup>181</sup> Music may also be classified according to niche cultural trends associated with social media, such as “cottagecore” or “liminal spaces”—which might not make sense to many users, but which nevertheless might appear in the platforms’ recommendation features.<sup>182</sup> Theoretically and practically, the metadata that may be assigned to music on streaming platforms are limitless, and their relation to the actual content of the music potentially infinitesimal.<sup>183</sup>

Despite the conceptually suspect nature of the musical identifiers used by the platforms, combinations of user data and track metadata allow streaming services to make inferences about user behavior.<sup>184</sup> Platforms offer these

176. Streaming platforms claim in public statements that metadata is assigned by labels and distributors before it is delivered to streaming platforms, and any problems with metadata must be communicated to those intermediaries. See, e.g., *Music Metadata Guidelines*, SPOTIFY <https://support.spotify.com/us/artists/article/metadata-formatting-guidelines/> [https://perma.cc/8Y8B-5QAG] (last visited July 11, 2025) (“Your metadata is set by your label or distributor before they deliver your music to us. To fix any problems with your music’s metadata, your label or distributor needs to send an update to us with the right info.”). This, however, does not absolve the streaming platforms of responsibility for the function of assigning metadata, given that metadata is required to make its host function and recommendation systems work. Metadata assignment by labels and distributors may thus be thought of as a function that streaming platforms outsource to those intermediaries.

177. PELLY, *supra* note 13, at 95.

178. *Id.*

179. *Id.*

180. Deniz Duman et al., *Music We Move To: Spotify Audio Features and Reasons for Listening*, 17 PLOS ONE 1 (2022).

181. *Id.*; see also PELLY, *supra* note 13, at 95.

182. PELLY, *supra* note 13, at 118–24 (on the incorporation of internet micro-trends into Spotify’s track metadata).

183. There is an entire field of analysis committed to the proposition that one can objectively quantify music’s emotional impact on users of streaming services, called “Music Emotion Recognition.” PELLY, *supra* note 13; NICK SEAVER, *COMPUTING TASTE: ALGORITHMS AND THE MAKERS OF MUSIC RECOMMENDATION* (2022).

184. PELLY, *supra* note 13, at 138 (on the inferences made from the author’s own dataset).

inferences *en masse* to rights holders as a condition of licensing agreements.<sup>185</sup> Platforms also sell them to third-party data brokers, who may also add categories of data to the platforms' metrics.<sup>186</sup> In other words, platforms monetize the data they collect on users and assign to music as a valuable resource. Market participants perceive these data as particularly valuable for their purported insights not only into users' behavior, but into their psychology, in turn helping them sell ads or target music recommendations. Researchers have demonstrated that listeners exhibit qualities of psychological ownership over their music libraries on streaming platforms, which generates high levels of user loyalty.<sup>187</sup> Playlists, too, offer insights into users' psychological profiles from the degree of creativity involved in making them.<sup>188</sup> Inferences about user psychology and behavior are thus sources of value for streaming platforms, including for their functions as ad markets and as music recommenders.

### 3. As Recommenders

Music streaming services are not only hosts or data collectors and assigners: They are also recommenders of music. When streaming platforms were initially introduced, few imagined that they would also be music recommenders, which was seen as a distinct line of business, with firms such as Echo Nest, Tunigo, and Songza already engaged in it, along with individual platform users.<sup>189</sup> Beginning in the early 2010s, however, industry observers began to assert that the streaming platforms should pursue growth through incorporating recommender functions, rather than through simply converting free users to subscribers.<sup>190</sup> During Spotify's "curatorial turn" in 2012 and 2013,<sup>191</sup> they acquired these music recommenders, whose functions were

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185. Maaso & Hagen, *supra* note 15, at 22–25, 27–29 (on the value of real-time data on listener engagement for record executives).

186. PELLY, *supra* note 13, at 138.

187. Gary Sinclair & Julie Tinson, *Psychological Ownership and Music Streaming Consumption*, 71 J. BUS. RSCH. 1 (2017).

188. Anja Nylund Hagen, *The Playlist Experience: Personal Playlists in Music Streaming Services*, 38 POPULAR MUSIC & SOC'Y 625 (2015).

189. PELLY, *supra* note 13, at 94 ("Before Tunigo and Echo Nest, user-generated playlists defined Spotify's curation ecosystem."). The function of music recommendation was also, and continues to be, performed offline by journalists, critics, advertisers, and social connections.

190. Antony Bruno, *Growth by Curation: Playlists, Not "Freemium" Business Models, Will Drive the Success of Subscription Music Services*, BILLBOARD MAG., Sep. 17, 2011, at 10.

191. See ERIKSSON ET AL., *supra* note 173, at 59–60 (on Spotify's "curatorial turn").

subsequently incorporated into the platform's design.<sup>192</sup> In the years since, the recommender function has become entrenched within the basic business model of the platforms, such that users are conditioned to the idea that music platforms will provide them with music recommendations that are both useful and engagement-generating. Today, music streaming's recommendation function is evident from the moment users encounter a service's interface. On Spotify, for instance, users are provided with a home screen of playlists filled with personalized recommendations.

In general, the services' recommender function comes in two varieties: curatorial—that is, through platform employees populating the platform's proprietary playlists—and algorithmic—that is, utilizing the inferences made through data networks to recommend music to users through a variety of automated features. Streaming platforms typically offer playlists that are meant to collect and recommend music associated with certain genres, moods, or activities. These proprietary playlists—different from playlists that users make themselves—are populated by curators, employees of the platforms whose job it is to select music to place on them.<sup>193</sup> These playlists are very popular with platform listeners, in no small part because of the frequency with which they are recommended to users. “RapCaviar,” for example, is the leading hip-hop playlist on Spotify, constructed by in-house curators.<sup>194</sup> “Lorem,” a “genre-fluid” playlist with a curiously generic title, is a leading source of music determined

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192. PELLY, *supra* note 13, at 27–29, 93 (on Spotify's acquisitions of Tunigo and Echo Nest, and Google's of Songza). These acquisitions resemble a pattern in which dominant technology platforms acquire small startups and absorb their functionality. See Mark A. Lemley & Matthew T. Wansley, *Coopting Disruption*, 105 B.U.L. REV. 457 (2025) (on the acquisition of nascent firms by large technology platforms and its effects on innovation).

193. See, e.g., Kristin Robinson, *Spotify's Global Head of Editorial Talks AI Music, New Editorial Features and Short-Form Video*, BILLBOARD (Apr. 17, 2025), <https://www.billboard.com/pro/spotify-global-head-editorial-sulinna-ong-interview/> [<https://web.archive.org/web/20260105202516/https://www.billboard.com/pro/spotify-global-head-editorial-sulinna-ong-interview/>] (interviewing the head of Spotify's curatorial team).

194. Craig Marks, *How Hits Happen Now*, VULTURE (Sep. 23, 2017), <https://www.vulture.com/2017/09/spotify-rapcaviar-most-influential-playlist-in-music.html> [<https://web.archive.org/web/20260105202544/https://www.vulture.com/2017/09/spotify-rapcaviar-most-influential-playlist-in-music.html>] (describing RapCaviar as “the most influential playlist in music”); Paul Resnikoff, *What Succeeds on Spotify's RapCaviar—A Statistical Analysis*, DIGIT. MUSIC NEWS (Aug. 18, 2020), <https://www.digitalmusicnews.com/2020/08/18/spotify-rapcaviar-analysis/> [<https://web.archive.org/web/20260105202628/https://www.digitalmusicnews.com/2020/08/18/spotify-rapcaviar-analysis/>] (“With more than 13 million followers to its credit, Spotify's foremost hip-hop playlist, RapCaviar, can change the trajectory of both individual tracks and entire careers.”).

by Spotify curators to be well-suited to the platform in general.<sup>195</sup> The prospect of placement on these playlists is understood by industry participants to have the power to make or break artists' careers.<sup>196</sup>

Other features—indeed, the vast majority of those that constitute streaming's recommendation function—are algorithmic. On Spotify, these include a user's "Daily Mixes," which collect music from various genres that the user has listened to in the past; their "daylists," which update regularly throughout the day; and "Discover Weekly," a playlist of personalized recommendations from new releases based on past listening habits.<sup>197</sup> Other personalized algorithmic features include "Smart Shuffle," which intersperses songs on user-made playlists with recommended tracks, and "AutoPlay," which allows an endless selection of tracks to continue streaming from a user's account automatically after an album or playlist has concluded.<sup>198</sup> These features each have their counterparts on Apple Music and Amazon Music. More recently, platforms have piloted "DJ" experiences branded as AI-powered and including an artificial human voice;<sup>199</sup> how they differ in substance from other algorithmically generated playlists, known as "mixes" or "radios," is unclear. Each of these features is powered by the inferences made from the data assigned and collected by the platforms, which allows for recommendation to be hyper-targeted to users.<sup>200</sup>

Importantly, algorithmic recommendation is not neutral or purely aesthetic in nature. It is highly influenced by the prices and terms set in licensing contracts with individual rights holders. For example, contracts may stipulate that a particular track be given added weight in a streaming service's algorithm or shown more often to subgroups of users. This is the key feature of Spotify's "Discovery Mode," which allows for higher algorithmic weights for

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195. Veronika Muchitsch, "Genrefluid" Spotify Playlists and Mediations of Genre and Identity in Music Streaming, 13 IASPM J. 48 (2022); PELLY, *supra* note 13, at 114, 140, 180–82.

196. Anne Steele, *The Playlist Power Broker Who Makes or Breaks New Artists*, WALL ST. J. (Jan. 17, 2025) [https://www.wsj.com/arts-culture/music/spotify-playlist-sulinna-ong-algorithm-7835e0ac?](https://www.wsj.com/arts-culture/music/spotify-playlist-sulinna-ong-algorithm-7835e0ac?https://web.archive.org/web/20260120064120/https://www.wsj.com/arts-culture/music/spotify-playlist-sulinna-ong-algorithm-7835e0ac) [https://web.archive.org/web/20260120064120/https://www.wsj.com/arts-culture/music/spotify-playlist-sulinna-ong-algorithm-7835e0ac].

197. PELLY, *supra* note 13, at 97.

198. *Id.* at 97–99, 186–88.

199. *Spotify Debuts a New AI DJ, Right in Your Pocket*, SPOTIFY (Feb. 22, 2023), <https://newsroom.spotify.com/2023-02-22/spotify-debuts-a-new-ai-dj-right-in-your-pocket/> [https://perma.cc/HZ3J-2RJ9].

200. Robert Prey, *Nothing Personal: Algorithmic Individuation on Music Streaming Platforms*, 40 MEDIA, CULTURE & SOC'Y 1086 (2017); PELLY, *supra* note 13, at 92–105.

certain music in exchange for an additional commission to Spotify (and, sometimes, other distributor intermediaries, like TuneCore)—in other words, accepting lower royalty payments.<sup>201</sup>

### III. MUSIC STREAMING PLATFORMS AND THEIR PROBLEMS

From this general overview of how music streaming services function as hosts, data collectors, and assigners, and as recommenders, five essential features stand out that resemble those of traditional platform industries: network effects, high capital costs, economies of scale, lock-in effects, and power as economic intermediaries.<sup>202</sup> These features are those that, when present in other industries, have historically led policymakers to regulate them as public utilities.<sup>203</sup> Unregulated platform industries with these features are typically subject to the risks of monopoly or oligopoly market structures: high prices for consumers and low wages for workers; service quality degradation; and the exercise of government-like power over a wide swath of commerce.<sup>204</sup> In music streaming, these risks play out in at least four general groups. First are problems with artist pay, which is discriminatory, opaque, and often declining. Second are problems with user surveillance, which raise concerns both on the grounds of user privacy and for how surveillance reinforces the platforms' power. Third, there are problems with the discriminatory treatment of artists through platform placement, related to the platforms' function as music recommenders. Fourth are the platforms' threats to cultural heterogeneity, in their distortions of the music marketplace and, over time, of music itself.

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201. *Spotify Discovery Mode*, TUNECORE, <https://support.tunecore.com/hc/en-us/articles/9010994114836-Spotify-Discovery-Mode> [<https://web.archive.org/web/20260201171232/https://support.tunecore.com/hc/en-us/articles/9010994114836-Spotify-Discovery-Mode>] (last visited Feb. 1, 2026); PELLY, *supra* note 13, at 186–89 (describing Discovery Mode and its lucrateness for the platform); Letter from Jerrold Nadler, Chair, H. Comm. on the Judiciary, to Daniel Ek, CEO, Spotify (June 2, 2021), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394661> [<https://web.archive.org/web/20260105203142/https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394661>] (raising concerns about the payola-like dynamics of Discovery Mode).

202. See RICKS ET AL., *supra* note 10, at 8–10 (on the characteristics typical of network, platform, and utility industries).

203. *Id.*

204. *Id.* at 13–17.

### A. WHY MUSIC STREAMING SERVICES ARE PLATFORMS

The first feature that music streaming services share with other platform enterprises is that they have network effects.<sup>205</sup> Streaming services are only useful insofar as they serve many users and carry the music of many artists, both for artists and users to reach each other and for users to employ the social-networking features of the services with other users.<sup>206</sup> Users making their own playlists, for example, want the platform to include music from all the artists they could want to put on a playlist, rather than having to switch between different platforms to listen to the music they want. Network effects also exist in the free, advertisement-based tier: As courts and economists evaluating the advertising technology business have found, online advertisers are only interested in a platform with maximum consumer reach.<sup>207</sup>

The second feature is the enormous cost of building a music streaming platform from scratch, which acts as a high barrier to entry. Put simply, offering a streaming service is very expensive. The necessary expenses include not only the costs of licensing millions of songs, which may add up to hundreds of millions of dollars,<sup>208</sup> but also the transaction costs associated with the several different categories of licenses platforms must obtain, as well as the costs of

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205. *Id.* at 9 (noting network effects as a defining characteristic of platform or network industries).

206. Other observers, including the European Commission, have noted the network effects of music streaming. *See, e.g.,* Case T-201/04, *Microsoft v. Comm'n*, 2007 E.C.R. II-3620; E. Jordan Teague, *Saving the Spotify Revolution: Recalibrating the Power Imbalance in Digital Copyright*, 4 CASE W. RESERVE J.L. TECH. & INTERNET 207 (2012). Some, however, add the qualifier that they are “indirect” network effects, meaning that one distinct group of users experience network effects because of the presence of other groups, but the others do not. *See, e.g.,* Imanol Ramirez, *Merger Thresholds in the Digital Economy*, 45 DEL. J. CORP. L. 433, 439 (2021). For practical policy-making purposes, the importance of this distinction is not clear: The relative value of the service, for at least some of its users, increases the more others also use it, thus making a larger, more interconnected network preferable. *Contra* Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1608 (2019) (“There are no comparably powerful network effects operating for digital streaming services (though some try to introduce them via social media-style sharing features).”). While Professors Raustiala and Sprigman rightly note streaming platforms’ efforts to generate network effects through social networking features, they neglect the network effects present in the value of carrying as much music as possible to as many users as possible. Their analysis may also predate the more recent entrenchment of several social networking features such as Spotify Wrapped and playlist sharing.

207. *See* *United States v. Google LLC*, 778 F. Supp. 3d 797, 832 (E.D. Va. 2025) (“Scale is a crucial factor for ad tech companies’ ability to compete because of the importance of big data analytics for optimizing ad tech services and the significant network effects that exist in programmatic advertising.”); Catherine E. Tucker, *Online Advertising and Antitrust: Network Effects, Switching Costs, and Data as an Essential Facility*, 1 COMP. POL’Y INT’L 30 (2019). Recall also that Spotify originated as an advertising platform with music distribution as its secondary rationale. PELLY, *supra* note 13, at 11.

208. *See* Singleton, *supra* note 122 (discussing Sony’s original contract with Spotify).

measuring engagement to distribute royalties appropriately. There are also the inherent costs of maintaining a digital platform with which millions of users regularly interact, including the costs of building and updating an interface and the costs of cloud storage, the owners of which may charge monopoly or oligopoly rents.<sup>209</sup>

Third, the network effects and high capital costs inherent to the streaming model make streaming a business with economies of scale: As new users are added to the platform, the marginal cost of serving each new user decreases.<sup>210</sup> This is because many users are needed to recoup the high costs of licensing music, as well as the high fixed costs of establishing a music streaming platform. As economies of scale arise, streaming platforms act as middlemen between the users with which they interact, as each relies on the platform to reach the others. Put simply, streaming platforms are most useful when they are large-scale enterprises that connect many users.

The fourth apparent feature is the lock-in effect experienced by the platforms' users. In other words, the costs of switching to a different platform are high.<sup>211</sup> While streaming music over time, users generate enormous amounts of data that is held by the platform: their listening history, their playlists, and music they have saved to their libraries. All of these data, including the copious and substantively suspect metadata associated with each individual unit, hold both psychological and economic value: psychological in the attachment listeners of music feel towards the music they enjoy,<sup>212</sup> and economic in both the usefulness of the data to the platform<sup>213</sup> and in the high switching costs of exiting a platform where a user's data is stored. Playlists made on Apple Music, for example, are not portable to Spotify's platform; similarly, users of one platform cannot hear a song a friend sends to them from another platform. A lack of interoperability between platforms means that once a user builds up a certain amount of data on a particular platform—including playlists, saved songs and albums, and the mostly invisible yet consequential data used

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209. For a discussion of the political economy of cloud computing, see Tejas Narechania & Ganesh Sitaraman, *An Antimonopoly Approach to Governing Artificial Intelligence*, 43 *YALE L. & POL'Y REV.* 95, 114–118 (2025).

210. See RICKS ET AL., *supra* note 10, at 8–9 (noting economies of scale as a characteristic of platform industries).

211. See *id.* at 9 (noting lock-in effects as a characteristic of unregulated platform industries).

212. Maaso & Hagen, *supra* note 15.

213. PELLY, *supra* note 13, at 142 (on Spotify's partnerships with data brokers).

by the platform to recommend music—they will be reluctant to exit that platform.<sup>214</sup> As one platform user told a pair of British researchers (of his use of Spotify as a recommender):

If I was to leave, jump ship and go to another streaming service, it's going to take a while for that streaming service to learn what I like. So for the first six or so months, or for the first year or something, it's going to have a few hits, but also a few misses because they don't know me as well as Spotify knows me.<sup>215</sup>

Artists, too, are incentivized to maintain a presence on each platform, regardless of the specific terms set by each one, as delivering their already-made music to listeners is their primary objective.<sup>216</sup> As in other platform industries, this offers these counterparties a disincentive to exit, making competition for artists unlikely to be an effective source of discipline on the platforms to remediate the problems posed by their business models.

Recognizing the fifth notable feature is dependent in part upon the realization of the others. Because of the network effects inherent within the streaming model, the high capital costs of building a platform and the resultant economies of scale, and the high switching costs users face when moving from one platform to another (making competition between streaming services unlikely to serve as an effective disciplining mechanism), streaming platforms possess extraordinary bargaining power over the various parties that transact with them. This bargaining power is so great that personal relationships with platform employees might mean the difference between success and failure in

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214. Streaming platforms typically offer users the option to download their data in large files that list their listening history, playlists, search queries, and other information. This data, however, is not automatically portable into analogous formats on other platforms; they are simply left as spreadsheets. See, e.g., *Understanding Your Data*, SPOTIFY, <https://support.spotify.com/us/article/understanding-your-data/> [<https://web.archive.org/web/20260115170055/https://support.spotify.com/us/article/understanding-your-data/>] (last visited Jan. 15, 2026).

215. Hracs & Webster, *supra* note 31, at 252.

216. An attempt at a large-scale artist boycott of Spotify over its CEO's investments in military technology companies made headlines in 2025. See, e.g., John Blistein, *Here Are the Artists Who Have Ditched Spotify Over Its CEO's Military Tech Ties*, ROLLING STONE (Sept. 10, 2025), <https://www.rollingstone.com/music/music-features/artists-left-spotify-ceo-daniel-ek-military-tech-1235425098/> [<https://web.archive.org/web/20260115170328/https://www.rollingstone.com/music/music-features/artists-left-spotify-ceo-daniel-ek-military-tech-1235425098/>]. But this episode has reinforced, rather than cast doubt on, the lock-in effects of the platform. As one market researcher noted, the loss of some artists may actually further incentivize other artists to remain, due to the zero-sum nature of Spotify's pro-rata compensation system. Tatiana Cirisano, *Some Artists Are Leaving Spotify (Again). Here's What's Different Now*, MIDA RSCH. (Aug. 7, 2025), <https://www.midiaresearch.com/blog/some-artists-are-leaving-spotify-again-heres-whats-different-now> [<https://web.archive.org/web/20260115170807/https://www.midiaresearch.com/blog/some-artists-are-leaving-spotify-again-heres-whats-different-now>].

a musical career, as was indicated in a recent profile of the head of Spotify's playlist division.<sup>217</sup> By occupying the position of middlemen in the music industry with vast reach, music streaming platforms possess power inherent to their business model that they are poised to exploit in the course of a logical, profit-maximizing business strategy.

## B. PROBLEMS WITH ARTIST PAY

If there is a single issue that has dominated public conversations about music streaming's political economy, it is the issue of artist pay. Reports that platforms pay artists mere fractions of cents on average per song<sup>218</sup>—and have even discontinued payment for entire swaths of tracks based on their low number of plays<sup>219</sup>—have galvanized widespread condemnation and led to new labor organizing efforts in the music industry.<sup>220</sup> Streaming platforms introduce new dynamics that suppress compensation for many artists. These dynamics are linked to the services' network effects and platform power.

### 1. Discrimination

The system of compensation on music streaming platforms<sup>221</sup> raises at least three distinct problems. First, it is discriminatory. Price discrimination—charging different prices to different counterparties based not on the platform's differing costs to serve them, but on the counterparties' differing willingness to pay<sup>222</sup>—is a typical practice of unregulated platform enterprises.<sup>223</sup> It is made

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217. Anne Steele, *The Playlist Power Broker Who Makes or Breaks New Artists*, WALL ST. J. (Jan. 17, 2025), <https://www.wsj.com/arts-culture/music/spotify-playlist-sulinna-ong-algorithm-7835e0ac> [<https://web.archive.org/web/20260201172743/https://www.wsj.com/arts-culture/music/spotify-playlist-sulinna-ong-algorithm-7835e0ac>].

218. See *supra* note 11 and cited sources.

219. Aubrey, *supra* note 12 (reporting on Spotify's decision to discontinue payments for all tracks on its platform with fewer than 1,000 streams, over 60 percent of the music it offers).

220. See, e.g., *Make Streaming Pay*, UNITED MUSICIANS & ALLIED WORKERS, <https://weareumaw.org/make-streaming-pay> [<https://web.archive.org/web/20260115171956/https://weareumaw.org/make-streaming-pay>] (last visited Jan. 15, 2026) ("Music workers create the enormous wealth that streaming platforms accumulate for their CEOs and investors year after year. But artists continue to be underpaid, misled, and otherwise exploited by streaming platforms. While artists experience declining wages and increasingly precarious employment, the music industry as a whole has reaped unprecedented profits, and CEOs of tech companies have become billionaires.").

221. See *supra* Part II.C.1, 3.

222. RICKS ET AL., *supra* note 10, at 14–16.

223. *Id.*

possible by the platform's power over its counterparties, which in turn derives from its network effects, economies of scale, and its lock-in effects, giving counterparties little bargaining power or incentive to exit the platform.<sup>224</sup> Price discrimination in platform industries is thus akin to the exercise of monopoly power, even in the absence of an actual monopoly over the provision of a particular good or service.<sup>225</sup>

In music streaming, price discrimination appears primarily as the payment of different prices to similarly situated artists and rights holders.<sup>226</sup> These payments are both those from streaming platforms to rights holders, and those from rights holders (such as record labels) to artists.<sup>227</sup> Because this discrimination takes place on the buy side, it is more accurately denoted as a form of monopsonistic or oligopsonistic price discrimination.<sup>228</sup> It is made possible—and encouraged—by the private negotiation of licenses allowed under copyright law without affirmative rate regulation. Because the copyright system allows licenses for musical works to be privately negotiated, and because it requires private negotiation for licenses in sound recordings, the royalties paid out and the terms offered to each individual rights holder by streaming platforms are highly variable.<sup>229</sup> A contract with a rights holder may stipulate a “promotional rate,” or lower royalty payments in exchange for promotion on the platform.<sup>230</sup> They may enlarge or narrow the total pool of platform revenues from which payments are calculated.<sup>231</sup> They may grant large corporate rights holders, such as major labels and publishers, guaranteed minimum payments or

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224. *Id.*

225. Indeed, oligopoly power, as is present in the music industry, functions similarly. *See id.* at 14–16 (on price discrimination and other forms of particularized value extraction as exercises of oligopoly power).

226. PELLY, *supra* note 13, at 148–52 (explaining the variations in Spotify's pro-rata payment system).

227. *Id.* at 151 (on the variability between similarly situated artists' recording contracts, including between independent and major record labels).

228. *See* ROBINSON, *supra* note 14, at 224–28 (on price discrimination and monopsony or oligopsony).

229. When some rates are regulated while others are left unregulated, what results is what copyright scholar Doug Lichtman calls the “seesaw effect,” wherein unregulated rates undermine the regulated ones because they can be adjusted in response to regulation. Douglas Lichtman, *The Seesaw Effect: How Unregulated Negotiations Undermine Regulated Prices in the Market for Music Streaming*, 47 COLUM. J.L. & ARTS 575 (2024). This is also an example of a more general phenomenon economists studying industrial organization have termed the “waterbed effect,” which is present in other industries with some form of rate setting, including telephones. *See* Roman Inderst & Tommaso M. Valletti, *Buyer Power and the “Waterbed Effect,”* 59 J. IND. ECON. 1 (2011); Christos Genakos & Tommaso Valletti, *Testing The “Waterbed” Effect in Mobile Telephony*, 9 J. EURO. ECON. ASSOC. 1114 (2011).

230. This is one way that streaming platforms' payment systems and their recommendation systems, and the problems of each, are highly interrelated. *See supra* Part II.C; *infra* Part III.D.

231. PELLY, *supra* note 13.

large advances from licensing deals, which may or may not be shared with artists.<sup>232</sup> Some music producers have even been directly commissioned by streaming platforms for lower royalty payments.<sup>233</sup> On the flip side, rights holders with higher relative bargaining power than others may be able to extract higher royalty payments or preferable terms from streaming platforms to the disadvantage of other rights holders, such as the major labels obtaining most favored nation (MFN) clauses in their original contracts with Spotify, which prohibited any other counterparty from getting better terms than the major label in question.<sup>234</sup>

Adding up all these contractual quirks, kickbacks,<sup>235</sup> and other modifications within the pro-rata system,<sup>236</sup> the degree of discrimination on streaming platforms may even approach perfect price discrimination—when every counterparty is paid the minimum amount (or charged the maximum amount) they are willing to accept.<sup>237</sup> On Spotify, for example, according to internal employee communications, “Each product-market-licensor combo has a unique royalty calculation.”<sup>238</sup> In other words, Spotify pays a different price for every piece of recorded music on its platform. For 60 percent of the music on Spotify, its creators receive no compensation, since all songs with under 1,000 streams have been demonetized.<sup>239</sup> This discrimination is further compounded in the system of private negotiation governing the terms of artists’ contracts with record labels, thereby adding an additional layer of price

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232. U.S. COPYRIGHT OFF., *supra* note 23, at 77–78. In 2018, when Warner sold its stake in Spotify, it credited \$126 million to artists on its roster—only 25 percent of the sale’s revenue. See *Warner Sells Entire Stake in Spotify, Crediting Artists with 126m as a Result*, MUSIC BUS. WORLDWIDE (Aug. 7, 2018), <https://www.musicbusinessworldwide.com/warner-sells-entire-stake-in-spotify-crediting-artists-with-126m-as-a-result/> [<https://web.archive.org/web/20190608222239/https://www.musicbusinessworldwide.com/warner-sells-entire-stake-in-spotify-crediting-artists-with-126m-as-a-result/>].

233. PELLY, *supra* note 13, at 57–67 (on Spotify’s commissioning of musicians to generate low-royalty content for placement on platform playlists). Apple has even acquired a startup that allows it to generate royalty-free music using artificial intelligence. Mark Gurman, *Apple Has Bought a Startup That Uses AI to Make Music to Fit Your Mood*, TIME (Feb. 27, 2022), <https://time.com/6146000/apple-ai-music/> [<https://web.archive.org/web/20260115174827/https://time.com/6146000/apple-ai-music/>].

234. See *supra* Part II.A.

235. PELLY, *supra* note 13, at 152 (describing contractual payment mechanisms as “kickbacks”).

236. *Id.* at 149–52 (for an explanation of these modifications).

237. ROBINSON, *supra* note 14, at 225 (“Perfect discrimination would be achieved if each unit of the commodity were bought at a different price.”).

238. PELLY, *supra* note 13, at 149.

239. Aubrey, *supra* note 12.

discrimination in determining artists' pay.<sup>240</sup>

Discriminatory pay is not only concerning on its own terms,<sup>241</sup> but also for several other reasons. First, as stated above, it is akin to the exercise of monopoly or oligopoly power over an area of commerce. The music streaming industry is anything but a site of perfect competition: It is one where the prices and terms offered to musicians are largely dictated by the platforms and major corporate rights holders, in the absence of sufficient bargaining power on the side of individual musicians to influence those offerings. Price discrimination is both enabled by and reinforces this dynamic. Second, it is disrespectful of musicians' status as creators and expressors of ideas in musical language.<sup>242</sup> Differences in pay between similarly situated artists on the platform require calculations that are inherently arbitrary and cannot be value-neutral, thus neglecting the value of the labor and craft musicians put into creating music. Third, it is a form of particularized value extraction, or squeezing maximum value out of each user of a platform.<sup>243</sup> This suggests that the platforms are focused primarily on deriving the maximum revenue from each of its individual contracts with rights holders and artists, rather than hosting a service for musicians and listeners to reach each other on fair and equal terms.

For their part, streaming platforms and record labels typically insist that their refusal to pay royalties for music with very few streams is meant to combat streaming fraud—that is, when individuals game the pro-rata system by uploading audio tracks to the platform that, in the platform's judgment, contain no real "music," and are instead noise or silence.<sup>244</sup> Several alleged schemes of

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240. PELLY, *supra* note 13, at 151 ("Once the rights-holder receives its payout from Spotify, it in turn pays artists according to their own deals, which also varyingly contribute to the ultimate size and fairness of the payments that artists receive.")

241. Economic discrimination by private actors is a practice generally looked down upon in American law, on a variety of grounds. *See, e.g.*, Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13) (banning price discrimination in commerce unjustified by cost differences); Civil Rights Act, Pub. L. 88-352, 78 Stat. 241 (1964) (banning employment discrimination on the basis of race, color, religion, sex, and national origin, and establishing the Equal Employment Opportunity Commission).

242. *Cf.* BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* (2015) (theorizing the relationship between various forms of discrimination and disrespect for those subjected to it).

243. *See* RICKS ET AL., *supra* note 10, at 15–16 (on particularized value extraction in platform industries).

244. In the words of Deezer CEO Jeronimo Folgueira, "We have 90 million tracks and many of them are just noise, like literally noise, the sound of a washing machine and rain. It is fundamentally wrong that thirty seconds of the recording of a washing machine gets paid the same as the latest single by Harry Styles." Universal CEO Lucian Grainge likewise criticized the platforms for hosting an "ocean of noise." Anna Nicolaou, *Universal Music Strikes Deal to Reshape Streaming Economics*, FIN. TIMES (Sept. 5, 2023), <https://www.ft.com/content/b28b97ca-a6aa-4e90-8b89-d48ccc940756>

this sort have generated concern throughout the music industry in recent years.<sup>245</sup> One of them even led to a DOJ indictment alleging that a North Carolina musician had created hundreds of thousands of AI-generated tracks and subsequently programmed bots to stream them in very small numbers each, adding up to billions of streams which granted him \$10 million in fraudulent royalty payments.<sup>246</sup> But while these high-profile instances of fraud are enough to generate concern in the music industry, they are policeable under existing fraud statutes; indeed, guarding against consumer fraud is a responsibility incumbent upon streaming platforms as consumer-facing corporations. But the use of these schemes to justify discriminatory pricing—including the halting of payments for tracks with under a certain number of streams—depresses the income of amateur musicians and other recording artists without large listener bases, while boosting platform and label profit margins.<sup>247</sup> They may also, in turn, implicate the platform's ability to fairly host noise music, and even tracks containing what some observers may perceive as silence, both of which have long histories as serious forms of music.<sup>248</sup>

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[<https://web.archive.org/web/20260201173919/https://www.ft.com/content/b28b97ca-a6aa-4e90-8b89-d48ccc940756>].

245. See, e.g., Aruni Soni, *AI Music Fraud Indictment Brings Scrutiny to Streaming Inflation*, BLOOMBERG LAW (Sep. 12, 2024), <https://news.bloomberglaw.com/ip-law/ai-music-fraud-indictment-brings-scrutiny-to-streaming-inflation> [<https://perma.cc/8KCM-KARA>]; Amanda Hoover, *Spotify Has an AI Music Problem—But Bots Love It*, WIRED (May 11, 2023), <https://www.wired.com/story/spotify-ai-music-robot-listeners/>

[<https://web.archive.org/web/20230605004158/https://www.wired.com/story/spotify-ai-music-robot-listeners/>] (on bots trained to listen to music produced by artificial intelligence, thereby generating rights holders fraudulent streaming royalties).

246. Press Release, U.S. Att'y's Off., S.D.N.Y., North Carolina Musician Charged with Music Streaming Fraud Aided by Artificial Intelligence (Sep. 4, 2024), <https://www.justice.gov/usao-sdny/pr/north-carolina-musician-charged-music-streaming-fraud-aided-artificial-intelligence>

[<https://web.archive.org/web/20260104095245/https://www.justice.gov/usao-sdny/pr/north-carolina-musician-charged-music-streaming-fraud-aided-artificial-intelligence>].

247. Nicolaou, *supra* note 244 (“The goal is to reduce the money flowing towards *amateurs*, bots, and white noise soundtracks. . . . Universal chief digital officer Michael Nash told the *Financial Times* that the changes would be ‘revenue positive’ for the company.”) (emphasis added).

248. See, e.g., John Cage, *4'33"* (composition) (1952) (a work of music with multiple recordings on streaming platforms which directs the performer to remain silent for four minutes and thirty-three seconds, meant to focus the listener towards the content of the ambient sounds around them during the performance); Tim Stegall, *Fifteen Bands Who Are Crucial to the History of Noise Music*, ALT. PRESS (Apr. 6, 2021), <https://www.altpress.com/best-noise-bands/>

[<https://web.archive.org/web/20230629194547/https://www.altpress.com/best-noise-bands/>]; see also PELLY, *supra* note 13, at 156–57 (“It became clear that [the royalty structure] wouldn’t just be impacting AI bots—it seemed like the majors were waging an attack on not only all sorts of DIY and ‘amateur’ musicians, but also artists working with noise, field recordings, and nature sounds. A whole range of musical traditions and practices was set to be affected.”).

## 2. Opacity

Second, the system of artist compensation is opaque. Because of the multitude of highly variable factors affecting their pay, artists report that they cannot often make sense of how their compensation matches up to the success of their music on the platform.<sup>249</sup> Musicians are also often prohibited from reviewing the contracts their labels and publishers sign with streaming platforms, due to the non-disclosure agreements (NDAs) signed by the parties to those contracts.<sup>250</sup>

On one hand, this “black box”<sup>251</sup> disempowers artists, thwarts the construction of countervailing power, and shields the platforms from effective accountability.<sup>252</sup> But it also undermines one of the core rationalizing justifications for an effective market system: the relative symmetry of decentralized information across market participants. Free markets require—and indeed, are purported by their defenders to promote—relative information symmetry between participants, as manifested in the market price system.<sup>253</sup> With such a high degree of information asymmetry, the music marketplace cannot function effectively as a market, because centralized nodes of distribution—including the streaming platforms—control the flow of capital through their possession of superior information relative to individual producers.<sup>254</sup> Existing efforts by streaming platforms to educate artists and the public about their compensation mechanisms, which often read more as public relations campaigns than genuine transparency in the manner of mandated

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249. See PELLY, *supra* note 13, at 148–49 (“[A]n outsized percentage of working musicians cannot accurately delineate what percentage of their income comes from streaming, simply due to the absurdly complicated nature of the system.”), 149–50 (“[T]he pro rata system creates a ‘layer of abstraction’ that creates mass confusion among artists.”).

250. See Meredith Filak Rose, *Streaming in the Dark: Competitive Dysfunction Within the Music Streaming Ecosystem*, 13 BERKELEY J. ENT. & SPORTS L. 23, 35–37 (2024) (on NDAs as a source of information asymmetry in music streaming).

251. Cf. FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015) (on the “black box” effects of algorithms and artificial intelligence); ERIKSSON ET AL., *supra* note 173 (describing music streaming as a “black box”).

252. PELLY, *supra* note 13, at 149–50 (“[W]hen industry execs say that it is all just too hard to explain, that’s also how artists are disempowered by the so-called expert class.”).

253. See, e.g., F.A. Hayek, *The Uses of Knowledge in Society*, 35 AM. ECON. REV. 519, *passim* (1945) (on the price mechanism of markets as a signal for participants with disaggregated information); Daniel F. Spulber, *Bargaining and Regulation with Asymmetric Information About Demand and Supply*, 41 J. ECON. THEORY 251 (1988).

254. Rose, *supra* note 250, *passim*.

public disclosures,<sup>255</sup> do not change the fundamental fact that this asymmetry is an inherent feature of music streaming's market structure, one in which centralized platforms have access to information about a multitude of decentralized actors with which they contract (including via major rights holders).<sup>256</sup>

### 3. Decline

For many artists, music's platformization has resulted in declining pay. This is because of the streaming business model, wherein monopsonistic platforms are incentivized to squeeze artists' incomes to maximize profits, trends towards depressing artist pay. Since streaming platforms first attained scale, artists have repeatedly reported low and declining pay for their recorded output,<sup>257</sup> forcing them to take on precarious and non-artistic labor in increasing amounts. This can be judged from empirical research done on the sources of musicians' income. In 2018, one survey found that the median musician in the United States earned between \$20,000 and \$25,000 from the entirety of their musical and non-musical labor.<sup>258</sup> Of the quarter of the respondents that reported income from streaming services, it accounted for, on average, only 5 percent of their total income.<sup>259</sup> A 2023 study in the United Kingdom—whose music industry is highly integrated with that of the United States—found that over half of that country's musicians are forced to supplement their careers with non-musical work.<sup>260</sup> Meanwhile, 44 percent reported that a lack of sustainable income was an active barrier to their musical career.<sup>261</sup> Even more recently, the Greater Nashville Music Census, a study of

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255. See, e.g., *Loud and Clear 2025*, SPOTIFY, <https://loudandclear.byspotify.com/> [<https://web.archive.org/web/20251225031305/https://loudandclear.byspotify.com/>] (last visited Dec. 25, 2025).

256. This is not only true of the subscription-fee model, but of the free-with-advertisements model as well. Analysts have remarked on the opacity of Spotify's advertising business to other users. See ERIKSSON ET AL., *supra* note 173, at 170 ("For consumers and musicians, this is indeed an opaque market.").

257. See, e.g., references cited *supra* note 11.

258. PRINCETON SURVEY RSCH. CTR., INAUGURAL MUSIC INDUSTRY RESEARCH ASSOCIATION (MIRA) SURVEY OF MUSICIANS 1, 3 (2018), [https://psrc.princeton.edu/sites/g/files/toruqf1971/files/resource-links/report\\_on\\_mira\\_musician\\_survey.pdf](https://psrc.princeton.edu/sites/g/files/toruqf1971/files/resource-links/report_on_mira_musician_survey.pdf) [[https://web.archive.org/web/20250821201442/https://psrc.princeton.edu/sites/g/files/toruqf1971/files/resource-links/report\\_on\\_mira\\_musician\\_survey.pdf](https://web.archive.org/web/20250821201442/https://psrc.princeton.edu/sites/g/files/toruqf1971/files/resource-links/report_on_mira_musician_survey.pdf)].

259. *Id.*

260. PELLY, *supra* note 13, at 154.

261. *Id.*

musicians geographically concentrated in an important center of America's record industry, found that 62 percent of its participants reported income from recordings as very little or none of their annual income.<sup>262</sup>

Of course, this is not to say that there are no musicians who benefit quite considerably from streaming platforms: Spotify reports that nearly 1,500 artists made over \$1 million each from its royalty payments in 2024.<sup>263</sup> But payments to high-earning artists may also be depressed by the platform model of distribution, as monopsonistic labor markets often depress pay across the board.<sup>264</sup> Indeed, the compensation of high-streaming artists pales in comparison to the compensation of streaming platform executives: Spotify CEO Daniel Ek and other senior executives earned more than any single artist in the platform's history in 2024 alone.<sup>265</sup>

Declining pay is especially felt by artists whose music is not necessarily suited to a high volume of individual streams. The pro-rata system, which calculates payouts based in part on the number of individual streams a track has, privileges artists whose music is designed to be played on repeat.<sup>266</sup> Under this system, all other music is rendered less valuable, all else being equal. Declining pay for those without high streaming shares is not only bad for those artists: It is highly distortive of art, the value of which is rarely—if ever—guaranteed by the quantity of individual occasions on which an individual

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262. GREATER NASHVILLE MUSIC CENSUS, *supra* note 30, at 8.

263. CJ Haddad, *Spotify Says It Paid Nearly 1,500 Artists \$1 Million or More in Royalties for 2024 Streams*, CNBC (Mar. 12, 2025), <https://www.cnbc.com/2025/03/12/spotify-says-it-paid-nearly-1500-artists-1-million-or-more-in-2024.html> [https://web.archive.org/web/20260201175310/https://www.cnbc.com/2025/03/12/spotify-says-it-paid-nearly-1500-artists-1-million-or-more-in-2024.html].

264. See, e.g., Suresh Naidu & Arindrajit Dube, *Monopsony Power in Labor Markets*, NAT'L BUREAU OF ECON. RSCH. (Apr. 24, 2024), <https://www.nber.org/reporter/2024number1/monopsony-power-labor-markets> [https://web.archive.org/web/20260113034334/http://web.archive.org/screenshot/https://www.nber.org/reporter/2024number1/monopsony-power-labor-markets?page=1&perPage=50].

265. Sam Willings, *Daniel Ek Earned More from Spotify in the Past Twelve Months than Any Artist Has Ever Earned on the Platform*, MUSICTECH (Aug. 5, 2024), <https://musictech.com/news/industry/daniel-ek-made-more-money-spotify-in-2024-than-any-artist/> [https://web.archive.org/web/20251211032122/https://musictech.com/news/industry/daniel-ek-made-more-money-spotify-in-2024-than-any-artist/].

266. PELLY, *supra* note 13, at 149 (“[P]ro rata is a system that benefits music that generates massive numbers of plays, whether that be through big marketing budgets, viral hits, or background-friendly streambait. . . . This is a definitive flaw at the heart of streaming remuneration: not all music is meant to be streamed endlessly on loop, but that doesn't mean it should be rendered value-less.”); see also World Intell. Prop. Org., *supra* note 40, at 8 (noting that major-label superstars derive disproportionate revenue from streaming platforms).

engages it.<sup>267</sup> The model of corporate governance employed by streaming platforms also introduces an incentive towards declining artist pay: The less they can pay rights holders as a cost of doing business, the more profit they can generate for shareholders—through increased revenue, growth projections, and stock price increases.<sup>268</sup>

Streaming platforms and some other observers of the music industry object to the idea that they are paying artists insufficiently and often cast blame for any maldistribution of royalties onto the intermediaries, like record labels and publishers, with which they contract.<sup>269</sup> Though these corporate intermediaries do have significant power over the payouts to individual artists—a reflection of their platformization—this attempted blame-shifting neglects the real power streaming platforms possess to determine artist pay via these intermediaries. This power is that of platform placement, which can strongly influence what music is successful on each platform. It also manifests in the platforms' power to engage in price discrimination, including via contractual terms such as advance payments, which may limit the funds available to be paid out to artists. And though most labels have sold much of their initial holdings in Spotify and other streaming platforms,<sup>270</sup> the labels' historical role in funding and designing the platform business model renders the functional separation between labels and platforms upon which these defenses logically rely less clear as a matter of fact.<sup>271</sup>

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267. To use one example from a colleague, one might watch the film *Happy Gilmore* twenty times, and *Schindler's List* only once. This certainly does not mean that the artistic value of *Schindler's List* is any less than that of *Happy Gilmore*.

268. Given the lack of restrictions on common ownership, these shareholders may also be major rights holders. See PELLY, *supra* note 13, at 18 (noting ownership shares as one of the concessions made to major labels to secure their buy-in into the streaming business model).

269. U.S. COPYRIGHT OFF., *supra* note 23, at 77–78 (quoting the Digital Media Association (DiMA), a trade organization representing streaming platforms, as claiming, “a significant portion of the royalties received are retained by [intermediaries] for their own account, or applied toward the recoupment of advances paid to recording artists and songwriters”). This has also been, at various times, the posture of some musicians and advocates. See, e.g., Jess Denham, *Billy Bragg Hits Back at Musicians' Criticism of Spotify*, INDEPENDENT (Nov. 7, 2013), <https://www.the-independent.com/arts-entertainment/music/news/billy-bragg-hits-back-at-musicians-criticism-of-spotify-8927693.html> [<https://web.archive.org/web/20260113035710/https://www.the-independent.com/arts-entertainment/music/news/billy-bragg-hits-back-at-musicians-criticism-of-spotify-8927693.html>].

270. See, e.g., Peter Kafka, *The Big Music Labels Are Selling Big Chunks of Their Spotify Stakes*, VOX (May 7, 2018), <https://www.vox.com/2018/5/7/17326590/spotify-warner-sony-equity-sales> [<https://web.archive.org/web/20260227210148/https://www.vox.com/2018/5/7/17326590/spotify-warner-sony-equity-sales>].

271. This is not to say the power the platforms exert is unidirectional: Indeed, as Rachel Landy has shown, the streaming platforms themselves constitute a major strategy through which major labels seek to

### C. PROBLEMS WITH SURVEILLANCE

Streaming platforms conduct surveillance on their users. According to communications scholars, “[m]usic streaming enables the tracking of listening behavior in more detail than any previous music-distribution format.”<sup>272</sup> According to a former Spotify employee, “It’s an outrageous amount of data . . . You should be under the assumption that any interaction you have within the Spotify app is going to be recorded.”<sup>273</sup> Surveillance presents problems on at least two grounds. First, it simultaneously infringes on the privacy of platform users and threatens the artistic integrity of musicians. Second, it entrenches platform power, which in turn enables the platforms’ other harmful and distortionary effects on the commerce of music.

#### 1. Violating Privacy and Artistic Integrity

As with other digital platform industries which engage in user surveillance,<sup>274</sup> music streaming platforms violate the privacy of their users. The American legal tradition has long held that individuals have a “right to privacy.” Originally grounded in the desire to protect private individuals from unlawful intrusions by the press,<sup>275</sup> and updated through the passage of sectoral privacy laws in the second half of the twentieth century,<sup>276</sup> the concern of the law for privacy is one which many advocates now argue ought to extend to limit data collection by digital platforms.<sup>277</sup> Violations of user privacy may be

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retain control over music distribution. See Rachel Landy, *Downstreaming*, 65 B.C. L. Rev. 1251 (2024). But in the matrix of bargaining power that the labels and the platforms each exert over the other, musicians end up on the losing side of the bargain.

272. Maaso & Hagen, *supra* note 15.

273. PELLY, *supra* note 13, at 137.

274. See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* (2019) (documenting and theorizing the surveillance conducted by digital platforms throughout the economy).

275. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

276. See, e.g., Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g; Privacy Act, Pub. L. 93-579, 88 Stat. 1896 (1974) (regulating the collection of personally identifiable information by federal agencies); Children’s Online Privacy Protection Act, Pub. L. 105-277, 112 Stat. 2681 (1998); Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (1999) (establishing privacy protections in the banking sector). Today, the default privacy regulator in the United States is the Federal Trade Commission, acting under its Section 5 authority. See CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY* (2016).

277. See John D. McKinnon, *Data-Privacy Bill Advances in Congress, but States Throw up Objections*, WALL ST. J. (July 20, 2022), <https://www.wsj.com/politics/policy/data-privacy-bill-advances-in-congress-but-states-throw-up-objections-11658347139> [<https://web.archive.org/web/20260215130402/https://www.wsj.com/politics/policy/data-privacy-bill->

particularly consequential in music, given the vulnerability of the behavioral and psychological user data platforms collect and the potential for their manipulation.<sup>278</sup> These profiles of users are sold to third-party data brokers<sup>279</sup> or used by the platform and large rights holders to target ads and recommendations to subsets of users.<sup>280</sup>

The data collection and assignment functions of streaming platforms may also threaten the artistic integrity of musicians in qualitatively new ways. Since the music industry's inception, music distributors have used language to market the music that is exogenous to the music itself.<sup>281</sup> But assigning unlimited metadata tags to music and offering it to users in never-ending algorithmic networks recontextualizes recorded music based upon technical or financial, rather than artistic or cultural, criteria. It may also nudge musicians to conform to platform incentives, rather than conforming the platform to the needs of musicians and listeners, as when a promotional video on Spotify for Artists showed a musician viewing his streaming data and deciding to change musical directions in reaction to them.<sup>282</sup> Though artistic process has always conformed in some way to technological<sup>283</sup> and legal<sup>284</sup> constraints, the recontextualization and consequent devaluation of music facilitated by metadata tags operates on a scale unprecedented by earlier generations of marketing and distribution technology.

## 2. Reinforcing Platform Power

Surveillance reinforces the power of music streaming platforms in at least

advances-in-congress-but-states-throw-up-objections-11658347139] (on the proposed American Data Privacy and Protection Act); Lina Khan, Samuel A.A. Levine & Stephanie T. Nguyen, *After Notice and Choice: Reinvigorating "Unfairness" to Rein in Data Abuses*, 77 STAN. L. REV. 1375 (2025).

278. See *supra* Part II.C.2.

279. Adi Robertson, *Lawsuit Claims Apple Violated Privacy Laws by Revealing iTunes Listening Data*, THE VERGE (May 28, 2019), <https://www.theverge.com/2019/5/28/18643146/apple-itunes-privacy-listening-data-disclosure-lawsuit-rhode-island-michigan> [<https://web.archive.org/web/20250314144037/https://www.theverge.com/2019/5/28/18643146/apple-itunes-privacy-listening-data-disclosure-lawsuit-rhode-island-michigan>]; PELLY, *supra* note 13, at 142 (on Spotify's sale of user data to third-party brokers).

280. PELLY, *supra* note 13, at 92–105 (on Spotify's recommendation system).

281. See James R. Ogden, Denise T. Ogden & Karl Long, *Music Marketing: A History and Landscape*, 18 J. RETAILING & CONSUMER SERVS. 120 (2011); see also PELLY, *supra* note 13, at 40–42 (on the historical use of marketing language linking music to particular moods).

282. PELLY, *supra* note 13, at 79–80.

283. See HOWIE SINGER & BILL ROSENBLATT, KEY CHANGES, *passim* (2023).

284. See Joseph Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333 (2015).

three ways. First, it contributes to the platforms' lock-in effects. Over time, the users of streaming playlists generate data to which they become psychologically attached.<sup>285</sup> This includes the records of their listening history (such as that which is collected and re-packaged in end-of-year marketing campaigns such as Spotify Wrapped and Apple Music Replay), in addition to playlists they have made and libraries of saved music.<sup>286</sup> These data are not accessible via other platforms, and they are portable only with the assistance of third-party processors which still require accounts with multiple services.<sup>287</sup> Thus, the switching costs of music streaming platforms may be substantial, as with the costs of exiting streaming platforms entirely.

Second, surveillance creates a valuable resource—data—that can be utilized by third parties, including advertisers and record labels, thus enhancing the value of the platforms to those parties. This is value generated by users for which users are not compensated. Platforms share data with advertisers and rights holders with whom they contract on their platform.<sup>288</sup> They may also sell them to data brokers, as in the case of Spotify's partnership with Acxiom, a large data broker, and the use of music streaming data by firms that evaluate

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285. Gary Sinclair & Julie Tinson, *Psychological Ownership and Music Streaming Consumption*, 71 J. BUS. RSCH. 1 (2017).

286. *Id.*; Hagen, *supra* note 188.

287. See, e.g., Maxwell Zeff, *These Two Friends Built a Simple Tool to Transfer Playlists Between Apple Music and Spotify, and It Works Great*, TECHCRUNCH (Sep. 14, 2024), <https://techcrunch.com/2024/09/14/these-two-friends-built-a-simple-tool-to-transfer-playlists-between-apple-music-and-spotify-and-it-works-great/> [<https://web.archive.org/web/20260115191502/https://techcrunch.com/2024/09/14/these-two-friends-built-a-simple-tool-to-transfer-playlists-between-apple-music-and-spotify-and-it-works-great/>]. Apple Music has introduced a feature whereby users can more easily transfer their music libraries from other services to Apple. Jazz Monroe, *Apple Music Now Lets You Import Playlists from Spotify and Other Streaming Services*, PITCHFORK (Aug. 6, 2025), <https://pitchfork.com/news/apple-music-now-lets-you-import-playlists-from-spotify-and-other-streaming-services/> [<https://web.archive.org/web/20260107195652/https://pitchfork.com/news/apple-music-now-lets-you-import-playlists-from-spotify-and-other-streaming-services/>]. Importantly, though, the switching it facilitates does not appear to be reciprocal, and interoperability remains voluntary as a matter of company policy at streaming platforms.

288. See, e.g., *Apple Music & Privacy*, APPLE (updated Dec. 12, 2025), <https://www.apple.com/legal/privacy/data/en/apple-music/> [<https://web.archive.org/web/20260107195917/https://www.apple.com/legal/privacy/data/en/apple-music/>] (“We are obligated to provide some aggregated non-personal data about the use of Apple Music and Apple Music Classical, as well as aggregated user demographics such as age group and gender (which may be inferred from information such as your name and salutation in your Apple Account), to record labels, publishers, and artists so that they can measure the performance of their creative work and meet royalty and accounting requirements.”).

consumer creditworthiness for loan approvals.<sup>289</sup> They also incorporate data from third parties, such as when Spotify engaged in a collaboration with the now-bankrupt genetic analysis firm 23andMe to offer users playlists from world regions based on their ascribed ancestry.<sup>290</sup> Spotify has even invested in features called Marquee and Campaign Kit, which utilize user data and sell advertisements to musicians looking for added promotion on the platform.<sup>291</sup> The sheer scale of the data platforms gather additionally contributes to the informational imbalance that makes their business decisions opaque to many users.<sup>292</sup>

Third, surveillance fuels the platforms' business as music recommenders, facilitating the *en masse* discrimination between like artists and users discussed elsewhere in this section.<sup>293</sup> From data on listeners, streaming platforms can construct detailed profiles that they can then use to match users to music they are under contract to promote.<sup>294</sup> Ignoring that because of this process, listener habits are deeply influenced by platform design and promotion, platforms can also use the resultant performance data to nudge artists with varying degrees of subtlety towards producing music that better matches the metrics tracked by the platform.<sup>295</sup> Music, thus, comes to be categorized and perceived according to descriptors set not by musicians or participants in musical culture, but by profit-motivated platform enterprises. Surveillance, in this way, not only affects the user experience on the platforms, but also the very nature of the cultural production the platforms mediate.

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289. Pelly, *supra* note 13, at 142.

290. John Herrman, *Content for Humans About the Content of Humans*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/style/spotify-ancestry-dna-playlists.html> [<https://web.archive.org/web/20260107201422/https://www.nytimes.com/2018/10/05/style/spotify-ancestry-dna-playlists.html>].

291. Pelly, *supra* note 13, at 190–91.

292. See *supra* Part II.C.2; Rose, *supra* note 250, *passim*.

293. See *supra* Part III.B; see *infra* Part III.D.

294. Prey, *supra* note 200.

295. At least one promotional material from Spotify has explicitly encouraged artists to adjust the content of their artistic output to conform to the areas in which the platform deems them successful. See Pelly, *supra* note 13, at 79–80 (“The video’s tenor is light and goofy, but its message is serious: follow the data if you want to make more streaming-friendly music. The video narrator proclaims that ‘data can help you learn things that maybe you hadn’t even thought about before!’ But the undertone is: study the data, see what is generating mass enthusiasm, and let the stats influence your sound.”). Spotify CEO Daniel Ek has also said that “some artists that used to do well in the past may not do well in this future landscape, where you can’t record music once every three to four years and think that’s going to be enough.” *Id.* at 167–68.

#### D. PROBLEMS WITH PLATFORM PLACEMENT

Music platforms use the reams of data they collect from listeners and artists in part to fuel their business as music recommenders. This function endows streaming platforms with an extraordinary form of gatekeeper power in the music industry: the power to place music in particular places on the platform<sup>296</sup> and steer users towards certain music.<sup>297</sup> On the scale at which streaming platforms operate, these recommendations have a powerful influence on mass listening habits and thus the commercial system of recorded music. Coupled with the financial incentives towards steering users towards music for which the platforms pay less, this recommender function lends itself to discrimination via platform placement. These problems resemble classic payola in some respects,<sup>298</sup> but they exist on a far greater scale than payola did on the radio in the twentieth century: They have been automated, turbocharged, and hyper-targeted to nearly all musical consumers.<sup>299</sup>

##### 1. Conflicts of Interest

Discrimination between like artists in recommending music to listeners is concerning for at least three reasons. First are the conflicts of interest it creates with the platform's function as a host of music.<sup>300</sup> While they host a wide variety of music to which users might be exposed, streaming platforms offer preferential placement to rights holders and artists who accept lower royalty rates for curatorial or algorithmic promotion on the platform.<sup>301</sup> This in turn incentivizes musicians who need to use the platforms to reach listeners to

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296. See *supra* Part II.C.1.

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

298. "Payola" refers to a practice in which record labels or other interested parties would grant payments, gifts, or special treatment to radio disc jockeys in exchange for playing certain music on the air. For a history of this practice in the twentieth century, see STERLING & KITTROSS, *supra* note 3, at 368; SEGRAVE, *supra* note 4. Indeed, one lawyer has made a compelling case for the FTC's oversight over streaming services' playlists under the FTC Act and existing anti-payola statutes. Kasi Wautlet, *Playlists as Endorsements: An Argument for Continued Payola Regulation in the Internet Age*, 76 N.Y.U. ANN. SURV. AM. L. 821 (2021). It is unclear whether the proposal would extend the same rules to algorithmic recommendation features.

299. For a discussion, see PELLY, *supra* note 13, at 185–96 (comparing and contrasting problems with platform placement on Spotify to classic payola).

300. See *supra* Part II.C.1.

301. See, e.g., PELLY, *supra* note 13, at 186 ("Rather than charge an up-front fee, labels or rights-holders agree to be paid a promotional recording royalty rate for streams in personalized listening sessions where we provided this service.").

accept such lower rates to influence each platform's placement of their music. This dynamic functions similarly to favoritism or self-preferencing, when a platform on which multiple sellers compete for customers grants its own offerings or its preferred sellers preferential treatment.<sup>302</sup> This practice points to a conflict between a platform's role as a provider of infrastructure and its role as a user itself of the infrastructure.<sup>303</sup> To use one example from music streaming, Spotify has directly commissioned artists to record music that they grant preferential placement in playlists, known internally as "perfect fit content," or PFC.<sup>304</sup> But a similar dynamic exists even when the platform does not directly commission the music: Artists' acceptance of lower royalty payments for preferential placement—which is akin to paying a tax to the platform on every stream—makes it more likely that users will stream their music.<sup>305</sup> A platform's power to advantage its preferred sellers—those who pay the tax—over others has, in other digital platform industries, not only harmed competition and the diversity of options available to consumers, but also driven down revenues for many sellers, thus discouraging investment and harming innovation.<sup>306</sup> In music streaming, this threat to innovation manifests as a threat to the heterogeneity of the music available to listeners.<sup>307</sup>

Another conflict of interest related to platform placement has been present in the common ownership of streaming platforms and major record labels and publishers. This common ownership, particularly dating from the early years of streaming's development, may have bearing upon platform decisions regarding musical placement. On the one hand, this is a simple conflict of financial interests: The less a transaction between the two compensates the label or publisher (and thereby the artists on their rosters) in the form of royalties, the more it can compensate the label or publisher as an owner in the form of dividends and capital gains.<sup>308</sup> But partial ownership also puts major

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302. RICKS ET AL., *supra* note 10, at 16 (on favoritism); Khan, *supra* note 21, at 988, 999–1000 (on Amazon and Google's self-preferencing to capture value and reinforce monopoly power).

303. See Khan, *supra* note 21, at 1052–55 (on conflicts of interest in platform industries).

304. PELLY, *supra* note 13, at 57–67.

305. See PELLY, *supra* note 13, at 149 (on the "promotional rates" offered by the platform to artists).

306. Lemley & Wansley, *supra* note 192 (on the harms to innovation caused by platform self-preferencing).

307. See *infra* Part III.E.

308. See TVO TODAY, *Cory Doctorow: How Spotify Rigged the Music Market: The Agenda*, YOUTUBE (May 26, 2023), [https://www.youtube.com/watch?v=FZ5z\\_KKeFqE](https://www.youtube.com/watch?v=FZ5z_KKeFqE) [<https://perma.cc/JS64-CTN9>] (noting that each dollar a major label receives from royalties as a rights holder is one less it can receive from dividends as a shareholder).

labels and publishers in a position to exert power over the platforms' corporate decisions, according to simple logic: If Sony, for example, is engaged in a contractual negotiation with Spotify on behalf of its artist roster, Sony can use its power as a partial owner of Spotify to influence its deliberations and actions—even if not through the dictation of specific terms, through the mere implication of withdrawing its investments. This could result in terms that give Sony preferential terms compared to other counterparties, such as independent labels and artists.<sup>309</sup> Conflicts of interest may not only be limited to particular deal negotiations, but to broader policy decisions, such as those that would limit compensation to other rights holders or adjust the weights of particular artists in algorithmic recommendation tools.<sup>310</sup> This may hurt other rights holders and musicians vis-à-vis platform placement, while driving additional value both to major labels and publishers as well as to the platforms themselves.<sup>311</sup>

Streaming platforms are not only partially owned by major rights holders vying for preferential placement on the platform: They also, in turn, do business as distributors and even as labels themselves. Spotify, for example, is a partial owner of DistroKid, a distribution platform which contracts with independent artists who lack label deals and generates revenue through charging fees paid by the artist.<sup>312</sup> Spotify has also licensed music directly from artists—in other words, acting as a record label itself.<sup>313</sup> Though doing so unilaterally and at scale might trigger collective revolt on the part of the major labels, vertically integrating recording and distribution creates the risk of self-preferencing. One classic example of self-preferencing from American history

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309. The contracts between platforms and labels that have been made public through leaks and investigative reporting included most-favored-nation (MFN) clauses. See Singleton, *supra* note 122.

310. See *supra* Part II.C.

311. In the years since their initial investments, the major labels have divested much of their ownership stakes in streaming platforms like Spotify. See, e.g., Ben Sisario, *As Spotify Goes Public, Sony Cashes In*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/business/media/as-spotify-goes-public-sony-cashes-in.html> [<https://web.archive.org/web/20201109035324/https://www.nytimes.com/2018/04/04/business/media/as-spotify-goes-public-sony-cashes-in.html>]. This does not indicate, however, that these conflicts of interest would no longer be possible, and it therefore remains important to address them.

312. PELLY, *supra* note 13, at 167; DISTROKID, <https://distrokid.com/> (last visited July 11, 2025).

313. Ben Sisario, *A New Spotify Initiative Makes the Big Record Labels Nervous*, N.Y. TIMES (Sep. 6, 2018), <https://www.nytimes.com/2018/09/06/business/media/spotify-music-industry-record-labels.html> [<https://web.archive.org/web/20230409012418/https://www.nytimes.com/2018/09/06/business/media/spotify-music-industry-record-labels.html>]; Tim Ingham, *Spotify Is Making Its Own Records... And Putting Them on Playlists*, MUSIC BUS. WORLDWIDE (Aug. 31, 2016), <https://www.musicbusinessworldwide.com/spotify-is-creating-its-own-recordings-and-putting-them-on-playlists/> [<https://perma.cc/YJP8-84TP>].

is the vertical integration of railroads and energy companies, which in turn granted those companies preferential treatment.<sup>314</sup> Another case of more recent vintage are the reports of Amazon's online marketplace giving its own products preferential treatment over third-party sellers.<sup>315</sup> Similar dynamics are at play on music streaming platforms: Even though they do not facilitate the purchases of individual units of music, they still have the power to influence which music is heard most often, including through the power of their proprietary playlists and algorithmic features such as Spotify's Discovery Mode, Smart Shuffle, and Autoplay, each of which automatically play certain music chosen by the platform's algorithm on users' accounts.<sup>316</sup> Should the platforms own record labels themselves, it would be logical and revenue-maximizing for them to tilt these features in favor of their own music, rather than those of other artists and rights holders.

## 2. Degraded Quality

Second are the quality degradations platform placement presents for listeners. Quality degradations are common in industries with monopolistic or oligopolistic market structures,<sup>317</sup> including music streaming. In a platform's role as a curatorial recommender, it may populate its playlists with lower quality, "filler" content which fits comfortably into the background for passive listeners but may also distort the genres or musical functions those playlists are meant to represent.<sup>318</sup> This may cause the quality of the musical experience to suffer for listeners. Algorithmic recommendation features may also harm quality. A streaming service's algorithm might give users what it "thinks" they will want to hear; in some cases, it will succeed. But the service may simultaneously create musical echo chambers, channeling music to users linked by the metadata tags platforms assign, rather than the real-world relationships of different types of music to each other. This dynamic is akin to that which

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314. See generally Matthew Jinoo Buck, *Railroad Regulation Reinterpreted*, 134 YALE L.J. 2912 (2025) (on the history of railroad regulation to solve self-preferencing, price discrimination, and other structural problems).

315. Khan, *supra* note 21, at 985–97.

316. This dynamic has caught the attention of Congress, with members of the House Judiciary Committee requesting information from Spotify about it in a public letter which raises concerns about potential payola-like practices. See Letter from Jerrold Nadler, *supra* note 201.

317. See RICKS ET AL., *supra* note 10, at 16–17.

318. PELLY, *supra* note 13, at 57–67 (on Spotify's commissioning of low-quality, lower-royalty content for placement on its playlists).

exists in social networking: By constantly providing users with content recommendations, many of which are low-quality but nonetheless stimulating because of their reinforcement of past preferences, their engagement is retained for longer durations and thus more of their activity surveilled and their data recorded.<sup>319</sup>

### 3. Contributions to Declining Artist Pay

Third is the impact which discriminatory placement has on artists' livelihoods. As was reported of artists when their tracks were added to, and then subsequently removed from, a popular platform playlist, "[S]ome . . . were able to pay their rents from music for the first time ever thanks to a single playlist placement. But it also illuminated Spotify's immense platform power: when the playlist was refreshed, artists could see their rent checks disappear."<sup>320</sup> Similarly, as one independent label manager reported, "Our streaming revenue heavily depends on editorial playlist placements . . . We used to be in someone's good graces there, but we pretty much just went through a two-year dry spell of barely getting any placements at all, and our revenue now has been cut in half"<sup>321</sup>—limiting the money that the label can then pay out to artists on its roster. In this way, the discretionary power of streaming platforms may limit and disincentivize the productive capacity of musicians, the fundamental element that fuels the music industry and which constitutes musical culture.

### 4. Entrenchment of Platform Power

Fourth, unregulated placement discretion entrenches platform power in music streaming. The function of music recommendation, particularly in algorithmic features, creates lock-in effects for users, as demonstrated by consumers feeling that the algorithm knows their taste after having built up data on their preferences.<sup>322</sup> Curated playlists also function as a filter within the network effects that streaming platforms create between musicians and

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319. See, e.g., Matteo Cinelli et al., *The Echo Chamber Effect in Social Media*, 118 PNAS 1 (2021).

320. PELLY, *supra* note 13, at 50, 113 ("One producer told me that getting prime playlist placements could mean the difference between earning six figures or earning nothing.")

321. *Id.* at 83.

322. Hracs & Webster, *supra* note 31.

listeners, thereby reinforcing the importance of satisfying the platform so musicians can reach audiences and vice versa.<sup>323</sup>

#### E. THREATS TO CULTURAL HETEROGENEITY

Cultural heterogeneity refers to a state in which a society accepts and encourages a wide variety of different cultural practices to be expressed and developed, and for these practices to be commonplace and broadly accessible by the public. Cultural heterogeneity is desirable for several reasons. First, it encourages free expression. Cultural homogeneity or sameness may create a chilling effect on expression understood to be outside a given norm, thereby limiting free expression, while heterogeneity instead encourages expression that may fall outside the norms of predominant traditions or practices. Second, it is democratic and egalitarian. By holding different forms of expression in equal regard, it encourages democratic participation in culture, rather than reserving it to only those who abide by a particular set of norms. Third, it is educational. Encountering different cultural practices enables us to learn more about those practices, in turn expanding our perception and knowledge of the society in which we live. Fourth, it results in cultural innovation. Free expression in culture lends itself to experimentation with new forms of that expression, whether by distinction with or synthesis of past practices, thereby helping to push culture forward. Finally, it strengthens bonds between people as participants in culture, promoting solidarity. Acknowledging the value of many different forms of cultural expression lends itself to a similar acknowledgment of the value of its different creators, creating strong social bonds both among creators and between creators and other members of society.

Streaming platforms threaten cultural heterogeneity through technological dynamics and business practices which, in the long run, promote musical homogeneity. They do so in at least three ways: by disincentivizing investment in musical careers; by incentivizing greater homogeneity in musical sound through platform design; and through spillover effects in other areas of musical commerce, including ticketing and live events, where concentrated economic power via platformization presents similar problems.

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323. See *infra* Part III.D.

### 1. Disincentivizing Investment

By suppressing artist pay through an opaque system of price discrimination, streaming platforms—and, in general, the music industry they shape—disincentivize investment in musical careers, which in turn threatens the heterogeneity of music available to listeners. Partly, this can be judged through data indicating a lack of expected income as a frequent barrier to entry into the music business.<sup>324</sup> But it is also evident in the popular perceptions and material reality of the musical profession that it has shifted in fundamental ways in the era of music's platformization. Musical composition, for example, once a stable profession in the era of Tin Pan Alley and Brill Building songwriting in the mid-twentieth century,<sup>325</sup> has continued its trajectory of downward mobility through precarious employment and squeezed earnings.<sup>326</sup> Meanwhile, recording artists—typically, these days, also composers themselves—face increasing barriers to breaking through in the commercial system of music, wherein recording contracts are difficult to come by and distribution via streaming platforms offers so little remuneration. On the one hand, this pushing of music-making to the margins of commercial society results in regional independent music scenes filled with talented and innovative musicians, often committed to do-it-yourself (“D.I.Y.”) aesthetics and values.<sup>327</sup> But it also makes the pursuit of music, at most, a part-time occupation for many of these participants, who engage in it in spite of, rather than for, its economic potential.<sup>328</sup> This road is indeed precarious: Creative labor, without the

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324. See *supra* Part III.B; Ying Zhen, *Career Challenges Facing Musicians in the United States*, 47 J. CULTURAL ECON. 519 (2022).

325. See Simon Barber, *The Brill Building and the Creative Labour of the Professional Songwriter*, in THE CAMBRIDGE COMPANION TO THE SINGER-SONGWRITER 67 (Katherine Williams & Justin A. Williams eds., 2016). “Tin Pan Alley” and the “Brill Building” were two New York landmarks that became synonymous with the American songwriting industry in the first two thirds of the twentieth century.

326. See, e.g., Lauren Boisvert, *New Study Shows Songwriters Can Barely Make a Living from Digital Streaming Profits*, AM. SONGWRITER (Aug. 3, 2024), <https://americansongwriter.com/new-study-shows-songwriters-can-barely-make-a-living-from-digital-streaming-profits/> [<https://web.archive.org/web/20260107222154/https://americansongwriter.com/new-study-shows-songwriters-can-barely-make-a-living-from-digital-streaming-profits/>].

327. See, e.g., David Verbuč, “A Whole Society, with Its Own Economic System”: *The Reciprocal and Capitalist Configurations of American DIY Music Scenes*, 32 ETHNOMUSICOLOGY FORUM 5 (2023).

328. As Rachel Brown, the lead singer and co-songwriter of critically acclaimed band Water from Your Eyes, put it, “[A]s you get older, it’s like, I’m spending all my time doing this thing that I love, but I’m running out of time to do it, because I need to make money. It’s why people age out of knowing what’s going on in the underground.” Music Person Podcast (@musicpersonpodcast), INSTAGRAM (July 9, 2025), [https://www.instagram.com/p/DL5F9kKxX0w?img\\_index=3\\_\[https://perma.cc/K42P-ZZ7P\]](https://www.instagram.com/p/DL5F9kKxX0w?img_index=3_[https://perma.cc/K42P-ZZ7P]).

guarantee of recoupment, can lead to exhaustion, burnout, and the cessation of that labor.<sup>329</sup> Often, this pursuit requires great commitment, or else inter-generational capital uncommon to many people.<sup>330</sup> These bottlenecks further narrow access to musical culture across society, both for its producers and for its consumers, resulting in a less heterogeneous cultural ecosystem.

## 2. Cultural “Flattening” and “Streambait”

Music’s platformization has material effects not only on the profession and practice of music-making, but on the content of music itself. Streaming platforms, as gatekeepers of recorded music distribution, steer huge numbers of listeners to particular music and musicians towards particular sounds.<sup>331</sup> These dynamics trend towards music being less diverse and innovative. This effect results in what scholars of algorithm-based platforms refer to as cultural “flattening,” or greater homogenization. In an algorithm-driven cultural economy, as Kyle Chayka writes:

Attention becomes the only metric by which culture is judged, and what gets attention is dictated by equations developed by Silicon Valley engineers. The outcome of . . . algorithmic gatekeeping is the pervasive flattening that has been happening across culture. By flatness I mean homogenization but also a reduction into simplicity: the least ambiguous, least disruptive, and perhaps least meaningful pieces of culture are promoted the most. Flatness is the lowest common denominator, an averageness that has never been the marker of humanity’s proudest cultural creations.<sup>332</sup>

In the music streaming context, this flatness manifests in part as what Liz Pelly calls “streambait”—the style of music most conducive to audio streams offered on streaming platforms.<sup>333</sup> Its qualities are ubiquitous: “muted, mid-tempo, and melancholy.”<sup>334</sup> The homogenizing effect of streaming platforms

329. Online resources for working musicians regularly address this problem, indicating its commonality. See, e.g., *Burnout*, MUSICIAN’S UNION (Mar. 28, 2024), <https://musiciansunion.org.uk/health-safety-wellbeing/mental-health-and-wellbeing/musicians-wellbeing-guidance-pack/burnout> [<https://web.archive.org/web/20260115203901/https://musiciansunion.org.uk/health-safety-wellbeing/mental-health-and-wellbeing/musicians-wellbeing-guidance-pack/burnout>].

330. See Aimee Ferrier, *The Middle-Class Takeover: Music Is Less of a Meritocracy than Ever Before*, FAR OUT MAG. (May 17, 2023), <https://faroutmagazine.co.uk/the-middle-class-takeover-music-is-less-of-a-meritocracy-than-ever-before/> [<https://web.archive.org/web/20260115204204/https://faroutmagazine.co.uk/the-middle-class-takeover-music-is-less-of-a-meritocracy-than-ever-before/>].

331. See *supra* Part II.B, C.

332. CHAYKA, *supra* note 33, at 9.

333. PELLY, *supra* note 13, at 40, 80–81, 87, 90–91.

334. *Id.* at 82.

exists not only at the general level, but also at the level of specific musical cultures and genres, as metadata tags and playlist placements determine, in the minds of the public, what constitutes their representative works.<sup>335</sup>

To be sure, properly conceiving of the effects of economic structure on the content of musical expression itself is a precarious task, given the acknowledged subjectivity of musical experience. But when one considers the tendency of unregulated platform industries to degrade service quality,<sup>336</sup> they find a potentially powerful framework within which to level such critiques in the context of music. Just as by viewing streaming services as platforms, differential royalty payments reappear as monopsonistic or oligopsonistic price discrimination,<sup>337</sup> the “flattening” effect on musical expression reappears in this view as the natural effect of unregulated platform power on the quality of the service the platform provides, for which the threat of competition offers little recourse. In this situation, the overall musical ecosystem is weakened, given that the creators of music that streaming platforms promote are placed in an oppositional relationship with the creators of other types of music in a competition for a shared pool of streaming revenues.<sup>338</sup> The platform, in turn, not only sets the rules for this contest but also, in many cases, picks the winners.<sup>339</sup> This results in an incentive on the part of musicians of all types to better conform with platform designs, an incentive which, in the long run, trends towards greater artistic homogenization.<sup>340</sup>

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335. Two good examples of this phenomenon are ambient music—a robust musical tradition whose representative works were substituted for low-royalty music on Spotify’s playlists—and hyperpop, a once-underground genre of electronic music whose success on Spotify granted the platform power to aesthetically shape it through the curation of its flagship playlist. *Id.* at 44–48 (on the devaluation of ambient music through platform placement alongside “chill” music), 111 (“The official Spotify playlist did to hyperpop what streaming giants do to culture at large: it worked as a flattening, making a scene that was previously sprawling and complicated into something commodified and palatable, cutting out many of its original voices along the way.”).

336. RICKS ET AL., *supra* note 10, at 16–17 (on this tendency); *cf.* Lina Khan, *Amazon’s Antitrust Paradox*, 126 *YALE L.J.* 710, 766–67 (2017) (noting a similar dynamic in Amazon’s online marketplace as it pertains to bookselling).

337. *See supra* Part III.B.1.

338. *See supra* Part III.B.1 (on the baseline pro-rata system of artist compensation); *cf.* PELLY, *supra* note 13, at 73–74 (describing how streaming has “flattened difference across musical purpose” through consolidation: “different music-adjacent industries and ecosystems that previously operated more in isolation, all suddenly now generating royalties from the same pots on the same platforms”).

339. *See supra* Part II.C; Part III.D.1.

340. Perhaps no individual case better demonstrates this effect than the recent success of the Velvet Sundown, an artist whose music racked up millions of listens in 2025 on Spotify despite being entirely generated by artificial intelligence, which relies on enormous data inputs from similar-sounding music. *See* Brian Hiatt, *AI “Band” the Velvet Sundown Officially Confirm They’re AI—And a “Provocation,”* ROLLING

Despite the links between the streaming business model and the promotion of greater cultural homogeneity, platform executives often suggest that their services democratize culture and expand the variety of music able to be heard by audiences around the world. In other words, they argue their services make musical culture more heterogeneous, not less. For example, in Spotify's filing with the Securities and Exchange Commission at the time of its initial public offering in 2018, CEO Daniel Ek wrote:

"With access to unprecedented amounts of data and insights, we're building audiences for every kind of artist at every level of fame and exposing fans to a universe of songs. In this new world, music has no borders. . . . We're working to democratize the industry and connect all of us, across the world, in a shared culture that expands our horizons."<sup>341</sup>

There are significant reasons to discount these claims as public relations with little backing.<sup>342</sup> As described above, streaming platforms exercise their power to decide what music is successful on its platform—through their marketing of promotional rates, their curatorial discretion, their algorithmic weight adjustments, and through algorithmic steering with the assistance of suspect metadata. These practices, when combined with the market power inherent to the platform business model, suggest that their role is not one of democratization but rather of centralizing control over the recorded music industry, resulting in a less robust and diverse commercial ecosystem for music.

### 3. Intermodal Effects

Another dimension of streaming platforms' threats to cultural heterogeneity relates to their effects on related cultural industries, including ticketing and live events. Streaming—i.e., recorded music distribution—and live events—i.e., live music distribution—can be thought of as two distinct industries that together make up a larger system of commercial music distribution, with changes in one affecting the other. This is true in at least two ways. One concerns music consumers: Economists and market researchers have

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STONE (July 5, 2025), <https://www.rollingstone.com/music/music-features/ai-band-the-velvet-sundown-confirm-ai-1235379354/> [<https://web.archive.org/web/20260115205021/https://www.rollingstone.com/music/music-features/ai-band-the-velvet-sundown-confirm-ai-1235379354/>]; cf. Narechania & Sitaraman, *supra* note 209, at 118–26 (on the data inputs required for artificial intelligence models to function).

341. Spotify Technology S.A., Registration Statement (Form F-1) 92 ("Letter from Daniel Ek") (Feb. 28, 2018).

342. For a thorough deconstruction of these claims, see Thomas Hodgson, *Spotify and the Democratization of Music*, 40 POPULAR MUSIC 1 (2021).

demonstrated a strong relationship between artists' streams and ticket sales, which supports the intuition that listeners are more likely to be concertgoers of artists whose music they have previously streamed.<sup>343</sup> Research indicates the converse effect is also true.<sup>344</sup> This results in streaming's *en masse* distortions of listening habits in recorded music being reflected in live music as well. A second concerns artists: As demonstrated in surveys of musicians, declining pay from streaming results in having to tour more regularly to make up the difference, given that many musicians' incomes come from a mix of recording and performing. It is worth noting here just how precarious and grueling touring is as a form of labor and income for musicians<sup>345</sup>—a situation made worse by the harms of concentration in live events and ticketing, with the preponderance of extractive business practices such as venue merchandise cuts<sup>346</sup> and junk fees<sup>347</sup> reflecting the industry's monopolistic structure.<sup>348</sup> While an analysis of the political economy of ticketing and live events is outside the scope of the present project, having been capably articulated elsewhere,<sup>349</sup> it is

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343. See Seifert et al., *supra* note 17; Christensen, *supra* note 17.

344. Eric Hogue, *The Complementary Relationship Between Live Performances and Post-Concert Streaming for Top-Performing Artists*, 56 APPLIED ECON. 8437 (2024).

345. See, e.g., James Reich, *Road to Madness: The Dangers of Touring and How Musicians Cope*, SPIN (Jan. 31, 2023), <https://www.spin.com/2023/01/how-musicians-cope-on-tour/> [<https://web.archive.org/web/20260115205716/https://www.spin.com/2023/01/how-musicians-cope-on-tour/>].

346. Nina Corcoran, *The Fight Between Musicians and Venues over Merch Profits Is a Big Deal with a Simple Solution*, PITCHFORK (Nov. 1, 2023), <https://pitchfork.com/features/article/artist-merch-cuts-venues/> [<https://web.archive.org/web/20260115210142/https://pitchfork.com/features/article/artist-merch-cuts-venues/>].

347. *Federal Trade Commission Announces Bipartisan Rule Banning Junk Ticket and Hotel Fees*, FED. TRADE COMM'N. (Dec. 17, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/12/federal-trade-commission-announces-bipartisan-rule-banning-junk-ticket-hotel-fees> [<https://web.archive.org/web/20260115210531/https://www.ftc.gov/news-events/news/press-releases/2024/12/federal-trade-commission-announces-bipartisan-rule-banning-junk-ticket-hotel-fees>].

348. Press Release, Justice Department Sues Live Nation-Ticketmaster for Monopolizing Markets Across the Live Concert Industry, U.S. DEP'T. OF JUST. (May 23, 2024), <https://www.justice.gov/archives/opa/pr/justice-department-sues-live-nation-ticketmaster-monopolizing-markets-across-live-concert> [<https://web.archive.org/web/20260201185345/https://www.justice.gov/archives/opa/pr/justice-department-sues-live-nation-ticketmaster-monopolizing-markets-across-live-concert>]. The DOJ has filed suit under the antitrust laws to unwind the merger between Ticketmaster and Live Nation that it had previously approved in 2010.

349. See Katherine Van Dyck & Lee Hepner, *The Case Against Live Nation-Ticketmaster*, AM. ECON. LIBERTIES PROJ. (Jan. 4, 2024), <https://www.economicliberties.us/wp-content/uploads/2024/01/20240104-AELP-Livenation-Brief-FINAL.pdf> [<https://web.archive.org/web/20251221125057/https://www.economicliberties.us/wp-content/uploads/2024/01/20240104-AELP-Livenation-Brief-FINAL.pdf>].

nonetheless important to note that the problems with streaming worsen the impact of the problems with that related industry.

#### IV. HOW TO GOVERN MUSIC STREAMING PLATFORMS

The dynamics that music streaming platforms have introduced into the political economy of music are ones that public policy can address. Throughout history, policymakers have used a coherent set of tools to address industries with similar dynamics: regulating them as public utilities; creating public options; and encouraging the development of cooperative governance within firms. Though many of these tools came under attack from the 1970s onwards,<sup>350</sup> in an age characterized by the advocacy of deregulation, privatization, and fiscal austerity across sectors,<sup>351</sup> they have been reinvigorated by a new generation of legal scholars and advocates as proposals to govern digital technologies and other industries with power over our economy, culture, and politics.<sup>352</sup> Exploring each of these legal and policy tools may help build a fairer and healthier system of commerce to support musical culture.

##### A. REGULATING MUSIC STREAMING AS A PUBLIC UTILITY

Music streaming services are platforms, and one way to address their problems would be to regulate them as policymakers have historically regulated platform industries: as public utilities. For musicians, listeners, and other participants in the music industry, streaming platforms are possessors of enormous economic power.<sup>353</sup> To deal with this reality, four tools from the law and policy of networks, platforms, and utilities (NPU) would apply well to music streaming platforms: rate regulation, nondiscrimination rules, structural separations, and interoperability mandates. Some of these tools are, in fact,

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350. See, e.g., DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005); GARY GERSTLE, *THE RISE AND FALL OF THE NEOLIBERAL ORDER* (2022).

351. See GANESH SITARAMAN, *THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY, AND UNITE AMERICA* (2019).

352. See, e.g., RICKSET AL., *supra* note 10; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *CARDOZO L. REV.* 1621 (2018); Khan, *supra* note 21; Lev Menand & Morgan Ricks, *Rebuilding Banking Law: Banks as Public Utilities*, 41 *YALE J. ON REG.* 591 (2024); Narechania & Sitaraman, *supra* note 209; Ganesh Sitaraman & Morgan Ricks, *Tech Platforms and the Common Law of Carriers*, 73 *DUKE L. REV.* 1037 (2024).

353. See *supra* Part II.B (on the economic, cultural, and political dimensions of streaming platforms' power).

already present in the music industry, but are limited in scope.<sup>354</sup> Governing streaming platforms will, thus, require completing the incomplete public utility regime that currently governs the music industry.<sup>355</sup>

### 1. Rate Regulation

Problems related to artist pay and placement on streaming platforms stem, in large part, from the platforms' ability to engage in price discrimination.<sup>356</sup> The most effective way to tackle price discrimination in the near term would be to regulate the rates for every license that streaming services must obtain at a level that fairly compensates musicians. Rate regulation is a classic tool in the governance of public utilities and infrastructural industries.<sup>357</sup> By mandating consistency in the rates platforms charge for a service (or in this case, pay for a good), rate regulation prevents harmful exercises of platform power, including particularized value extraction via price discrimination.<sup>358</sup> And by setting the rates at specific levels—contra nondiscrimination rules, which do not specify particular rates<sup>359</sup>—rate regulation can serve as an effective tool to ensure that the platforms compensate their counterparties fairly and sufficiently, and that those counterparties do so for musicians.

Rate regulation in music streaming is, conceptually, a relatively simple proposition: Every comparable license acquired by a platform would earn every comparable rights holder the same amount of money. This amount of money could be calibrated to ensure that artists can earn a living wage.<sup>360</sup> Regulating every rate would effectively prohibit platforms from offering lower rates for promotion on the platform. They would also eliminate the financial incentive the platforms possess to steer listeners towards music that costs less for the platforms to offer. A comprehensive system of rate regulation could ensure that

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354. *See supra* Part I.C.

355. *Id.*

356. *See supra* Part III.B.1, D.3.

357. RICKS ET AL., *supra* note 10, at 25.

358. *Id.* at 14–16.

359. *See infra* Part IV.A.2.

360. *Cf.* Press Release, Tlaib Introduces Living Wage for Musicians Act, CONGRESSWOMAN RASHIDA TLAIB (Mar. 6, 2024), <https://tlaib.house.gov/posts/tlaib-introduces-living-wage-for-musicians-act> [<https://web.archive.org/web/20260106024120/https://tlaib.house.gov/posts/tlaib-introduces-living-wage-for-musicians-act>] (on a piece of legislation that aims to guarantee a living wage for musicians by creating an additional royalty fund, instead of regulating the other categories of royalties meant to compensate musicians).

every similarly situated artist is paid fairly and equitably for their work.

Obviously, there is a great deal of nuance and complication that would arise in designing such a system of rate regulation, and there may be reason to be concerned about its capacity to recognize a diversity of artistic practices. Consider these questions: Should the rate-regulated licenses be based on units of tracks, streams, or some other metric? How should rates account for different, hardly comparable types of music, or for music that is designed to be listened to on repeat, versus music that, while equally valuable, might only be suitable for listening to a few times? What constitutes “similarly situated” or “comparable” artists in the first place? How should rates account for the number of individual musicians involved in a record’s creation, which could vary quite broadly? These are complicated questions, and they are the subject of fierce contestation within the current system of private, individual negotiation.<sup>361</sup> Though they may be complex, these questions may be answered at least in part through the establishment of different tiers within each regulated rate: Symphony orchestras, for example, might be compensated comparably to each other for their recordings, while individual singer-songwriters, to take a different example, would be considered separately.<sup>362</sup> The advantage of empowering a public authority to set these rates, despite the complexity of the task at hand, is that the remuneration system can be built with some modicum of public input, transparency, and democratic legitimacy, rather than being left to the behind-the-scenes dictates of streaming platforms and their corporate counterparts in recording and publishing. It may also allow for the design and implementation of new, fairer, and more capacious models of artist payment than ones based on the quantity of individual streams alone.

Importantly, rate regulation need not supplant the rate-setting function of existing copyright law. Rather, it would extend the logic of rate regulation already applied to the “mechanical right” in musical works, which sought to prevent the harmful exercise of monopoly power in music distribution.<sup>363</sup> Regulating every rate could thus address what Professor Douglas Lichtman calls

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361. Recall that determining the monetary value due music’s creators is an inherently complicated task. See *supra* Part I.C.

362. It is important to distinguish this scheme from the “artist tiers” that streaming platforms have internally constructed, which assign differential treatment to artists based on how much money artists generate in royalties. See PELLY, *supra* note 13, at 159. Tiers set here would flip the script, determining compensation levels and thereby platform revenues based on the different costs incurred to produce music, and affording equal treatment to all as far as possible.

363. See KOHN, *supra* note 23; *supra* Part I.A, B.

a “seesaw effect,” wherein the policy goals in regulating one type of rate are undermined when other rates are left unregulated.<sup>364</sup> If a license for a musical work is regulated while a license for its sound recording is left unregulated, for example, streaming platforms can simply pay more or less accordingly for the unregulated license, thereby enabling them to discriminate between artists in the same way the regulated rate was intended to prevent. If instead we regulated the rates of all the licenses streaming services must obtain, it would prohibit the platforms from engaging in price discrimination across the board, and it would empower a public authority to make sure the platforms pay musicians fairly.

Here’s how it could work: Congress could empower the Copyright Royalty Board (CRB), which currently sets rates for mechanical licenses in musical works, to set rates for every license the streaming platforms are required to obtain to offer music, including licenses for sound recordings. The CRB could establish different tiers of rates within each category of license to account for the circumstances of differently situated rights holders and musicians. It could be required to review and update the rates at regular intervals, as it currently does for the rates already under its purview. Alternatively, Congress could empower the FCC to set rates for these licenses. Though the FCC has not traditionally exercised authority over copyright law and policy, it has had experience as a regulator of communications networks,<sup>365</sup> of which streaming platforms are close analogues. Indeed, the FCC served as one of the most important regulators of the music industry when it assisted the FTC in enforcing anti-payola regulations against radio broadcasters<sup>366</sup>—a function that continues to the present day.<sup>367</sup> A price-setting authority at the FCC could absorb and fulfill the functions of the CRB, while establishing the regulation of the music industry as a comprehensive public utility system, rather than as an amalgamation of individual licensing contracts.

There are a few problems with the existing copyright rate-setting process

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364. See Lichtman, *supra* note 229. Economists have noted a similar dynamic in other networked industries, which they refer to as the “waterbed effect.” See *supra* note 229.

365. RICKS ET AL., *supra* note 10, at 332–369 (on the FCC and telecommunications regulation).

366. 3 SANJEK, *supra* note 1, at 447.

367. Dylan Smith, *Payola Crackdown? FCC Issues Enforcement Advisory Targeting Free Artist Shows and Appearances*, DIGIT. MUSIC NEWS (Feb. 17, 2025), <https://www.digitalmusicnews.com/2025/02/17/payola-enforcement-advisory-fcc/> [<https://web.archive.org/web/20260106032311/https://www.digitalmusicnews.com/2025/02/17/payola-enforcement-advisory-fcc/>].

which policymakers could improve as they expand it. First, there are the standards by which rates are set. Currently, the CRB judges are required to set the rates of mechanical licenses according to a “willing buyer-willing seller” standard<sup>368</sup>—that is, by conducting market research and holding hearings to determine what a typical buyer and a typical seller in an open market would think is a fair price for the license. The S.D.N.Y. judges (“rate court”) assigned to handle licensing disputes in performance rights are required to evaluate, simply, whether rates are “reasonable.”<sup>369</sup> These standards contradict and undermine the logic of rate-setting. For mechanical licenses, the mere presence of rate regulation significantly curtails the existence of an open, competitive market with willing buyers and willing sellers transacting at freely negotiated rates, making the task of rate regulation reliant on an imaginary hypothetical.<sup>370</sup> “Reasonability,” in turn, may vary significantly on a case-by-case basis, making the rates for performance licenses potentially inconsistent. But more importantly, by basing the value of a particular license solely on the terms of its exchange, these standards do not account for the full range of costs musicians incur in making different types of music. They treat music like a simple commodity that derives its value from exchange between artists and businesspeople, instead of the rich and complex public good that it is. A better standard would be more akin to a “cost-plus” pricing standard common in public utility industries, wherein regulators consider not only existing market transactions, but the actual input costs of providing a service.<sup>371</sup> This standard would guarantee an overhead above these costs to ensure that copyright owners—in this case, musicians—sufficiently profit to continue creating

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368. See SCHERER, *supra* note 23, at 30.

369. See U.S. COPYRIGHT OFF., *supra* note 23, at 41.

370. As the longest-serving judge currently on the Copyright Royalty Board has noted, “Because the statutes supplant the actual market, the CRB Judges must establish a ‘hypothetical market’ that satisfies the statutory standard. A critical element in that regard is the testimony of the parties’ economists, which consists of various forms of economic modeling.” Hon. David R. Strickler, *Identifying an “Effectively Competitive” Market: The Work of the Copyright Royalty Board*, 48 COLUM. J.L. & ARTS 546, 547 (2025). See also Natilie Linn, *Mechanical Licenses and the Willing Buyer/Willing Seller Standard: Establishing Royalty Rates in a Vacuum of Knowledge*, 40 CARDOZO ARTS & ENT. L.J. 313 (2022). Cf. Joseph Stiglitz, *How Models Get the Economy Wrong*, AM. PROSPECT (Apr. 3, 2023), <https://prospect.org/2023/04/03/2023-04-03-how-models-get-economy-wrong/> [<https://web.archive.org/web/20260227211501/https://prospect.org/2023/04/03/2023-04-03-how-models-get-economy-wrong/>] (on the problems posed by certain forms of economic modeling more generally).

371. RICKS ET AL., *supra* note 10, at 25, 34 (on setting rates according to input costs plus a fair rate of return).

work.<sup>372</sup> Typically, regulators set these rates with robust public input, which an expanded authority might attract from musicians and their allies in greater numbers.

Second, there is the problem of exceptions. Under current law, the CRB allows rates that deviate from its set rates, as long as the parties—i.e., the songwriter or publisher and licensor—mutually agree on them by contract.<sup>373</sup> This also undermines the logic of rate-setting, because in effect, it allows platforms to alter their payments to songwriters and publishers in exchange for kickbacks, promotional placement, or other adjustments. To prevent price discrimination more effectively, Congress should significantly curtail the exceptions that may be made to the CRB's set rates and instead establish a capacious rate-setting methodology that factors in many potential circumstances.

Third, there is the problem of capacity. A panel of only three judges, in an office that only includes four additional staff members, faces a tall order setting even one type of rate, let alone those for the up to six different licenses that might be needed in different (sometimes extraordinary) circumstances, each with their own potential tiers.<sup>374</sup> This is one reason it might be preferable to empower an entirely different and better-resourced authority to set these rates, such as the FCC. Whatever route it takes, Congress should appropriate funds sufficient to ensure that the authority they empower is fully resourced and equipped to consider a large volume of testimony on input costs and set fair rates accordingly. While the CRB may not have sufficient capacity as of this writing to regulate every necessary rate, it is important to note that a regime of rate regulation would be eminently administrable. Indeed, setting prices is a function that is already performed by private streaming platforms, with all the data, personnel, and resources they need to determine how much each rights holder should be paid according to their calculations. It is also done by record labels, where teams of employees determine how much artists on their rosters should be paid. The capacity required for a government body to set rates would certainly be no greater than that which is already possessed by these firms,

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372. *Id.*

373. 17 U.S.C. § 115(2)(a)(i) ("License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license . . . shall be given effect in lieu of any determination by the Copyright Royalty Judges.")

374. See Lichtman, *supra* note 229, at 580 n.14; Libr. of Cong., *supra* note 57, at 122 (on staffing numbers).

which exercise price-setting power over the music industry as it currently exists. In fact, in the absence of resource-intensive price discrimination, it might even require *less* capacity, all else being equal.

## 2. Nondiscrimination Rules

In lieu of or in addition to across-the-board rate regulation for music licensing, policymakers could implement a nondiscrimination rule for streaming platforms, mandating that they serve similarly situated rights holders, artists, and other users with reasonably equal prices and terms. Like rate regulation, nondiscrimination rules—variously known also as “neutrality mandates” or “equal access” rules—are another classic tool of public utility regulation, which have appeared in the regulatory systems governing many industries including railroads,<sup>375</sup> electricity,<sup>376</sup> insurance,<sup>377</sup> banking,<sup>378</sup> and, indeed, music licensing.<sup>379</sup> Rather than prohibiting price discrimination by setting *specific* rates, though, a nondiscrimination rule would prevent it *in general*.

Functionally, a nondiscrimination rule would require platforms to publicly post their pricing schedule for licenses. This would empower regulators, musicians, and the public to determine whether the rates are fair and nondiscriminatory. This was the model of regulation adopted by the Interstate Commerce Commission to govern railroads, infrastructure which facilitated America’s economic growth in the nineteenth century.<sup>380</sup> By requiring publicly posted pricing schedules of rates to carry goods, regulators were better equipped to prevent rail companies from engaging in particularized value extraction and thus reducing service quality.

Similar logic would apply by implementing similar rules in music streaming. Indeed, nondiscrimination rules already apply in some parts of the music industry relevant to streaming platforms, including the equal access rules to which ASCAP and BMI are subject under the terms of their consent

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375. RICKS ET AL., *supra* note 10, at 475–572.

376. *Id.* at 647–728.

377. See Daniel Schwarz, *Ending Public Utility Style Rate Regulation of Insurance*, 35 YALE J. ON REG. 941 (2018) (arguing against the utility regulation of insurance).

378. Menand & Ricks, *supra* note 352.

379. See *supra* Part I.A, B (on the nondiscrimination rules to which performance licenses are subject under the ASCAP and BMI consent decrees).

380. RICKS ET AL., *supra* note 10, at 497–532.

decrees.<sup>381</sup> They are also present in the scheme of compulsory licensing for mechanical rights in musical works, in the requirement that a right holder in a musical work must offer mechanical licenses to any third party on equal terms.<sup>382</sup> Applying these rules not only to the monopoly on a work's mechanical reproduction—in other words, the property right—created by copyright law, but to the oligopsony of streaming platforms that license works and recordings, would extend the logic policymakers applied in that instance to the music industry as it works today.

Like rate regulation, nondiscrimination rules could help solve several problems with music streaming platforms at once. They could eliminate incentives to discriminate between artists through platform placement, thus rendering the recommendation function less susceptible to a platform's profit motive. They could promote fair payment for recorded music, and thereby stimulate its production, by ensuring transparency and consistency in the rates artists can expect to receive. In doing so, they can make the property system governing music distribution more conducive to the public interest.

### 3. Structural Separations

To remedy the conflicts of interest associated with the common ownership of labels, publishers, and streaming platforms, Congress should consider applying structural separations between these distinct and interdependent lines of business. One way to address the problem of discriminatory treatment of musicians and rights holders in music streaming is to enact a nondiscrimination rule or neutrality mandate. But structural separations, by comparison, have the advantage of eliminating the ability to discriminate because of common ownership, instead of simply prohibiting the practice. This reduces the costs of enforcing a rule, because the activity the rule is designed to prevent has been structurally preempted.<sup>383</sup>

To remedy the conflicts of interest created by common ownership,<sup>384</sup> structural separations in the music streaming industry could take several forms. First, rights holders that do business with music streaming platforms could be

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381. See *supra* Part I.B.

382. *Id.*

383. See Khan, *supra* note 21, *passim* (on the administrative preferability of structural separations as compared to narrow behavioral rules).

384. See *supra* Part III.D.1.

prohibited from owning shares in streaming platforms. This would require major labels and publishers to divest any remaining ownership shares in streaming platforms.<sup>385</sup> Second, streaming platforms could be prohibited from doing business as record labels or music publishers. This would prohibit Spotify from directly commissioning music from producers, in which case it acted as a record label. To be sure, musical artists without label contracts or publishing deals would still be able to license their music to Spotify—but Spotify would be prohibited from contracting with those artists to receive cuts of royalties. For this reason, the structural separation would be highly integrated within the scheme of rate regulation proposed above.

A third type of structural separation could be implemented between the host and recommender functions of streaming platforms. This policy would be particularly useful in the absence of rate regulation or nondiscrimination rules to limit financial incentives in music recommendation, and it might even be desirable alongside those policies. Unbundling hosting and recommending would eliminate the conflict of interest between these roles and recognize these as fundamentally distinct lines of business. This is not to say that music recommendation could not exist as a functionality on a streaming interface. Rather, it would render the business of music recommendation as a standardized *protocol* that could work across many applications, rather than as a proprietary platform enterprise. This reflects one proposal made in reference to the content moderation functions of social networks.<sup>386</sup> Before the rise of online platforms, basic functions made possible by the internet such as email, instant messaging, and search consisted not of proprietary platforms (as they do today), but as sets of protocols established and maintained by voluntary associations of computer engineers and members of the public.<sup>387</sup> These

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385. It may be necessary to make an exception to this rule for cooperative streaming platforms. See *infra* Part IV.C. Under a musician-owned cooperative model, musicians as counterparties of the platform would necessarily be permitted to own shares in the platform; indeed, they would be the *only* owners. Cooperative exemptions have precedent in the law, including notably the Capper-Volstead Act, which exempted agricultural cooperatives from antitrust enforcement under certain strict conditions to act in the collective interest of their member-owners. Pub. L. 67-146, 42 Stat. 388-389 (1922); see also Sandeep Vaheesan & Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PENN. ST. L. REV. 1, 28-31 (2019).

386. See Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, KNIGHT FIRST AMENDMENT INST. (Aug. 21, 2019), <https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech> [<https://web.archive.org/web/20260106041447/https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech>].

387. *Id.*

protocols—which became industry standards—could then be applied to a variety of different applications.<sup>388</sup> Making music recommendation a protocol would mean that users could access recommendation of music available on various music streaming platforms, and the recommender function could exist on the same interface as that music. But by being built on metadata and algorithms constructed by associations of expert participants—including artists and music enthusiasts—a standardized algorithmic recommendation protocol could ensure that such recommendations are made, as far as possible, on aesthetic rather than commercial grounds.<sup>389</sup>

#### 4. Data Minimization and Interoperability Rules

Two other sorts of rules could be applied to music streaming platforms. First, policymakers should consider a rule to limit the amount and types of data that streaming platforms can collect on their users. Rules of this type are often called “data minimization” rules—that is, the firms subject to them would be required to minimize the data they collect on user behavior to only that which is necessary to offer the essential service they provide.<sup>390</sup> In the case of music streaming, a data minimization rule could include restrictions on the information about users they collect—including the various inferences made about them from their listening history. Crucially, the minimization principle could apply not only to users, but to material carried by the platform. In other words, the rule could require platforms to minimize the metadata tags assigned to music to only those needed to offer its essential service. Second, policymakers could mandate interoperability between platforms. Interoperability rules are common in platform industries wherein the interconnection of all users is important to the success of the service, such as in

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388. *Id.*

389. There may be reason to doubt the efficacy or desirability of *any* algorithmic recommendation mechanism based on linguistic metadata, because of the difficult relationship between music and language. For a discussion of this relationship through the analysis of musical phrases based on the work of linguist Noam Chomsky, who insists that languages share deep “syntactic structures” in common, see LEONARD BERNSTEIN, *THE UNANSWERED QUESTION: SIX TALKS AT HARVARD* (1976). Nonetheless, a well-built recommendation protocol might closely approximate this relationship and thus generate music recommendations that listeners find useful.

390. For examples, see Council Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1; Cal. Civ. Code §§ 1798.100–1798.199 (West 2018) (effective Jan. 1, 2020) (codifying the California Consumer Protection Act of 2018).

telephone networks.<sup>391</sup> In music streaming, playlists, for example, could be exchanged between users of different platforms, which is currently not possible except with the use of third parties and multiple subscriptions.<sup>392</sup> User data could be portable between platforms, reducing switching costs and thereby limiting the lock-in effects to which listeners are subject. This could facilitate greater competition between platforms for users between platforms by facilitating their easier exit and transfer to competing services. There are limitations worth noting here: It is not guaranteed—and in fact it may be unlikely—that additional competition between platforms alone would serve the overarching interests of artists and of the listening public. Platforms may compete for users, for example, by limiting the payouts they make to artists, or they could further accelerate their competitive strategies of creating “experiences” based on user data.<sup>393</sup> But such a rule would improve the listener experience by allowing for a greater degree of interconnection between platforms, thus making an interoperability rule worthwhile on consumer protection grounds, when supplemented with rate regulation to ensure fair artist payment and rules to limit data collection.

### 5. Regulation Through Antitrust Enforcement

Ideally, regulating music streaming as a public utility would be done by passing legislation through Congress. But antitrust enforcement also provides a promising avenue for setting up a public utility regime to govern music streaming.<sup>394</sup> Antitrust enforcers at the federal or state level or private individuals or firms could investigate and sue streaming platforms under the antitrust laws for their discriminatory payment and recommendation systems, as well as their common ownership with rights holders, which may harm competition in the music marketplace.<sup>395</sup> Should such lawsuits be successful,

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391. RICKSET AL., *supra* note 10, at 13 (on developing integrated systems as a goal of the laws governing platforms).

392. See, e.g., Chase Bernath, *How to Transfer Apple Music to Spotify*, SOUND GUYS (Apr. 8, 2025), <https://www.soundguys.com/how-to-transfer-apple-music-to-spotify-67647/> [<https://web.archive.org/web/20260105150811/https://www.soundguys.com/how-to-transfer-apple-music-to-spotify-67647/>].

393. See Hrac & Webster, *supra* note 31, at 253 (arguing that streaming platforms’ exploit user data to engineer “experiences” as a competitive strategy).

394. Cf. Ganesh Sitaraman, *The Public Utility Tradition in Antitrust Remedies*, EMORY L. REV. (forthcoming 2026) (on antitrust remedies as substitutes for NPU regulatory legislation).

395. See *supra* Part III.B, D.

streaming platforms could be governed by the remedies issued by courts in those cases, which could ban harmful business practices including price discrimination and the integration of streaming with recording and publishing. Indeed, antitrust enforcement has served as the vehicle for utility-style regulation in the music industry before—through the PROs’ consent decrees.<sup>396</sup> This is a model that could be replicated to govern music streaming platforms.<sup>397</sup> The Federal Trade Commission and various state attorneys general also possess the authority to define and prohibit unfair methods of competition (UMC) and unfair and deceptive acts and practices (UDAP), which could be useful avenues for regulating music streaming platforms.<sup>398</sup> Additionally, innovative litigators might bring suits against streaming platforms under the law of common carriers, which legal scholars and at least one Supreme Court justice have argued applies to digital platforms.<sup>399</sup>

## B. A VIRTUAL PUBLIC LIBRARY FOR RECORDED MUSIC

Historically, platform enterprises in the United States—along with enterprises of many kinds—were not only subject to public utility regulations, but also, frequently, to public ownership.<sup>400</sup> Public enterprises, including public options which coexist with private offerings, offer several benefits: They can guarantee the universal provision of essential services; they can offer goods and services affordably and pay workers fairly, unconstrained by the profit motive of private firms; and they can have a disciplining effect on private firms through

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396. See Jacob Noti-Victor and Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 Wash. U. L. Rev. 1 (2023).

397. Importantly, an antitrust consent decree regime for music streaming might suffer from the same problem as the one for PROs: that they apply to specific firms, rather than to an entire class of firms defined by a particular economic activity. See *supra* Part I.A, B.

398. See, e.g., 15 U.S.C. § 45; N.Y. Gen. Bus. Law art. 22-A § 349 (banning deceptive acts and practices).

399. See Sitaraman and Ricks, *supra* note 352; Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1224 (2021) (mem.) (Thomas, J., concurring). For one example of such a lawsuit, filed by the Attorney General of Ohio, see Complaint for Declaratory Judgment and Injunctive Relief at 3, 5, 11, *State ex rel. Yost v. Google LLC*, No. 21-CV-H-06-0274, 2021 WL 2333652 (Ohio C.P. Del. Cnty. June 8, 2021). The Ohio case is currently pending on appeal. See Press Release, Ohio Att’y Gen., AG Yost Appeals Ruling in Google Common Carrier Case (Aug. 29, 2025) <https://www.ohioattorneygeneral.gov/Media/News-Releases/August-2025/AG-Yost-Appeals-Ruling-in-Google-Common-Carrier-Ca>. [<https://web.archive.org/web/20260227212318/https://www.ohioattorneygeneral.gov/Media/News-Releases/August-2025/AG-Yost-Appeals-Ruling-in-Google-Common-Carrier-Ca>]

400. Such industries include healthcare (in the form of Medicare and Medicaid), education (in the form of public schools and universities), consumer credit (in the form of public options for housing and education finance), electricity (in the form of municipally or federally owned power facilities), and mail (in the form of the postal service). See, e.g., GANESH SITARAMAN & ANNE ALSTOTT, *THE PUBLIC OPTION 1* (2019).

competition on price and quality.<sup>401</sup> They are also capable of addressing the problems posed by unregulated platform industries, including price discrimination and harms to innovation and dynamism.

Indeed, though many modern observers think of cultural production as a private sector enterprise,<sup>402</sup> the American music industry has a long tradition of public options. In the 1930s, the Federal Music Project of the Works Progress Administration directly employed over 13,000 musicians, who gave concerts, organized orchestras and jazz groups, served as music teachers for the young, and produced field recordings of traditional American music.<sup>403</sup> In the 1960s, the Johnson Administration founded the National Endowments for the Arts and Humanities, which offer public grants to musicians as well as to writers and visual artists.<sup>404</sup> The government even owns a record label: In 1987, the Smithsonian Institution acquired Folkways, the label founded in 1948 that contributed to the popularization of American folk music in the mid-twentieth century.<sup>405</sup> And in a tradition dating back to the Founding Era, when music was distributed primarily through the medium of printed sheet music, the United States Postal Service continues to emphasize the importance of distributing this media through the mail by offering discounted rates, which also apply to records, CDs, and other forms of musical media.<sup>406</sup>

Over the long term, the most effective way to address the problems of music's platformization may be to reinvigorate this tradition and build a public option music streaming service. Such a service—in other words, a virtual

401. *Id.*

402. See Tyler Cowen, *The Arts in a Free Market Economy*, FOUND. FOR ECON. FREEDOM (Dec. 1, 1995), <https://fee.org/articles/the-arts-in-a-free-market-economy/> [<https://web.archive.org/web/20260105192209/https://fee.org/articles/the-arts-in-a-free-market-economy/>] for one normative defense of art as a private, capitalistic enterprise.

403. Sharon Musher, *The New Deal and the Arts*, OXFORD RSCH. ENCYCLOPEDIA OF AM. HISTORY 4 (2022), <https://doi.org/10.1093/acrefore/9780199329175.013.81> [<https://web.archive.org/web/20240711092112/https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-81>].

404. See, e.g., MARK BAUERLEIN & ELLEN GRANTHAM, EDs., *THE NATIONAL ENDOWMENT FOR THE ARTS: A HISTORY, 1965–2008*, at 1, 21 (2009).

405. *About Us: Mission and History*, SMITHSONIAN FOLKWAYS RECORDINGS, <https://folkways.si.edu/mission-and-history> [<https://web.archive.org/web/20260105195716/https://folkways.si.edu/mission-and-history>] (last visited Jan. 5, 2026).

406. *What Is Media Mail?*, U.S. POSTAL SERV., <https://faq.usps.com/s/article/What-is-Media-Mail-Book-Rate> [<https://perma.cc/N4XG-P28E>] (last visited Jan. 12, 2026). See generally RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* (1998) for more on the early history and democratic function of the postal service, though without specific mention of music.

public library of recorded music—could compete with private offerings, including Spotify, Apple Music, and Amazon Music, offering recorded music to the public and compensating artists on fair terms. Done right, this service might come to be considered a preferable offering by musicians and the listening public, allowing for the public governance of music's streaming economy.

Indeed, public option streaming has already been piloted at local libraries in cities ranging from Austin, Pittsburgh, and Chapel Hill to Salt Lake City.<sup>407</sup> These are mostly small-scale initiatives, often with fifty or so albums chosen by curators from the local music scene.<sup>408</sup> But they offer a microcosmic view of what a fully-fledged public option streaming service might look like. They take in music via applications with metadata provided by the artists themselves, which typically only includes basic identifiers like names and song lengths.<sup>409</sup> Some services contract with outside technologists to build their interface, including those like MusiCAT that have developed platform interfaces specifically for streaming services at local libraries.<sup>410</sup> Others feel strongly about keeping their operations in-house, even down to the data servers on which files are stored.<sup>411</sup> Regardless of the particulars, each of them is committed to maintaining a library of recorded music for the public to access and that benefits musicians.

The ideal agency to host such a service at the federal level would be the Library of Congress ("LOC"). Indeed, the raw materials for building a public option streaming service at the LOC are already in place. As the parent entity of the U.S. Copyright Office, it is the designated receiver of copyrighted musical works and recordings.<sup>412</sup> This means that any individual or entity registering a copyright in a musical work or recording must furnish the LOC with a copy of that work or recording,<sup>413</sup> which are in turn made available to the Library's

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407. PELLY, *supra* note 13, at 224.

408. *Id.*

409. See MONEY ON THE LEFT, *supra* note 38.

410. *Id.*

411. PELLY, *supra* note 13, at 225 ("According to Eli Neiburger, the [Ann Arbor] library's deputy director, building the library's own streaming and mp3 downloads infrastructure directly into its website has been an important decision. A lot of the musical material . . . is stored in the library's own data center, in its basement.").

412. 37 C.F.R. § 202.20 (2025) (requiring deposit copies for copyright registration); U.S. COPYRIGHT OFF., CIRCULAR 56, *supra* note 37.

413. 37 C.F.R. § 202.20 (2025); U.S. COPYRIGHT OFF., CIRCULAR 56, *supra* note 37.

users: members of Congress and registered researchers. Should the Library expand access to those materials through a user interface accessible to the public, it could create a competitive streaming platform without the need to engage in negotiations with each individual rights holder.

Compensation for rights holders could, by default, operate on similar terms as they would on private streaming platforms following the model of rate regulation outlined above. But one advantage of the public option as opposed to reforms within the copyright system alone would be its ability to pioneer new models of artist payment beyond copyright royalties, including those that do not rely on the number of individual streams a track receives. Copyright treats music like widgets: It bases compensation for musicians on the quantity of individual units they produce which listeners consume, rather than the value of artists' labor in creating music as a public good.<sup>414</sup> A public streaming service could explore alternatives to this system. These alternative payment models could resemble programs of guaranteed basic income for musicians, as is currently offered by the government of Ireland.<sup>415</sup> Indeed, this is not dissimilar from the program of direct employment hosted by the New Deal's jobs programs for musicians, which compensated musicians for a wide variety of musical jobs, including as teachers and performers, in addition to recording artists and composers.<sup>416</sup> This could enable America's music industry to be more heterogeneous than is possible under the existing pro-rata royalty system of private platforms, given that a variety of artistic practices not grounded solely in the number of individual units produced could be funded and thereby encouraged.

Whatever the compensation structure, three considerations are especially important for the success of a public library for recorded music. First is offering a highly effective and engaging user interface. Part of the attraction of private

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414. The author thanks Professor Rohan Grey for this formulation.

415. Ashley King, *Irish Government Pays Artists & Musicians \$330 "Basic Income" Allowance*, DIGIT. MUSIC NEWS (Sep. 12, 2022), <https://www.digitalmusicnews.com/2022/09/12/irish-government-basic-income-artists-musicians/> [<https://web.archive.org/web/20260105210224/https://www.digitalmusicnews.com/2022/09/12/irish-government-basic-income-artists-musicians/>]; cf. Dean Baker, *The Artistic Freedom Voucher: An Internet Age Alternative to Copyrights*, CTR. FOR ECON. POLY & RSCH. (Nov. 15, 2003) [https://cepr.net/documents/publications/ip\\_2003\\_11.pdf](https://cepr.net/documents/publications/ip_2003_11.pdf) [[https://web.archive.org/web/20260105210514/https://cepr.net/documents/publications/ip\\_2003\\_11.pdf](https://web.archive.org/web/20260105210514/https://cepr.net/documents/publications/ip_2003_11.pdf)] (proposing a guaranteed income for artists through the tax system as an alternative to remuneration via the copyright system).

416. See MUSHER, *supra* note 39, at 1–2.

streaming platforms for users are their excellent graphic design, user-friendly navigation, and ease of use, despite their harmful business practices. To compete with private platforms and offer users good service, the online public library for music should offer an interface that at least meets, and ideally exceeds, the standard set by private offerings.

Second is the importance of staffing the streaming service with sufficient personnel, both at the stage of its creation and for its maintenance and improvement over time. These personnel would include engineers, lawyers, and people with expertise in many different musical traditions and practices. One way to do this, at least for technical staff, would be to hire personnel from the private sector, including the streaming platforms with which the public option would compete. This can be done through a process known as “Schedule A” hiring authority, as was utilized by the U.S. Digital Service in the Obama Administration to hire technologists to improve the federal government’s digital capacity.<sup>417</sup> There are important caveats worth noting here, including that recent actions by the Trump Administration have reduced state capacity and have significantly eroded the security and prestige of government jobs.<sup>418</sup> These problems can only be repaired with concerted effort and determination in future administrations, including through the mass re-hiring of personnel and the strengthening of public sector unions.

A third, and perhaps most important, consideration for making public option streaming work is securing the buy-in of the musicians whom the platform is intended to serve. Primarily, this will require ensuring that the platform compensates musicians on terms that are better and fairer than those currently offered by private streaming firms, including, potentially, by piloting the new models of remuneration outlined above. It will require that the platform runs as a neutral host to the extent possible, with any recommendation functions fulfilled by an independent protocol, to avoid the appearance of political influence on musical curation. It will also require a

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417. See *Hiring FAQ*, U.S. DIGIT. SERV., <https://www.usds.gov/faq> [<https://web.archive.org/web/20260105214334/https://www.usds.gov/faq>] (last visited Jan. 5, 2026).

418. See, e.g., Makena Kelly, *DOGE Has Started Gutting a Key U.S. Technology Agency*, WIRED (Feb. 12, 2025), <https://www.wired.com/story/doge-tts-fired/> [<https://web.archive.org/web/20260201193543/https://www.wired.com/story/doge-tts-fired/>]; Benjamin Wallace-Wells, *What Did Elon Musk Accomplish at DOGE?*, NEW YORKER (June 16, 2025), <https://www.newyorker.com/magazine/2025/06/23/what-did-elon-musk-accomplish-at-doge> [<https://web.archive.org/web/20251113051241/https://www.newyorker.com/magazine/2025/06/23/what-did-elon-musk-accomplish-at-doge>].

prodigious public engagement operation, which can interface with musicians and increase the salience of the service among the public. Above all, it must offer a genuine alternative for musicians to existing offerings, one that is thereby useful to the development of American musical culture.

### C. ESTABLISHING COOPERATIVE GOVERNANCE

The problems of music's platformization may also be addressed by establishing cooperative streaming platforms. As defined by the International Cooperative Alliance, cooperatives refer to "autonomous association[s] of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise."<sup>419</sup> Tracing their roots to the founding of the Rochdale Society of Equitable Pioneers in Rochdale, England in 1844,<sup>420</sup> self-identified modern cooperatives are governed according to seven principles: open and voluntary membership; democratic member control; members' economic participation; autonomy and independence; education, training, and information; cooperation among cooperatives; and concern for community.<sup>421</sup> Functionally, they indicate models of governance wherein a firm's owners—typically called owner-members—are that firm's consumers or workers, rather than independent shareholders. Models of cooperative governance have been adopted in a variety of industries throughout history, including electricity,<sup>422</sup>

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419. *Cooperative Identity, Values, & Principles*, INT'L COOP. ALL., <https://ica.coop/en/whats-co-op/co-operative-identity-values-principles> [https://web.archive.org/web/20260105221258/https://ica.coop/en/whats-co-op/co-operative-identity-values-principles] (last visited Jan. 5, 2026).

420. *Understanding the Seven Cooperative Principles*, NAT'L RURAL ELEC. COOP. ASS'N (Dec. 1, 2016), <https://www.electric.coop/seven-cooperative-principles%E2%80%8B> [https://web.archive.org/web/20260105221529/https://www.electric.coop/seven-cooperative-principles%E2%80%8B].

421. INT'L COOP. ALL., *supra* note 419.

422. SANDEEP VAHEESAN, *DEMOCRACY IN POWER: A HISTORY OF ELECTRIFICATION IN THE UNITED STATES* 5 (2025).

agriculture,<sup>423</sup> insurance,<sup>424</sup> law,<sup>425</sup> groceries,<sup>426</sup> and consumer retail.<sup>427</sup> Cooperative governance serves similar ends as utility regulation and public options because it can allow platforms to operate at scale while simultaneously preventing the structural exploitation of their consumers and/or workers by making them the platform's owners.<sup>428</sup> In other words, cooperative governance can check platforms' monopoly power.<sup>429</sup>

Indeed, collectives of musicians have already established cooperative streaming platforms, albeit at small scale. One such enterprise, Catalytic Soundstream, offers a subscription service that commits to a fifty-fifty split of profits between the musicians and the platform, with the musicians' share being split equally between their member-owners.<sup>430</sup> Another, Resonate, offers a "pay-as-you-play" model, wherein payment is collected from users per stream until the user owns a copy of the recording, which they can thereafter stream for free.<sup>431</sup> While these organizations offer the music of at most a couple thousand owner-members and are not known by many music listeners,<sup>432</sup> they offer a vision of what a healthy and fair system of commerce to support music-making could look like. They also invite consideration of how streaming co-ops could grow as a broader response to music's platformization.

A music streaming co-op would ideally take the form of a worker-owned, rather than consumer-owned, co-op. By making the musicians whose music it carries the primary governors of the enterprise, the co-op could ensure that it

423. Vaheesan & Schneider, *supra* note 385 (on antitrust exemptions for agricultural cooperatives).

424. Peter Molk, *The Puzzling Absence of Co-operatives*, 88 TUL. L. REV. 899, 956–957 (2014) (on the application of cooperative governance in health insurance).

425. MODEL RULES OF PRO. CONDUCT r. 5.4(d) (A.B.A. 1983) (prohibiting the non-lawyer ownership of law firms, functionally making law firms lawyer-owned cooperatives); *cf.* Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 2022 YALE L.J. FORUM 259 (arguing against proposals to allow nonlawyer ownership of law firms).

426. *See, e.g., Mission Statement*, PARK SLOPE FOOD COOP, <https://www.foodcoop.com/mission/> [<https://web.archive.org/web/20260105225812/https://www.foodcoop.com/mission/>] (last visited Jan. 5, 2026).

427. *See, e.g., Who We Are*, REI CO-OP, <https://www.rei.com/about-rei?msocid=3e8b7a20b5a369613cc06917b4cc68ec> [<https://web.archive.org/web/20260105230217/https://www.rei.com/about-rei?msocid=3e8b7a20b5a369613cc06917b4cc68ec>] (last visited Jan. 5, 2026).

428. *See* Narechania & Sitaraman, *supra* note 209, at 167–69.

429. Vaheesan & Schneider, *supra* note 385, at 1.

430. PELLY, *supra* note 13, at 217–223.

431. *Pricing*, RESONATE, <https://resonate.coop/pricing/> [<https://web.archive.org/web/20251203000655/https://resonate.coop/pricing/>] (last visited Jan. 5, 2026).

432. Catalytic has thirty musician-owners, while Resonate had 1,700 as of 2021. PELLY, *supra* note 13, at 219, 222. As of this writing, Resonate is on hiatus, and is not accepting new members. *Id.*, at 222.

works on behalf of musicians and the community they create. Listeners, in turn, could pay subscription fees or other forms of payment as decided by the musician member-owners, which would fairly compensate those musicians for their labor.

Establishing a successful cooperative streaming platform at scale would require the same elements as establishing a successful public option, including offering a useful interface, staffing technical personnel, and attracting the buy-in of musician-owners and listeners. Key to the cooperative model would be attracting music listeners away from existing corporate streaming platforms, whether through appeals to the benefit of the co-op for musicians and thereby for musical culture, or through competitive subscription prices, which might be possible given the absence of platform pricing power. Crucially, cooperative streaming platforms would have to contend with the network effects of the streaming model, which incentivizes carrying the music of as many artists as possible.<sup>433</sup> If network effects are unattainable, a successful co-op may require either interoperability with other platforms, or else a program of social education to encourage listening to music in the contexts presented by artists—such as album tracklists—rather than playlists of many different artists whose music is only available on separate platforms. Record labels may also be unlikely to license the music of their artist rosters to a co-op service, or they may prohibit their artists from becoming co-op member-owners. For this reason, a system of compulsory licensing for sound recordings, in addition to the system of rate regulation outlined above, could ensure that cooperative streaming platforms would be able to license their members' music, by prohibiting these restrictive terms.

### CONCLUSION

Though they have become the dominant distribution avenue for today's recorded music industry, music streaming services are not the only firms that act as platforms in the era of music's platformization. Record labels and the publishers with whom they are integrated also operate as platforms, connecting musicians to distribution outlets and vice versa. Ticketing and live events companies do as well, connecting musicians to live audience members and vice versa. Each of these firms, which possess power inherent to their business

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433. See *supra* Part III.A.

models as economic middlemen, should be subject to the rules that have governed other enterprises of their type.

Problems in the commerce of music extend far beyond the dynamics that streaming has introduced, as would be expected of any commercial or property system governing something so intangible and yet culturally vital as art. But recognizing the ways that music platforms act similarly to other platform enterprises reveals powerful tools that policymakers have used to address those issues in other contexts. Going forward, these tools should be part of the conversation about how to govern the commerce of music for the benefit of musicians and the democratic public.

# The Sooner the Better? How to Optimize Bargaining Power When Serving Notice of Copyright Termination

Rachel R. Altomose\*

## INTRODUCTION

If artists like Billy Joel cannot successfully reap the benefits of copyright termination, then who can, and *how*?<sup>1</sup> Congress primarily enacted the termination right to give authors a “second bite at the apple”: the ability to terminate their disadvantageous deals after a specified number of years and re-exploit the value of their copyright when that value is better known.<sup>2</sup> Despite this noble goal, statutory termination is highly complex, and few artists—even icons like Billy Joel—succeed in availing themselves of its purported rewards.<sup>3</sup> Case law discussing the termination right is sparse, yet scholarship and critical commentary on termination is extensive, further indicating that sections

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1. See DYLAN GILBERT ET AL., MAKING SENSE OF THE TERMINATION RIGHT: HOW THE SYSTEM FAILS ARTISTS AND HOW TO FIX IT 23 (Pub. Knowledge 2019), <https://publicknowledge.org/wpcontent/uploads/2021/11/Making-Sense-of-the-Termination-Right-1.pdf> [<https://web.archive.org/web/20260129210002/https://publicknowledge.org/wp-content/uploads/2021/11/Making-Sense-of-the-Termination-Right-1.pdf>] (discussing Billy Joel’s struggle and ultimate failure in 2013 to terminate his 1978 grant of copyright); David Marchese, *In Conversation: Billy Joel*, VULTURE (July 2018), <http://www.vulture.com/2018/07/billy-joel-in-conversation.html> [<https://web.archive.org/web/20260125195855/https://www.vulture.com/2018/07/billy-joel-in-conversation.html>] (“[I]t’s one thing if you own your recordings. I don’t. There was a supposed to be a reversal of copyright back to me in 2013. Well, the record company dug in and got their battery of lawyers and we never got the stuff back. So I still don’t own my recordings. People wonder why there’ve been so many Billy Joel live albums and compilations. They’re not my idea. The record company owns all these recordings and can package them any way they want.”); 17 U.S.C. §§ 203, 304.

2. H.R. REP. NO. 94-1476 (1976); see David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y U.S.A. 387, 405 (2001).

3. See R. Anthony Reese, *Termination Formalities and Notice*, 96 B.U. L. REV. 895, 899–900 (2016) (discussing the difficulty of comprehending various complex termination requirements); see *infra* Part I.

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203 and 304 of the 1976 Copyright Act are ripe for reform.<sup>4</sup> However, given the underuse of the termination right, change has been relatively slow, and authors possess little guidance from Congress, the courts, or the Copyright Office on how to use the current system to their advantage.<sup>5</sup>

The termination process, as codified in sections 203 and 304, is replete with requirements and formalities, and while termination itself is a powerful tool, authors have little choice in how they wield it.<sup>6</sup> Serving notice of termination, which is required “not less than two or more than ten years” before the effective date of termination, and choosing an effective termination date are two of the limited termination decisions left to the discretion of the author.<sup>7</sup> In this Note, I will weigh the potential benefits and detriments of sending early notice of termination versus later notice of termination. Specifically, I will examine two statutory “exceptions” to termination—the “Right of First Refusal” Exception and the Derivative Works Exception—not only to determine how each exception influences when an author should send notice, but also to help authors navigate the practical consequences of each exception in the music, book, and film industries.

This Note begins, in Part I, with a brief overview of the termination right and the process of sending notice of termination. Part II will delve into the potential pros and cons of sending the notice of termination as early as possible, and which authors will benefit most from early notice. I will focus on the practical implications of the “Right of First Refusal” Exception, which allows authors to renegotiate a new grant of copyright with their original grantee (usually an author’s original publisher) immediately after serving notice of termination.<sup>8</sup> Part III, on the other hand, will enumerate the benefits of sending notice of termination as close to the effective termination date as possible. Specifically, this section will explore the Derivative Works Exception, which allows owners of a derivative work (again, usually an author’s publisher) to exploit and distribute their derivative works even after the copyright owner of the underlying work terminates the original grant.<sup>9</sup> I will discuss the real-world consequences of the many possible interpretations of this Exception, particularly for the music industry, and how these interpretations might influence certain authors or artists to serve later notice of termination. Finally, Part IV will examine how authors may balance the various considerations that arise under these exceptions to determine

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4. See GILBERT ET AL., *supra* note 1; Lionel Bently & Jane C. Ginsburg, “The Sole Right . . . Shall Return to the Authors”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1579 (2010).

5. Joshua Yuvaraj et al., *U.S. Copyright Termination Notices 1977–2020: Introducing New Datasets*, 19 J. EMPIRICAL LEGAL STUD. 250, 280 (2022) (“[Termination] laws have been subject to remarkably little use.”); see also Chase A. Brennick, Note, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?*, 93 N.Y.U. L. REV. 786 (2018).

6. See Reese, *supra* note 3; 17 U.S.C. §§ 203, 304.

7. 17 U.S.C. §§ 304(c)(4)(A), 203(a)(4)(A).

8. The “Right of First Refusal Exception” is codified in 17 U.S.C. §§ 203(b)(4), 304(c)(6)(D). If authors are interested in negotiating a new grant with a different publisher (i.e., not their original publisher), they must wait until *after* the effective date of termination (explained further in Part II).

9. The “Derivative Works Exception” is codified in 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

the optimal moment to terminate their grants of copyright. While I ultimately argue that earlier termination confers the most benefits on the greatest number of authors, I will note the rare exceptions to this rule and propose some best practices for these authors going forward.

## I. BACKGROUND: TERMINATION AND THE NOTICE REQUIREMENT

Copyright termination, as codified in sections 203 and 304 of the 1976 Copyright Act, is an inalienable right enacted to “safeguard[] authors against unremunerative transfers” of their copyrights “notwithstanding any agreement to the contrary.”<sup>10</sup> Despite Congress’s good intentions, the termination process is notoriously complicated, containing multiple formal requirements authors must satisfy in order to successfully terminate their grants.<sup>11</sup> This Part will provide a brief overview of these various requirements and their accompanying legislative history, with a specific focus on the requirement to send notice “not less than two or more than ten years” before the effective date of termination.<sup>12</sup> This Part will also discuss how serving notice at a particular time affects authors’ abilities to negotiate or regain their transferred rights.

### A. THE TERMINATION RIGHT

The 1909 Copyright Act allowed authors to regain and re-grant their copyright after twenty-eight years (the “renewal term”) when the value of the work was much clearer than at the time the author assigned the copyright to a grantee.<sup>13</sup> While the renewal provision technically gave authors a “second chance” to benefit from their work, authors were often forced to assign their renewal rights to their powerful publishers before the rights vested—eviscerating authors’ abilities to take advantage of their reverted rights once the twenty-eight-year term ended.<sup>14</sup> When crafting the 1976

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10. H.R. REP. NO. 94-1476, at 124 (1976); 17 U.S.C. §§ 203(a)(5), 304(c)(5).

11. See Reese, *supra* note 3, at 899 (“[T]he termination provisions offer an example of formal requirements remaining in U.S. law that seem so complicated as to unduly hinder exercise of the rights that they govern. The statutory provisions do not provide potential terminating parties with clear notice of how to exercise their termination rights.”); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKLEY TECH. L.J. 1175, 1241 (2010) (arguing that the termination provision “is so cumbersome and complicated that most authors will not realistically have a meaningful opportunity to terminate these transfers”); Jane C. Ginsburg, *Authors’ Transfer and License Contracts Under U.S. Copyright Law*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY LICENSING 132, 142 (Jacques de Werra ed., 2013) (discussing how “[t]he notice provisions of § 304(c) are not author-friendly”).

12. 17 U.S.C. §§ 304(c)(4)(A), 203(a)(4)(A).

13. H.R. REP. NO. 94-1476, at 133–34 (1976).

14. MARYBETH PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 chs. 6:1, 6:4 (1977) (discussing H.R. REP. NO. 94-1476 (1976)); see GILBERT ET AL., *supra* note 1, at 4 (“[I]t became common practice for publishers to require that authors sign away their renewal rights as part of their initial license contract. . . . This frustrated the ultimate policy goal of automatic rights reversion because, as a matter of practice, ‘to get their works commercially published, authors generally had no option but to assign their rights to both terms of protection.’” (citing Kate Darling, *Occupy Copyright: A Law & Economics Analysis of U.S. Author Termination Rights*, 63 BUFFALO L. REV. 147, 152 (2015))). The Supreme Court validated this practice in *Fred Fisher Music Co. v. M. Witmark & Sons*, where “Justice Frankfurter contended that authors need not be protected

Copyright Act, Congress discarded the twenty-eight-year renewal term and created an *inalienable* termination right with sections 203 and 304, which allow authors to terminate any “transfer of copyright ownership” or non-exclusive license after a certain period of time, as explained in greater detail below.<sup>15</sup> Section 203 applies to “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978,” while section 304—a “close but not exact counterpart” of section 203—generally applies to “any copyright subsisting in either its first or renewal term on January 1, 1978.”<sup>16</sup> To simplify, section 203 covers post-1978 grants, and section 304 covers pre-1978 grants.

While section 304 is far more robust and includes many additional components compared to section 203, both contain essentially identical provisions when it comes to serving notice, though with one notable difference: the opening of the notice window.<sup>17</sup> Both sections allow authors to effect termination within a five-year window.<sup>18</sup> However, under section 203, the window opens thirty-five years from the date of execution of the grant or, if the grant covers the right of publication, either “thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier” (the “Zone of Termination”).<sup>19</sup> Under section 304, on the other hand, the window generally

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against themselves, and that they could rationally choose to assign the renewal term for a small consideration before its vesting, rather than gamble on a greater return at the end of twenty-eight years.” Bently & Ginsburg, *supra* note 4, at 1586 (summarizing *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943)).

15. H.R. REP. NO. 94-1476, at 125 (1976); Dori Ann Hanswrith, *I’ll Be Back: Termination Rights Under Section 203 of the Copyright Act*, 2012 INTELL. PROP. MAG. 59. This Note mainly focuses on scholarship and case law surrounding section 203 terminations since they only began in 2013 and are rapidly increasing (while section 304 terminations are decreasing). However, I will still reference section 304 case law given the similarity of the section 304 and section 203 termination provisions.

16. 17 U.S.C. §§ 203(a), 304(c); H.R. REP. NO. 94-1476, at 140 (1976).

17. See H.R. REP. NO. 94-1476, at 124, 139 (1976). Section 304 generally covers the “Duration of Subsisting Copyrights,” while section 203 singularly covers “Termination of Transfers and Licenses.” In addition to termination provisions, section 304 discusses the future of copyrights that, at the time of the 1976 Act, are in their renewal term as prescribed under the 1909 Act. Therefore, there are some key differences between sections 203 and 304, but none beyond the notice window are relevant for the sake of this Note.

18. 17 U.S.C. §§ 203(a)(3), 304(c)(3). In other words, the statute provides authors with a five-year termination interval, and they can choose an effective termination date at any time within that interval.

19. 17 U.S.C. § 203(a)(3). The House Report provides two examples illustrating the notice period in practice:

Case 1: Contract for theatrical production signed on September 2, 1987. Termination of grant can be made to take effect between September 2, 2022 (35 years from execution) and September 1, 2027 (end of 5 year [sic] termination period). Assuming that the author decides to terminate on September 1, 2022 (the earliest possible date) the advance notice must be filed between September 1, 2012 and September 1, 2020.

Case 2: Contract for book publication executed on April 10, 1980; book finally published on August 23, 1987. Since contract covers the right of publication, the 5-year termination period would begin on April 10, 2020 (40 years from execution) rather than April 10, 2015 (35 years from execution) or August 23, [2022] (35 years from publication). Assuming that the author decides to make the termination effective on January 1, [2024], the advance notice would have to be served between January 1, [2014], and January 1, [2022]. H.R. REP. NO. 94-1476, at 126 (1976).

opens fifty-six years from the date copyright was originally secured, or on January 1, 1978—whichever is later.<sup>20</sup>

Even when the window opens, termination is not automatic. The statute requires advanced notice in the form of a letter from the author, served no less than two and no more than ten years before the effective date of termination.<sup>21</sup> Accordingly, if dealing with a grant executed after January 1, 1978 (subject to section 203) that does not cover the right of publication, the earliest date an author can serve notice of termination is twenty-five years after execution of the grant, and the latest date an author can serve notice is thirty-eight years after execution of the grant.<sup>22</sup> The author must not only calculate an effective date of termination that falls within the termination window—a process that is easier said than done—but the author’s notice must also comply with a number of formalities, including service of notice on the grantee or the grantee’s successor-in-interest and recordation of the notice with the Copyright Office.<sup>23</sup> Failure to observe the requisite formalities may ultimately render the notice invalid or result in extensive litigation to determine whether the author still possesses a right to terminate her copyright.<sup>24</sup>

## B. NOTICE: “NOT LESS THAN TWO OR MORE THAN TEN YEARS”

The two-to-ten-year stretch before the Zone of Termination is thus a critical period for authors interested in terminating their works. If the author does not send notice of termination within this timeframe, the author automatically loses the right to terminate (though the author may still terminate the agreement with the consent of the

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Note that the original House Report incorrectly used the years 2222, 2224, and 2214 in its example (e.g., thirty-five years after 1987 is 2022, not 2222). Congress corrected these errors via the Congressional Record in the section entitled, *Correction of Errors in Printed House Report on S.22. 122 CONG. REC. 31,676–77 (1976)* (amending the aforementioned years to 2022, 2024, and 2014, respectively).

20. 17 U.S.C. § 304(c)(3); *but see* 17 U.S.C. § 304(d)(2) (providing that where an author’s termination right expired before the effective date of the 1976 Act, and the author did not previously exercise a termination right under the 1909 Act, termination may be effected “at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured”); *see also* MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 11.06 (2025) (discussing exceptions to standard termination periods and “gap grants,” i.e., transfers made before January 1, 1978, for works created *after* that date).

21. 17 U.S.C. §§ 304(c)(4)(A), 203 (a)(4)(A).

22. NIMMER ON COPYRIGHT, *supra* note 20, at § 11.06 (also discussing the earliest and latest dates to send notice of termination for pre-1978 grants and post-1978 grants covering the right of publication); *see supra* note 19 for other examples.

23. *See* Reese, *supra* note 3, at 901–02 (discussing the ambiguities in calculating the effective date of termination).

24. *See* Nance v. Equinox Music, No. 09-cv-7808, 2010 U.S. Dist. LEXIS 113146 (N.D. Ill. Oct. 22, 2010) (emphasizing the importance of serving notice to the correct grantee); Mtume v. Sony Music Ent., 408 F. Supp. 3d 471, 474 (S.D.N.Y. 2019) (where musician Jason Mtume’s termination notices were challenged because he “failed to list the correct date of execution for the works as required by statute”); *see also* Joshua Yuvaraj, *An Empirical Study of Case Law Relating to 17 U.S.C. § 203*, 64 IDEA 678, 716–19 (2024) (further discussion of case law emphasizing statutory termination requirements).

original grantee).<sup>25</sup> Interestingly, the legislative history barely discusses this seemingly arbitrary selection of two-to-ten years for the notice period.<sup>26</sup> The Supplementary Report of the Register of Copyrights from 1965 does mention that the two-to-ten year period was meant to “establish a definite period for filing the notice toward the end of the 35- or 40-year term, thus avoiding earlier, indiscriminate terminations, and to provide a fair period of advance notice to the grantee that his rights are to be terminated.”<sup>27</sup> Therefore, it seems Congress calculated the notice period with the grantee rather than the author in mind. Additionally, while authors and grantees have litigated termination notices that fell outside of the two-to-ten-year period, the courts and Copyright Office have yet to debate how the timing of a termination *within* the notice period influences an author’s termination right.<sup>28</sup> As a result, authors possess limited instruction when deciding to send notice of termination.

Nimmer offers some guidance, emphasizing the importance of choosing an effective termination date within the five-year period that “permit[s] compliance” with the “ten-year maximum and two-year minimum” notice requirements.<sup>29</sup> He provides the following example:

Suppose . . . that termination may occur during the period of January 1, 2022, through January 1, 2027. If the actual date for termination as specified in the notice is January 1, 2026, then its notice must be served not later than January 1, 2024, two years before the specified termination date. A termination notice served thereafter, but prior to January 1, 2025, would be ineffective, even though it is served more than two years before the expiration of the five-year period.<sup>30</sup>

Beyond this general acknowledgement that an author’s choice of effective termination date ultimately dictates the notice window, it is still unclear whether providing notice ten years before effective termination will benefit the author in any way, or if waiting until the two-year mark is preferable.<sup>31</sup>

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25. See *Archie Comic Publ’ns, Inc. v. DeCarlo*, No. 00 Civ. 5686 (LAK), 2001 U.S. Dist. LEXIS 19692 (S.D.N.Y. Dec. 3, 2001) (holding that premature service of notice outside of the notice period is not permitted); see also Yuvaraj, *supra* note 24, at 716–18 (discussing the importance of complying with notice requirements). For an extended discussion of voluntary termination—where the author and grantee mutually decide to terminate an agreement—see *infra* Part II(A)(1).

26. See H.R. REP. NO. 94-1476 (1976).

27. SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 75 (H. Comm. Print 1965) [hereinafter “SUPPLEMENTARY REPORT”]. Note that the Report is specifically referring to section 203 given its reference to the “35- or 40-year term.”

28. See *Archie Comic Publ’ns*, 2001 U.S. Dist. LEXIS 19692, at \*11.

29. NIMMER ON COPYRIGHT, *supra* note 20, at § 11.06.

30. *Id.*

31. *Id.*; see Reese, *supra* note 3, at 902 (discussing the limited guidance offered to authors when terminating their copyright).

### C. HISTORY OF TERMINATION NOTICES AND THE IMPORTANCE OF TIMING

In a 2016 study of section 304 termination notices filed in the year 2000, scholars found that most terminations were filed by “heirs of single author songwriters . . . terminating grants made to music publishers as soon as they possibly can.”<sup>32</sup> In a recent 2022 study analyzing all termination notices served under section 203 or 304 from 1977–2020, the data showed how sound recordings made up less than 5 percent of copyright registrations, but more than 31 percent of total works subject to termination notices.<sup>33</sup> This statistic not only further indicates musicians’ (and their heirs’) recognition of the potential value of terminating sound recording rights, but also demonstrates why heirs of songwriters might have served notice as soon as possible—to promptly benefit from the potential profit of the termination.<sup>34</sup> The same 2022 study also notes that the American Guild of Authors and Composers (“AGAC”, now the Songwriters Guild of America) was largely responsible for the initial spike of termination notices immediately after section 304 came into effect.<sup>35</sup> AGAC filed 86 percent of termination notices within the “performing arts” category in 1978, suggesting that AGAC filed for termination on behalf of its various claimants the moment it became possible to do so.<sup>36</sup> However, the study also proposes that AGAC’s rationale had less to do with a specific strategy for the authors, and more to do with AGAC’s excitement to use section 304—especially since AGAC was a huge advocate for the creation of a termination right.<sup>37</sup>

While the 2022 study provides some rationale behind an author’s decision to serve notice at a certain time (usually as early as possible, at least within the music industry, to benefit as quickly as possible), the study does not address whether this strategy ultimately helped or hindered the authors’ ability to terminate or renegotiate their rights.<sup>38</sup> Although Congress created the notice period for the benefit of the grantee, providing more or less notice can significantly influence an author’s negotiating power depending on the author’s circumstances—e.g., what rights did the author reserve in the original grant?<sup>39</sup> Does the author want to remain with the original grantee? Does the author have concerns about her estate or the heirs to her copyright interests?

This Note argues that sending notice as soon as possible, and choosing the earliest effective termination date, is generally the best strategy, regardless of an author’s

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32. Yuvaraj et al., *supra* note 5, at 255 (citing David M. Given, *U.S. Copyright Termination: Remonetization’s Final Frontier*, 11 J. INTELL. PROP. L. & PRAC. 826 (2016)).

33. *Id.* at 270–71, 275 (finding that there was “little correlation between the proportion of registrations and termination notices”). This statistic indicates the relative longevity of the commercial value of musical compositions compared to other copyrighted works, as discussed in greater detail *infra* Part III(B)(ii).

34. *Id.* According to the study, musical compositions are the most popular type of work subject to termination under sections 203 or 304.

35. *Id.* at 274–75.

36. *Id.*

37. *Id.*

38. *Id.*

39. SUPPLEMENTARY REPORT, *supra* note 27, at 75 (discussing how the notice period was created with the grantee in mind).

current situation. However, this Note will also highlight the various detriments of early notice, as well as the specific instances where sending later notice of termination, thus providing the grantee with as little notice as possible, is beneficial. Specifically, I will address how two statutory exceptions present countervailing interests for authors: the Right of First Refusal, which encourages early notice of termination, and the Derivative Works Exception, which, as currently interpreted by the courts, encourages late notice of termination.

## II. THE RIGHT OF FIRST REFUSAL EXCEPTION AND BENEFITS OF EARLY NOTICE OF TERMINATION

### A. THE “RIGHT OF FIRST REFUSAL” EXCEPTION

In the House Report, Congress described section 203(b)(4) as “a right of ‘first refusal,’” as it gives the original grantee the chance to negotiate a new deal with the author or author’s heirs before any other third party.<sup>40</sup> While authors are prohibited from granting rights in their work to a new grantee until after the effective date of termination, sections 203(b)(4) and 304(c)(6)(d) of the Copyright Act allow authors or their heirs (under specific circumstances) to negotiate with the original grantee immediately after serving notice of termination.<sup>41</sup> Therefore, if an author is only interested in renegotiating with the original publisher or grantee, as opposed to reclaiming their rights, then an author can send notice to terminate and regrant their rights up to ten years before the effective date of termination.<sup>42</sup>

This is a very common practice in both the book and music publishing industries, as many authors are not looking to shop around their works to other publishers or receive substantially more money in the long run. Authors are usually more interested in an immediate lump-sum advance, or “refresher” advance, and a slight increase in

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40. 17 U.S.C. § 203(b)(4); H.R. REP. NO. 94-1476, at 127 (1976). While termed “a right of first refusal,” it is not technically a right of first refusal as the author is under no obligation to negotiate with the original grantee. See Brennick, *supra* note 5, at 819 (discussing the “Right of First Refusal” Exception).

41. 17 U.S.C. § 304(c)(6)(D) (“A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee’s successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.”); 17 U.S.C. § 203(b)(4) (“... as an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee’s successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a)”); H.R. REP. NO. 94-1476, at 127, 140 (1976).

42. See H.R. REP. NO. 94-1476, at 127 (1976). For example, if an author is terminating a grant subject to section 203 that does not cover the right of publication, and that author chooses an effective termination date exactly thirty-five years after the date of execution of the original grant, the author may begin negotiations with the original grantee just twenty-five years after the date of execution.

royalties.<sup>43</sup> Additionally, many authors recognize that they are inextricably bound to the original grantee post-termination, either through the grantee's continued exploitation of international rights (which, at least until recently, were not considered terminable under sections 203 or 304), contractual provisions outside of the terminated grant of copyright, or joint authorship with the original grantee.<sup>44</sup> Instead of bifurcating their U.S. and international rights by granting U.S. rights to a third party while international rights remain with the original grantee, authors are further incentivized to exploit the Right of First Refusal and remain with the original grantee.<sup>45</sup>

While the Right of First Refusal Exception eliminates authors' ability to exploit their rights themselves or grant rights to a new entity until the next termination period accrues, the Exception is often mutually beneficial for author and grantee. Grantees "lock in the [author's] property" without competition from third parties, and authors not only renegotiate rights and receive better terms up to ten years before the termination period begins, but also avoid angering the original grantee with termination, which could result in retaliatory behavior.<sup>46</sup> For example, if the original grantee retains international rights post-termination, "there is the risk that, if the author invokes section 203 without the intent to retransfer, the transferee could express its discontent by underexploiting the international rights, sabotaging the author in the marketplace."<sup>47</sup> All things considered, particularly when it comes to general convenience, it is not surprising that most authors remain with their original grantees and utilize the Exception.

### 1. Voluntary Termination and Superseding Agreements

While the "Right of First Refusal" provides a specific time period—from service of notice to the effective termination date—for authors and grantees to terminate and renegotiate their original agreement, it is important to note that the Exception does not limit the author's ability to terminate and renegotiate contracts at any time with the *consent* of the original grantee.<sup>48</sup> When describing section 203, Congress included certain language that it did not include when describing section 304: "Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any

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43. See Brennick, *supra* note 5; Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1352 (2010); Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists and Labels Over Album Copyrights*, BILLBOARD (Sep. 28, 2017), <https://www.billboard.com/articles/business/7981597/album-copyrights-master-recordings-1976-law> [<https://web.archive.org/web/20251017135730/https://www.billboard.com/pro/album-copyrights-master-recordings-1976-law/>] ("[L]abels much prefer to offer these acts higher royalty rates or rich advances in order to hold onto the rights.").

44. See Brennick, *supra* note 5, at 789, 804–15; see discussion *infra* Part II(B)(1).

45. See Brennick, *supra* note 5, at 808–14; see discussion *infra* Part II(B)(1).

46. Evynne Grover, *Copyright Act § 203 Termination of Transfers and Licenses: Could More Blockbusters Get Busted?*, 35 COMM'NS LAWYER 23, 28 (2020); see Brennick, *supra* note 5, at 819–20.

47. Brennick, *supra* note 5, at 819 (Additionally, the original grantee could "engag[e] in questionable accounting practices that diminish the amount of income that the author would receive from exploitations of the works.").

48. H.R. REP. NO. 94-1476, at 127 (1976).

time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running.”<sup>49</sup> While the legislature explained that section 304 is a “close counterpart” of section 203, Congress never clarified 1) whether section 304 prevents parties from terminating agreements at any time, or 2) if new agreements effectively restart the termination clock as explicitly stated in section 203.<sup>50</sup> However, *Penguin Grp., Inc. v. Steinbeck* resolved this question.<sup>51</sup>

*Penguin* centered around two agreements with Viking/Penguin Press for some of John Steinbeck’s most famous works.<sup>52</sup> Steinbeck and Viking executed the original agreement in 1938, and Steinbeck’s widow, Elaine, executed a subsequent agreement for continued publication in 1994.<sup>53</sup> The 1994 agreement explicitly superseded the previous agreement, as it addressed the publication of all works covered by the 1938 agreement and altered the economic terms of the 1938 agreement to Elaine’s benefit.<sup>54</sup> Elaine passed away in 2003, bequeathing her copyright interests to her children and grandchildren from a previous marriage—a move that intentionally excluded Thomas and John Steinbeck IV (Steinbeck’s sons from a previous marriage) from the proceeds of the 1994 agreement.<sup>55</sup> When Steinbeck’s sons attempted to file notice of termination for the original 1938 agreement, the court held that their termination notice was invalid since the 1994 agreement terminated and superseded the 1938 agreement, leaving in effect no pre-1978 grants subject to section 304(d) termination.<sup>56</sup> The *Penguin* court thus acknowledged the validity of the 1994 agreement and, accordingly, the ability to terminate original agreements with the parties’ mutual consent before the start of the termination period under section 304.<sup>57</sup>

## B. AUTHORS WHO BENEFIT FROM EARLY EXPLOITATION OF THE EXCEPTION

### 1. Authors Intending to Remain with the Original Grantee

If an author intends to remain with the original grantee, there are not only benefits to exploiting the Right of First Refusal but also exploiting it as early as possible. As previously mentioned, it has become standard practice for authors to regrant their

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49. *Id.*

50. *Id.* at 140. Given the lack of explicit language, there was uncertainty whether parties could still terminate agreements at any time prior to termination, and if new agreements (for the same work) executed prior to termination restarted the thirty-five-year termination period.

51. *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

52. *Id.* at 196.

53. *Id.*

54. *Id.* The 1994 agreement explicitly stated, “when signed by Author and Publisher, [it] will cancel and supersede the previous agreements, as amended, for the [works] covered hereunder.” *Id.* at 196. The agreement also increased royalties to 10-to-15 percent of retail sales (rather than wholesale sales) and provided a larger annual guaranteed advance. *Id.*

55. *Id.* at 197.

56. *Id.* Note that the 1994 agreement was not terminable since it was not made by an author, as required under section 203. Elaine thus succeeded in completely cutting out the other heirs. Discussed further *infra*, Part II(B)(2)–(C)(1).

57. *Id.*

rights to the original grantee for a myriad of reasons.<sup>58</sup> While authors can terminate the underlying grant of copyright, Chase Brennick's note, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?*, illustrates how difficult it is for an author to fully extricate herself from the original grantee.<sup>59</sup> Sections 203 and 304 seemingly only allow for termination of U.S. rights, so if an author's original grant permitted international distribution, the original grantee will still retain the foreign rights to the author's work after termination.<sup>60</sup> Additionally, authors usually grant promotional rights and rights of publicity (such as name, image, and likeness) to the original grantee.<sup>61</sup> Again, while the original grantee may no longer have the right to exploit an author's underlying work, it will still possess these other rights post-termination for the duration of the contract. This situation is exacerbated when a prolific author—one with multiple books or songs with the same publisher—terminates only a single book or song, while the original grantee still has the right to publish and distribute the author's other works.<sup>62</sup>

Therefore, there are clear advantages to regranting rights to the original grantee. Many logistical issues are solved, particularly since the author does not have to worry

58. See Brennick, *supra* note 5; Yuvaraj et al., *supra* note 5, at 280 (discussing how Stephen King filed termination notices for grants with Knopf and CBS Films, but Knopf then released a new paperback edition of his book, and CBS films released a new series adaptation post-the effective date of termination. This suggested that the termination notices “encouraged the publishers and film production company to negotiate new distribution agreements . . . enabling King to share more fully in the proceeds of *The Stand*.”).

59. Brennick, *supra* note 5, at 804, 819.

60. However, the Fifth Circuit recently affirmed the District Court for the Middle District of Louisiana's holding in *Vetter v. Resnik*: that statutory terminations of copyright grants, as well as terminations of contingent copyright renewal rights, apply worldwide and are not limited to domestic U.S. rights. No. 23-1369-SDD-EWD, 2024 U.S. Dist. LEXIS 122767 (M.D. La. July 12, 2024), *aff'd*, 163 F.4th 951 (5th Cir. 2026). While this affirmation suggests that authors may not need to worry about bifurcation of U.S. and foreign rights going forward, many legal scholars have already voiced their concern regarding the implications and significant consequences of the decision. See, e.g., Aaron Moss, *Fifth Circuit Expands Copyright Termination Beyond U.S. Borders*, COPYRIGHT LATELY (Jan. 12, 2026), <https://copyrightlately.com/vetter-resnik-fifth-circuit-ruling/> [<https://web.archive.org/web/20260223212333/https://copyrightlately.com/vetter-resnik-fifth-circuit-ruling/>] (explaining how the Fifth Circuit “leav[es] intact a holding” that 1) “threatens to destabilize international expectations for authors, rightsholders, and anyone dealing in cross-border copyright exploitation,” and 2) is “built on a misreading of statutory text, a misapplication of the Supreme Court’s opinion in *Kirtsaeng v. John Wiley & Sons*, and a fundamental disregard for how international copyright actually works”); see, e.g., Joshua Love et al., *Termination Beyond U.S. Borders? What Vetter v. Resnik Means for Authors and Rightsholders*, REED SMITH (Jan. 26, 2026), <https://www.reedsmith.com/articles/termination-beyond-us-borders-what-vetter-v-resnik-means-for-authors-and-rightsholders/> [<https://web.archive.org/web/20260223195021/https://www.reedsmith.com/articles/termination-beyond-us-borders-what-vetter-v-resnik-means-for-authors-and-rightsholders/>] (“The decision is likely to prompt a wave of U.S. litigation testing (i) whether *Vetter* was correctly decided, and (ii) if so, how far its reasoning extends beyond the Fifth Circuit.”). Therefore, it is questionable what *Vetter*'s relevance and influence will look like, and whether other U.S. courts will adopt the Fifth Circuit's rationale in future termination decisions.

61. Brennick, *see supra* note 5, at 813–14 (“In the early- to mid-2000s, record labels began making ‘360-degree deals,’ which entitle record labels to a percentage of the author’s income from all entertainment activities, including touring, merchandise, fan clubs, acting, and promotional activities.”).

62. *Id.* at 820.

about bifurcating the U.S. and international rights to their work or dealing with potential competition between multiple grantees.<sup>63</sup> Additionally, the Right of First Refusal effectively increases the amount of time an author can push for a new advance or better marketing from the original grantee. For example, if the work in question is a major bestseller for a book publisher, the publisher likely wants to retain rights to the work. Therefore, an author can request that, during the period between notice and effective termination, the publisher implement or propose new marketing strategies to demonstrate its commitment to the author and the title.<sup>64</sup> The author is unable to grant rights to a new party or exploit the rights herself during this exclusive period anyway, so to best exploit the benefits of the Right of First Refusal, the author might as well serve notice as early as possible to extend the period of renegotiation.<sup>65</sup>

Authors must realize, though, that the Right of First Refusal Exception ultimately prohibits the author from exploiting rights on her own or transferring rights to another publisher or third party.<sup>66</sup> While authors may receive increases in royalty percentages and a refresher advance, particularly if the work is valuable, the Exception essentially preserves the status quo.<sup>67</sup> However, as previously discussed, the practice of re-granting rights to the original grantee is relatively ubiquitous, and the pros of keeping all rights for a work in one place likely outweigh the cons (namely, losing the potential for complete creative control of your work post-termination).<sup>68</sup>

## 2. Authors of Multiple Works

If an author has written or created only one work, the incentive to terminate will differ from an author with an extensive catalogue of works. When an author publishes a series of books or many works with a single publisher, the value of each individual work becomes tied to the value of the catalogue as a whole—especially if all of the works center around a particular character, and there is a film series surrounding that character (such as Harry Potter).<sup>69</sup> Consequently, grantees prefer to retain the rights to

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63. *Id.* at 819.

64. I observed this successful strategy on numerous occasions working as an agent at a boutique literary agency—particularly with author estates. *See also* Ed Christman, *Reversion Rights: Will 2013 Be a Game-Changer?*, BILLBOARD (Dec. 27, 2012), <https://perma.cc/DN9E-9JF5> (discussing various ways publishers “sweeten the pot” to retain authors whose works are up for termination).

65. 17 U.S.C. §§ 304(c)(6)(D), 203(b)(4). Once an author receives an offer from the original grantee during the exclusivity period, the author also receives vital valuation information she can use if she ultimately decides to effect termination with the original grantee/shop the work around to other entities.

66. 17 U.S.C. §§ 304(c)(6)(D), 203(b)(4); *see* Brennick, *supra* note 5.

67. *See* Brennick, *supra* note 5, at 789.

68. *Id.* at 819–21.

69. Additionally, characters themselves can be copyrightable depending on certain criteria, and grantees will likely want to hold on to an initial book or film that develops critical character traits for a main character who appears in other books/films in a series. *See* *Klinger v. Conan Doyle Est.*, 755 F.3d 496 (7th Cir. 2014); *see* *Anderson v. Stallone*, 11 U.S.P.Q. 2d 1161 (C.D. Cal. 1989); *see infra* Part III(B)(3) (discussing how termination of an initial work impacts sequels and series in the film industry).

all the works rather than one-off books within the series or catalogue, since they would rather deal with the author's works holistically.<sup>70</sup>

As a result, when an author with many works—published over many years—decides to terminate the first of those works to reach the Zone of Termination, publishers are not only concerned about the work that is up for termination, but the other works that will reach their respective termination periods over the next few years.<sup>71</sup> Losing one work could significantly influence the value of the remaining works, which often incentivizes publishers to not only exploit the Right of First Refusal for the work that is up for termination, but to also use it as an opportunity to terminate the remaining agreements for the author's subsequent works—including those that will not reach their termination periods for several years.<sup>72</sup> Therefore, a publisher will not just renegotiate a new deal for the book up for termination but offer a much larger deal encompassing, and reflecting the joint value of, the entirety of the author's catalogue. Unlike initial contracts, publishers are also more willing to limit the duration of these new contracts (i.e., no longer the full term of copyright), so authors can renegotiate a new advance and royalties much sooner than termination would typically allow.<sup>73</sup>

Authors with several books must keep this practice in mind when they decide to terminate their works, especially if they do not intend to take their books elsewhere and prefer to remain at their original publisher. The Right of First Refusal Exception permits authors to renegotiate a new deal for one title up to ten years before the effective date of termination, and it also allows authors to renegotiate deals for all their titles decades before they reach their respective Zones of Termination.<sup>74</sup> Authors can thus receive a much larger advance and royalties, as they are negotiating many valuable titles at once. Additionally, if an author has written ten books and the original grantee possesses rights to only six of those books post-termination, the publisher's willingness to invest in those six books may decrease, as their marketing efforts for the author could, in effect, benefit the other publishing house that receives rights to the remaining

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70. In-house counsel at a leading book publisher confirmed that it is “common for imprints [i.e., the small subsidiaries that make up a larger publishing house] to negotiate a new backlist deal holistically rather than process terminations piecemeal.” In my own experience as a literary agent, I saw this type of negotiation often—particularly when some of our author's books with the original grantee would not reach their termination window for five-to-ten more years.

71. While this Note mainly discusses this situation in the context of the book industry, it is as—if not more—relevant to the music industry where “industry contracts are relatively long-term (often covering five to six albums),” and “the first album may be eligible for termination,” but “the subsequent four remain under the original transferee's control.” Brennick, *supra* note 5, at 820 (citing DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 68, 104–05 (8th ed. 2013)).

72. *Id.*

73. See also Christman, *supra* note 64 (quoting a record label executive, who describes how the label can offer attractive benefits to musicians who are willing to renegotiate: “We can offer a higher royalty rate for the expiring copyright, and we can sweeten the pot by offering to pay a higher royalty rate for albums that have not yet hit the 35-year point, and we can offer a higher royalty rate on records outside the U.S.”).

74. Again, authors and publishers may terminate and renegotiate agreements at any time before the termination window opens. However, it is unlikely publishers will be willing to do so unless there are extenuating circumstances, or the first of the author's books is in the termination window.

four titles—especially if those four titles are the most valuable.<sup>75</sup> Again, authors would thus benefit from keeping all of their work in one place and using the Right of First Refusal to reap those benefits as soon as possible.

However, authors must keep in mind that entering into new agreements for works that have yet to reach the Zone of Termination could either restart the termination period or, if the new grant is made by the author's heir, eliminate the termination right entirely.<sup>76</sup> *Steinbeck* and similar cases, including *Baldwin v. EMI Feist Catalog, Inc.*, *Milne v. Stephen Slesinger, Inc.*, *Classic Media, Inc. v. Mewborn*, and *Brumley v. Albert E. Brumley & Sons, Inc.*, address the implications of superseding agreements—one being that, if the author signs a new agreement that 1) contains express language specifying its superiority over a prior agreement or 2) grants the same rights as a prior contract with new financial benefits to the author or heirs, the termination period restarts from the date of the new agreement.<sup>77</sup> Therefore, if only one work is up for termination but the publisher's offer under the Right of First Refusal Exception covers the remaining books in an author's catalogue, the author will ultimately extend the termination deadline for all titles in the deal. If the author intends to stay with the publisher indefinitely and receive a large payment upfront, this is less of a concern. However, if the author is interested in eventually terminating her relationship with the original grantee, she may inadvertently extend it.

Additionally, section 203 specifies that “the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, *executed by the author* on or after January 1, 1978, otherwise than by will, is subject to termination.”<sup>78</sup> Therefore, only section 203 grants *made by the author* are terminable, so heirs who “regrant rights in lieu of termination thereby lose their statutory termination rights.”<sup>79</sup> In order to avoid situations like *Steinbeck* where Elaine's superseding agreement essentially divested Steinbeck's sons of their termination rights (though not for reasons related to section 203), heirs who terminate and renegotiate agreements must do so carefully.<sup>80</sup>

### 3. Authors of Works That Decrease in Value Over Time

Scholars have suggested that the time between initial transfer of rights and termination is too long, and research on the frequency and type of typically filed terminations indicates that few text-based works have enough enduring value for

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75. See Brennick, *supra* note 5 (discussing the same practice within the music industry).

76. See *infra* notes 78–80 and accompanying discussion.

77. Bently & Ginsburg, *supra* note 4, at 1585–86 (describing this practice as the “recission-and-rollover technique”); *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18 (2d Cir. 2015); *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008); *Brumley v. Albert E. Brumley & Sons, Inc.*, 822 F.3d 926 (6th Cir. 2016). The cases discuss the various instances where an agreement will “supersede” a prior agreement versus when an agreement is “an agreement to the contrary” that does not supersede the original/restart the termination clock.

78. 17 U.S.C. § 203(a) (emphasis added).

79. Bently & Ginsburg, *supra* note 4, at 1585.

80. *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

authors and heirs to even pursue recovering their rights in the first place.<sup>81</sup> In Yuvaraj's 2022 study assessing termination notices from 1977–2020, data suggested that books subject to termination notices accounted for only 0.03% of corresponding copyright registrations.<sup>82</sup> In other words, despite the millions of books registered in that time period, only 0.03% (about 750 books) were subject to section 203 termination notices.<sup>83</sup> While the study partially attributed this low figure to informal or contractual reversion of rights outside of the official copyright termination process, the study's authors also inferred that "most books have little value to authors and estates 35 years after the rights are granted," and that termination laws, as they currently exist, disproportionately benefit a "handful of the most commercially successful writers."<sup>84</sup> New books are typically most profitable in the first year of sale, and, given the benefits conferred upon authors of multiple works, it is somewhat predictable that termination provisions are far more useful for authors of bestselling series.<sup>85</sup>

Unless Congress or the courts reform the current statute, authors—particularly authors of works that decrease in value over time (like books)—should send notice as soon as possible to best capitalize on the value of their work, which may be higher twenty-five years after execution of the original grant than thirty-five years after execution.<sup>86</sup> If an author selects an effective termination date as soon as the termination period opens, the author can either begin renegotiations with the original grantee or, in some circumstances where the grantee is no longer interested in exploiting rights to the author's work, regain their rights up to ten years before the effective termination date.<sup>87</sup> While an author of a single, modest title is unlikely to see the significant returns

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81. See Yuvaraj et al., *supra* note 5, at 252, 273 ("... rightsholders (such as book and music publishers and record labels) typically lose interest in works at the end of their commercial life which can be many decades before the copyright expires"); see Reese, *supra* note 3, at 896.

82. Yuvaraj et al., *supra* note 5, at 278–79.

83. *Id.*

84. *Id.* at 279–80; see GILBERT ET AL., *supra* note 1, at ii–iii ("[W]hile the music industry has placed a growing emphasis on making its back catalog available to consumers, this is an outlier among creative industries; it is exceptionally rare for books, for example, to remain widely distributed and promoted for decades after their initial publication."). While book publishing relies on "backlist" titles—i.e., titles that are no longer in their first year of publication—to "pay the bills," books must demonstrate continuous sales to become a particularly valuable part of the backlist.

85. *Id.*; see *infra* Part IV(B) for further discussion.

86. Yuvaraj et al., *supra* note 5, at 279.

87. This process is the functional equivalent of a "reversion" or "out-of-print" clause, which "allow[s] an author to regain copyrights in works that the publisher is no longer exploiting. In most publishing contracts, the rights do not automatically revert; it is up to the author to demand that the publisher put the book back on sale, and if the publisher declines to do so within a specified period, the author gets the rights back." *Out of Print Clauses*, KERNOCHAN CTR. FOR LAW, MEDIA & ARTS, <https://kernochan.law.columbia.edu/content/out-print-clauses> [<https://web.archive.org/web/20260127005424/https://kernochan.law.columbia.edu/content/out-print-clauses>] (last visited Jan. 26, 2026). In the termination scenario, though, an author does not need to rely on nonexistent sales as a prerequisite for renegotiation. "Recently, at least one publisher has taken the position that a book never goes 'out of print,' because digital media make it possible for publishers to make the book available on demand. So even if the publisher sells only one copy a year (or for that matter, no copies), the book would not be 'out of print' because the publisher stands ready to make and send a copy to anyone who requests it." *Id.* Even if the book is selling well, a negative relationship, or a grantee's lack of willingness to

of someone like Stephen King or Debbie Macomber, the less time between publication and invocation of the Right of First Refusal, the better.<sup>88</sup>

### C. ADDITIONAL BENEFITS OF EARLY NOTICE OF TERMINATION

#### 1. Facilitate Estate Planning

Under sections 203(b)(2) and 304(c)(6)(B), future rights that revert upon termination of the grant “become vested on the date the notice of termination has been served.”<sup>89</sup> In other words, when notice is served, “ownership of the rights covered by the terminated grant reverts to everyone who owns termination interests.”<sup>90</sup> Depending on the age of the author or heir within whom the rights will vest, it might be preferable to send notice of termination as early as possible. For example, if the terminating party is worried about estate planning and wants to ensure that the rights vest in their name or their designated heirs, serving notice at the ten-year mark is prudent. Literary executors are still a rarity and, given the extensive litigation and controversies between family members that arise surrounding rights to literary estates, serving notice ensures that the ownership and legacy of an author’s work is not left to chance.<sup>91</sup>

#### 2. Limit Potential Litigation on the Validity of Notice

Statutory formalities are critical for statutory termination, and there is substantial case law highlighting the importance of filing notices on time, to the right grantee, and with the correct dates of execution and effective termination.<sup>92</sup> If the work subject to termination is particularly valuable, the grantee may file a counternotice or challenge the validity of the notice of termination.<sup>93</sup> While the Copyright Office and some courts have held that “harmless” errors will not affect the adequacy of notice, the litigation process is time-intensive, and the longer an author waits to serve notice, the more likely litigation will extend past, and hold up, the effective date of termination.<sup>94</sup> If an author

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market a book that will reach termination in the next decade, might motivate grantees to relinquish the rights upon service of notice.

88. Yuvaraj et al., *supra* note 5, at 279.

89. 17 U.S.C. §§ 203(b)(2), 304(c)(6)(B).

90. H.R. REP. NO. 94-1476, at 127 (1976).

91. See Lloyd J. Jassin & Ronald M. Finkelstein, *Literary Executors: A Primer for Authors, Executors, Trustees & Heirs*, COPYLAW (Nov. 29, 2021), <https://www.copylaw.org/2018/05/estate-planning-and-copyrights.html> [https://perma.cc/8NM6-E3QP]; see also *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

92. See *supra* notes 24–25 and accompanying discussion.

93. See Yuvaraj et al., *supra* note 5, at 281–82.

94. 37 C.F.R. § 201.10(e)(1) (2025) (“Harmless errors in a notice. . . shall not render the notice invalid” if they do not “materially affect the adequacy of the information required to serve the purposes of 17 U.S.C. 203”); see Reese, *supra* note 3, at 903–04 n.37 (“Given that the statute dictates the period during which termination may be effected, an incorrect date would not seem to be a harmless error under [the Copyright Office’s] standard.”); see *Mtume v. Sony Music Ent.*, 408 F. Supp. 3d 471, 476–78 (S.D.N.Y. 2019) (ordering

is proactive and serves notice well before the two-year deadline, she will not only limit the possibility that litigation will cut into her ability to terminate and exploit her rights, but she will also increase the likelihood of conciliatory behavior from the original grantee—potentially limiting litigation in the first place.<sup>95</sup>

### III. THE DERIVATIVE WORKS EXCEPTION & BENEFITS OF LATE NOTICE OF TERMINATION

#### A. THE DERIVATIVE WORKS EXCEPTION

The Derivative Works Exception is an explicit “carve-out” to the termination right and is codified in sections 203(b)(1) and 304(c)(6)(A).<sup>96</sup> Both sections contain identical language:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.<sup>97</sup>

A derivative work is a “work based upon one or more preexisting works,” and works consisting of “editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship” can be classified as “derivative”—i.e., films, sound recordings, audiobooks, etc.<sup>98</sup> For the purposes of this Note, it is also important to highlight that the copyright in a derivative work “extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work.”<sup>99</sup>

The Derivative Works Exception arose as a “limitation” on the copyright owner’s termination rights to “protect owners of derivative works like film producers who own derivative copyrights in books or plays.”<sup>100</sup> It balances the termination right, allowing owners of derivative works—if “prepared” pre-termination—to continue exploiting those works “under the terms” of the terminated grant without having to renegotiate with the author of the underlying work.<sup>101</sup> However, grantees are not permitted to create new derivative works post-termination, and the grantee’s use of previously prepared derivatives post-termination is limited to the “terms” of the original grant.<sup>102</sup> Therefore, if the grantee was required to pay royalties on the derivative to the author

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additional discovery to determine if the assignee received adequate notice and the error was made in good faith).

95. See Brennick, *supra* note 5, at 819.

96. 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

97. *Id.*

98. 17 U.S.C. § 101.

99. 17 U.S.C. § 103(b).

100. H.R. REP. NO. 94-1476, at 127 (1976); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 170 (1985).

101. *Id.*

102. See *Mills*, 469 U.S. at 155–56, 165–67 (clarifying “under the terms of the grant” in the context of royalty distributions post-termination); Loren, *supra* note 43, at 1341.

pre-termination, the same obligation remains post-termination.<sup>103</sup> Additionally, if the grantee's use of the derivative exceeds the scope of the original grant, all revenue generated by such a use belongs solely to the author.<sup>104</sup>

### 1. The Problem with “Prepared” and the Impact on Notice

While the Derivative Works Exception seems relatively reasonable and straightforward on its face, Lionel Bently and Jane C. Ginsburg acknowledge an ambiguity in the statutory language of the Exception—specifically, the word “prepared” in the phrase “*prepared* under the authority of the grant before its termination.”<sup>105</sup> In order to continue utilizing a derivative work post-termination, it must have been *prepared* pre-termination. The question thus arises: “[M]ust the derivative work have been fully created before termination, or will the derivative work escape termination so long as its creation has been undertaken before the effective date of termination?”<sup>106</sup> Additionally, how should this influence an author's timing when he or she serves notice of termination? If an author decides to serve notice ten years before the effective date of termination, does this ultimately give the creator(s) of the derivative work a heads-up, incentivizing them to develop as many derivatives as possible within those ten years?<sup>107</sup>

Derivative works are very common, particularly within the music industry where authors typically grant copyright in their musical compositions to their publishers and their right to exploit sound recordings to their record labels.<sup>108</sup> When grantees are given wide breadth to exploit the Derivative Works Exception, the author of the underlying work increasingly loses the ability to exploit his or her rights post-termination, as the market is already “flooded” with certain derivative uses of the work by the time the author regains her rights.<sup>109</sup> Therefore, broad interpretation of the word “prepared” could severely limit the author's rights and expand the grantee's right to

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103. Loren, *supra* note 43, at 1341; *see also* Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc., 155 F.3d 17, 23, 24–25 (2d Cir. 1998) (holding that the revenue generated by the post-termination use of a sound recording belonged to the author, not the music publisher, because it went beyond the scope of the pre-termination license).

104. Ahlert, 155 F.3d at 23–25.

105. *See* Bently & Ginsburg, *supra* note 4, at 1579–80 (citing 17 U.S.C. § 304(c)(6)(A)).

106. *Id.* at 1579.

107. In conversations with copyright termination litigators, they explained how they do not believe that notice terminates publishers' or grantees' ability to continue developing derivative works, as there are no such limitations in the statutory language.

108. *See* Brennick, *supra* note 5, at 794–95 (“There are two separate copyrights in music: the musical work (the composition, the music and lyrics) and the sound recording. Two types of transferees have emerged around these two copyrights: music publishers for musical works and record labels for sound recordings. While the content handled is distinct, music publishers and record labels have remarkably similar business models. Both contract with authors for a transfer of the ownership of the copyrighted work and distribute these works to the public.” (citing PASSMAN, *supra* note 71, 17 U.S.C. § 102(a)(2))); *see also* James J. Schneider, Note, *Defeating the Terminator: How Remastered Albums May Help Record Companies Avoid Copyright Termination*, 53 B.C. L. REV. 1889, 1899–1903 (2012).

109. Brennick, *supra* note 5, at 802.

exploit derivative works. If “prepared” is merely interpreted as “developed” or “started,” the publisher could technically begin “preparing” the derivative work the day before effective termination and still preserve the ability to exploit the derivative post-termination. Notice of termination thus becomes a significant consideration, as the author must serve notice a minimum of two years before termination. Once the grantee is aware that termination is coming, it could rush to “prepare” derivatives before termination, as two years is sufficient time to not only start but also complete a sound recording or audiobook.<sup>110</sup>

## 2. Prevailing Interpretations of “Prepared”

As Bently and Ginsburg point out, neither the Copyright Office nor the courts have directly confronted or ruled on the proper understanding of “prepared,” and Congress never defined “prepared” despite its prevalence throughout the 1976 Copyright Act.<sup>111</sup> Only Nimmer provides a reading of “prepared” in relation to the Exception, suggesting that, “because a work that is ‘fixed’ in the copyright sense is also ‘prepared’ within the meaning of the . . . Derivative Works Exception, it would seem that the part . . . that has been fixed as of the termination date may be utilized thereafter.”<sup>112</sup> In other words, even if the work is not “complete,” whatever portion of it is “fixed” can be utilized after termination. If more material is added to the derivative work after the termination date, though, “the later added material may be used if, and to the extent that, such additional material is not in itself based on the underlying work the rights in which have been terminated.”<sup>113</sup> Nimmer then provides the example of a film based on a novel, where the story elements were filmed pre-termination, but a musical score was added post-termination.<sup>114</sup>

If Nimmer’s interpretation is correct, then publishers or third parties who create a derivative work do not have to “complete” the derivative work before the effective termination date. While Nimmer’s reading does limit the publisher’s or third party’s

110. See *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at \*14–15 (S.D.N.Y. Aug. 10, 2021). Upon receiving notice of termination for the “Phillie Phanatic” mascot costume, The Phillies immediately began preparation of a derivative version of the costume. *Id.*

111. See Bently & Ginsburg, *supra* note 4, at 1579–80. The word “prepared” appears over thirty times throughout the 1976 Copyright Act, but at no point is it explicitly defined. In the Derivative Works Exception alone, “prepared” appears twice in two different forms: first, “prepared under authority of the grant” and second, “this privilege does not extend to the preparation after the termination of other derivative works.” 17 U.S.C. § 203(b)(1); 17 U.S.C. § 304(c)(6)(A). While “prepared” is past tense, as if referring to something that has been completed or already exists, and “preparation” connotes the beginning or process of developing something, the division in meaning between the two uses is not that simple. Throughout the Copyright Act, “prepared” is also notoriously used to categorize works made for hire, governmental works, and joint works. See 17 U.S.C. § 101. Neither the Act nor the legislative history clarify whether “prepared” means “complete” versus “created/started,” or if “prepared” merely refers to the compilation or creation of a work under certain circumstances (e.g., as something developed within the author’s scope of employment). See Bently & Ginsburg, *supra* note 4.

112. NIMMER ON COPYRIGHT, *supra* note 20, at § 11.02[C].

113. *Id.*

114. *Id.*

ability to utilize source material after termination, grantees could still prioritize “fixing” all elements relying on source material in the window between notice of termination and effective termination. One might question whether, if an author serves notice just two years before the effective termination date, someone creating a derivative could “fix” all necessary aspects in such a short time. While one could read Nimmer’s example of a film and assume that, given the difficulty of coordinating shooting schedules, little could be done in a two-year period, this is not the case for other industries where creation-to-completion has a much quicker turnaround.<sup>115</sup> Therefore, the type of work—both the underlying work and the derivative work—becomes an important consideration that may influence when an author decides to send notice of termination.<sup>116</sup>

So far, Nimmer’s reading is referenced only in *Architettura, Inc. v. DBSI Cumberland at Granbury LP*, a district court case interpreting section 203 in the context of architectural plans.<sup>117</sup> While the plaintiff (an architect) devised the initial drawings for an apartment complex, his relationship with the contracting entity dissolved, so a different architectural firm created a derivative site plan (using the plaintiff’s drawings) and continued to alter the plan after the plaintiff terminated his license to use the drawings.<sup>118</sup> Although the plaintiff claimed that the defendants wrongfully “prepared” their derivative after he revoked his license to the underlying work, the court held that the defendants could add material to a derivative post-termination as long as all post-termination “changes . . . ha[ve] nothing to do with the [underlying] work.”<sup>119</sup> Since the defendants allegedly did not reference the plaintiff’s work for any post-termination alterations to the site plan, the court found that the Derivative Works Exception applied.<sup>120</sup>

The *Architettura* court did not rest its ultimate holding on an interpretation of “prepared,” but the court’s rationale— i.e., that the “changes . . . ha[ve] nothing to do with the [underlying] work”—indicates an acceptance of Nimmer’s reading. The court utilized Nimmer’s hypothetical about adding a musical score to a film post-termination and repeatedly emphasized how, if the plaintiff prevailed, the defendants would have to destroy any work completed pre-termination if they could not finish the work post-

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115. See *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*13–15 (where the creator of the derivative Phillie Phanatic costume delivered sketches 19 months after the owners of the original costume served notice of termination).

116. See *supra* Part IV(A) for additional discussion of the types of work.

117. *Architettura, Inc. v. DBSI Cumberland at Granbury LP*, 652 F. Supp. 2d 775, 782, 784–85 (N.D. Tex. 2009).

118. *Id.* at 776–77.

119. *Id.* at 785. The plaintiff also argued that “the Derivative Works Exception does not apply to situations where, as here, a revocable license of indefinite duration has been terminated by the grantee,” and “applies only to statutory terminations of licenses, a situation governed by 17 U.S.C. § 304(c)(6)(A).” *Id.* at 782. The court rejected this argument, citing *Korman v. HBC Florida, Inc.*, 182 F.3d 1291 (11th Cir. 1999) and NIMMER ON COPYRIGHT, *supra* note 20, at § 11.02 n.2, determining that the Exception applies to “all nonexclusive grants of a license executed after January 1, 1978, including implied, oral licenses that are revocable at will.” *Architettura*, 652 F. Supp. 2d at 782.

120. *Id.* at 785.

termination.<sup>121</sup> Therefore, the court endorsed the albeit limited ability to continue “preparing” derivative works post-termination of the underlying grant, particularly in situations where further changes post-termination are necessary to make a valuable derivative useful or functional.

In a more recent case, *Phillies v. Harrison*, the S.D.N.Y. court used a similar rationale when evaluating whether a new version of the “Phillie Phanatic” mascot costume, designed during the two years post-termination notice and pre-effective termination, was a derivative work subject to the Exception.<sup>122</sup> The court held that, given the Second Circuit’s relatively low standard for originality in derivative works, the new costume was a derivative work despite the very minor changes between the original and derivative costumes.<sup>123</sup> The court also said it was “undisputed” that the Phillies “developed” the new costume before the date of termination since the drawings of the costume were complete pre-termination, though the costume itself was not fully constructed.<sup>124</sup> Therefore, the costume qualified as a derivative work because, as stated in the “plain language” of the statute, it was “prepared under the authority of the grant before its termination.”<sup>125</sup>

This case demonstrates one of the main concerns regarding the Exception: when notice incentivizes a grantee to prepare a new design “with the express intent of creating a derivative work” in the interim between notice and termination.<sup>126</sup> The *Phillies* court seemed to acknowledge the challenges grantee-generated derivatives present to authors, even referencing how “the rights that would revert [to the author] are highly limited” given the quantity of other derivative works—merchandise, etc.—The Phillies created before termination.<sup>127</sup> However, this recognition did not inspire the court to narrow its interpretation of acceptable derivatives. The court still sided with The Phillies, seemingly unconcerned about the fact that permitting such unlimited creation of derivatives could eviscerate the termination right.<sup>128</sup>

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121. *Id.* at 784–85. The court explained that finding in the plaintiff’s favor would create an “absurd result . . . contrary to the purpose of the Derivative Works Exception,” as it would render the defendants’ pre-termination efforts futile. *Id.*

122. *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554, at \*14–16, \*121–22 (S.D.N.Y. Aug. 10, 2021).

123. *Id.* at \*15–16, \*79–80, \*84–85. According to the Second Circuit, the derivative work must be “independently copyrightable,” and while the alterations to the original work must be “more than trivial,” the court has recognized the originality test as a “modest” one, with a low threshold.” *Id.* at \*80 (citing *TCA Television Corp. v. McCollum*, 151 F. Supp. 3d 419, 430–31 (S.D.N.Y. 2015) and *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980)). In *Phillies*, the court found that minimal edits (“no great strokes of brilliance”) to the Phillie Phanatic mascot costume—a wider head, larger hat, etc.—were sufficient to constitute a derivative work that could be utilized post-copyright termination. *Phillies*, 2021 U.S. Dist. LEXIS 243554, at \*85. The court also discussed how derivatives are supposed to have the “same aesthetic appeal” as the original, as they would otherwise not be derivatives, but “entirely new creation[s].” *Id.* at \*84.

124. *Id.* at \*91–92.

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

126. *Id.* at \*14.

127. *Id.* at \*17.

128. *Id.* at \*17, \*121–22.

While informative, the staying power of both cases is questionable, particularly since the holdings significantly contravene the termination right through the courts' generous interpretation of the Derivative Works Exception.<sup>129</sup> These cases avoid any significant discussion of legislative intent—which dominated the section 304 case law interpreting the Derivative Works Exception—and reframe the Exception as balancing original and derivative authors' interests rather than, as indicated in the legislative history, balancing original authors' and publishers'/producers' interests.<sup>130</sup> However, the issue underlying *Phillies* is not an isolated incident, and many practitioners seem to endorse Nimmer's reading of "prepared."<sup>131</sup> Until there is additional case law, grantees can rely on these cases as precedent, and they are thus relevant for authors planning on termination.<sup>132</sup>

## B. AUTHORS WHO MAY BENEFIT FROM LATER NOTICE

### 1. Authors Who Do Not Intend to Remain with the Original Grantee

As previously discussed in Part II, there are many advantages to remaining with the original grantee, and if an author does decide to remain with the original grantee, sending notice as early as possible allows the author to reap the most benefits from the

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129. See *supra* note 123 and accompanying text.

130. In the process of concluding that the Derivative Works Exception must prevail, the courts in *Phillies* and *Architettura* emphasized how ruling in favor of the original author would significantly contravene the derivative author's ability to create their work. The courts found that such a holding would be "contrary to the purposes of the Derivative Works Exception." *Architettura, Inc. v. DBSI Cumberland at Granbury LP*, 652 F. Supp. 2d 775, 784 (N.D. Tex. 2009); see also *Phillies*, 2021 U.S. Dist. LEXIS 243554 at \*82–90. However, neither court cited the legislative history of the Exception in the opinion, even though previous case law dealing with the Exception discussed legislative intent extensively. *Mills Music, Inc. v. Snyder*—the most notable case dealing with the Exception—and the line of cases that followed made it clear that the Exception was enacted to balance the interests of the original author with the "motion picture producer" or her equivalent. 469 U.S. 153, 174–76 (1985); see *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998) ("[A] ruling for [the original author] is "more consistent with the general thrust of § 304, which is designed to protect the interests of authors and their heirs and to maximize their ability to exploit the value of their Songs during the extended renewal term."); see also *Woods v. Bourne Co.*, 60 F.3d 978 (2d Cir. 1995). In reframing the Exception as a battle between authors of seemingly equal status, the recent case law ignores the "principal purpose" of copyright termination: "to provide added benefits to authors," and to "make the rewards for the creativity of authors more substantial" when they were forced to deal with powerful, exploitative entities in their original grant of copyright. *Mills Music*, 155 F.3d at 172–73.

131. In discussions with practitioners, including in-house counsel at publishers, they mentioned the innumerable times they saw publishers intentionally exploit derivative works rights after receiving notice.

132. See Aaron Moss, *Judge Recommends Approving New Phanatic Mascot Despite Termination*, COPYRIGHT LATELY (Aug. 10, 2021), <https://copyrightlately.com/judge-recommends-approving-new-phanatic-mascot-despite-copyright-termination/> [<https://web.archive.org/web/20260130205257/https://copyrightlately.com/judge-recommends-approving-new-phanatic-mascot-despite-copyright-termination/>] ("[T]he *Phillies* case could have an impact far beyond the world of sports mascots, potentially serving as a blueprint for motion picture studios looking to ways to retain rights in fictional characters. So long as relatively modest changes are made to a character before copyright termination is effected, that derivative version could be used even after termination. And if the modified version has become the definitive representation of the character in the eyes of the public, this could significantly devalue the original grantor's termination rights.").

Right of First Refusal Exception. However, if authors have a negative experience with a grantee and are certain, even at the time of notice, that they want to transfer rights to someone else or exploit rights themselves, the incentive to send notice as early as possible decreases—especially if 1) the grantee is not aware that termination is approaching, and 2) the author granted many subsidiary/derivative rights in their contract that the grantee could exploit (without author approval) in the period between notice and termination.<sup>133</sup> Additionally, practitioners tend to advise publishers or grantees to increase their exploitation of rights (i.e., increase preparation of derivatives) as the termination date approaches, especially after service of notice.<sup>134</sup> Even if the grantee exploited its derivative rights before the notice period began, notice provides an official end date, prompting grantees like The Phillies to act.<sup>135</sup>

It is also important to note that, while it is still standard for authors to re-grant their rights to the original grantee in the book and music publishing industries, authors like Debbie Macomber and Nora Roberts and musicians like Prince have successfully transferred their terminated rights to new publishers.<sup>136</sup> Additionally, in this digital age, the ability for an author to exploit her own rights through various online platforms (Spotify, Open Road, etc.) has significantly increased.<sup>137</sup> Most authors also have only one work, so there is less of a need to remain with the original grantee for the benefit of the author's series or multiple works, as discussed in Part II(B)(2). Therefore, it is questionable whether regranteeing rights to the original grantee will remain the default, and if not, serving late notice of termination could benefit those artists hoping to retain as many potential exploitations as possible.

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133. See GILBERT ET AL., *supra* note 1, at 15 (“Because the language of the initial contract governs the scope of the later termination, grantees may take advantage of *Mills* and avoid *Ahlert* by requiring expansive terms for grants—such as, for example, authorizing the grantee to exercise unilateral control over all exploitations of derivative works.” (citing Bently & Ginsburg, *supra* note 4, at 1579)); see also Christman, *supra* note 43 (discussing singer-songwriter Louise Goffin, who wanted to leave the original grantee because, in her words, “[t]here is always the point where the label moves on when the second single doesn’t sell; or the label has a changing of the guard. Soon, you find yourself stuck with people who don’t know who you are and you have no sovereignty over your work, and it just sits in the vaults. That is where the artists have their souls destroyed.”).

134. Publishing attorneys explained, and the *Phillies* case demonstrates, how creation of last-minute derivatives can effectively empower grantees—even if the derivatives are subpar. See generally David Gurnick & Tal Grinblat, *Nine Ways to Avoid Copyright Termination: Part Two*, 37 NEW MATTER 5, 5–7 (2012) (enumerating the various ways grantees can avoid copyright termination, including by creating derivative works during the term of a copyright grant); see generally Schneider, *supra* note 108 (discussing how record companies should develop remastered sound recordings to preserve rights to exploit music post-termination, even though it is questionable whether sound recordings qualify as derivative works under the Copyright Act).

135. See *supra* Part III(A)(2).

136. Christman, *supra* note 43; Yuvaraj et al., *supra* note 5, at 279, 281.

137. See Brennick, *supra* note 5, at 815 (“Although most authors contract with transferees to distribute their works, authors have successfully distributed their works independently, especially now that most distribution occurs through online streaming services.”).

## 2. Authors Whose Works Increase in Value Over Time

While the possible increase of value over time is not a standalone basis to justify delaying service of termination, it is still worthwhile to acknowledge the types of works that benefit from longevity and, therefore, might benefit from later notice of termination. Unlike books, music often increases in value the longer it is available.<sup>138</sup> Therefore, if an author, unlike those mentioned above, is interested in renegotiating with the original grantee or taking their rights elsewhere, it might be more advantageous to choose an effective termination date on the latter end of the termination period and serve notice closer to the two-year mark. Just as the author of a work that *decreases* in value over time will heighten their bargaining position at an earlier date, an author whose work *increases* in value over time might have more negotiating power at the latest possible date. Although there is no guarantee that a work will be more valuable at the thirty-eight-year mark than at the twenty-five-year mark (respectively, the latest and earliest times an author can serve notice under section 203), the estimated future value of an author's work remains a relevant consideration.<sup>139</sup>

## 3. Authors Whose Works Are Ripe for Quickly Developed or Highly Valuable Derivatives

As previously mentioned, the music industry is known as a hive for derivative works, not only because music publishers can license musical works to create sound recordings (and remastered sound recordings may qualify as derivative works), but also because the creation of sound recordings is a relatively quick process.<sup>140</sup> Even two years of notice can prompt extensive development of many derivative works, each of which limit authors' ability to exploit their own work in a similar manner post-termination—that is, if the author does not decide to re-grant rights to the original grantee.<sup>141</sup> While this may seem like less of a concern in the book publishing industry, since authors (at least those represented by an agent or attorney) today typically transfer few derivative rights in the initial grant, audiobook rights have become increasingly valuable and, like

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138. GILBERT ET AL., *supra* note 1, at ii-iii (“[T]he music industry has placed a growing emphasis on making its back catalog available to consumers.”).

139. Note that the notice timeline might change if the grant covers the right of publication. See 17 U.S.C. § 203(a)(3); see H.R. Rep. No. 94-1476 at 126 (1976); see *supra* note 19 and accompanying text.

140. See Brennick, *supra* note 5, at 802–03 (noting that while “[i]t is not yet clear whether remastered sound recordings constitute derivative works . . . affirmance . . . could have significant effects on the post-termination market for the original work. Record labels must receive at least two years’ advance notice of termination, which would give them time to prepare remastered versions before the effective date of termination. Remastered works could devastate the post-termination market for the original work because they are direct replacements.” (comparing Jon Peritz, Note, *Closing a Loophole in Musicians’ Rights: Why Digital Remasters of Analog Sound Recordings Are Not Derivative Works Protected by the Copyright Act*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 385 (2013), with Schneider, *supra* note 108)).

141. Brennick, *supra* note 5, at 802–03.

sound recordings, are quickly and easily developed.<sup>142</sup> The Derivative Works Exception may also seem like less of a concern in the film industry (Congress's main area of concern when drafting the Exception), since two years' notice for termination does not seem like sufficient time for producers to "get in that one last sequel."<sup>143</sup> However, recent attempts to terminate source material for large movie franchises like *The Terminator*, *Friday the 13th*, and *Die Hard* left the movie industry scrambling, and legal scholars are already recommending that studios "prepare" as much as possible before the effective termination dates.<sup>144</sup>

Until additional guidance from courts or the Copyright Office settles the proper meaning of "prepared," authors worried about derivative works should consider sending later notice of termination, as that is likely the best method to preserve the maximum amount of post-termination rights. If Nimmer's reading is correct, grantees will possess the ability—albeit a limited ability—to work on a derivative post-termination.<sup>145</sup> While grantees are not able to continue using the underlying source material post-termination, if the material in question is part of a franchise or series, writers will likely "become adept at crafting a production that uses elements that were added on by the production in sequels without using any of the copyrighted source material that reverted to the author or heirs."<sup>146</sup> Ultimately, limiting access to underlying source material is critical for authors who want to take their rights elsewhere, and serving notice as late as possible is one of the few strategies authors can deploy to protect their work.

In light of the section 203 case law where the courts broadly interpreted the definition of "derivative works," the threat becomes even more acute, as "grantees could attempt to monetize derivative works post-termination by initiating the large-scale

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142. Matt Knight, *Securing Audiobook Rights: The Rights You Need to Bring Your Audiobook to Market*, JANE FRIEDMAN (updated Feb. 18, 2025), <https://janefriedman.com/securing-audiobook-rights-the-rights-you-need-to-bring-your-audiobook-to-market/> [<https://web.archive.org/web/20260118171133/https://janefriedman.com/securing-audiobook-rights-the-rights-you-need-to-bring-your-audiobook-to-market/>].

143. See Grover, *supra* note 46, at 23, 28.

144. While this is general advice for filmmakers, regardless of whether a notice has been served or not, termination of underlying source material for major movie franchises has only just begun, and notice of termination has thrown multiple grantees of film rights for a loop. Therefore, in an age where studios are just starting to look out for termination, serving notice will undoubtedly spur movie studios to complete as much as possible before the rights are revoked. See *id.* at 28 (discussing how filmmakers not only rely on underlying works for original films, but for sequels, and how certain questions arise "for the production company that needs to promote the movie completed just before the termination date is effective. Even if the movie is made before the window closes, what about advertising and promotion? Can you exploit the works without creating additional derivative works? In this multiplatform digital world, movies are often promoted with supplementary materials, games, and behind-the-scenes features. How do you make sure all marketing, promotional videos, and supplementary marketing material using the original source work are 'prepared' before the window closes? What are the parameters of exploiting the original derivative work, and how do you do it without creating more?").

145. See *supra* Part III(A)(2).

146. Grover, *supra* note 46, at 29.

creation of ‘derivative works’ based on mere technical changes to the original work.”<sup>147</sup> Again, it is questionable whether the current case law will endure, but a expansive understanding of “derivative work” has prevailed—at least in the Second Circuit—through years of litigation, though in a different context.<sup>148</sup> If adding a bigger hat and brighter coloring to a mascot costume is all it takes to create a derivative, it is unlikely grantees in other industries will need to make significant alterations to sound recordings or the like to create derivatives and secure post-termination exploitation rights.

#### IV. SOONER IS (USUALLY) BETTER: OPTIMIZING TERMINATION TIMING

Early termination provides ample benefits—especially with the Right of First Refusal Exception—and unless the author is particularly concerned about the creation of derivative works, early termination is preferable. This Part discusses a few guidelines for authors who are unsure about their termination priorities, some recent legal developments that may cabin the threat of the Derivative Works Exception, and recommendations for authors going forward.

##### A. ASSESS THE TYPES OF WORK AT ISSUE: THE UNDERLYING WORK AND DERIVATIVE WORK

The Derivative Works Exception, while a valid concern, is not the dominating issue for most authors when sending notice of termination. Going back to Nimmer’s example of a movie score added to a film post-termination, the type of underlying work and derivative work likely influence how quickly a publisher, or third party, can prepare or modify a derivative pre-termination.<sup>149</sup> For example, if the underlying work is a musical composition or novel, and the derivative is a sound remaster or audiobook, the incentive to terminate as close to the two-year mark as possible might increase. Since sound recordings and remasters are easily produced, the amount of lead time provided to the publisher may only increase the creation of additional derivative works.<sup>150</sup> This is especially true in cases where the standard for derivatives is low, i.e., where courts have held that slight modifications to the underlying work are sufficient for a derivative, as seen in the *Phillies* case.<sup>151</sup>

If it will take years to develop a derivative, like a film or book translation, serving notice at the two-year mark may also limit the grantee’s ability to use the underlying

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147. GILBERT ET AL., *supra* note 1, at 15–16; see Moss, *supra* note 132 (discussing the potential for film studios to make minor modifications to characters, which would then qualify as derivatives).

148. See Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L.J. 1505, 1509 (2013).

149. See NIMMER ON COPYRIGHT, *supra* note 20, at § 11.02[C][1]; see *supra* note 114 and accompanying text.

150. See *supra* note 140 and accompanying text.

151. See *supra* Part III(A)(2) for an extended discussion of *Phillies v. Harrison*, No. 19-CV-7239 (VM) (SN), 2021 U.S. Dist. LEXIS 243554 (S.D.N.Y. Aug. 10, 2021) and Second Circuit case law.

work in the creation of the derivative. However, the need to serve late notice of termination in an effort to preserve certain rights is likely less pressing.<sup>152</sup> Serving earlier notice might actually prove beneficial to authors who anticipate (and want to personally exploit the rights to) a film derivative from their book, as grantees and third-party licensors may be less eager to pursue development of a film at all if an author serves notice of termination ten years before the effective termination date. If the author can time service of notice with the announcement of a movie option, the author also significantly heightens her bargaining position in negotiations with the original grantee, as the grantee likely needs rights to the underlying work post-termination to prepare and market the film.<sup>153</sup>

### B. ASSESS THE VALUE OF THE WORKS AT ISSUE

Additionally, authors should not only consider the value of their underlying work, but the potential value and longevity of the derivative work. While a film could have significant staying power in the market, incentivizing a grantee to establish as much of the derivative as possible before termination, grantees may be in less of a rush to prepare a derivative—a new edition of a textbook, perhaps—that has a relatively short shelf life.<sup>154</sup> While the first of these scenarios might convince an author to send notice as late as possible, authors should also keep in mind how late notice could prompt a grantee to rush out shoddy derivatives in the two years between notice and termination. What could have been a highly valuable film or recording thus turns into something with relatively little market power or returns for the author.<sup>155</sup> Therefore, if an author knows a grantee will prepare the derivative in question no matter what, early notice likely triumphs again. The earlier the notice, the more time for a grantee to prepare a quality derivative work using the author's material—something that will benefit the author in the long run.

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152. Note that the effort to create translations may decrease significantly going forward, as automated translation services are already putting many translators out of work. See, e.g., Ella Creamer, *Survey Finds Generative AI Proving Major Threat to the Work of Translators*, GUARDIAN (Apr. 16, 2024), <https://www.theguardian.com/books/2024/apr/16/survey-finds-generative-ai-proving-major-threat-to-the-work-of-translators> [<https://web.archive.org/web/20260130213906/https://www.theguardian.com/books/2024/apr/16/survey-finds-generative-ai-proving-major-threat-to-the-work-of-translators>] (“More than a third of translators have lost work due to generative AI.”).

153. See Grover, *supra* note 46, at 29 (discussing whether studios will be able to successfully market films without rights to the underlying work post-termination). An important note: Unless the book or underlying work is commercially successful, valuable derivatives like movie options are also rarely a concern for most authors when deciding to send notice of termination.

154. See *How to Save on College Textbooks*, TENN. TECH COLL. GRADUATE STUD.: BLOG (Aug. 18, 2021), <https://blogs.tntech.edu/graduate/2021/08/18/how-to-save-on-college-textbooks/> [<https://web.archive.org/web/20260126173040/https://blogs.tntech.edu/graduate/2021/08/18/how-to-save-on-college-textbooks/>] (“In STEM fields, new discoveries are made almost daily, which means textbooks must be updated constantly. This shortens the cycle of production for new editions from roughly every five years to every two or three years. Consequently, expensive books become obsolete very quickly.”).

155. See *infra* Part IV(C) for a discussion of the poor reception of the revised Phillie Phanatic costume.

Authors should also recognize that grantees or publishers will often implement plans for termination as soon as the original agreement is signed, and that they maintain extensive lists of termination dates—especially for their most valuable works.<sup>156</sup> In other words, grantees may increase creation of derivative works as the termination date approaches, regardless of whether notice is served or not. In these situations, the need to optimize or delay notice decreases, since it will have little influence on the grantee's incentive to create derivatives. However, while publishers or grantees will keep track of termination for their most valuable works and utilize their derivative rights long before notice prompts them to do so, it is unlikely they will pay significant attention to a majority of the songs or books in their catalogue.<sup>157</sup> Most authors' works fall into this bucket, so, when serving notice, these authors should still evaluate 1) which derivative rights have not yet been exploited, and 2) whether serving notice might influence the grantee to take advantage of these forgotten, unexploited rights. Given the complexity of termination, publishers also rely on the fact that most authors do not know how to use their termination rights in the first place.<sup>158</sup> Yuvaraj's 2022 study revealed the significant underutilization of copyright termination, so termination is likely not on the forefront of a grantee's mind when it comes to all but the most commercially successful works.<sup>159</sup> Therefore, authors should still expect their notice to contain an element of surprise, which could prompt a sudden reevaluation, and exploitation, of the grantee's derivative rights.

### C. THE DERIVATIVE WORKS EXCEPTION: EVALUATING THE THREAT

While the section 203 case law on the Exception does present cause for concern, recent trends in the Copyright Office, plus the increasing use of section 203 terminations, indicate that the Exception's seemingly potent threat may subside. For example, in 2024, the Copyright Office released a final ruling on the applicability of the Derivative Works Exception to the section 115 compulsory license.<sup>160</sup> Prior to this

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156. In addition to observing this practice firsthand, I confirmed that this is an industry standard with most large publishers in the book and music space through conversations with in-house counsel, litigators, and agents.

157. See Brennick, *supra* note 5, at 820 (discussing how “the author’s work is only one of thousands that a large transferee controls,” so underexploiting one author’s work “would not be as devastating to the transferee as it could be for the author”); see also Yuvaraj et al., *supra* note 5, at 280 (“[T]he termination laws, in their current form, disproportionately benefit only a small handful of the most commercially successful writers.”).

158. See generally Yuvaraj et al., *supra* note 5, at 251, 255, 269 (discussing the disproportionately low number of termination notices in comparison to the millions of works registered for copyright); see also Reese, *supra* note 3, at 896.

159. See Yuvaraj et al., *supra* note 5, at 251, 255, 269.

160. Termination Rights, Royalty Distributions, Ownership Transfers, Disputes, and the Music Modernization Act, 89 Fed. Reg. 56586 (July 9, 2024) (to be codified at 37 C.F.R. pt. 210); see also Murray Stassen, *Songwriter Groups Hail “Landmark Victory” as U.S. Copyright Office Issues Rule Confirming How Termination Rights Apply to Streaming Royalties*, MUSIC BUS. WORLDWIDE (July 9, 2024), <https://www.musicbusinessworldwide.com/songwriter-groups-hail-landmark-victory-as-us-copyright-office-issues-rule-confirming-how-termination-rights-apply-to-streaming-royalties/>

ruling, many authors worried that, after terminating a grant transferring copyright in a musical composition to their music publisher, they would still have to share any proceeds from a compulsory license with the publisher.<sup>161</sup> The publishers argued that, under the analysis of the Exception in *Mills Music*, receiving proceeds or royalties on derivatives (including compulsory licenses) post-termination is the “status quo.”<sup>162</sup>

The Copyright Office rejected this argument, reaffirming the authors’ termination rights under the Music Modernization Act and clarifying that songwriters are entitled to collect all mechanical royalties generated from streaming platforms—even after termination of their underlying grant to their music publishers.<sup>163</sup> This pronouncement demonstrates the Copyright Office’s awareness of the threat the Derivative Works Exception poses to the purpose of termination rights: to allow authors to “receive fair compensation when reclaiming their copyrights.”<sup>164</sup> While the ruling does not answer the various outstanding questions about derivatives subject to the Exception—especially those outside the category of statutory licenses—it establishes a “precedent that strengthens the very foundation of copyright law in the digital age” and eliminates one of the most significant concerns for composers when terminating their rights.<sup>165</sup>

If this trend continues, it is also questionable whether the recent section 203 case law will survive, particularly given the backlash the *Phillies* case engendered.<sup>166</sup> Fans were outraged at the replacement of the original costume with the lackluster, slightly altered derivative—a fact many have speculated led to settlement between the parties

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[<https://web.archive.org/web/20260126173845/https://www.musicbusinessworldwide.com/songwriter-groups-hail-landmark-victory-as-us-copyright-office-issues-rule-confirming-how-termination-rights-apply-to-streaming-royalties1/>]. For the sake of clarity, a compulsory license, as codified in 17 U.S.C. § 115, allows artists to create and distribute their own recording of any composition by paying an amount determined by a royalty tribunal.

161. See Matthew Hersh, *Copyright News: Derivative Works Exception Will Not Apply to Statutory Licenses of Musical Works*, VITALLAW: IP LAW DAILY (Jul. 10, 2024), <https://www.vitalaw.com/news/copyright-news-derivative-works-exception-will-not-apply-to-statutory-licenses-of-musical-works/ipm01ab2c75fa5dd04cedada70ec43138e246> [<https://web.archive.org/web/20260131142211/https://www.vitalaw.com/news/copyright-news-derivative-works-exception-will-not-apply-to-statutory-licenses-of-musical-works/ipm01ab2c75fa5dd04cedada70ec43138e246#>].

162. *Id.*

163. Stassen, *supra* note 160.

164. *Id.*; Termination Rights, *supra* note 160, 89 Fed. Reg. at 56590 (“[T]he Office concluded that ‘[t]o be subject to termination, a grant must be executed by the author or the author’s heirs,’ and that ‘[a]s a type of statutory license, the blanket license is “self-executing,” such that it cannot be terminated’ under section 203 or 304. The Office also explained that ‘[i]f a blanket license cannot be terminated, then it cannot be subject to an exception to termination; the license simply continues in effect according to its terms.’”).

165. Stassen, *supra* note 160 (quoting Jordan Bromley, a board member of the Music Artists Coalition). A 2023 section 304 case, *Atticus Ltd. Liab. Co. v. Dramatic Publ’g Co.*, also circumscribed the Derivative Works Exception somewhat. The court found that, while the Exception allows the grantee to utilize a derivative work post-termination, a license that was exclusive pre-termination is no longer exclusive post-termination. No. 22cv10147 (DLC), 2023 U.S. Dist. LEXIS 73732, at \*16–17 (S.D.N.Y. Apr. 27, 2023), *aff’d in part, vacated in part*, 145 F.4th 257 (2d Cir. 2025) (affirming the aforementioned holding).

166. Moss, *supra* note 132 (“[A] large segment of the Phillies’ fan base doesn’t particularly like the ‘new and improved’ version of the Phillie Phanatic.”).

and reinstatement of the original costume.<sup>167</sup> Additionally, as section 203 terminations become more prevalent now that we are a more than a decade out from their 2013 origins, authors and publishers will (hopefully) become more adept at navigating termination.<sup>168</sup> Moreover, increased interest in termination will inevitably lead to increased clarity regarding the scope of the Exception—a situation we have already seen in the realm of section 115 compulsory licenses, where widespread fear of a diminished termination right inspired the Copyright Office to delimit the Exception's reach.<sup>169</sup> For now, as we await additional case law, limiting the preparation of derivative works via late notice remains a relevant strategy, but given the many benefits of early notice of termination, there are better, more proactive methods to preserve termination rights.

#### D. THE IDEAL SCENARIO: EARLY NOTICE OF TERMINATION FOR A NARROW GRANT

Sections 203 and 304 specify that, after termination, grantees can utilize derivatives only “under the terms” of the original grant.<sup>170</sup> There has been much litigation surrounding this phrase, and while grantees have used this language to their advantage by requiring expansive terms for grants—i.e., grants “authorizing the grantee to exercise unilateral control over *all* exploitations of derivative works”—authors should also take advantage of this language when possible.<sup>171</sup> Prince is perhaps the most successful musician to exercise termination rights, largely due to the fact that he demanded an “unusual degree of control over his copyrights and was unafraid to place those demands on his labels and representation.”<sup>172</sup> Few authors possess such bargaining power upfront when negotiating an initial grant, but the lesson is still relevant.

For example, in *Architettura*, the court harped on the fact that, “in order to determine which party is entitled to post-termination distributive rights, the court must examine what rights each party was entitled to before termination.”<sup>173</sup> In that case, “there were no restrictions on Defendants’ use of [architectural] drawings” pre-termination, allowing Defendants “to show the Work to anyone they wished, until the license was terminated.”<sup>174</sup> Unlike the court in *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.* that concluded the original grantee’s uses of a derivative post-termination were

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167. *Id.*

168. See Yuvaraj et al., *supra* note 5, at 267 fig. 4 (a line chart demonstrating a steady increase of section 203 terminations since 2013, though with a slight drop-off after 2019).

169. See *supra* note 164 and accompanying discussion.

170. 17 U.S.C. § 203(b)(1); 17 U.S.C. § 304(c)(6)(A).

171. GILBERT ET AL., *supra* note 1, at 15; see also *supra* note 133 and accompanying text.

172. GILBERT ET AL., *supra* note 1, at 23; see Ryan Faughnder, *Prince Took a Protective Stance on Music Copyrights*, L.A. TIMES (Apr. 21, 2016), <https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-prince-copyrights-20160421-story.html> [<https://web.archive.org/web/20260126175512/https://www.latimes.com/entertainment/envelope/cotown/la-et-ct-prince-copyrights-20160421-story.html>].

173. *Architettura, Inc. v. DBSI Cumberland at Granbury LP*, 652 F. Supp. 2d 775, 783 (N.D. Tex. 2009).

174. *Id.* at 783–84.

*restricted* based on the limitations imposed pre-termination, the *Architettura* court found such *lack* of restriction translated to the grantee's unfettered ability to use the derivative post-termination.<sup>175</sup> If authors are particularly concerned about certain post-termination exploitations of derivative rights, they should thus attempt to limit the exercise of such rights through contractual approval or reserved rights in the initial grant.

Again, it can be difficult for most authors, especially debut authors, to exercise significant bargaining power when negotiating an initial grant, but even minimal limitations (e.g., on who the publisher can show the derivative to during the license period) may preserve significant rights when it comes time for termination. Even new authors can successfully negotiate some kind of approval rights, which not only limit possible uses of the derivative later, but also allow authors to send early notice without fear.<sup>176</sup> If the author retains approvals over derivative uses, it stands to reason that the original grantee cannot surreptitiously develop unsatisfactory derivative works between service of notice and effective termination. While a more drastic tactic, authors and their attorneys might also consider negotiating the type and amount of derivative works that a grantee may create after notice is served upfront, i.e., in the initial grant. This could preserve the grantee's ability to prepare derivative works until termination, place the author back in a better bargaining position, and potentially limit litigation on the subject going forward. Ultimately, if the initial grant is relatively narrow, consternation surrounding derivative exploitations post-notice of termination diminishes, and authors can more confidently reap the benefits of early notice of termination.

## CONCLUSION

The termination right is far from perfect, and if authors are going to fully benefit from termination as Congress initially intended, reform is necessary. However, until change arrives—if it ever does—authors should keep in mind the various strategies that will best equip them to exploit the termination right in its current form. Service of notice is one of the few ways authors can assert some element of decision-making in the termination process, and rather than arbitrarily choose an effective date of termination or date of service within the specified windows, authors should evaluate whether late or early service is most beneficial to their personal circumstances.

Authors should consider the practical implications of statutory exceptions like the Right of First Refusal—one of the greatest assets for authors of multiple works, if deployed tactically—and the Derivative Works Exception. While these exceptions raise conflicting incentives, authors will generally maximize their bargaining power and receive the greatest remittance of their rights if they serve notice of termination as

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175. *Id.*; see *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17 (2d Cir. 1998).

176. See BRIANNA L. SCHOFIELD ET AL., UNDERSTANDING AND NEGOTIATING BOOK PUBLICATION CONTRACTS 91–94 (Brianna L. Schofield & Robert Kirk Walker, eds., 2018) (discussing approvals and consultation requests in a book contract).

early as possible. Not only does early notice allow authors to derive the greatest possible benefits from the Right of First Refusal Exception, but it also provides the authors with the small luxury of time—i.e., additional time to mull over the original grantee’s offer, exploit their own works if they so desire, and, most importantly, consider their various options. The Derivative Works Exception is not a negligible threat, but for most authors, its cons do not outweigh the many pros that accrue from early service of notice. Only time—and rulings from the Copyright Office or courts—will tell how “[ph]anatical” authors should feel about its ominous presence, and until that day comes, authors should scrutinize the terms of their initial agreement to determine their vulnerability.

Termination is severely underutilized, and while this is hardly a surprise considering its complexity, lack of clarity on the law should not eviscerate authors’ attempts to exploit termination in the first place. Armed with a greater understanding of the notice requirements and the way termination operates within respective arts industries, authors may finally reclaim what is rightfully theirs.





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