Comments

The Implications of Pop-Star Practices on the Future of Intellectual Property

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ABSTRACT

Major recording artists like Taylor Swift are taking advantage of the generous protections afforded to them by U.S. copyright and trademark laws. Swift has filed for, and received, numerous trademarks for lyrical phrases such as "This Sick Beat" and "Party Like It's 1989" and has threatened merchants selling handmade Swift-themed goods through the online marketplace, Etsy. Swift is primarily targeting fan-made artwork whose creators profit minimally, if at all, and that likely has little to no effect on Swift's own merchandise sales. Swift has also expressed strong opposition to music streaming services, such as Spotify, that other recording artists have praised for allowing consumers to easily and affordably access a wide array of music. Artists who share Swift's views have withheld their music from streaming services, demonstrating their disapproval of royalty policies that they believe undercompensate artists, producers, writers, and labels.

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2017. I would like to thank my family, friends, and my boyfriend, Steve, for their love, support, and praise. I would also like to thank Taylor Swift for her catchy music and comment-worthy career choices.

This Comment first discusses the origin and evolution of intellectual property law—specifically copyright and trademark—in the United States. This Comment then examines how music artists have utilized and influenced copyright and trademark laws over time. Next, this Comment analyzes how present-day pop-stars like Taylor Swift have used these laws to their own advantage and to the detriment of creative innovation and public exposure to creative expression. Finally, this Comment recommends modification of current copyright and trademark laws to prevent this type of overprotection, specifically by restricting the trademarking of lyrical phrases and limiting simultaneous protection of lyrical phrases under both copyright and trademark laws.

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I. INTRODUCTION

Taylor Swift ("Swift") is, "quite simply, a global superstar."[1] With ten GRAMMY Awards,[2] more Billboard Music Awards than any other

1. *About*, TAYLOR SWIFT, http://taylorswift.com/about (last visited Sept. 4, 2016).
2. *Id.*

artist,[3] a 2016 Guinness World Record for "[m]ost million-selling weeks on US albums charts[,]"[4] and an ever-growing list of other accolades,[5] Taylor Swift's superstardom is undeniable. While Swift is credited with "almost single-handedly reshaping the music industry[,]"[6] the extent of her influence goes well beyond the confines of music, into the realm of intellectual property ("IP") law.[7]

For Swift, 2015 was the year that cemented her status as an IP activist. Throughout that year, Swift applied to trademark numerous phrases associated with her hit album "1989," such as "This Sick Beat" and "Party Like It's 1989," and garnered significant media attention for doing so.[8] In addition to applying for various trademarks, Swift has taken an aggressive approach to copyright and trademark violations by issuing cease-and-desist letters to Etsy[9] merchants selling items embellished with her lyrics.[10] Swift's opposition to music streaming also came to a head in June of 2015 when she wrote an open letter criticizing the royalty payments—or lack thereof—for Apple's new streaming service.[11] Swift, who had previously removed her entire music library from Spotify,[12] convinced Apple to change its royalty policy almost instantly after she threatened to withhold her music.[13]

This Comment will argue that the aggressive practices that Swift uses to protect her IP actually hinder creative innovation and reduce public exposure to creative expression and, therefore, are contrary to the purposes of copyright and trademark. Part II will discuss the origins and

3. Mesfin Fekadu, *Taylor Swift Just Won the Most Billboard Awards of Any Artist in the Show's History*, BUS. INSIDER (May 18, 2015, 4:45 AM), http://read.bi/1LdAiyi.

4. Rachel Swatman, *Taylor Swift Enters Guinness World Records 2016 With Yet Another Record-Breaking Achievement*, GUINNESS WORLD RECORDS (Aug. 31, 2015), http://www.guinnessworldrecords.com/news/2015/8/taylor-swift-enters-guinness-world-records-2016-with-yet-another-record-breaking-394566.

5. *See, e.g.*, Dawn Levesque, *Taylor Swift Has It All*, GUARDIAN LIBERTY VOICE (Jan. 26, 2014), http://guardianlv.com/2014/01/taylor-swift-has-it-all/; Jason Lipshutz, *Taylor Swift's Top 10 Biggest Career Moments*, BILLBOARD (Dec. 13, 2012), http://www.billboard.com/articles/list/474590/taylor-swifts-top-10-biggest-career-moments.

6. Frank Pallotta, *Taylor Swift Is Everything to the Music Industry*, CNN MONEY (Nov. 6, 2014, 1:43 PM), http://money.cnn.com/2014/11/06/media/taylor-swift-business/.

7. *See, e.g.*, Keli Ewing, *Taylor Swift is Making Headlines in the Realm of Intellectual Property*, HEAD, JOHNSON & KACHIGIAN, P.C.: COPYRIGHTS (Mar. 20, 2015), http://www.hjklaw.com/blogs/copyrights/entry/taylor_swift_is_making_headlines.

8. *See, e.g.*, *infra* note 102 and accompanying text.

9. *About*, ETSY, https://www.etsy.com/au/about/?ref=ftr (last visited Sept. 5, 2016) ("Etsy is a marketplace where people around the world connect, both online and offline, to make, sell and buy unique goods.").

10. *See, e.g.*, *infra* note 113 and accompanying text.

11. *See infra* note 136 and accompanying text.

12. *See infra* note 132 and accompanying text.

13. *See infra* note 139 and accompanying text.

purposes of copyright and trademark laws in the United States and the evolution of those laws over time. Part II will also describe the ways in which music artists have utilized and influenced copyright and trademark laws for their own benefit. Part III will analyze how Swift has used copyright and trademark laws to protect her music and build her brand and will argue that this overprotection of IP will have negative implications for creative expression and consumption of music. Finally, Part IV will recommend a modification of current laws in order to prevent further negative consequences.

II. BACKGROUND

The concept of IP, while seemingly modern, dates back to at least the seventeenth century when the English Parliament adopted the Statute of Monopolies.[14] Enacted in 1624, the Statute of Monopolies revolutionized the English patent system by allowing the use of patents—then called "monopolies"—for only new and innovative techniques and inventions.[15] In 1720, the British Parliament implemented the first government-regulated copyright system with the Statute of Anne, which gave the author, rather than the publisher, the exclusive right to make copies of his or her literary works.[16] These English notions of monopolies and copyrights provided the basis for what would become U.S. IP law.[17]

A. *Constitutional Underpinnings and Theoretical Justifications*

The foundation of U.S. IP law has its roots in what is known as the Patent and Copyright Clause ("the Clause") of the U.S. Constitution.[18] The Clause gives Congress the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and

14. *See* Chris Dent, *'Generally Inconvenient': The 1624 Statute of Monopolies as Political Compromise*, 33 MELB. U. L. REV. 415, 447 (2009) (explaining that the Statute of Monopolies was prompted by "the desire to boost employment" and "the benefits of improving the balance of trade").

15. *See* Bilski v. Kappos, 561 U.S. 593, 627 (2010) (stating that prior to the Statute of Monopolies, patents were granted for even traditional industries because English monarchs had complete discretion over granting monopolies).

16. *See* Golan v. Holder, 132 S. Ct. 873, 900–01 (2012) (stating that prior to the Statute of Anne's enactment, publishers typically controlled the right to produce copies of literary works, providing little protection to authors).

17. *See Bilski*, 561 U.S. at 626–27 ("The Constitution's Patent Clause was written against the 'backdrop' of English patent practices . . . and early American patent law was 'largely based on and incorporated' features of the English patent system.").

18. U.S. CONST. art. I, § 8, cl. 8. *See Bilski*, 561 U.S. at 630–31 ("At the Constitutional Convention, the Founders decided to give Congress a patent power so that it might 'promote the Progress of . . . useful Arts.'").

inventors the exclusive right to their respective writings and discoveries."[19] Unlike other provisions of the Constitution that were considered controversial or underwent extensive debate, the Clause was passed "without objection or debate[,]" suggesting that the framers of the Constitution considered Congressional regulation of IP to be both appropriate and necessary.[20]

1. Copyright & Trademark: Historical Rationale

Since its inclusion in the Clause, copyright law has changed and evolved, but the theoretical justifications behind it have largely remained intact:

> "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.[21]

The primary justification behind copyright law is to incentivize the author to release his work to the public for its consumption and benefit, whereas the secondary justification is to reward the author for his creation.[22] The copyright system aims to both facilitate the "free flow of ideas, information and commerce" and provide economic incentives to encourage authors to further create.[23]

Trademark law has similarly evolved over time, but its concepts have likely been in existence since before the Middle Ages.[24] Multiple justifications underlie the concepts of trademark law, but perhaps the most fundamental rationale is that trademarks indicate the origin of a particular good.[25] By indicating the source of a good, consumers can

19. U.S. CONST. art. I, § 8, cl. 8.

20. *See Bilski*, 561 U.S. at 630–31.

21. United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

22. *See id.*

23. Martin Skladany, *Unchaining Richelieu's Monster: A Tiered Revenue-Based Copyright Regime*, 16 STAN. TECH. L. REV. 131, 135 (2012) (quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).

24. *See generally* Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TMR 265 (1975) (stating that the first known trademarks were likely markings on animals, specifically cattle, that indicated ownership).

25. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163 (1995) (discussing how use of a particular color on a product may indicate the product's origin similar to the way a word or logo can).

easily identify and repurchase a good with minimal confusion and reduced search costs.[26]

In addition to aiding consumers, trademark law also seeks to incentivize producers to make quality goods and, in exchange for those goods, gives producers the benefit of exclusive use of their trademarks.[27] Simultaneously, trademark law dissuades producers from using another's mark, thereby preventing those producers from profiting off of the goodwill associated with another's trademark.[28] In turn, trademark law assures producers that the use of their trademark is exclusively theirs; this assurance encourages producers to manufacture high-quality goods, and, as a result, consumers benefit.[29] The rationales behind copyright and trademark law are noticeably consumer-based in that the primary justifications focus on benefitting consumers and the public, whereas only the secondary justifications focus on the author or producer.[30]

B. *Changes Over Time and the Current Status of U.S. Copyright and Trademark Law*

1. Copyright

a. The Copyright Act of 1790

In 1790, Congress passed its first federal copyright legislation.[31] The Copyright Act of 1790[32] ("the Copyright Act"), as described in its preamble, was "[a]n Act for the encouragement of learning, by securing the copies of maps, Charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."[33] The Copyright Act

26. *See generally* William M. Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

27. *See id.* at 270.

28. *See id.* ("If the law does not prevent it, free riding will eventually destroy the information capital embodied in a trademark, and the prospect of free riding may therefore eliminate the incentive to develop a valuable trademark in the first place.").

29. *See id.*

30. *See, e.g.*, *id.* ("It should be apparent that the benefits of trademarks in lowering consumer search costs presuppose legal protection of trademarks. The value of a trademark is the saving in search costs made possible by the information or reputation that the trademark conveys or embodies about the brand . . . ."). *But see* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840–41 (2013) ("[T]rademark law was not traditionally intended to protect consumers. Instead, trademark law, like all unfair competition law, sought to protect producers from illegitimate diversions of their trade by competitors.").

31. Jonathan L. Kennedy, Note, *Double Standard and Facilitated Forum Shopping: A Historical Approach to Resolving the Circuit Split on Copyright Registration Timing*, 60 DRAKE L. REV. 305, 317 (2011).

32. Copyright Act of 1790, ch. 15, 1 Stat. 124.

33. *Id.*

granted authors a copyright in their works for an initial term of fourteen years with an option to renew the copyright for an additional fourteen years after the first term's expiration.[34]

b. Revisions to the Copyright Act

After its implementation in 1790, the Copyright Act underwent numerous changes, most notably in 1831, 1870, and 1909.[35] In 1831, Congress extended the initial fourteen-year copyright term to twenty-eight years, yet left the fourteen-year renewal option unchanged.[36] Congress again revised the Copyright Act in 1870, requiring authors to deposit copies of their works with the Library of Congress rather than with the district courts.[37] In 1909, Congress made a more significant change to the Copyright Act by extending copyright protection to "all the writings of an author," and increasing the optional copyright extension term to twenty-eight years.[38]

c. Current Status of Copyright Law

Congress again revised the copyright laws in the Copyright Act of 1976[39] ("the 1976 Act").[40] The 1976 Act drastically transformed the substance of U.S. copyright law and replaced and preempted all prior laws concerning copyright.[41] The 1976 Act was codified as Title 17 of the U.S. Code ("Title 17"); although it has been revised since its implementation, Title 17 remains in effect today.[42]

Under Title 17, "original works of authorship fixed in a tangible medium of expression" are protected by copyright; this protection includes, but is not limited to, literary works, musical works, motion pictures, and sound recordings.[43] Title 17 also provides authors with a

34. *Id.*

35. *See Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RES. LIBR., http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.Vhcebem_KRk (last visited Sept. 4, 2016) [hereinafter *Copyright Timeline*].

36. *Id.*

37. *Id.* (indicating that prior to the 1870 revision, the Copyright Act required authors to submit copies of their works to the clerk of the district court where the author resided); 1 Stat. 124.

38. *See* Copyright Act of 1909, ch. 320, 35 Stat. 1075 (current version at 17 U.S.C. §§ 102, 302-05 (2012)).

39. Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2012).

40. *See Copyright Timeline*, *supra* note 35.

41. *See id.*

42. *Id.*

43. 17 U.S.C. § 102 (2012) (protecting a non-exhaustive list of works of authorship that also includes dramatic works, pantomimes, choreographic works, pictorial works, graphic works, sculptural works, and architectural works).

set of exclusive rights accompanying the copyright, including the rights to reproduce, create derivative works, distribute copies, publicly perform the work (either live or via audio transmission), and publicly display the work.[44]

One of the most notable changes in Title 17, as compared to the prior copyright laws, was the significant extension to the length of copyright terms.[45] Under the 1976 Act, as originally drafted, the copyright protection would last for the life of the author plus fifty years after the author's death.[46] The copyright term was again extended in 1998 when Congress passed the Sonny Bono Copyright Term Extension Act[47] ("the 1998 Act").[48] The 1998 Act increased the copyright protection term of Title 17 to the life of the author plus 70 years; this term length remains in effect today.[49]

Although Title 17 grants authors a set of exclusive rights in their copyrighted works, those rights are subject to the limitation of fair use.[50] Congress established a fair use exception "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research."[51] The doctrine of fair use "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[52]

In 1998, Congress also passed the Digital Millennium Copyright Act[53] (the "DMCA"), which sought to address several crucial copyright related issues.[54] The DMCA significantly increased penalties for digital copyright infringement and created a notice and takedown procedure to

44. *Id.* § 106.

45. *See Copyright Timeline*, *supra* note 35.

46. Pub. L. No. 94–553, § 302, 90 Stat. 2541, 2572 (1976).

47. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998).

48. *Copyright Timeline*, *supra* note 35.

49. *Id.*; 17 U.S.C. § 302 (2012) (stating that the modified copyright term applies to works created on or after January 1, 1978 and does not apply to anonymous or pseudonymous works or works made for hire, which have separate term guidelines).

50. 17 U.S.C. § 107 (stating that multiple factors must be considered in determining whether a particular use constitutes a fair use). The fair use factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Id.*

51. *Id.*

52. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

53. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

54. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY (1998), http://www.copyright.gov/legislation/dmca.pdf.

more easily allow authors and artists to confront infringement.[55] The DMCA also created a safe harbor for both Internet providers and online venues, largely exempting them from liability arising from infringement by their users.[56]

2. Trademark

a. The *Trade-Mark Cases* and the 1881 Trade Mark Act

Prior to the implementation of federal trademark regulations, state common law was the only source of protection for trademarks.[57] Congress passed its first federal trademark legislation in 1870: "An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights."[58] In 1879 the U.S. Supreme Court ruled that the 1870 Act regulating trademarks was unconstitutional.[59] The Court held that, while the Patent and Copyright Clause did not give Congress the authority to regulate trademarks, Congress could do so under its Commerce Clause[60] powers.[61]

Congress responded to the Supreme Court's decision and evoked its Commerce Clause authority by passing the Trademark Act of 1881 (the "1881 Act").[62] The 1881 Act provided protection to those producers using trademarks in commerce with foreign nations or Indian tribes and required owners to register their trademarks with the Patent Office and pay a $25 fee to the U.S. Treasury.[63] Congress revised the 1881 Act in 1905, extending protection to trademarks used in commerce among the

55. *See id.*

56. *Id.* (explaining that the liability exemption for a service provider or online venue is predicated on the provider or venue complying with specific measures imposed by the DMCA).

57. *Overview of Trademark Law*, BERKMAN CTR. FOR INTERNET & SOC'Y AT HARVARD UNIV., https://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm (last visited Sept. 5, 2016).

58. Act of July 8, 1870, ch. 230, 16 Stat. 198.

59. Trade-Mark Cases, 100 U.S. 82, 99 (1879).

60. U.S. CONST. art. I, § 8, cl. 3.

61. *Trade-Mark Cases*, 100 U.S. at 93, 96–99 (concluding that, although Congress could regulate trademarks under its Commerce Clause powers, it could do so only if the legislation regulated trademarks with respect to interstate commerce, and holding that, because the statute at issue did not explicitly regulate interstate commerce, the law was unconstitutional).

62. Trademark Act of 1881, ch. 138, 21 Stat. 502 ("An act to authorize the registration of trade-marks and protect the same.").

63. *Id.*

states and trademarks used in commerce with foreign nations or Indian tribes.[64]

b. The Lanham Act of 1946 and the Current Status of Trademark Law

Trademark law in the United States is currently governed by the Lanham Act,[65] which Congress enacted in 1946 and amended in 1996.[66] Like the previous trademark laws, the Lanham Act requires the owner of a trademark to use the trademark in commerce in order to register the trademark with the Patent and Trademark Office.[67] The Lanham Act defines a trademark as including:

> Any word, name, symbol, or device, or any combination thereof used by a person, or which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if the source is unknown. The Act also provides procedures and remedies for cases of trademark infringement.[68]

The Lanham Act also provides the trademark owner with procedures and remedies if an infringing user is "likely to cause confusion, or to cause mistake, or to deceive[.]"[69]

The Lanham Act prohibits not only trademark infringement, but also trademark dilution with respect to famously distinctive marks.[70] Dilution can occur by blurring or by tarnishment, both of which are punishable under the Lanham Act.[71] Prohibiting dilution by blurring aims to protect the distinctive quality of a famous trademark, whereas prohibiting dilution by tarnishment protects the trademark's reputation from negative associations.[72]

64. Act of Feb. 20, 1905, ch. 592, 33 Stat. 724 ("An Act To authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same.").

65. 15 U.S.C. §§ 1051–1127 (1996).

66. *See Overview of Trademark Law*, *supra* note 57.

67. 15 U.S.C. § 1051.

68. *Id.* § 1127.

69. *Id.* § 1114.

70. *Id.* § 1125.

71. *Id.*

72. *Id.* (stating that dilution by blurring "is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark," whereas dilution by tarnishment "is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark").

An individual trademark falls into one of the five following categories: fanciful, arbitrary, suggestive, descriptive, or generic.[73] Under the Lanham Act, generic terms cannot be protected as trademarks, and a descriptive term is protected only if the term has acquired a secondary meaning.[74] Suggestive, arbitrary, and fanciful terms may be protected as trademarks without proof of a secondary meaning.[75]

C. *Music Artists Influencing and Utilizing Copyright and Trademark*

1. Copyright Protection

Although certain provisions of the DMCA are considered controversial for being excessively restrictive,[76] the DMCA is also facing criticism from artists who claim that the provisions are too lenient.[77] Artists, speaking out in favor of stronger policing with respect to the DMCA's takedown policy, claim that illegally copied files can be uploaded in a matter of seconds, while the artist "must spend countless hours trying to take [the copied files] down, most unsuccessfully."[78]

Four members of Congress recently introduced the Fair Play Fair Pay Act of 2015 (the "Fair Play Fair Pay Act").[79] If passed, the Fair Play Fair Pay Act would require ordinary radio stations to pay artists royalties for broadcasting their music, as is currently required of satellite stations

73. E.T. Browne Drug Co. v. Cococare Prods., Inc., 538 F.3d 185, 191 (3d Cir. 2008) (citing A.J. Canfield Co. v. Honickman, 808 F.2d 291, 296 (3d. Cir. 1986)).

74. *Id.*

75. *Id.* at 199 (citing Commerce Nat'l Ins. Servs., Inc. v. Commerce Ins. Agency, Inc., 214 F.3d 432, 438 (3d Cir. 2000)). The court stated:

> We have identified an eleven-item, non-exhaustive list of factors relevant to the factual determination whether a term has acquired secondary meaning: (1) the extent of sales and advertising leading to buyer association; (2) length of use; (3) exclusivity of use; (4) the fact of copying; (5) customer surveys; (6) customer testimony; (7) the use of the mark in trade journals; (8) the size of the company; (9) the number of sales; (10) the number of customers; and, (11) actual confusion.

Id. at 191.

76. Katherine A. Franco, *Protecting Free and Open Source Software: Solutions in the Digital Millennium Copyright Act*, 12 COLUM. SCI. & TECH. L. REV. 160, 177 (2011) ("Because the anti-circumvention provisions provide copyright owners with measures for relief outside of the exclusive rights traditionally provided under copyright law, the provisions are often considered overly restrictive and the most controversial provisions of the DMCA.").

77. *See* Grant Gross, *Copyright Owners Call for Overhaul of DMCA Takedown Notices*, PCWORLD (Mar. 13, 2014, 11:51 AM), http://www.pcworld.com/article/2108100/copyright-owners-call-for-overhaul-of-dmca-takedown-notices.html.

78. *Id.*

79. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015).

under the DMCA.[80] Currently, all types of radio stations pay songwriter performance royalties, but artists advocating for this bill's passage are also seeking payment in the form of master recording performance royalties.[81] Several well-known music artists, including Cyndi Lauper and Elvis Costello, have publicly shown support for the bill, and some artists have also shared their beliefs that artists are unfairly compensated under the DMCA's current provisions.[82]

Music artists are also speaking out about the impact of illegal online file sharing on the music industry.[83] Some artists are praising online file sharing because it exposes more people to their music and also enables affordable access to music.[84] Artists, such as Lady Gaga, Shakira, and more, have expressed "that they are OK with music piracy, if not in full support of it."[85] While reasons for this support vary, these artists tend to share the notion that selling music is less important than sharing their music with fans.[86] However, several major artists, including Elton John, Lilly Allen, and James Blunt, have voiced their opposition and suggested that online file sharing will have a detrimental impact on up-and-coming talent.[87]

2. Trademark Protection

Music artists have also made a habit of using and influencing trademark law with respect to band names, brands, song names, and more; some artists have even taken "extreme measures to protect their trademarks."[88] For instance, following the 1998 death of Beach Boys band member Carl Wilson, Beach Boys frontman Mike Love obtained the exclusive trademark and licensing rights to the "Beach Boys"

80. Ed Christman, *'Fair Play, Fair Pay Act' Introduced, Seeks Cash from Radio Stations*, BILLBOARD (Apr. 13, 2015), http://www.billboard.com/articles/business/6531693/fair-play-fair-pay-act-performance-royalty-radio.

81. *Id.* (explaining that the DMCA currently requires satellite radio stations to pay both songwriter performance and master recording performance royalties, whereas terrestrial radio stations are only required to pay songwriter performance royalties).

82. *Id.*

83. *See infra* notes 84–87 and accompanying text.

84. *See* Courteney Palis & Catherine Smith, *Lady Gaga, Jack White, Norah Jones and More: 10 Musicians OK with Piracy and Illegal Fire-Sharing*, HUFFINGTON POST (Feb. 9, 2012, 10:33 AM), http://www.huffingtonpost.com/2012/02/06/lady-gaga-jack-white-norah-jones-musicians-piracy_n_1258319.html.

85. *Id.*

86. *Id.*

87. *See* Katie Allen, *Elton John Backs Crackdown on Music Piracy*, GUARDIAN (Sept. 21, 2009, 12:34 PM), http://www.theguardian.com/business/2009/sep/21/musicindustry-internetipos.

88. *5 Nasty Trademark Disputes Featuring Famous Musicians*, SECUREYOURTRADEMARK.COM, https://secureyourtrademark.com/blog/trademark-disputes-featuring-famous-musicians/ (last visited Sept. 5, 2016).

moniker.[89] Love subsequently sued former bandmate Al Jardine for touring as "Al Jardine of the Beach Boys" and also sued his cousin and former bandmate Brian Wilson for releasing an uncompleted Beach Boys album.[90]

"Queen of Pop" Madonna[91] recently faced a trademark dispute of her own over the name "Material Girl."[92] While Madonna brought fame to the name "Material Girl" with her 1985 hit song of the same name, she failed to trademark the name at that time.[93] Madonna's failure to trademark "Material Girl" made the name an open target for L.A. Triumph, Inc. ("L.A. Triumph"), a California clothing retailer, which began using the mark in 1997 for its own clothing line.[94] L.A. Triumph initially registered the trademark in California and later registered for a federal trademark in 2009.[95]

Issues later arose when Madonna created a clothing line called "Material Girl" for retail giant Macy's; following the clothing line's release in 2010, L.A. Triumph sued both Madonna and Macy's for infringing upon its "Material Girl" trademark.[96] In 2011, the U.S. District Court for the Central District of California denied Madonna's motion for summary judgment, concluding that material issues of fact existed with respect to first use of the mark, likelihood of confusion, and trademark abandonment.[97] The Central District of California also notably concluded: "This Court and other courts have recognized that the singing of a song does not create a trademark."[98] The parties eventually settled the case before trial, which resulted in Madonna acquiring the right to continue her clothing line under the "Material Girl" trademark.[99]

89. *Id*.

90. *Id*.

91. *See generally* Andrew Matson, *Madonna is Still the Queen of Pop, After All These Years*, SEATTLE TIMES (Sept. 28, 2012, 11:08 AM) (last updated on Sept. 28, 2012, 3:46 PM), http://www.seattletimes.com/entertainment/music/madonna-is-still-the-queen-of-pop-after-all-these-years/.

92. *See generally* L.A. Triumph, Inc. v. Ciccone, No. CV 10-06195 SJO (JCx), 2011 U.S. Dist. LEXIS 132057 (C.D. Cal. Aug. 31, 2011).

93. *Id*. at *2–4.

94. *Id*.

95. *Id*.

96. *Id*. at *3–4.

97. *Id*. at *6–16.

98. *Id*. at *7.

99. *See* Melvin N.A. Avanzado, *Entertainment Litigation: Madonna's Battle Over "Material Girl" Trademark*, ENTERTAINMENT LITIGATION BLOG (Feb. 6, 2012), http://www.entertainmentlitigationblog.com/2012/02/entertainment_litigation_madon_1.html; *see also* MATERIAL GIRL, http://materialgirlcollection.com (indicating that Madonna continues to use the "Material Girl" name for her Macy's clothing line). (last visited Dec. 11, 2016).

III. ANALYSIS

A. *Swift's Rise to IP Fame*

One major artist in particular has recently made headlines in the IP realm: Taylor Swift.[100] As a result of the aggressive approach she has taken to protect all aspects of her IP, Swift has quickly risen to fame in the IP world.[101] A media frenzy ensued in January of 2015, when news broke that Swift had applied to trademark numerous phrases from her hit album "1989," such as "This Sick Beat" and "Party Like It's 1989."[102] Swift's aggressive trademark strategy received criticism from the media as well as other entertainers;[103] musician Ben Norton publicly voiced his disapproval and even recorded a metal song entitled "This Sick Beat™" to mock Swift's prospective trademark.[104]

As of February 2015, Swift had applied for 121 trademarks and successfully registered fifty-four trademarks in the United States.[105] Several of Swift's prospective trademarks from her latest album are currently pending final approval for registration from the U.S. Patent and Trademark Office, including "Party Like It's 1989," "This Sick Beat," "Cause We Never Go Out Of Style," "Could Show You Incredible

100. Ewing, *supra* note 7.

101. *See id.* ("Taylor is working to build an empire that will allow her to use her intellectual property in almost limitless ways with as much protection as possible.").

102. *See* Sarene Leeds, *Taylor Swift Trademarks 'This Sick Beat' and Other Catchphrases*, WALL ST. J.: SPEAKEASY BLOG (Jan. 29, 2015, 8:30 AM), http://blogs.wsj.com/speakeasy/2015/01/29/taylor-swift-trademarks-this-sick-beat-and-other-catchphrases/. *See also* Kory Grow, *Taylor Swift Trademarks 'This Sick Beat' and Other '1989' Phrases*, ROLLING STONE (Jan. 28, 2015), http://www.rollingstone.com/music/news/taylor-swift-trademarks-this-sick-beat-and-other-1989-phrases-20150128; Jess Collen, *Taylor Swift Trademark Primer—Dozens of Trademarks 'Belong With Me,'* FORBES (Feb. 9, 2015, 4:33 PM), http://www.forbes.com/sites/jesscollen/2015/02/09/taylor-swift-trademark-primer-dozens-of-trademarks-belong-with-me/ ("Taylor trademark-mania is striking an unlikely note in the world of trademark law.").

103. *See, e.g.*, Geoff Weiss, *Taylor Swift's Latest Trademark Filings Reveal a Shrewd Business Strategy*, ENTREPRENEUR (Jan. 30, 2015), http://www.entrepreneur.com/article/242430.

104. Samantha Grossman, *Taylor Swift Wants to Trademark "This Sick Beat" So Somebody Wrote a Metal Song to Protest It*, TIME (Feb. 4, 2015), http://time.com/3695657/taylor-swift-trademarks-this-swift-beat-metal-protest-song/; PeculateMusic, *This Sick Beat™ (Official Lyric Video)*, YOUTUBE (Jan. 31, 2015), https://www.youtube.com/watch?v=uipp8kiYU9I ("Trademarks of common idioms such as this are a direct attack on one of the most fundamental and inalienable rights of all: our freedom of speech.").

105. Tim Lince, *Taylor Swift's Trademarks Fuel Media Misreporting and Protest Songs*, WORLD TRADEMARK REV. (Feb. 4, 2015), http://www.worldtrademarkreview.com/blog/Detail.aspx?g=61ccf10f-885e-4aa6-9d04-3421f8c7e3b4.

Things," and "Nice To Meet You Where, Where You Been?," among others.[106]

Swift has aggressively exercised the rights afforded to her by copyright law as well.[107] Swift's team recently sent a cease-and-desist letter to a podcast called "Citizen Radio" immediately after one of the hosts recited a few of Swift's lyrics during the podcast's September 3, 2015 episode.[108] The episode, which apparently involved a discussion of Swift's "Wildest Dreams" music video and a brief recitation of the song's lyrics, was promptly removed following receipt of the cease-and-desist letter.[109]

Though Swift's record label and rights management company are largely responsible for her aggressive approach to IP protection, Swift herself has been vocally critical of music streaming services such as Spotify.[110] Swift has expressed the opinion that artists, writers, and music creators are not fairly compensated by music streaming services and has stated that she does not "agree with perpetuating the perception that music has no value and should be free."[111]

B. *The Etsy Takedown*

Shortly after the world learned that Swift had applied to trademark phrases from her album "1989," Swift's team sent cease-and-desist

106. *See Swift, Taylor Trademarks*, JUSTIA TRADEMARKS, https://trademarks.justia.com/owners/swift-taylor-1396036/index.html (last visited Sept. 5, 2016).

107. Swift herself is not responsible for the maintenance and protection of her intellectual property; TAS Rights Management, LLC "is Swift's boots on the ground in the dark and twisted realm of copyright infringement, chasing down and prosecuting counterfeiters, often en masse." James Joiner, *Taylor Swift's Secret Police*, DAILY BEAST (Feb. 14, 2015, 6:50 AM), http://www.thedailybeast.com/articles/2015/02/14/taylor-swift-s-secret-police.html. The "TAS" in the company's name stands for "Taylor Allison Swift." *Id.* With respect to major artists, such as Swift, it is "unlikely that the pop-star knows that the cease and desists and trademarking are happening until after they are completed." *Id.* All references to Taylor Swift in this Comment refer not only to Swift herself, but also to her team and rights management company ("Swift's team").

108. Citizen Radio, FACEBOOK (Sept. 4, 2015), https://www.facebook.com/CitizenRadio/posts/1094113390601947; *see also* Madison Malone Kircher, *Swift's Fans Are Starting to Make Fun of Her Insanely Strict Copyright Rules*, BUS. INSIDER: TECH INSIDER (Sept. 16, 2015, 10:11 AM), http://www.techinsider.io/taylor-swift-copyright-meme-taking-over-tumblr.

109. *See* Citizen Radio, *supra* note 108; *see also* Allison Kilkenny (@AllisonKilkenny), TWITTER (Sept. 4, 2015, 1:14 PM), https://twitter.com/allisonkilkenny/status/639894216173309952?ref_src=twsrc%5Etfw ("Yesterday's @CitizenRadio has been deleted. Hey @TaylorSwift are you aware your people are harassing podcasts?").

110. *See* Kory Grow, *Taylor Swift Shuns 'Grand Experiment' of Streaming Music*, ROLLING STONE (Nov. 6, 2014), http://www.rollingstone.com/music/news/taylor-swift-shuns-grand-experiment-of-streaming-music-20141106.

111. *Id.*

messages to several Etsy[112] merchants who were making and selling "Swift-themed items."[113] While many of the Swift-related products have since been removed from Etsy, Swift has actually been pursuing Etsy merchants since at least 2013 when Etsy's legal department sent out takedown notices on Swift's behalf.[114]

According to at least one of the Etsy artisans who received a cease-and-desist message, the handmade Swift-themed items that she was selling were made for fun and were never intended to be profitable.[115] This particular Etsy artisan explained that "[t]he cost of the item covered shipping costs, and production costs with very little left over."[116] She was shocked by the cease-and-desist message because the relative popularity of her items did not, in her view, seem to be enough to threaten or harm Swift's brand.[117]

Swift is targeting fan-made artwork that is inspired by fans' passion for Swift's music and their desire to creatively express that passion and share it with like-minded fans.[118] Unfortunately, widespread cease-and-desist campaigns like Swift's discourage this sort of creative expression: "These free, loving, creative minds are being stopped by the very artists who have inspired them."[119]

Other major artists, such as Drake, have pursued retailers like Macy's and Walgreens for selling merchandise emblazoned with the artists' lyrics; however, threatening a major corporation with legal action is far different than threatening the craftsmen and artisans that make up Etsy.[120] The Etsy artisans selling pop-star themed artwork likely realize

112. *See About*, *supra* note 9.

113. Victor Luckerson, *Why Taylor Swift is Going to War with Twee Retailer Etsy*, TIME (Feb. 6, 2015), http://time.com/3698790/why-taylor-swift-is-goint-to-war-with-twee-retailer-etsy/.

114. *See* Patrick Smith, *Taylor Swift's Lawyers Threatened Etsy Sellers in Trademark Dispute*, BUZZFEED (Feb. 6, 2015, 3:37 AM), http://www.buzzfeed.com/patricksmith/taylor-swifts-lawyers-have-threatened-etsy-sellers#.dbKxNA0ml.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.* ("Fans like to see themselves as part of the artist's story, however small. They want to contribute and be creative and have fun.").

119. *See id.*

> [I]t leaves us with a bitter taste in our mouths. It feels as though we don't matter, that our ideas and thoughts and creations never belonged to us in the first place. No matter how hard we worked. And for other fans who make art, I'm afraid that this is going to be the future.

Id.

120. *See* Hazel Cills, *Why Taylor Swift's Etsy Crackdown Feels So Wrong*, REFINERY29 (Feb. 13, 2015, 3:30 PM), http://www.refinery29.com/2015/02/82294/taylor-swift-sues-fan-made-etsy-products.

very little, if any, profit from their products' sales.[121] Meanwhile, any commercial threat to pop-stars as a result of these handmade products is relatively miniscule.[122]

Skeptics of IP law have long warned that overprotection, such as trademarking lyrical phrases, may halt creative innovation by limiting the ability of new artists to build off of and create works inspired by art already in existence:[123]

> Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.[124]

Thus, a large drawback to IP law is that "too much intellectual property protection can actually . . . slow down, rather than speed up, the pace of innovation."[125]

Swift's practice of trademarking lyrical phrases also strays from one of the main justifications of trademark law: to reduce consumer confusion by enabling consumers to easily identify the origin of a good.[126] Online consumers are likely savvy enough to realize that the Swift-related products sold on Etsy—an online marketplace for handmade and vintage goods[127]—are made by independent artists and

121. *See id.* ("Most likely, these crafters are fans and no doubt they are close in age to Swift. It's doubtful they are making a huge profit off of their under $20 merchandise.").

122. *See generally* Zack O'Malley Greenburg, *The Top-Earning Women in Music 2014*, FORBES (Nov. 4, 2014, 10:00 AM), http://www.forbes.com/sites/zackomalleygreenburg/2014/11/04/the-top-earning-women-in-music-2014/ ("Taylor Swift ranks second with $64 million, the highest mark of her career. As she completes her crossover from country to pop, Swift continues to pull in cash from live shows, recorded music and endorsements for Diet Coke, Keds and CoverGirl."); *see also* Andrew Hampp, *How Pop Stars Make Money Now*, VULTURE (Sept. 11, 2015, 5:30 PM), http://www.vulture.com/2015/09/how-pop-stars-make-money-now.html# (stating that Swift's take-home from her *1989* Tour will "easily exceed the $30 million she personally grossed from 2013's *Red* Tour").

123. *See generally* Parker Higgins, *Without Intellectual Property Day*, ELECTRONIC FRONTIER FOUNDATION: DEEPLINKS BLOG (Apr. 26, 2014), https://www.eff.org/deeplinks/2014/04/without-intellectual-property-day ("[P]ushing only for more IP restrictions tips a delicate balance against creativity[.]").

124. White v. Samsung Elecs. Am., Inc. 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

125. Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 923 (2010).

126. *See* Landes & Posner, *supra* note 26 at 268 (explaining that trademark infringement can only be found where use of a potentially infringing trademark is "shown to create a likelihood of confusion regarding the source of goods").

127. *About*, *supra* note 9 ("[A]n online community where crafters, artists and makers could sell their handmade and vintage goods and craft supplies.").

not actually made or endorsed by Swift herself.[128] Threats like Swift's are generally unsubstantiated because a finding of trademark infringement requires there to be a likelihood of confusion; however, even the threat of an expensive legal battle with a celebrity is enough to "scare the average person into stopping whatever it is they are doing."[129]

C. *The War on Music Streaming*

When Taylor Swift released her fourth album, *Red*, in 2012, she initially refused to make it available on Spotify's streaming service.[130] While *Red* was eventually made available to Spotify listeners after its commercial debut, neither *Red* nor any of Swift's other albums can be found in Spotify's library today.[131] In November of 2014, Swift decided to remove her entire music library from Spotify and called the decision both a business and an artistic choice.[132] Just months before she pulled her music from Spotify, Swift wrote an op-ed piece for *The Wall Street Journal* detailing her thoughts and hopes for the future of the music industry.[133] Swift opined that "[p]iracy, file sharing and streaming have shrunk the numbers of paid album sales drastically[.]"[134]

In June of 2015, Swift had a similar falling-out with Apple before the debut of its new Apple Music streaming service.[135] On her Tumblr blog page, Swift posted an open letter to Apple explaining why she planned to withhold her then upcoming album, *1989*, from Apple

128. *See* Kevin L. Boyd, *Celebrity Trademark Owners – The Bullies of the Intellectual Property World*, LEGALLY CONSIDERED BLOG (Apr. 3, 2015), http://www.legallyconsidered.com/?p=113 ("If a person saw a candle or mug for sale on Etsy with 'Feyoncé' or 'this sick beat' hand-painted on it, would the person really believe that it was Beyoncé or Taylor [S]wift who created and is selling that mug? Probably not – especially if the mug was listed as a hand-made item.").

129. *See id.* ("[T]here was, and is, arguably no trademark infringement occurring on websites such as Etsy because it is unlikely that a consumer would ever actually be confused as to the source of these products.").

130. *See* Charlotte Alter, *Taylor Swift Just Removed Her Music from Spotify*, TIME (Nov. 3, 2014), http://time.com/3554438/taylor-swift-spotify/.

131. *See id.*

132. MELISSA HARRIS-PERRY, *Taylor Swift, Spotify and the Battleground of Intellectual Property* (MSNBC television broadcast Nov. 15, 2014), http://www.msnbc.com/melissa-harris-perry/watch/taylor-swift-vs.-spotify-359086659812.

133. *See* Taylor Swift, *For Taylor Swift, the Future of Music is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM), http://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219.

134. *Id.*

135. *See* Dieter Bohn, *Taylor Swift Calls Apple Music Free Trial 'Shocking, Disappointing' in Open Letter*, VERGE (June 21, 2015, 8:41 AM), http://www.theverge.com/2015/6/21/8820035/taylor-swift-apple-music-free-trial-shocking-disappointing.

Music.[136] Swift's grievance with the new streaming platform was over Apple's decision to offer free three-month trials to users, during which time artists, producers, and writers would not be compensated.[137] Swift pleaded with Apple to reconsider its compensation policy, claiming to do so not for her own benefit, but on behalf of artists, writers, and producers less successful than herself who may rely heavily on royalties.[138]

While Apple gave in to Swift's pleas almost immediately,[139] not everyone took kindly to the stand Swift took against streaming.[140] Tom Conrad, former Chief Technology Officer of Pandora Internet Radio, highlighted the hypocrisy of Swift's appeal to Apple: "Swift's career was built on terrestrial radio play, which is a free service AND doesn't pay recording artists a dime."[141] Simply put, artists, like Swift, who have pulled their music from streaming services are limiting access to their music.[142]

Many music consumers use Spotify and similar streaming platforms to expose themselves to new music at a reasonable cost.[143] Swift's issue with Spotify's royalty payouts fails to consider the true value of music streaming, which is that more consumers will be exposed to an artist's

136. Taylor Swift, *To Apple, Love Taylor*, TUMBLR (June 21, 2015), http://taylorswift.tumblr.com/post/122071902085/to-apple-love-taylor.

137. *Id.*

138. *Id.*

> This is not about me. Thankfully I am on my fifth album and can support myself, my band, crew, and entire management team by playing live shows. This is about the new artist or band that has just released their first single and will not be paid for its success. This is about the young songwriter who just got his or her first cut and thought that the royalties from that would get them out of debt. This is about the producer who works tirelessly to innovate and create, just like the innovators and creators at Apple are pioneering in their field . . . but will not get paid for a quarter of a year's worth of plays on his or her songs.

Id.

139. *See* Brian Stelter, *Apple Caves After Taylor Swift Threatens to Pull Album*, CNN MONEY (June 22, 2015, 4:40 PM), http://money.cnn.com/2015/06/21/media/taylor-swift-1989-apple-music/ ("Apple responded to Swift late Sunday night in a series of tweets from Eddy Cue, a key lieutenant of CEO Tim Cook. '#AppleMusic will pay artist for streaming, even during customer's free trial period,' Cue tweeted, adding that 'We hear you @taylorswift13 and indie artists. Love, Apple.'").

140. *See generally* Sam Sanders, *In the Battle Between Taylor Swift and Apple, Swift Didn't Fight Alone*, NPR (June 22, 2015, 8:13 PM), http://www.npr.org/sections/thetwo-way/2015/06/22/416538357/in-the-battle-between-taylor-swift-and-apple-swift-didnt-fight-alone.

141. *Id.*

142. *See* Dave Smith, *Taylor Swift is Wrong About Spotify*, BUS. INSIDER (May 28, 2015, 5:38 PM), http://www.businessinsider.com/taylor-swift-is-wrong-about-spotify-2015-5 ("Spotify gets music: It allows paid subscribers to endlessly binge on music at a reasonable price . . . [t]hat's great for customers who love music, and artists who want their work to be heard.").

143. *See id.* ("[Swift's] decision affected millions of her own fans, and millions of other people who use Spotify to expose themselves to new music[.]").

music and more of those consumers will become fans.[144] While Swift may have earned only cents on the dollar for each Spotify play,[145] a listener who discovers and likes her work may be likely to attend one of her concerts and buy some of her merchandise.[146] In the end, pop-stars like Swift earn the bulk of their wealth through touring, tour-related merchandise sales, and endorsement deals.[147]

While copyright law allows artists and their labels to choose where and how their music is displayed or distributed,[148] the firm stance that some artists have taken against music streaming deviates from the rationale behind copyright protection.[149] Copyright protection aims to make artistic works accessible to the public by providing authors and artists with incentives to create and distribute their work.[150] As streaming platforms like Spotify are "quickly becoming the way the world accesses music[,]"[151] pulling music from those platforms greatly reduces its accessibility to the public at large.[152]

Further, the incentives for pop-stars to keep creating and releasing music are so substantial that music streaming likely has little effect on a pop-star's take-home pay.[153] While streaming platforms like Spotify may not be lucrative for pop-stars, "[Spotify] exists simply because people love music, and it's better and safer than piracy."[154] Between 2004 and 2009, the music industry saw a thirty percent drop in global music sales; in large part, the decline was attributed to digital piracy.[155]

144. *See id*.

145. *See* David Johnson, *See How Much Every Top Artists Makes on Spotify*, TIME (Nov. 18, 2014), http://time.com/3590670/spotify-calculator/ (stating that Spotify pays between $0.006 to $0.0084 per play).

146. *See* Smith, *supra* note 142 ("[I]f someone discovers Taylor Swift and likes her work, there's a good chance they could attend one of her concerts or buy some of her merchandise—that's much more 'valuable' than counting pennies from song plays.").

147. *See* Kelley Dunlap & Reggie Ugwu, *Here's How Taylor Swift Gets Paid*, BUZZFEED (Nov. 3, 2014, 1:51 PM), http://www.buzzfeed.com/kelleydunlap/how-does-taylor-swift-make-her-money#.cdDOnB0nW (stating that Swift's *Red* tour grossed $150 million, and for each ticket purchased an average of $17 of merchandise was sold).

148. *See* 17 U.S.C. § 106 (2012).

149. United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

150. *Id.*

151. Hugh McIntyre, *Taylor Swift vs. Spotify: Should Artists Be Allowed to Opt Out of Free Streaming?*, FORBES (Aug. 8, 2015, 11:42 AM), http://www.forbes.com/sites/hughmcintyre/2015/08/08/taylor-swift-vs-spotify-should-artists-be-allowed-to-opt-out-of-free-streaming/#2715e4857a0b43e9cbfc1546.

152. *See generally* Smith, *supra* note 142 ("Spotify has over 60 million active users, and more than 15 million paid subscribers[.]").

153. *See generally supra* note 147 and accompanying text.

154. Smith, *supra* note 142.

155. Eric Pfanner, *Music Industry Counts the Cost of Piracy*, N.Y. TIMES (Jan. 21, 2010), http://www.nytimes.com/2010/01/22/business/global/22music.html?_r=0.

In 2010, approximately ninety-five percent of the music downloaded worldwide was done so illegally.[156]

When the founders of Spotify launched their streaming platform in 2008, their goal was to combat music piracy by providing a free, legal, and superior alternative.[157] Today, person-to-person file sharing "accounts for less than [ten percent] of total daily traffic in North America[,]" in part due to platforms like Spotify that "provid[e] subscribers a wealth of content at reasonable prices."[158] In this digital age where "you can't beat technology,"[159] Taylor Swift's romanticized hopes for the future of the music industry are increasingly unrealistic.[160]

When offered a free and legal alternative to file sharing, people ages eighteen to twenty-nine are fifty-five percent less likely to pirate music.[161] So while music streaming may not be as lucrative for artists as physical and digital sales, "[i]f you've got millions and millions of people using those services, at least they're in a commercial ecosystem[;] [b]efore, they weren't—they were completely un-monetized."[162] Even with royalties that are minimal in comparison to digital sales, artists like Swift have still been able to bring in around $500,000 per month from Spotify streaming, suggesting that streaming may be more friend than foe to the music industry in its fight against copyright piracy.[163]

D. *"Are we out of the woods yet?"*[164]

Swift, unfortunately, is not the only major artist employing these hazardous practices; other artists seem to have followed suit by overlapping copyright and trademark protection,[165] threatening Etsy

156. *Id.*

157. *See* John Seabrook, *Revenue Streams*, NEW YORKER (Nov. 24, 2014), http://www.newyorker.com/magazine/2014/11/24/revenue-streams; *Spotify's Impact on Piracy*, SPOTIFY ARTISTS, http://www.spotifyartists.com/spotify-explained/. (last visited Dec. 11, 2016).

158. *Spotify's Impact on Piracy*, *supra* note 157.

159. Seabrook, *supra* note 157.

160. *See* Swift, *supra* note 136 ("In my opinion, the value of an album is, and will continue to be, based on the amount of heart and soul an artist has bled into a body of work, and the financial value that artists [] place on their music when it goes out into the marketplace."); *see also* Seabrook, *supra* note 157.

161. Seabrook, *supra* note 157.

162. Steve Knopper, *Taylor Swift Pulled Music From Spotify for 'Superfan Who Wants to Invest,' Says Rep*, ROLLING STONE (Nov. 8, 2014), http://www.rollingstone.com/music/news/taylor-swift-scott-borchetta-spotify-20141108.

163. *See generally* Seabrook, *supra* note 157.

164. TAYLOR SWIFT, *Out of the Woods*, *on* 1989 (Big Machine Records, LLC 2014).

165. *See, e.g.*, *supra*, notes 92–99 and accompanying text (following her settlement with L.A. Triumph, Madonna acquired the "Material Girl" trademark); MATERIAL GIRL, Registration No. 77,983,068; Press Release, Iconix Brand Group, Inc., MG Icon Announces the Launch of Truth or Dare by Madonna (Nov. 3, 2011),

merchants,[166] and withholding music from streaming services.[167] Continued overlapping protection "undermines the careful balance individually developed under each body of intellectual property law."[168] Furthermore, the goals of copyright law are undermined when access to music is limited by artists' refusal to participate in streaming.[169]

In order to combat the negative consequences of these pop-star practices, legislators should prevent further overlap by limiting the scope and subject matter protected by both trademark and copyright laws.[170] Ideally, any given work would qualify for only one form of protection—copyright or trademark—at most.[171] Congress should initiate these changes by first acknowledging that a problem exists[172] and taking the position that overlapping protection was never intended.[173] Such a statement "would provide an interpretive rule for the courts to aid in the resolution of claims for overlapping protection and it would provide a roadmap for future expansion of intellectual property rights."[174]

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http://www.prnewswire.com/news-releases/mg-icon-announces-the-launch-of-truth-or-dare-by-madonna-133145858.html (explaining that Madonna indirectly owns fifty percent of MG Icon LLC, which owns and licenses the "Material Girl" trademark); Copyright Catalog Search for *Material Girl*, U.S. COPYRIGHT OFFICE, http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=23&ti=1,23&Search%5FArg=madonna%20material%20girl&Search%5FCode=FT%2A&CNT=25&PID=VT32qCCkPWKQKbNm9f5ifm0BwO&SEQ=20160304200535&SID=7 (last visited Sept. 5, 2016) (showing that Sire Records Company registered Madonna's song "Material Girl" with the U.S. Copyright Office).

166. *See, e.g.*, Rob Price, *Beyoncé Threatened to Sue Craft Website Etsy for Selling 'Feyoncé' Mugs*, BUS. INSIDER (Jan. 23, 2015), http://www.businessinsider.com/beyonce-feyonce-etsy-mugs-2015-1?r=UK&IR=T (reporting that Beyoncé threatened to take legal action against Etsy for selling mugs that featured "a play on the word 'fiance' referring to Beyoncé's hit 'Single Ladies.'").

167. *See, e.g.*, *Adele Talks Decision to Reject Streaming Her New Album*, TIME (Dec. 21, 2015), http://time.com/4155586/adele-time-cover-story-interview-streaming/ (discussing how Adele withheld her most recent album from music streaming platforms and commended Swift for her similar stance on streaming).

168. Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J. L. & TECH. 35, 88 (2010–2011).

169. *See supra* notes 149–52 and accompanying text.

170. *See generally* Beckerman-Rodau, *supra* note 168 (discussing how expansion of the subject matter protected under copyright, patent, and trademark law allows a single subject matter to be simultaneously protected under multiple bodies of IP law).

171. *See* Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473, 1530–31 (2004).

172. *See id.* at 1510 ("There is no evidence that either Congress or the courts have thought in any systematic way about overlapping trademark and copyright protection. . . . Such a lack of attention indicates that overlapping copyright and trademark protection has arisen accidentally, as a byproduct of the expansion of intellectual property right, rather than by design.").

173. *See id.* at 1531.

174. *Id.*

These issues may be further alleviated through "facilitat[ing] a more coordinated development of the various bodies of intellectual property law" by consolidating oversight into one unified agency.[175] Oversight of copyright and trademark law is currently vested in separate entities—the U.S. Patent and Trademark Office and the U.S. Copyright Office, respectively—which only perpetuates "the fragmented development of intellectual property law and policy rather than a coherent and integrated approach."[176]

In addition, artists like Swift should begin to embrace, rather than resist, the movement toward music streaming. While album sales are declining, streaming sales are rising and artists should welcome the exposure and valuable data that music streaming provides.[177]

IV. CONCLUSION

The influence of pop-stars like Taylor Swift is no longer limited to the realms of music, fashion, and entertainment. As these pop-stars are building their brands by trademarking names, lyrics, and phrases, small-scale artists are in turn being thwarted with threatened legal action and claims of copyright and trademark violation. When pop-stars opt out of music streaming and hold out for higher royalties, consumers' access to affordable music is consequently diminished.

To address these implications, the overlap between copyright and trademark law should be eliminated or, at the very least, strictly limited. Congress should acknowledge that the various branches of intellectual property are not intended to overlap, and courts should consequently decide cases consistent with that principle. Oversight of IP protection should also be consolidated into a single comprehensive agency in order to harmonize the system and prevent overlap. Further, major artists like Swift should begin to accept the reality of music streaming and take advantage of the benefits that it offers. Failure to address these issues will likely have negative consequences on the future of creative innovation and exposure to creative expression. "Don't say I didn't, say I didn't warn ya."[178]

175. Beckerman-Rodau, *supra* note 168, at 89.

176. *Id.* at 40–41.

177. *See* Stephanie Kim, *8 Reasons Why Artists Should Embrace Music Streaming Services*, STELOMANE (Jan. 12, 2016), http://www.stelomane.com/blog/2016/1/12/8-reasons-why-artists-should-embrace-music-streaming-services ("With streaming, consumers gain increased music listening, discovery and experience capabilities, while artists gain the data and features that are now necessary to heighten their reach, and ultimately, their revenues.").

178. TAYLOR SWIFT, *Blank Space*, *on* 1989 (Big Machine Records, LLC 2014).