Tension in Intention: Competing Goals of Intellectual Property Law Inherent in Statutory Copyright Law for Interactive Digital Music Distribution Platforms

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I. INTRODUCTION

One of the essential powers of Congress is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] The intellectual property clause has been interpreted as having two main purposes that inform the scope of Congress's power to create laws under it: (1) to incentivize the creation of the useful arts and sciences and (2) to foster access to the arts and sciences.[2] In practice, the way statutory copyright law has evolved under the clause's mandate has created an inherent tension between statutory copyright law and intellectual property's constitutional purposes.[3] Paradoxically, portions of copyright statutory law are at odds with the purposes of the intellectual property clause with respect to how the statutory provisions regard the access and creation incentivization goals of the Constitution's intellectual property clause. Congress's bifurcation of intellectual property law into separate copyright and patent law regimes[4] has contributed to the tension in part. Often, copyright provisions hinder, rather than promote, access to copyrighted works, and disincentivize the creation of the useful arts.

The tension is particularly problematic with respect to interactive music streaming services like Spotify.[5] With over fifty million paying subscribers[6] and over 100 million active users,[7] Spotify is the most popular on-demand interactive music streaming service in the industry today.[8] However, services like Spotify are exempt from the compulsory licensing scheme for

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[1] U.S. CONST. art. I, § 8, cl. 8.

[2] *See* L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L. J. 909, 946-48 (2003).

[3] *See* 17 U.S.C.A. § 114(d)-(f), §§ 301-305 (2010).

[4] Clark D. Asay, *Intellectual Property Law Hybridization*, 87 U. COLO. L. REV. 65, 75 (2016).

[5] *See* John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or Its Foe?*, NEW YORKER (Nov. 24, 2014), http://www.newyorker.com/magazine/2014/11/24/revenue-streams.

[6] *Fast Facts*, SPOTIFY (last visited May 15, 2017), https://press.spotify.com/us/about/ (number of paying subscribers as of March 2017).

[7] *Fast Facts*, SPOTIFY (last visited May 15, 2017), https://press.spotify.com/us/about/ (number of active users as of June 2016).

[8] *See* Shirley Halperin, *Apple Music Hits 20 Million Subscribers; Execs Want 'More, Faster—We're Hungry!'*, BILLBOARD (Dec. 6, 2016), http://www.billboard.com/biz/articles/news/digital-and-mobile/7604328/apple-music-hits-20-million-subscribers-execs-want-more; David Z. Morris, *Tidal May Have Been Wildly Inflating Subscriber Numbers*, FORTUNE (Jan. 21, 2017), http://fortune.com/2017/01/21/tidal-subscriber-number-inflation/; Paul Resnikoff, *More Than 100 Million People Now Pay for Streaming Music Services*, DIGITAL MUSIC NEWS (Sept. 6, 2016), http://www.digitalmusicnews.com/2016/09/06/100-million-subscribers-streaming-music/.

public performance rights granted to non-interactive digital music services.[9] Spotify is therefore forced to engage in expensive private licensing deals with music publishers in order to provide its service.[10] Although it is not a foregone conclusion that digital streaming services are the future of the music industry,[11] in a music economy facing waning revenue, digital streaming services are the only platforms to have seen revenue increases over the last few years.[12] Given Spotify's popularity as a mode of access to copyrighted works[13] and its pioneering position as a successfully engineered interactive streaming service,[14] it is important to ensure that copyright law, at the very least, does not make it more difficult for Spotify and like services to enter and remain in the music industry.

However, as copyright law currently stands, certain copyright provisions hinder rather than promote access to copyrighted works and disincentivize creation of the useful arts. In terms of hindering access, in addition to not granting a compulsory license for public performance rights to interactive digital streaming services,[15] copyright law also grants copyrights essentially for a term of life plus ninety-five years.[16] Such an extended term improperly balances promoting access and incentivizing creation of copyrighted works by over-impeding access in favor of fostering creation.[17] Copyright law also disincentivizes creation of the useful arts, traditionally the realm of patent law.[18] When an invention[19] like Spotify is valuable to the public[20] but turns

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[9] 17 U.S.C.A. § 114(d)(2) (2010).
[10] Seabrook, *supra* note 5.
[11] Mark Mulligan, *The Real Problem With Streaming*, MUSIC INDUSTRY BLOG (Aug. 25, 2015), https://musicindustryblog.wordpress.com/2015/08/25/the-real-problem-with-streaming/ (describing issues with streaming platforms' profitability that bring into question their financial viability).
[12] Ben Sisario & Karl Russel, *In Shift to Streaming, Music Business Has Lost Billions*, N.Y. TIMES (Mar. 24, 2016), https://www.nytimes.com/2016/03/25/business/media/music-sales-remain-steady-but-lucrative-cd-sales-decline.html.
[13] *Fast Facts*, *supra* note 6.
[14] *See* Seabrook, *supra* note 5.
[15] 17 U.S.C.A. § 114(d)(2)(A)(i) (2010).
[16] *Id.* at § 304(b).
[17] Caren L. Stanley, *A Dangerous Step Toward the Over Protection of Intellectual Property: Rethinking* Eldred v. Ashcroft, 26 HAMLINE L. REV. 679, 711-12 (2003).
[18] Asay, *supra* note 4.
[19] *See generally* Spotify patents, http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&p=1&u=%2Fnetahtml%2FPTO%2Fsearch-bool.html&r=0&f=S&l=50&TERM1=Spotify&FIELD1=AANM&co1=AND&TERM2=&FIELD2=&d=PTXT.
[20] *See Fast Facts*, *supra* note 6.

out to be unprofitable[21] because of impediments created by copyright law,[22] copyright law is interfering with the other mandate of the intellectual property clause—incentivizing creation of the useful arts.[23]

Tensions within the texts and manifestations of copyright statutes are exacerbated by the bifurcation of intellectual property law into separate copyright and patent regimes[24] and the piecemeal nature of copyright law.[25] Separating copyright and patent law, as has been Congress's tradition, generates statutes in one realm of intellectual property protection that fail to account for the goals of the other and ignores the interdependent relationship between creativity and innovation.[26] Reading the intellectual property clause in a more unified way[27] that accounts for the goals of both copyright and patent law may be a useful guiding principle for lawmakers that helps future legislation and court decisions to better address this tension.

Further, though not a problem faced by copyright law alone, copyright law has persistently had trouble keeping up with the development of new technologies.[28] Once a piece of legislation responsive to an emerging problem has been enacted, it is often quickly outstripped by continuing developments in technology.[29] More financial and personnel resources are needed to help Congress study and implement better, more predictive, and longer-lasting copyright law.[30] Congress recently recognized these needs by passing legislation that requires the Register of Copyrights to be presidentially appointed, bringing the Office more firmly under the purview of Congress, rather than that of the Library of Congress.[31] Making the U.S. Copyright Office a

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[21] Seabrook, *supra* note 5.
[22] *See, e.g.*, 17 U.S.C.A. § 114(d)(2) (2010).
[23] U.S. CONST. art. I, § 8, cl. 8.
[24] Asay, *supra* note 4.
[25] Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 374-75 (2003).
[26] Asay, *supra* note 4.
[27] Joshua I. Miller, *The Unitary Progress Clause:* District of Columbia v. Heller *and the Structural Interpretation of the Progress Clause*, 28 SANTA CLARA COMPUT. & HIGH TECH. L.J. 241, 241 (2012).
[28] S. REP. NO. 105-190 at 2; *see, e.g.*, Joshua Keesan, *Let it Be? The Challenges of Using Old Definitions for Online Music Practices*, 23 BERKELEY TECH. L. J. 353 (2008) (discussing generally how copyright law has failed to keep pace with a changing music industry).
[29] *See, e.g.*, THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995 (Note: Within a few years after its enactment, interactive streaming services became much more popular than the Act originally anticipated). *See* Vanessa Van Cleaf, *A Broken Record: The Digital Millennium Copyright Act's Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio*, 40 STESTON L. REV. 341, 345 (2010).
[30] *See* REGISTER OF COPYRIGHTS SELECTION AND ACCOUNTABILITY ACT OF 2017 REPORT 115-91.
[31] *Id.*

fully empowered administrative agency will take this reform one step further in giving copyright regulation the expertise[32] and resources it needs to continue to develop in ways sensitive to technological advances, while promoting access and creation of both the sciences and useful arts.

The tension between statutory interpretations of the intellectual property clause and its constitutional purposes needs to be resolved in a unified way. Perpetuating statutory interpretations inapposite to the constitutional goals of intellectual property will only make it more difficult for services like Spotify to come into existence. It is important to encourage, or at least not significantly impede, the emergence of Spotify and like services, to the extent that ensuring the longevity of the music industry is important. Even if Spotify does not completely usurp the role of traditional access outlets, it is becoming an ever-important player in the music marketplace.[33] Spotify is a platform through which consumers have come to expect to find access to copyrighted works in lieu of other outlets.[34] At the very least, interactive streaming platforms give consumers more choices through which to listen to music, and by their very existence encourage access to copyrighted works.[35] Continuing to create legislation that fails to fully address interactive streaming services in ways that provide the desire and means for such services to enter and remain in the music industry may do more harm than good in the long run to the music marketplace.[36]

The U.S. has a body of copyright law that, by itself, is a constitutional exercise of congressional power to the extent that such law promotes the progress of science by incentivizing creation. However, in practice, much of copyright law acts *counter* to the purpose of the intellectual property clause by hindering access to the sciences and discouraging creation of the useful arts. This puts copyright law at odds with its own purposes, and with the purposes of the full mandate of the intellectual property clause. Copyright law needs to be reinterpreted by the U.S. Copyright Office as a newly empowered, knowledgeable, and experienced administrative agency. The U.S. Copyright Office should read the intellectual property clause in

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[32] Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 148 (2004).
[33] *See* Joshua P. Friedlander, *News and Notes on 2016 RIAA Shipment and Revenue Statistics*, RIAA (2016), http://www.riaa.com/wp-content/uploads/2017/03/RIAA-2016-Year-End-News-Notes.pdf.
[34] *Id*.
[35] *See* American University, *How Streaming is Changing the Music Industry*, AU BLOGS (Feb. 1, 2016), http://au.blogs.american.edu/audio-technology/how-streaming-is-changing-the-music-industry/.
[36] *Id.*

a unified way to account for the goals of the dual mandate of the clause. In so doing, the Office will be able to make regulations that constitute a full and proper exercise of the intellectual property power by incentivizing creation of, and access to, *both* the sciences and the useful arts.

Part II of this note will discuss the historical underpinnings of the intellectual property clause and its purposes. Part III will explore places within copyright law where the tension is evident and where statutes tend to be at odds with the purposes of the intellectual property clause. Part IV will highlight the problem using the example of Spotify. Part V will discuss possible resolutions to the inherent tension. Part VI will recommend a solution to adopt, apply this solution to Spotify, and conclude that the U.S. Copyright Office, as a newly empowered administrative agency, can help resolve the tension between constitutional and statutory copyright law manifestations by promulgating regulations that are more attuned to both goals of the intellectual property clause.

II. PURPOSES OF THE INTELLECTUAL PROPERTY CLAUSE

The Constitution's intellectual property clause has been traditionally interpreted as mandating incentivization to create the sciences and useful arts. However, promoting access to that creation was also an important purpose of the clause's inclusion in the Constitution. Without access, creating science and the useful arts would serve no purpose. Access is necessary to society's enjoyment of the progress that incentivizing creation of the sciences and useful arts brings about.

Spotify, as a platform through which to access copyrighted works, therefore provides a service that is aligned with the intellectual property clause's goals. Statutory copyright law is an interpretation of the Constitution's intellectual property mandate. Thus, statutory copyright law works against the goals of its own source of power when it impedes the development of useful arts that promote access to the sciences.

Part II(A) will give an overview of what the congressional power under the intellectual property clause entails and discuss the history of the clause's inclusion in the Constitution. Part II(B) will discuss the importance of the clause's incentivizing creation and ensuring access purposes.

A. The Intellectual Property Clause and Its History

The intellectual property clause vests Congress with the power to promote the progress of "Science and the Useful Arts."[37] Under conventional academic wisdom, this clause has been interpreted as a provocation to make laws that incentivize the creation of science (generally all "knowledge," which includes copyrighted material like sound recordings),[38] and to make laws that incentivize the pursuit of the "useful arts" (generally all patentable material).[39] This incentivization has taken the form of primarily economic means.[40] But the scope of this power does not merely pertain to enacting laws that increase the "quantity or quality" of science or the useful arts.[41] It also applies to laws that augment the ability to distribute copyrighted works[42] *through* a useful art, thereby enhancing access to those works.[43]

Promoting the progress of science and useful arts by granting copyright and patent protection respectively was important enough to gain constitutional enshrinement.[44] The Founders recognized[45] an advantage to the newly formed Union in granting intellectual property rights: ensuring the right to enjoy the fruits of one's labor[46] contributed to the public good by incentivizing continued investment in the pursuit of promoting the progress of science and the useful arts.[47] The Constitution provided for the promotion of science and the useful arts for a variety of reasons.[48] Chief among them was to promote learning in a nascent country.[49] Promoting and protecting access to that knowledge was equally as important.[50]

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[37] U.S. CONST. art. I, § 8, cl. 8.
[38] Orrin G. Hatch & Thomas R. Lee, *"To Promote the Progress of Science": The Copyright Clause and Congress's Power to Extend Copyrights*, 16 HARV. J. L. & TECH. 1, 8 (2002).
[39] *Id.*
[40] *See id.* at 23.
[41] Hatch & Lee, *supra* note 38, at 6, 11; *see* Eldred v. Ashcroft, 537 U.S. 186, 189 (2003).
[42] Hatch & Lee, *supra* note 38, at 6, 11.
[43] *Id*. at 6, 21; *see* Patterson & Joyce, *supra* note 2.
[44] U.S. CONST. art. I, § 8, cl. 8.
[45] *See* THE FEDERALIST NO. 43 (James Madison).
[46] Randolph J. May & Seth L. Cooper, *The "Reason and Nature" of Intellectual Property: Copyright and Patent in The Federalist Papers*, 9 PERSPECTIVES FROM FSF SCHOLARS 3, 16 (2014).
[47] *Id.* at 15.
[48] *See* Patterson & Joyce, *supra* note 2.
[49] Patterson & Joyce, *supra* note 2.
[50] *Id.*

The more common understanding is that the intellectual property clause incentivizes creation,[51] and incentivizing creation was important to the clause[52] in that without creation, there would be no knowledge to access or from which to learn. However, at least with respect to copyrightable material, the Founders felt that access was necessary to realizing the incentivization goals as construed from the initial requirement of publication to garner protection in earlier versions of the Copyright Act.[53]

The first Copyright Act in 1790 (the 1790 Act) required publication of a work in order to gain copyright protection for that work.[54] Publication was required to ensure the prevention of censorship, which stemmed from fears left over from the oppressive regime that spurred the United States' founding.[55] In England, at the time of the founding, copyright protection was only granted to a certain class of materials that did not contradict the values of the government.[56] "Seditious," "blasphemous," or "heretical" works were censored and not allowed to be published.[57] To ensure that the granting of copyright protection would not become a tool of censorship that would directly contradict the First Amendment, the 1790 Act required publication as a means of promoting access to copyrighted works.[58]

There are also socio-political and economic underpinnings to protecting the promotion of, and access to, knowledge and the useful arts.[59] Access to knowledge and the useful arts was fundamental to the democratic society created under the Constitution,[60] in order to facilitate the kind of informed participation in social, political, and economic affairs necessary to fulfilling the vision of the democratic republic on which American society exists.[61] Further, providing access to a country's cultural history, as it is preserved in the works of authorship that comprise

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[51] Hatch & Lee, *supra* note 38, at 11.
[52] *See* Patterson & Joyce, *supra* note 2.
[53] The Copyright Act, § 3 (1970) (amended 1976); The Copyright Act, § 9 (1909) (amended 1976); *see* Patterson & Joyce, *supra* note 2, at 948.
[54] *See* Patterson & Joyce, *supra* note 2, at 948.
[55] *See id*. at 946.
[56] Patterson & Joyce, *supra* note 2, at 948.
[57] *Id*.
[58] *Id*.
[59] *See* Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1031, 1043-45 (2007).
[60] *Id.* at 1043.
[61] *See id.*, at 1013, 1031, 1043-45.

"science," has been a "long recognized…cultural imperative,"[62] which is made possible through copyright protection. Copyright and patent protection also provide the economic incentive necessary to spur creation such that the aforementioned aims may be realized.[63] By ensuring exclusive rights for a limited time, intellectual property protection also creates a market for authors and inventors to realize financial gains from their work. In this way, intellectual property protection acts as an assurance to creators and to those to whom creators assign their rights that they will have sufficient time to distribute and publicize works to be able to profit from them.[64]

B. Importance of Incentivizing Creation and Ensuring Access Goals

Incentivizing creation and ensuring access to that creation are indeed worthy goals. Creation and access benefit intellectual property consumers and creators. Intellectual property law "play[s] a critical role in promoting public education, political discourse, and equality."[65] Creation of ideas drives a society forward by filling the marketplace of ideas. Without ideas, art, and innovations, there is nothing to debate and nothing to refine in advancing the course of knowledge, learning, and understanding of the world.[66] Further, without the ability to access, take in, and respond to those ideas that comprise culture, there cannot be the attendant learning, debating, and understanding. Access has broadened the scope of information available to the public, which opens entirely new lines of previously unconceived discourse and thinking.[67] Greater access through the expanded distribution capabilities digital streaming platforms offer therefore contributes to the realization of these goals.[68]

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[62] Menell, *supra* note 59, at 1043.
[63] Andrew M. Hetherington, *Constitutional Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause*, 9 MICH. TELECOMM. & TECH. L. REV. 457, 471 (2003); *see* Patterson & Joyce, *supra* note 2, at 947.
[64] Hatch & Lee, *supra* note 38, at 16; *see* Sean M. O'Connor, *The Lost Art of the Patent System*, U. ILL. L. REV. 1397, 1465 (2015).
[65] Menell, *supra* note 59, at 1042.
[66] *See* June T. Tai, *History, Culture, and the Copyright Act*, 9 U. CHI. L. SCH. ROUNDTABLE 201, 201 (2002).
[67] *See* Menell, *supra* note 59, at 1043.
[68] *See id.* at 1042.

For creators, with greater access to copyrighted sound recordings in particular[69] comes a wider and more diversified audience for their works.[70] This allows sound recordings to reach niche subsets of people who would not have been exposed to them otherwise; this group of individuals can now participate in the music economy.[71] Expanded access also allows more, even lesser-known, artists to find a place to exist satisfactorily in the music industry.[72] For example, at least one independent artist, Kina Grannis, found it much easier to make the choice not to go with a large record label when confronted with the possibility of losing decision-making power over her album due to the presence of other more accessible platforms on which she could disseminate her music.[73] Because she found so much success with primarily digital distribution channels, she was able to retain more artistic control while still making a profit off her works and allowing public access to them.[74]

Incentivizing creation and ensuring access to that creation therefore benefits both public consumers' interests and those of creators and innovators. Though society may agree that it wants intellectual property rights in order to realize the benefits of creation and access, the way that statutory copyright law has evolved under the intellectual property clause's mandate does not always ensure that both of those goals are achieved.

III. THE GOALS TENSION BETWEEN THE INTELLECTUAL PROPERTY CLAUSE AND STATUTORY PROVISIONS

Statutory copyright law is the manifestation of the power granted to Congress by the Constitution's intellectual property clause to make laws that promote the progress of science and the useful arts.

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[69] Note: Other forms of copyrighted works are equally important and serve these two goals as well. However, for the purposes of this paper, the focus is on sound recordings and the public performance right to them with respect to digital interactive streaming services.

[70] *See* Josh Constine, *How Spotify is Finally Gaining Leverage Over Record Labels*, TECH CRUNCH (Mar. 18, 2017), https://techcrunch.com/2017/03/18/dictate-top-40/.

[71] *Id.*

[72] *See* Eva Tam, *Why Kina Grannis Chose YouTube Over Record Label*, WALL ST. J. (April 9, 2015, 4:20 AM) http://blogs.wsj.com/digits/2015/04/09/why-kina-grannis-chose-youtube-over-record-label/; *see* Shirley Halperin & Portia Medina, *How Kina Grannis Walked Away From a Major Label Deal and Became Music's Next Big Thing*, HOLLYWOOD REPORTER (Jan. 12, 2012, 11:16 AM), http://www.hollywoodreporter.com/news/kina-grannis-video-interview-major-label-interscope-280904.

[73] *Id*.

[74] *See id*.

It is generally accepted that statutes enacted pursuant to constitutional grants of power cannot exceed the scope of that power.[75] Neither should a statute be at tension with the goals of the clause that gives the law its authority.[76] At the very least, a statute should not make it more difficult to realize the goals of its enabling constitutional provision.

Yet, parts of statutory copyright law promote access to and incentivize creation of the sciences while disincentivizing creation of the useful arts.[77] This outcome is inapposite to the full scope of the Constitution's intellectual property clause.[78]

Part III will discuss several examples within statutory copyright law of the tension between the goals of the intellectual property clause and how copyright law plays out in practice. Part III(A) will discuss the tension evident in the lack of a compulsory licensing scheme for interactive streaming services. Part III(B) will discuss the tension evident in the term granted to copyrights and patents. Part III(C) will highlight a more positive example where the tension is less evident in the statutory rate setting scheme.

A. The Public Performance Right

The tension between the goals of the intellectual property clause and copyright statutory interpretations of the clause is most evident in the current Copyright Act's inclusion of a compulsory licensing scheme only for non-interactive digital streaming services, and not for interactive digital streaming services.[79] The Copyright Act provides a public performance right[80] that applies to digital interactive streaming services, but it does not make a license for that right compulsory for interactive digital services.[81] In order for interactive digital streaming services to comply with this public performance right when sound recordings are played from digital

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[75] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 208 (2003).
[76] *Id*.
[77] 17 U.S.C.A. §§ 301-305 (1998) (Note: It may well be that the patent law regime similarly hampers access and creation incentivization of the sciences while promoting access and creation incentivization of the useful arts; this note makes no comment on whether or not that is true of statutory patent law perpetuated under the Constitution's intellectual property clause. However, that inquiry would be another avenue worthy of exploration within the realm of the identified goals tension.); *see* 17 U.S.C.A. § 114(d)(3)(A) (2010).
[78] *See* U.S. CONST. art. I, § 8, cl. 8.
[79] *See* 17 U.S.C.A. § 114(d)(3)(A) (2010) (noting that "[n]o interactive service shall be granted an exclusive license..." for digitally streamed content).
[80] *Id.* at § 106(6).
[81] *Id.* at § 114(d)(3)(A).

interactive streaming platforms, the platforms must secure a license from the copyright owner (usually record labels,[82] but sometimes the artists themselves) if they want the ability to play the sound recordings.[83]

An interactive service is "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient."[84] The user's ability to hand-select the next sound recording that he or she will hear thus distinguishes interactive and non-interactive services.[85] A service is not considered interactive if the service does not "substantially consist of sound recordings that are performed within 1 hour of the request."[86] The reason for distinguishing between the two types of digital services was an outgrowth of the reason for granting a performance right in the first place.[87]

The 1976 Copyright Act lacked a public performance right.[88] Recognizing both that digital music distribution platforms were an emerging and important part of the future of the music industry, and that the proliferation of music piracy was harming revenue,[89] Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPRA).[90] The DPRA's main purpose, however, was to enhance the Copyright Act's § 106(1) and § 106(3) rights to reproduce and distribute copyrighted works by "protecting against the loss of sales from digital piracy and new digital delivery services."[91] Interactive streaming services therefore went uncovered by the compulsory licensing system the DPRA set up, because their on-demand nature

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[82] *See* Seabrook, *supra* note 5.

[83] *See* 17 U.S.C.A. § 114(d) (2010) ("[A]n interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording.").

[84] 17 U.S.C.A. § 114(j)(7) (2010).

[85] *See id.*

[86] *Id.*

[87] *See* Gary M. McLaughlin, *Digital Killed the Radio Star: The Future of the Sound Recording Performance Right*, 19 CARDOZO ARTS & ENT. L. J. 225, 227 (2001).

[88] *See* Rebecca F. Martin, *The Digital Performance Right in the Sound Recordings Act of 1995: Can it Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 CARDOZO ARTS & ENT. L. J. 733, 740 (1996) (noting that the harm caused by the "lack of a performance right in their works" was discussed by Congress in 1990).

[89] *See* McLaughlin, *supra* note 87, at 227-28.

[90] *See* Martin, *supra* note 88, at 741.

[91] McLaughlin, *supra* note 87, at 227-28.

and ability to purposefully select the next song heard meant they were most likely to displace record sales' share of the market.[92]

At the time, it was desirable for the music industry to force interactive platforms into private deals, because of the significant threat they posed to upending the traditional music economy.[93] Although the DPRA contemplated the existence of interactive digital music streaming services, the statute did not contemplate how big a part of the music industry interactive services would become,[94] even as compared to non-interactive services.[95]

Though the U.S. Copyright Office "does not perceive that the voluntary market for licensing of sound recording rights is not functioning,"[96] the Office's recommendation is nonetheless that the compulsory licensing scheme offered to non-interactive digital streaming services be expanded to cover interactive digital streaming services as well.[97]

The interactive/non-interactive distinction has remained "functioning" because of a proclivity to classify services as non-interactive despite increasing customizability and interaction with the service interface.[98] The distinction chafes against the impulse among digital streaming services to offer increasing customizability of the music consumption experience.[99] However, streaming services may prefer to exist under the compulsory licensing scheme because it offers predictability of content acquisition costs and a built-in way to get content[100] This dissonance, perpetuated by the interactive/non-interactive distinction Congress made in the DPRA, thus forces access platform creators to design their useful art around copyright law. In so doing, the progress of the useful arts is handicapped by copyright law, and access platforms for sound recordings are less than optimized for their access purpose, thereby affecting consumers.

In failing to provide a compulsory license for interactive services, Congress perpetuated

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[92] *Id.* at 228.
[93] *See id.*
[94] *See, e.g.*, *Fast Facts*, *supra* note 6 (describing the number of subscribers, Spotify's revenue, and the number of countries in which Spotify's services are available).
[95] *See* Resnikoff, *supra* note 8.
[96] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS, 177 (February 2015).
[97] *Id*. at 176.
[98] *See id*.; Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 162-64 (2nd. Cir. 2009) (holding an arguably interactive streaming service was not interactive).
[99] Deborah Bothun & Christopher A. H. Vollmer, *2016 Entertainment and Media Industry Trends*, STRATEGY & (2016), https://www.strategyand.pwc.com/trends/2016-entertainment-media-industry-trends (noting that, for entertainment and media companies, customization ensures longevity).
[100] *See* COPYRIGHT AND THE MUSIC MARKETPLACE *supra* note 96, at 48-52.

the tension between the goals of the intellectual property clause and statutory interpretations. Simply by treating two types of access platforms differently, Congress disincentivized creation of interactive platforms as a useful art, thereby hindering access to copyrighted works that might have existed on those platforms even earlier.[101] Therefore, the DPRA in itself cannot be said to adequately address the goals of intellectual property protection.

B. The Duration of the Copyright Term

By granting an extended term in copyrights, the statutory interpretation of the intellectual property clause once again puts the law at odds with its goals. Copyrights are now granted for a term as long as ninety-five years beyond the author's lifetime.[102] While having this length of a term to some extent incentivizes creation of copyrighted works by ensuring adequate time from which to profit from them,[103] life plus ninety-five years skews the balance between access and creation too heavily in favor of the latter. The same aims of incentivizing creation can be achieved with a shorter term that remains adequate[104] for the purposes of ensuring time to profit. Although *Eldred v. Ashcroft*[105] deemed the Copyright Term Extension Act (CTEA)[106] to be a constitutional use of Congress's power under the intellectual property clause,[107] the Court's ruling is not a legislatively binding comment on the desirability or wisdom of having such a long term of copyright protection.

In effect, what a life plus ninety-five years term does is prevent works from entering the public domain for multiple generations. The added royalties that copyright holders attain with the twenty-year extension under the CTEA pale in comparison to the negative effects of restricting access to those works, both procedurally and financially.[108] Thus, access is unduly burdened with

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[101] *See* Seabrook, *supra* note 5 (explaining that because Spotify is an interactive streaming service, it has to negotiate directly with copyright holders, which ended up taking two years, far longer than a previously estimated six weeks).
[102] 17 U.S.C.A. § 302 (1998).
[103] Hatch & Lee, *supra* note 38, at 16.
[104] *Id.* at 20.
[105] Eldred v. Ashcroft, 537 U.S. 186 (2003).
[106] Note: An Act that extended copyright protection from an effective life plus seventy-five years to life plus ninety-five years. *See* 17 U.S.C.A. § 302 (1998).
[107] *Eldred*, 537 U.S. at 187.
[108] *See* Matthew Dean Stratton, *Will Lessig Succeed in Challenging the CTEA, Post-Eldred?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 893, 908-09 (2005); *Opposing Copyright Extension: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1995) (testimony of Professor Peter Jaszi, Professor of L., Am. U.).

little benefit to creation incentivization. In contrast, patent rights are granted for a term of twenty years.[109] There is no discernible reason why useful arts should be treated differently than science in terms of the length of protection,[110] other than perhaps to recognize that it is procedurally easier to obtain copyright protection than it is patent protection.[111] However, that distinction only bolsters an argument for treating the two types of intellectual property with parity, if not giving patents a longer term of protection. The reasons given for extending the copyright term in the past are all equally applicable to patents,[112] including reasons such as that the public does not benefit from a shorter term because the prices of copyrighted works tend to stay the same, whether or not Congress was right to conclude that.[113]

In having such drastically different terms of protection for the useful arts and sciences, the tension between statutory interpretations and the constitutional intellectual property clause is once again evident as an effect of intellectual property law's bifurcation.[114] In separating the bodies and laws that consider patent rights and copyrights, the impetus to make legislation that promotes access and incentivization of creation for *both* the useful arts and sciences is removed, resulting in laws like the differing terms of protection that over-incentivize creation of the sciences while unduly hindering access to them, and over-promoting access to the useful arts. Neither term is in balance with the goals of the intellectual property clause.

C. The Statutory Rate Setting System for Compulsory Licenses

To its credit, statutory copyright law does attempt more explicitly to achieve the right balance between access and incentivization in order to better realize the aims of the intellectual

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[109] 35 U.S.C.A. § 154(a)(1) (2015).

[110] Edward C. Walterscheid, *The Remarkable—And Irrational—Disparity Between the Patent Term and the Copyright Term*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 233, 268-71 (2001) (explaining that "the appropriate duration of the [copyright and patent] term[s] should be such as to stimulate creative activity by authors and inventors, but not so long as to be detrimental to the public" and that the copyright term being much longer than the patent term does not serve this purpose).

[111] Lisa Pearson, Andrew Pequignot & Ashford Tucker, *Copyright Law for Trademark Lawyers: U.S. Copyright Protection for Logos, Packaging, and Products*, http://www.kilpatricktownsend.com/~/media/Files/LisaPearsonArticle.ashx (last visited May 15, 2017) ("A copyright registration, when available, is far easier and less expensive to obtain than a registered trademark or patent.").

[112] Walterscheid, *supra* note 110, at 269.

[113] *Id.*

[114] *See* Asay, *supra* note 4, at 75.

property clause under its compulsory licensing scheme for non-interactive digital streaming services.[115] In setting the royalty rates to be paid to copyright owners from revenues made from non-interactive streaming services, the Copyright Royalty Board has to, in part, consider the impact on the market and on the ability of licensees to remain in business when it sets its rates.[116] This factor inclusion seems to recognize some balance between technological innovation and copyright monopoly.

The impact of statutory copyright law placing access and creation incentivization at odds with one another, and with the full mandate of the intellectual property clause, is particularly apparent when viewed through the lens of Spotify.

IV. THE PROBLEMATIC RESULT OF THE GOALS TENSION THROUGH THE LENS OF SPOTIFY

The tension between the goals of the intellectual property clause and statutory copyright law is most evident in the interactive/non-interactive digital streaming music service distinction perpetuated by § 114 of the 1976 Copyright Act. The tension is best demonstrated by the example of Spotify, an interactive digital music streaming service, and the service's struggle to attain and maintain its dominant position in the streaming music marketplace.[117]

Part IV(A) will discuss the difficulties Spotify has had getting into and remaining in the music industry. Part IV(B) will discuss why Spotify and like services are important mediums whose development should be encouraged. Part IV(C) will address how the tension is apparent and problematic for Spotify in particular.

A. The Stumbling Rise of Spotify

Spotify is one of the modern music industry's most successful music access platforms.[118] It has over 100 million active users,[119] over half of which are paying subscribers.[120] Spotify is an

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[115] *See* 17 U.S.C.A. § 114(f) (2010).
[116] *Id.* at § 114(f)(2)(B).
[117] *See Fast Facts*, *supra* note 6.
[118] *Fast Facts*, *supra* note 6.
[119] *Id.*
[120] *Fast Facts*, *supra* note 7.

interactive digital music streaming service that operates on the freemium model[121] where users may use the service for free to access catalogues of sound recordings via a desktop or mobile application.[122] If users wish to pay a subscription fee, they get access to additional services like ad-free listening, the ability to download playlists users create on the platform, and a full slate of features available on the desktop application for the mobile application. Ad revenues and paying subscribers support the layer of free users[123] who may eventually decide to pay the subscription price for the additional features.

Spotify is today an obvious asset and giant in an increasingly digital and streaming-based music industry[124] for access to content, but the service encountered hindrances to its upstart in 2008 while trying to navigate the United States' copyright laws.[125] The service is based out of Sweden,[126] not the United States, and found an easier time of getting started abroad. Spotify only came to the United States in 2011, three years after its founding.[127] It took Spotify two years to get licensing deals from the four major record labels, in order to offer the kind of content (now a catalogue of over 30 million songs)[128] that has put it on the digital music streaming services map.[129]

An early barrier to Spotify's entry into the American music market was that the company offered its service to non-paying users, in addition to offering a subscription-based version with added features.[130] The non-paying user base scared the major labels, the owners of the sound recording copyrights that Spotify needed to court in order to have a viable business model—the

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[121] James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory Licensing Scheme for On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. L. REV. 45, 57 (2014).
[122] Ben Sisario, *New Service Offers Music in Quantity, Not By Song*, N.Y. TIMES (July 13, 2011), http://www.nytimes.com/2011/07/14/technology/spotify-music-streaming-service-comes-to-us.html?scp=3&sq=spotify&st=cse.
[123] *Id.*
[124] Ed Christman, *U.S. Record Industry Sees Album Sales Sink to Historic Lows (Again)—But People Are Listening More than Ever*, BILLBOARD (July 6, 2016), http://www.billboard.com/articles/business/7430863/2016-soundscan-nielsen-music-mid-year-album-sales-sink-streaming-growth; Sofia Ritala, *Pandora & Spotify: Legal Issues and Licensing Requirements for Interactive and Non-Interactive Internet Radio Broadcasters*, 54 IDEA 23, 24 (2014).
[125] Seabrook, *supra* note 5.
[126] Ritala, *supra* note 124, at 41.
[127] Seabrook, *supra* note 5.
[128] *About*, SPOTIFY, https://press.spotify.com/uk/about/ (last visited Mar. 19, 2017).
[129] Seabrook, *supra* note 5.
[130] *Id*.

labels were afraid that no one would pay the subscription fee, and thus that there would be negligible revenue from which to cull their royalty rates.[131]

Thus, in order to assure record labels of their profits,[132] Spotify had to engage in private, non-disclosed[133] licensing deals. From what is known of the private licensing deals, the sound recording copyright owners get 70% of Spotify's revenue from song plays of the licensed catalogues.[134] In addition, the labels combined have an 18% equity stake in Spotify, which in total amounts to the labels owning nearly 15% of the company.[135] Before the royalty rate was set, before record labels knew if Spotify would be profitable, they required Spotify to pay them an unspecified amount of money up front.[136] Spotify posted two straight years of financial losses, including the year Spotify entered the U.S. market, with lost profits increasing between 2010 and 2011.[137] Further, the private licensing deals Spotify has with the record labels are renegotiated every two to three years, so the record labels can negotiate larger percentages of Spotify's revenue as Spotify continues to grow.[138]

Spotify's current royalty rate model for interactive streams divides the streams per month of a given artist's music by the total number of monthly music streams Spotify had overall, which is the artist's portion to keep.[139] By some calculations, it takes, on average, 150 streams of a song to equate to one ninety-nine-cent song download.[140] Spotify keeps 30% of the number representing the artist's share multiplied by its total revenue per month, and the other seventy percent goes to the record labels and other sound recording rights' owners, divided according to the private licensing deals.[141] The record labels then subsequently pay their artists according to their own negotiated deals.[142]

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[131] *See* Seabrook, *supra* note 5.
[132] Seabrook, *supra* note 5.
[133] *Id*.
[134] *Id*.
[135] *Id*.; COPYRIGHT AND THE MUSIC MARKETPLACE, *supra* note 96, at 52.
[136] *Id*.
[137] Richardson, *supra* note 121, at 58; Seabrook, *supra* note 5.
[138] Seabrook, *supra* note 5.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*.

Still, Spotify has yet to turn a profit.[143] 80% of Spotify's revenue goes toward content acquisition under these private licensing deals.[144] Subscribers paying at a rate of $9.99 per month for one account are making up just over half of Spotify's user base.[145] Interactive streaming services, even ones as popular as Spotify, still have a long way to go before becoming viable and sustainable business models.[146] However, current copyright law is not helping Spotify and like-services go that distance.

With 100 million active users,[147] Spotify is an undoubtedly popular digital music access platform. Why, for such a ubiquitous platform that is right in tune with the step of consumers as they march forward through the twenty-first century music economy, is it this hard and expensive to sit at the negotiating table? The tension between statutory interpretations of the intellectual property clause and the goals of the clause itself in fostering incentivization of creation and access to that creation is evident in Spotify's difficulties in entering and remaining in the music industry.

B. Encouraging the Development and Sustenance of Spotify and Other Similar Services

If Spotify has had trouble getting into and staying in the music industry, it is worth asking why copyright law should adapt in some way to ease those burdens for other Spotify-like services, and why these barriers should not merely be chalked up to being the product of a competitive market.

When radio constituted a larger part of the music economy as a point of access to music, the National Association of Broadcasters (NAB) lobbied Congress so that radio broadcasters would not have to pay a royalty fee for the public performance of sound recordings broadcast via

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[143] Amy X. Wang, *Spotify Has 50 Million People Paying for Its Music. Why is it Still Unprofitable?*, QUARTZ (Mar. 4, 2017), https://qz.com/924057/spotify-has-50-million-people-paying-for-its-music-why-is-it-still-unprofitable/.
[144] *Id*. (Note: Part of that revenue may also go toward paying composers for their public performance right. Composers are compensated separate from artists who produce the sound recording). *See* 17 U.S.C.A. § 114 (2010); William Henslee, *What's Wrong with the U.S.? Why the United States Should Have a Public Performance Right for Sound Recordings*, 13 VAND. J. ENT. & TECH. L. 739, 758 (2011).
[145] *Fast Facts*, *supra* note 6.
[146] Jingping Zhang, *Apple, Spotify, and the Battle Over Freemium*, HARV. BUS. REV. (May 13, 2015), https://hbr.org/2015/05/apple-spotify-and-the-battle-over-freemium-2.
[147] *Fast Facts*, *supra* note 7.

terrestrial audio transmissions.[148] The NAB argued that the access radio provided to copyrighted works drove physical sales of albums, and without radio, sales would be a reduced part of rights owners' revenue streams.[149] Thus, the DPRA exempted terrestrial radio broadcasts from the performance right uses of copyrighted works, thereby exempting terrestrial radio from the compulsory licensing scheme.[150]

Terrestrial audio transmissions got away with that justification in 1995. Spotify's market difficulties are directly linked to the notion that because interactive streaming services are most likely to displace traditional record sales, they should bear full liability and be subject to private licensing deals.[151] In contrast, radio drove sales and so was allowed to evade a statutory royalty fee for public performances of sound recordings. While the fear of interactive services engaging in sales displacement while radio helped sales may have been well founded at the time of the DPRA, it is now not just the case that interactive services might displace traditional record sales—they have.[152] Interactive services are the only music platforms to see an increase in revenue in the last few years.[153] To deny that there is at least a popular if not usurping trend in how music is accessed because it does not fit the old sale model of the music industry is to deny the very promotion of progress the intellectual property clause sought to protect.[154]

At the very least, even if Spotify does not overtake and become the market, it is a large part of the market.[155] Having consumer choice is the hallmark of a truly free market.[156] A free and diverse market of ideas was a primary justification for securing intellectual property protection for the Founders.[157] Access, which can be better achieved when there are multiple

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[148] STATEMENT OF MARYBETH PETERS THE REGISTER OF COPYRIGHTS BEFORE THE SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY COMMITTEE ON THE JUDICIARY (1995), https://www.copyright.gov/docs/regstat062895.html.

[149] Ashley Griffith, *Copyright Law as it Relates to Performance Rights*, BERKLEE COLL. OF MUSIC MUSIC BUS. J. (2008), http://www.thembj.org/2008/03/the-last-hurrah-copyright-law-as-it-relates-to-performance-rights/.

[150] 17 U.S.C.A. § 114(d)(1) (2010).

[151] McLaughlin, *supra* note 87, at 228.

[152] Friedlander, *supra* note 33.

[153] Sisario & Russel, *supra* note 12.

[154] *See, e.g.*, Patterson & Joyce, *supra* note 2.

[155] Friedlander, *supra* note 33.

[156] Arthur Kemp, *Freedom of Choice*, FOUND. FOR ECON. EDUC. (Aug. 1, 1960), https://fee.org/articles/freedom-of-choice/.

[157] Menell, *supra* note 59, at 1042.

points of access, was essential to realizing the benefits of the marketplace of ideas.[158] To continue under current copyright law, knowing that a growingly popular point of access will continue to face unreasonable burdens to its existence, ignores the purposes of intellectual property protection and thus would perpetuate law inapposite with its own goals. Spotify and similar services have brought consumers back to the music marketplace such that they are now willing to pay modest subscription fees for the convenience of access when for many years fewer and fewer people were paying for music at all.[159] At the end of the day, a reduced music economy is better than none at all. Copyright law should be evolving with trends in the industry to ensure its longevity, not actively fighting against consumer trends.

C. Spotify is Particularly Evident of The Statutory/IP Clause Tension

What happened in Spotify's case, and in other interactive streaming services cases now subject to private licensing deals, is that the copyright owners have too much bargaining power that interferes with the growth of these services.[160] When a service like Spotify is forced into private, non-transparent deals, the power of record labels (who are often the rights owners) is concentrated. Spotify and other interactive streaming services cannot make a concerted effort like the NAB did with Congress as a consolidated body of interested parties to negotiate more favorable deals across the board if they cannot discuss the specifics of the licensing deals.

Further, Spotify's novel ability to gain an early, though tenuous, foothold in the market before other interactive services came from its willingness to give equity stakes to record labels on top of paying a royalty fee.[161] Had record labels been willing to forgo the royalty fees for a period of years and just be content with their equity stakes, perhaps by now Spotify would be profitable. But there is a holdover problem for rights holders from the old physical sales-based music economy—rights holders want to make a lot of money.[162] It is not that one should not be able to profit from his or her copyrights; indeed, granting protection to intellectual property was

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[158] *See id.*, at 1043.
[159] Richardson, *supra* note 121, at 50.
[160] *See* Constine, *supra* note 70; Richardson, *supra* note 121, at 67.
[161] Seabrook, *supra* note 5.
[162] *See* Kelsey McKinney, *Is Streaming Bad for Artists? Yes and No. The Future of Music, Explained*, VOX (Dec. 17, 2014), https://www.vox.com/2014/11/24/7272423/taylor-swift-spotify.

aimed at ensuring that one could.[163] However, as interactive streaming services come to constitute a larger part of the market economy,[164] artists, record labels, and whomever else rights holders may be might have to grow accustomed to profits from their copyrights that are still "[adequate],"[165] but less than they would have been in a physical sales-driven economy.[166]

Spotify is not a service that will just go away, based on consumer demand.[167] Perhaps it is Spotify's hope that its growing consumer base will either eventually make the service profitable, or give the service enough bargaining power that rights owners cannot afford to forgo negotiating a more equitable deal with Spotify. Further, the experience of accessing and listening to music has become intimately tied to consumers' social worlds, as a part of their communicative experience with peers and with artists.[168] To ensure a continued place in the market for eminently popular services like Spotify, and to meet the dual mandate of the intellectual property clause, the tension between statutory interpretations of the clause and the access and creation incentivization goals of the clause needs to be addressed.

V. TENSION RESOLUTIONS THROUGH COPYRIGHT LAW

Though copyright law may now be flawed in its interpretation of the intellectual property clause to the extent that it creates a goals tension, copyright law and how it is made can be amended to better address the very tension it creates.

Part V(A) will discuss a compulsory licensing scheme solution to the tension. Part V(B) will discuss redefining "limited Times"[169] as a possible solution. Part V(C) will discuss making the U.S. Copyright Office an administrative agency and guiding the Office's interpretations of copyright law with a unified reading of the intellectual property clause.

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[163] Hatch & Lee, *supra* note 38, at 16; *see* O'Connor, *supra* note 64, at 1465.
[164] Friedlander, *supra* note 33.
[165] Hatch & Lee, *supra* note 38, at 20.
[166] *See* McKinney, *supra* note 162.
[167] *See Fast Facts*, *supra*, note 7.
[168] *See* Robert LaRose & Junghyun Kim, *Share, Steal, or Buy? A Social Cognitive Perspective of Music Downloading*, 10 CYBERPSYCHOLOGY & BEHAVIOR 267, 267 (2007).
[169] U.S. CONST. art. I, § 8, cl. 8.

A. Compulsory Licensing Scheme for Interactive Streaming Services

The key to a successful compulsory licensing scheme for interactive streaming services is to "negate the inequitable distribution of bargaining power"[170] so that negotiations reflect a fair market value for licenses for the right to publicly perform sound recordings.[171] James Richardson's proposal for a new type of compulsory licensing seems to be the most workable.[172]

Richardson proposes that the financial disincentives created by not coming to a negotiated agreement need to be similar for both Spotify and the record labels in order to even the playing field[173] between the access platform and the rights holders. Even if the compulsory licensing scheme afforded to non-interactive services were mapped onto interactive services, the compulsory minimum rate as set by the CRB would give rights holders an anchor in their negotiations, and in so doing, a significant advantage in the negotiating process.[174]

Thus, the floor in an interactive streaming compulsory licensing scheme has to be a rate equal to that of Spotify's net revenue, so that neither rights holders nor access platforms can realize profit without fairly negotiating with each other.[175] Even as net revenue increases each year, the compulsory minimum licensing rate increases in line with that net revenue.[176] The negotiated maximum will be capped at whatever Spotify's net profits are, to prevent access platforms from refusing to negotiate out of fear of negative profit.[177]

Under this model, however, Spotify and like services will not face content acquisition costs at their inception until they start becoming profitable.[178] With the compulsory licensing rate set at a platform's net revenue, the inclination for new platforms not to negotiate at their inception for fear of incurring further losses is removed, providing the platforms with "free content rights" as there is no additional cost while expanding to acquire content.[179] Further, to prevent platforms from merely operating without profiting, the CRB would be responsible for

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[170] Richardson, *supra* note 121, at 67.
[171] *Id*.
[172] *See generally* Richardson, *supra* note 121.
[173] Richardson, *supra* note 121, at 67.
[174] *Id*.
[175] *Id*.
[176] *Id*.
[177] *Id*. at 68.
[178] *Id*. at 67.
[179] *Id*. at 68.

setting a minimum royalty rate, like it is now for non-interactive streaming services, so that Spotify and like services cannot abuse the scheme altogether.[180]

Further, Richardson proposes taxing the license fees record labels command at a decreasing rate in proportion to the amount of the license fee.[181] Essentially, the lower the licensing fee record labels negotiate with Spotify, the lower the tax on that licensing fee income for the record labels.[182] The tax prevents rights holders from negotiating too high a licensing fee.

Still, compulsory licenses have their problems.[183] They can lead to extraordinarily high royalty rates that prevent companies from turning a profit.[184] In the non-interactive streaming services market, this is because services like Pandora are subject to the "willing buyer/willing seller"[185] rate standard, and thus have to pay whatever price for royalty fees that the market will bear,[186] as set out by the CRB.[187]

Other proposals for compulsory licensing lack practicality as another major overhaul to the Copyright Act, such as was done in 1976, would be required to bring them about.[188] For example, John Seay proposes a compulsory licensing scheme that involves enacting a net neutrality act that would provide one performance right for each type of copyrighted work and a one-stop licensing agency for those rights.[189] The act would also set a mandatory minimum licensing rate to maintain artists' compensation.[190] However, this compulsory licensing solution would be procedurally difficult to implement in practice because of the extensive revisions

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[180] *Id*. (suggesting setting the minimum royalty rate at the median of all access platforms' net revenue, adjusted on a per-subscriber basis. This will prevent access platforms from offering "artificially free content" while providing access platforms with free content rights at their upstart. *Id*.).
[181] *Id*. at 69.
[182] *Id*.
[183] *Id*. at 63.
[184] *Id*.; Ben Sisario, *Fight Builds Over Online Royalties*, N.Y. TIMES, (Nov. 4, 2012), http://www.nytimes.com/2012/11/05/business/media/fight-growing-over-online-royalties.html; Andy Fixmer, *Pandora Is Boxed In by High Royalty Fees*, BLOOMBERG (Dec. 20, 2012). https://www.bloomberg.com/news/articles/2012-12-20/pandora-is-boxed-in-by-high-royalty-fees.
[185] 17 U.S.C.A. § 114(f)(2)(B) (2010).
[186] Fixmer, *supra* note 184.
[187] 17 U.S.C.A. § 114(f) (2010).
[188] John Seay, *Legislative Strategies for Enabling the Success of Online Music Purveyors*, 17 UCLA ENT. L. REV. 163 (2010); Richardson, *supra* note 121, at 66.
[189] *Id*.
[190] *Id*.

Congress would have to make to the existing Copyright Act.[191] Richardson's model would require less work than overhauling the current Act, though getting Congress to pass a new form of tax will likely be no easy feat itself.[192]

Although treating interactive services with parity and subjecting them to a compulsory licensing scheme like non-interactive services are seems workable, ultimately it is not the best solution for addressing the specific tension between statutory interpretations of the intellectual property clause and the goals of the intellectual property clause. With a compulsory licensing scheme, the problem of statutory copyright law not doing enough to adequately balance access and creation incentivization of both the sciences and the useful arts would merely be pushed into the statutory licensing scheme. Yes, compulsory licensing provides a way in for Spotify-like services, but it still subjects them, at least under Richardson's proposal, to protracted negotiations and to the problems that non-interactive services face. It does little to address the problem that copyright law might disincentivize the creation of the useful arts by subjecting Spotify and similar platforms to exorbitantly high royalty rates.[193] A different solution is called for.

B. Re-Defining "Limited Times"

The intellectual property clause "secur[es] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[194] Under the intellectual property clause, Congress has the ability to set whatever it deems is a "limited time" as the term duration of copyrights.[195] Congress has done so four times before,[196] most recently with the CTEA.[197] Thus, Congress has "re-defined" what a limited time is on multiple occasions, and the Supreme

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[191] Richardson, *supra* note 121, at 66-67.

[192] *See, e.g.*, National Federation of Independent Business v. Sebellius, 567 U.S. 519, 563-65 (2012); Rachel Bade & Bernie Becker, *Think Obamacare Repeal Was Hard? Wait for Tax Reform*, POLITICO (Aug. 13, 2017), https://www.politico.com/story/2017/08/13/trump-congress-tax-reform-241506 (discussing generally the political difficulties of passing a tax overhaul).

[193] Richardson, *supra* note 121, at 63; Sisario, *supra* note 184; Fixmer, *supra* note 184.

[194] U.S. CONST. art. I, § 8, cl. 8.

[195] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[196] *Id.* at 194-95.

[197] *See* 17 U.S.C.A. § 301-305 (1998).

Court found this to be a constitutional exercise of its power in *Eldred v. Ashcroft*.[198] Although nothing in *Eldred* suggests that Congress is not at liberty to change its mind and possibly shrink the copyright term,[199] given Congress's long history of only extending, rather than reducing, the copyright term, it seems unlikely and futile to pursue some kind of definitive and immutable statutory definition of what constitutes a limited time.

Were the definition of a "limited time" to be set statutorily for time immemorial, it would at least have the effect of definitively putting the public on notice as to when works would enter the public domain. This would increase access to copyrighted works, and would grant access sooner were the term to be shortened,[200] but would not address the full problem of statutory copyright law being at odds with the dual mandate of the intellectual property clause.

C. Empowering the U.S. Copyright Office as an Administrative Agency and Reading the IP Clause in a Unified Way

The U.S. Copyright Office should be a full blown administrative agency empowered and enabled to create regulations under Congress's purview. One benefit of making the Copyright Office an administrative agency is the greater attention and expertise a knowledgeable body like the Copyright Office can give to creating copyright regulation.[201] Further, regulation is typically more flexible than legislation,[202] allowing an agency to respond to emerging problems more quickly but with less rigidity. These two features can solve the problems of piecemeal copyright legislation[203] (when it leads to a statute becoming outdated quickly after it is enacted),[204] and the problem of copyright law being unresponsive to, and non-predictive of, emerging technologies.

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[198] Eldred, 537 U.S. 186.
[199] *See generally id*.
[200] *See* Edward C. Walterscheid, *Musings on the Copyright Power: A Critique of* Eldred v. Ashcroft, 14 ALB. L.J. SCI. & TECH. 309, 335 (2004).
[201] Liu, *supra* note 32, at 148.
[202] *Id*.
[203] Hughes, *supra* note 25, at 375.
[204] Van Cleaf, *supra* note 29, at 345.

Congress has already begun to recognize the unique expertise of the Copyright Office[205] and may be advancing toward making the Office an administrative agency,[206] which makes this solution the most plausible in terms of likely implementation. Congress recently passed H.R. 1695, which makes the Register of Copyrights a presidentially appointed position with a term of ten years.[207] Presidential appointments require the advice and consent of the Senate, and therefore this bill brings the Copyright Office more firmly under Congress's purview, rather than the Library of Congress's.[208]

Even with a Copyright Office empowered as an administrative agency, regulation made by the agency could have much of the same problems as current statutory copyright law. An effort needs to be made to read the scope of the intellectual property power to require the development of legislation and regulation in line with the dual mandate of the clause. After all, the tension between copyright statutes and the intellectual property clause stems from statutes' tendency not to consider access and creation incentivization of *both* the sciences and useful arts when they are perpetuated under one intellectual property law regime over the other.[209]

Conventional academic wisdom has always read two separate congressional powers into Article I, § 8, clause 8 of the Constitution—(1) to promote the progress of science, and (2) to promote the progress of the useful arts.[210] This led to the bifurcation of the copyright law and patent law regimes.[211] But given the Supreme Court's analysis of the Second Amendment's similar constitutional language in *District of Columbia v. Heller*,[212] it is entirely plausible that the "to promote the Progress of" language is a prefatory part of the intellectual property clause that denotes how that grant of congressional power is to be exercised as whole,[213] rather than a provocation to separate copyright and patent law.

The Second Amendment reads, "A well regulated Militia, being necessary to the security

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[205] REGISTER OF COPYRIGHTS SELECTION AND ACCOUNTABILITY ACT OF 2017, H.R. 1695, 115th Cong.
[206] *See* H.REP. NO. 115-91, at 3.
[207] Dina Lapolt & John Meller, *H.R. 1695: A Vital First Step Towards Copyright Office Modernization*, THE HILL (Apr. 25, 20017), http://thehill.com/blogs/congress-blog/politics/330397-hr-1695-a-vital-first-step-towards-copyright-office.
[208] *Id.*
[209] *See* 17 U.S.C.A. § 114(d)-(f), §§ 301-305 (1998).
[210] Miller, *supra* note 27, at 244.
[211] *Id.*, at 245; Assay, *supra* note 4, at 75.
[212] Dist. of Columbia v. Heller, 554 U.S. 570 (2008).
[213] Miller, *supra* note 27, at 255.

of a free State, the right of the people to keep and bear Arms, shall not be infringed."[214] In *Heller*, the Court rephrased the Amendment to read, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."[215]

Reading the Amendment this way makes it clear that the text includes a prefatory and operative clause.[216] The prefatory clause, "a well regulated Militia, being necessary to the security of a free state," announces a purpose for the operative clause (or command),[217] "the right of the people to keep and bear arms shall not be infringed."[218] The Court in *Heller* said, "[l]ogic demands that there be a link between the stated purpose and the command."[219] Requiring this logical connection allows prefatory clauses to serve a clarifying function in resolving potential ambiguities in the interpretation of the operative clause, rather than letting the prefatory clause limit or expand the scope of the operative clause.[220]

The intellectual property clause, like the Second Amendment,[221] has a prefatory and an operative clause.[222] The prefatory clause, "to promote the Progress of Science and useful Arts,"[223] announces a purpose; the operative clause, "by Securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,"[224] acts as a command in carrying out that purpose.[225]

Under a unified reading of the clause, the promotion of the progress of science and the useful arts is one goal. As in *Heller*, the prefatory and operative clauses are read to be consistent with one another, rather than as the prefatory clause expanding or limiting the scope of the

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[214] U.S. CONST. amend. II.
[215] Heller, 554 U.S. at 577.
[216] *Id*.
[217] *Id*.
[218] *See* Miller, *supra* note 27, at 252-53; Dist. of Columbia v. Heller, 554 U.S. 570, 577 (2008).
[219] Heller, 554 U.S. at 577.
[220] *Id.* at 578 (Note: This note makes no comment on the outcome of the Heller case, but rather uses the reading of the constitutional language at issue to inform the reading of the intellectual property clause).
[221] *Id*. at 577-78.
[222] Miller, *supra* note 27, at 255.
[223] U.S. CONST. art. I. § 8, cl. 8.
[224] *Id*.
[225] *See* Dist. of Columbia v. Heller, 554 U.S. 570, 577-78 (2008); Eldred v. Ashcroft, 537 U.S. 186, 212 (2003).

operative clause.[226] The separation of copyright and patent law under the statutory tributaries emanating from the clause is a legislative creation, not necessarily one mandated by the Constitution.[227] Reading the clause in a distributive fashion as has been Congress's custom allows the prefatory clause to dictate the subject matter of patent and copyright law respectively; such a reading is therefore not in line with the Supreme Court's reading of similar language in *Heller*.[228] Thus, the intellectual property clause should be read in a unitary way such that the goal of promoting the progress of science does not impede the goal of promoting the progress of the useful arts due to an arbitrary bifurcation that is textually unnecessary.

One counterargument is that if the unified reading of the clause is the "correct" reading, then all of copyright law may need to be overhauled.[229] But a unified reading of the intellectual property clause need not completely upend the current copyright/patent distinction that characterizes intellectual property law in the United States.[230] Rather than mandate an intellectual property law overhaul, reading the intellectual property clause as a unified power could act more as a guiding principle for legislators to help them determine how to better balance access and creation incentivization of both the sciences and useful arts.

As a constitutional matter, Congress would still be acting within its powers, whether the clause is read in the more traditional distributive fashion or in the unitary manner.[231] However, requiring the Copyright Office as an administrative agency promulgating regulation to read the clause as one power will more firmly prime its focus on both interests, allow for future intellectual property regulation to keep pace with technological advancements, and address the contradictory tension inherent in current copyright law.

VI. RECOMMENDATION AND CONCLUSION

To address the tension between statutory interpretations of the intellectual property clause and the clause's access and creation incentivization goals, Congress should make the U.S.

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[226] Miller, *supra* note 27, at 253.

[227] *Id.* at 282-83 (Note: A unified reading also has the added benefit of removing the gray area that has emerged for courts trying to determine whether something seeking protection falls under the separate copyright or patent regimes. *Id.* at 284.).

[228] *See* Miller, *supra* note 27, at 283; *Heller*, 554 U.S. at 577-78.

[229] *See* Seay, *supra* note 188; Richardson, *supra* note 121, at 66.

[230] *Cf.* Miller, *supra* note 27, at 284.

[231] Miller, *supra* note 27, at 254; *see* Dist. of Columbia v. Heller, 554 U.S. 570, 570 (2008).

Copyright Office an administrative agency whose enabling act requires the Office to promulgate regulation under a unified reading of the intellectual property clause.

Had Spotify come to exist under a copyright law regime so designed, it is likely that the DPRA would have more fully considered the impact that interactive streaming technologies would have on the music economy and probably would have brought interactive services under a compulsory licensing scheme. This at least would have eased Spotify's entry into the U.S. music market and dispensed with the exorbitantly expensive private licensing deals that has foreclosed Spotify's profitability to date.[232] It is also possible that the CTEA might not have come to be, or at least may have imposed different copyright terms for different types of works to better promote access to sound recordings through interactive digital streaming services. Going forward, with the U.S. Copyright Office as an administrative agency, regulations can be promulgated that are more sensitive to developing technologies like Spotify.[233] Regulations are typically faster to implement than legislation and more flexible,[234] allowing an agency to be responsive to new technologies in a way that may attenuate the problem of overcoming enormous legislative hurdles to enact legislation that quickly becomes outdated.[235]

The U.S. has a body of copyright law that by itself is a constitutional exercise of congressional power to the extent that it promotes the progress of science by incentivizing creation, but that acts *counter* to the scope of that power when it hinders access to that knowledge and discourages creation of the useful arts. This puts copyright law at odds with itself and with the full mandate of the intellectual property clause. Copyright law needs to be reinterpreted by the U.S. Copyright Office as an administrative agency in light of the dual goals of the intellectual property clause in order to constitute a full and proper exercise of the intellectual property power that incentivizes creation of and access to *both* the sciences and the useful arts.

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[232] Wang, *supra* note 143.

[233] *See* Liu, *supra* note 32, at 149.

[234] Liu, *supra* note 32, at 148.

[235] *See, e.g.*, THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995 (Note: Within a few years after its enactment, interactive streaming services became much more popular than the Act originally anticipated); *see* Van Cleaf, *supra* note 29.