BESPOKE RECORDINGS: 
THE LIMITS OF INTELLECTUAL PROPERTY AND THE REVIVAL OF THE MUSIC INDUSTRY

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Abstract
The recording industry and Hollywood in general have responded to declining music sales by attempting to expand excessively intellectual property protection, domestically through the proposed, yet indefinitely postponed, Stop Online Piracy Act and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, and internationally through the Anti-Counterfeiting Trade Agreement and the intellectual property provisions of the Trans-Pacific Partnership Agreement. Such legislation restricts free speech, reduces innovation, and weakens due process rights on the internet. This paper proposes an alternative revenue-generating strategy—bespoke musical recordings that would be privately auctioned rather than publicly released. For example, a recording of Anne-Sophie Mutter playing a piece she has never publicly performed would be sold to a music lover or an investment fund as a one-of-a-kind recording, as unique as an Artemisia Gentileschi painting or a Camille Claudel sculpture. Besides providing the recording industry with additional revenue, bespoke recordings would generate more income for musicians, augment funds for music outreach programs and other music nonprofits, and increase the chances of discovering new musical talent. Similarly to many new markets, it would take time for such recordings to generate substantial revenue. To aid the development of a fluid market for bespoke recordings, numerous new legal and institutional arrangements would be established, including a bespoke recording registry, tailored contractual agreements, anti-counterfeit protections, and a secure bespoke recording storage facility. By facilitating an extreme form of ownership for isolated recordings, we might prevent the overall expansion of the intellectual property regime.

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I. INTRODUCTION

My idea is that there is music in the air, music all around us, the world is full of it and you simply take as much as you require.

—Edward Elgar

The internet would seem to transform Elgar’s poetic vision into reality, a prospect that copyright protected industries (Big Copyright) views as a scene out of Dante’s Inferno. Big Copyright has consistently clamored for legal responses to technological innovations that alter how cultural creation is distributed. Historically, intellectual property laws, specifically copyright, have either undergone no changes or measured revisions to accommodate such shifting market circumstances, rather than capitulating to Big Copyright’s

1. ROBERT J. BUCKLEY, LIVING MASTERS OF MUSIC: SIR EDWARD ELGAR 32 (1905) (quoting Edward Elgar).

financial incentives to disable the new technology.\(^3\)

Such absence of legal modification or reasonable amendment of copyright law is meant to encourage the growth of new technologies and holds the interest of society above the demands of the copyright holder. As the Supreme Court recognized in \textit{Sony Corp. of America v. Universal City Studios, Inc.}, such a balancing of interests is on strong legal footing because copyright law has never granted copyright owners “complete control over all possible uses of [their] work.”\(^4\)

With the advent of the first wave of machines capable of recording music—Thomas Edison’s phonograph and Henri Fourneaux’s piano player—composers demanded that they should be compensated for any mechanical reproduction of their compositions, something the law did not take into account under the composers’ right to license public performances of their work.\(^5\) Instead of allowing composers to unilaterally set licensing fees, Congress established compulsory licenses, which allowed recording artists to record music as long as a fee set by statute was paid to the copyright holder.\(^6\)

Just as composers were not allowed to price recording devices out of existence, TV broadcasters were also prohibited from stopping the development of cable TV.\(^7\) As a means of compromise, Congress again employed compulsory licenses after TV broadcasters claimed that cable TV operators were illicitly rebroadcasting their content.\(^8\) Thus, cable operators could distribute TV shows as long as they paid the legally set compulsory fee to TV broadcasters.\(^9\)

The dawn of other major new technologies for disseminating cultural creation elicited no adjustment to copyright. While radio stations are required to pay composers whenever they play their music, they are not obliged to compensate recording artists—musical performers instead of composers, although at times recording artists and composers are one and the same individual.\(^10\) Recording artists implored politicians to alter copyright to compel payment, yet Congress ultimately saw the situation differently, refusing to amend copyright, possibly believing that the publicity gained from having one’s recording played on the radio outweighed other concerns.\(^11\) The

\(^3\) \textit{See} \textit{Jessica Litman, Digital Copyright} 23 (2001) (“Copyright bills passed only after private stakeholders agreed with one another on their substantive provisions.”).


\(^7\) \textit{See} \textit{Fortnightly Corp. v. United Artists Television, Inc.}, 392 U.S. 390, 400–01 (1968) (stating that unlike broadcasters, cable operators do not edit content or perform works but rather simply carry them); \textit{see also} Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 409 (1974) (upholding the ruling in \textit{Fortnightly Corp.}; further stating that the development of new CATV functions does not subject their operators to copyright infringement).

\(^8\) 17 U.S.C. § 111(c) (2012).

\(^9\) \textit{Id}; \textit{see also} 17 U.S.C. § 501 (2012) (detailing the secondary display of broadcasts within the copyright infringement scheme).

\(^10\) \textit{Id.} \textit{Lessig, supra} note 6, at 58–59.

\(^11\) \textit{Id.}
same occurred when Sony introduced what was to become known as the VCR. Hollywood was concerned over the perceived piracy enabled by a device that not only played VHS cassettes but allowed consumers to record their own copies of TV shows and movies. After the Supreme Court rejected the motion picture companies’ plea for protection, Hollywood’s Congressional lobbying led to naught.

This legal tradition of accommodation and balance has recently come under attack by the recording industry, and Hollywood in general, because of declining record sales. Big Copyright’s lobbying efforts have centered on expanding and extending intellectual property laws without due regard to the interests of society. For example, the Digital Millennium Copyright Act forbids the sale of goods or services that help individuals circumvent technological locks—digital rights management (DRM) technologies—to get to the underlying artwork, regardless of whether it is protected by copyright or is in the public domain. This prohibition against the sale of circumvention technology also applies regardless of the nature of the buyer’s intent to circumvent DRM technologies—e.g., an individual wanting to save electronic material to a newer format so as to not lose it.

Sir Tim Berners-Lee, founder of the World Wide Web, states that “[r]ecord labels have a very strong voice when it comes to arguing for their particular business model, which is in fact out of date.” He believes that “[t]he result is that laws have been created which make out as if the only problem on the internet is teenagers stealing music.” For example, France experimented with a law allowing for an individual’s Internet service to be cut off if she or he was deemed to have illegally downloaded copyrighted material three times. Most recently, Big Copyright has pushed for the Stop Online

13. Id. at 876.
14. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (holding that the fair use doctrine protects time-shifting because it is a substantial non-infringing use of the VCR (Betamax)).
18. Id.
20. Id.
21. Projet de Loi favorisant la diffusion et la protection de la création sur Internet [Proposed Law promoting the distribution and protection of creative works on the Internet], MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION [MINISTRY OF CULTURE AND COMMUNICATION] (2009) (Fr.). While establishing an agency to monitor citizens’ Internet usage, the “Hadopi law” only ever disconnected one individual’s Internet
Piracy Act (SOPA) in the U.S. House of Representatives and a similar bill in the Senate, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP ACT or PIPA). Big Copyright has lobbied for similar treatments internationally through the Anti-Counterfeiting Trade Agreement (ACTA) and the intellectual property provisions of the Trans-Pacific Partnership Agreement, which not only contain many of the harmful substantive principles espoused in the domestic bills but were also negotiated primarily in secret.

While both SOPA and PIPA have been indefinitely postponed, the underlying lobbying efforts of Big Copyright continue, as does the threat that such pressure may ultimately lead to the passage of modified versions of the bills. Both proposed laws were put on hold because technology giants, like Google and Wikipedia, opposed Big Copyright’s attempt to throw a net of potential liability over legitimate websites. For example, SOPA would have labeled a website as dedicated to theft if it was marketed as “offering goods or services in a manner that engages in, enables, or facilitates” copyright violations. The overly broad use of “enables” and “facilitates” would have meant that the proposed law would not have been limited to websites “guilty of any copyright infringement, direct or even contributory infringement.” Hence, the bill targets “considerable protected speech on legitimate sites.”

In tandem with such overbroad scope, such proposed laws would remove standard procedural safeguards. Lemley, Levine, and Post state

[b]ased upon nothing more than an application by a federal prosecutor alleging that a foreign website is “dedicated to infringing activities,” Protect IP authorizes courts to order all U.S. Internet service providers, domain name registries, domain name registrars, and operators of domain name servers—a category that includes hundreds of thousands of small and medium-sized businesses,
colleges, universities, nonprofit organizations, and the like—to take steps to prevent the offending site’s domain name from translating to the correct Internet protocol address.\footnote{32} Additionally, SOPA would “allow rightsholders to force payment processors to cut off payments and advertising networks to cut ties with a site simply by sending a notice.”\footnote{33} Furthermore, SOPA and PIPA remedies could take effect after \textit{ex parte} proceedings, where the owner of the allegedly infringing site was not “even made aware that the action was pending against his or her ‘property.’”\footnote{34}

Such weakened procedural adequacy and free speech concerns would also harm innovation through increased potential liability brought on by a lack of legal clarity.\footnote{35} Wu states “[a]s the pace of technological change accelerates, copyright’s role in setting the conditions for competition is quickly becoming more important, even challenging for primacy the significance of copyright’s encouragement of authorship.”\footnote{36} Of course, the rise of the internet may well have cut into the recording industry’s revenues. Zentner estimates that “peer-to-peer usage reduces the probability of buying music by 30 percent.”\footnote{37} On this basis, he calculates “sales in 2002 would have been around 7.8 percent higher.”\footnote{38} While the possible sources of declining music sales will be examined later, it is worth noting that some scholars claim that the music industry’s difficulties have very little to do with illegal file-sharing, or piracy because other industries, such as the “personal computer software market (with 57 percent average piracy, yearly)” have not experienced the same significant revenue decline.\footnote{39} As Berners-Lee implies, the recording industry is hurting financially because it has been slow to consider altering its business model in the face of rapid transformation around it.\footnote{40} It is understandable that an industry that has relied on a tool—copyright law—for decades would reflexively react to a changing world by demanding that the tool’s powers be expanded, but, as Berners-Lee states, “[w]e mustn’t allow record companies’ fear that their business model isn’t working to upset the openness of the internet . . . .”\footnote{41}

Recording labels are not alone in needing to rely less on copyright by finding alternative revenue sources. Copyright has largely been ineffective at supporting unknown musicians and non-elite music nonprofits—e.g., music

\footnotesize{\begin{itemize}
\item \footnote{32} Mark Lemley et al., \textit{Don’t Break the Internet}, 64 STAN. L. REV. ONLINE 34, 34 (2011).
\item \footnote{34} Lemley, supra note 32, at 36.
\item \footnote{35} Michael A. Carrier, SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements, 11 NW. J. TECH. & INTELL. PROP. 21, 27 (2013).
\item \footnote{36} Timothy Wu, Copyright’s Communications Policy, 103 MICH. L. REV. 278, 279 (2004).
\item \footnote{37} Alejandro Zentner, Measuring the Effect of File Sharing on Music Purchases, 49 J. L. & ECON. 63, 63 (2006).
\item \footnote{38} Id.
\item \footnote{39} \textsc{David Kusek} \& \textsc{Gerd Leonhard}, \textsc{The Future of Music: Manifesto for the Digital Music Revolution} 83 (2005).
\item \footnote{40} Solon, supra note 19.
\item \footnote{41} Id.
\end{itemize}}
outreach programs for kids as opposed to the Berlin Philharmonic.\footnote{See Gabriel Jacob Fleet, What’s in a Song? Copyright’s Unfair Treatment of Record Producers and Side Musicians, 61 Vand. L. Rev. 1235, 1264 (2008) (stating that side musicians do not get credit for the work they add to songs).}

Big Copyright doesn’t have to abandon copyright, it simply needs to stop being reactionary and experiment with numerous new revenue generating strategies beyond suing one’s customers and attempting to impair freedom, creativity, and innovation on the internet. Musicians have been more willing than recording companies to experiment with alternative revenue sources, such as relying more on touring, promoting the concept of tipping musicians,\footnote{Cate Czarnecki, A Tip Jar for the Digital Age, Off Beat (Jan. 30, 2013), www.offbeat.com/2013/01/tip-jar-digital-age/.} or asking fans to voluntarily pay what they think a recording is worth.\footnote{Tobias Regner, Why Consumers Pay Voluntarily: Evidence from Online Music (Jena Economic Research Papers, Working Paper No. 081, 2010), available at http://hdl.handle.net/10419/56912.}

Belatedly, record companies have only recently begun to seriously consider alternative business models such as subscription-based Rhapsody and satellite-based Pandora, yet more experimentation is required.\footnote{See generally John Eric Seay, Legislative Strategies for Enabling the Success of Online Music Purveyors, 17 UCLA Ent. L. Rev. 163 (2010) (discussing necessary legal changes that need to be made in order for online music purveyors to function).}

Section II provides an overview of bespoke recordings. Section III describes the state of the recording industry, arts funding in public schools, foundation support of arts and culture, and the factors precipitating such difficulties. Section IV elaborates on the legal, technological, and institutional mechanisms needed in order to establish a market for unique music recordings. Section V articulates some possible difficulties and how they could be minimized. Section VI briefly concludes.

\section{The Proposal}

On May 30, 2013, David Lang premiered the Whisper Opera, a piece he specifically composed to be “so quiet and so intimate and so personal to the performers that you needed to be right next to them or you would hear almost nothing.”\footnote{David Lang, The Whisper Opera, David Lang Music, http://davidlangmusic.com/music/the-whisper-opera (last visited Sept. 22, 2014).} He envisioned “[a] piece like this would have to be experienced live.”\footnote{Id.} In this vein, “the score to the whisper opera states clearly that it can never be recorded, or filmed, or amplified.”\footnote{Id.}

Unlike paintings, which cannot be perfectly reproduced and hence are each one-of-a-kind cultural creations, music’s fixed tangible form is frequently encapsulated in recordings using vinyl, magnetic tape, or electronic bits.\footnote{Of course, music can also be notated on scores.} Given that music’s physical medium makes it susceptible to being not only recorded but also effortlessly copied, Lang desired to compose music that was impossible to record in order to remind us of the beauty of music performed
live. But the prevalence of recordings has also prevented musicians from benefiting from the scarcity dynamics associated with unique paintings.

Yet such scarcity can be engineered by establishing legal, technical, and institutional mechanisms to support the creation of bespoke recordings (e.g., a one-of-a-kind recording by Martha Argerich) and bespoke compositions (e.g., a unique composition by Jennifer Higdon) that would not be copied nor released publicly but instead would be privately auctioned. Each bespoke musical recording would be as unique as an Artemisia Gentileschi painting or a Camille Claudel sculpture and would be sold to music lovers or investment funds. In a sense, bespoke recordings would be a new unique form of distribution—of almost non-distribution.

Walter Pater once observed that “[a]ll art constantly aspires towards the condition of music,” in the sense that, of all fields of art, music perfectly unifies content and form given its non-representational nature. This magnifies the transcendent nature of art, for “wherever it is we believe great art takes us, music takes us there in a more unambiguous, direct and unhindered way than any other art form.” While certainly lyrical and thoughtful, and possibly even true, bespoke recordings would be an attempt to reverse this aspiration in terms of form. The motivation to do so would be to allow music to benefit financially from the uniqueness inherent in other artistic forms.

To conceptualize more fully the value of bespoke recordings, it might be helpful to contrast them to the first or master version of a publicly released recording. Such a master recording can be analogized to the first print of a series, while bespoke recordings can be equated with unique paintings. Yet even such a comparison to a limited print series is far from perfect because, unlike a print series that is capped at, for example, 200 authorized prints, a master recording can have an unlimited number of subsequent copies. Not
surprisingly, limited edition prints sell for a small fraction of a unique painting by the same artist. Hence, a bespoke recording would be much more valued by collectors and investors than the master copy of a publicly released recording.

Along with advocating for the creation of bespoke recordings, this paper proposes establishing a nonprofit that would encourage emerging and established musicians to annually either compose a bespoke piece or produce a unique recording for auction, with the proceeds going to music nonprofits of their choosing. Since many of the musical outreach programs would likely center on classical music, it would make sense to initially ask contemporary classical performers to record bespoke pieces, yet the nonprofit should also encourage musicians from other fields to donate unique recordings.

Just as a round of golf with Tiger Woods has been auctioned off for $30,000, so have there been a few ad hoc music charity auctions where philanthropists have bid for a private evening with a composer or soloist. For example, a private forty-minute performance in one’s home by Philip Glass was estimated to fetch $10,000 at a charity auction. The hammer prices have been modest because while such an evening can be magical, it cannot also be a valuable financial asset since it cannot be enjoyed and then resold at a later date. The intent behind bespoke recordings would be to create the same demand that allows for an individual sculpture by Alberto Giacometti to sell at auction for $109.5 million—or, to generate significant proceeds that can make a real difference in steadying the financial future of nonprofit music programs and recording labels.

While initially bespoke recording auction prices could be less than 1/100th of the price of a Warhol or 1/100th the price of a contemporary artist’s work such as Jeff Koons, as the market for unique recordings and compositions grew over the decades, the hope would be that such charitable music auctions could raise millions a year for worthy music nonprofits. In 2005, in the U.S. alone, live charity auction sales were $14.6 billion and $12.1 billion for “art, antiques and collectibles.” If over time bespoke recordings only captured the equivalent of 10% of the live art auction sales in a year, it would equate to

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58. See What is an Original Print?, STUDIO1617, www.studio1617.com/prints.htm (last visited Sept. 22, 2014) (“[A] reproduction sells for hundreds or even thousands of dollars less than an original work by the same artist.”).
61. Id.
63. Id.
$1.21 billion. Even if only a portion of this amount was donated, it would be a revolution in funding for music nonprofits. Worldwide art gallery sales are estimated to be over 20 billion euros (roughly $26 billion). While bespoke recording galleries may or may not evolve, the fact that art gallery sales are estimated to be over twice the size of the live art auction market is an encouraging sign for the possible future depth of the bespoke recording market.

The investment returns of artwork have been robust. Mei Jianping and Michael Moses created the Mei-Moses art index, which “shows average annual art returns were 7.7 percent between 1875 and 2000, compared with 6.6 percent from equities.” Further, the art auction market is so established and deep that art exchanges, similar to stock exchanges, have begun to spring up. In 2009, the government of China established the Shenzen Cultural Assets and Equity Exchange (SZCAEE). In France, Pierre Naquin has launched a similar art exchange “offering in January 2011 his first thousandth parts in the works of Sol Lewitt and Francesco Vezzoli.” If in the long-term bespoke recordings develop into a successful new revenue source for the music industry and music nonprofits, a similar bespoke recording exchange could be considered.

Other high-value fields auction off material at astounding prices even though a sizable portion of bidders ultimately consume the product. For example, the worldwide wine auction market was $389 million dollars in 2012. Wine investment funds are gaining ground, at least one wine fund index tracks prices overtime, and numerous high-net worth individuals hold tens of thousands of bottles. Wine can only be consumed once and will ultimately go bad at some point if not drunk, as opposed to being listened to over and over again throughout the centuries, yet both individuals and institutions treat it as a serious investment class.

Almost any artwork can be imperfectly copied if one is given access to the work, yet pieces retain their financial value if they can be distinguished

66. Nazanin Lankarani, Art Funds Feel a Revival as Economy Thaws Out, N.Y. TIMES, Sept. 4, 2009, available at http://www.nytimes.com/2009/09/05/business/global/05martfund.html. But cf. William J. Baumol, Unnatural Value: or Art Investment as Floating Crap Game, 76 AM. ECON. REV. 10 (1986). One critical difficulty in comparing such papers is the time period used in the data set—e.g., the Baumol paper has a significantly smaller and less recent time frame.
67. Lankarani, supra note 66.
69. Id.
70. Just as a thousand people cannot all hang the same unique painting in their home even though they all own a portion of it, the rights of owners of a portion of a bespoke recording could not be the same as a sole owner of a bespoke piece.
73. Id.
74. Id.
from illicit or unacknowledged copies or, more importantly for bespoke recordings, if unauthorized duplicates can be effectively prevented from being produced. In the digital age it has commonly been assumed that the reproduction of art is inevitable, but the market for unique musical recordings can be structured to ensure that bespoke pieces can be authenticated and copies can be prevented. Yet copyright law does not solve this concern; intellectual property laws are practically incapable of providing assurance to collectors and investors that reproductions of a bespoke recording do not exist.\footnote{Copyright holders possess exclusive rights over reproduction, distribution, public performance, and public display of their works. \textit{17 U.S.C. § 106} (2012). Copyright also applies to derivative works. \textit{Id.}} To do so, numerous legal, technological, and institutional safeguards must be implemented.

First, a registration or title system would be created to verify the authenticity of a bespoke recording and who owns it. Second, buyers and sellers would enter into contractual agreements containing numerous provisions that would provide legal assurance to the buyer, including, for example, representations from the owner about whether the piece was ever copied. Third, the physical device on which the bespoke recording existed could be outfitted with numerous technological anti-counterfeiting protections and could even possibly transmit the recording through bone conduction, “sending vibrations to the inner ear through the skull,” instead of using traditional speakers.\footnote{\textit{Poll: Would You Get Earphones Implanted into Your Head?}, \textit{GUARDIAN} (Aug. 7, 2013), http://www.theguardian.com/music/muscblog/poll/2013/aug/07/poll-earphones-implanted-head.} Fourth, adopting the ubiquitous model of storing paintings and sculpture in guarded freeports, a secure storage facility could be established to allow owners of bespoke recordings the option of storing their works there. The work would never leave the premises and even owners would be thoroughly searched for recording devices before being allowed access to their work in order to ensure no copies were made and hence maximize the bespoke recording’s value. Fifth, as already mentioned, a bespoke recording nonprofit would be set up to encourage artists to donate unique recordings, auction the works, and implement the first four measures: maintaining the bespoke recording registry, tailoring contractual agreements, implementing the anti-counterfeit protections, and coordinating with or supervising the secure bespoke recording storage facility.

\section*{A. Benefits of Bespoke Recordings}

There are at least four benefits of bespoke musical recordings, which would assist numerous actors including the public at large, musicians, music nonprofits, and the recording industry.

First, bespoke recordings could benefit the nonprofit music community and those they serve. In the long run, bespoke recordings would generate significant new funds for different music nonprofits such as those teaching underprivileged children how to play musical instruments or those offering musical therapy. Expanding the reach of music nonprofits so that they could
encourage more kids and adults to play, compose, and listen to music would bring enjoyment and instrumental cognitive and health benefits. As Goethe prescribes—“[o]ne ought, every day at least, to hear a little song, read a good poem, see a fine picture, and, if it were possible, to speak a few reasonable words.” Yet it would also improve the lives of those newly touched by music because composing or playing an instrument allows us to go beyond consumption—to search for beauty and meaning, struggle to master a skill, and to communicate. As Arthur Miller simply, yet dramatically, noted, “[i]f somebody doesn’t create something, however small it may be, he gets sick.”

Encouraging more individuals to get involved with music is a good in and of itself because a beneficial consequence of letting a million flowers bloom is that some may be breathtaking. This brings us to the second desirable aspect of bespoke recordings—they would make it more likely that new musical geniuses would be found. This is primarily because of the expanded musical outreach programs that would be funded by bespoke recordings. These musical outreach programs would get more children and adults involved with music, increasing the odds that someone with exceptional potential is introduced to composition or performance. While cultivating genius is a mysterious endeavor, expanding music access to segments of the population who would likely not ever be exposed to classical music or jazz, will increase the probability of uncovering more exceptional talent. This is not only because more people would be introduced to music, but also because people with diverse backgrounds bring, by definition, different experiences to bear on artistic activities, potentially allowing them to express themselves in captivating ways and to reinterpret fields.

Third, cultivating a market for unique recordings would increase the salaries of composers and performers. The more mature and liquid the bespoke recording market became, the higher the income musicians could demand. Famous musicians would not be the only ones to benefit from the development of a bespoke recording market. While young or up-and-coming artists could not command hammer prices remotely comparable to established musicians, recording bespoke pieces and selling them at auction either for profit or for charity would give them valuable exposure to serious music connoisseurs and investors. Not only are music lovers on the lookout for new


82. A potential second, yet minor, reason that bespoke recordings could increase the chances of finding musical geniuses could be through the enhanced salaries that bespoke recordings would generate for the more successful artists. This could occur through motivating young musicians to stay with music instead of abandoning the field for more stable jobs. This is not to say that musicians are significantly motivated by money but rather theoretically that the music industry might be able to support a few more artists through bespoke recordings increasing the music industry’s revenues.
talent to enrich their musical understanding, some investors would search for hidden talent in order to enrich their pocketbooks. Furthermore, fans or investors with smaller pockets would be drawn toward more affordable bespoke recordings by emerging musicians. Both the art and wine auction markets sell a significant number of artworks and bottles of wine that are imminently affordable, which suggests that young musicians could use bespoke recordings as a method to enhance their visibility. For example, the average price per lot—usually either one bottle or a case of 12 bottles—of wine in 2012 was $2,792.83

Bespoke recordings would also help artists more easily give back to their communities. Nationally televised Live Aid-like concerts aside, arguably the most impact that a musician can make in one night is performing a charity concert where either the ticket sales are donated to charity or the tickets are subsidized or free and distributed to individuals who usually do not get a chance to attend concerts.84 Yet organizing a charity concert is no small feat, and musicians are not necessarily also businesspeople. Further there are risks that the concert might not be a success and reflect poorly on the musician. Alternatively, composers and performers can record a unique composition and donate the proceeds of its sale to a charity of their choosing. With bespoke recordings there is less of a chance of failure—the artist can always record a second take, and there are no worries associated with filling a full house. The unique recording could fetch less than expected, yet this could be more easily explained away than a half-empty concert hall. There is less demand put on others’ time—i.e., there is no need for planning the advertising and marketing, issuing tickets, deploying ushers, etc. Also, in the long run the financial impact of auctioning a bespoke recording for charity can be much more than hosting a concert. For example, assuming you could fill all 2,804 seats in the Isaac Stern Auditorium of Carnegie Hall at $100 each, a tall order, the total evening’s take would be $280,400 before subtracting the spectacular fees associated with putting together a concert in the middle of Manhattan.86 It might take two decades, but exceeding such a take by auctioning off bespoke recordings by famous musicians will become relatively commonplace over time—just think of how little such a sum buys at art auctions.

Fourth, promoting the market for bespoke recordings would provide the recording industry with a financial lifeline, making them potentially less inclined to lobby Congress to attempt to demand greater intellectual property protection and gain overreaching powers to monitor the Internet. This may appear to be the weakest of the potential benefits because there is no definitive way to assure that a financial resurgence would lead the recording industry to

83. Meltzer, supra note 71.
84. This is not to deny that there are many ways musicians can give back. Nor is this to claim that performing strict utilitarian calculations with one’s charity commitments is often or always a wise rule.
85. See generally Suzy, How to Organize a Charity Concert, TAKELESSONS (Apr. 10, 2013), http://resource.takelessons.com/how-to-organize-a-charity-concert/ (listing the requirements for putting together a charity concert).
be more reasonable. Yet there is a significant countervailing force: society. The music industry and Big Copyright in general need to understand the value of gaining the approval of society, not its opprobrium. For too long the music industry has not seriously considered the fact that how society perceives it can substantially impact its success. Past methods like massive lawsuits against individuals—over 30,000 individuals in total\(^87\)—and the recent attempts to lobby Congress described above are out of touch.\(^88\) What other industry sues its own consumers and then attempts to gain the power to shut down their Internet access without proper judicial process? Its methods are not only out of step with society but are conservative methods of profit maximization. Such negative perceptions of the industry do it no favors when citizens are deciding how to interact with the recording industry. For example, knowledgeable consumers still desiring to support artists can do so through going to see them in concert because they know the artist retains more of such sales than royalties from record sales. Being fed up with labels, such consumers may feel justified downloading copyrighted songs without paying for them.

Consumers may only become more upset with the music industry if it adopts bespoke recordings as a revenue source but continues its misguided attempts to regulate and criminalize them. Nonetheless, bespoke recordings are a perfect way for the music industry to experiment with alternative funding sources because they are in no danger of eroding sales elsewhere, unlike other potential sources of income for the industry.

Bespoke recordings are a promising tool, yet they will likely not be a complete solution to the revenue struggles of the music industry. This does not make bespoke recordings a deficient idea because not only does such a comprehensive solution probably not exist but also because there are no significant drawbacks to bespoke recordings. Bespoke recordings could be separately pursued along with other new revenue generating ideas, for example, further promoting the broadcasting of live concerts in movie theaters across the country, as has been pioneered with opera by the Metropolitan Opera.\(^89\) These high-definition opera broadcasts “from the Met stage” are also available at some public schools.\(^90\) This idea could even be modified to have live concerts broadcast over the Internet for a small fee.\(^91\)


\(^88\) See generally, David Kravets, Tech Giants Form Internet-Freedom Lobby to Counter MPAA, RIAA Clout, WIRED (Sept. 19, 2012, 4:04 PM), http://www.wired.com/2012/09/internet-freedom-lobby/ (explaining that the RIAA was one of the groups pushing for the passage of SOPA and PIPA).


\(^91\) It is unlikely that such pay-per-view online concerts would reduce demand for physically attending live concerts. The two could even fuel demand for each other. Both are distinct from listening to recorded music; all three are potentially valuable to music lovers. Yet online broadcasts of live concerts are not being promoted enough.
III. STATE OF THE RECORDING INDUSTRY AND MUSIC NONPROFITS

The first subsection presents numerous statistics to paint a picture of the current state of the for-profit and nonprofit music fields. The second subsection examines the underlying reasons for the current state of affairs. The final subsection discusses how much money bespoke recordings could potentially raise.

A. The State of the For-Profit and Nonprofit Music Fields

The music industry, arts funding in public schools, and foundation support of art and culture are examined below.

1. Music Industry

Overall album sales, of physical and digital albums and track-equivalent albums, plummeted in the United States until 2010 at which point they stabilized, though at a much lower level. In 2005, overall album sales were 654.1 million.92 The figure in 2006 was 646.4 million,93 584.9 million in 2007,94 535.4 million in 2008,95 489.8 million in 2009,96 443.4 million in 2010,97 457.7 million in 2011,98 and 450 million in 2012.99 While a slight increase was recorded in 2011,100 the number is not encouraging compared to 2005 sales, or even 2009 sales.

Overall album sales is a good metric to begin to get a sense of the health of the music industry because it takes into account that selling a recorded single is not as profitable as an entire album through creating “track equivalent album” figures. Overall music sales figures have risen from 1.003 billion in 2005101 to 1.661 billion in 2012,102 yet overall music sales are defined as

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93. Id.
100. BUS. WIRE, supra note 98.
101. BUS. WIRE, supra note 92.
102. BUS. WIRE, supra note 99.
albums, singles, music video, and digital tracks. Since sales of singles have skyrocketed during this period, the overall music sale figure is deceptive because the music industry would much rather sell albums than singles. Overall album sales is also a better metric than total album sales because the latter, which includes CD, CS, LP, and digital albums, does not take into account track equivalent albums, and hence, posts significantly lower figures. For example, total album sales in 2012 were 316 million versus 450 million overall album sales in the same year. Yet the decline in total album sales relatively closely tracks the same decline in overall album sales. For example, total album sales in 2011 were 331 million but 618.9 million in 2005.

Revenue figures can be misleading if they do not take into account inflation. When inflation and population growth are taken into account, to give a sense of how many dollars the average American spends on music, revenue figures again relatively closely track overall album sales. For example, using figures from the Recording Industry Association of America for U.S. recorded music revenue, at the end of 2009 the music industry was down 64% from its peak in 1999. The figure was 40% if not adjusted for inflation and population.

2. Arts Funding in Public Schools

The recording industry is not alone in experiencing challenging times. Arts programs, broadly defined to include music, in public schools were under threat even before the recent Great Recession. Between the school years 2004-2005 and 2006-2007, seven percent of elementary school teachers reported a decrease in instruction time for arts education. Further, in regards to time spent on arts instruction, “teachers at schools with higher percentages of low-income or minority students reported significantly larger average decreases compared with other teachers.” This is alarming given that high school students from “low socioeconomic” backgrounds “who earned few or no arts credits were five times more likely not to have graduated than students

103. Id.
104. Id.
105. Id.
106. Id.
107. Id.
109. Id.
110. Id.
111. Given the difficulty of finding statistics only on music programs, arts figures generally, which include music, will be used when discussing both public school programs and foundation funding. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-286, ACCESS TO ARTS EDUCATION: INCLUSION OF ADDITIONAL QUESTIONS IN EDUCATION’S PLANNED RESEARCH WOULD HELP EXPLAIN WHY INSTRUCTION TIME HAS DECREASED FOR SOME STUDENTS (2009) (showing a decrease in arts funding before the Great Recession).
112. Id. at 3.
113. Id. at 14.
who earned many arts credits.”

Not only was instruction time at risk prior to the recession, so was arts funding. Of thirty-two “states that had funding in both school years 2001-2002 and 2006-2007,” eight states had funding of arts in education grants that “decreased greatly” and four states had funding that “decreased somewhat.”

While much more up to date comprehensive studies often come with multi-year delays, it would not be unreasonable to assume that arts programs have continued to experience challenging times during the Great Recession that began shortly afterwards. There are also scores of reports of cutbacks such as in the Toledo, Ohio area, where 132 elementary specialists in art, music, and physical education were eliminated. Between 2000 and 2006, while the number of Minnesota public school students fell only 1.5 percent, the “number of public school music teachers dropped more than 11 percent.” From 1991 to 2013, a school district in Eugene, Oregon lost 42% of its music teachers.

3. Foundation Support of Arts and Culture

Foundation funding in general declined slightly in 2009 and again in 2010, though total foundation donations are significantly up from 2000. While funding to arts and cultural programs by foundations has increased in dollar amounts from 2000 to 2009, such programs are receiving a smaller percentage of overall funding, auguring a change in funding priorities. The same is true for aggregate education funding by foundations—total dollar amounts were up in the first decade of the century, yet the share of funds going to education programs decreased. The reason for this relative decline in percentage of funds is because foundations and philanthropists have been concentrating more on issues such as health initiatives in developing countries and less on expanding music education programs and other arts related programs. For example, in 2003, education programs constituted 25% of grant dollars distributed by a sample size of over a thousand “larger foundations”


115. U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 111, at 19.


122. Id. at 4.
collected by the Foundation Center. Arts and culture programs received 13% of grant dollars in the same year. By 2009, education nonprofits only received 23.3% of grants funds, while arts and culture programs received only 10.5% of grant funds allocated by a sample size of 1,384 of the largest U.S. foundations.

This downward trend in funding for both education and arts and culture is also seen by examining the number of grants given in each field. In the same study from 2003, education received 20% of the total number of grants issued, while arts and culture collected 15% of the total number of grants. These figures decreased to 19.5% and 13.4% respectively by 2009. The fields that education and arts and culture have been losing ground to include the funding of international affairs, development, and peace; environment and animals; science and technology; and health. The fields of international affairs, development, and peace have seen their funding amounts increase from 3% of grant dollars to 5.5%, while environmental and animal programs have gone from receiving 6% to 7.4% from 2003 to 2009. During the same time frame, science and technology funding by foundations has increased from 2% to 2.6%. The field of health took 20% of grant funding in 2003, which increased to 22.6% by 2009. Finally, while these figures are not as devastating as the decline in overall album sales and revenue seen by the recording industry, they suggest that alternative funding could be beneficial to both the recording industry and music nonprofits.

B. Factors Precipitating Difficulties

In the for-profit sphere, Big Copyright has consistently blamed the rise of digital technologies and the Internet for its ills because such developments allow individuals to share recordings through file-sharing sites. As mentioned earlier, Zentner estimates that “peer-to-peer usage reduces the probability of buying music by 30 percent,” which would have lead to sales being roughly 7.8 percent higher in 2002. Some argue that popular sites like iTunes, which sell many individual songs for roughly a dollar, have Balkanized


124. Id.

125. GRANTMAKERS IN THE ARTS, supra note 121.

126. This is not to claim that funding certain areas is more important than others. The statistics are simply meant to demonstrate how both arts and culture funding and education funding are receiving smaller portions of the overall foundation grant pie.

127. FOUNDATION CTR., supra note 123.

128. GRANTMAKERS IN THE ARTS, supra note 121.

129. Id.

130. Id.

131. Id.

132. Id.


134. Zentner, supra note 37.
the album. Big Copyright also avers that the sale of illicit CDs on street corners has reduced the bottom line.136

Yet others argue that illicit file sharing plays a minor or negligible part in the story of the recording industry’s decline. Kusek and Leonhard point out that other industries with high illicit sharing rates have not fallen on hard times.137 They argue that the recording industry’s struggles instead stem from “the labels’ unwillingness to experiment and develop really different artists, and the many competing forms of entertainment that exert magnetic power over the disposable dollars of the consumers, including video games, wireless services, and DVDs.”138 They also claim that declining music sales partially stem from labels’ shifting their “primary distribution channel away from the traditional record store and over to the ‘big box’ retailers such as Best Buy, Target, and Wal-Mart, all of which sell CDs at heavily discounted prices in order to attract crowds into their stores.”139 Additionally, such a shift has “sharply reduced the amount of square footage available to record companies for presenting their wares” relative to the space traditional record stores provided.140 Finally, with the conversion from vinyl to CDs, consumers had to repurchase their favorite songs, yet a similar inefficiency has been less prevalent from the switch from CDs to digital.141 Thus, the music industry became accustomed to such conversion or replacement sales but could not capitalize on them with the most recent technological shift.142 For the purposes of bespoke recordings, both Big Copyright and its critics’ narratives about declining music revenue could have some truth to them. Regardless, bespoke recordings could boost revenue for labels and artists.

Sales figures might never return to their peak. Jim Donio, the president of the National Association of Recording Merchandisers, believes there were four main reasons that the 2011 figures slightly increased: more digital channels through which consumers can buy music; the shutdown of LimeWire, the peer-to-peer file sharing website, at the end of 2010; growing awareness of new music through social media avenues; and the popularity of music TV shows such as American Idol.143 Yet with the release of lower 2012 sales, his guarded optimism has not materialized.

In the nonprofit world, public school programs have been experiencing a difficult time maintaining current levels of funding while music outreach...
programs and other music nonprofits primarily funded by foundations have been losing ground in terms of the percentage of foundation funds that they receive.\textsuperscript{144} A significant portion of the pre-recession difficulties that continued through the recession was due to pressures to improve students’ test scores in core educational areas such as English and math “required by ‘No Child Left Behind,’ in addition to other state and local assessment tests.”\textsuperscript{145} These exams funneled money to fields with mandated testing and away from art and music.\textsuperscript{146}

\textbf{C. The Potential Financial Scope of Bespoke Recordings}

In 2010, total U.S. recorded music revenue was $6.2 billion.\textsuperscript{147} Total estimated funding by more than 76,000 U.S. foundations in 2010 was $45.7 billion.\textsuperscript{148} An estimated 10.5% of the foundation funding was for arts and culture.\textsuperscript{149} Estimating that 50% of arts and cultural funding went to music programs, even though the actual figure is likely lower,\textsuperscript{150} suggests that roughly $2.4 billion of foundation funds went to nonprofit music programs and NGOs.

Artpiece collected worldwide fine art auction receipts\textsuperscript{151} from “5.4 million auction results from 3,600 auction houses” globally.\textsuperscript{152} In 2010, total worldwide auction sales were estimated at $9.36 billion.\textsuperscript{153} The U.S. portion of global auction sales turnover accounted for 29.9%.\textsuperscript{154} Thus, U.S. 2010 auction proceeds were roughly $2.8 billion. This estimate is substantially lower than the $12.1 billion approximation for 2005 mentioned in the introduction, although it not only covered art but also antiques and collectibles.\textsuperscript{155} It is important to remember that both of these figures are only a portion of the art market. They exclude private, non-auction sales that are more difficult to track.\textsuperscript{156} Such private arrangements are substantial, given that such deals have certain advantages: the potential for higher prices or lower fees

\begin{itemize}
\item \textsuperscript{145} Grace Chen, Decreasing Public High School Elective Programs, PUB. SCHOOL REV. (Oct. 6, 2008), http://www.publicschoolreview.com/articles/51.
\item \textsuperscript{146} Id.
\item \textsuperscript{148} LAWRENCE & MUKAI, supra note 120, at 4.
\item \textsuperscript{149} GRANTMAKERS IN THE ARTS, supra note 121, at 2.
\item \textsuperscript{150} My estimate assumes all music foundation funding went to US music nonprofits, though likely some of it was used abroad. See id. (noting drops in international funding).
\item \textsuperscript{151} Auction figures are hammer prices. They do not include fees and commissions. See SOTHEBY’S, http://www.sothebys.com/en/Glossary.html (last visited Sept. 22, 2014) (defining hammer price).
\item \textsuperscript{152} ARTPRI CE, supra note 68, at 6.
\item \textsuperscript{153} Id. at 7.
\item \textsuperscript{154} Id. at 11.
\item \textsuperscript{155} Art auction figures vary substantially. For example, the Artnet database estimates 2011 worldwide auction sales at $30.5 billion. While one cannot strictly compare figures from different years, it is unlikely that global auction receipts jumped over $20 billion from 2010 to 2011. Rachel Corbett, How Big Is the Global Art Market?, ARTNET, http://www.artnet.com/magazineus/news/artnetnews/china-the-worlds-top-art-and-antique-market.asp (last visited Sept. 22, 2014).
\item \textsuperscript{156} Corbett, supra note 155 (estimating private sales based on dealers).
\end{itemize}
through “can’t refuse” unsolicited offers or bargain deals for individuals needing to sell quickly or discreetly. Further, they provide increased privacy for those not wanting to flaunt their wealth or suggest that they are “distressed sellers.” This figure also does not include art gallery sales or art sold to the masses. Such private deals are so substantial that an art economist, Clare McAndrew, estimated that combined worldwide auction and private sales were $64.1 billion in 2011, yet she also estimates auction sales to be triple Artprice’s figures. McAndrew estimates the U.S. market accounts for 29% of this total, or $18.6 billion.

Breaking down the Artprice 2010 fine art auction figures by historical period reveals that 10% of sales were of contemporary art, 18% post-war art, 51% modern art, 10% from the 19th century, and finally, 11% of auction sales were of old masters. Such variations in time period may be helpful in tentatively projecting future auction receipts for bespoke recordings. The data clearly shows a bell curve centered on modern art. While it is impossible to confidently state the reason for such a distribution—e.g., it is difficult to know whether modern art outsells old masters because of a smaller supply of old masters or because of a matter of collectors and investors’ tastes—if such a bell curve was replicated for the bespoke recording market, it could suggest that the bespoke recording market could continue to grow for decades or alternatively that the bespoke recording market could take decades to mature. Since during the initial creation of the bespoke recording market only contemporary recordings would be for sale, to get a better sense of the mid- to long-term sales projections for bespoke recordings, we could compare it to the 10% share ($280 million) that contemporary art occupies of the U.S. $2.8 billion art auction market as calculated by Artprice. A similar 10% stake of the U.S. art market in general, as estimated by McAndrew, would yield a substantially more robust sum of $1.85 billion. If after a decade or two the bespoke recording market could remotely approach this $280 million to $1.85 billion market, it would be a great success.

The fine art auction market includes numerous art forms. By percentage

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157. Lankarani, supra note 66.
158. Id.
159. Also, nothing prevents individual pieces of art to be resold every year, boosting the overall yearly sales figures. Yet, auction house fees are not insignificant, dampening the likelihood that an individual piece would be sold frequently.
161. Corbett, supra note 155.
162. ARTPRICE, supra note 68, at 17.
163. Examining the success over time of individual works of art or the opus of individual artists initially looks like it could yield fruitful information on when the value of individual works peak, yet it might reveal little that could not already be assumed, especially given the effort needed to untangle the variation in a painting’s value over time relative to the general rise in the auction market, changes in acquiring works of art for investment purposes, arbitrary shifts in tastes, etc.
164. ARTPRICE, supra note 68, at 8.
165. Corbett, supra note 155.
166. I use ARTPRICE’s and McAndrew’s figures as approximate low and high estimates. See ARTPRICE, supra note 68; Corbett, supra note 155 (estimating the monetary value of the art market).
of total sales in 2010 estimated by Artprice, painting comprises 52.33% of the market, drawing 33.92%, sculpture 9.89%, print 1.97%, photography 1.40%, and others like installations 0.49%.\textsuperscript{167} By number of auction lots sold, painting consists of 41.61%, drawing 27.30%, print 19.72%, sculpture 5.91%, photography 4.16%, and others 1.30%.\textsuperscript{168} We can only speculate the relevance of such information for the bespoke recording market. The large disparity in sales figures between paintings and drawings relative to photographs and prints might imply that it would be wise for owners of bespoke recordings to never make any copies in order to maximize the financial value of their unique pieces.

IV. CREATING A BESPOKE RECORDING MARKET

This section will address the legal, technological, and institutional mechanisms needed to assure potential buyers that bespoke recordings are genuine and have not been copied unless clearly acknowledged so by a seller. Numerous mechanisms will be described below that, in combination, could make bespoke recordings practically feasible.\textsuperscript{169} The exact mix of approaches could vary between different actors in the music industry, though having an industry-wide standard could accelerate the development of the bespoke music recording market.

A. Bespoke Recording Registry

A bespoke music registry would perform two critical functions. First, the registry would contain a universal list of existing bespoke music pieces, both compositions and recordings.\textsuperscript{170} Second, it would designate who owned a recording in a similar way to how land registries work.\textsuperscript{171} The existence of a bespoke recording registry would make it more difficult to claim falsely that an undiscovered masterpiece was found in one’s attic—i.e., for fake bespoke recordings, as opposed to illicit copies of a genuine bespoke recording, to be successfully passed off as authentic.\textsuperscript{172} The music registry would also provide assurance to potential subsequent buyers that the current holder of a recording was in fact the legitimate, legal owner of a piece.\textsuperscript{173} Finally, the registry would reduce the motivation to steal unique

\textsuperscript{167} ARTPRICE, supra note 68, at 14.

\textsuperscript{168} Id.

\textsuperscript{169} This section will not lay out a definitive model or strategy for creating a market for bespoke music recordings. While implementing all of the discussed mechanisms would likely maximize the chances of success for bespoke recordings, such pieces might become a reality with fewer mechanisms or with the introduction of additional, new approaches.

\textsuperscript{170} This function is less critical for land because of its physical properties—i.e., we can verify its existence by simply taking a walk. KEVIN GRAY & SUSAN FRANCES GRAY, LAND LAW 59–60 (2007).

\textsuperscript{171} Id.

\textsuperscript{172} Plus, the overwhelming majority of such bespoke recordings will be by living composers and performers, who, if need be, can verify a piece’s authenticity.

\textsuperscript{173} The legitimate owner of a bespoke recording by Maurizio Pollini could attempt to create and sell a fake version of the recording in order to be able to keep the original. This would be as difficult, if not more so, than attempting to illicitly copy a bespoke recording because it would require counterfeiting the anti-
pieces. A stolen bespoke recording could not be sold in the open market without legal risk, given that clear documentation of who the legitimate owner was would exist. Thus only individuals willing to buy a known stolen recording and keep it a secret, as opposed to treating it as an investment, would provide any type of a market for thieves. While bespoke recording registries would minimize the risk of theft, the unusual nature of bespoke recordings would already create a strong disincentive to attempt to steal such works. Essentially, bespoke recordings would only retain their financial value if potential buyers were confident that the piece was never copied. If a bespoke recording were stolen, then potential buyers could not rely on any of the legal, technological, or institutional mechanisms described in this paper for assurance—i.e., potential buyers would have to assume that a thief made copies of the work before attempting to sell it.

While the registry would provide these two valuable services to enhance the value of bespoke recordings, owners of such pieces would not be obligated to avail themselves of its services. The registry’s purpose would be to facilitate the development of a bespoke music recording market. It would aim to make bespoke pieces more valuable through verifying the existence of a piece and its owner.

While going some way toward easing transaction costs holding up the viability of unique recordings, such a registry would need to be paired with other mechanisms to further strengthen the market for bespoke recordings.

B. Contractual Agreements

Contractual agreements for bespoke recordings between buyers and sellers would be a critical component of the establishment of a bespoke recording market. While bespoke recording contracts will invariably have many standard provisions in the sale of artwork such as a clause committing the seller to guarantee that the piece she was selling was in fact the stipulated genuine piece and not a counterfeit, this section will only touch on some of the more important, novel clauses required of bespoke recording sale contracts between buyers and sellers as well as transfer agreements memorializing the donation of the bespoke recording by musicians to the bespoke recording nonprofit.

First, a provision enumerating whether any copies of the bespoke recording exist would be standard. If an owner of a bespoke recording wanted...
to create copies of the work, there would be little reason to prevent her from doing so as long as she truthfully disclosed such information to all potential buyers and contractually bound herself to such a representation. Yet, creating copies would severely depress the financial valuation of the recording for two reasons. First, the value of a bespoke recording would be significantly reduced if copies were made simply because it would no longer be unique. Second, creating copies of a bespoke recording would deflate its value because it would erase the ease of tracking the provenance of only one recording and replace such convenience with having to possibly account for many other copies, potentially all owned by numerous different individuals.

Creating copies for sale would also complicate contractual provisions. For example, if ten copies exist, contracts would have to prevent all owners from making the work publicly available or making any additional copies so as not to reduce the value of the copies held by others. Thus, creating only a few copies of a bespoke recording for sale could prevent the bespoke recording from ever being made publicly available, an option that would exist if the unique recording was never copied and sold.

Even if no legitimate copies of a bespoke recording were made, hunting down an illicit copy would become difficult if bespoke recordings were bought and sold with the frequency of stocks. A comparison to the art world is encouraging in that famous paintings or sculptures are often held for decades or centuries at a time, making it easier to trace any illegitimate copies that might surface because of such a slow turnover in ownership. More importantly, if a bespoke recording were always held at a secure storage facility, the benefits of which will be expanded on below, then it could be sold frequently at little risk because the unique piece would never leave the facility and all visitors would be searched for recording devices.

Second, performing artists and the record labels that represent them might desire a provision stating that any owner of a bespoke recording, into perpetuity, could never make more than a set number of copies for sale. The purpose of such a clause would be to prevent a bespoke recording owner from publicly releasing the bespoke recording for profit, causing potential consumer confusion, and in the eyes of recording labels at least, creating undesired competition—since the bespoke recording owner might begin to look like a recording label that represents the artist. Such a provision against public release should not apply to the bespoke recording being given away for free to the public. Also, such a distribution limit would likely be set at a few hundred copies, as prints usually are, and be a cap on total copies made by all past and present owners combined.

Such a do-not-publicly-release-for-sale provision would originate in the transfer agreement documenting the donation of the bespoke recording by the artist to the bespoke recording nonprofit. It would mandate the nonprofit to ensure that such a provision was included in all future sales contracts of the

176. Copyright law grants the holder of a copyrighted work the exclusive right to reproduce the work “in copies or phonorecords.” 17 U.S.C. § 106(1) (2012).
piece. This would entail a provision in the sales contract that would essentially be enabling third-party enforcement.\textsuperscript{177} Beginning with \textit{Jacobsen v. Katzer},\textsuperscript{178} courts have recently supported such an arrangement solidifying the enforceability of open source licenses.\textsuperscript{179}

Third, while the five exclusive rights in copyrighted works (reproduction, adaptation, distribution, public performance, and public display)\textsuperscript{180} can be subdivided and owned and enforced separately,\textsuperscript{181} the transfer agreement outlining the terms of the donation of a bespoke recording would have to assign all five rights to make bespoke recordings practically feasible. Such assignment of all rights would completely separate a composer from her composition just as a painter is from her painting,\textsuperscript{182} though performers could still re-record a piece that was the basis for a donated bespoke recording unless the composition was also bespoke.

\textbf{C. Anti-Counterfeit Protections and Technological Restrictions}

A number of relatively low-cost anti-counterfeit and technological protections could be taken to provide further assurance of the authenticity of bespoke recordings and hence enhance their value. While such measures would also help ensure that third parties could not steal or make illicit copies of bespoke recordings and successfully pass on the work, they would not prevent owners of bespoke recordings from making copies.

First, artists could sign the score or physical device containing any musical piece that they either composed or recorded. This would be one indication that the artist actually did record this particular performance. While this measure alone would only be so helpful, it could be paired with numerous other protective measures.

Second, the bespoke digital recordings would be encrypted. Advanced encryption software could deter all but the most skilled and determined of criminals.

Third, the unique hardware that would encase the recording could have anti-counterfeiting physical protections built into it in a similar way that anti-counterfeiting protections are built into a dollar bill.\textsuperscript{183} For example, unique

\textsuperscript{177} This also applies to the above discussion of barring an owner of a commercial copy of a bespoke recording from ever copying it.

\textsuperscript{178} \textit{Jacobsen v. Katzer}, 535 F.3d 1373, 1381 (Fed. Cir. 2008).


\textsuperscript{180} 17 U.S.C. §§ 106(1)–(6) (2012).


\textsuperscript{182} With the introduction of bespoke recordings, possible legislative revisions could be considered for moral rights. The primary vehicle granting moral rights legal protection in the United States is the Visual Artists Rights Act of 1990 (VARA), which applies only to visual artwork and grants artists both a right of integrity and a right of attribution. See \textit{See generally Thomas F. Cotter, Pragmatism, Economics, and the Droit Moral}, 76 N.C. L. REV. 21–22 (1997) (detailing the scope of VARA including its recognition of integrity and attribution rights).

\textsuperscript{183} \textit{Security Features}, \textit{BUREAU OF ENGRAVING & PRINTING U.S. DEP’T OF TREASURY},
serial numbers could be incorporated into the recording. Such safeguards would be a measure of a recording’s authenticity and could be verified by the maker of the technology.

Fourth, anti-counterfeiting measures could vary from one unique piece to another in order to make it more difficult for a potential thief or counterfeiter to know what she was dealing with—i.e., that she properly disabled all safeguards.

Fifth, bespoke recordings could use bone conduction technology, which sends vibrations through the skull to the inner ear, to play a piece instead of traditional speakers. This would make it significantly more difficult to simply use a recording device to create a copy of the unique recording.

A combination of such protections would make counterfeits difficult to successfully pass off as genuine bespoke recordings, reduce the chances of physical theft, and diminish the likelihood of illicit copies being made.

Making imperfect copies would also be arduous, given that one would need access to the bespoke recording in order to attempt to duplicate it. Of course, access would be difficult for anyone but the owner, who could legally and easily make perfect or imperfect copies of the recording, as long as they truthfully acknowledge as such if they ever attempted to sell the bespoke piece. To further assure potential buyers, above and beyond such representations in sale contracts, owners of bespoke recordings could continually house the pieces at a secure facility that could search anyone accessing the piece for recording devices. This would provide the maximum protection against any perfect or imperfect, unacknowledged or illicit copies being made.

D. Secure Storage Facility

Buyers of bespoke recordings would have the option to store their newly acquired piece at a secure storage facility that would be dedicated to protecting the recording from theft and illicit or unacknowledged copies of it being made. Owners could determine if they desired anyone who came in contact with the recording to be searched for recording instruments. Owners who were concerned about maximizing the value of their work could even stipulate that they themselves be searched for recording instruments before gaining access to their own musical piece, which would provide potential future buyers the most assurance. Such a stringent requirement would likely become the default procedure for those purchasing bespoke recordings for investment purposes.

Numerous similar secure storage sites exist for artwork and other valuables. Just one storage facility in Switzerland, the Geneva Freeport, holds countless works, including thousands of Pablo Picasso paintings,
sculptures, and drawings. Given the existence of freeports across the globe, some secure bespoke recording facilities could possibly simply be housed within them.

Given that recording devices can be quite small, it would be imperative to take numerous precautions to ensure that no one who was listening to a bespoke recording within a secure facility could record a copy of it. Such steps could include metal detectors being calibrated to a sensitive setting, requiring that individuals not bring anything into the listening studio, sweeping for recording devices using magnetic field detection devices, and using infrared photography to detect heat signatures of any recording device.

Numerous owners of bespoke recordings might prefer to have their pieces at home, so they could listen to them at any time. While this may be the case for some owners, it would not necessarily be the most common preference for several reasons. First, many owners of recordings might not be individuals but investment funds or other corporate entities that acquire recordings solely for investment purposes. Not only would employees at such funds likely not care to listen to the recordings on a routine basis, they would prefer to have their bespoke recordings physically secure. Second, even owners who were individuals might favor storing the recording outside their home for safekeeping as evidenced by the common use of safety deposit boxes at banks and freeports. Third, not only would both individuals and corporate entities likely be concerned with the physical safety of their recordings, but they would also desire to maximize the works’ financial value. Such maximization would occur when bespoke recordings were stored at an off-site facility that took measures to prevent copying recordings, reassuring future buyers that no copies of a bespoke recording existed. Fourth, holding bespoke recordings in a dedicated facility would likely lower the cost to owners of insuring such recordings.

187. Id. It is worth noting that many of these storage facilities act as tax havens—e.g., at the Geneva Freeport, no import or transaction taxes have to be paid as long as the artwork stays at the facility. While such tax considerations would increase demand for bespoke recordings, a bespoke recording storage facility could choose not to participate in such tax avoidance schemes.

188. Id. It is worth noting that many of these storage facilities act as tax havens—e.g., at the Geneva Freeport, no import or transaction taxes have to be paid as long as the artwork stays at the facility. While such tax considerations would increase demand for bespoke recordings, a bespoke recording storage facility could choose not to participate in such tax avoidance schemes.

189. There are other measures to take including not having any windows in the listening studio so that exterior laser-bounce listening devices cannot be deployed. Such a device can pick up very sensitive displacements. See generally, Chen-Chia Wang et al., A New Kind of Laser Microphone Using High Sensitivity Pulsed Laser Vibrometer, IEEE (May 4–9, 2008), http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=4572314. (explaining that a laser microphone uses a high sensitivity pulsed laser vibrometer).

190. Recording devices, including digital ones, create miniscule signals that can be detected. Sweeps could occur near the vicinity of the listener while the bespoke recording was being played within the listening room in order to distinguish the signature of any illicit recording device from the signature of the device playing the bespoke recording. See Anuja Marathe Kanhere, How to Detect Hidden Listening Devices, BUZZLE (Dec. 19, 2011), www.buzzle.com/articles/how-to-detect-hidden-listening-devices.html.

191. Cooling the room would help the clarity of the photographs. Id.

192. There would be nothing stopping an owner of a bespoke recording from keeping it at home or on her iPod, if she preferred such easy access. It would simply reduce the financial value of the piece if the owner ever attempted to sell it.

recordings because the greater security would reduce the risk shouldered by the insurance company.\textsuperscript{194} Finally, given that individuals happily travel to concert halls to hear performances, it might not be so unreasonable that some people would willingly travel to a secure facility to listen to an utterly unique recording.\textsuperscript{195} Especially since steps can be taken to minimize the inconvenience of viewing one’s art—e.g., the Singapore Freeport ferries collectors in “white limos from the tarmac to the warehouse.”\textsuperscript{196}

The secure facility could implement measures to prevent employees from illicitly copying any bespoke recordings. For example, each bespoke recording could be stored on a device that was locked in a vault that could only be opened with a key held by the owner.\textsuperscript{197} Alternatively, the digital equivalent of this could be implemented, where the bespoke recording owner would have a digital password that was unknown to anyone at the storage facility.\textsuperscript{198}

The secure facility could also buy insurance against an employee illegally copying a bespoke recording to compensate an owner of a piece were it ever somehow improperly copied. While such insurance may seem unlikely to be forthcoming, past and present insurance practices strongly suggest that a respected insurer would issue such a policy.\textsuperscript{199} For example, insurers have issued policies for Heidi Klum’s legs, America Ferrera’s smile, and Bruce Springsteen’s vocal chords.\textsuperscript{200} More on point, it is standard practice for a movie being made to get errors and omissions insurance against, among other things, copyright infringement claims.\textsuperscript{201} The insurance rates would, of course, vary and might be roughly comparable to other types of insurance, such as directors’ and officers’ liability insurance.\textsuperscript{202}

E. Bespoke Recording Nonprofit

A novel music nonprofit could be established to coordinate all aspects of promoting the development of a market for bespoke recordings with the aim of raising funds for other music nonprofits such as music outreach programs.\textsuperscript{203} In addition to encouraging musicians to donate unique pieces and holding

\textsuperscript{194} If a freeport becomes too large, the fact that one fire could wipe out so much art can add upward pressure on insurance rates. Segal, supra note 160.

\textsuperscript{195} Yet, it should be noted that a secure bespoke recording storage facility will not exist in all cities.

\textsuperscript{196} Or, as with some safety deposit boxes, two keys would be required to open the lock and both the storage facility and the owner of the bespoke recording would have one of the keys.

\textsuperscript{197} Other possible measures include constant video surveillance and guards working in tandem.

\textsuperscript{198} See Carl Anthony Mao, Staying Well within the Law, FOX ROTHSCHILD (May 2009), http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=9474 (discussing the growing need for coverage to protect against employee dishonesty).


auctions of bespoke recordings, it could maintain the registry of bespoke pieces; make freely available sale contracts tailored for bespoke recordings; implement anti-counterfeit, theft, and anti-copy protections; and even potentially operate the secure storage facilities. The motivations to do so have already been articulated: to increase musicians’ incomes, to boost the odds of uncovering new musical talent, to generate funds for music nonprofits, and to decrease the chances that Big Copyright could successfully lobby for a modified version of SOPA or PIPA that reduced innovation, free speech, and due process protections on the internet.

Part of the process of convincing well-established and up-and-coming composers and performers to donate a bespoke composition or recording each year would be persuading recording labels to understand the personal, professional, and social benefits of encouraging their signed artists to submit pieces to be auctioned for charity. Even if record labels could not appreciate such benefits, depending on how artists’ recording contracts were written, musicians would not need the blessing of their labels to make donations of bespoke pieces to charity.

In terms of guiding the growth of such donations, a potentially effective strategy could be to first promote bespoke recordings in one musical field. Contemporary classical music would be a good possible place to start given that it is the closest cousin to artistic fields that demand the highest premium at art auctions, many music outreach programs specialize in teaching individuals how to play orchestral instruments, and it is a small musical subfield in terms of record sales. This last consideration is important because experimenting with bespoke recordings in a subfield that is not a high priority for the for-profit music industry would lower the odds that major labels would attempt to experiment with initially. If bespoke recordings were proven to be successful in classical music, it would give major labels more confidence and desire to expand such recordings into other musical fields.

During the systematic push to develop classical bespoke recordings, famous popular musicians could still be approached for their help to establish the idea of such a market. Success would take time, likely over a decade.

204. The bespoke recording nonprofit could even also help musicians record their performances. See, e.g., Services, TIM SHROUT, http://timshrout.com/services/ (last visited Sept. 22, 2014) (offering musicians bespoke recording services).

205. While it is likely that such contracts prohibit for-profit unauthorized recordings being distributed by anyone but the label, not-for-profit recordings may or may not be covered. See Richard E. Caves, Contracts Between Art and Commerce, 17 J. ECON. PERSP. 73, 78–79 (2003).


207. See Outreach and Education, 100 CAPE TOWN PHILHARMONIC ORCHESTRA, http://www.cpo.org.za/index.php?option=com_content&view=article&id=72&Itemid=134 (last visited Sept. 22, 2014) (“This programme has expanded over the years to include an instrument bank, study grants, small ensembles, rural outreach, the Masidlale Strings project and in assisting local and international groups in setting up similar projects.”).

208. See Jonathan Berr, The Death of Classical Music in America, 24/7 WALL ST (May 1, 2011, 6:44 AM), http://24/7wallst.com/investing/2011/05/01/the-most-cash-strapped-classical-music-organizations/ (explaining that classical music only has a 2–4% market share of the record industry).
Such a timeline would be ambitious and should not be considered a mark against the idea. The time to develop a mature market for bespoke recordings should be compared to the much longer time it took to have the art auction world mature.

Ideally, the recording nonprofit would be funded with foundation support until the market for bespoke recordings was large enough that a small fraction of auction sales could cover its own costs and the vast majority of proceeds could be donated to worthy music endeavors. The larger the market, the smaller the share of proceeds that would need to go towards maintaining the recording nonprofit. The potential ability for the bespoke recording nonprofit to ultimately become completely self-funding is another attractive feature of this proposal—a rarity in the nonprofit world.

Finally, if bespoke recordings were successful, the bespoke recording nonprofit could over the long term apply the idea of bespoke pieces to other art forms including ballet, poetry, short stories, cinema, TV shows, and books, in the hopes of raising added funds for nonprofits specializing in these fields. The feasibility or attractiveness of the idea would vary from field to field. For example, unlike convincing a famous pianist to record a piece she has never played before, it would be significantly more difficult to create a bespoke $100 million film, though smaller budget films might not be completely out of the picture. If one painting can sell for $100 million, many up-and-coming or famous film directors and actors could possibly agree to work on a bespoke film with a much smaller budget.

V. POTENTIAL DIFFICULTIES

This section will discuss possible concerns and difficulties with creating a market for bespoke musical pieces. The largest objection, that collectors or investors would be reticent to commit to such purchases or investments, will not be discussed in this section because it has been addressed at length above.

A. Propagating Inequality of Access to Music

If a bespoke recording market were established, it would mean that a significant number of bespoke recordings would remain inaccessible to the
public because only a fraction of unique pieces would over time be donated to the public. This would create greater inequality of access to certain recordings, but, to put this into perspective, it is quite similar to the private sale of a Mary Cassatt painting, \(^{213}\) a Camille Claudel sculpture, \(^{214}\) or a Zaha Hadid building. \(^{215}\)

Ralph Waldo Emerson observed that “[i]n the Greek cities, it was reckoned profane, that any person should pretend a property in a work of art, which belonged to all who could behold it.”\(^ {216}\) Yet there is much art that is inherently private and personal, and society accepts that a substantial amount of such artwork—e.g., paintings and sculpture—will remain in private hands.\(^ {217}\) The numerous reasons for such tolerance are applicable to bespoke recordings.

First, to block the development of bespoke recordings would be philosophically illiberal, because their creation and sale would not harm anyone.

Second, the nature of capitalism, and the basis for much of our wealth as a nation, depends on the private production and consumption of countless goods, including artistic masterpieces. Creating new methods for musicians to be able to financially support themselves should be celebrated. During the Renaissance and Early Modern period in Europe when recordings did not exist, composers and performers had to find other ways to sustain themselves. Some made their living through music, though by devoting a significant amount of time to activities not directly related to their composing—e.g., Bach was a church organist,\(^ {218}\) and Vivaldi was a music director of an orphanage\(^ {219}\)—and many accepted the awkward power dynamics of patronage, such as Haydn.\(^ {220}\) To this day, it is not uncommon for musicians to work day jobs outside of music—e.g., Morton Feldman worked in his family’s textile business,\(^ {221}\) while Philip Glass drove a taxi.\(^ {222}\)

The third reason for accepting the private ownership of some artwork is the abundance of artwork—it is estimated that the “active universe of songs” is eight million, while the “available music catalog worldwide” is roughly fifty

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218. RAYMOND ERIKSON (ED.), THE WORLD OF JOHANN SEBASTIAN BACH 1:45 (2009).


220. DAVID WYN JONES (ED.), OXFORD COMPOSER COMPANIONS: HAYDN 325 (2002).


Most new musical compositions will continue to be released to the public, even if bespoke recordings are spectacularly successful. This is because musicians want to be heard by a large audience—they want to touch others’ lives with their work. As Glenn Gould suggested, the purpose of art is the “lifelong construction of a state of wonder and serenity.” Furthermore, unlike the field of painting, recordings can almost costlessly be distributed the world over, making such aspirations possible for successful artists. Also, for a musician’s bespoke recording to be highly sought after, she must be widely known, a result that would be hard, though not impossible, to achieve without releasing public recordings for wider distribution and frequent touring.

The calculus as to why bespoke recordings are ultimately good for society is that the positive benefits described earlier—i.e., improving the finances of musicians and the recording industry, increasing funding to music nonprofits, encouraging the discovery of new musical talent, and reducing the impetus for Big Copyright to shackle the internet—outweigh the fact that most bespoke recordings will remain private.

### B. Weak Demand for Bespoke Recordings

In the short to medium term, weak demand would only be fatal if a foundation or group of philanthropists were unwilling to fund the bespoke recording nonprofit any further. If potential donors were interested in cultivating bespoke recordings, they would understand that markets can take time to develop—e.g., recall the decades of evolution of the computer—and would thus hopefully be willing to fund such an endeavor into the medium term, especially given that the costs of a bespoke recording nonprofit would not be prohibitive.

Even if no philanthropists could be found to establish a bespoke recording nonprofit, the recording industry might be willing to explore such a new market on its own. Their eagerness to do so might be substantial given they can relatively costlessly negotiate during contract talks with artists to have

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223. **KUSEK & LEONHARD, supra note 39, at 90.**
224. See Ian Rogers, ‘You’ve Got to Go to Gigs to Get Gigs’: Indie Musicians, Eclecticism and the *Brisbane Scene*, 22 J. MEDIA & CULTURAL STUD. 639, 643 (2008) (noting bands were trying to get out of Brisbane’s small-audience market).
225. See id. at 648 (arguing that musicians “want to be heard” and want “to be recognized for their work”).
226. **KEVIN BAZZANA, WONDROUS STRANGE: THE LIFE AND ART OF GLENN GOULD 337 (2005).**
227. A final argument against bespoke recordings could claim that while the above analysis of most goods, including artistic works, is correct, given donor largesse, the classical music world has escaped such capitalist calculus. First, if it were true, such reasoning would only apply to this one small segment of music. Second, such thinking is romantic but likely substantially too optimistic. As articulated earlier, public schools are viciously reducing funding of music or completely eliminating it from curriculums. Foundations are reducing the percentage of their funds dedicated to arts and culture. Further, there are few indicators that a substantial rebound is around the corner.
228. **See generally ERIC SWEDEN & DAVID FERRO, COMPUTERS: THE LIFE STORY OF A TECHNOLOGY (2007) (giving a broad overview of the development of computer technology and its effect on human development through history).**
them provide the recording labels with a given number of unique recordings.

If either philanthropic or recording industry support could be secured for an extended period, the prospects for success for the bespoke recording market would be buoyed by the fact that, unlike most goods, bespoke recordings would also have significant investment potential. Bespoke recordings would not only provide investors with the possibility of financial reward but also the benefits of diversification as a distinct, new asset class. While wealthy individuals would likely be the first to enable the bespoke recording market to grow, robust financial returns would, over time, attract the interest of investment funds.

Art investment funds took decades to develop. While individuals have been collecting art as an investment for centuries through “art clubs or similar collectives, the British Rail Pension Fund (the BRPF) was the first to formally adopt the rubric of what we would today call an art investment fund.” Nearly 40 years ago, “a portion of the BRPF’s capital was invested in over 2,500 works of art during a six-year period.” The return on its art investments was “11.3% per year compounded from 1974 to 1999.” Even with the success of the BRPF’s art investments, it took decades for such funds to take hold firmly. Since art funds are not required to publicly release investment data, it is difficult to obtain figures on the overall size of the art fund market. Fortunately, the Art Fund Association announced in May 2011 that they are beginning a new initiative to collect data on the size of the market. Current statistics are anecdotal. One New York Times article states “during the economic boom of 2005 to 2007, around 40 art funds raised $350 million to $450 million,” while another from the same newspaper claims that hundreds of art funds were established before the Great Recession.

While a similarly long gestation period should be expected for bespoke recording investment funds to become part of the institutional landscape, given that art funds initially led the charge in such alternative investments, their mistakes and successes can be more quickly avoided or implemented by bespoke recording investment funds.

230. Id.
231. Id.
232. Id.
233. Id.
234. Id.
237. Lankarani, supra note 66 (explaining that many of these funds folded in the Great Recession along with scores of non-art related investment funds).
C. Buyers Unable to Hear a Bespoke Piece Before Buying It

With regards to allowing potential buyers to preview a bespoke recording before bidding on it, the simplest option would be to not allow bidders to listen to the piece until after they bought it. Buyers would be essentially purchasing the reputation of the artist along with the thrill of buying an unknown treasure. While a discount could materialize in such circumstances, it is not clear that the discount would be substantial. Buying a bespoke recording of a well-known piece might be less of a risk than acquiring a bespoke composition and could hence affect the relative prices of bespoke recordings versus bespoke compositions. This would increase the relative value of the well-known piece over the new composition but also widen the divide in financial value of bespoke pieces by well-known artists versus emerging artists.

An alternative scenario that would resolve this potential concern would be to allow serious potential buyers to listen to a portion of the bespoke recording during a listening period before an auction. Such a practice would be similar to viewing periods ahead of ancient coins and art auctions. Serious potential buyers could be screened using any set of numerous criteria including, for example, their past purchase histories at art or bespoke recording auctions or their willingness to pay a substantial fee to preview the piece. In such a case, legal and physical precautions would be taken to prevent any potential buyer from illicitly recording the piece.

Allowing for listening periods would likely win out over not allowing the piece to be previewed before an auction because it would increase demand and the process could be done securely so as to protect against any copies of the piece being made. Listening to excerpts would also be preferable to allowing potential investors to listen to the entire piece, which could dilute the value of the bespoke recording and would open up the possibility that a musical savant could memorize the bespoke recording and then transcribe it after only one hearing of the piece, especially if the piece was painfully simple as in John Cage’s piece of four minutes and 33 seconds of silence. Of course such an illicit attempt at memorization would be worthless if the bespoke piece was a recording of an existing well-known piece.

D. Why Have Bespoke Recordings Been Overlooked?

Another potential criticism is why haven’t bespoke recordings already been proposed, especially given the institutional and financial resources of the recording industry. While to some this question might not seem relevant, I address it to assuage the possible skepticism of others.

Larry Page and Sergey Brin invented a new search engine based on the


239. See generally KYLE GANN, NO SUCH THING AS SILENCE: JOHN CAGE’S 4’33” (2010) (explaining the silent musical piece and its cultural impact as modern music).
number of connections between websites and other factors. They attempted to sell the idea for as little as one million dollars but found no interested bidders. So, they were ultimately “forced” to build the company on their own. Why hadn’t anyone developed the particular search algorithms beforehand and why did no one want to buy a $400 billion idea (the current market capitalization of Google) for under $1 million?

One potential explanation is that skeptics conflate the worth of an idea with the likelihood that it should exist—i.e., if Google was a better search engine, it should have existed before Page and Brin created it. Thus, all novel good ideas should already exist, while only bad new ideas will be absent. One could ask the “why doesn’t this idea already exist” question of any new invention before it has a chance to prove itself. Yet, it must be clear from the totality of all human invention in the past that this line of reasoning is flawed. It might seem reasonable to ask this question when every new invention is proposed, but the fact that inventions continue to be adopted demonstrates the lack of value of this line of reasoning. Thus, while it is legitimate to question the value of an invention on its own, it makes little sense to question its value in relationship to why it doesn’t already exist.

Another possible explanation is that some individuals do not believe in the possibility of new ideas because they are constrained by the assumptions underlying the foundational economic model. Economic theory is built on the idea of perfect competition—a world where no one producer has enough power to influence the price that she charges. This model is based on numerous assumptions such as the nonexistence of marketing. While we have known for ages about monopolies, the fact that humans are not completely rational, that individuals can be altruistic, etc., such realities of the world only creep into economic theory after the fact as alleged anomalies, market inefficiencies, and market failures. Yet in fact, such phenomena are not exceptions to the norm but the norm itself—i.e., attempting to find one totally rational individual would be as successful as Diogenes’ lantern experiment. This is not to say economic models that require numerous assumptions in order to begin to make sense of the world are unhelpful. While the basic model of perfect competition assumes away confirmation bias, disregarding new information that does not agree with one’s worldview, and the anchor effect, the importance of setting an agenda or educational plan, both realities not only exist but also influence our view of the basic model of perfect competition.

The economic theory of perfect competition dictates that, if you see a

241. Id.
242. Id.
$100 bill on the ground, you must be mistaken because an efficient market would dictate that someone else had already picked up the bill before you saw it. This model suggests that no new idea or innovation is theoretically possible (though later models relax this assumption). Again, economic reality is miles away from such a basic model, yet because the initial model is the foundation of economics, it creates skepticism that a new idea exists.

VI. CONCLUSION

Big Copyright cannot be allowed to impede creativity, innovation, and free speech simply because technology has evolved to the point where copyright can no longer further contort itself to accommodate the interests of Big Copyright. That technology can make certain intellectual property laws less relevant is not a new phenomenon, yet Big Copyright has been unwilling to accept copyright’s diminishing importance and limited revenue generating capacity, at least in regards to certain fields of art. This paper has put forward a proposal to alleviate this overreliance on copyright—bespoke music recordings.

Bespoke recordings can breathe life back into the music industry by increasing income for both musicians and record labels. Further, donated bespoke recordings from musicians can be auctioned off with the proceeds going to help spread the appreciation of music through funding music nonprofits and outreach programs, which could bring scores of individuals in greater contact with music, including possibly the next generation of composers and performers. By facilitating an extreme form of ownership for isolated recordings, we might prevent the overall expansion of the intellectual property regime and not drain the vitality of the internet.