

TAYLOR SWIFT AND GRIMES'S COMPETING VISIONS OF MUSIC OWNERSHIP: COPYRIGHT PROTECTION VERSUS CREATIVE INNOVATION

Grace Detwiler*

The evolution of music copyright law reflects a dynamic interplay between artistic expression, technological advancement, and legal frameworks. From ancient belief in music's divine inspiration to the emergence of proprietary copy rights during the Renaissance to the modern era of streaming and AI-generated music, conflicting visions of music's purpose and ownership have persisted. This Note examines the divergent philosophies of popular musicians Taylor Swift and Grimes regarding music ownership and copyright, highlighting the tension between artist control, economic interests, and creative freedom. Swift's advocacy for artist ownership contrasts with Grimes's radical call to dismantle copyright altogether. Through analyzing these perspectives as case studies, this Note seeks a legal middle ground that balances artist rights with innovation. It explores alternative licensing options like Creative Commons and "copysquare" as temporary solutions while advocating for broader legislative reforms to foster democratic creativity in the music industry. Emphasizing collective creative interests in intellectual property, this Note calls for copyright reform that aligns with the collaborative nature of musical innovation, ensuring that music remains a shared cultural heritage.

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MIXTAPE¹

- (1) “The Great War,” *Midnights (3am Edition)*, Taylor Swift
- (2) “I Wanna Be Software,” Grimes & Illangelo
- (3) “ME!,” *Lover*, Taylor Swift (feat. Brendon Urie)
- (4) “Life in the Vivid Dream,” *Art Angels*, Grimes
- (5) “Dancing With Our Hands Tied,” *reputation*, Taylor Swift
- (6) “Genesis,” *Visions*, Grimes
- (7) “Love Story,” *Fearless (Taylor’s Version)*, Taylor Swift
- (8) “New Gods,” *Miss Anthropocene*, Grimes
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- (10) “We Appreciate Power,” *Miss Anthropocene (Deluxe Edition)*, Grimes (feat. HANA)

1. Grace Detwiler, *Taylor/Grimes Mixtape*, SPOTIFY (2025), <https://open.spotify.com/playlist/1pjAkwedPxImbhZSyLx1Js?si=15ead3abe1a649f9> [<https://perma.cc/E5Z5-DPVQ>].

INTRODUCTION

“When you can’t sleep at night, you hear my stolen lullabies.”

— Taylor Swift, “my tears ricochet”²

“Upload my mind, take all my data, what will you find?”

— Grimes, “I Wanna Be Software”³

While the concept of a proprietary legal ownership right over musical output did not arise until the latter Middle Ages,⁴ there have been conflicting visions of music’s purpose in our society before and since. Whether associated with storytelling, religion, politics, entertainment, or consumerism, music has always been an integral part of the way human beings communicate with one another and express themselves. In fact, “in the ancient world and in medieval Europe, music was thought to be divinely inspired, and it circulated as a form of background knowledge stored in the minds of performers and audience.”⁵ In spite of these beliefs, the English doctrine of copyright law arose with the advent of new technologies. After the popularization of the printing press in the early Renaissance, proprietary claims to musical compositions were regularly made by publishers of sheet music, who would receive exclusive “printing privileges” or *copy* rights granted by the crown.⁶ With the creation of legal copyrights, publishers and composers were suddenly able to generate profit from the sale of their works, and the early modern concept of the “music industry” was born.⁷

As demand for printed sheet music was slowly replaced by consumers’ desire for physical media products such as vinyl records and then CDs, copyright protections became even more oriented toward economic incentivization, rejecting the idea that

2. TAYLOR SWIFT, *My Tears Ricochet*, ON FOLKLORE (Republic Recs. 2020).

3. GRIMES & ILLANGELO, *I Wanna Be Software*, ON I WANNA BE SOFTWARE (NAZGUL RECORDING LLC 2023).

4. Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as A Form of Property*, 72 U. CIN. L. REV. 1405, 1408 (2004).

5. *Id.* at 1409.

6. *Id.*

7. *Id.*

music is “divine in origin,”⁸ which had been the dominant philosophy from antiquity until the fifteenth century.⁹ Rather than representing a collective output of cultural consciousness, music became commodified and considered the property of the individual creator (or whoever owned their master recordings). In the United States, Congress’ power to pass copyright (and patent) legislation comes from the Progress Clause of the Constitution, which states, “The Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁰ Copyright was first enshrined into U.S. federal law in 1790, revised in 1909, and reformulated into the system we know today with the passage of the Copyright Act of 1976.¹¹

In the evolving landscape of the music industry in the twenty-first century, the clash between the established system of music copyright and innovative forms of creative expression—epitomized by the contrast between Taylor Swift’s battle for ownership of her master recordings and Grimes’s participation in the creation of AI-generated music—raises critical questions about ownership of music, artistic freedom, and the future of the music industry in the era of streaming and artificial intelligence (AI). Whether the legal doctrine of copyright actually serves to empower artists and creators is a hotly contested issue. If a musician owns the rights to control their music, lyrics, and recordings, then that singular musician may feel that the law protects their interests in their work. However, the enforcement of copyright law often comes at the expense of creative innovation and experimentation, especially for amateur musicians who are not backed by record labels, remix artists, and artists whose copyrights are owned by third parties.

This Note aims to dissect the seeming contradictions between Swift and Grimes’s copyright philosophies regarding music ownership and searches for a legal middle ground—such as the “Creative Commons”¹² or “copysquare”¹³ license—that

8. *Id.* at 1436.

9. *Id.* at 1452.

10. U.S. CONST. art. I, § 8, cl. 8.

11. Copyright Act of 1976, 17 U.S.C. § 101.

12. CREATIVE COMMONS, <https://creativecommons.org> [https://perma.cc/MSH9-PRSG].

13. See generally Eric E. Johnson, *Rethinking Sharing Licenses for the Entertainment Media+*, 26 CARDOZO ARTS & ENT. L. J. 391 (2008).

preserves both artist credit attribution and the creative freedom of musicians to build on the work of those who came before them. By examining two divergent case studies in artist legal philosophies regarding ownership over music, this Note seeks to diagnose the problems with our current copyright system that impede widespread, democratic creative innovation in the musical arts, and advocates for more expansive use of alternative licenses as temporary solutions until more substantial legislative reform can take place.

First, this Note will examine the intellectual property philosophy of singer/songwriter Taylor Swift, embodied by her recent endeavor to rerecord her first six albums in order to regain control over her catalogue. When Swift's former label sold her master sound recordings to a third-party private equity firm, Swift was extremely disappointed in her label's failure to offer her the first purchasing option.¹⁴ She then began to enact and model her own artist-driven reforms to music industry norms, specifically regarding artist ownership of the various copyright-protected elements of music: the melody, lyrics, and sound recordings ("masters").¹⁵ Swift's stance is that artists themselves should have exclusive rights to and control over their own work. As she further explained in a social media post, "Artists should own their own work for so many reasons, but the most screamingly obvious one is that the artist is the only one who really *knows* [*sic*] that body of work."¹⁶

On the other hand, electronic musician Grimes has a contrasting vision of how to assign legal ownership of music to best protect artists' creative freedom and innovation. As she stated on Twitter/X earlier this year regarding AI-generated music, "I think it's cool to be fused w[ith] a machine and I like the idea of open sourcing [*sic*] all art and killing copyright."¹⁷ A

14. Taylor Swift (@TaylorSwift13), X (Nov. 16, 2020, 3:55 PM), <https://x.com/taylorswift13/status/1328471874318311425> [<https://perma.cc/WM9X-XESP>].

15. Larry Iser, *How Taylor Swift Got to Re-Record Her Songs . . . And Can Any Artist Make a 'Taylor's Version' of Their Own Albums?*, MUSIC BUSINESS WORLDWIDE (Aug. 15, 2023), <https://www.musicbusinessworldwide.com/how-taylor-swift-got-to-re-record-her-songs-and-can-any-artist-make-a-taylors-version-of-their-own-albums> [<https://perma.cc/5GHU-W76J>].

16. Taylor Swift (@TaylorSwift13), X (Feb. 11, 2021, 6:17 AM), <https://twitter.com/taylorswift13/status/1359854050544615425> [<https://perma.cc/CL3G-2UTD>].

17. Grimes (@Grimezsz), X (Apr. 23, 2023, 7:02 PM), <https://twitter.com/Grimezsz/status/1650304205981089793> [<https://perma.cc/2XFW-2U9D>].

future-oriented thinker and creator, Grimes envisions humanity’s inevitable integration with technology as opening a door to new forms of musical creation and as a new evolution of the human species itself.¹⁸ Undeniably a radical legal philosophy, Grimes’s desire to completely dismantle the copyright system reflects the attitudes of many independent musical artists who lack the support of large record labels’ legal resources, especially those who work in remixing, sampling, and the creation of fan art.

After investigating how the copyright system can serve the interests of artists as differently situated in the music industry as Grimes and Taylor Swift, this Note seeks to identify an alternative legal option to protect creative works that will simultaneously protect the rights of both creators and copyright owners alike.

I. BACKGROUND

A. *Contemporary Music Copyright Theory in The Digital Age: A&M Records v. Napster, Inc.*

To provide a brief introduction to the legal doctrine, copyright is an area of intellectual property law that offers protection against the misappropriation of “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁹ Copyright guarantees owners a suite of legal rights relating to a variety of uses of their intellectual property, including reproduction, adaptation, distribution, performance, and display rights.²⁰ Copyright law is most commonly justified through an economic or utilitarian theory that creative works would be underproduced if authors were unable to capture the economic value of their work. While this is a prominent theory of copyright law, there are a variety of other justifications that creators point to as their reasoning

18. At the 2023 International Music Summit, Grimes described today’s humans as having become “*techno sapiens*” or “*homo techno*,” a new evolution beyond *homo sapien*. Int’l Music Summit, *Grimes Keynote Interview*, YOUTUBE, (May 4, 2023), https://www.youtube.com/watch?v=eNY_ZSh3Gno [https://perma.cc/5N6D-WDPJ].

19. Copyright Act of 1976, 17 U.S.C. § 102(a) (2023).

20. *Id.* at § 106.

for wanting legal ownership over their creative output, namely theories of labor and personhood.

Just as the “Death of the Author” discourse in literary studies debates whether authors or readers have metaphysical “ownership” over the meaning of a given work of creative writing,²¹ there is a disconnect between musical artists who view their output as a kind of public property—Michael W. Carroll’s “background knowledge”²²—and those who see music as privately owned by the creator. While modern copyright doctrine outright rejects this public property theory of art (unless copyright protections have expired over time and a work has entered the public domain), this question is often at the heart of most copyright infringement litigation. For example, in the early 2000s, MP3 file-sharing website Napster came to popularity during the so-called dot-com boom and was subject to much litigation by the record companies who owned much of the music being shared between users on the platform.²³

In *A&M Records v. Napster, Inc.*, the Ninth Circuit held Napster liable for secondary copyright infringement, also known as contributory infringement.²⁴ The plaintiff companies alleged that by failing to remove copyright-protected material and to prevent it from being shared on their platform, Napster had a contributory role in facilitating copyright infringement.²⁵ Because Napster users primarily used the platform to upload, transfer, and download copyrighted music, Napster itself could be held liable for enabling infringement by users. Despite the court acknowledging that “[t]he mere existence of the Napster system, absent actual notice and Napster’s demonstrated failure to remove the offending material, is insufficient to impose contributory liability,” citing *Sony v. Universal*,²⁶ Napster’s knowledge of how its site was used foreclosed an ignorance-based defense to the claim of secondary copyright infringement.

Napster’s primary statutory defense was that its website’s functions were protected by the Audio Home Recording Act of 1992, which protects manufacturers of any audio recording

21. See generally Elton Fukumoto, *The Author Effect After “The Death of The Author”*: *Copyright in a Postmodern Age*, 72 WASH. L. REV. 903, 914 (1997).

22. Carroll, *supra* note 4, at 1409.

23. *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

24. *Id.* at 1029.

25. *Id.* at 1021.

26. *Id.* at 1027.

medium from liability for infringement actions based on copyright-protected material introduced to the manufacturer's product by consumers.²⁷ The statute reads:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.²⁸

However, the court elected to view the sharing of digital audio recordings as different from, for example, a consumer purchasing a CD and sharing it with their friends in real life.²⁹ This distinction is based on a metaphysical conception of Napster's file sharing as providing unauthorized reproductions of audio recordings that were available for download to users. This idea neglects the reality that any friend borrowing a CD is perfectly capable of downloading those songs to their personal computer as well. Ultimately, the Ninth Circuit determined that Napster's knowledge and failure to mitigate the alleged harm to copyright owners was sufficient to hold the platform liable for contributory copyright infringement.³⁰

In its defense, Napster also "identifie[d] three specific alleged fair uses: sampling, where users make temporary copies of a work before purchasing; space-shifting, where users access a sound recording through the Napster system that they already own in audio CD format; and permissive distribution of recordings by both new and established artists."³¹ Even where its conduct may have otherwise violated copyright law, Napster argued that its handling of copyright-protected material was nonetheless noninfringing because it conformed to the fair use standard, but the court rejected this argument as well.³² Thus, *Napster* provides an apt illustration of how the public's noncommercial use and transfer of assumedly-purchased digital

27. *Id.* at 1024.

28. Audio Home Recording Act of 1992, 17 U.S.C. § 1008 (2024).

29. *Id.* at 1019.

30. *Id.* at 1021.

31. *Id.* at 1014.

32. *Id.* at 1017.

music sound recordings is constricted by the enforcement of copyright protections. Napster's vision for an open-source approach to the dissemination of music following initial purchase, however, is a nominally noble one.

B. Can You Make Open-Source Music?

Open-sourced music doesn't exist, not really. However, there is something to be said for attempting to formulate a music licensing scheme that reflects the open-source approach used in the field of software development and copyright. As practicing intellectual property attorney and scholar Brad Frazer explains, an open-source license is just that, a license.³³ He also points out that contrary to popular belief, "open-source" and "public domain" are not synonymous terms.³⁴ In fact, open-source licenses are subject to certain limitations set forth by the licensing agreement; "open-source does not connote an abandonment of a copyright," insists Fazer.³⁵ Instead, he argues that open-source is "a licensing philosophy to be employed by the owner of the copyright in the software in question in recognition of the axiom that collaboration is better than insular behavior."³⁶ This "open-source ethos," however, does not similarly motivate most music copyright licensing agreements, which typically retain strict control over use and public performance.

Fazer uses the definition of "open-source" dictated by the Federal Circuit in *Jacobsen v. Katzer*:

Open-source software projects invite computer programmers from around the world to view software code and make changes and improvements to it. Through such collaboration, software programs can often be written and debugged faster and at lower cost than if the copyright holder were required to do all of the work independently. In exchange and in consideration for this collaborative work, the copyright holder permits users to copy, modify and distribute the

33. Brad Frazer, *Open Source is Not Public Domain: Evolving Licensing Philosophies*, 45 IDAHO L. REV. 349, 350 (2009).

34. *Id.*

35. *Id.* at 357.

36. *Id.* at 350.

software code subject to conditions that serve to protect downstream users and to keep the code accessible.³⁷

While the creation of computer code is arguably a functional—not artistic—pursuit, musical innovation is in many ways similar to, and dependent on, technological innovation. As one example of the positive impact of open-source software, the *Katzer* court pointed to Wikipedia—the free online encyclopedia written and edited by a global network of volunteers.³⁸ In reference to the access to information provided worldwide by Wikipedia, the court identified that not only does the open-source approach enable creative innovation, but more broadly, it provides the public with wider access to resources and information that would otherwise have to be paid for.³⁹

At the same time, *Katzer* ultimately held that “[c]opyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material.”⁴⁰ By providing a balance between protecting the original creator’s copyright and the ability of other creators to benefit from their effort, the open-source licensing scheme provides a more equitable mechanism for mediating the opposing interests motivating copyright law. Those interests, which will be examined in full in the two subsequent Parts, are fiercely defended by artists, politicians, and legal theorists alike, and both possess powerful arguments in their favor. Embodied most simply in the diverging interests of popular and independent musicians, the central tension between *ownership* and *access* to art in copyright law is starkly visible in the diverging legal philosophies of Taylor Swift and Grimes.

First, this Note will examine the “personal ownership” approach to music copyright by detailing Swift’s legal efforts to protect her work. Then, the following Part will explore the open-source approach through the lens of Grimes’s statements on music copyright and her recent AI project Elf.Tech.

37. *Id.* at 358 (citing *Jacobsen v. Katzer*, 535 F.3d 1373, 1378–79 (Fed. Cir. 2008)).

38. *Id.* at 367–68.

39. *See id.* at 367.

40. *Id.* at 370.

II. TAYLOR SWIFT'S "GREAT WAR": COPYRIGHT AS PERSONAL OWNERSHIP OF ART

A. *Taylor's Version: Taylor Swift Versus The Music Industry*

When Taylor Swift first signed her record deal with Big Machine Records ("Big Machine") in 2005, it is unlikely that the fifteen-year-old⁴¹ or her family fully understood the implications of the contract they signed. Under the contract, Swift would own the copyright to her lyrics and musical compositions, but the audio recordings of the six albums she made with Big Machine would in fact be owned by the label itself.⁴² Therefore, Big Machine entirely maintained the right to choose how and when Swift's music could be licensed, distributed, and even performed under certain circumstances.⁴³ Entertainment attorney Larry Iser credits "industry-standard-for-a-new-artist contractual language in Big Machine's recording agreement" for the ultimate result, which was that "Big Machine ended up owning the copyright in all those [six albums] master recordings."⁴⁴ These "industry-standard" contract terms are clearly composed not to protect the interests of artists themselves, but those of the record companies who draft them.

As Ann Herman explores in *You Belong With Me: Recording Artists' Fight For Ownership Of Their Masters*, the rights held by the owner of a sound recording are, on paper, weaker than those held by the owner of the musical composition copyright.⁴⁵ In fact, "Under the Copyright Act, the owner of the copyright of a musical composition has the exclusive rights of distribution, reproduction, public performance, public display, and the right to create derivative works."⁴⁶ However, "These exclusive rights are alienable, and any of them can be licensed to other

41. Justyna Piątek-Pawłowska, *Look What You Made Me Do: Taylor Swift's Fight for Her Creative Legacy*, THE OBJECTIVE STANDARD (Dec. 22, 2023), <https://theobjectivestandard.com/2023/12/look-what-you-made-me-do-taylor-swifts-fight-for-her-creative-legacy> [<https://perma.cc/B7GG-5RFG>].

42. *Id.*

43. Iser, *supra* note 15.

44. Larry Iser is a Managing Partner at Kinsella Holley Iser Kump Steinsapir LLP. *Id.*

45. Ann Herman, *You Belong with Me: Recording Artists' Fight for Ownership of Their Masters*, 18 NW. J. TECH. & INTELL. PROP. 239, 241 (2021).

46. *Id.*

parties.”⁴⁷ Herman goes on to explain how musicians commonly assign the rights to their master recordings to a record label in exchange for financial backing, promotion, and distribution when signing contracts.⁴⁸ This means that many artists lose control of how their songs are licensed and used in movies or commercials, and how they are released to the public.⁴⁹ This modern reality was not likely imagined by the drafters of the Constitution’s Progress Clause, the constitutional source of Congress’s authority to legislate copyright law.

Swift’s rude awakening occurred in 2018 when her contract with Big Machine finally expired, and the label was sold to an entity owned by music manager Scooter Braun, who then sold Swift’s master recordings to a third party for a significant profit.⁵⁰ On Twitter/X, Swift expressed her outrage that her music was sold twice without her consent and she was never offered an option to purchase her catalog by Braun.⁵¹ Further, Braun and his associates attempted to prevent Swift from performing songs from her first six albums at the televised 2019 American Music Awards (AMAs), claiming that doing so would constitute creating a rerecording before the date she was contractually permitted to do so.⁵² Braun went so far as to hold Swift’s performance rights hostage, only willing to release them if she were to agree to not rerecord and reissue “Taylor’s Version[s]” of her albums.⁵³ Due to extreme public pressures, however, Braun eventually relented, and in 2021 Swift began releasing her own versions of the Big Machine albums, starting with *Fearless (Taylor’s Version)*.⁵⁴

According to Professor Julie Cohen, American copyright law does not function, as intended—to incentivize creativity—but instead provides a framework through which creativity can be exploited.⁵⁵ Cohen and Herman each point to labor theory and

47. *Id.*

48. *See id.* at 242.

49. *Id.*

50. *Id.*

51. Taylor Swift (@TaylorSwift13), X (Nov. 16, 2020, 3:55 PM), <https://twitter.com/taylorswift13/status/1328471874318311425/photo/1> [<https://perma.cc/UR37-FQ5J>].

52. Taylor Swift (@TaylorSwift13), X (Nov. 14, 2019, 4:35 PM), <https://twitter.com/taylorswift13/status/1195123215657508867/photo/1> [<https://perma.cc/HQ3G-R93B>].

53. *Id.* This is a right not typically enjoyed by owners of sounds recording copyrights.

54. Iser, *supra* note 15.

55. Herman, *supra* note 45 at 244.

property theory in order to justify their claims that a copyright system that truly incentivized creativity would recognize an artist's possessory interests in their work—that “[a]n artist’s work is ‘intimately linked to their self-concept.’”⁵⁶ Taylor Swift, it seems, would agree, stating that “[y]ou deserve to own the art you make,” and alluding to the labor theory of value when she described her 2019 AMA Artist of the Decade award as a celebration of “a decade of hard work and of art.”⁵⁷

B. “Me!”: Personhood Theory and Who Ought To Own Music

The idea that “self-concept” can be bound up in property ownership is also argued by legal philosopher Margaret Radin in her influential article *Property and Personhood*, which posits,

[T]he premise underlying the personhood perspective is that to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. . . . The personhood perspective is often implicit in the connections that courts and commentators find between property and privacy or between property and liberty.⁵⁸

Radin identifies that property rights in personal property are attached to our ability to self-actualize and live a rewarding life.⁵⁹

Echoing Radin, in a 2014 op-ed for the *Wall Street Journal*, Swift “alluded to the effort and emotional taxation of creating her music as an aspect of the music’s value. . . . She stressed that ‘[m]usic is art, and art is important and rare.’ In speaking about her desire to own her masters, Swift related the importance of ownership to her personal life and childhood dreams,” supporting the idea that a musician’s work is deeply connected to their identity and sense of self.⁶⁰ While Radin’s theory was written with physical—rather than intellectual—property in mind, its principles are clearly applicable to the realm of

56. *Id.*

57. *Id.* at 247–248.

58. Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).

59. *Id.* at 977.

60. Herman, *supra* note 45, at 250.

property rights in creative output. One could easily replace the word “object” with “song,” and “people” with “artist” in some of her passages and end up with a similar effect: “most [artists] possess certain [songs] they feel are almost part of themselves. These [songs] are closely bound up with personhood because they are part of the way [artists] constitute [themselves] as continuing personal entities in the world.”⁶¹

By dividing all property as either personal or fungible, Radin argues that personal property should be unalienable from its owner, pointing to the philosophies of Hegel and Marx.⁶² Just like a song, personal property, such as a wedding ring or a home, carries more value and emotional weight for its owner than it would generate in the market if sold to a stranger. The personhood theory provides the primary counterargument against the assumptions at the heart of the utilitarian or economic incentive theory of copyright. To many artists, the ability to maintain control, ownership, and artistic autonomy is more important than the financial gain from their work.

C. *“Dancing With Our Hands Tied”: The Plight of The Fan-Artist*

However, applying personhood theory to intellectual property—especially of the artistic variety—denies the reality that when art is put out into the world it also becomes the cultural property of all people who hear it, connect to it, and live their lives to it. Music made by other people touches the audience’s hearts and souls, just as it touches the original artists’ own. While copyright protections can protect the creative output of individual artists, enforcement of copyright protections can hamper the creativity of those who engage with an artist’s work or are influenced by it.⁶³ In addition to the ongoing success of her *Taylor’s Version* project of the 2020s, Swift has never been a stranger to exercising her intellectual property rights in her favor.⁶⁴ In 2015, following the release of *1989*, Swift applied for trademarks associated with a number of lyrical phrases—such as “This Sick Beat”—and began to issue cease and desist letters

61. Radin, *supra* note 58, at 959.

62. *Id.* at 987.

63. Meera Puri, *The Implications of Pop-Star Practices on the Future of Intellectual Property*, 121 PENN ST. L. REV. 505, 522 (2016).

64. *Id.* at 518.

to artists on platforms like Etsy who were creating fan-made merchandise.⁶⁵ Because the lyrics are then protected by both copyright and trademark, these trademark claims represent an overlap between the protections offered by trademark and copyright law, which are meant to apply to different types of intellectual property.

One such artist reported that “the handmade Swift-themed items that she was selling were made for fun and were never intended to be profitable. This particular Etsy artisan explained that ‘the cost of the item covered shipping costs, and production costs with very little left over.’”⁶⁶ After receiving a cease and desist letter from Swift’s legal team, she was disheartened to learn that her idol saw her creations as an economic threat. Swift’s willingness to pursue legal action against her own fans made headlines in 2015 and points to the current intellectual property regime’s deepest weakness: Even the creation of works and uses of protected material that pose no economic threat to the copyright holder are often suppressed by the law. Fan-created content does not enjoy the same protections of criticism, parody, or other “socially beneficial” uses listed under fair use.⁶⁷ While copyright law has always served the interests of industry heads over individual laborers, there is no denying that creativity is stifled when fans are not permitted to create and sell small-scale derivative works.

As Professor Meera Puri writes,

Swift is targeting fan-made artwork that is inspired by fans’ passion for Swift’s music and their desire to creatively express that passion and share it with like-minded fans. Unfortunately, widespread cease-and-desist campaigns like Swift’s discourage this sort of creative expression: “These free, loving, creative minds are being stopped by the very artists who have inspired them.”⁶⁸

Having recently become a billionaire following her massively successful Eras Tour,⁶⁹ Swift is certainly not suffering

65. *Id.* at 507.

66. *Id.* at 520.

67. *Id.* at 512.

68. *Id.* at 520.

69. Monic Mercuri, *Taylor Swift Didn’t Need Lucrative Side Hustles to Become a Billionaire*, FORBES (Oct. 30, 2023),

significant economic losses as a result of fan-artists selling their wares on independent platforms like Etsy or Redbubble. Individual artists absolutely deserve to have control over how their art is licensed and distributed, but perhaps copyright law goes too far when it prohibits others' creative expression that responds to that original artwork.

Ultimately arguing that the overlap between copyright and trademark law ought to be statutorily eliminated, Puri observes that “[a]s these pop-stars are building their brands by trademarking names, lyrics, and phrases, small-scale artists are in turn being thwarted with threatened legal action and claims of copyright and trademark violation.”⁷⁰ If copyright law was indeed written to protect artistic works from exploitation (or to facilitate their exploitation within the market), then it ought not to be used to suppress fan-made artistic derivatives that are essentially nonexploitative.

Not all professional musical artists share Swift's mindset. Others, like Canada's indie darling Grimes, have found new ways to use copyright law to encourage and support the creative output of their fans, and have expressed a desire to see the current copyright system dismantled in favor of something more equitable, democratic, and enabling of free creativity.

III. “I WANNA BE SOFTWARE”: GRIMES'S NEW VISION OF OPEN-SOURCING MUSIC

A. *Miss Anthropocene: Music as Shared Cultural Property*

To say that Grimes is a bit of a technology fetishist would be a massive understatement. “I think we are a lot more transhumanist than we [would] think,” Grimes explained at the 2023 International Music Summit (IMS) in Ibiza.⁷¹ “We are closer to cyborgs than we think. . . . [Humans] are fully integrated with technology,” she emphasized, “I'm unemployable without it.”⁷² An electronic indie musician who rose to

<https://www.forbes.com/sites/monicamercuri/2023/10/30/taylor-swift-didnt-need-lucrative-side-hustles-to-become-a-billionaire/?sh=13eb0df77d1b> [<https://perma.cc/XU8F-7MPT>].

70. Puri, *supra* note 63, at 527.

71. International Music Summit, *supra* note 18.

72. *Id.*

prominence with the 2012 release of her third album *Visions*,⁷³ Grimes has spent the last decade of her career capturing the zeitgeist with her increasingly controversial antics. From naming her first child with tech mogul Elon Musk “X Æ A-Xii,”⁷⁴ to her more recent interest in protecting AI-generated art from its naysayers,⁷⁵ Grimes has never been one to conform to popular opinion. This theme extends to her legal philosophy as an artist. As she went on to say in her keynote interview at the IMS, “Copyright sucks, I don’t think art belongs to anyone. I think art is a conversation that we have with like [sic] all the humans that came before us, and it’s messages we’re leaving to everyone coming after us.”⁷⁶ Previously signed to indie label 4AD Ltd., Grimes is officially label-less as of April 23, 2024⁷⁷—her latest release coming from her own Nazgul Recording LLC, under exclusive license to TRINITY Studio.⁷⁸

Grimes’s legal philosophy has more in common with the artists of antiquity than with many of her peers in the twenty-first century. In ancient Greece, for example, musical creations “remained in the realm of intangible, collective expression,” and were not considered property of the creator.⁷⁹ Grimes remarked on this fact at the 2023 IMS as well, observing that throughout human history many artworks were anonymously authored until relatively recently.⁸⁰ “The idea of

73. Lindsay Zoladz, *Visions*, PITCHFORK (Feb. 17, 2012), <https://pitchfork.com/reviews/albums/16211-grimes-visions> [<https://perma.cc/G67S-GL34>].

74. Mark Savage, *Grimes Says Anyone Can Use Her Voice For AI-generated Songs*, BBC (Apr. 25, 2023), <https://www.bbc.com/news/entertainment-arts-65385382> [<https://perma.cc/SD6D-E4TW>].

75. Antonio Pequeño IV, *Grimes Helps Artists Distribute Songs Using Her AI Voice—If They Split Royalties. Here’s How It Works*, FORBES (June 12, 2023), <https://www.forbes.com/sites/antiopequenoiv/2023/06/12/grimes-helps-artists-distribute-songs-using-her-ai-voice—if-they-pay-royalties-heres-how-it-works> [<https://perma.cc/3ENR-E6WN>].

76. International Music Summit, *supra* note 18.

77. Grimes (@Grimezs), X (Apr. 23, 2023, 7:02 PM), <https://twitter.com/Grimezs/status/1650304051718791170?lang=en> [<https://perma.cc/2CKK-3CDS>].

78. Grimes, *Geidi Primes (Nightcore Edition)*, SPOTIFY (2024), https://open.spotify.com/album/4jVGdfqeTVshiq1qgkPTFR?si=9_27WpnXTpmSgSnD7w2ZuA [<https://perma.cc/5TE3-VR8V>]. However, this album has recently been restricted on streaming services, presumably for copyright issues. Fans speculate that this is because the release was a “Nightcore Edition” of a previous Grimes album. Here, could Grimes possibly have made an unauthorized reproduction of her own album?

79. Carroll, *supra* note 4, at 1420.

80. International Music Summit, *supra* note 18.

art being so intertwined with the Ego is a very . . . 20th century concept,” she said, critiquing the idea that individual artists have a personal, proprietary interest in their work.⁸¹ Of her own artistic project, she said, “I’ve always kind of believed in open-sourcing ‘Grimes.’”⁸²

Grimes also disparages the kind of artist-initiated legal action that leads to independent creators being shut down for creating derivative fan-made works. Describing the small industry of creators who make and sell fan art, Grimes said at the IMS, “It seems beautiful that you could love something . . . and that you could earn [something] from it too.”⁸³ Grimes went on to suggest that the artists who actually take advantage of the protections afforded by copyright law are often the ones who need those protections the least, while independent artists have their own intellectual property stolen often, usually with few consequences.⁸⁴

The music industry has been very defined by lawyers . . . I think it puts a real stranglehold on creativity . . . I would like if the labels lost some of their control . . . I don’t believe art should be owned by people. . . . Every time [music] is not [gatekept], we get these beautiful explosions of creativity.⁸⁵

If the purpose of copyright law is to incentivize creation by facilitating the capture of its economic value, why should that not also be true for fan-artists—or others who create derivative works—even if the original artist were still owed proportional compensation and attribution? If there were greater freedoms for artists to create, Grimes argues, “the net outcomes of great art would be higher.”⁸⁶

B. “Life in The Vivid Dream”: Artificial Intelligence and Accessibility To Art

In her quest to “open-source” the creation of Grimes’s music, the artist unveiled an unprecedented technology earlier this year that allows anyone to record a song using her voice:

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

Elf.Tech.⁸⁷ Elf.Tech is an interactive online program that enables artists to “transform their own voice samples into a ‘GrimesAI voiceprint’ that can be used in original songs.”⁸⁸ Developed in partnership with tech company CreateSafe, Elf.Tech provides users access to a “generative AI music operating system” trained with Grimes’s voice.⁸⁹ Elf.Tech is additionally partnered with TuneCore, a digital music firm that provides users with an avenue for distribution on all major streaming platforms, such as Spotify and Apple Music.⁹⁰ Grimes said of her project, “[F]eel free to use my voice without penalty. I have no label and no legal bindings.”⁹¹

Elf.Tech allows any musical artist—regardless of resources or popularity—to digitally collaborate with Grimes and acquire distribution for their music. A separate profile for “GrimesAI” now exists on most music streaming platforms, where it collects every song released by Elf.Tech, which users can designate as a collaborator or featured artist on their songs. Grimes envisions programs like Elf.Tech becoming an everyday part of many musicians’ lives, saying “we really want to petition to Spotify . . . [to] also make an AI section [on each artist’s profile].”⁹² Not only does the process provide visibility for up-and-coming songwriters and producers, but it also allows users to maintain complete legal ownership over the music they create as long as royalties are shared with the original artist.⁹³ The point Grimes aims to make with Elf.Tech, is that great music is great music, regardless of how it is made and who makes it. By circumventing the music industry establishment with Elf.Tech, Grimes has demonstrated the immense possibilities that arise from democratizing the creation of art, even in a highly commercialized environment. Playing into her own cyberpunk self-mythology, Grimes described her satisfaction with the results of the project to the *New York Times* in typical form, “It really feels like Grimes is self-replicating.”⁹⁴

87. Antonio Pequeño IV, *supra* note 75.

88. *Id.*

89. *Id.*

90. *See id.*

91. Grimes, *supra* note 77.

92. International Music Summit, *supra* note 18.

93. *Id.*

94. Joe Coscarelli, *Grimes Invited Anyone to Make A.I. Grimes Songs. Here Are Her Reviews.*, N.Y. TIMES (May 24, 2023), <https://www.nytimes.com/2023/05/24/arts/music/grimes-ai-songs.html> [https://perma.cc/AH3Z-EZVF].

In that same interview, when the *New York Times* reporter Joe Coscarelli asked Grimes how she felt about people using her voice to make music that she does not like or support, Grimes seemed unbothered by the idea of losing control over what music to which her name is attached.⁹⁵ In fact, she expressed her fascination with seeing her voice used in ways she would not have conceived of on her own. “That’s why we’re doing Kito’s Version and Grimes’s Version, using the Taylor Swiftian nomenclature,” she said in reference to the most popular Elf.Tech track at the time, Kito’s “Cold Touch (feat. GrimesAI).”⁹⁶ “[M]aking beautiful art is something that has typically been behind a gate for a lot of people—extreme amounts of time and energy, years of technical training. I think it’s valuable that there’s a tool with which, if you have a beautiful idea, you can make a beautiful thing and access that,” she said in reference to the capabilities of artificial intelligence.⁹⁷ Grimes’s ultimate argument is that more art can never be a bad thing, even if that means loosening our grip on the “property” part of intellectual property. If she had her way, she would want to see music production deregulated, de-commodified, and made more accessible to the creative masses.

However, regarding the implementation of AI in music generally, there are certain important steps that must be taken to protect the interests of human creators. An incredibly disruptive technology in the industry—not unlike file sharing in the *Napster* era—AI poses both opportunities and risks to the livelihood of musicians. As Eric Sunray emphasizes,

Courts and policymakers must consider equitable, licensing-based solutions to promote a mutually beneficial AI music ecosystem for technology companies and copyright owners alike. AI may indeed someday change how music is created and consumed for the better, but we must take care not to disregard the significance of the human element in our haste to realize technology’s promise for the future.⁹⁸

95. *Id.*

96. *Id.*

97. *Id.*

98. Eric Sunray, *Sounds of Science: Copyright Infringement in AI Music Generator Outputs*, 29 CATH. U. L. & TECH. 185, 218 (2021).

Only two years after he wrote those words, AI has already enacted permanent change in the music industry. While the AI genie cannot be put back in the proverbial bottle, we must be careful what we wish for. However, if we implement this new technology mindfully, the creative potential is truly endless.

C. *“Genesis”: Protecting The Freedom To Create*

With Elf.Tech, Grimes shows us one version of a collaborative, democratic, and accessible licensing scheme that enables both amateur and professional musical artists to benefit from the visibility of Grimes’s intellectual property. This allows them to keep legal ownership of their art, all while ensuring that she is credited and compensated. Taylor Swift and her legal team could learn a thing or two from Grimes’s model and even create her own network of artists that are able to produce collaborative fan-works with her blessing and with the help of her resources.⁹⁹ Most interestingly, Elf.Tech provides a fascinating model of how small- and large-scale artists can lend their talents to one another and each benefit from the royalties, attention, and appreciation that result. Within the music industry, though, copyright owners are historically hostile to attempts by others to build off their past work.¹⁰⁰

Just as remix and sampling artists continue to fight for legitimacy within the music industry, the plight of artists who walk the line between fair use and infringement carries on regardless of technological innovation. In her article in defense of mash-up artists, Kerri Eble discusses the importance of balancing the interests of “primary and secondary artists” within copyright law.¹⁰¹ Eble conceptualizes artists who create derivative works as secondary artists, while the original creator is the primary artist.¹⁰² Eble points out that “[a]dvancements in technology increase the ability of the public to access and use copyrighted material without permission.”¹⁰³ And while primary artists focus on protecting their economic and property

99. Grimes, *supra* note 77. It is worth noting, however, that Grimes’s previous labels—Arbutus Records and 4AD Ltd—own the copyrights to her original music released before 2023.

100. Kerri Eble, *This is a Remix: Remixing Music Copyright to Better Protect Mashup Artists*, 2013 U. ILL. L. REV. 661, 664–65 (2013).

101. *Id.* at 673.

102. *Id.* at 673–74.

103. *Id.* at 674.

interests, secondary artists believe “that primary artists only need ‘protection against the piracy of their works by competitors in the marketplace’ and that secondary artists are not competitors because they are creating a new kind of art.”¹⁰⁴ Empirically, remixes, samples, and mash-ups rarely serve as competitors¹⁰⁵ to or substitutions for the original track; in fact, they often increase demand for the original song, just as parodies tend to.¹⁰⁶

Eble presents arguments that advocate for the inclusion of remixing, sampling, and mash-ups under the fair use umbrella. Proponents of this idea argue that these uses are sufficiently transformative and often serve as commentary on the original artwork.¹⁰⁷ Currently, though, to legally make use of samples, secondary artists often have to pay thousands of dollars to the primary artist before royalties even start coming in.¹⁰⁸ To combat these inequities between primary and secondary artists, Eble proposes two potential solutions, one legislative and one contractual.¹⁰⁹ To begin with, Congress could be lobbied to expand fair use protections to more forms of derivative works. However, were these uses to be protected under fair use, it is likely that primary artists would have concerns about alternate interests in their intellectual property, such as attribution and compensation. Her other recommendation, on the other hand, is something that musical artists can start implementing today and also responds to the individualized needs of artists: the Creative Commons license.¹¹⁰

IV. ALTERNATIVES TO TRADITIONAL COPYRIGHT LAW AND THE PROMOTION OF CREATIVITY

A. *Creative Commons Licensing*

Creative Commons is a nonprofit organization that strives to “[empower] people to grow and sustain the thriving commons

104. *Id.*

105. *Id.* at 680.

106. *See id.* at 663, 665–66.

107. *Id.* at 676.

108. Pablo Olóndriz, “How Much Does it Cost to License a Familiar Song?”, LEGIS MUSIC, <https://legismusic.com/license-famous-songs> [<https://perma.cc/ST6G-Z377>].

109. Eble, *supra* note 100, at 693–94.

110. *See* CREATIVE COMMONS, *supra* note 12.

of shared knowledge and culture” by issuing Creative Commons licenses and public domain tools to creators who wish to make their work available for use to a wider audience than traditional copyright law might allow.¹¹¹ These resources “give every person and organization in the world a free, simple, and standardized way to grant copyright permissions for creative and academic works; ensure proper attribution; and enable others to copy, distribute, and make use of those works.”¹¹² Creative Commons facilitates creator collaboration by allowing users to adopt their licenses by sharing their work on platforms that offer a Creative Commons option, by sharing their work with an open license, or by assigning their work to the public domain.¹¹³ The different licenses offered by Creative Commons let creators choose how others can use or modify their art and offer choice among terms that address aspects of use such as attribution, commercial/noncommercial works, and adaptation/derivative works.¹¹⁴

The public benefit provided by the Creative Commons licensing scheme is significant. “Granting some rights to the general public is thought to encourage sharing and the creation of new or derivative works from others, which will in turn spur additional growth within the commons.”¹¹⁵ Seeking to “rebuild the public domain,” Creative Commons aims to partially deconstruct the power that proprietary interests exercise over cultural media.¹¹⁶ In contrast to the common phrase “all rights reserved” in traditional copyright notices, Creative Commons makes use of the slogan “some rights reserved” to emphasize the intention behind their project.¹¹⁷ However, compared to the free software movement which inspired it, the Creative Commons license has received much less attention from legal scholars and

111. *Id.*

112. *What We Do*, CREATIVE COMMONS, <https://creativecommons.org/about> [<https://perma.cc/YNC6-SL7M>].

113. *Share Your Work, Licenses and Tools*, CREATIVE COMMONS, <https://creativecommons.org/share-your-work> [<https://perma.cc/V8EH-W6HS>].

114. *About CC Licenses, Licenses and Tools*, CREATIVE COMMONS, <https://creativecommons.org/share-your-work/cclicenses> [<https://perma.cc/V5LM-PVEK>].

115. Ashley West, *Little Victories: Promoting Artistic Progress Through the Enforcement of Creative Commons Attributions and Share-Alike Licenses*, 36 FLA. ST. U. L. REV. 903, 904 (2009).

116. Eric E. Johnson, *Rethinking Sharing Licenses for the Entertainment Media+*, 26 CARDOZO ARTS & ENT. L.J. 391, 408 (2008).

117. *Id.*

practitioners.¹¹⁸ Regardless, the licensing scheme has been widely adopted by online platforms and users, with hundreds of millions of websites carrying Creative-Commons-licensed content.¹¹⁹

While this kind of licensing scheme seems like just the kind of alternative to traditional copyright protections artists like Grimes are looking for, there is one major problem: enforcement. As legal scholar Ashley West observes, because there are terms within Creative Commons licenses that are not covered by the Copyright Act, there are often no legal remedies available for people whose Creative Commons licenses are infringed.¹²⁰ Unfortunately, many courts have interpreted participation in Creative Commons as a waiver of copyright protections, since works are made available for public use. This is primarily because “Creative Commons licenses that allow derivative works, including the ShareAlike licenses, contain a waiver of the licensing artist’s background-law moral rights to the fullest extent allowed by law.”¹²¹ However, despite the fact that little litigation has occurred around Creative Commons licenses, they are drafted with the intention of being enforceable in court and claim to terminate user permissions when infringement occurs.¹²² Lackluster enforcement is unlikely to improve without legislative action or new binding precedent, which represent the more structural changes that the copyright system could undergo in order to better serve creators’ needs.¹²³

Practically all existing case law involving Creative Commons licenses at the time of writing revolves around a number of suits brought by the same plaintiff, photographer Larry G. Philpot, who sued multiple publications that violated the terms of his Creative Commons license. In *Philpot v. Independent Journal Review*, the court ultimately held that the alleged infringement was, in fact, fair use and granted summary judgment in favor of the defendant, despite violating the express terms of the Creative Commons

118. *Id.* at 407.

119. *Id.*

120. See West, *supra* note 115, at 906.

121. Johnson, *supra* note 116, at 417 n.87.

122. West, *supra* note 115, at 911.

123. See *infra* Parts II, III.

agreement.¹²⁴ In deciding that case, the court referenced the plaintiff's earlier lawsuit, *Philpot v. Media Research Ctr. Inc.*, that reached the same conclusion on the grounds that the uses were significantly transformative on account of their purpose.¹²⁵ And, because the Creative Commons license was deemed "non-exclusive" by the court, it neglected to enforce its terms.¹²⁶ Further, because the image was made publicly available through Wikimedia, a platform that supports Creative Commons licenses, it was apparently not subject to protection from infringement.¹²⁷

The *Philpot* cases demonstrate the tension between a contract law approach (Creative Commons license) and a statutory approach (fair use) to protecting creativity and creative works. It is ironic then, that the fair use doctrine is the primary reason that Creative Commons license holders are unable to enforce the rights afforded to them by a licensing scheme designed to promote creative collaboration. Thus, while Creative Commons' efforts are commendable, they are ultimately flawed due to their incompatibility with the current state of copyright law jurisprudence. Given that copyright law is almost entirely defined by statute in the first place, perhaps the only way to effectively change the copyright landscape for the better is through legislative or broad judicial change that would ensure the enforcement of Creative Commons licenses.

B. "Copysquare" Licenses

In order to address a few of the pitfalls of the Creative Commons license, law professor Eric Johnson imagines an alternative regime that he described as "copysquare."¹²⁸ According to Johnson:

124. *Philpot v. Indep. J. Rev.*, No. 1:20-cv-00590-AJT-TCB, 2021 U.S. Dist. LEXIS 156382, at *16 (E.D. Va. Aug. 18, 2021), *rev'd and remanded*, 92 F.4th 252 (4th Cir. 2024). While this case is emblematic of courts' struggle with the tension between Creative Commons licensees and fair use, it should be noted that, on appeal, the Fourth Circuit eased this tension by reversing the lower court and finding that the defendant was not protected by fair use. *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 262 (4th Cir. 2024).

125. *Philpot v. Media Rsch. Ctr. Inc.*, 279 F.Supp.3d 708, 715 (E.D. Va. 2018).

126. *Id.* at 713.

127. *Id.*

128. Johnson, *supra* note 116, at 394.

Copysquare uses three basic license provisions to pursue its aims: (1) a requirement of notification, (2) a right to reject, and (3) “favored nations” treatment. The copysquare license says, in short, “You can use my creative work—film footage, picture, sound effect, etc.—in your creative work, but you must notify me that you are doing so (the notification provision), give me a chance to opt out (the right to reject), and you need not pay me or credit me, but if you pay or provide credit to others for the same kind of contribution, you must pay me and credit me on an equal basis (the favored-nations provision).”¹²⁹

Primarily intended to facilitate the sharing of smaller media elements that can be incorporated into larger works of art, such as images and samples, the copysquare license prioritizes the intellectual property rights associated with a personhood or moral interest in property. Those include notification, a right to refuse, and equal treatment by users.

While Johnson’s discussion of copysquare licensing focuses on its application to the film industry, he emphasizes that it can easily be implemented in many forms of media creation, ranging from print media to video, audio, and digital mediums.¹³⁰ The necessity of changing our approach to copyright protections arose out of the digital revolution of the early twenty-first century, which democratized the creation of art, media, and practically all forms of cultural output. Referred to by Johnson as “nano media,” the current prevalence of user-generated art can be traced to the democratization of both media creation and media distribution.¹³¹ Not only can many individuals now afford the equipment necessary to create music, but they also have the means of distribution through the internet on platforms such as YouTube, SoundCloud, and Bandcamp. No longer is a contract with a record label a prerequisite to mass distribution of music.

In response to the issue of enforcement,

copysquare leverages copyright law and standardized sharing licenses, offered to the broad public, to construct a voluntary sharing regime that not only encourages sharers, but also discourages moochers—those who, given the chance,

129. *Id.* at 395.

130. *Id.*

131. *Id.* at 396.

would take unfair advantage of the sharing of others in a way that undermines confidence in the sharing milieu and its long-term sustainability.¹³²

Accordingly, the copysquare license is formulated in such a way that copyright holders maintain their ability to capture the economic value of their work by “simultaneously [making] the content available to no-budget desktop-based creators for free and available to established Hollywood studios for the highest prices they pay.”¹³³ Copysquare represents another potential private-law alternative to traditional copyright protection that could support the work of secondary artists while justly crediting or compensating primary artists.

While copyright licensing schemes such as Creative Commons and copysquare are still in their legal infancy, there is enormous potential for increased artistic creation and innovation if these alternative license formulations were more broadly recognized, legitimized, and enforced by the courts. Without uniform enforcement, however, there is little that individual licensors and primary artists can do to ensure that their interests are protected as well.

C. Protecting Creativity Through Policy

Contract-based licensing schemes such as the Creative Commons and copysquare licenses have a great deal of potential to empower artists to build off the work of those who came before them by utilizing facets of their intellectual property. However, that potential can never be truly realized until both state and federal courts and legislatures begin to conceptualize copyright law in a new way. The main purpose of copyright law must shift focus from economic compensation for creation toward promotion of the right to create in the first place. Until courts legitimize and enforce the contracts at the heart of Creative Commons and copysquare agreements, there is little that private citizens can do to ensure that their rights are protected by these licenses.¹³⁴

Alternatively, if promoting the creation of art were at the center of copyright law theory, rather than the commodification

132. *Id.* at 394.

133. *Id.* at 394–95.

134. West, *supra* note 115, at 911.

of art, then doctrines such as fair use could look a lot different as well. Congress is then left with a choice: either expand the fair use doctrine to protect secondary works like remixes or fan-made derivatives, or ensure that courts enforce the terms of private contracts that seek to expand the accessibility of creating art while protecting the interests of primary artists. With fair use protections for derivative works shrinking ever smaller following Supreme Court holdings like that in *Warhol Foundation v. Goldsmith*,¹³⁵ enforceable licensing agreements based on the open-source ethos may be the only effective way to protect the creative interests of the public at large going forward. These agreements must preserve artists' moral and economic rights, without stifling the creativity of those they inspire. Were Congress to codify a copyright infringement action for violations of artistic licensing agreements,¹³⁶ or provide instruction to courts to enforce nontraditional licensing agreements, then courts would not be left guessing when such a claim comes up on their docket.

Further, courts must follow the precedent set by the Federal Circuit Court's decision in *Jacobsen v. Katzer*,¹³⁷ where the court overturned the district court's ruling that the terms of the open-source public license created no cause of action for copyright infringement. Despite dealing with a software license, the Federal Circuit's opinion in *Katzer* excited the creative community by discussing the "popularity of the Creative Commons and the open source licensing movement more generally, as a system for collaboration between creators that leads to lower costs, rapid distribution of new creative works, and faster solutions to the problems faced by creators, specifically in the technological community."¹³⁸ There is no reason why the same rule that governs open-source licenses in software copyright cannot govern artistic commons licenses in music copyright.

What these artistic licensing regimes point out is that the legal interests of artists and creators are not a monolith. For every Taylor Swift who wants complete control of her discography, there is a Grimes who would do away with

135. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

136. *See West, supra* note 115, at 915.

137. *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008); *see West, supra* note 115, at 912–13.

138. *West, supra* note 115, at 913.

copyright altogether. What Creative Commons and copysquare offer is a build-your-own menu of legal rights, from attributions and notification to bars on commercial or derivative use, putting agency in the hands of artists. If nothing else, an artist's relationship with their art is a deeply personal one. Even if my own philosophy aligns more with Grimes than Taylor Swift, I must respect Swift's choice to maintain tight creative control over her musical legacy and empower other artists to do the same. Increasing the enforcement power behind alternative artistic licenses can provide individual artists with unprecedented amounts of agency and accommodate a broad range of legal philosophies. However, what Grimes and Taylor Swift share is the autonomy to make these choices for their own careers. Until real steps are taken to address the prevalence of abusive contracts in the music industry—another issue altogether—contractual solutions are unlikely to be available for any but the most privileged of artists.

CONCLUSION

Throughout the history of music copyright, the only constant is change. As copyright law continues to lag behind both technological innovations and the needs of artists, change must occur in the doctrine and case law to reflect the increasingly democratic and accessible environment in which the creation of music takes place. Whether an individual artist is motivated by a personal, moral, or economic interest in their music, creative copyright licenses such as the Creative Commons and copysquare regimes provide a customizable and tailored alternative to the restrictive and oppressive contracts offered by major record labels.

From the open-source ethos of Grimes to the personal property interests of Taylor Swift, there is space in both the music industry and world of intellectual property for more diverse legal protections. Courts and legislatures must respond to the varied needs of artists by expanding the enforcement of contractual solutions or by expanding fair use protections for secondary artists, while recognizing a cause of action for primary artists whose contractual use permissions are violated by those who endeavor to exploit their work. Before this change can take place, however, the value and necessity of collaboration to creative innovation must be adopted as a central tenet of copyright law by judges, legislators, and rightsholders.

The law must begin to recognize a creative interest in intellectual property, one shared by all people who engage in the cultural exchange of “intangible products of the mind.”¹³⁹ As anyone who deeply loves a song by Taylor Swift, Grimes, or any artist, knows (in the ways that truly matter) music belongs to us all. It is only through collaboration that musical innovation occurs, and the law ought to yield to the nearly divine capability of human beings to create art.

139. Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 808 (2001).