A Fair Stream: Recommendations for the Future of Fair Trade Music

ABSTRACT

Allied Business Intelligence research suggests that, by 2019, the music streaming industry will reach $46 billion in premium subscription revenues. As the music streaming industry grows, the creators of the musical content appear to be getting left behind. While there are a number of suggestions for why creators of musical content are not receiving their share of the pie, one thing is certain: a new business model is needed. This Note suggests that one possible way to ensure fairness in the music streaming supply chain is through applying the fair trade concept to the music streaming model. As such, this Note explores the tools, standards, and standard-setting bodies of the conventional fair trade movement and attempts to harmonize them with the needs of the music streaming industry.

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Much like when the cassette tape crashed onto the music scene in the late 1960s,[1] the music industry is experiencing a monumental business model shift in the form of streaming music.[2] While the consumer benefits of the streaming model are extensive, such as allowing consumers access to a nearly unlimited library available on multiple devices at a minimal cost,[3] the supply side of the industry is experiencing a number of growing pains, both legally and financially.[4] This conflict recently reared its head when American artist Taylor Swift wrote an op-ed piece for *The New York Times* discussing the trends in the music industry and then again when Swift wrote an open letter to Apple, Inc., chastising it for not paying royalties to artists during the Apple Music trial period.[5] "Music is art," Swift

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1. *Cassette Culture*, RECORDING HIST., http://www.recording-history.org/HTML/musictech10.php [https://perma.cc/4VWJ-VHTS] (last visited Nov. 12, 2016).

2. *See* Alexandra Topping, *Music Industry Struggles to Make Digital Leap of Faith*, GUARDIAN (Jan. 31, 2011), http://www.theguardian.com/media/2011/jan/31/music-industry-digital-midem [https://perma.cc/G6V3-PLGM].

3. *See* Tony Bradley, *Cloud Music Streaming: Pros and Cons*, PCWORLD (May 22, 2011), http://www.pcworld.com/article/228376/cloud_music_streaming_pros_and_cons.html [https://perma.cc/6FUU-SWPQ].

4. *See* Paul Resnikoff, *My Song Was Streamed 178 Million Times. I Was Paid $5,679...*, DIGITAL MUSIC NEWS (Sept. 24, 2015), http://www.digitalmusicnews.com/2015/09/24/my-song-was-played-178-million-times-on-spotify-i-was-paid-5679/ [https://perma.cc/ZL8P-N76B] [hereinafter Resnikoff, *$5,679 for 178 Million Streams*] (explaining the vast inconsistencies between the fact that the streaming business is supposed to be a billion-dollar industry yet a songwriter who has a number-one hit in seventy-eight countries only made $5,679 off of it via Pandora); Paul Resnikoff, *Spotify Paid Me $40,000 for 10 Million Streams. Is That Fair?*, DIGITAL MUSIC NEWS (Oct. 26, 2015) http://www.digitalmusicnews.com/2015/10/26/spotify-paid-me-40000-for-10-million-streams-is-that-fair/ [https://perma.cc/AGY2-A36V].

5. Peter Helman, *Read Taylor Swift's Open Letter to Apple Music*, STEREOGUM (June 21, 2015), http://www.stereogum.com/1810310/read-taylor-swifts-open-letter-to-apple-music

writes, "and art is important and rare. Important, rare things are valuable. Valuable things should be paid for."[6]

These changes have sent songwriters and artists hunting for a viable way to continue profiting from their trade, especially since content creators do not have a voice in the changing landscape.[7] While boycotting certain services or creating specialized, artist-centric streaming companies may seem like possible fixes,[8] the reality is that these solutions are merely corks plugging holes in a dam that is about to burst open. The age of streaming is here, and the music industry must design a commercially viable strategy that ensures proper compensation for creators and performers.

While there are many paths that producers and other parties in the music industry could follow to remedy the plight of the artist, one stands out as an innovative and forward-thinking solution: fair trade music.[9] Learning from the success of earlier fair trade movements in the coffee and cocoa industries, a collection of songwriters and musicians have proposed a new regime. A fair trade music movement takes the power from the hands of record labels and streaming services and places it in the hands of the consumer.[10] In the fair trade coffee movement, certain brands of coffee are certified with a fair trade label that informs the consumer that every member in the supply chain, from the farmer to the person unloading the truck at the retail store, was given a fair cut of the profits.[11] This movement has shown that the consumer is willing to pay a premium for the product in exchange for peace of mind that the product was free from supply chain exploitation.[12] Likewise, fair trade music could certify

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/news/ [https://perma.cc/X6X8-VY8S] ("We don't ask you for free iPhones. Please don't ask us to provide you with our music for no compensation."); Taylor Swift, *For Taylor Swift, the Future of Music Is a Love Story*, WALL ST. J. (July 7, 2014), http://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219 [https://perma.cc/4Q3Z-WWHG].

6. *See* Swift, *supra* note 5.

7. *See* PIERRE-É. LALONDE, STUDY CONCERNING FAIR COMPENSATION FOR MUSIC CREATORS IN THE DIGITAL AGE 7 (2014) (noting how negotiations for royalties are often between the streaming services and the record labels, leaving the artist with no voice); Resnikoff, *$5,679 for 178 Million Streams*, *supra* note 4.

8. *See* Helman, *supra* note 5; Ben Popper, *Tidal Refutes Leaked Documents, Says It's Paying Four Times the Royalty Rate Spotify Does*, VERGE (May 5, 2015), http://www.theverge.com/2015/5/5/8552977/tidal-four-times-royalty-rate-stream-spotify [https://perma.cc/4DG3-G5JG].

9. *See* LALONDE, *supra* note 7, at 4.

10. *Id.* at 24 ("In the case of music services, a symbol or logo displayed on websites and apps could be used to indicate that that particular service operates according to established criteria such as sustainable compensation to all rights holders, and transparency.").

11. *Coffee*, FAIR TRADE USA, http://fairtradeusa.org/products-partners/coffee [https://perma.cc/8X8L-B3N7] (last visited Jan. 24, 2017).

12. *Id.*

and monitor the supply chain of the digital music industry to ensure that creators are given a voice in the process and a proper share of the profits. The theory is that, while certification may increase the cost of music for a consumer, many consumers would be willing to pay an additional cost to ensure that creators are not being exploited in the music supply chain.

This Note seeks to analyze and critique the structure proposed by the fair trade music movement, discusses the benefits of using the fair trade model, and suggests an alternative solution to one of the major hurdles facing the movement. Part I dissects the conventional fair trade movement through an inspection of its history, tools, standards, and governing body. Part II reviews the state of the music industry and concludes that change is necessary to protect the creators of music. Additionally, it examines the work of Fair Trade Music International, which is the first organization working toward certifying certain aspects of the digital music supply chain. Finally, Part III reviews the applicability of conventional fair trade techniques to the fair trade music movement and lays out a series of recommendations.

I. THE BEGINNING OF FAIR: THE CONVENTIONAL FAIR TRADE MODEL

The exploitation of producers is not a new phenomenon. Those who produce goods traditionally lack the capital and expertise necessary to ensure their exports make it into the hands of consumers and, consequently, producers must rely on a number of "middlemen" for assistance. The problem is that these middlemen act as gatekeepers to the consumers and inevitably use their advantageous position to siphon the profits away from the producers. Fair trade movements have sought to minimize the effect of the middleman and ensure that producers receive their fair share of profits.

A. A Brief History of Fair Trade

The concept of fair trade has gained popularity because of its success in the coffee market.[13] Before fair trade, coffee farmers sold their coffee products on the international market, placing themselves at the mercy of both fluctuations in the market and exploitation by middlemen acting as gatekeepers to major coffee-consuming

13. *See* DANIEL JAFFEE, BREWING JUSTICE: FAIR TRADE COFFEE, SUSTAINABILITY, AND SURVIVAL 2–3 (2014) (noting that coffee was really the first fair trade product).

countries.[14] Farmers who sold their coffee on the international market through intermediaries found themselves earning 35–40 cents per pound, whereas farmers who could reach the international market directly earned 60–70 cents per pound.[15]

The first fair trade certification system was created in 1988 by the Max Havelaar Foundation.[16] The fair trade label was created to help consumers in the Netherlands identify coffee brands that sought to protect farmers from exploitation in the supply chain.[17] The program gave small farmers access to a mainstream market, allowing them to obtain a fair price for their goods.[18]

While the movement sought to ensure that farmers and producers had a voice in the market and received a fair price for their products,[19] the fair trade system has a number of underlying themes that have allowed it to gain the prominence it maintains today.[20] These themes include an emphasis on long-term working relationships between producers and buyers, increased consumer education about the movement, an environment of fairness, and an emphasis on transparency about the process.[21]

The fair trade movement has been tremendously successful around the world.[22] Over forty products in more than 1,500 retail companies currently fall under the fair trade umbrella, including bananas, tea, sugar, and cocoa.[23] Furthermore, the market is rapidly growing.[24] In 2005, worldwide sales of fair trade products totaled $1.3 billion and benefited more than a million families in fifty-two countries.[25]

Much of fair trade's success can be attributed to its promotion of ethical consumerism.[26] This occurs when "consumers who value

14. *See* Grant E. Helms, Note, *Fair Trade Coffee Practices: Approaches for Future Sustainability of the Movement*, 21 IND. INT'L & COMP. L. REV. 79, 82–83 (2011).

15. *See* Paulette L. Stenzel, *Mainstreaming Fair Trade and Resulting Turmoil: Where Should the Movement Go from Here?*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 617, 620 (2013).

16. *See id.* at 622.

17. *See id.*

18. *See id.* at 619–20.

19. *Id.* at 617 ("Fair Trade provides a stepping stone toward a just and sustainable economic system that ensures that people get paid a fair wage for their work.").

20. *See Definition of Fair Trade*, WORLD FAIR TRADE ORG., http://wfto.com/fair-trade/definition-fair-trade [https://perma.cc/M6Y5-MBPJ] (last visited Jan. 17, 2017) ("[Fair trade] contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers . . . .").

21. Helms, *supra* note 14, at 82; *see* Stenzel, *supra* note 15, at 625–28, 664.

22. H.R. Res. 349, 108th Cong. (2003).

23. *See* JAFFEE, *supra* note 13, at 2–3.

24. *See id.* at 3.

25. *Id.*

26. *See* Helms, *supra* note 14, at 97–98.

social justice [use] their purchasing power to buy products from companies that use socially conscious practices in their production methods and trade."[27] This stands in contrast with the typical view of consumers as individualistic and focused on what is best for themselves.[28] Instead, the fair trade movement demonstrates that consumers are willing to pay a premium for products that create some greater social value. One shortcoming of ethical consumerism, however, is that consumers are generally vulnerable to marketing techniques by corporations attempting to confuse true fair trade products with phonies that claim to be fair trade but are not.[29] Therefore, a successful movement must incorporate protections to ensure that consumers are not being duped.

B. How Does It Work? The Tools of Conventional Fair Trade Movements

1. Government Intervention in Fair Trade

Hypothetically, the government could positively influence the fair trade movement. Congress could regulate fair trade financial information to ensure its accuracy.[30] It could also assist the movement through trade agreements and treaties attempting to harmonize the various standards available internationally.[31] At a minimum, Congress could help organizations educate the general public about the benefits of a fair trade system through events or social media.[32]

Instead, the US government's actions have been underwhelming.[33] Nearly the full extent of the government's response to the fair trade movement is contained within US House Resolution 349 of the 108th Congress.[34] The resolution merely draws attention to the fair trade coffee movement and encourages the consumption of fair trade coffee in various offices of the US government.[35] The strongest provision in H.R. 349 is the acknowledgement that:

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27. *See id*.
28. *See id*.
29. *Id*. at 98.
30. *See* Stenzel, *supra* note 15, at 658–59.
31. *See* Helms, *supra* note 14, at 104–05.
32. *See* Stenzel, *supra* note 15, at 665–67.
33. *See* Helms, *supra* note 14, at 104.
34. H.R. Res. 349, 108th Cong. (2003).
35. *Id.*

> [T]he legislative and executive branches of the Federal government have a responsibility to set a high standard of ethics with regard to their economic activities, and should therefore ensure that the goods and services they purchase and use are produced in the fairest manner possible.[36]

Although government assistance could benefit the fair trade movement, its current lack of intervention is also beneficial for several reasons. For example, government intervention can be slow and tainted by compromises required by the American political process. Furthermore, government intervention could subject the movement to the influence of lobbyists looking to capitalize on the goodwill built by fair trade.[37] Such political capture could be tremendously harmful to the fair trade brand and should be avoided. Therefore, the fair trade movement has relied on other devices to fulfill its goals.

2. Intellectual Property Protections and Fair Trade

The fair trade movement's success lies in its system of informing consumers of its mission through the use of certification marks. Certification marks are labels owned by third parties, such as fair trade organizations, that indicate that a certain service or product meets a specific standard.[38] Certification marks have been used around the world and in a number of industries.[39]

In the United States, certification marks in the field of intellectual property are controlled and issued by the United States Patent and Trademark Office (USPTO) and are governed by the Trademark Manual of Examining Procedure (TMEP) Section 1306.[40] Under Section 45 of the Lanham Act,[41] a certification mark is defined as:

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36. *Id.*

37. *See* Stenzel, *supra* note 15, at 659.

38. Fair Trade USA utilizes SCS Global Services as its third-party certification body. *See* SCS GLOBAL SERVICES, CERTIFICATION MANUAL 2 (2016), http://fairtradeusa.org/sites/default/files/wysiwyg/filemanager/standards/FTUSA_MAN_CertificationManual_V2-1__042916.pdf [https://perma.cc/CYS7-PKLY].

39. *Certification Mark*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/certification_mark [https://perma.cc/P96Z-Z87L] (last visited Jan. 13, 2017). For example, consumer products use Underwriter Laboratories' UL mark as sign to certify that the product has passed rigorous testing making the product safe for consumers. *About UL*, UNDERWRITER LABORATORIES, http://www.ul.com/aboutul/ [https://perma.cc/D5Z6-3J4L] (last visited Jan. 13, 2017).

40. *See* 1 ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 1306.01 (Matthew Bender 2013).

41. 15 U.S.C. § 1127 (2012).

> any word, name, symbol, or device, or any combination thereof . . . used by a person other than its owner . . . to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.[42]

The marks are distinguishable from trademarks; they are not permitted to be used by their owners, and, consequently, the mark is not allowed to indicate the commercial source of the product or service.[43] Furthermore, applications for certification marks must include a copy of the certification standards used when certifying goods as well as a "certification statement" that briefly describes exactly what the mark is supposed to certify and confirms that the mark is in compliance with TMEP 1306.[44]

Although certification marks are registered and controlled by the USPTO, their efficacy primarily relies on the private organizations that monitor the marks and ensure that a product or service follows the certification standards. The mark's owner carries the heavy burden of ensuring that the mark is applied only to products that meet the requirements established by the owner.[45]

C. What Are the Rules? Exploring Fair Trade

While many international organizations certify fair trade goods, the most established US organization is Fair Trade USA. Founded in the 1940s, Fair Trade USA began as a collection of organizations seeking to help communities in developing countries sell their crafts throughout the United States and has grown to include numerous products.[46] The organization was a member of the Fairtrade Labeling Organizations International (FLO) until 2011, when it splintered off from the international organization to focus its efforts on the domestic fair trade movement in the United States.[47]

Fair Trade USA has enjoyed a great deal of success.[48] The organization's most recent annual report showed that, in 2013, more than 155 million pounds of certified fresh produce were imported into the United States, resulting in $4.2 million in premiums ending up in

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42. *Id.*; *see also* 1 LALONDE, *supra* note 40, at § 1306.01.
43. 1 LALONDE, *supra* note 40, at § 1306.01.
44. *Id.* at § 1306.02(a)(i).
45. *Id.* at § 1306.01(a).
46. *See What Is Fair Trade?*, FAIR TRADE USA, http://fairtradeusa.org/what-is-fair-trade/history [https://perma.cc/B9DZ-RL74] (last visited Mar. 4, 2015).
47. *See* Stenzel, *supra* note 15, at 637.
48. *See* FAIR TRADE USA, FAIR TRADE USA 2013 ANNUAL REPORT 32 (2013), http://fairtradeusa.org/sites/default/files/2013-FairTradeUSA-Annual_Report.pdf [https://perma.cc/R3PE-U3ZX].

the pockets of producers.[49] Furthermore, fair trade fresh produce grew 37 percent in that time period.[50] In terms of the coffee market, premiums exceeded $30 million for the second consecutive year, while farmers who were a part of the program earned an average of 84 to 89 cents per pound above market.[51] Therefore, Fair Trade USA's mark appears to be having a positive impact on these once marginalized farmers.

On its website, Fair Trade USA champions itself as the "leading third-party certifier of Fair Trade products in the United States" and explains that it

> audits and certifies transactions between U.S. companies and their international suppliers to guarantee that the farmers and workers producing Fair Trade Certified goods are paid fair prices and wages, work in safe conditions, protect the environment and receive community development funds to empower and uplift their communities.[52]

Fair Trade USA works to meet these goals using the USPTO's certification mark program and was last certified on April 16, 2013.[53]

In accordance with the certification requirements described above, Fair Trade USA was required to submit a copy of its standards in order to register its certification mark with the USPTO. While Fair Trade USA has a number of standards related to different products and aspects of the supply chain, the two standards most relevant for this Note are the Trade Standard Version 1.0 (TS), applied to supply chain intermediaries,[54] and the Farm Workers Standard Version 1.1 (FWS), applied to large farms and independent farmers.[55] The standards are generally based on what part of the supply chain is seeking to be certified. This division of standards between different points in the supply chain has become a basic tenet of the Fair Trade USA standard framework.[56] It would be impossible to have a true fair trade product unless each step in the supply chain, from the producer

49. *Id.*

50. *Id.* at 33.

51. *Id.* at 32.

52. *Who We Are*, FAIR TRADE USA, http://fairtradeusa.org/about-fair-trade-usa/who-we-are [https://perma.cc/U77X-5ALX] (last visited Jan. 25, 2017).

53. *See* Fair Trade Certified, Registration No. 86312698. Please note that other prior registration numbers include at least Trademark Registration Nos. 2868219, 2989872, and 3698079.

54. *See generally* FAIR TRADE USA, TRADE STANDARD VERSION 1.0 (2013), http://fairtradeusa.org/sites/all/files/wysiwyg/filemanager/FTUSA_Trade_Standard_1.0_EN_121813.pdf [https://perma.cc/8FEY-LJ66] [hereinafter TRADE STD. 1.0].

55. *See generally* FAIR TRADE USA, FARM WORKERS STANDARD VERSION 1.1 (2014) [hereinafter FWS VERSION 1.1], http://fairtradeusa.org/sites/all/files/wysiwyg/filemanager/standards/FTUSA_FWS_Standard_1.1_EN_060114.pdf [https://perma.cc/JY85-Y7UD].

56. *See* U.S. Trademark Application Serial No. 85423797 (filed Feb. 13, 2013) (noting that the mark will be used with a plethora of different tiers).

to the consumer, complied with the stringent standards set up by Fair Trade USA.

1. Trade Standard Version 1.0

TS is the standard used by processors, exporters, importers, and distributors along the supply chain.[57] The standard is structured around three themes: economic development, trade, and enforcement.[58] First, the standard promotes economic development by including a section focused on creating "stable business relationships and pre-determined premiums."[59] This section recognizes that the parties ultimately responsible for delivering the fair trade product to the consumer have an abundance of opportunities to exploit the producer. Therefore, the standard looks to establish bright-line criteria to ensure fairness.[60]

These bright-line rules take the form of fair trade price and premium requirements.[61] For example, ED-PR 1 (hereinafter referred to as the "Trade Standard Price Requirement") states that traders must "pay producers at least the Fair Trade Minimum Price for the product contracted . . . or the relevant market price where no Fair Trade Minimum Price exists."[62] This standard's requirements are clear: traders must comply with Fair Trade Minimum Prices if they wish to enjoy the marketing benefits of dealing in fair trade goods.[63] Also, ED-ST 2 (hereinafter referred to as the "Trade Standard Access Requirement") requires that traders give producers access to the contracts signed between Fair Trade Conveyors and Fair Trade Payers.[64] This requirement allows for clarity throughout the supply chain. It could allow proactive producers to ensure that they are not cut out of a deal by allowing them to examine contracts used by other actors in the supply chain.

Second, Section 2.0 of TS addresses the trade aspect of the supply chain by promoting transparency and traceability.[65] Arguably, the most important rule in all of TS lives in this section under the heading TR-BR 1 (hereinafter referred to as the "Trade Standard Audit Requirement"). This rule creates transparency by forcing the

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57. *See* TRADE STD. 1.0, *supra* note 54, at 2.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 4.
62. *Id.*
63. *Id.*
64. *Id.* at 5.
65. *Id.* at 2.

trader to comply with both announced and unannounced fair trade audits on either a quarterly, bi-annual, or monthly basis.[66] These audits are imperative to ensuring that traders are not deceiving the public or improperly deriving benefits from the user of the fair trade logo. Without regular audits, a member of the supply chain could preliminarily qualify as a fair trade partner, then subsequently retreat back to exploitative practices while utilizing its market advantage over producers to ensure that it does not get caught. To conduct these audits, Fair Trade USA utilizes a third-party certification body called Scientific Certification Systems (SCS).[67] SCS markets itself as "a trusted leader in third-party environmental, sustainability and food quality certification, auditing, testing and standards development."[68] Third-party certifiers allow the certification owner to outsource the audit to a company that is better equipped to make normative judgments about the state of a company's programs.

In the realm of traceability, rule TR-TD 2 (hereinafter referred to as the "Trade Standard Document Requirement") requires traders to maintain documentation of fair trade transactions for "a sale to be traced back to a purchase."[69] By ensuring that there is a paper trail for all transactions related to fair trade, the Trade Standard Document Requirement impacts the entire supply chain. Creating this traceability works to prevent back-room transactions that seek only to draw value away from the producers.

Finally, TS enforces the program through TR-CS 1 and TR-DC 1 (hereinafter collectively referred to as the "Trade Standard Enforcement Requirements"). These rules create repercussions for suppliers willing to exploit producers—specifically, suspension and decertification.[70] Because Fair Trade USA is a private certification organization, it cannot assess criminal or civil penalties for non-compliance with its standards, but suspension and decertification still produce commercial impact by injuring a trader's brand and profit margin.

2. Farm Workers Standard Version 1.1

Similar to TS, FWS promotes transparency and traceability central to Fair Trade USA through mandated announced and

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66. *Id.* at 6.
67. *Id.* at 2.
68. *Company*, SCS GLOBAL SERVS., https://www.scsglobalservices.com/company [https://perma.cc/K7CU-RZHU] (last visited Mar. 4, 2016).
69. *See* TRADE STD. 1.0, *supra* note 54, at 2.
70. *Id.* at 10.

unannounced fair trade audits and required sales documentation.[71] However, FWS is primarily aimed at the participation of large farms in fair trade certification.[72] As such, FWS focuses on the farms and farmers who produce fair trade products, whereas TS focuses on traders further down the supply chain.

FWS contains an empowerment section, which seeks to give a voice to farmers.[73] Sections EM-DM 1 through EM-DM 3 (hereinafter referred to as the "Farm Standard Plan Requirements") compel the certified farm to create a fair trade implementation plan addressing "the social and economic development of workers" and hold senior management accountable to this plan.[74] Furthermore, EM-PTA 1 (hereinafter referred to as the "Farm Standard Committee Requirement") requires each certifying farm to create a fair trade committee comprised of representatives from both management and production.[75] This committee is tasked with managing the use of a fair trade premium and ensuring that each party represented in the committee gets a fair share.[76] These programs address an important issue that should be at the heart of every fair trade movement: giving a voice to those responsible for the production of a good. Without empowering producers in this way, farmers are at the mercy of "the middle men" who have historically used their economic advantage to leave as little as possible to parties in the supply chain who are imperative to the commercial venture.[77]

3. Shortcomings of Fair Trade Certification

While the certification mark system has allowed fair trade programs to enjoy a great deal of success, the system is not without problems. For instance, there is a risk of consumer confusion from the proliferation of so many marks.[78] Because a certification mark can be created by anyone, there is little stopping organizations from creating their own set of criteria and labeling it with a title similar to "fair

71. *See* FWS VERSION 1.1, *supra* note 55, at 25–26.
72. *Id.* at 2.
73. *Id.*
74. *Id.* at 6.
75. *Id.* at 7.
76. *Id.*
77. *See* Sami Grover, *What Do You Know About the Farmer Who Grew Your Coffee?*, MOTHER NATURE NETWORK (July 22, 2013), http://www.mnn.com/money/sustainable-business-practices/stories/what-do-you-know-about-the-farmer-who-grew-your-coffee [https://perma.cc/779N-TFCX].
78. *See* Alicia Morris Groos, Comment, *International Trade and Development: Exploring the Impact of Fair Trade Organizations in the Global Economy and the Law*, 34 TEX. INT'L L.J. 379, 407–08 (1999).

trade." Some major players in the market have taken this approach and dedicated significant resources to creating their own standards.[79] For example, Starbucks has created its own version of a fair trade standard called C.A.F.E. (Coffee and Farmer Equity) Practices.[80] While Starbucks's standard may be legitimate (in fact, many of their broad standards mirror those of Fair Trade USA),[81] the creation of different standards could confuse consumers and even pave the way for imposters who simply wish to capitalize on purchaser goodwill.[82]

Worse, potentially misleading standards may even qualify as "legitimate" certification marks under the current certification mark system.[83] In the current system, the US Court of Appeals for the Federal Circuit interpreted the Lanham Act as deeming a mark sufficient if its owner has taken "reasonable steps, under all the circumstances of the case, to prevent the public from being misled."[84] Since the term "reasonable steps" is subject to a wide array of interpretations, it may consequently do little to protect consumers.

Furthermore, while fair trade certifiers claim that transparency is an ultimate goal, it is almost impossible for consumers to determine whether or not a product complies with a standard.[85] The consumer has no way to confirm that producers are paid the premiums promised to them. The current system does not require any third party to ensure compliance with fair trade standards or even guarantee independence between the certifier and the supply chain, despite the benefit of these approaches for promoting transparency. Instead, consumers must rely on the certifier's word or independently analyze the standards allegedly exemplified by a particular certification mark by researching the standards on a company's website or the USPTO website. Such obstacles to information access frustrate the purported goal of transparency and may delegitimize a fair trade movement.

D. Who Selects the Rules?

Non-governmental organizations (NGOs), such as Fair Trade USA, are typically responsible for certifying fair trade goods and

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79. *See id.*

80. *See Ethical Sourcing: Coffee*, STARBUCKS, http://www.starbucks.com/responsibility/sourcing/coffee [https://perma.cc/Q6Y8-927H] (last visited Mar. 4, 2016).

81. *Id.*

82. *See* Margaret Chon, *When Worlds Collide: Intellectual Property at the Interface Between Systems of Knowledge Creation*, 77 FORDHAM L. REV. 2311, 2330 (2009).

83. *Id.* at 2336–38.

84. *Id.* at 2336.

85. *Id.* at 2338–39.

creating fair trade standards. These organizations have been effective primarily because they are independent of the processes they certify and do not need to understand the entire industry for which they create standards. Usually, NGOs can follow a one-size-fits-all approach when creating standards, utilizing various degrees of customization for different products. However, this one-size-fits-all approach may not be effective in more complex industries.

1. Fair Trade USA

Fair Trade USA develops its standards in-house using a hierarchical standard-setting body consisting of a Standards Team; a Vice President of Certification, Standards, and Impact ("the VP"); the Senior Management Team; and, occasionally, an Advisory Committee.[86] The Standards Team is responsible for drafting new standards and revising them when necessary.[87] It is also responsible for reviewing and analyzing any feedback received during public consultations of proposed standards.[88] Meanwhile, the VP handles minor revisions to existing standards, such as improving or clarifying language.[89] Ultimately, either the VP or Senior Management Team is responsible for the approval of a final draft of a standard.[90]

The Standards Team is sometimes complemented by the Advisory Council, which consists of external stakeholders "with expertise in the relevant product or production set-up."[91] The Council assists the Standards Team in drafting new standards and can be relied on to analyze the feedback received during both public consultations and field tests of the standards.[92]

The Fair Trade USA standard-setting body assists the traditional fair trade environment by involving the producer in a variety of ways. First, members of the Advisory Council can provide specific expertise that allows for standards to target specific industries.[93] Second, the body allows for a notice-and-comment process wherein interested parties are given a voice in the standard-drafting process.[94] These features allow for the interests of

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86. *See* FAIR TRADE USA, STANDARDS DEVELOPMENT AND REVISION POLICY 2 (2015), https://fairtradeusa.org/sites/default/files/wysiwyg/filemanager/standards/FTUSA_StandardsDevelopmentPolicy_EN_120415.pdf [https://perma.cc/9Q7N-AJEX].

87. *Id.*

88. *Id.* at 3.

89. *Id.* at 2.

90. *Id.* at 3.

91. *Id.* at 2.

92. *Id.* at 3.

93. *Id.* at 2.

94. *Id.*

consumers, industries, and producers to be heard while ensuring that standards are created efficiently. However, as the ultimate body responsible for certification of members, Fair Trade USA retains the final word on a standard.[95] While this centralization of authority may work in many fair trade models, such as the coffee fair trade movement, it may be difficult to apply to an industry like music where control lies in the hands of many different players. As such, implementing the fair trade model in the music industry will require developing a standard-setting body that provides industry players with access to the standard-setting process while ensuring its independence.

2. The Financial Accounting Standards Board

Although a Fair Trade standard-setting body has worked successfully for industries in the past, an alternative strategy might work best in an industry where control is decentralized. In the aftermath of the Great Depression, Congress enacted the Securities Exchange Act of 1934, which established the Securities and Exchange Commission (SEC).[96] In 1973, the SEC formally endorsed the Financial Accounting Standards Board (FASB) as the private sector's primary body for creating financial accounting and reporting rules.[97] The FASB was tasked with creating standards for all of the diverse parties in the accounting world and does so by utilizing a structure that emphasizes independence and expertise.[98] The FASB's structure could provide insight into the type of standard-setting body best suited for fair trade in the music industry.

The creators of the FASB understood that some degree of independence was imperative in a body that sets standards.[99] The first way that the FASB facilitates independence is by restrictions on the financing structure of the organization.[100] At one point, the FASB received approximately a third of its funding through voluntary contributions from the accounting profession and the financial industry.[101] This funding structure had the potential to upset the FASB's independence by pulling its attention away from the interests of the financial industry and toward the interests of those funding the

95. *Id.* at 3.

96. *See* Andreas M. Fleckner, *FASB and IASB: Dependence Despite Independence*, 3 VA. L. & BUS. REV. 275, 284 (2008).

97. *See id.* at 283.

98. *See generally id.*

99. *See id.* at 282–83.

100. *Id.* at 292.

101. *Id.*

FASB. Because of this risk, Congress altered the FASB's funding through Section 109 of the Sarbanes-Oxley Act.[102]

In the current funding regime, the FASB is required to set up an annual budget for each fiscal year, reviewable by the SEC.[103] In order to fund the approved budget, the FASB is required to collect an annual mandatory accounting support fee (the total of which is not to exceed the annual budget approved by the SEC) that is taxed upon all financial reporting issuers.[104] By making the annual accounting support fee mandatory for all issuers, Congress sought not only to ensure that those who benefit from the FASB's standards properly contribute to its fund, but also to maintain the financial independence of the FASB.[105] In the current system, no single interested party can legally influence the FASB's decisions through financial compensation.[106]

Second, the FASB seeks to create independence through its structure.[107] The FASB consists of four different bodies: the Financial Accounting Foundation (FAF), the standard-setting board itself (the "Standards Board"), the Emerging Issues Task Force (EITF), and the Financial Accounting Standards Advisory Council (FASAC).[108] Each part of the structure performs specific tasks and ensures that no single entity within the unit holds enough power to endanger independence. For example, the FAF is a nonprofit entity charged with selecting the board members for the Standards Board and is responsible for the adequate funding of the FASB.[109] In contrast, while the Standards Board is tasked with creating the concrete standards that govern the field of public accounting, it does not have the ability to set its own funding.[110]

Finally, the FASB ensures independence through rules that govern board member relationships. One rule requires that every board member fully cut ties with his or her former employer and not return there after his or her term on the FASB has concluded.[111] Therefore, the members of the Standards Board cannot, in theory, be influenced by former employers who may want to use the potential of

102. *Id.* at 292–93.
103. *Id.* at 293.
104. *Id.* at 294.
105. *See id.* at 292–96.
106. *See id.*
107. *Id.* at 283.
108. *Id.* at 280.
109. *Id.*
110. *Id.*
111. *Id.* at 283.

future employment as leverage to gain improper access to the standard-setting structure.

a. Ensuring Expertise

The FASB was designed with an understanding that the field of financial accounting is complex, and the creation of proper standards requires an in-depth and intimate understanding of the entire breadth of the industry.[112] The primary way that the FASB combats the complexities of the industry is by ensuring that its members hail from a plethora of fields of expertise within the accounting industry.[113] For example, the FAF, which selects the members of the Standards Board, is made up of individuals from eight different well respected accounting and finance organizations, including the American Accounting Association, the American Institute of Certified Public Accountants, and the Securities Industry and Financial Markets Association.[114] Additionally, the FASAC, which assists the Standards Board in determining the standards, consists of thirty experts in the industry with varying backgrounds, including auditors, preparers, and users of financial information.[115] Through this diverse mix of experts, the FASB ensures that the standards it promulgates properly address the problems in the financial industry.

The FASB provides an example of a standard-setting body that works well at creating standards for an industry with a diverse set of players. Much like the financial industry, the music industry has a great number of parties working together to commercialize music. Therefore, the music industry may benefit from a standard-setting body similar to the FASB.

112. *See id.* at 277.

> One of the most instructive examples of the challenges today's legislators face is accounting: hardly anyone except professional accountants understand it, and it would be naïve to assume that government officials or members of parliament could draft, discuss, and enact accounting rules. Most of the people involved would not even have a cursory understanding of the relevant issues if legislators set the rules for derivatives or share-based payments, to name just two well-known problems. For that reason, policymakers rely on private entities to establish financial accounting and reporting standards.

Id.

113. *Id.* at 280.

114. *Id.*

115. *Id.*

II. THE STATE OF THE MUSIC INDUSTRY AND THE NEED FOR FAIR TRADE MUSIC

A. The Digital Conversion of the Music Industry

With the rise of Napster at the turn of the century, the music industry saw a dramatic shift into the digital age. However, the judiciary determined that the peer-to-peer service was in violation of the Copyright Act.[116] Consequently, the industry was forced to search for legal ways to digitally distribute music to the public. One of the first companies to successfully distribute digital music was Apple through the iTunes store in 2001.[117] The iTunes store allowed consumers to download music legally by purchasing a song for about a dollar and listening to it through a computer or a portable electronic device, such as an iPod or iPhone.[118] Initially, this "download" model was attractive because it allowed consumers to pick out the one or two songs from an album that they liked instead of having to pay for the entire album. The "download" model was dominant until the late 2000s, when the music industry shifted again, this time toward a "streaming model," introduced by companies like Pandora and Spotify.[119]

Allied Business Intelligence (ABI) research suggests that by 2019 there will be around 191 million subscribers to streaming services and as such, the streaming industry will generate $46 billion of premium subscriber revenue.[120] Most streaming subscription services work on an "addiction" model whereby the service allows consumers to stream music in a number of ways for free on the assumption that the consumer will become "hooked" and inevitably pay for "premium" features, such as off-line access or commercial-free listening.[121]

There are two primary methods that consumers can use to stream music: interactive and non-interactive.[122] Interactive

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116. *See* Sofia Ritala*, Pandora & Spotify: Legal Issues and Licensing Requirements for Interactive and Non-Interactive Internet Radio Broadcasters*, 54 IDEA 23, 24 (2013).

117. Taylor Hatmaker, *Before Beats: A Walk Through Apple's Digital Music History, 1977 to 2014*, READ WRITE (May 29, 2014), http://readwrite.com/2014/05/29/apple-digital-music-timeline [https://perma.cc/5TPM-8DR7] (describing the creation of iTunes).

118. *Id.*; *see* James Schneider, *Apple iTunes to Stay at 99 Cents/Song*, GEEK.COM (May 3, 2006), http://www.geek.com/apple/apple-itunes-to-stay-at-99-centssong-562945/ [https://perma.cc/WU64-2QDW].

119. *See* Nicole McInnes, *How Pandora Does It*, PANDORA (Apr. 7, 2015), http://blog.pandora.com/nz/how-pandora-does-it/ [https://perma.cc/4KET-659T]

120. LALONDE, *supra* note 7, at 9.

121. *See id.* at 12.

122. *See id.* at 15.

streaming gives a user the ability to listen to whatever song he desires.[123] This method is exemplified by programs like Spotify, which gives the consumer access to an immense catalog of music at his fingertips and the ability to create his own playlists.[124]

The non-interactive model involves a streaming service that algorithmically curates a playlist based on a consumer's song preferences.[125] This service is considered "non-interactive" because the consumer must listen to the songs the service selects for her, rather than those she selects for herself.[126] Pandora and Spotify Radio both fall into this second category, and they represent two of the biggest players in the music industry today.[127] These internet radio broadcasters earn revenue in two different ways: through free-to-user subscriptions that employ advertising and through premium subscriptions.[128]

Pandora Music is currently one of the most dominant non-interactive services in the United States.[129] In 2014 and 2015, Pandora had over 81 million users.[130] In 2014, the company grew over 40 percent in total revenue to $920 million, 80 percent of which came from advertising and the remainder of which came from its "premium" subscription service.[131] In 2015, total revenue grew even further to $1.16 billion.[132] However, in 2014, Pandora incurred net losses of $30 million.[133] These losses have historically been attributed to the high costs of music licensing.[134] In 2015, the company had even larger losses of $169 million.[135]

Meanwhile, Spotify is a service that has both a non-interactive component, like Pandora, and an interactive component.[136] Spotify is based on a "mixed advertising/freemium" model that essentially

123. *See id.* at 9.

124. *See id.*

125. *See id.* at 15.

126. *See id.* at 9.

127. *See id.* at 10; Ritala, *supra* note 116, at 24.

128. Ritala, *supra* note 116, at 24.

129. *See* LALONDE, *supra* note 7, at 10.

130. PANDORA MEDIA, INC., 2016 PANDORA ANNUAL REPORT 39 (2016) [hereinafter PANDORA], http://investor.pandora.com/Cache/1001215554.PDF?O=PDF&T=&Y=&D=&FID=1001215554&iid=4247784 [https://perma.cc/2YU4-WCZJ].

131. *Id.* at 49–50; Ritala, *supra* note 116, at 28.

132. PANDORA, *supra* note 130, at 39.

133. *Id.* at 68.

134. Ritala, *supra* note 116, at 28; *see also* Mike Reid, *Pandora, Pockets Full of Lint, Sues ASCAP over Higher Licensing Fees*, TINY MIX TAPES (Nov. 9, 2012), http://www.tinymixtapes.com/news/pandora-sues-ascap-over-higher-licensing-fees [https://perma.cc/NGJ2-6UHF].

135. PANDORA, *supra* note 130, at 39.

136. *Id.* at 9.

allows users to access its service for free but severely limits what the user can do within the service.[137] If the user would like to unlock the remaining features, such as off-line listening or access to his playlists on a mobile device, he must pay a subscription fee of about $10 per month.[138] In 2014, Spotify reported revenue of $1.3 billion, which was a 45 percent increase from 2013.[139] A year later, revenue continued to grow to $2.1 billion.[140] The company had a net loss, however, of $197 million in 2014 and $194 million in 2015, largely attributed to the fact that the company has only 15 million paid users and 45 million free users.[141] Spotify has said that the net losses are due to investments in "product development, international expansion, and general increase in personnel."[142]

B. The Cost of Music

The substantial losses incurred by major streaming services indicate that streaming is not yet a viable business model. However, despite these losses, a study from the International Council of Creators of Music Conference in 2014 argued that the cost of music to the service is actually on par with where it should be.[143] The study compared streaming music with creative expenditures spent in other media, such as radio, television, and pay-per-view television, and concluded that the cost of creative expenditures is equal to or even below where it should be, based largely on the fact that streaming music affords the consumer access to a much larger catalog of content than on radio, television, or even pay-per-view.[144] The report claimed that part of the reason the streaming services have continued to

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137. Pascal-Emmanuel Gobry, *How Spotify's Business Works*, BUS. INSIDER (Oct. 12, 2011, 12:53 PM), http://www.businessinsider.com/how-spotifys-business-works-2011-10 [https://perma.cc/QJD3-L538]. For example, consumers using the advertising/freemium model who have not paid a subscription fee cannot listen to any song they want on their mobile devices. *Id.* They can only pick a playlist or album and shuffle the songs in that selection. *Id.* Furthermore, the consumer cannot download songs to their mobile device in a freemium model. *Id.*

138. Ben Sisario, *Spotify's Revenue Is Growing, but So Are Its Losses*, N.Y. TIMES (May 8, 2015), http://www.nytimes.com/2015/05/09/business/media/as-spotify-expands-revenue-rises-and-losses-deepen.html?_r=0 [https://perma.cc/T3Y4-6DZT].

139. *Id.*

140. Tim Ingham, *Spotify Revenues Topped $2BN Last Year as Losses Hit $194M*, MUSIC BUS. WORLDWIDE (May 23, 2016), http://www.musicbusinessworldwide.com/spotify-revenues-topped-2bn-last-year-as-losses-hit-194m/ [https://perma.cc/FW2J-ACDG].

141. *Id.*; Sisario, *supra* note 138.

142. Sisario, *supra* note 138.

143. *See* LALONDE, *supra* note 7, at 15.

144. *See id.* at 14–15 (explaining that the cost of creative content compared to revenue should be around 70 percent—which is similar to the current ratio of pay-per-view services—due to the fact that there is so much more content available on streaming services).

generate losses is because the business model is still in the development stage where subscription prices and advertising revenues are less than they would be in a more mature market.[145]

If the cost of creative content appears to be on par with expectations, then why are artists and creators struggling to make a living off streaming? Part of the answer comes from the imbalance of power between the record labels and the creative players in the industry.[146]

C. Exploitation of the Musical Farmer

In the current model, a vast majority of the royalties paid by streaming services goes to record labels.[147] One study suggests that as much as 93 percent of licensing royalties are being retained by record labels, leaving a mere 7 percent to be split among the publishers, composers, and writers.[148] Through a series of comparisons between digital sales and physical sales, the study concluded that the revenue splits should reflect 37 percent of the revenue going to the labels, 21 percent going to the artist, and 42 percent going to the publishers and songwriters.[149]

This major inconsistency can be explained in part by the fact that creative actors in the music business do not have a role in negotiations.[150] In fact, negotiations are largely conducted between record labels and streaming services through blanket licenses covering all artists signed to that particular label.[151] Although the label is supposed to account for the interests of artists and songwriters, the numbers do not appear to be reflecting this basic assumption.[152]

Even more troubling, record labels and streaming services have been accused of colluding in ways that create conflicts of interest.[153] Specifically, there have been reports that some labels receive non-recoupable advances from streaming services or that the services pay the record companies sums of money regardless of whether anyone ever actually plays a song.[154] Consequently, this practice decreases the record label's incentive to ensure that its artists get sufficient

145. *See id.* at 26.
146. *See id.* at 2.
147. *Id.* at 19.
148. *Id.*
149. *Id.* at 22.
150. *See id.* at 7.
151. *Id.*
152. *Id.*
153. *See id.*
154. *See id.*

playtime through these services. Also, there have been reports that record labels have equity stakes in some streaming services.[155] This would incentivize a record label to negotiate lower royalty rates, which could decrease the costs to the streaming service and result in a larger net income and larger distributions to the record label through dividends.

This system and these allegations have led some to believe that there needs to be a check on the power that the record labels maintain over streaming services.[156] Some have argued for increased transparency in the industry so that both consumers and producers know exactly where the money is flowing.[157] Others have argued that there should also be an alignment of goals and incentives between all aspects of the supply chain.[158]

D. Fair Trade Music International

One organization has attempted to establish a workable set of fair trade music standards: Fair Trade Music International (FTMI).[159] FTMI is an "independent, not-for-profit organization overseen by music creators from five continents" that seeks to certify select aspects of the music distribution chain as "fair trade."[160] While FTMI gives producers a much-needed start to a successful fair trade music system, the delivery is still in its infancy and certain areas could be improved.

1. FTMI Standard Creation

In early 2016, a diverse conglomerate of music-industry parties convened in Toronto, Canada, to discuss the creation of a set of preliminary standards to govern the release of an album or single.[161] This body included attorneys, artists, songwriters, representatives from performing rights organizations, and various other music industry individuals.[162] The organization drafted a set of standards that it felt would best represent the goals of fair trade music.[163]

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155. *See id.*

156. *See id.* at 25.

157. *Id.* at 25–26.

158. *See id.* at 26.

159. *The Certification Process*, FAIR TRADE MUSIC, http://www.fairtrademusicinternational.org/fair-trade-music-certification/ [https://perma.cc/Z93G-JLEK] (last visited Jan. 6, 2016).

160. *Id.*

161. The Author thanks Eddie Schwartz, President of the Songwriters Association of Canada, for his helpful ideas and insights regarding Fair Trade Music International.

162. *Id.*

163. *Id.*

Subsequently, these standards were agreed upon by representatives from some of the largest independent record labels in North America.[164]

An examination of FTMI's structure reveals some very important features. First, FTMI was able to bring together professionals from a cross-section of the music industry in order to derive standards that help create value and viability for everyone in the supply chain. Second, the body was able to agree on a number of standards that very closely reflect those appearing in other fair trade movements. These two accomplishments were important milestones for fair trade music.

However, the FTMI standard-setting body is not without its faults. For example, the organization generally lacks structure. Due largely to a lack of resources, the body convened in Toronto when the parties would already be in town during another conference.[165] Also, the body does not know when it will meet again or whether it will consist of the same individuals. Relying on this type of system creates a consistency problem, and consistency will be crucial to the creation of fair trade music standards because consistent standards and themes will likely be the mark of legitimacy in the eyes of the consumers.

Furthermore, not every critical player in the music industry was represented at the initial meeting in Toronto. At the preliminary meeting, members of the record labels and music publishing agencies were not present and were consulted only after the standards had already been created.[166] It is important to involve these parties in the creation of standards for other areas of the supply chain because without uniform involvement, fair trade music runs the risk of one part of the chain disrupting the process of full producer-to-consumer certification. Therefore, it is imperative that all interested parties have a seat at the table when the standards are being drafted.

2. FTMI Adopted Standards

FTMI has currently only adopted standards for use with album or single releases.[167] Those standards follow closely in the footsteps of the standards used in fair trade movements, like those of Fair Trade USA. For example, FTMI's first standard relates to the disclosure of

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164. *Id.*

165. *Id.*

166. *Id.* This fact is particularly important when considering the fact that, generally, record labels and publishing companies are the entities that have the authority to negotiate on certain rights of creators. *See* LALONDE, *supra* note 7, at 7.

167. *See The Certification Process*, *supra* note 159.

revenue.[168] The standard states that a label or similar entity releasing a certified release must disclose "full, complete, and comprehensive accounting statements."[169] This standard appears to reflect the ideal of transparency that is prevalent in Fair Trade USA.[170] FTMI seeks to shine a light on where the money goes to ensure that each party in the chain can stand up for itself and hold other parties accountable.

The second FTMI standard sets a minimum percentage for the payment of royalties.[171] Much like in the Trade Standard Price Requirement, the standard here creates a bright-line rule so that the parties with the most leverage cannot use creative financial tactics to disadvantage other members in the supply chain. Similarly, the fifth standard mandates that the organization or individual seeking to be certified agree to FTMI audits.[172] As mentioned in Section I.C. of this Note, audits are a staple of any fair trade movement because without them, it is nearly impossible to corroborate whether or not people are following through with their promises to adopt fair trade methods.

The sixth standard is unique to fair trade music. It mandates that an applicant "disclose all third party and equity stakes connected to potential conflicts of interest to all applicable creators and rights holders."[173] As noted above in Section II.C., the streaming industry appears to be plagued with a conflict-of-interest problem.[174] This standard reflects an understanding that it is unreasonable and inefficient to ban all conflicts of interest, but seeks to combat improper practices by making the conflicts known to all parties.

Although the FTMI standards appear strong, they have several shortcomings. The primary issue is that FTMI currently only certifies a very small portion of the supply chain: the release of music.[175] The FTMI website explains that it does not "certify the channel, label, digital platform, store, or venue in which that music is being sold."[176] Therefore, the standards miss the mark, considering the fact that the overarching goal of fair trade is to ensure that the whole supply chain is free from exploitation. Because of this, it is misleading to compare the current FTMI certification to fair trade. Consumers seeing the

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168. *Release Criteria*, FAIR TRADE MUSIC, http://www.fairtrademusicinternational.org/fair-trade-music-certification/#criteria [https://perma.cc/M7EY-42AH] (last visited Jan. 6, 2016).

169. *Id.*

170. TRADE STD. 1.0, *supra* note 54, at 2.

171. *See Release Criteria*, *supra* note 168.

172. *Id.*

173. *Id.*

174. *See id.*

175. *See The Certification Process*, *supra* note 159.

176. *Id.*

FTMI mark on a product might perceive that the whole supply chain has been certified when, in reality, only that individual release is truly fair trade. Therefore, it is imperative for FTMI, or similar standard-setting bodies in the music industry, to create and implement standards that ensure that the entire flow of goods has been protected from unfair trade practices.

Finally, the current FTMI standards could benefit from more specificity. For example, the fifth standard merely explains that the applicant will be subject to mandatory audits at FTMI's expense every three years.[177] However, there are no explicit rules regarding the process for the audit or even who the body is that will be completing the audit. In contrast, Fair Trade USA has a whole brochure explaining its audit process, why it exists, and giving guidance for those being audited.[178] While secrecy is important in the world of audits, the current standard seems to be lacking in depth. This audit is a highly important part of the fair trade music process and a more substantial framework should be built around it.

III. PUTTING IT ALL TOGETHER: RECOMMENDATION TO THE FAIR TRADE MUSIC MOVEMENT

Upon reviewing the goals of the fair trade movement and the issues plaguing the music industry today, it is clear that applying the fair trade model to the music industry might be the best way for the producers to regain some semblance of control. However, a traditional fair trade model may not be the best fit for the music industry.

A. Suggested Tools

As previously mentioned, ethical consumerism lies at the heart of fair trade.[179] Consumers are given the choice to pay more for a product that they know has compensated the parties that get the product into their hands.[180] From its inception, the fair trade movement has worked hard to create legitimate certification procedures to inform consumers that certain products live up to fair trade ideals.[181] Therefore, fair trade music would likely benefit from following a similar certification mark model.

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177. *Release Criteria*, *supra* note 168.

178. *Fair Trade USA On-Site Audit Terms*, FAIR TRADE USA, https://fairtradeusa.org/sites/default/files/Audit%20Terms.pdf [https://perma.cc/9A6W-5JAX] (last visited Nov. 18, 2016).

179. *See* Helms, *supra* note 14, at 97–98.

180. *See id.*

181. *See* JAFFEE, *supra* note 13, at 1–2.

The certification mark procedure is relatively easy. The process consists of a minimal filing fee, and the body in charge of certification simply has to fill out an online form including both a certification statement and a set of standards.[182] As of the writing of this Note, no certification mark registration has been created for the mark "Fair Trade Music."

With regard to government intervention, fair trade music should remain independent. Within the next decade, the music streaming industry is estimated to top more than $46 billion in revenue.[183] With so much money at stake, it is imperative that the movement minimize susceptibility to interest groups. Since lobbyists can be so influential in the legislative process, most forms of government intervention will fall short of this goal. Therefore, fair trade music should avoid government intervention and use private means to ensure the growth of the fair trade music movement.

Finally, the fair trade music movement will benefit from the goodwill already established by other fair trade movements. "Fair trade" has become a generally understood term. While some consumers may not completely understand the movement or be able to list all of its standards, they recognize that anything with a "fair trade" label generally seeks to give a voice to all individuals responsible for creating the product. Fair trade music can build on the momentum of other movements by creating its own certification mark.

B. Recommended Standards

Like other fair trade organizations, FTMI has created standards that promote transparency and traceability.[184] This Note recommends that fair trade music continue to build upon these standards and tailor future standards to meet the needs of the music industry.

First, fair trade music should adopt a minimum price requirement standard. The Trade Standard Price Requirement states that traders must "pay producers at least the Fair Trade Minimum price for the product contracted . . . or the relevant market price where no Fair Trade Minimum Price exists."[185] This standard attempts to set a price floor so that those in charge of producing a good can earn a livable wage. It is important to the music industry that a parallel standard be adopted for fair trade music. Instituting a minimum price

182. 1 LALONDE, *supra* note 40, § 1306.02–03.

183. *See* LALONDE, *supra* note 7, at 9.

184. *The Certification Process*, *supra* note 159.

185. TRADE STD. 1.0, *supra* note 54, at 4.

standard will help ensure that future generations of musicians and songwriters can continue to pursue their passion without having to worry about being compensated.

The second standard that should be adopted is a set of concrete rules on transparency. Transparency ensures that the middle men in the supply chain are paying "the farmers," or producers and artists, the wages they say they will pay. Similarly, transparency in fair trade music will allow consumers to see that the creators of the music they love are being paid fairly. One way that transparency is achieved is through mandatory audits by a third party on a regular basis.[186] These audits ensure that all members of the supply chain are complying with important procedures such as price minimums. However, the utility of these audits would be nearly zero if the body tasked with auditing the supply chain lacked independence. Therefore, fair trade music should outsource the supply chain audit to a neutral third party.

Third, the fair trade music movement should maintain a private database of the contracts and transactions between the parties in the supply chain. The Trade Standard Access Requirement necessitates that traders give producers access to the contracts signed between "Fair Trade Conveyors and Fair Trade Payers."[187] This standard allows farmers to understand the whole process and be vigilant about areas where they may be taken advantage of. In the realm of music, a similar database will allow creators to see how their songs are being brought to the market and understand why they are receiving the profits they receive. Relatedly, the Trade Standard Document Requirement mandates traders to maintain documentation of all fair trade transactions so that fair trade goods can be traced through the supply chain.[188] Producers could more easily monitor all sources of revenue if they were given the ability to see the transactions through the supply chain. This will allow them to account for royalties themselves. As the model currently stands, it is nearly impossible for producers to determine what they are actually owed.[189]

As noted above, FTMI has done a tremendous job creating the first set of standards surrounding the fair trade music movement. While these are a strong start, these standards alone are not enough.

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186. *Id.* at 2.

187. *Id.* at 4–5.

188. *Id.* at 7.

189. *See* RETHINK MUSIC, FAIR MUSIC: TRANSPARENCY AND PAYMENT FLOWS IN THE MUSIC INDUSTRY 4 (2015), https://www.berklee.edu/sites/default/files/Fair%20Music%20-%20Transparency%20and%20Payment%20Flows%20in%20the%20Music%20Industry.pdf [https://perma.cc/95XZ-FQH2].

Clarification and specificity must increase to ensure that those seeking certification are aware of what is expected of them. Furthermore, the standards lack breadth. Unlike the Fair Trade USA standards, which include different sets of standards for each step in the supply chain, FTMI has merely created a guideline for the release of an album. While FTMI's standards may assist independent or small-scale releases, fair trade music cannot impact the full scope of the music industry without standards protecting the entire supply chain. For that reason, the foregoing proposed standards ought to be adopted to ensure a robust fair trade music system.

C. Proposed Standard-Setting Body

The traditional fair trade model envisions the standard-setting body as a neutral third party that creates standards with varying influences from producers and other actors in the supply chain. However, due largely to the intangible nature of music and the fact that copyright law partitions ownership of music into a bundle of different rights, the supply chain in the music industry is far more intricate than the supply chains in other fair trade industries. For this reason, a single third-party fair trade governing body, such as the one within Fair Trade USA or even one identical to FTMI's body, will likely fail to complete the process of creating a full body of standards for the music industry.

The FTMI structure appears to take the traditional fair trade model a step further by allowing input from a range of parties in the music industry. However, the FTMI standard-setting body itself lacks the structure necessary to continue the process of creating a full set of standards. For one, not all of the parties that represent the complex supply chain of digital music were accounted for in the initial meeting in Toronto. In order to create consistent standards that the whole industry can adopt, fair trade music standards need to represent the interests of all affected parties. Furthermore, the body itself should have consistent members and a consistent meeting date.

A group tasked with creating standards for any industry should include not only independent members, but also members with intimate knowledge of the industry who represent all of the existing interests. For this reason, the standard-setting body of fair trade music should resemble an entity closer to the FASB than the traditional model. For purposes of this Note, the proposed standard-setting body will be called the Standards Council of Fair Trade Music (SCFTM).

In the SCFTM, the constituents in the industry can have a voice in creating standards that will propel fair trade music forward.

The structure of the SCFTM should begin with an Executive Committee that performed similar functions to the FAF, consisting of representatives from all aspects of the music industry, such as producers, artists, major record labels, independent record labels, performance rights organizations, and the like. The members of the Executive Committee will assist the SCFTM on a part-time basis and will be primarily charged with selecting the members of the other committees and funding of the SCFTM.

The members selected by the Executive Committee will be considered the standard-setting board (similar to the FASB's Standards Board) and will be tasked with creating the standards by which the fair trade music certification mark is measured. Much like the members of FASB's Standards Board, these members will be required to be fully independent from their prior employers and will be compensated solely from the collection of mandatory contributions from parties utilizing the fair trade music mark. In this manner, the standard-setting board will be insulated from monetary influence by all outside parties and can focus on creating standards best suited for the industry as a whole instead of any single player. Furthermore, because these members will be experts in their fields, they can focus on creating standards that properly address the needs and complexities of the music industry and copyright law.

The biggest hurdle for SCFTM will be to create standards that protect the multiple interests in the music industry. In contrast to the FASB, who has enforcement powers granted to it by the SEC and Congress,[190] fair trade music can do little to force its standards upon members. Therefore, SCFTM will have to be creative in finding other ways to hold parties accountable. The most obvious way would be to de-certify the offending party, much like the Fair Trade USA standards permit.[191] The SCFTM may wish to also use monetary penalties.

IV. CONCLUSION

With the many growing pains that the music industry is facing while traversing through the digital age, it is clear that there is a need for change in the supply chain of digital music. While many parties are clamoring to solve the music industry's supply chain problem, the fair trade music movement appears to provide a novel solution rooted in an established movement that has gained some real traction. Traditional fair trade movements have demonstrated that when

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190. *See* Fleckner, *supra* note 96, at 284.
191. TRADE STD. 1.0, *supra* note 54, at 7.

consumers are given the choice to make ethical decisions using their wallets, powerful changes in a supply chain are possible.

However, in order to see long-term results in any system, establishing a basic foundation and structure is imperative. The fair trade music movement must look not only to traditional fair trade models when seeking to create a foothold in the music industry, but outside of those models as well. If done correctly, the movement can create a lasting impact on an industry that has a lot of potential but is in dire need of a major readjustment.

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