

HOW PLAYLISTS BROKE THE INTERNET: AN ANALYSIS OF COPYRIGHT IN PLAYLIST OWNERSHIP

Tori Misrok[†]

TABLE OF CONTENTS

INTRODUCTION	1412
I. BACKGROUND.....	1415
A. <i>The History of Copyright in American Jurisprudence</i>	1415
B. <i>Modern Judicial Applications</i>	1418
II. THE “NEW MUSIC ECONOMY”—THE RISE OF DIGITAL MUSIC AND STREAMING SERVICES.....	1423
A. <i>Interactive Versus Non-Interactive Services</i>	1424
B. <i>Terms and Conditions for Digital Music Streaming Services</i>	1425
C. <i>Playlists as User-Generated Content</i>	1426
D. <i>International Applications</i>	1429
III. ANALYSIS: THE COPYRIGHTABILITY OF PLAYLISTS.....	1430
A. <i>Playlists as Compilations</i>	1432
B. <i>Originality and Creativity in Playlist Creation</i>	1439
C. <i>Terms and Conditions as a Potential Bar to Copyrightability</i>	1441
IV. PROPOSAL: THE INCLUSION OF PLAYLISTS AS COPYRIGHTABLE COMPILATIONS NECESSITATES AMENDMENT OF THE COPYRIGHT COMPENDIUM.....	1443

[†] De Novo Editor, *Cardozo Law Review*. J.D. Candidate (May 2019), Benjamin N. Cardozo School of Law; B.A., Binghamton University, 2016. Thank you to Professor Christopher Buccafusco for dedicating his time as my Note Advisor, and for his continuous guidance and feedback. Thank you to the editors of Volumes 39 and 40 of the *Cardozo Law Review* in preparing this Note for publication. A special thank you to my family and friends, especially my parents Mindy and Norm, for their endless support, patience, and love.

A. <i>Potential Objections</i>	1447
CONCLUSION.....	1448

INTRODUCTION

The proliferation of on-demand digital music streaming services such as Apple Music and Spotify in the past decade mirrors the way in which music consumption has changed, as these services have become the primary media for listeners.¹ Digital music streaming services have “taken over” the industry, replacing CDs, iPods, and previous music platforms.² For the first time in American history, these services have overtaken the majority of both digital music sales and the manner in which music is consumed and purchased.³ For example, Kanye West’s *The Life of Pablo* became the first album to go platinum in the United States based on listens through streaming services *alone*, after being streamed more than 1.5 billion times.⁴ This is indicative of the impact and reach of streaming services.

¹ See Jason Koransky, *Digital Dilemmas: The Music Industry Confronts Licensing for On-Demand Streaming Services*, LANDSLIDE, Jan./Feb. 2016, at 21–22; see also David Pierce, *The Secret Hit-Making Power of the Spotify Playlist*, WIRED (May 3, 2017, 7:30 AM), <https://www.wired.com/2017/05/secret-hit-making-power-spotify-playlist> [<http://perma.cc/9GED-FWJW>].

² See Kate Samuelson, *Americans Listening to Playlists Over Albums, Study Finds*, TIME (Sept. 23, 2016), <http://time.com/4505600/playlists-albums-loop-music-business> [<https://perma.cc/9D3F-72VT>] (“More people in the U.S. listen to playlists than albums . . .”); *Everyone Listens to Music, But How We Listen Is Changing*, NIELSEN (Jan. 22, 2015), <http://www.nielsen.com/us/en/insights/news/2015/everyone-listens-to-music-but-how-we-listen-is-changing.html> [<https://perma.cc/PB46-WTZN>].

³ *Streaming Overtakes U.S. Digital Music Sales for First Time: Nielsen*, REUTERS (Jan. 5, 2017, 11:23 AM), <https://www.reuters.com/article/us-music-streaming/streaming-overtakes-u-s-digital-music-sales-for-first-time-nielsen-idUSKBN14P1YH> [<https://perma.cc/7CR4-A4DE>]; Amy X. Wang, *Spotify Is Not Just Streaming. It’s Becoming the Entire Music Industry.*, QUARTZ (Oct. 25, 2017), <https://qz.com/1110546/spotify-is-not-just-streaming-its-becoming-the-entire-music-industry> [<https://perma.cc/3F46-9BJV>] (“Spotify—the biggest music-streaming service in the world right now, with 140 million active users, 60 million of whom are paying subscribers . . .”).

⁴ *Kanye West’s The Life of Pablo Becomes UK’s First Gold Album from Streaming Alone*, BBC (Oct. 4, 2017), <http://www.bbc.co.uk/newsbeat/article/41495162/kanye-wests-the-life-of-pablo-becomes-uks-first-gold-album-from-streaming-alone> [<https://perma.cc/6UKB-QQLZ>]. This shows the extent to which streaming services have become the predominant medium in which users listen to music. See *supra* note 2 and accompanying text.

Subscribers to the services pay to digitally stream music from the services' catalogues and pre-made radio stations.⁵ They can also create playlists, wherein they can select, arrange, and organize the songs.⁶ In turn, these users have the ability to "publish" their playlists to the platform-at-large, where other users can search for and easily listen to them.⁷ Both individual users and companies utilize playlists in their daily lives and business models, respectively.⁸ For example, SoulCycle, a popular indoor cycling studio, creates playlists based on artists and genres for its workout classes, which have become an indispensable part of its business platform.⁹ This shows that playlists are multipurpose tools, extending to more than mere use in one's car or on their computer or music player.

Streaming service users generally do not create the songs comprising the playlists themselves, but do they create a work that warrants copyright protection? Is the user entitled to copyrightable ownership over the playlist? Copyright protection extends to original and creative works.¹⁰ Courts in the United States have yet to address whether playlists are eligible for copyright protection, and the issue has been raised internationally without resolution.¹¹

The crux of this issue—a copyright interest in a playlist—lies in the relationship between industries based in copyright law and the internet

⁵ See *Playlists*, SPOTIFY, https://support.spotify.com/us/using_spotify/playlists/create-a-playlist [<https://perma.cc/6X2A-EDLG>] (last updated Sept. 28, 2018); *Features*, SPOTIFY, https://support.spotify.com/us/using_spotify/features [<https://perma.cc/3Q65-KAXQ>] (last visited Nov. 21, 2018).

⁶ See *Playlists*, *supra* note 5; see also *Playlist*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/playlist> [<https://perma.cc/EG5D-R4KW>] (last updated Dec. 24, 2018).

⁷ See *Playlists*, *supra* note 5.

⁸ See Aaron Taube, *5 Brands That Are Killing It on Spotify*, CONTENTLY (Mar. 20, 2015), <https://contently.com/strategist/2015/03/20/5-brands-that-are-killing-it-on-spotify> [<https://perma.cc/ZB2S-GK2K>]; see also *Brand Playlists*, SPOTIFY, <https://support.spotify.com/us/article/brand-playlists> [<https://perma.cc/YEF5-6SMZ>] (last updated Mar. 9, 2018).

⁹ See Michele Foley, *This Playlist Was Created by a SoulCycle Instructor, So You Know It's Gonna Be Good*, YAHOO! FINANCE (Oct. 15, 2017), <https://finance.yahoo.com/news/playlist-created-soulcycle-instructor-know-232008170.html> [<https://perma.cc/5JQV-C38X>]. Other industries utilize playlists as components of their business models as well. Consider *The Infatuation*, a website and restaurant recommendation service for cities across the world, which produces monthly playlists and playlists for users' special occasions. See INFATUATION, <https://www.theinfatuation.com/playlists> [<https://perma.cc/YLW4-J8PS>] (last visited Nov. 21, 2018).

¹⁰ See discussion *infra* Part I.

¹¹ See discussion *infra* Part II.

economy.¹² Streaming services are operating in a copyright system that did not anticipate their creation or widespread popularity,¹³ causing friction in this area of intellectual property.¹⁴ Furthermore, judicial and legislative resolutions to copyright disputes involving streaming services are minimal, if not non-existent.¹⁵ Although playlists can be grouped with other works, such as mixtapes or set lists, this Note will focus on playlists in the context of digital music streaming services.¹⁶ This Note will explore whether the work involved in constructing a playlist possesses the requisite creativity and originality to transform song aggregation and selection into copyrightable expression, and if so, whether the Copyright Compendium should be amended to include playlists.

Part I of this Note discusses the prevailing understanding of copyright law and the Copyright Act's existing statutory scheme that governs copyright protection for artistic and creative works. This Part also explains the implications of such categorizations on how the courts deem which works are sufficiently original and creative to receive federal copyright protection. Part II delineates the history and rise of digital music streaming services and playlists and how copyright law protections may apply to them. Part III examines the application of federal copyright law to playlists. In doing so, this Part determines whether playlists are compilations and, if so, whether copyrights should be extended to playlists created on digital music streaming services. This Part argues that, to the extent that playlists meet the requisite standards of originality and creativity under federal law, copyright protection should follow. Part IV proposes a comment to the Copyright

¹² See INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 5 (2013), <https://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf> [<https://perma.cc/4B2W-6A9U>] ("In [2010], these industries contributed 4.4 percent of U.S. GDP, or approximately \$641 billion.").

¹³ See Koransky, *supra* note 1, at 22.

¹⁴ *Id.*

¹⁵ See 17 U.S.C. § 501 (2018) (this section of the Copyright Act does not enumerate a remedy for infringements of 17 U.S.C. § 102, the section of the Copyright Act that this Note argues should include playlists). Cf. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

¹⁶ See *Mixtape*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mixtape> [<https://perma.cc/9RKF-8T3S>] (last updated Oct. 20, 2018) ("[A] compilation of songs recorded (as onto a cassette tape or a CD) from various sources").

Compendium that extends copyright protection to playlists to ensure consistency and certainty as to whether users' playlists must be protected under the Copyright Act.

I. BACKGROUND

A. *The History of Copyright in American Jurisprudence*

Copyright law and entailing protections are based in the United States Constitution. Article 1, Section 8 states, "Congress shall have power . . . To 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 . . ."¹⁷ On its face, this indicates that the framers sought to extend intellectual property protections and rights to works within the art and science fields.¹⁸

The Copyright Act was promulgated in 1790, with its greatest modern revision occurring in 1976.¹⁹ Prior to Congress's 1976 revision, courts operated under the 1909 Act, which was antiquated by virtue of its statutory ambiguity and technological advances (despite efforts to intermittently adopt general revision bills).²⁰ The new, reworked

¹⁷ U.S. CONST. art. I, § 8, cl. 8. The Supreme Court subsequently interpreted "writings" to mean the "fruits of creative intellectual or aesthetic labor." *Goldstein v. California*, 412 U.S. 546, 561 (1973).

¹⁸ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (1990). As such, that interest in promoting artistic progress was compelling enough to be included in the cardinal document of the United States government. *See id.* § 1.02 (1990) ("When the Framers . . . met . . . to consider which powers might best be entrusted to the national government, there was unanimity in determining that copyright should be included within the federal sphere.").

¹⁹ *See United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ1a.html> [<https://perma.cc/MU2Q-N5G4>] (last visited Oct. 30, 2018); *see, e.g., Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RESEARCH LIBRARIES, <https://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#> [<https://perma.cc/YHY8-Q8VA>] (last visited Nov. 21, 2018); Bill Rosenblatt, *The Big Push to Reform Music Copyright for the Digital Age*, FORBES (Feb. 25, 2018, 9:15 AM), <https://www.forbes.com/sites/billrosenblatt/2018/02/25/the-big-push-to-reform-music-copyright-for-the-digital-age/#30bb050c2d6d> [<https://perma.cc/35D6-BZ2S>] ("The last major revision of federal copyright law, in 1976 . . .").

²⁰ *See* Copyright Act of Mar. 4, 1909, 35 Stat. 1075, *repealed by* 1976 General Revision of Copyright Law, Pub. I. No. 94-553, 90 Stat. 2541 (1976); Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 478-80 (1977).

Copyright Act significantly expanded the scope of protections and subject areas eligible for those protections. For example, Section 102 of the Copyright Act extends copyright protection to “original works of authorship fixed in *any* tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated,” but expressly denies such protection to ideas, procedures, processes, and so forth.²¹

Further, Congress enumerated eight categories of copyrightable works, including, but not limited to literary, musical, dramatic, pantomime and choreographic, pictorial, graphic, sculptural, motion picture and audiovisual, sound recordings, and architectural works.²² These categories included works eligible for copyrights, but were not exhaustive and did not exclude protection of other works.²³ As such, Congress left open the possibility for other works to receive copyright protection even if they were not contemplated by the 1976 Act.²⁴ This promotes the aim of copyright law—the advancement of the arts—because authors will not be denied protection if their work is not a type delineated in Section 102, and because Congress will not need to redraft legislation every time an author seeks protection.²⁵

“The *sine qua non* of copyright protection is originality,” insofar as a work must be original to an author to qualify for copyright protection, together with a minimal degree of creativity.²⁶ This is the baseline

²¹ See 17 U.S.C. § 102(a) (2018) (emphasis added). “Most works are fixed by their very nature, such as . . . a song recorded in a digital audio file” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 305 (3d ed. 2017) [hereinafter COMPENDIUM].

²² 17 U.S.C. § 102(a). “The categories are non-exclusive, but only the U.S. Congress may create new categories. Congress did not delegate that authority to the courts or the Copyright Office.” Oliver Herzfeld, *Protection of Compilations: Are Yoga Poses and Dance Moves Copyrightable?*, FORBES (Aug. 8, 2012, 9:05 AM), <https://www.forbes.com/sites/oliverherzfeld/2012/08/08/protection-of-compilations-are-yoga-poses-and-dance-moves-copyrightable/#5a234aaf13b6> [https://perma.cc/8SQ3-B3MX].

²³ COMPENDIUM, *supra* note 21, at § 307 (alteration in original) (quoting H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666) (“The categories of works set forth in Section 102(a) ‘do not necessarily exhaust the scope of “original works of authorship” that the [Copyright Act] is intended to protect.”).

²⁴ See Christopher Buccafusco, *Making Sense of Intellectual Property Law*, 97 CORNELL L. REV. 501 (2012).

²⁵ See *supra* note 23.

²⁶ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). “[O]riginality requires independent creation plus a modicum of creativity” *Id.* at 346. As such, a work may still be

standard promulgated by Congress to determine if a work is sufficiently original and creative enough to receive protection under the Copyright Act.²⁷ The phrase “original works of authorship” is undefined.²⁸ The phrase was intentionally left undefined in order to express the originality standard to be applied by courts without imposing an undue requirement of artistry or novelty.²⁹ The originality standard requires that the work be original to the author.³⁰ This unspecified and relatively low threshold of originality has enabled the subject matter of copyright to expand without judicial and legislative judgments about which works are “original” enough to be protected.³¹

The originality of a work alone is not sufficient to award copyright protection. The second component of copyrightable works is creativity.³² The Supreme Court has not expressly stated the requisite level of creativity required for copyright protection, but, like originality, it does not require an “inventive leap,” or innovation.³³ In fact, the Court has set a low bar for what works will fail the creativity prong of a copyright or infringement claim.³⁴ Works that are commonplace, mechanical, or obvious will fail the creativity requirement, as there is a lack of “intellectual production.”³⁵ In essence, copyrightability stems

original even if it is neither new nor inventive or if it resembles preexisting works. *See id.* at 345–46.

²⁷ *Id.*

²⁸ *See* Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 L. & CONTEMP. PROBS. 3, 7 (1992).

The phrase “original works of authorship,” which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.

Id.

²⁹ *See* H. R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

³⁰ *See* Krishna Hariani & Anirudh Hariani, *Analyzing “Originality” in Copyright Law: Transcending Jurisdictional Disparity*, 51 INTELL. PROP. L. REV. 491 (2011).

³¹ *See id.* at 491–93; NIMMER & NIMMER, *supra* note 18, § 2.01 (1990) (“The originality necessary to support a copyright merely calls for *independent creation*, not *novelty*.”).

³² The work must express and exude a minimal degree of creativity. *See* Hariani & Hariani, *supra* note 30, at 491–93; *see also infra* Part III.

³³ *See* NIMMER & NIMMER, *supra* note 18, at § 2.01[B].

³⁴ *See* David E. Shipley, *Thin But Not Anorexic: Copyright Protection for Compilations and Other Fact Works*, 15 J. INTELL. PROP. L. 91, 95 (2007).

³⁵ *Id.* at 98; *see also supra* note 33.

from the presence of originality and requires more than a *de minimis* level of creativity.³⁶

Aside from subject matter, the Copyright Act delineates which types of works warrant federal protection and under which circumstances protection will attach.³⁷ Under the Copyright Act, compilations are eligible for copyright protection.³⁸ A compilation is a work comprised of preexisting works in a manner that produces a new, original work in itself.³⁹ Compilations can contain several forms of authorship, including: (1) selection of the material that will be included in the compilation; (2) coordination of the order or grouping of the material; and (3) arrangement of the order and placement of the material within the compilation as a whole.⁴⁰ Further, the legislative history of the Copyright Act explains that a compilation is created from the process of “selecting, bringing together, organizing, and arranging previously existing material” *even if* the underlying material has been previously copyrighted.⁴¹ The copyright in a compilation extends *only* to the material contributed by the author of the compilation, not to the preexisting material included in the work, and does not affect or imply any exclusive rights in the preexisting material.⁴²

B. *Modern Judicial Applications*

Since the Copyright Act does not explicitly provide a standard to evaluate compilations, courts interpreted the scopes of creativity and originality for compilations.⁴³ The Supreme Court articulated the

³⁶ See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (“The legal maxim ‘*de minimis non curat lex*’ (sometimes rendered, ‘the law does not concern itself with trifles’)”).

³⁷ See 17 U.S.C. § 102 (2018).

³⁸ 17 U.S.C. § 103(b) (2018).

³⁹ 17 U.S.C. § 101 (2018) (“[A] work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”).

⁴⁰ COMPENDIUM, *supra* note 21, at § 312.2.

⁴¹ See H.R. REP. NO. 94-1476, at 57 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5670. For example, the Copyright Compendium utilizes the Copyright Act’s legislative history and states that a collection of the best sound recordings of 1985 is a compilation. See COMPENDIUM, *supra* note 21, at § 508.1.

⁴² 17 U.S.C. § 103(b) (2018).

⁴³ See Shipley, *supra* note 34, at 92.

standard for compilation copyrightability in *Feist Publications, Inc. v. Rural Telephone Service Company*.⁴⁴ Rural Telephone Service Company, Inc., the telephone company responsible for assembling and creating telephone books, sued Feist for copyright infringement on the grounds that copyright protection extended to the names, towns, and telephone numbers listed in Rural's book, copied by Feist.⁴⁵ Despite the well-established premise that facts are not copyrightable, the Court, in determining whether Rural's telephone book entailed the requisite originality and creativity in its creation to permit copyright protection, asked if Rural selected, coordinated, or arranged these un-copyrightable facts in an innovative or surprising way.⁴⁶ This inquiry touched on the paradoxical nature of the case—that while facts themselves are not copyrightable, compilations of facts may be.⁴⁷ Here, the Court answered in the negative, as the contents of Rural's book were typical of telephone books, and there is nothing inherently creative or innovative about alphabetical arrangements.⁴⁸

The Supreme Court held that within the bounds of telephone books, alphabetic listings of names, towns, and telephone numbers were not copyrightable insofar as the placement and selection of listings lacked the necessary and requisite creativity to “transform mere selection into copyrightable expression.”⁴⁹ The Court in *Feist* upheld the statutory requirements of compilations while reinforcing the notion that copyrightability turns on the combination of originality and more than a *de minimis* level of creativity.⁵⁰ In essence, the holding in *Feist* gave “teeth” to the requirements for compilation copyrightability and solidified the modern originality standard.

Subsequent to *Feist*, the Second Circuit addressed the interrelation between compilations, originality, and copyright interests in *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*⁵¹ Maclean published a book (the Red Book) eight times per year, for

⁴⁴ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344, 362 (1991).

⁴⁵ See *id.* at 343–34.

⁴⁶ See *id.* at 344, 362.

⁴⁷ See *id.* at 344–45.

⁴⁸ See *id.* at 363–64.

⁴⁹ *Id.* at 362.

⁵⁰ See *id.*; see also Megan M. Carpenter, *Space Age Love Song: The Mix Tape in a Digital Universe*, 11 NEV. L.J. 44, 65–66 (2010).

⁵¹ See *CCC Info. Servs. v. MacLean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994).

different regions of the United States, which consisted of their projections and predictions of the value of used cars sold in that region, categorized by automaker.⁵² CCC was in the same business; however, CCC's business was internet-based and continuously uploaded portions of the Red Book onto its database.⁵³

Upon suit, the court inquired whether the Red Book manifested the requisite originality to qualify for protection under copyright law, providing Maclean with a protected copyright interest.⁵⁴ The court touched upon the notion that some compilations are protectable insofar as they devise "new and useful" selections and arrangements that contribute to public knowledge and welfare through facilitated access.⁵⁵ As distinguished from *Feist*, Maclean's work did not rest solely on facts, which are not copyright protected, as they were based on opinions and predictions, arguably an original creation.⁵⁶ Applying *Feist* and copyright principles, the court held for Maclean, stating that the selection and arrangement of data within the Red Book were sufficiently original and creative to justify copyright protection.⁵⁷ The court relied on the proposition that copyright law extends to whatever is original and creative within compilations, even when the original contributions themselves are minimal.⁵⁸

In *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, the Sixth Circuit declined to extend copyright protection to ATC's catalog of illustrations and transmissions parts.⁵⁹ ATC, a company in the business of selling transmissions parts, created a catalog that consisted of illustrations found in another distributor's catalog and rearranged them in accordance with the assembly and disassembly of a transmission, together with a preexisting

⁵² See *id.* at 63–64.

⁵³ See *id.* at 64.

⁵⁴ See *id.* at 64–65.

⁵⁵ *Id.* at 66.

⁵⁶ See *id.* at 67 ("[T]he use of logic to solve the problems of how best to present the information being compiled is independent creation.").

⁵⁷ See *id.* at 66–67.

⁵⁸ See *id.* at 66.

⁵⁹ See *ATC Distribution Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 712 (6th Cir. 2005).

numbering system for the catalog.⁶⁰ An ATC employee left the company to form his own company, Whatever It Takes Transmissions, and created a catalog nearly identical to ATC's.⁶¹ ATC brought suit, alleging copyright infringement over the catalog, the individual part numbers in the catalog, and the illustrations within the catalog.⁶² The Sixth Circuit held that none of the copied works were eligible for copyright protection, insofar as all of ATC's creative aspects were ideas, and the catalog was insufficiently original as to the design, order, and sorting of the transmissions parts, instead being listed in a commonplace manner.⁶³ ATC's catalog thus lacked the two components for copyright protection as a compilation: originality and a minimal level of creativity.⁶⁴

The standard by which the originality and creativity of factual compilations are evaluated remains intact, and is applicable to other types of compilations.⁶⁵ For instance, courts have upheld copyright protection for compilations as to the particular selection and ordering of songs, so long as the compiler exercised "some minimal level of creativity" in selection.⁶⁶ In *Caffey v. Cook*, a New York District Court determined whether a compilation for a musical show retained the requisite originality and creativity to qualify for protection under federal copyright law.⁶⁷ The court concluded that the manner in which Caffey, the show's producer, selected and ordered the songs for the show based upon his general vision of the show, amongst other artistic considerations, was sufficient to satisfy the minimal degree of creativity

⁶⁰ *Id.* at 704 ("The ATC catalog and the parts numbering system used in the catalog were based on an original catalog and numbering system that McCarty, the printing company, had distributed . . .").

⁶¹ *Id.* at 703.

⁶² *Id.* at 705–06.

⁶³ *Id.* at 707; see 17 U.S.C. § 102(b) (2018) ("[I]n no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

⁶⁴ See *ATC Distribution Grp.*, 402 F.3d at 705–13.

⁶⁵ Post-*Feist*, academia has suggested the holding be applied to works of art, music, and literature. See Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV 1487, 1491 (2011).

⁶⁶ *Caffey v. Cook*, 409 F. Supp. 2d 484, 497 (S.D.N.Y. 2006) ("[A] copyright in a compilation arises from 'the selection and arrangement of a number of pre-existing works, and not *per se* from the reproduction of any particular prior work.'").

⁶⁷ See *id.* at 494.

and extended copyright protection to his compilation.⁶⁸ While the individual songs were not original themselves, the manner in which they were arranged and organized was, and it is that creative effort and process that copyright law seeks to protect.⁶⁹

Subsequent to *Caffey*, a Maryland District Court ruled on whether a compilation of a disc jockey's (DJ) mixes constituted ownership of a valid copyright in the first prong of a copyright infringement claim.⁷⁰ Under the reasoning set forth in *Feist* and *Caffey*, the court held that to the extent that the DJ arranged and selected songs within her mixes, the mere fact that the mixes consisted of copyrighted songs did not preclude a claim of copyright infringement.⁷¹ This holding reiterates the principle that a minimal degree of creativity is required to fulfill the originality requirement under copyright law, and that copyrighted works amalgamated into an original work as a compilation are protectable under Section 103 of the Copyright Act.⁷²

The breadth of works protected under copyright law has expanded since the promulgation of the Copyright Act in 1909.⁷³ The Copyright Act delineates which entities are and are not eligible for protection, and provides liberal standards for determining whether works are sufficiently original and minimally creative enough.⁷⁴ This is the test for the copyrightability of compilations.⁷⁵ The judiciary filled in these baseline statutory standards to create copyright jurisprudence that

⁶⁸ *Id.* at 497.

⁶⁹ *Id.*; see *supra* text accompanying notes 41–42.

⁷⁰ See *Estate of Edgerton v. UPI Holdings, Inc.*, No. CCB-09-1825, 2010 WL 2651304, at *4–*5 (D. Md. July 1, 2010).

⁷¹ *Id.* at *5.

⁷² See *supra* text accompanying notes 25–41; see also *Topline Sols., Inc. v. Sandler Sys., Inc.*, No. ELH-09-3102, 2017 WL 1862445, at *17 (D. Md. May 8, 2017) (applying and affirming the creativity and originality standards for compilations, “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble, or obvious it might be.”).

⁷³ See *Ringer*, *supra* note 20, at 479.

⁷⁴ See 17 U.S.C. § (102) (2018) (delineating which categories of works are covered under the Act).

⁷⁵ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“To qualify for copyright protection, a work must be original to the author . . . Original, as the term is used in copyright, means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.”) (internal citations omitted).

remains controlling and simultaneously allowed the scope of copyrightable works to expand.⁷⁶

II. THE “NEW MUSIC ECONOMY”—THE RISE OF DIGITAL MUSIC AND STREAMING SERVICES

Digital technology has visibly changed the way the music economy operates, shifting from CDs to iPods, and now to online, on-demand music streaming services.⁷⁷ On-demand streaming services originally emerged in the mid-to-late 2000s, accelerating a change in the music industry and the channels of music consumption.⁷⁸ Streaming consists of listening to music or watching videos in “real time,” as opposed to downloading the music or video file to a computer and listening to or watching it at a later date.⁷⁹ Irrespective of the reasons for streaming’s growth and popularity, whether it is the convenience of having millions of songs at one’s fingertips, the mobility of the service, or the ability to create playlists, consumers and the music industry have responded positively.⁸⁰ The two premier streaming services are Spotify and Apple Music, each comprised of millions of paid users and extensive song catalogues.⁸¹ The transition to streaming was imperfect, as the music industry—artists, record labels, and streaming services alike—had to adjust to ensure that their copyrights, licenses, and royalties were adhered to.⁸² However, streaming creates new copyright questions,

⁷⁶ See *infra* note 239.

⁷⁷ See *Everyone Listens to Music, But How We Listen Is Changing*, *supra* note 2.

⁷⁸ See Lucas Shaw, *The Streaming Revolution*, BLOOMBERG, <https://www.bloomberg.com/quicktake/the-streaming-revolution> (last updated Mar. 6, 2018).

⁷⁹ *What is Streaming?*, BBC (Oct. 10, 2012), <http://www.bbc.co.uk/webwise/guides/about-streaming> [<https://perma.cc/FWV3-B9FT>].

⁸⁰ See Koransky, *supra* note 1, at 1. (“By 2014, global digital revenues had increased almost 57 percent, to approximately \$6.9 billion.”); Reuters, *A Quick Guide to Apple Music, Spotify, and More Top Music Streaming Services*, FORTUNE (Sep. 11, 2017), <http://fortune.com/2017/09/11/spotify-apple-music-tidal-streaming> [<https://perma.cc/R2ZX-SNZQ>].

⁸¹ See Reuters, *supra* note 80; see also Jon Porter & Hugh Langley, *Spotify, Apple Music and More: Which is the Best Music Streaming Service?*, TECH RADAR (July 27, 2015), <http://www.techradar.com/news/which-is-the-best-music-streaming-service-for-you>.

⁸² See James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. L. REV. 45, 46 (2014) (“Since the digitization of audio recordings . . . the music industry has been forced to evaluate complex copyright and intellectual property issues. The recent

including whether users own personal music playlists and libraries.⁸³ In fact, current copyright law in the United States is not suited to address the myriad of issues involved with digital music services, further exacerbating copyright and ownership issues.⁸⁴ In order to ascertain whether playlists are eligible works for copyright protection, it is important to examine digital music streaming services and the underlying components that constitute them.

A. *Interactive Versus Non-Interactive Services*

There are two types of digital music streaming services: interactive and non-interactive.⁸⁵ A non-interactive subscription service, such as Pandora or an internet radio station, does not allow a user to choose specific songs or albums, whereas an interactive, on-demand service like Apple Music and Spotify furnishes users with the option to choose what songs to listen to, together with access to the entirety of the service's music catalogue.⁸⁶ In other terms, interactive services transmit music files at the user's request in order "to listen to a recording or a playlist

emergence of cloud-based data storage and computing suggests that the next frontier will be centered on streaming rights for audio recordings.").

⁸³ See Mark A. Fischer, *Do You Own Your Music Playlist?*, MONDAQ, <http://www.mondaq.com/unitedstates/x/310898/Copyright/Do> [<https://perma.cc/23K4-TGRY>] (last updated May 1, 2014); Jacob Ganz, *How Streaming Is Changing Music*, NPR (June 1, 2015, 10:20 AM), <http://www.npr.org/sections/therecord/2015/06/01/411119372/how-streaming-is-changing-music> [<https://perma.cc/536Q-Y9TU>].

⁸⁴ See Koransky, *supra* note 1.

[T]ension and difficulty exists with these services due to the complex licensing system for compositions and sound recordings in the digital realm, and the disparate treatment these works receive under the law. . . . The methods by which digital streaming services obtain rights to perform and make copies of the sound recordings and compositions require different negotiations and licensing processes.

Id. at 2; see also U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (2015), <https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [<https://perma.cc/W2HJ-S6Y8>].

⁸⁵ See Koransky, *supra* note 1, at 2.

⁸⁶ *Id.*; see Mary LaFrance, *Rights and Revenues in the U.S. Recorded Music Industry*, WILLIAM S. BOYD SCH. L., U. NEV., LAS VEGAS (July 2015), <https://www.law.berkeley.edu/wp-content/uploads/2015/07/LaFrance-Rights-and-Revenues-in-Recorded-Music.pdf> [<https://perma.cc/U3W9-D9TS>].

contemporaneously with the user's request."⁸⁷ Both Apple Music's and Spotify's platforms are representative of these interactive services. As such, users are given on-demand access to the service's music catalogue, can create playlists, and can take advantage of other constantly expanding features, all for a monthly fee.⁸⁸ Thus, interactive music streaming services are more likely to track copyrightability and intellectual property issues for users by virtue of their use of the streaming service.

B. *Terms and Conditions for Digital Music Streaming Services*

Like any entity, on-demand digital music streaming services implement lengthy terms and conditions for subscribers to abide by while using their platforms.⁸⁹ Also known as "terms of service," these rules stipulate the appropriate use of media as determined by the business, including rights granted to the user, rights granted to the service, and warranties and disclaimers.⁹⁰ Streaming services' terms and conditions indicate that, by signing up for or using the service, or

⁸⁷ See *Digital Definitions*, HARRY FOX AGENCY, <https://secure.harryfox.com/public/DigitalDefinitions.jsp#73> [<https://perma.cc/D7L2-26PC>] (last visited Nov. 23, 2018). Interactive services are enumerated in 17 U.S.C. § 114(j)(7), which states,

An "interactive service" is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, that is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request.

17 U.S.C. § 114(j)(7) (2018).

⁸⁸ See *The Basics*, SPOTIFY, https://support.spotify.com/us/using_spotify/the_basics (last visited Nov. 3, 2018); *Playlists*, *supra* note 5.

⁸⁹ See *infra* text accompanying notes 90–92.

⁹⁰ See *Apple Media Services Terms and Conditions*, APPLE, <https://www.apple.com/legal/internet-services/itunes/us/terms.html> [<https://perma.cc/5PQQ-4PX8>] (last visited Oct. 14, 2017); *Spotify Terms and Conditions of Use*, SPOTIFY, <https://www.spotify.com/us/legal/end-user-agreement> [<https://perma.cc/QH6B-EXDV>] (last visited Oct. 14, 2017); *Terms of Service*, DICTIONARY.COM, <http://www.dictionary.com/browse/terms-of-service> [<https://perma.cc/77BP-969R>] (last visited Oct. 14, 2017).

accessing any material made available by the service, the user assents to and enters into a binding contract with the service.⁹¹ Thus, whenever a user on Spotify or Apple Music creates a playlist, the playlist is subject to the terms and conditions of the streaming service. It is important to note that the terms and conditions of digital music streaming services explicitly emphasize adherence to and respect for intellectual property rights.⁹²

C. *Playlists as User-Generated Content*

Playlists are used to organize a personal digital music collection⁹³ and consist of an “ordered sequence of songs meant to be listened to as a group.”⁹⁴ There are three essential components of a playlist: (1) it consists of a set of songs; (2) placed in an explicit order; and (3) intended to be listened to as a continuous whole.⁹⁵ Songs are copied in their entirety onto the playlist, as they otherwise exist on the streaming service.⁹⁶ The purposes of playlists are multifaceted, as one may create a list of songs for the purposes of driving, studying, or to reflect a particular emotion, artist, or genre.⁹⁷ These categorizations likely influence the choice as to what songs are chosen and placed in a given

⁹¹ See *supra* note 90.

⁹² See *Apple Media Services Terms and Conditions*, *supra* note 90; *Spotify Terms and Conditions of Use*, *supra* note 90.

⁹³ See *Playlist*, *supra* note 6.

⁹⁴ Ricardo Dias et al., *From Manual to Assisted Playlist Creation: A Survey*, 76 MULTIMEDIA TOOLS & APPLICATIONS 14375, 14379 (2016).

⁹⁵ See *id.*

⁹⁶ See Carpenter, *supra* note 50, at 64.

⁹⁷ See Sally Jo Cunningham et al., ‘More of an Art than a Science’: Supporting the Creation of Playlists and Mixes, PROC. 7TH INT’L CONF. ON MUSIC INFO. RETRIEVAL (ISMIR, Victoria, Canada), Oct. 2006, at 240, <https://pdfs.semanticscholar.org/2086/b2904cc2f4dea8ace14551ad193e2e6a1e28.pdf> [<https://perma.cc/JY46-KDM8>] (“One quarter of mixes focused on specific Artists, Genres, or Styles—for example, ‘Best of Prince’, ‘acoustic-country-folk type stuff’, [and] ‘Hawaiian Music.’”). Some are listened to as background music for an event or activity, or are constructed to tell a story by describing an experience in music, such as for an upcoming occasion or trip; the purposes of playlists are subjective and limitless. *Id.* at 3; see also *About Us*, SPOTIFY, <https://www.spotify.com/us/about-us/contact> [<https://perma.cc/2JT2-6S9A>] (last visited Oct. 21, 2017) (“There are millions of tracks on Spotify. So whether you’re working out, partying or relaxing, the right music is always at your fingertips. . . . [s]oundtrack your life with Spotify.”).

order, increasing compatibility and flow between songs, and giving rise to a consistent, coherent, and tailored playlist.⁹⁸

While ordered or themed song lists are not a new innovation—frequently utilized by DJs and radio stations alike—playlists have become popular works due to the rise of streaming services' enormous catalogues.⁹⁹ Streaming services are cognizant of their users' propensity to create playlists on their platforms, and have drawn upon it to expand their businesses and services.¹⁰⁰ Users may compile their own playlists through the aggregation of individual songs and albums, or listen to and supplement pre-made playlists created by the service.¹⁰¹ Due to the breadth of streaming services' music catalogues, playlists enable users to create and publish personal compilations for others, thereby taking the responsibility of extensively searching through the digital catalogues.¹⁰² Moreover, users' ability to create and publish playlists allows them to promote their status and work on the service itself.¹⁰³ Thus, playlists are beneficial tools for both the creator and other users on the platform.

Users create playlists manually on streaming services. In doing so, they decide what kind of songs to add, what feeling the playlist seeks to establish, or whether to tailor the playlist for a specified event, mood, or occasion.¹⁰⁴ Users can browse through a service's music collection, or

⁹⁸ See Cunningham et al., *supra* note 97, at 2 (“If the songs all conform to the organizing style or theme of the playlist . . . there is little risk of an abrasive transition between songs (‘so it’s not a big shock going from punk to world music or something’)”).

⁹⁹ See Marc Hogan, *How Playlists are Curating the Future of Music*, PITCHFORK (July 16, 2015), <https://pitchfork.com/features/article/9686-up-next-how-playlists-are-curating-the-future-of-music> [<https://perma.cc/9G9V-8JCH>].

¹⁰⁰ See Jason Warnock, *User-Generated Content: What Your Brand Can Learn From Spotify*, MARKETING LAND (May 2, 2017, 10:03 AM), <https://marketingland.com/user-generated-content-brand-can-learn-spotify-212972> [<https://perma.cc/E2HM-JZUC>]; 5 of the Best User Generated Content Ideas We’ve Seen, SHAREROOT (May 17, 2017), <https://www.shareroot.co/single-post/2017/05/17/5-OF-THE-BEST-USER-GENERATED-CONTENT-IDEAS-WEVE-SEEN> [<https://perma.cc/X5EF-R69F>]; see also Amplify Videos, *Joe Jonas Spotify Playlist: Play This At My Funeral*, YOUTUBE (Feb. 28, 2017), <https://www.youtube.com/watch?v=l3ASwNgE7Zw> (Spotify campaign highlighting user-generated playlists).

¹⁰¹ See *Playlists*, *supra* note 5; *Apple Music*, APPLE, <https://www.apple.com/apple-music> [<http://perma.cc/V4SW-5XNL>] (last visited Oct. 21, 2017) (“Be your own DJ by easily making a playlist of your favorite songs . . .”).

¹⁰² See Dias et al., *supra* note 94, at 14376.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 14381–82; see also MICHAEL BULL, *SOUND MOVES: IPOD CULTURE AND URBAN EXPERIENCE* 129 (2007) (“I tailor my music and content by activity. ‘Playlists’ allow me to create

their personal library, filtering by a plethora of criteria such as album, artist, genre, or a “similarity between the artists” feature.¹⁰⁵ Playlists are a form of personal expression in the digital music age, serving as a “possession” for the creator and instilling a sense of ownership, similar to that of DJ practices.¹⁰⁶ In this sense, playlists are user generated content (UGC).¹⁰⁷ UGC refers to content created by users of a system or service that is subsequently made publicly available on that platform.¹⁰⁸ Digital music streaming service users utilize the services’ catalogues to create playlists, which qualifies playlists as UGC.¹⁰⁹

Playlists are the core UGC for streaming services, since they are used to discover new music or listen to a collection of songs.¹¹⁰ Subscribers to Spotify or Apple Music are not the only users creating playlists; recording artists and organizations create and publish playlists as well, contributing to the overall community of music on the platforms.¹¹¹ The quantity of playlists that exist on streaming services

subsets of music that I can easily call up. I create ‘playlists’ to tailor my music to my different moods. I label them as ‘Quiet’ or ‘Exercise tunes’ or ‘Contemplative.’”).

¹⁰⁵ See Dias et al., *supra* note 94, at 14382. Once the playlist is complete, the user may reorder the selected songs to get a better flow and transition scheme between songs. *Id.*

¹⁰⁶ See Tom McCourt, *Collecting Music in the Digital Realm*, 28 POPULAR MUSIC & SOC’Y 249, 251 (2005); see also Jeremy Wade Morris & Devon Powers, *Control, Curation and Musical Experience in Streaming Music Services*, 8 CREATIVE INDUSTRIES J. 106, 109 (2015) (streaming services allow users to customize their listening experiences and essentially “brand” themselves).

¹⁰⁷ See Armando Crespo, *YouTube Playlists, the Other UGC*, ORCHARD: DAILY RIND (Apr. 16, 2015), <https://www.dailyrindblog.com/youtube-playlists-ugc>; *Playlists: How Listeners Take Ownership*, TOR BAIR (Dec. 2, 2015), <http://www.torbair.com/blog/2015/12/2/playlists-how-streaming-services-give-listeners-ownership> [<https://perma.cc/C9BQ-W7X3>]; see also Adam Vincenzini, *How to Create a Compelling YouTube Channel Without Your Own Original Content*, THE NEXT WEB (Apr. 8, 2011), <https://thenextweb.com/lifehacks/2011/04/08/how-to-creating-a-compelling-youtube-channel-without-any-original-content> [<https://perma.cc/H548-4B6D>].

¹⁰⁸ See *Playlists: How Listeners Take Ownership*, *supra* note 107 (“User generated content (UGC) is the key to the explosive success of many new-gen media platforms Anyone can upload material . . . and immediately have it be searchable and potentially monetizable. . . . User generated content provokes feelings of authenticity and builds a sense of community. . . . On platforms like Spotify, UGC manifests in the form of playlists.”).

¹⁰⁹ See BULL, *supra* note 104, at 129 (“Digital technology, with its storage and organising potential, has enabled users to fulfil their dream of control over mood, time and surroundings, permitting them to live in a dream of auditory control[.]”).

¹¹⁰ See *Playlists: How Listeners Take Ownership*, *supra* note 107 (“On platforms like Spotify, UGC manifests in the form of playlists. There are over 2 billion playlists on Spotify alone.”).

¹¹¹ *Id.*

shows that users turn to playlists to personally engage with the music, either because of the creator or because of an underlying personal preference.¹¹² In other words, playlists and the processes by which they are created constitute a larger part of digital music streaming services than presumed at first glance and are a core aspect of subscribers' activity and use that reflects ownership over music.¹¹³

D. *International Applications*

Courts in the United States have yet to address the question of whether there is, or should be, copyright protection over playlists on digital music streaming services.¹¹⁴ Ministry of Sound, a dance music group that produces compilation albums, brought proceedings against Spotify in the United Kingdom in 2014, alleging that Spotify infringed its copyright by allowing users to create playlists that were the same, or

¹¹²

Some playlist creators are major influencers with hundreds of thousands of followers . . . [s]ome are brands or organizations . . . [b]ut the playlists we value most are created by the radio stations we enjoy, or the artists we know and love, or our closest friends. These last playlists are the most authentic, made by our peers - but similar playlists are also made by the artists and curators we wish to feel closer to, building a sense of community around music. Importantly, playlists made by peers, artists, and Spotify themselves all look and feel identical in the product.

Id.

¹¹³ "According to an industry estimate, 1 out of every 5 plays across all streaming services today happens inside of a playlist." Reggie Ugwu, *Inside the Playlist Factory*, BUZZFEED (July 12, 2016, 11:35 PM), https://www.buzzfeed.com/reggieugwu/the-unsung-heroes-of-the-music-streaming-boom?utm_term=.omXEzaY5d#.hmOjED9BZ [<https://perma.cc/K7ZH-UJ8K>]; see Marc Chacksfield, *The Power of the Playlist: How Streaming is Changing the Way We Listen to Music*, TECHRADAR (Mar. 30, 2017), <http://www.techradar.com/news/the-power-of-the-playlist-how-streaming-is-changing-the-way-we-listen-to-music>; see also *How Playlists from Streaming Services Have Changed the Way We Discover New Music*, TECHFRUIT (Mar. 17, 2017), <https://techfruit.com/2017/03/17/playlists-streaming-services-changed-way-discover-new-music> [<https://perma.cc/QPA8-FF5V>].

¹¹⁴ See Marc A. Fritzsche, *Copyrightability of Music Compilations and Playlists: Original and Creative Works of Authorship?*, 6 PACE INTELL. PROP. SPORTS & ENT. L.F. 258, 264 (2016); Michelle Davis, *Are Playlists Protected Under Copyright? A Look at Ministry of Sound vs. Spotify*, FUTURE MUSIC COALITION (Sept. 6, 2013, 11:47 AM), <https://futureofmusic.org/blog/2013/09/06/are-playlists-protected-under-copyright-look-ministry-sound-vs-spotify> [<https://perma.cc/P5SB-D7RX>] ("We'll cross that bridge if and when we come to it."). For an analysis of relevant and related case law in the United States, see *supra* Part I.

substantially the same, as Ministry's compilations.¹¹⁵ Ministry's compilations received copyrights based on the order in which songs were compiled into the whole album.¹¹⁶ Ministry argued that its works are copyright protected because the selection and arrangement of its contents constituted an original creation.¹¹⁷ Spotify countered by stating that the track arrangements were "banal" and obvious arrangements lacking artistry and creativity.¹¹⁸ While the case settled before trial, its legal issues are analogous to this Note's issue.¹¹⁹ Ministry of Sound's case against Spotify reflects two principles: (1) the notion that there is a potential copyright interest in playlists; and (2) that playlists are compilations.¹²⁰

III. ANALYSIS: THE COPYRIGHTABILITY OF PLAYLISTS

As United States courts struggle with the copyrightability of compilations and the scope of copyright protection post-*Feist*, it is uncertain whether there is a valid copyright claim in users' playlists on streaming services.¹²¹ Streaming services' users are undoubtedly compiling and creating these playlists insofar as choosing what songs to include and in what order to place them.¹²² Copyrightability will turn on

¹¹⁵ Ministry argued that its compilations were composed by a team based upon a certain theme, including factors like exclusivity and familiarity of the tracks, balance of sound, artists and mix of each CD, and the chronology of the chosen tracks. Team members subsequently revise and reorder the songs in accordance with the respective purposes of the compilation. Ministry of Sound argued that "Spotify users were compiling playlists that were the same, or substantially the same, as various Ministry compilations." See Tom Iverson, *Can Copyright Subsist in a Music Compilation or Playlist?*, SIMKINS (Mar. 21, 2014), <https://www.simkins.com/can-copyright-subsist-music-compilation-playlist-2> [https://perma.cc/443J-4YHA]; see also Vanessa Barnett et al., *Compilation-Album Copyright, the Case of Ministry of Sound v. Spotify*, 25 ENT. L. REV. 1 (2014).

¹¹⁶ See Jonathan Blake, *Spotify and Ministry of Sound Agree to End Legal Action*, BBC: NEWSBEAT (Mar. 2, 2014), <http://www.bbc.co.uk/newsbeat/article/26405114/spotify-and-ministry-of-sound-agree-to-end-legal-action> [https://perma.cc/UJ23-GKRD].

¹¹⁷ *Id.*

¹¹⁸ See Iverson, *supra* note 115.

¹¹⁹ See discussion *supra* Part I.

¹²⁰ See discussion *infra* Part III.

¹²¹ See *supra* note 114; see also Mark A. Fisher, *Do You Own Your Music Playlist?*, MONDAQ, <http://www.mondaq.com/unitedstates/x/310898/Copyright/Do> [https://perma.cc/VD4R-SPKP] (last updated May 1, 2014); *infra* note 140.

¹²² See Fritzsche, *supra* note 114, at 259.

whether there is something original and minimally creative enough about users' playlists to extend federal copyright protections.¹²³ Additionally, copyright protection requires the work to be fixed in a tangible medium of expression.¹²⁴ Playlists satisfy this part of the analysis, as they are fixed on the streaming service wherein they may be accessed and played.¹²⁵

Under the Copyright Act, federal copyright protection attaches to musical works, the words accompanying musical works, and sound recordings.¹²⁶ Like any other copyrightable entity, musical works and sound recordings require originality and creativity for federal protection.¹²⁷ As playlists are composed of songs—copyrightable musical works under the law—it is possible that playlists may be compilations of musical works or sound recordings, to the extent they are assembled by users in an original and creative manner.¹²⁸ This analysis tends to lean more closely to the law governing compilations and the copyrightability of such works. In order to determine whether there is a valid copyright interest in user-created playlists, the competing interests and entities must be examined, beginning with analysis of playlists as compilations and determining whether playlists contain the requisite originality and creativity to categorically fall under the purview of the Copyright Act.¹²⁹

¹²³ See *supra* note 40 and accompanying text.

¹²⁴ See *supra* note 21.

¹²⁵ Users do not physically own the music they listen to on streaming services, as the playlists remain fixed in the service itself. Users also cannot export the music or transfer it to another platform—it remains on the streaming service. See Hazel Cills, *Looking for a Connection in an Infinite Jukebox*, NPR (June 4, 2015, 3:00 PM), <https://www.npr.org/sections/therecord/2015/06/04/411795140/looking-for-a-connection-in-an-infinite-jukebox> [https://perma.cc/NA5V-MZLN] (“[P]eople all essentially own equal levels of access to the same music on a streaming service . . .”).

¹²⁶ 17 U.S.C. § 102(a) (2018). Musical works are undefined, but the U.S. Copyright Office has listed them as songs, song lyrics, symphonies, concertos, advertising jingles, and similar types of musical works. See COMPENDIUM, *supra* note 21, at § 503.1(B).

¹²⁷ NIMMER & NIMMER, *supra* note 18, at § 2.05.

¹²⁸ Although federal copyright laws did not anticipate the advent of digital music, digital or electronic music that is original and meets the statutory requirements for copyright protection should nonetheless receive protection despite statutory differences. Thus, songs on digital music streaming services can be treated as musical works and sound recordings. See generally Robert Stephen Savelson, *Electronic Music and Copyright Law*, 13 COPYRIGHT L. SYMP. 133, 145–47 (1963).

¹²⁹ *Id.*

A. *Playlists as Compilations*

Spotify's terms and conditions explicitly state that users may create "playlist compilations."¹³⁰ Beginning with a blank list, interactive streaming service users add songs, or even entire albums, to their playlist, wherein they can categorize, edit, and listen to the chosen music.¹³¹ Under the statutory definition of a compilation,¹³² playlists are compilations *per se*, as users are assembling and creating them based on preexisting musical works—songs—and creating a new work in its entirety.¹³³ The law is well-settled and established on these delineations. A compilation is copyright-eligible if it is original and displays a minimal quantum of creativity, arising from the selection and arrangement of preexisting works.¹³⁴ This is a lenient standard, as the originality, intellectual creation, and creativity standards are low thresholds for copyright protection.¹³⁵ However, the scope of copyright protection for works is thin, extending only to those aspects that are *original* to the author.¹³⁶ This threshold for copyrightability can cut two ways.¹³⁷ For one, thin protections isolate eligible works by only extending to wholly new works original to the author.¹³⁸ Secondly, thin protections provide leeway in determining what *types* of works qualify for copyright protection.¹³⁹ Insofar as the originality and creativity prongs of *Feist* are fulfilled, copyright law is not exhaustive, and

¹³⁰ See *Spotify Terms and Conditions of Use*, *supra* note 90 ("Spotify users may post, upload, and/or contribute ('post') content to the Service (which may include . . . playlist compilations, and/or other types of content) . . .").

¹³¹ See *Playlists*, *supra* note 5.

¹³² See 17 U.S.C. § 101 (2018); COMPENDIUM, *supra* note 21, at § 508.1.

¹³³ See *supra* text accompanying notes 39–41.

¹³⁴ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991); see also Tyler Laurence, "Wake Up Mr. West!": *Distinguishing Albums and Compilations for Statutory Damages in Copyright Within a Streaming-Centric Music Economy*, 26 U. MIAMI BUS. L. REV. 85, 108–09 (2018) ("The creative aspect of arranging the songs into a cohesive body of work is also a copyrightable element and extends only to the arrangement globally.").

¹³⁵ See Shipley, *supra* note 34, at 96.

¹³⁶ See *Feist Publ'ns*, 499 U.S. at 359; see also Shipley, *supra* note 34, at 92 ("While . . . the 'copyright in a factual compilation is thin,' we do not believe it is anorexic."); 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3.65 (2018) ("[T]he copyright in a factual compilation is thin.").

¹³⁷ See Shipley, *supra* note 34, at 96.

¹³⁸ *Id.*

¹³⁹ *Id.*

protection can be extended to works as compilations that are not explicitly included in the Copyright Act.¹⁴⁰

If *Feist* and its progeny are applied, it follows that playlists can be classified as compilations and that the creator-user has an ownership right to the playlist at large.¹⁴¹ Moreover, as some courts have extended copyright protection to music set-lists and playlists qualifying as compilations,¹⁴² similar copyright protections should be extended to playlists created on digital music streaming services.¹⁴³ Following the Supreme Court's reasoning in *Feist*, in *Caffey*, the New York court found that the particular selection and order of songs within the show attained the requisite levels of originality and creativity to obtain copyright protection as a compilation and collective work.¹⁴⁴ It is important to again note that copyright protection did not extend to the underlying songs themselves, but to the compilation.¹⁴⁵

The *Feist* and *Caffey* holdings should extend to playlists. Both feature set-lists, and similarly, playlists include a designated set of songs, selected for a particular purpose in a particular manner.¹⁴⁶ For instance, the plaintiff in *Caffey* selected the show's songs to manifest his "vision of creating a show in which three African-American tenors could sing a

¹⁴⁰ Although Congress is solely responsible for dictating what works warrant federal copyright protection, there is room to argue that playlists fall under the statutorily protected "musical works" category as a compilation under the Copyright Act. This would likely require judicial interpretation of 17 U.S.C. § 102, but precedent within district courts cuts in favor of including playlists in the musical works category of covered compilations. See 17 U.S.C. § 102(a) (2018); Herzfeld, *supra* note 22. "The author of a compilation may claim copyright in an original selection, coordination, and/or arrangement of preexisting material, provided that the material has been used in a lawful manner." COMPENDIUM, *supra* note 21, at § 508.2.

¹⁴¹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991).

¹⁴² See *supra* text accompanying notes 67–72.

¹⁴³ See *supra* text accompanying notes 67–72.

¹⁴⁴ See *Caffey v. Cook*, 409 F. Supp. 2d 484, 497 (S.D.N.Y. 2006). In *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77 (2d Cir. 2004), Silverstein compiled a selection of poems and sought to have the collection published. After rejecting Silverstein's proposal, Penguin published the poem compilation. Although Silverstein did not write the poems himself, the court acknowledged that a compiler may enjoy a copyright in the selection if "some minimal level" of creativity was applied in selection. Accordingly, the court remanded the case on this question of fact—whether Silverstein compiled the poems with originality and creativity. *Id.* at 77, 81–83 ("[I]f the selection process imbues a compilation with the requisite creative spark, the compilation may be protected so long as there indicia that principles of selection (other than all-inclusiveness) have been employed.").

¹⁴⁵ See *Caffey*, 409 F. Supp. 2d at 497.

¹⁴⁶ *Id.*

variety of musical genres without merely sounding like opera singers.”¹⁴⁷ This aspiration of order, selection, and arrangement was sufficiently original under the Copyright Act.¹⁴⁸ Like the set-list in *Caffey*, streaming service users are creating playlists for designated purposes and are not claiming ownership to the underlying songs that constitute the playlists.¹⁴⁹ No user may assert or seek a copyright in Apple Music’s or Spotify’s music catalogues, since copyright protection is limited, extending only to the playlist as a cohesive whole.¹⁵⁰ Insofar as a playlist is sufficiently original and creative to constitute a compilation,¹⁵¹ it should be copyrightable.

In *UPI Holdings*, the Maryland court upheld a DJ’s copyright due to her sufficiently creative and original selection and arrangement of music in her radio programs and club mixes, which included separately copyrighted songs.¹⁵² A DJ mix is not significantly different from a playlist, since DJ mixes, like playlists, encompass two or more songs or recordings into a single piece.¹⁵³ Under this framework, the holding in *UPI* logically extends to encompass playlists due to the similarities between the two works. The DJ mixes in *UPI* involved actual production and sale of CDs that contained the mixes of songs that the DJ selected and arranged.¹⁵⁴ There is no such production, sale, or fiscal attribute in playlist creation on digital music streaming services.¹⁵⁵

Irrespective of the fact that the CDs were compilations of other artists’ songs, the court nonetheless upheld the DJ’s copyright in the

¹⁴⁷ *Id.* at 497.

¹⁴⁸ *Id.* at 497–500.

¹⁴⁹ *Id.* at 497; *see infra* Section III.B.

¹⁵⁰ *See* discussion *supra* Section II.B.

¹⁵¹ *See* discussion *supra* Section II.B.

¹⁵² *See* *Edgerton v. UPI Holdings, Inc.*, CCB-09-1825, 2010 WL 2651304, at *4–*5 (D. Md. 2010).

¹⁵³ *Mix*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/mix> [<https://perma.cc/J3XV-M6KF>] (last visited Oct. 30, 2018) (“Produce (a piece of continuous music . . .) by combining a number of separate recordings.”).

¹⁵⁴ *See UPI Holdings*, 2010 WL 2651304, at *1.

¹⁵⁵ Users’ playlists remain fixed on the service itself, limited to use on a computer or the service’s mobile application. Further, users cannot utilize the playlists for commercial gain—users are precluded from doing so pursuant to the services’ terms. *See Spotify Terms and Conditions of Use*, *supra* note 90 (“We grant you a limited, non-exclusive revocable license to make use of the Spotify Service . . . to make personal, non-commercial, entertainment use of the Content . . . and that you will not redistribute or transfer the Spotify Service or the Content.”).

mixes.¹⁵⁶ Streaming service users who create playlists do so on the service's platform and are not entitled to use the playlists outside the bounds of the service, especially for financial gain, which would constitute infringement.¹⁵⁷ As such, Spotify's terms of service explicitly state that users are granted with a license to make "personal, non-commercial, entertainment use" of the content, and Apple Music's terms state that users "may use the Services and Content only for personal, noncommercial purposes."¹⁵⁸ If a musical compilation composed of preexisting songs is copyrightable due to its originality and creativity, playlists should likewise be considered compilations and should be extended the copyright protections that similar works have been granted.¹⁵⁹ The Supreme Court's reasoning in *Feist* as applied in subsequent compilation cases supports the extension of copyright protection to playlist creators.¹⁶⁰

Playlists are distinguishable from the compilations that were denied copyright protection in *Whatever It Takes Transmissions*.¹⁶¹ The Sixth Circuit found (1) that *Whatever It Takes Transmissions*' catalog was insufficiently original as a copyrightable compilation, as the design, order, and sorting of the parts in its catalog were identical to ATC's, and (2) that the catalogue's parts were listed in an obvious matter, lacking the creativity required for copyright protection.¹⁶² Under this reasoning, a playlist that copied an album or another preexisting playlist verbatim could not obtain copyright protection, as there would be nothing

¹⁵⁶ The court explained,

Ms. Edgerton selected and arranged the music in both her radio programs and club mixes. Indeed, her skill in these areas is what distinguished her from other radio DJs and brought her such fame. . . . [A] factfinder could easily determine that she exercised the minimal degree of creativity required to prove originality.

UPI Holdings, 2010 WL 2651304, at *5.

¹⁵⁷ See *supra* note 90.

¹⁵⁸ See *supra* note 90. This Note does not discuss whether users should have a financial claim to their playlists, and only discusses copyright interests and the entailing protection.

¹⁵⁹ See *supra* text accompanying notes 145–54.

¹⁶⁰ See *supra* text accompanying notes 145–54.

¹⁶¹ See *ATC Distrib. Grp. v. Whatever It Takes Transmissions & Parts*, 402 F.3d 700 (6th Cir. 2005).

¹⁶² "The ATC catalog does not even have this minimal level of creativity . . . the only aspect of the catalog that differs . . . is the choice of headings and arrangement of the parts into categories—two minor differences that we have previously held to be insufficiently creative to justify copyright protection." *Id.* at 711.

creative or original about the compilation.¹⁶³ *Whatever It Takes Transmissions* does not bar copyright protection of compilations insofar as they are sufficiently creative and original.¹⁶⁴ As long as the songs are arranged in a sufficiently original, non-obvious, and minimally creative enough manner, copyright law does not seem to *prima facie* bar protection towards playlists as compilations.¹⁶⁵

Albums of music are considered compilations by courts.¹⁶⁶ In *Bryant v. Media Right Productions, Inc.*, the Second Circuit held that albums are compilations under the Copyright Act, as the songs are preexisting works in themselves and comprise the album as a whole.¹⁶⁷ While the issue in *Bryant* turned on copyright infringement damages, the court's reasoning is relevant to compilations.¹⁶⁸ The court held that as a compilation, the albums were entitled to a singular damage award, despite any value the songs had individually.¹⁶⁹ Thus, *Bryant* highlighted that the aggregation of preexisting songs in a creative and original manner, combined into a singular work, will be treated as a compilation under the Copyright Act.¹⁷⁰

On a plain reading of the Copyright Act, this classification should also extend to playlists.¹⁷¹ Similar to albums, playlists are a collection of copyrighted works arranged and selected in order to create a new piece—the playlist itself.¹⁷² If albums are legally deemed to be compilations, what is prohibiting playlists from receiving the same copyright protection? An album is arguably merely an artist-created playlist of their own personal content.¹⁷³ Further, the contemporary music marketplace has seen the rise of compilation albums, albums composed of songs that have already been licensed and recorded for

¹⁶³ *Id.* at 712.

¹⁶⁴ *Id.* at 710–11.

¹⁶⁵ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 363 (1991).

¹⁶⁶ See *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140–41 (2d Cir. 2010).

¹⁶⁷ *Id.* (“An album falls within the Act’s expansive definition of a compilation. An album is a collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album.”).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ However, the history of the Copyright Act does not provide a definitive answer.

¹⁷² See *supra* note 167.

¹⁷³ See Chacksfield, *supra* note 113.

another purpose.¹⁷⁴ Such albums, similar to playlists, follow a designated theme or mood, such as “Best of . . .” or “Now! That’s What I Call Music,” and are composed of songs by the same artist or a plethora of artists.¹⁷⁵ Compilation albums are digitally available as well, manifesting in virtual compilations available for streaming.¹⁷⁶

Since compilation albums are permissible, this leaves open the possibility for other music compilations to be copyrightable as well.¹⁷⁷ There is nothing inherently different between compilation albums and playlists. It follows that the same protection should be extended to playlists, a non-purchasable work composed of preexisting songs. Playlists can fulfill the statutory requirements of compilations as embodied in Section 103 because the user-creator is seeking a copyright in the playlist, not the preexisting songs comprising it.¹⁷⁸ Additionally, courts’ recent holdings cut in favor of extending compilation copyrights to playlist creators.¹⁷⁹ Under this paradigm, there appears to be no compelling reason why playlists should not receive copyright protection as compilations if they are original and minimally creative enough.

The Copyright Act states that copyright protection in a compilation extends only to the material contributed by the *author* of such work.¹⁸⁰ Case law after the promulgation of its 1976 revision has

¹⁷⁴ See Patrik Wikström & Robert Burnett, *Same Songs, Different Wrapping: The Rise of the Compilation Album*, 32 POPULAR MUSIC & SOC’Y 507, 509 (2009).

¹⁷⁵ *Id.* Further, the U.S. Copyright Office has stated that a copyrightable compilation includes “a collection of sound recordings of the top hits of 2004[,]” a compilation album. See U.S. COPYRIGHT OFFICE, COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS (2013), <https://www.copyright.gov/circs/circ14.pdf> [<https://perma.cc/H6PJ-CGV3>].

¹⁷⁶ Wikström & Burnett, *supra* note 174, at 519.

¹⁷⁷ *Id.*

¹⁷⁸ See 17 U.S.C. § 103 (2018). Further, § 103(b) states,

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

Id.

¹⁷⁹ See *supra* text accompanying notes 67–72.

¹⁸⁰ See 17 U.S.C. § 103(a). The Act is silent on explicitly what, or whom, the author must be for copyright-eligible works, as compared to the traditional definition of an “author.” See *Author*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/author> [[https://](https://www.merriam-webster.com/dictionary/author)

established that an author is one who contributes something that is copyrightable on its own, fixed in a tangible medium of expression.¹⁸¹ Is a music artist an author under this framework? What about a user on a streaming service that compiles a playlist? The Copyright Act's definition is imprecise, but suggests that streaming service users are authors for purposes of copyright protection.¹⁸² Under the still-ambiguous definition implemented by the U.S. Copyright Office, it follows that artists and streaming service users could be authors, provided that they produce copyrightable, tangible works.¹⁸³ Artists¹⁸⁴ in the music industry are indisputably creating and producing new songs and albums that are subject to federal copyright law.¹⁸⁵ In turn, this creation and production is sufficient to render an artist or streaming service user the author of a copyrightable work under copyright law.¹⁸⁶ If a streaming service user compiles a playlist in an original and creative manner, they arguably become an artist.¹⁸⁷ Playlist authorship on streaming services is easily discernable.¹⁸⁸ If a user creates a playlist, that playlist materializes into an entity belonging to that user—and once published, that author.¹⁸⁹ Thus, users who create playlists on streaming services are in effect the authors of their playlists, and should be eligible for copyrightability of the playlist as a compilation.

perma.cc/HVP8-PTXC] (last updated Oct. 18, 2018) (“one that originates or creates something”).

¹⁸¹ See Russ VerSteeg, *Defining “Author” for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1332–33 (1996). “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101.

¹⁸² See generally VerSteeg, *supra* note 181.

¹⁸³ See discussion *infra* Part IV.

¹⁸⁴ See *Artist*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/artist> [<https://perma.cc/RSA2-ZHS7>] (last visited Nov. 23, 2018).

¹⁸⁵ See *supra* note 159.

¹⁸⁶ See *supra* note 150. “Under the copyright law of 1976, he who creates owns. That’s the basic premise of copyright law. Copyright is an expression. And if you create it, you own it . . . when a copyright is generated, the author or creator is the owner . . .” ARAM SINNREICH, *MASHED UP: MUSIC, TECHNOLOGY, AND THE RISE OF CONFIGURABLE CULTURE* 118 (2010).

¹⁸⁷ Law Professor Jennifer Urban states that if an iPod user creates a playlist, they are an artist if the playlist is a creative selection and arrangement. Urban adds that although copyright enforcement on an iPod playlist is unprecedented, books have received copyrights as compilations when composed of chapters by different people. See *id.* at 118.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

B. *Originality and Creativity in Playlist Creation*

The standards for creativity and originality put forth by the Supreme Court in *Feist* remain in place, together with subsequent decisions that extend copyright protection to musical compilations involving the selection and arrangement of preexisting, copyrighted songs.¹⁹⁰ Since albums and DJ mixes are protected as copyrightable compilations, the selection and arrangement of songs within a playlist should likewise be eligible for copyright protection.¹⁹¹

The Court in *Feist* declined to extend copyright protection for an alphabetical listing of data because there is nothing inherently original or creative about alphabetical lists.¹⁹² However, playlists are different. It does not matter that the songs used to create the playlist are preexisting copyrighted works, for this has “no bearing on the originality analysis.”¹⁹³ Choosing the order in which songs are placed, selected, and ultimately played is inherently original and creative.¹⁹⁴ The copyrightability of a playlist as a compilation turns on these standards, together with the multitude of considerations that creators can take into account.¹⁹⁵ Under *Feist*, a playlist should be eligible for copyright protection if it is original in its song selection and arrangement and it encompasses a *de minimis* level of creativity.¹⁹⁶ There needs to be demonstrative, evidentiary proof that the user arranged and selected the songs in a manner to render the playlist wholly original.¹⁹⁷

The purposes for which playlists are created runs the gamut. Users may create a playlist for a specific event—a birthday party, exercising, a vacation.¹⁹⁸ The purpose for which a playlist is created influences the artists and songs included in the playlist and the length of the playlist

¹⁹⁰ See discussion *supra* Part I.

¹⁹¹ See SINNREICH, *supra* note 186, at 118.

¹⁹² See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 362–63 (1991).

¹⁹³ See COMPENDIUM, *supra* note 21, § 310.9.

¹⁹⁴ See *supra* note 39.

¹⁹⁵ See *supra* note 39; *Feist Publ'ns*, 499 U.S. at 360–64.

¹⁹⁶ See *Feist Publ'ns*, 499 U.S. at 362–64.

¹⁹⁷ *Id.*

¹⁹⁸ See Bull, *supra* note 104, at 128 (“It’s a painless process to create a new playlist for every conceivable mood or situation.”).

itself.¹⁹⁹ These are creative choices actively made by the user. In deciding what songs to include on a playlist, the creator must take the above factors into consideration.²⁰⁰ It is this engagement with the music catalogue or collection, and deliberate arrangement and selection, that is creative.²⁰¹ Anyone can select songs at random and drop them into a playlist. Carefully sifting through thousands, if not millions of tracks to select songs that reflect a broader message or theme requires time, contemplation, and most importantly, creativity.²⁰² Creating a playlist is an art, as good playlists inherently share similar characteristics, such as balancing popular songs, artist and genre homogeneity and diversity, and smooth transition between tracks.²⁰³

The intellectual property value of a playlist lies in the originality and creativity of its arrangement and composition of the songs selected.²⁰⁴ While the order of songs on a playlist is significant, the reasoning behind song choice and order on a given playlist is significant as well, hinging on the creator of the playlist and the purpose with which it was created.²⁰⁵ If song order is this important for playlists, it follows that creators devote considerable attention to this aspect of

¹⁹⁹ See Marian Bull, *This Guy Knows the Secret to the Perfect Party Playlist*, GQ (July 5, 2017), <https://www.gq.com/story/restaurant-playlists-charlie-bird> [<https://perma.cc/B486-XCM6>].

²⁰⁰ Playlists must consist of a set of songs; the songs must have an explicit order; and the songs must be intended to be listened to as a whole. See Dias, *supra* note 94.

²⁰¹ *Id.*

²⁰² See Carpenter, *supra* note 50, at 66 (“There are millions of songs in the world . . . and millions of ways to connect them . . .”). Playlist creation is time consuming; however, the time commitment required to produce a playlist is not sufficient in itself to obtain a copyright under the “sweat of the brow doctrine.” This doctrine was developed by courts to justify copyright as a reward for the hard work that went into compilations, but was flawed in that it extended copyright protection in a compilation beyond selection and arrangement—the compiler’s original contributions—to the facts themselves. See *Feist Publ’ns*, 499 U.S. at 353.

²⁰³ See Dias, *supra* note 94, at 14381.

²⁰⁴ See Carpenter, *supra* note 50, at 66; see also *supra* note 115.

Anyone who has listened to a DJ in a nightclub or at a wedding knows that there can be genuine creativity involved in compiling a playlist. This art form is well recognized, even in putting together the running order of an artist’s studio album, let alone a compilation of 60 tracks from multiple artists covering many years or decades. Big names in the world of dance music are paid big bucks (significantly more than producers in many instances) to select and arrange compilation albums.

Iverson, *supra* note 115.

²⁰⁵ See Dias, *supra* note 94, at 14383.

playlist creation.²⁰⁶ This choice and ordering of songs is important, in that playlist creators are considering a plethora of factors, such as what songs to include and the order of songs, and are deciding how to select and arrange them in a certain manner.²⁰⁷ Thus, playlists should be copyrightable provided that they consist of songs that are arranged and selected in an original and creative manner and are not mere copies of another work.

C. *Terms and Conditions as a Potential Bar to Copyrightability*

Users of digital music streaming services adhere and consent to the terms and conditions of the services by virtue of their subscriptions.²⁰⁸ The terms and conditions of these services pose one of the most crucial issues for the copyrightability of user-generated playlists on these platforms. Even if the requisite levels of originality and creativity materialize in a playlist, the terms and conditions delineate user guidelines regarding playlist creation and dissemination, together with the licenses to music granted to streaming services.²⁰⁹ Thus, users may not freely distribute their playlists or use them in a manner that infringes upon intellectual property rights.²¹⁰

The terms and conditions of Spotify dictate that users may post or contribute content including “playlist compilations,” but may not post any content that violates the agreement between the user and Spotify or intellectual property law.²¹¹ This bars users from explicitly copying preexisting content that infringes copyrights on the service, amongst other user guidelines, such as illegally copying and selling the files.²¹²

²⁰⁶ See Gary Trust, *The Importance of Album Track Order in the Digital Age*, BILLBOARD (Dec. 4, 2012, 12:30 PM), <http://www.billboard.com/biz/articles/news/1082814/the-importance-of-album-track-order-in-the-digital-age> [<https://perma.cc/X7A7-XEFQ>].

²⁰⁷ See Dias, *supra* note 94.

²⁰⁸ See *supra* text accompanying notes 89–92.

²⁰⁹ See *supra* text accompanying notes 89–92.

²¹⁰ See *Spotify Terms and Conditions of Use*, *supra* note 90.

²¹¹ *Id.*

²¹² *Id.* This is a logical extension of the holding in *Whatever It Takes Transmissions*. Purely copying a work is both an infringement on the original work’s copyright, and insufficient to warrant protection as a compilation, failing the originality and creativity thresholds. See *supra* note 59.

Despite these restrictions, the pertinent portion of Spotify's terms and conditions state:

You grant Spotify a non-exclusive, transferable, sub-licensable, royalty-free, perpetual . . . irrevocable, fully paid, worldwide license to use, reproduce, make available to the public (e.g. perform or display), publish, translate, modify, create derivative works from, and distribute any of your User Content in connection with the Service through any medium Aside from the rights specifically granted herein, you retain ownership of all rights, including intellectual property rights, in the User Content. Where applicable and permitted under applicable law, you also agree to waive any "moral rights" (or the equivalent under applicable law) such as your right to be identified as the author of any User Content, including Feedback, and your right to object to derogatory treatment of such User Content.²¹³

On its face, these terms and conditions *may* allow users to seek a copyright over their playlist as a compilation as long as there is no infringement or literal copying of content. If Spotify has a non-exclusive license over users' content—including playlists—and users otherwise retain ownership of intellectual property rights over their content, it follows that users may have valid copyright interests over their playlists.²¹⁴ A copyright is an intellectual property right.²¹⁵ Under the supposition that playlists are compilations within the purview of the Copyright Act, playlists fall under the user content that is granted intellectual property protection.²¹⁶

Additionally, licensing procedures for digital music streaming services may challenge the copyrightability of user-generated playlists.²¹⁷ Digital music streaming services need to obtain the rights to perform

²¹³ See *Spotify Terms and Conditions of Use*, *supra* note 90. It is interesting to note that Apple Music does not provide a provision in its Terms and Conditions for users' ownership rights, so this may pose an obstacle for those users to obtain copyright protection over playlists on that platform. See *Apple Media Services Terms and Conditions*, *supra* note 90.

²¹⁴ See *Spotify Terms and Conditions of Use*, *supra* note 90.

²¹⁵ WORLD INTELLECTUAL PROPERTY ORGANIZATION, WHAT IS INTELLECTUAL PROPERTY?, WIPO Pub. No. 450(E), http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf [<https://perma.cc/B64J-E3VE>].

²¹⁶ See 17 U.S.C. § 103.

²¹⁷ See Koransky, *supra* note 1, at 2–4.

and make copies of the sound recordings and compositions utilized on their services, which entails several licensing and statutory hoops.²¹⁸ There are two works within music that are distinct for copyright purposes. There are separate copyrights for the musical work (or composition) holder and for the sound recording holder.²¹⁹ As such, streaming services are required to obtain these licenses in order for users to access music on the platform.²²⁰ Although users are paying to use the service, it is not clear whether they are paying towards the licensing of the music, or whether the original license holders would even permit the extension of a compilation copyright to streaming service users.²²¹ Again, courts have not ruled on whether there is a copyright interest in compilations or playlists created on digital music streaming services.²²² Until such a claim is brought, there is no controlling authority aside from the Copyright Act and case law on compilations,²²³ leaving this an open question for Congress and the courts.

IV. PROPOSAL: THE INCLUSION OF PLAYLISTS AS COPYRIGHTABLE COMPILATIONS NECESSITATES AMENDMENT OF THE COPYRIGHT COMPENDIUM

The Copyright Compendium is an administrative manual promulgated by the U.S. Copyright Office that provides instruction regarding copyright practices and related intellectual property law principles.²²⁴ Chapter 300 of the Compendium provides guidelines for

²¹⁸ See *id.*

²¹⁹ See 17 U.S.C. § 102(a) (2012); U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2012), <https://perma.cc/7SPG-QW6Z>.

²²⁰ See Koransky, *supra* note 1, at 2–4.

²²¹ See *id.* at 2–3. The U.S. Copyright Office has struggled with licensing on digital music streaming services in general, attempting to find a balance between creators' and streaming services' rights. See *supra* note 84.

²²² See discussion *supra* Parts I & II.

²²³ “A copyright claim is a claim in the original authorship that an author or authors contributed to the work.” COMPENDIUM, *supra* note 21, § 503.

²²⁴ See *generally id.* The Copyright Office states that,

The Compendium documents and explains the many technical requirements, regulations, and legal interpretations of the U.S. Copyright Office with a primary focus on the registration of copyright claims, documentation of copyright ownership, and recordation of copyright documents, including assignments and licenses . . . The

establishing copyrightable authorship at large,²²⁵ while Chapter 500 explains how to identify copyrightable authorship, specifically how to describe copyright claims in compilations.²²⁶ Although the Copyright Act is unambiguous and specifically delineates which categories of works are copyrightable and what constitutes a compilation, an amendment to the Copyright Compendium would eliminate uncertainty as to whether playlists are compilations under federal copyright law. While the Compendium lacks the force of law, it is persuasive authority and is given judicial deference when a novel intellectual property issue arises that is not addressed in the Copyright Act or subsequent regulations.²²⁷

As the law currently stands, copyright protection is afforded to compilations comprised of musical works²²⁸ and sound recordings.²²⁹ Although the Supreme Court explicitly laid out the standards for compilation copyrightability in *Feist*, subsequent court holdings extended copyright protection to set-lists and DJ mixes as compilations, further complicating the legal treatment of playlists.²³⁰ An amendment to the Copyright Act to provide for the inclusion of playlists as copyrightable subject matter in Section 102 is a drastic and unlikely remedy. If the U.S. Copyright Office clarified whether playlists are a copyrightable work, digital service streaming users would be entitled to seek a copyright claim in their playlists; however, only Congress has the authority to create new categories of authorship that are entitled to

Compendium provides guidance regarding the contents and scope of particular registrations and records . . . The Compendium does not cover every principle of copyright law or detail every aspect of the Office's administrative practices. The Office may, in exceptional circumstances, depart from its normal practices to ensure an outcome that is most appropriate.

Id.

²²⁵ See *id.* § 301.

²²⁶ See *id.* § 501.

²²⁷ See 17 U.S.C. §§ 102, 103 (2018); COMPENDIUM, *supra* note 21, at Introduction. Although lacking the force of law, the Compendium is persuasive and influential authority upon courts, including guidance on what is copyrightable and what works fall under compilations. See *id.*; *infra* note 233.

²²⁸ See 17 U.S.C. §§ 102, 103.

²²⁹ See *id.*

²³⁰ See *Caffey v. Cook*, 409 F. Supp. 2d 484, 497 (S.D.N.Y. 2006); *Edgerton v. UPI Holdings, Inc.*, CCB-09-1825, 2010 WL 2651304, at *4-5 (D. Md. 2010).

copyright protection.²³¹ Thus, an amendment to the Compendium is the proper remedy for legislative silence regarding playlists as compilations. Federal courts have the authority to interpret copyright claims with regard to the scope of the subject matter of the work and the originality and creativity of the work,²³² and they often refer to the Compendium's interpretations during adjudication.²³³ Due to this deference, it follows that an amendment to include playlists in Chapter 500 of the Compendium would allow courts to find a copyright claim in users' playlists.

The most recent Compendium includes musical works and sound recordings as protected works.²³⁴ As playlists are composed of songs, playlists are in essence a compilation of musical works or sound recordings. Under the supposition that playlists are compilations, it follows that the inclusion of playlists as a copyrightable work would neither burden nor frustrate the existing statutory scheme.²³⁵ Subject to the terms and conditions of the streaming service that users assent to, there should be an amendment to the Compendium that delineates copyright protection to playlists on digital music streaming services. This amendment is necessary by virtue of the fact that playlists are an omnipresent part of the contemporary music marketplace.²³⁶

²³¹ See COMPENDIUM, *supra* note 21, at § 307.

Congress gave federal courts the flexibility to interpret the scope of the existing subject matter categories, but only Congress has the authority to create entirely new categories of authorship. If the federal courts do not have the authority to establish new categories, it necessarily follows that the Copyright Office also has no such authority in the absence of any clear delegation of authority.

Id.

²³² *Id.*

²³³ Courts often cite to the Compendium in copyright cases, which is indicative of its persuasive authority. See COMPENDIUM, *supra* note 21, at § 101(A). “The Supreme Court recognized that courts may consider the interpretations set forth in administrative manuals, policy statements, and similar materials ‘to the extent that those interpretations have “the power to persuade.”’” *Id.* (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)).

²³⁴ See *id.* § 307. Musical works encompass songs and song lyrics, amongst other works, while sound recordings encompass works such as a recording of a song, a recording of a vocal performance, a recording of a musical performance, and a digital file of a performance, amongst others. See *id.* § 503.1(B).

²³⁵ See 17 U.S.C. § 103(a) (2018).

²³⁶ “There are over 2 billion playlists on Spotify alone.” *Playlists: How Listeners Take Ownership*, *supra* note 107; see also Eamonn Forde, “They Could Destroy the Album’: How Spotify’s Playlists Have Changed Music Forever, *GUARDIAN* (Aug. 17, 2017, 6:41 PM), <https://www.theguardian.com/music/2017/aug/17/spotify-playlists>.

It is undisputed that the copyright laws are antiquated, for the 1976 Congress could neither have possibly predicted the rise and popularity of digital music streaming systems, nor have framed copyright laws to keep up with technological advances of this nature.²³⁷ It is for this reason that the Compendium should be amended to provide for playlists. In order to actualize the aim of copyright law to spur advancement, creativity, and progress in the arts, laws must adapt to the present ways that people create and the markets in which they create.²³⁸ Copyright law is grounded in societal progress of the arts and sciences, through fostering creativity and advancement.²³⁹ Although copyright law aims to reward authors for their creativity,²⁴⁰ users are currently unable to obtain ownership or reap any nominal benefit over their playlists. Thus, including playlists as a protected compilation in the Compendium would provide user-creators with a valid copyright interest.

As copyright law hinges on the dichotomy between the rights of authors and creators, and the access of consumers and users,²⁴¹ an amendment to the Compendium to include playlists would serve as a beneficial clarification to both parties and the music industry as a whole. Digital music streaming service users create playlists based upon a plethora of factors, including artists, events, mood, or occasions, but this list is not exhaustive.²⁴² For example, consider the SoulCycle instructor who creates a playlist for a workout class, deliberately selecting and ordering the songs, as the playlist is the foundation of the class.²⁴³ Or consider the user who creates a playlist in accordance with a specified order and manner for their everyday life.²⁴⁴ These choices, the

www.theguardian.com/music/2017/aug/17/they-could-destroy-the-album-how-spotify-playlists-have-changed-music-for-ever [<https://perma.cc/L7NQ-FFVH>].

²³⁷ See Koransky, *supra* note 1, at 2; WILLIAM PATRY, *HOW TO FIX COPYRIGHT 12* (1st ed. 2012).

²³⁸ See PATRY, *supra* note 237, at 40.

²³⁹ See *Goldstein v. California*, 412 U.S. 546, 555 (1973).

²⁴⁰ *Id.*

²⁴¹ See Abrams, *supra* note 28, at 3.

²⁴² See text accompanying notes 172–76.

²⁴³ “Turns out, the instructors spend a lot of time figuring out the perfect songs to make classes fun and push you harder . . .” Jeff Cattel, *The Cardio Playlist Your Next Workout Needs*, GREATIST (May 8, 2015), <https://greatist.com/move/soulcycle-playlist> [<https://perma.cc/RH96-MHDY>].

²⁴⁴ See Cunningham et al., *supra* note 97, at 4.

amalgamation of originality—in terms of arrangement, order, and selection—and creativity—in terms of flow, mood, or theme—are unique and creative.²⁴⁵ There is something expressive, and hence copyrightable, about selecting the order of songs on a playlist.²⁴⁶

Users should be rewarded for the original and creative playlists that they create. This reasoning is congruent with copyright and intellectual property law principles.²⁴⁷ Playlists should be accorded this copyright protection due to personalization of music that has accompanied the growth of digital streaming services, and this can be performed through their inclusion within the Copyright Compendium.²⁴⁸

A. *Potential Objections*

One potential objection to an amendment to the Copyright Compendium to include playlists as a compilation is inefficiency. Logistically speaking, granting a copyright to every user that desired one over their playlists would result in an exorbitant amount of copyrights, likely ranging in the millions, if not more.²⁴⁹ Even if playlists are original works of authorship that qualify for copyright protection as compilations, opponents may argue that they do not necessarily need copyright protection or the incentive of copyright protection to be created in the first place.²⁵⁰ However, an amendment to the

I try to make playlists so that there's not too many slow songs, hard rock, sad songs together. I try to mix them up a little but not so much that it sound random. A couple of upbeat ones, then a slower one, then a fast but maybe sad one, then a real hard rock one, then some slower ones again . . . I try to make it not too samey but not so random it's completely un-listenable. Making a playlist is more of an art than a science.

Id.

²⁴⁵ *Id.* at 4–5.

²⁴⁶ See discussion *supra* Part III.

²⁴⁷ See discussion *supra* Part III.

²⁴⁸ See Mathieu Deflem, *Music and Law*, in 18 SOCIOLOGY OF CRIME, LAW AND DEVIANCE 62, 62–63 (2013) (“Overlapping advancements in technology and the diffusion of popular music into habitus of listeners have provided the framework for an instrumental rationalization of litigious approaches to copyright protection . . .”).

²⁴⁹ See Fritzsche, *supra* note 114, at 261.

²⁵⁰ See Pamela Samuelson, *Too Many Copyrights?*, 54 COMM. ACM 29 (2011). Opponents to widespread copyright protections argue that if too many works are in-copyright, then the culture loses the ability to distinguish between works that need copyright protection and those

Compendium including playlists as copyrightable compilations will not create widespread copyrightability, as the playlists must be sufficiently original and creative to qualify.²⁵¹ If these statutory thresholds are not met, then the playlist would not be protected under the amendment.²⁵² While an amendment has the potential to increase the amount of protected playlists and to create subsequent legal issues, inefficiency is not a bar to legality.

CONCLUSION

The Copyright Act and the Constitution protect original and creative expression because of the social, economic, and cultural value that a copyrighted work offers.²⁵³ Originality and creativity are the underpinnings of copyright law; they are the values that federal law purports to protect. Copyright law seeks to provide creators with exclusive rights in their works, bootstrapped with the incentive to create further works for the public good.²⁵⁴ Thus, the importance of copyright law in the American legal system is unequivocal. However, technological advances challenge copyright law, specifically in terms of the modern music industry.²⁵⁵ The music industry and marketplaces have transformed—the music industry that witnessed the 1976 revision is dead. Digital music streaming services such as Apple Music and Spotify have become the predominant form of music consumption in the United States, and are at odds with the current posture of federal copyright laws.²⁵⁶

that do not. *See id.* at 31. However, there is an attenuated argument for playlists, because they can be constantly recreated and there is no impediment for others to create as well.

²⁵¹ *See* NIMMER & NIMMER, *supra* note 31, at § 2.01.

²⁵² *See id.*

²⁵³ *See* Goldstein v. California, 412 U.S. 546, 555 (1973).

²⁵⁴ The Supreme Court elaborated on this, stating, “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by the incentive, to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

²⁵⁵ *See* Koransky, *supra* note 1, at 2.

²⁵⁶ *See id.* Although Congress has enacted laws subsequent to the Copyright Act to combat copyright issues in the music industry, and the U.S. Copyright Office has promulgated reports recognizing such issues, the music industry remains at odds with federal copyright law. *See id.* at 5.

Users on digital music streaming services have the ability to compile playlists from the services' comprehensive catalogues.²⁵⁷ As a result, users have the ability to create a new work—a compilation of their own. It is indisputable that users do not have *any* copyright interest in the underlying songs themselves, as the streaming service separately contracts and purchases the requisite licenses to stream the music.²⁵⁸ This Note discussed whether playlists are copyrightable as a compilation. As aforementioned, copyrightability turns on the conjunction of sufficient originality and a minimal level of creativity.²⁵⁹ On its face, playlists fulfill these criteria, insofar as users compile songs in an original and creative manner and do not infringe on preexisting playlists and copyrights. Playlists have become more prevalent in society, due to the proliferation of streaming services, and providing a carve-out exception for their protection under federal copyright law would bolster the creative processes the founders aimed to protect.²⁶⁰

²⁵⁷ See *supra* note 6; Tim Brookes, *How to Get Started Using Apple Music Playlists*, MAKEUSEOF (Apr. 24, 2018), <https://www.makeuseof.com/tag/apple-music-playlists-guide> [<https://perma.cc/RSL3-FM9Z>] (explaining how to create and edit playlists on Apple Music).

²⁵⁸ See Koransky, *supra* note 1, at 2–3.

²⁵⁹ See NIMMER & NIMMER, *supra* note 31, at § 2.01.

²⁶⁰ See U.S. CONST. art. I, § 8, cl. 8.