Copyright Law

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Topics:

- How copyright law and other things collectively give us art and business
- What we hear as the *result* of copyright rather than existing *independent* of copyright
- Is it possible to separate out the role of law, history, money & business practices, & creative contributions?

Copyright and the Music Industry: Continuing Questions and Concerns:

- What determines what music we hear? How does © (and other law) influence the content of music? How does the content of music influence © (and other law)?
- What counts as "Progress" in the realms of art and business? What forms of originality and creativity count? How?
- Balances: incentives (to produce and distribute new things now) *and* access (to enjoy things, and to produce and distribute new things in the future).
- Preserving older works, genres. What older works, genres get preserved? Whose older works, genres? How? Who profits from the power to access and use genres?
- Blending: History/existing industry structures *and* novel art forms/technologies/modes of production and consumption
- Monopolization/power/control questions (who has it), equity questions (who doesn't)

Music as money …

Modern music industry descends from music publishers ($$ comes from sheet music and licensing performances, both live and recorded) and record companies ($$ comes from selling records – 45s, then LPs, then CDs, then iTunes, then Spotify …)

In ©, rules are consolidated in 1909 and 1976 Acts: broad exclusive rights for compositions, subject to mechanical licensing; narrow exclusive rights for recordings, not subject to mechanical licensing.

Implication: "covers" (re-record the entire song) are easy to clear and cheap to make, and plentiful; "sampling" (copy a small snippet of the recording) is time-consuming to clear, and expensive to make.

Financially, the industry (both sides) "peaked" during the mid-1960s to early 1990s – the era of album-oriented rock 'n' roll, big pop songs, FM radio, and stadium shows. Publishers (songwriters) and labels got wealthy; performers didn't – unless they wrote their own songs and owned their own publishing (Beatles as the model). To the industry, that's the $$$ baseline; lobbying and litigation are intended to restore (preserve the revenue and profits from) that golden era:

vs. [and] music as art and culture …

Music as art and culture: where music (art) comes from:

One view:

Artists create it, then the law defines and regulates it (law might recognize it and celebrate it with copyright recognition; law might exclude it and treat it as part of the public domain; law + business might do the same – include or exclude).

This a "linear" view of "Progress."

E.g.,

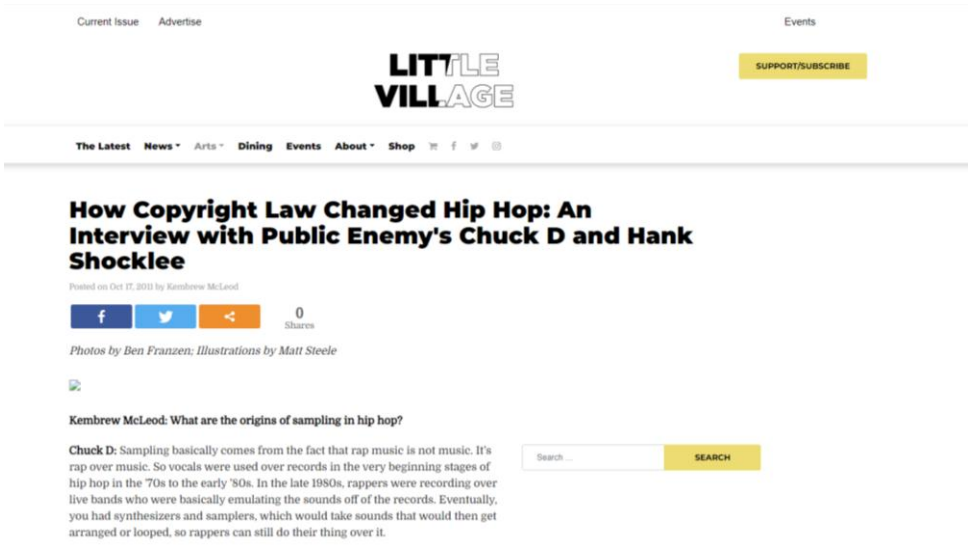
- Irving Berlin, Jerome Kern → songs (compositions) were copyrighted → co-founded ASCAP → ASCAP songwriters got rich.
- ASCAP (founded 1914) excluded non-white artists and blues, country, and early rock 'n' roll artists. They joined BMI (founded 1939) in large numbers. *Different songwriters* got rich.
- Early blues artists often lacked the resources to protect their compositions by complying with 1909 © Act requirements. E.g., Robert Johnson, Muddy Waters, Willie Dixon → Led Zeppelin.

Music as art and culture: where music (art) comes from:

A different view:

Art (music) is part of a feedback loop. Artists create it, then the law defines and regulates it (law might recognize it and celebrate it with copyright recognition; law might exclude it and treat it as part of the public domain; law + business might do the same – include or exclude) *then those same artists – or new artists – adapt the art to how it's been received by the law – business – culture combination*.

This a "circular" view. Is it "Progress"? Is it new?



Why it's so complex: Practical problems of turning $$ and art into law and practice:

- Number of industry, marketplace, and cultural players, and their different interests (composers, publishers, performers (featured vs. others); recording companies/labels; distributors (radio, streaming); equipment manufacturers (jukeboxes, record players, PCs, MP3 players, smart phones)); software developers (Bluetooth, Android); ISPs; cloud service providers; consumers/listeners; next-generation composers and performers
- Overlapping copyright interests in (a) musical compositions (the songs; s/k/a "the publishing"; rights to use these works = s/k/a "mechanicals" b/c of history with player pianos and jukeboxes) and (b) sound recordings [see Taylor Swift, *Taylor's Version* – since 2021]
- Broader scope of copyright rights under § 106 for compositions; limited rights for recordings - see §§ 106(6) and 114 - as a result of industry / Congress negotiations.
- Lots of special © provisions for music, based in industry and tech history

Section 116 – the "jukebox" license.

Originally (1909), exempted performance via "a coin-operated machine" from the public performance right.

Today, jukeboxes are not exempt but are subject to voluntary collective licensing.

The "jukebox" license effectively created the jukebox industry, and the jukebox lobby, which still exists today, as the "Amusement and Music Operators Association" (AMOA).

Copyright and the Music Industry Illustrated: Mechanical Licensing 1

Mechanical licensing – Section 115:

"(a) Availability and Scope of Compulsory License.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery….

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner."

Key point:

The mechanical license applies to *making and selling copies* of the musical work. *It does not cover performance rights in the musical work.* The license originated in the era of player pianos as a tool to limit the power of piano producers (the machines) over the piano rolls (the content). IOW: mechanical licensing originated in the law of competition.

Issues:

(1) "Basic melody or fundamental character of the work." Consider *Campbell v. Acuff-Rose Music* (US 1994).

(2) No one uses the mechanical licensing provisions of the Copyright Act. The music industry relies on Harry Fox (HFA). Cover recordings are cleared automatically if HFA rules or Section 115 rules are complied with.

(3) Mechanical licensing only apply to the songwriting copyright (the music composition, a/k/a "the publishing). It does not apply to the sound recording copyright (the recording, a/k/a "the master").

(4) "Grand rights" (dramatic uses) and "sync/synch" rights (such as soundtrack uses) are negotiated one-to-one.

(5) By industry practice, samples – which use both publishing and masters -- are always cleared via one-to-one negotiation. The *less* you use, the *more* you pay. *Bridgeport Music v. Dimension Films* illustrates. *But see Newton v. Diamond (applying* de minimis copying *rule in the Ninth Circuit).*

Copyright and the Music Industry Illustrated: Mechanical Licensing 2

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE IN GENERAL.—

(1) ELIGIBILITY FOR COMPULSORY LICENSE.—(A) Conditions for compulsory license.—A person may by complying with the provisions of this section obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work, including by means of digital phonorecord delivery. A person may obtain a compulsory license only if the primary purpose in making phonorecords of the musical work is to distribute them to the public for private use, including by means of digital phonorecord delivery, and—**(i)** phonorecords of such musical work have previously been distributed to the public in the United States under the authority of the copyright owner of the work, including by means of digital phonorecord delivery; …

(2) MUSICAL ARRANGEMENT.—A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

Mechanical licensing – Section 115:

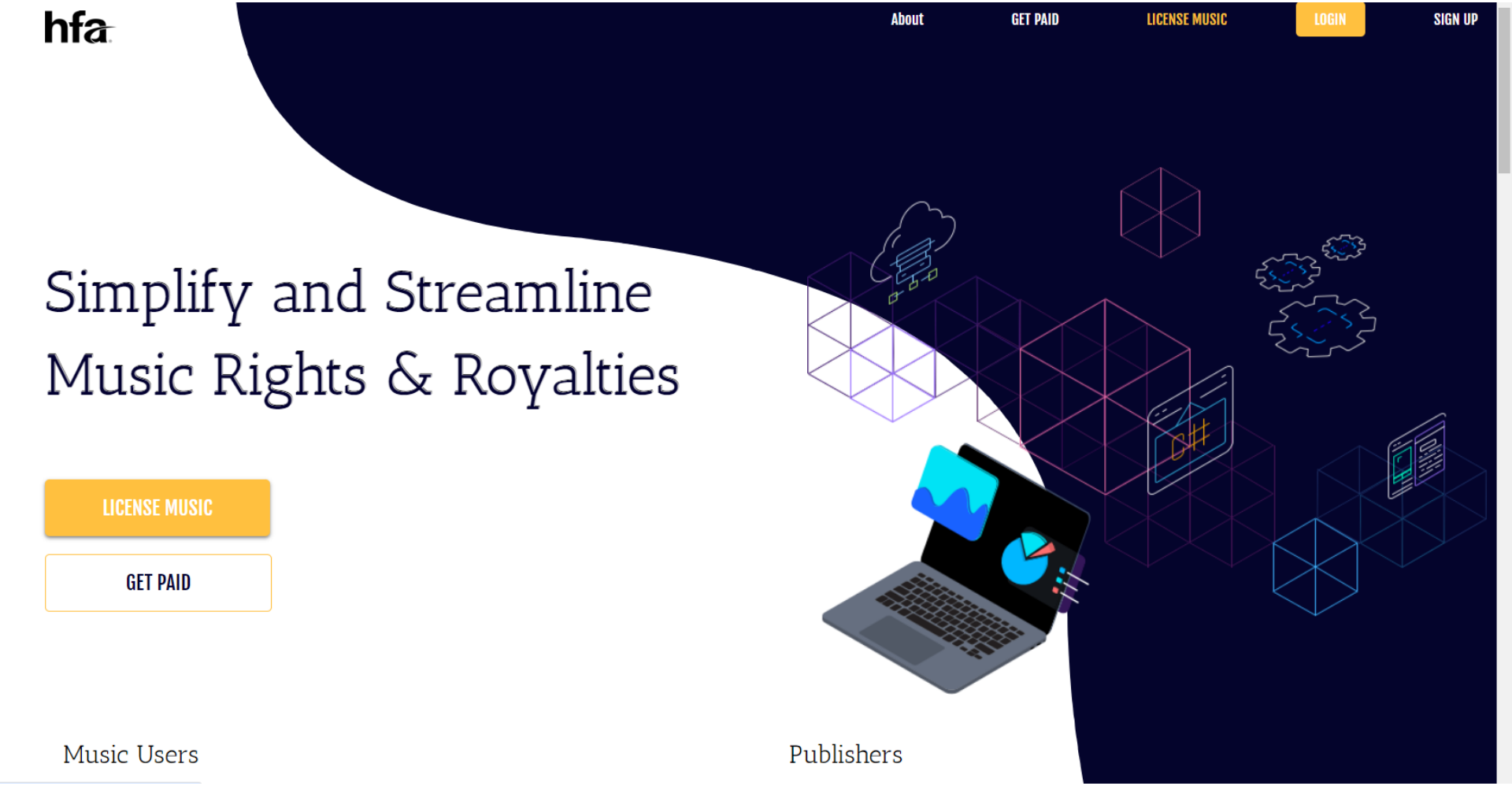
- It's a subsidy – a way for new artists to avoid paying market rates to record familiar music.
- But even famous and wealthy artists can take advantage of it, and they do.

For debate: Should the mechanical license be repealed?

- *PRO: Everyone should pay market rates. Owners of copyrights in successful compositions should be entitled to control how their works are used and what they're paid for them. New artists should pay their own way or write their own works.*
- *AND The mechanical license subsidizes mediocre work that competes with (and often dilutes) the artistic and commercial power of the originals. Successful works shouldn't have to co-exist with lousy versions of the same things.*

- *CON: It limits the market power of music publishers,*
- *AND: It offers a relatively inexpensive path into the industry for new artists, because they can get a market foothold via familiar music, plus*
- *It promotes diversity of musical styles and genres.*

Copyright and the Music Industry: Voluntary Licensing



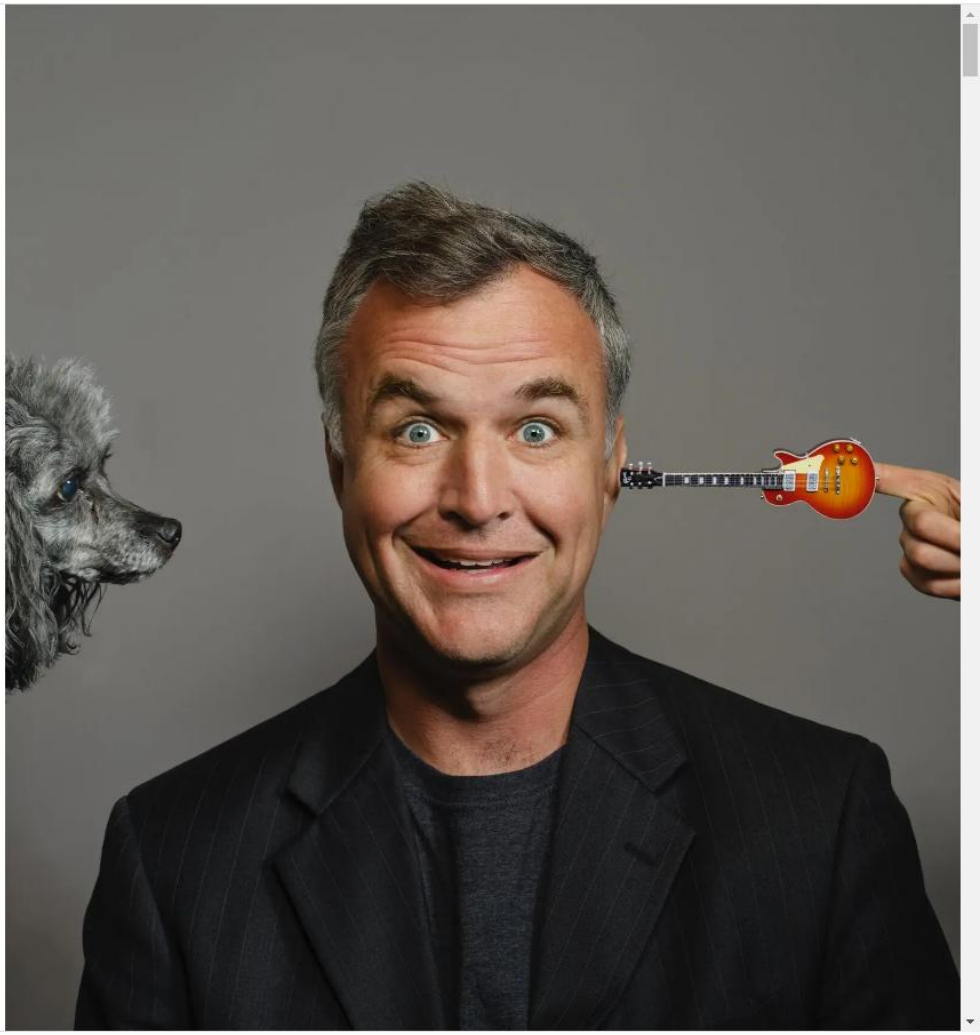
Copyright and the Music Industry: *Feist* Meets Spotify Meets Algorithms

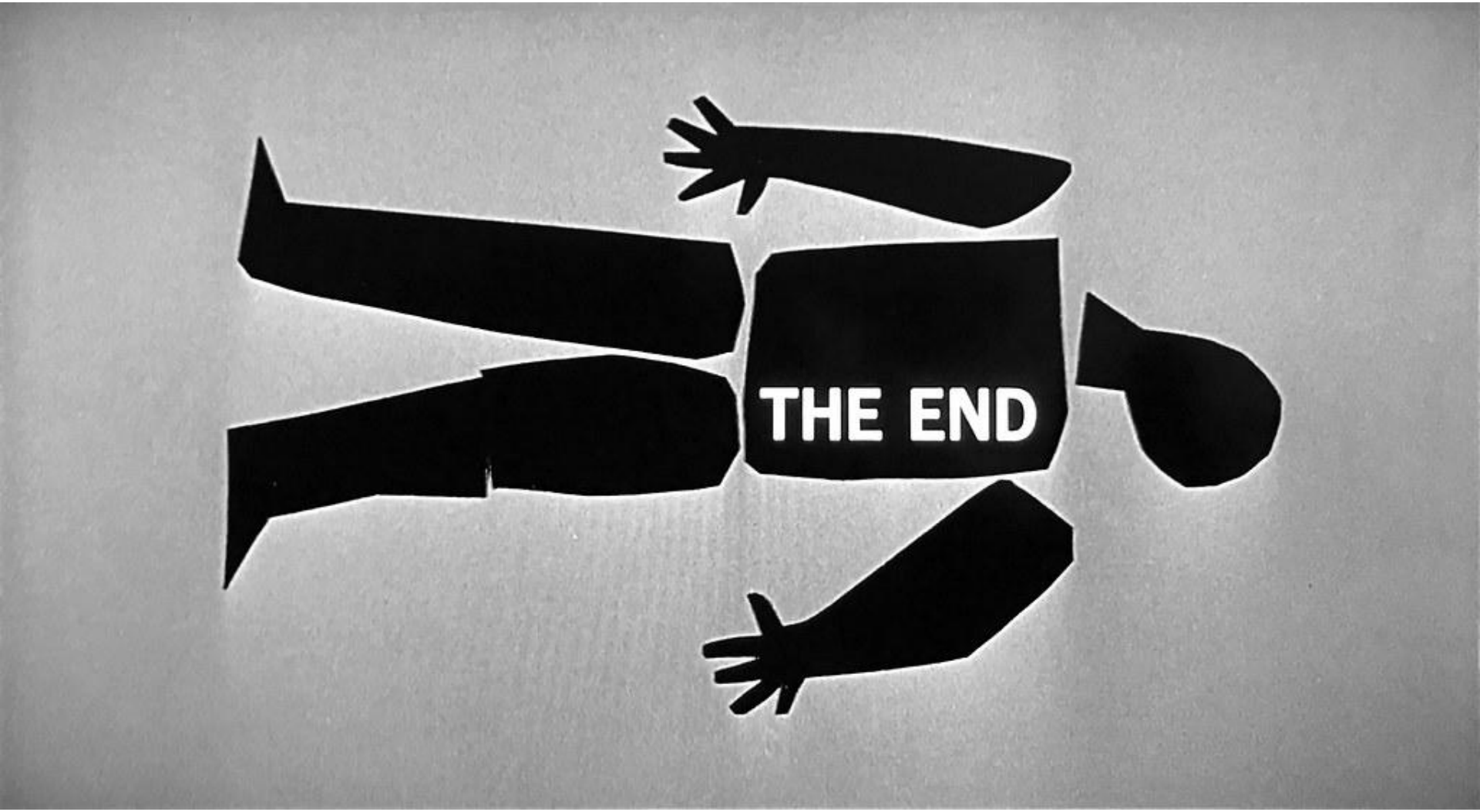
The New York Times Magazine

Account

Why Did This Guy Put a Song About Me on Spotify?

The answer involves a remarkable — and lucrative, and ridiculous — scheme to game the way we find music today.

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