Common Sense, Accommodation and Sound Policy for the Digital Music Marketplace

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Introduction

"We stand here confronted by insurmountable opportunities."
Pogo

The music industry is in desperate trouble. It has been in a decade-long death-spiral for which no one has yet offered a recovery plan that has worked. It is my purpose in this article to propose a comprehensive

approach to rights administration that will not only reverse the music industry's decline but will also simultaneously promote technological innovation, facilitate the growth of all manner of digital audio services, and allow consumers to participate in the lawful enjoyment of music when, where and how they want.

The plan I propose involves the creation of a new right for music industry rights holders specifically adapted for application to digital transmissions of sound recordings and the musical works they embody. This new right, the "digital transmission right," would be implemented through a combination of voluntary collective rights management and licenses freely negotiated between individual rights holders and those who would be legally liable for providing digital transmissions of recorded music.

The digital transmission right would not depend on the efficacy of access restrictions or anti-copying measures for its success. Its monetization would not involve the imposition of a statutory license or an Internet access tax. And it would not require the impressment of Internet service providers or colleges and universities as enforcers on behalf of music industry rights holders.

Through the digital transmission right, implemented as I suggest in this article, authorized transmissions of recorded music could be made available from the largest number and widest array of licensed sources, anytime, anywhere, to anyone with network access. This, in turn, would provide songwriters, music publishers, recording artists and record labels, in the aggregate, with their best opportunity to do as well—if not better—financially than they have done under the system that the digital transmission right would replace. That is the result for which I seek to lay a foundation in this article.

A. *The Source of the Problem*

The music industry's predicament is largely of its own making. It results from insistence by those who benefited most from how the industry operated before the Internet arose that the established relationships upon which their past successes were based be preserved as the digital music marketplace develops. Because of this unwillingness to change, the industry has failed to undertake the transformation now needed to prosper.

The major record labels have primarily driven the overall industry response to the challenges presented by advent of the Internet. They are committed to the single-minded pursuit of ways in which to make the Internet safe for the sale of recorded music on terms and conditions that they alone decide. They risked everything on the belief that through a combination of physical means, such as digital rights management

("DRM"), and the force of law, they could contain unauthorized Internet distribution of copies of their recordings.

This has proven not to be possible. In my view, the objective never was attainable. The Internet is fundamentally incompatible with a sales-based revenue model for works of popular culture that can be rendered in digital format. This is especially so for recorded music.

Prior to the Internet, large-scale piracy of physical products, such as records, tapes and CDs required an organizational infrastructure, manufacturing facilities, distribution channels and lots of capital. It was cumbersome at best and vulnerable at every turn to the industry's anti-piracy campaigns. Also in the past the copying of music by individual consumers was limited to the making of analog tape recordings the sound quality of which degraded significantly with each successive generation of copy. Moreover, the means by which consumers were able to distribute these tapes was limited to face-to-face transactions between individuals who handed-off copies to each other. This conduct, while troubling, never imperiled the industry.

The Internet changed this dynamic. Music piracy has become cheap, quick, easy, and ubiquitous. Record labels already have made nearly all recorded music lawfully available in digital format through the sale of CDs. Practically anyone can turn these recordings into digital audio files and make them available on the Internet. Every Internet user, whether or not involved in P2P file-sharing, file-streaming, or social networking, and every webcaster, podcaster, or other digital audio service provider in the world is a potential source of unauthorized mass distribution of recorded music in pristine and unprotected form. In addition, it is now possible to copy one's computer hard drive onto a pendant-sized device and loan that to a friend so that he or she can directly copy the tens of thousands of MP3 files that may be loaded there. From the music industry's perspective, this conduct is neither quaint nor benign.

Through the Internet, the market for sale of individual recordings can be saturated in a moment's time and without payment of any royalties to any music industry rights holders. The dollar amount at risk may well be greater for larger rights holders, but all rights holders, large and small, are impacted to the extent they share in revenue earned from the sale of recordings.

Given this, the industry's principal revenue model, based on the sale of hit recordings at thin margins, can no longer be sustained. Neither law, nor technology, nor moral suasion will change this result.

In practice, the labels' strategy to salvage their sales-based revenue model has compelled them to resist consumer demand for full, unfettered, DRM-free access to music. This has entailed a campaign

of copyright infringement litigation against audio service providers, P2P and social network operators, and individual Internet users. It has also required suppression of free markets for technology products and consumer electronics that may enable the commission of acts of access, copying and distribution for which music industry rights holders have exercised their prerogative under existing law to refuse to grant authorization.

Nevertheless, in 2006, the ratio of illegal to legal song downloads was 40:1, and 20 billion recordings were downloaded that year without authorization.[1]

Record label revenue from the sale of recordings has steadily declined year after year.[2] According to the Recording Industry Association of America (the "RIAA"), CD sales generated $14.3 billion for 2000.[3] If revenue from the sale of CDs had only kept pace with the growth of the U.S. economy, the industry would earn approximately $17 billion for 2007.[4] Instead, the industry is expected to report only approximately $10.3 billion in CD sales for 2007.[5] In addition, the industry projects that global sales of physical products will drop by 61 percent by 2009.[6]

Record labels are not the only music industry rights holders to be harmed by these lost sales. They also mean lost record royalties for recording artists, and lost mechanical rights royalties for songwriters and music publishers.

Compounding these losses, the labels' strategy has undercut the ability of songwriters and music publishers, on the one hand, and recording artists and record labels themselves, on the other, to benefit financially from Internet streaming performances of their respective musical works and sound recordings. The major labels (and music publishers) fear that

1. Richard Wachman, *Pirates Still Have All The Best Tunes*, THE OBSERVER, May 27, 2007, *available at* http://observer.guardian.co.uk/business/story/0,,2088830,00.html (citing figures provided by IFPI).

2. Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, June 19, 2007, *available at* http://rollingstone.com/news/story/15137581/the_record_industrys_decline (citing sales figures provided by Nielsen SoundScan).

3. RECORDING INDUSTRY ASS'N OF AMERICA, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA'S 2000 YEAREND STATISTICS, *available at* http://76.74.24.142/9C601D59-D955-CE22-6CC0-CF61CC8A829D.pdf (last visited Dec. 15, 2007).

4. Greg Sandoval, *Radiohead's Web Venture Spooks Wall Street*, CNETNEWS.COM, Nov. 7, 2007, *available at* http://www.news.com/8301-10784_3-9812275-7.html (last visited on Dec. 15, 2007) (citing estimates prepared by Richard Greenfield, Pali Research (the research division of Pali Capital, Inc.)).

5. *Id*.

6. Alexandra Osorio, *IFPI, Pricewaterhouse Deliver Drizzly CD Sales Forecast*, DIGITAL MUSIC NEWS, June 4, 2007, *available at* http://digitalmusicnews.com/stories/060407ifpi/ (last visited on Dec. 9, 2007), citing estimates prepared by IFPI, PricewaterhouseCoopers and Soundbuzz.

streaming will allow consumers to make unauthorized copies of the recordings being transmitted. Accordingly, because preservation of the sales-based revenue model is foremost in their minds, they have sought to suppress Internet streaming altogether, and to hobble, to the greatest extent possible, those audio service providers who are able to obtain authorization to offer streaming of recorded music.

For their part, music publishers, and the mechanical rights and public performance rights licensing organizations (the latter being "PROs") with which they are affiliated, have pursued a separate but related Internet strategy no less maladapted to success than that of the record labels. They have based their Internet licensing efforts, in large part, on the proposition that every Internet transmission of a musical work involves both the making of a copy of that work as well as a public performance of it; and that separate license fees must be paid for each. For example, music publishers assert a right to collect mechanical license fees for on-demand streaming performances of their songs even though such performances do not result in permanent copies being retained by the end users who listen to them. They also assert a right to collect public performance license fees for transmissions that only result in downloads and which are not audible by end users while being sent.

This effort by music publishers and their licensing representatives to extract multiple license fees for a single transmission of a single song has caused considerable consternation among audio service providers who view it as "double dipping."[7] In a March 22, 2007, statement before the House Subcommittee on Courts, the Internet and Intellectual Property, the United States Register of Copyrights observed that, "One of the major frustrations facing online music services today, and what I believe to be the most important policy issue that Congress must address, is the lack of clarity regarding which licenses are required for the transmission of music."[8]

Over all, the music industry's Internet strategy has resulted in fewer licensed transmissions of fewer works and slowed the growth of royalties that songwriters, music publishers, recording artists and record labels otherwise may have earned. In Part I of this article, I will discuss in

7. *See*, *e.g.*, Press Release, Digital Media Ass'n, Digital Media Association Asks Court to Deny Music Publisher Double-Dip on Music, Movie and Television Downloads (Feb. 28, 2007), *available at* http://digmedia.org/content/release.cfm?id=7216&content=pr.

8. *Reforming Section 115 of the Copyright Act for the Digital Age*: *Hearing before the House Comm. on the Judiciary*, *Subcomm. on Courts*, *the Internet and Intellectual Property*, 110th Cong. (2007) (Statement by Marybeth Peters, the Register of Copyrights, United States Copyright Office), *available at* http://www.copyright.gov/docs/regstat032207-1.html.

greater detail the music industry's responses to the challenges presented by the Internet and the negative consequences those responses have had for the industry itself as well as for the other stakeholders in the digital music marketplace.

B. *The Source of the Failure*

The music industry's strategy failed because it was based on a fundamental misapprehension, shared by Congress, regarding the impact the Internet would have on the industry's traditional ways of doing business.

When, in 1995, Congress first granted record labels a limited digital performance right in their sound recordings, it observed that, in light of the rise of digital technologies, then-current law was inadequate to protect the music industry's traditional business model. According to the Senate Judiciary Committee:

> "[C]urrent copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenue derived from traditional record sales."[9]

The goal of the Digital Performance Right in Sound Recordings Act of 1995 (the "DPRSA")[10] was to "provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies…."[11]

Congress reaffirmed its understanding and intent regarding the matter when it passed the Digital Millennium Copyright Act of 1998 (the "DMCA").[12] The House Conference Committee stated that the DMCA was intended to achieve two purposes:

> "[F]irst, to further a stated objective of Congress when it passed the…[DPRSA] to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services."[13]

9. S. REP. NO. 104-128, at 14 (1995).
10. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).
11. S. REP. NO. 104-128, at 15 (1995)(DPRSA S. Rep.).
12. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 1, 112 Stat. 2860 (1998).
13. H.R. REP. NO. 105-796, at 79–80 (1998).

None of these goals has been achieved. The music industry no longer controls the market for distribution of its products; little licensing is going on; and the arrival of new technologies has been stymied.

Prior to the Internet, the reproduction and distribution rights, on the one hand, and the public performance right, on the other, were separate and distinct, exploited in different ways, and subject to different business models and licensing regimes. Digital technology generally, and the Internet in particular, has rendered unenforceable certain of these pre-existing rights and blurred the distinctions between others. Through the Internet, the means of reproduction, distribution and public performance of songs and of the recordings that embody them have been merged into a single act of digital transmission that can be initiated and completed on a massive scale in a matter of moments at practically no cost by anyone and everyone in the world with network access. The industry's strategy to salvage the sales-based revenue model proceeded in opposition to these changed circumstances which it never could have overcome.

The industry's traditional ways of doing business depend on the ability to control how consumers interact with music. However, it is not possible, either directly or indirectly, for the music industry to control the conduct of end users on the Internet. Consumers will continue to download and share whatever music they wish whether or not it is legal to do so. Sources beyond the industry's control will continue to provide consumers with the music that they demand whether or not rights holders approve or are paid. Digital audio services that the music industry does support but which fail to meet consumer demand for full, unfettered, DRM-free access to music will continue to leave the sales-based revenue model vulnerable to widespread infringement by consumers who will not accept less than they already know they can have.

In addition, the industry's existing revenue models depend on the ability to distinguish between which of the many rights in which works have been exploited, how and by whom. However, it is neither practical nor reasonable for the industry to base its licensing regimes on the need to know, in each of what is already tens of billions of instances, whether consumers merely listen to streaming performances, download and retain perfect digital copies of the recordings involved, or both.

The problem does not lie with the Internet. Nor does it lie with technology run amok. Nor with consumers who cannot be made to relinquish their newly-acquired ability to enjoy music when, where and how they want. Rather, the problem lies with the music industry's addiction to the sales-based revenue model. As long as its fortunes are tied to

sales it must continue punitive litigation against consumers and interference in the free markets for technology, consumer electronics, and digital audio services.

C. *A Different Approach*

Yet, even if the industry were now willing to undertake the transformation needed to meet the changed circumstances imposed on it by the Internet, it could not do so without Congressional assistance.

The rights of music industry rights holders do not arise from the "free market." Congress, through the Copyright Law, specifies the rights that songwriters, music publishers, recording artists and record labels shall have in their musical works and sound recordings. In turn, the business models that the industry may lawfully pursue are delimited by the nature and scope of the rights Congress has granted it. Accordingly, there cannot be a "free market" solution, as such, to the crisis that grips the digital music marketplace. Congress alone has the authority to induce the change that is needed.

In my view, public policy should strongly support both the right and the opportunity of music industry rights holders to derive ample rewards from their contributions to culture and commerce. By the same token, however, the music industry should not have the right to demand that public policy support its desire to do business in a particular way. What is needed is an alternative to the existing rights structure and corresponding business models for digital transmissions of musical works and sound recordings. I propose such an alternative in Part II of this article.

I suggest that Congress should aggregate the rights of songwriters, music publishers, recording artists and record labels in their respective musical works and sound recordings and create a single right for digital transmissions of recorded music. This digital transmission right would be a new right, not an additional right. It would replace the parties' now-existing reproduction, public performance and distribution rights for purposes of digital transmissions.

Part II examines the definition and scope of this new right; ownership and the authority of rights holders to grant licenses; the responsibility of rights holders to account to each other for royalties earned; conduct for which a license would be required; and the parties who would be liable for unauthorized transmissions of recorded music. Further, I will discuss the obligations under the digital transmission right of digital audio service providers (including, for example, web site operators and operators of P2P and social networks), and of consumers; and the

impact of infringing uses on the industry's ability to monetize the digital transmission right.

By its terms, the digital transmission right would apply to over-the-Internet transmissions of traditional broadcast radio stations. In Part II, I suggest that the entire operation of traditional broadcasters—both their over-the-air and their over-the-Internet transmissions—should be treated as a single transmitting entity under the digital transmission right; and that the total license fee liability of radio broadcasters should be calculated on the same basis and in the same manner as that of any other digital audio service provider. This would allow US-based recording artists and record labels to benefit from analog broadcast performances of recorded music (as their counterparts elsewhere already do, and as songwriters and music publishers everywhere always have) without the need for Congress to enact a separate analog performance right in sound recordings and without burdening traditional broadcasters with excessive new license fee obligations for their transmissions of recorded music.

In Part III, I provide a plan for implementation of the digital transmission right; a specific means by which to turn this new right into license fees and to turn those license fees into royalty payments for music industry rights holders. For these purposes, I favor a combination of licenses freely negotiated between rights holders and audio service providers, and voluntary collective rights management. In my view, the ideal marketplace would contain at least one collective in each territory whose catalog encompassed all or nearly all recordings and which was authorized to grant worldwide rights at its local rates for all digital transmissions of recorded music that originate in its territory.

Also in Part III I discuss the advantages of voluntary collective rights management; offer suggestions regarding governance, transparency, accountability and regulation of collectives; discuss the relationship of collectives to the individual rights holders who are their members; the relationship to each other of collectives in different territories; the relationship of collectives to digital audio service providers; the basis upon which collectives might license digital transmissions, including transmissions that begin in one territory and end in another; the role of direct licensing by individual rights holders in the context of collective management; the conduct of music use monitoring to support royalty distribution; and the allocation and payment of royalties to rights holders, including royalties payable for transborder transmissions.

I also suggest a basis for calculating license fees under the digital transmission right; though I will not suggest specifically how much license fees should be. That later function would require access to

economic data that I do not have. In any event, the setting of license fees themselves is, quintessentially, the proper subject of negotiations between the interested parties.

Nevertheless, in my view, license fees under the digital transmission right should reflect the *benefit realized* by service providers from their transmissions of recorded music. To this end, I will suggest a structure for calculating this benefit in different circumstances, including, for service providers who charge consumers to receive transmissions of recorded music; those who transmit recorded music in connection with advertising; those who transmit recorded music in connection with the sale of goods or services other than access to music itself; and those who do not charge consumers to receive transmissions of music, do not carry ads, and do not sell goods or services. I will also suggest license fee structures for over-the-air broadcast radio stations and the web sites they operate; for P2P file-sharing networks; and for those instances in which it may be necessary for individual end users to pay license fees under the digital transmission right.

Finally, in Part III I propose a means by which to secure the music industry's financial wellbeing during a limited period of transition from its traditional ways of doing business to the digital transmission right.

I. The Music Industry's Efforts to Preserve the Way Things Were, and Their Consequences

Music was the first killer app among consumer products on the Internet, and the threat to the music industry's traditional ways of doing business—especially its sales-based revenue model—was apparent from the outset. Unfortunately, though music has been available online for more than ten years, the industry has failed to undertake the transformation needed to succeed in the digital music marketplace. Instead, it has sought to preserve the established relationships upon which its past successes were based and to extend its sales-based revenue model well beyond what has turned out to be its effective reach.

To these ends, the industry has experimented with a variety of access restrictions and anti-copying measures. All of these efforts have engendered effective technological countermeasures and news of each successful hack quickly found its way to everyone who cared to know it. Those who create DRM tools for the music industry have proven to be no match for smart kids with computers, many of whom are beyond the easy reach of the law. Moreover, it is not necessarily desirable that the technology used to protect recordings should be beyond the grasp of young people. Nor is it realistic to seek to protect music as if it were

national security information. And while it is generally illegal to circumvent technological measures used to prevent unauthorized access to and copying of copyrighted content,[14] there are circumstances in which circumvention is lawful.[15] In any event, punishing music enthusiasts as criminals has not brought about the principal result that the industry seeks. The landscape is littered with failed DRM schemes and abandoned security initiatives. There is no reason to believe that the result will be different next time, or ever.[16]

The industry also has used its substantial lobbying resources in an effort to persuade lawmakers to protect music and other entertainment content according to current and sometimes inapposite legal mechanisms that effectively chill the development and distribution of new products and services.

The industry has pursued legislation banning hardware and software that might undermine the sales-based revenue model by inducing infringement.[17] It has also sought to ban the use of digital audio file formats that cannot be configured to inhibit consumers from downloading music without authorization. It proposed legislation that would prohibit the use of file formats, such as MP3, by audio service providers who wish to avail themselves of the existing—albeit limited—statutory license in the United States for webcasting.[18] Also, in connection with

14. *See* 17 U.S.C.A. § 1201.

15. The Copyright Office conducts periodic rulemaking proceedings to identify those classes of works to which technological measures have been applied which adversely affect users in their ability to make non-infringing uses of the works in question. In its most recent rulemaking on this subject, the Copyright Office identified six categories of works of which non-infringing uses are, or are likely to be, adversely affected by application of technological measures and regarding which circumvention is permissible. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed.Reg. 68,472 (proposed Nov. 27, 2006)(to be codified at 37 C.F.R. pt. 201), *available at* http://www.copyright.gov/fedreg/2006/71fr68472.html.

16. This is not to say that DRM does not have significant beneficial applications. It can be a valuable tool when used to prevent unauthorized access to digital files containing medical records, business information, private correspondence, and other non-public material. To be sure, DRM can be compromised when applied to these categories of content; but the nature of those who would seek to access such content without authorization, the resulting injury to the interested parties, and the degree of public tolerance of enforcement actions against such wrong-doers, is different in kind than the circumstances involved when the efforts of music industry rights holders to protect individual recordings through DRM are overcome.

17. *See* Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004).

18. *See* The Platform Equality and Remedies for Rights Holders in Music Act of 2006, S. 2644, 109th Cong. (2007), which would have amended Title 17 § 114(d)(2)(A) by adding after clause (iii) the additional requirement that qualifying webcasters must

settlement discussions following the new statutory license fee structure for webcasting announced by the Copyright Royalty Board (the "CRB") on March 2, 2007,[19] the industry announced it would seek to require webcasters to employ DRM to prevent end users from "engaging in 'streamripping'—turning Internet radio performances into a digital library."[20]

The industry has also turned to the courts for assistance in maintaining the status quo as it existed prior to advent of the Internet. At the industry's urging, the courts have shutdown services that offered consumers new and appealing ways either to acquire or to interact with music. For example, the courts closed Napster when it operated as a centralized P2P file-sharing service with more than 60,000,000 users,[21] and closed MyMP3.com, a music locker service that provided consumers with online access to their music collections from anywhere in the world.[22] In addition, and again at the music industry's urging, the Supreme Court has upheld the proposition that those who distribute products and promote their use for activities that may infringe copyright are liable for copyright infringement committed by others.[23]

As a result, consumer electronics makers, fearing liability, have been slow to offer greater interoperability between the many recording, playback, and communications devices that are available. They have also

employ such transmission technology "that is reasonably available, technologically feasible, and economically reasonable to prevent the making of copies or phonorecords embodying the transmission. . . ."

19. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order, 72 Fed. Reg. 24,084, 24,114 (May 1, 2007)(to be codified at 37 C.F.R. pt. 380), *available at* http://www.loc.gov/crb/fedreg/2007/72fr24084.pdf. *See also infra* note 41 and accompanying text.

20. Soundexchange.com, News, SoundExchange Confirms Minimum Fee Offer (July 13, 2007), *available at* http://soundexchange.com.

21. Transcript of Judge Marilyn Hall Patel's Ruling, A&M Records, Inc. v. Napster, Inc. (N.D. Cal. July 26, 2000), *available at* http://news.findlaw.com/legalnews/lit/napster/s/patelruling1.html; John Borland and Cecily Barnes, *Judge Issues Injunction Against Napster*, CNET NEWS.COM, July 26, 2000, *available at* http://www.news.com/2100-1023-243698.html; A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002); *see*, *also*, Sam Costello, *Court Orders Napster to Stay Shut*, PC WORLD, March 25, 2002, *available at* http://www.pcworld.com/article/id,91144-page,1/article.html; Janelle Brown, *Napster's Wake*, SALON.COM, May 17, 2002, http://dir.salon.com/story/tech/feature/2002/05/17/napster_wake/index.html.

22. UMG Recordings, Inc. v. MP3.com, Inc., 92 F.Supp.2d 349 (S.D.N.Y. 2000); *see also* Brad King, *RIAA Wins Suit Against MP3.com*, WIRED, April 28, 2000, *available at* http://www.wired.com/techbiz/media/news/2000/04/35933.

23. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, *Ltd*, 545 U.S. 913, 919 (2005), the Court held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."

been reluctant to offer new products with next generation capabilities, such as web-enabled home entertainment systems or embedded device recording capabilities. In addition, technology firms and their investors, also fearing liability, have withdrawn support for certain of their own previously released software products or located their operations off-shore. One can only speculate as to the magnitude of the revenue opportunities lost by consumer electronics makers and technology firms because of the continued irresolution of the crisis in digital music licensing.

Moreover, efforts to limit the market to copyright "friendly" files, players, and other devices and systems may raise fair use and free speech concerns depending on whether and how they impede individuals from communicating with each other. Besides, consumers want devices that accept all works, and recordings that play on all devices; they want to enjoy music when, where and how they themselves decide.

The industry also has steadfastly refused to authorize services that offer consumers full, unfettered, DRM-free access to music. To be sure, the industry supports services that offer DRM-encumbered music files; files in less well known formats, such as MPQ; files that are tethered to particular playback devices; files that cannot be shared; files that time-out; files only available while the consumer remains a subscriber of the service from which the music was obtained; or files subject to other use restrictions. Many of these industry-sanctioned services will do well, attracting enthusiastic and loyal users. However, they are, at best, alternatives to the services that consumers demand, not substitutes for them. Because these offerings fall short of responding to consumer demand, they leave the sales-based revenue model vulnerable to widespread infringement by consumers who refuse to accept less than they already know they can have.

In May, 2007, EMI released recordings from its catalog through iTunes in what EMI called "DRM-free formats."[24] According to EMI's then-serving CEO, Eric Nicoli, "We believe that fans will be excited by the flexibility that DRM-free formats provide, and will see this as an incentive to purchase more of our artists' music."[25] However, EMI's offering through iTunes is not "DRM-free." It relies on the use of

24. Amy Wong, *Apple Debuts Unprotected Songs Online*, AP TECHNOLOGY WRITER, May 30, 2007, *available at* http://www.ibtimes.com/articles/20070530/apple-itunes plus.htm.

25. Press Release, EMI Group, EMI Music Launches DRM-Free Superior Sound Quality Downloads Across Its Entire Digital Repertoire (April 2, 2007), *available at* http://www.emigroup.com/Press/2007/press18.htm.

watermarking technology to encode each music file with information that personally identifies the consumer who purchases it.[26]

EMI's use of watermarking does not signal abandonment of DRM. It merely indicates a shift in strategy regarding its use. Gone are EMI's efforts to restrict access to its recordings by physical means. Instead, if EMI were to discover that its watermarked files had been distributed over the Internet without authorization, it could use the personally identifying information contained in them to locate and sue the consumer who purchased the particular files from iTunes (or from whatever other online music retailers through which EMI may make its recordings available).

I doubt that this use of watermarking will reverse the erosion of sales of EMI's recordings. Eventually, the means by which to delete the personally identifying information from these music files will be publicly available on the Internet; as will the EMI recordings themselves, truly free of DRM. In any event, what will it benefit EMI, or any other record label, to obtain judgment in an infringement action against an individual from whom it will not be possible to recover in damages anything approaching the loss suffered because of the infringement? If the expected benefit is deterrence of other wrong-doers, that expectation likely will go equally as unfulfilled as it has with the industry's ongoing infringement litigation campaign against individual users of P2P file-sharing networks.

As of this writing, EMI has yet to release specific data regarding its sales of watermarked files through iTunes. Nevertheless, on August 6, 2007, EMI reported that revenue had fallen 5.1 percent during the preceding 18-week period compared to the same period in 2006.[27] This decline included a 26 percent increase in revenue from digital sales but a 19.8 percent decline in revenue from sales of physical products.[28]

Universal Music Group also has announced that it will "test" the sale of its music in "DRM-free" formats, albeit not through iTunes.[29] It is unclear at this time, however, whether Universal will also rely on

26. Greg Sandoval, *Apple Criticized for Embedding Names, E-Mails in Songs*, ZDNET NEWS, June 2, 2007, http://news.zdnet.com/2100-9595_22-6188337.html?part=rss&tagg=feed&subj=zdnn.

27. Press Release, EMI Group, Interim Management Statement for the 18 Week Period from 1 April to 6 August 2007 (Aug. 6, 2007), *available at* http://www.emigroup.com/Press/2007/press55.htm.

28. *Id*.

29. Louis Hau, *Universal To Set Its Music Free,* FORBES, Aug. 10, 2007, *available at* http://forbes.com/business/2007/08/10/universal-music-download-biz-media-cx_lh_0810bizuniversal.html; *Universal Music Takes on iTunes*, BUSINESSWEEK.COM, Oct. 22, 2007, http://www.businessweek.com/magazine/content/07_43/b4055048.htm?chan=search.

watermarking technology when its music is sold without physical access restrictions.[30]

By its refusal to meet consumer demand, the music industry has relegated consumers to unlicensed services. In turn, the industry has used technological measures in an effort to disrupt these services. For example, it seeds them with adware and spyware.[31] It also engages in a practice known as "spoofing" by which consumers who search P2P networks for music files have instead been sent corrupted files that may damage their computers.[32]

The industry has also undertaken an aggressive campaign of infringement litigation against consumers, already having sued more than 20,000 of its own customers, seeking ruinous damages for conduct occurring in the privacy of people's homes and dorm rooms.[33] In connection with this effort, the industry has sought legislation that would authorize the Department of Justice to initiate civil actions for copyright infringement against those involved in P2P file-sharing or other forms of unauthorized distribution of recorded music with a value of greater than $1,000.[34] It also has sought legislation that would require colleges and universities that participate in federal financial aid programs to act as enforcers on the music industry's behalf.[35]

30. One commentator at WIRED noted that "MP3 downloads of Universal recordings . . . do contain a watermark, presumably so Universal can track how many end up on peer-to-peer networks." Seth Mnookin, *Universal's CEO Once Called iPod Users Thieves. Now He's Giving Songs Away*, WIRED, Nov. 27, 2007, *available* at http://www.wired.com/entertainment/music/magazine/15-12/mf_morris?currentPage=1.

31. Andrew Brandt and Eric Dahl, *Risk Your PC's Health for a Song?*, PC WORLD.COM, December 29, 2004, http://www.pcworld.com/article/id,119016-page,1/article.html.

32. Andrew Ross Sorkin, *Software Bullet is Sought to Kill Music Piracy*, THE NEW YORK TIMES, May 4, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?sec=technology&res=9F0CE1D7123CF937A35756C0A9659C8B63; John Borland, *Start-Ups Try To Dupe File-Swappers*, CNETNEWS.COM, July 15, 2002, http://news.com.com/2100-1023-943883.html; *Record Industry 'Spoofs' Net Pirates*, BBC NEWS, July 4, 2002, *available at* http://news.bbc.co.uk/1/hi/entertainment/new_media/2093931.stm.

33. *See, generally* Ray Beckerman, "Recording Industry vs. The People," http://info.riaalawsuits.us/ (last visited Oct. 30, 2007) (Web site maintained by Ray Beckerman, a New York City-based attorney active in representing consumers in copyright infringement actions brought against them by the Recording Industry Association of America ("RIAA")). *See also id*., http://info.riaalawsuits.us/documents.htm (last visited Oct. 30, 2007) (Table of certain of these cases, including links to pleadings and other documents).

34. Intellectual Property Enforcement Act of 2007, S. 2317, 110th Cong. (introduced Nov. 7, 2007); *see also* Declan McCullagh, *Senators Want Justice Department To Sue P2P Pirates*, CNET NEWS.COM, Nov. 7, 2007, http://www.news.com/8301-13578_3-9813358-38.html.

35. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong., §§ 487 (Institutional and Financial Assistance Information for Students) and 494 (Campus-Based Digital Theft Prevention) (introduced Nov. 9, 2007).

Another element of the industry's strategy has been its efforts to suppress Internet streaming of recorded music. The industry fears that webcasting will allow consumers to make unauthorized digital copies of recordings if they know—or are reasonably able to anticipate—when particular recordings will be streamed. Accordingly, the industry, led by the major record labels, has sought to suppress Internet streaming altogether, and to hobble, to the greatest extent possible, those audio service providers who are able to obtain the authorization needed to offer streaming lawfully.

With the exception of services that qualify for a statutory license, the Copyright Law, revised as urged by the recording industry, grants record labels the exclusive right to authorize—or to refuse to authorize—the activities of all digital audio services that offer Internet streaming of recorded music. In combination with the exclusive right to distribute copies of their recordings over the Internet, the right to control streaming effectively allows the major labels to operate as gatekeepers of licensed Internet transmissions of recorded music within reach of United States law.

The principal exception to this broad grant of rights relates to that limited class of webcasters who qualify for a statutory license. However, in order to qualify, webcasters must comply with certain business model limitations, content restrictions, and user-interface requirements. For example, they may not offer interactive programming by which consumers can request that particular recordings be performed or that music programming be specially created for them;[36] may not offer programming dedicated to particular artists, or containing more than a few songs by the same artist or from the same recording;[37] may not promote their services by publishing program guides or by making announcements of the recordings they will stream, other than immediately prior to the transmission itself;[38] and may not offer archived programs shorter than five hours duration.[39] On the other hand, in order to promote the sale of recordings on behalf of the record labels whose music they stream, qualifying webcasters are required to identify in textual data to

36. In order to qualify as an "eligible nonsubscription transmission" service, a webcaster's transmissions must be, inter alia, noninteractive. 17 U.S.C.A § 114(j)(6) (West 2005, Supp. 2007); *see*, *also*, H.R. REP. No. 105-796, at 87–88 (1998) (Conf. Rep.).

37. 17 U.S.C.A §§ 114(d)(2)(C)(i) and 114(j)(13) (West 2005 & Supp. 2007).

38. *Id*. § 114 (d)(2)(C)(ii) (West 2005, Supp. 2007); *see*, *also*, H.R. REP. No. 105-796, at 81–82 (1998) (Conf. Rep.).

39. 17 U.S.C.A §§ 114 (d)(2)(C)(iii), 114(j)((2) (West 2005, Supp. 2007); *see*, *also*, H.R. REP. No. 105-796, at 87–88 (1998) (Conf. Rep.).

be displayed on the end user's computer screen the title of the recording being streamed and the name of the recording artist.[40] This interference with webcasting has no counterpart in the music industry's relationship with non-digital audio program services. It diminishes webcasting unnecessarily, rendering it less compelling in many ways than over-the-air broadcast radio.

The record labels do not intend to allow webcasting to thrive; they have used the rate setting process as a means to throttle it. The expectation is that the increase in statutory license fees for webcasting announced by the CRB[41]—which measures between 300 percent and 1,200 percent over prior fees—will cause large numbers of existing webcasters to shutter their operations.[42] In discussing the impact of the CRB's decision on the continued viability of webcasting, John Simson, Director of SoundExchange (which represents record labels in rate setting proceedings under the statutory license), asked rhetorically: "Is 10,000 stations the right number? Does having so many Web stations disperse the market so much that it hurts the artist? What's the right number? Is it 5,000? Is it less?"[43]

Contrary to the implications of Mr. Simson's statement, limiting the number of webcasters who qualify for the statutory license is especially

40. 17 U.S.C.A. § 114(d)(2)(c)(ix) (West 2005, Supp. 2007); *see also* H.R. REP. No. 105-796, at 84 (1998) (Conf. Rep.).

41. The CRB imposed a per-song, per-performance, per-listener license fee for all digital audio transmissions of copyrighted sound recordings by webcasters. The rate rises from $.0008 per-performance for 2006 to $.0019 per-performance for 2010. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order, 72 Fed.Reg. 24,084, 24,111 (May 1, 2007)(to be codified at 37 C.F.R. pt. 380), *available at* http://www.loc.gov/crb/fedreg/2007/72fr24084.pdf. In making this determination, the CRB noted that the applicable statute, 17 U.S.C. § 114(f)(2))(B), "directs us 'to establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace.'…Accordingly, the [CRB] Judges construe the statutory reference to rates…as the rates to which, absent special circumstances, most willing buyers and willing sellers would agree." *Id*., 72. Fed.Reg. at 24,087. The CRB also determined that "a minimum fee of an annual non-refundable, but recoupable $500 minimum per channel or station payable in advance is reasonable over the term of this license." *Id*., 72 Fed.Reg. at 24,097.

42. Evan Moore, *Online Radio Stations Unhappy About Royalty Rate Hike*, CNSNEWS.COM, June 19, 2007, http://www.cnsnews.com/ViewCulture.asp?Page=/Culture/archive/200706/CUL20070619b.html; *see also* SaveNetRadio.org, http://www.savenetradio.org/about/index.html (last visited Dec. 9, 2007); Eliot Van Buskirk, *Royalty Hike Panics Webcasters*, WIRED, March 6, 2007, *available at* http://www.wired.com/entertainment/music/news/2007/03/72879; Daniel McSwain, *Webcast Royalty Rate Decision Announced*, RADIO AND INTERNET NEWS LETTER, Mar. 2, 2007, *available at* http://www.kurthanson.com/archive/news/030207/index.shtml.

43. *Webcasters and Rising Royalty Fees: Paying the Price for Innovation?*, WASHINGTONPOST.COM, March 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/16/AR2007031600514_pf.html.

injurious to recording artists. It impairs their ability to earn revenue from streaming performances of their sound recordings. Under the webcasting statutory license, recording artists receive a mandatory 50 percent share of all webcasting royalties available for distribution.[44] However, if a webcaster does not qualify for the statutory license yet desires to continue to operate lawfully, it must enter into direct licenses with each record label that owns a recording it will transmit (assuming, of course, that the labels in question are willing to issue such licenses). When webcasters enter into direct licenses with record labels, the recording artists and other musicians involved do not receive the mandatory 50 percent share of royalties they otherwise would have received under the statutory license. Rather, they receive whatever—likely much lower—amount that is provided for in their agreements with their record labels.[45]

In addition, limiting the number of webcasters who qualify for the statutory license also limits the number of potential licensees for the PROs. This will impair the ability of songwriters and music publishers to earn revenue from Internet streaming performances of their copyrighted musical works.

In response to the CRB's decision, legislation was introduced in the House[46] and in the Senate[47] that would nullify the CRB's determination,[48] amend the standard to be applied by the CRB in setting rates for webcasters,[49] and substitute a transitional rate structure by which

44. 17 U.S.C.A. §§ 114(d)(2)(C)(g)(2)(B), (C), (D); *see also* Digital Performance Right in Sound Recordings Act of 1995, S. REP. No. 104-128, at 31 (1995).

45. *See* Posting of David Oxenford, A Tale of Two Press Releases—Who Is A Musician To Believe?, to Broadcast Law Blog (March 28, 2007), http://www.broadcastlawblog.com/archives/internet-radio-a-tale-of-two-press-releases-who-is-a-musician-to-believe.html.

46. Internet Radio Equality Act, H.R. 2060, 110th Cong. (introduced April 26, 2007); *see*, *also*, Daniel McSwain, *Internet Radio Equality Act Introduced in House*, RADIO AND INTERNET NEWS LETTER, April 26, 2007, *available at* http://kurthanson.com/archive/news/042607b/index.shtml.

47. Internet Radio Equality Act of 2007, S. 1353, 110th Cong. (introduced May 10, 2007).

48. *Id*., Internet Radio Equality Act of 2007 at § 2.

49. In particular, the legislation would instruct the CRB to "establish rates and terms in accordance with the objectives set forth in section 801(b)(1)." *Id*., § 3(a). In turn, 17 U.S.C.A. § 801(b)(1) provides that rates shall be calculated to achieve the following objectives: "(A) To maximize the availability of creative works to the public. (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions. (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication. (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

webcasters would be permitted, at their own election, to pay fees calculated at a rate of either thirty-three cents ($0.33) per-listener hour or 7.5 percent of revenue.[50] Senators Sam Brownback (R-KS) and Ron Wyden (D-OR), explained that they co-sponsored the Internet Radio Equality Act in the Senate:

> "[B]ecause the Copyright Royalty Board's decision to dramatically increase royalties and apply what we see as unfounded minimum rates threatens to devastate the Internet radio industry. The fact is online radio services do not have enough revenue to support what will amount to unprecedented royalties. The $500 per channel minimum fee alone will deliver an over $1 billion annual windfall to record companies, a windfall that is not justified by any business or equity considerations."[51]

Senators Brownback and Wyden also commented on the overall importance of webcasting:

> "Internet radio is crucial to many segments of business and culture—to small and large webcasters building businesses; to independent artists trying to make it in a crowded industry; and to millions of music fans searching for new diverse music that corporate radio generally does not offer. Innovation and creativity are the winners if Internet radio flourishes, and are the losers if Internet radio stagnates."[52]

And, finally, in their Joint Statement, Senators Brownback and Wyden also expressed concern regarding the record labels efforts to use settlement negotiations under the statutory license as a means to impose mandatory DRM requirements on webcasters:

> "Now we are hearing that the recording industry is attempting to use this aspect of the CRB decision to force webcasters to adopt recording restrictions far in excess of the controls that have governed broadcast content for decades. While we strongly support a negotiated solution, we will not allow the minimum fee issue to be used to force an agreement that mandates DRM technology and fails to respect the established principles of fair use and consumer rights."[53]

As of this writing, the future of webcasting remains uncertain.[54] On August 24, 2007, SoundExchange, representing the record labels, and the Digital Media Association ("DiMA"[55]), representing the largest commercial webcasters, reached a limited agreement regarding the

50. *Id*., § 3(b).
51. Press Release, Senators Sam Brownback & Ron Wyden, Brownback, Wyden Comment on Copyright Royalty Board's Decision: Call CRB's Rates for Webcasters "Unfounded" (Aug. 2, 2007), *available at* http://brownback.senate.gov/pressapp/record.cfm?id=280375.
52. *Id*.
53. *Id*.
54. *See*, Steven Gordon, *Who'll Win the Webcasting War?*, THE REGISTER.COM, Aug. 16, 2007, *available at* http://www.theregister.co.uk/2007/08/16/steve_gordon_webcasting_stalemate/ (last visited on Dec. 9, 2007).
55. *See generally* http://www.digmedia.org/.

minimum fee to be paid under the CRB's new rate structure. According to one report, "the maximum a service would have to pay is $50,000 under a provision requiring a $500 per station advance for royalties. In other words, large Webcasters would not pay more than $50,000 for the advance against royalties, no matter how many stations they own."[56] On the other hand, this agreement on minimum per-station fees would not affect the overall license fee increases set by the CRB.[57]

Statutory relief from excessive license fees would help many webcasters to stay in operation. But that alone is only a stop-gap measure. It misses the point of the music industry's strategy regarding Internet streaming of recorded music: That webcasting must be tightly circumscribed because through it consumers can create digital libraries of the recordings that are streamed and thus subvert the music industry's sales-based revenue model.

The industry's treatment of webcasters exemplifies its approach to the licensing of digital audio services generally. By and large, rights holders are unwilling to offer licenses for digital uses of music that do not map to an identifiable right and associated business model in the analog world with which rights holders are comfortably familiar. Audio service providers who wish to offer music in ways that do not comply with the business model limitations, program content restrictions, and

56. K.C. Jones, *SoundExchange Inks Royalty Deal with Large Webcasters*, INFORMATION WEEK, August 24, 2007, *available at* http://www.informationweek.com/internet/showArticle.jhtml?articleID=201802212.

57. Daniel McSwain, *DiMA, SoundExchange Strike Deal to Cap Per-Channel Minimum Fee*, RADIO AND INTERNET NEWSLETTER, August 24, 2007, *available at* http://kurthanson.com/archive/news/082407/index.shtml.

Recently, SoundExchange and Music Choice, a digital cable music service, reached an agreement, under 17 U.S.C.A. §§ 114(f)(1)(A) and (B), on rates and terms for the statutory license applicable to digital audio subscription services that had commenced operation prior to 1998 (of which, Music Choice is the last remaining in operation). Pursuant to that agreement, for the period 2008 through 2011, the agreed upon license fee is 7.25 percent of residential subscriber revenue. For 2012, the fee rises to 7.5 percent of revenue. Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services: Notice of Proposed Rulemaking, 72 Fed. Reg. 61,585 (Oct. 31, 2007)(to be codified at 37 C.F.R. pt. 382), *available at* www.loc.gov/crb/fedreg/2007/72fr61585.pdf (last visited on Dec. 12, 2007). This settlement prompted Representatives Jay Inslee (D-WA) and Donald Manzullo (R-IL), co-sponsors of the Internet Radio Equality Act in the House of Representatives, to write a letter to John Simson, Director of SoundExchange, dated November 7, 2007. In their letter, the two Congressmen congratulated Mr. Simson on the voluntary agreement between SoundExchange and Music Choice. However, they also expressed confusion "about why SoundExchange has so vehemently opposed [the 7.5 percent rate suggested in the Internet Radio Equality Act] while simultaneously agreeing to nearly identical royalty rates with cable radio." Letter from Representatives Jay Inslee & Donald Manzullo, U.S. Congress to John Simson, Executive Director, SoundExchange (Nov. 7, 2007) (on file with author).

user interface requirements necessary to qualify for the statutory license may find it nearly impossible to obtain authorization for their services.

Moreover, even when rights holders are willing to discuss licenses for new configurations of use, negotiations tend to be protracted. And if a license is granted, it is likely to be strictly limited to the business model and transmission technology in use by the service provider at the time the agreement was made. This limits the ability of service providers to meet ever-changing consumer demand. Instead, they are authorized only to offer what consumers wanted yesterday.

In addition, the license fees demanded by music industry rights holders from service providers that offer industry-sanctioned "new business models" are so high as to limit the number of services that can possibly participate in the lawful marketplace. For example, it has been reported that Lala.com, a service that offers users free, on-demand streaming of recordings from two of the four major record labels, expects to pay in excess of $160,000,000 in music rights license fees over the course of the site's first two years of operation.[58] Lala.com believes it will recoup its music licensing costs through sales of recordings.[59] Another example is the agreement between Universal Music Group and Imeem.com, a service that offers advertiser-supported streaming.[60] The terms of this agreement have not been made public. However, an article at LATimes.com attributes to "a person familiar with the arrangement" the comment that Imeem will pay a minimum amount per song played even if no ads are viewed;[61] and attributes to unnamed Imeem executives the statement that Imeem will pay approximately 50 percent of its advertising revenue to music industry rights holders.[62]

When rights holders refuse to make licenses available for digital uses of their works, or only authorize activities of a very limited scope, or are unable to make licenses available in a timely manner, or charge license fees that are beyond the means of all but the most highly financed service providers, compliance is only possible by those who either forego the use of copyrighted music or cease doing business altogether. This

58. Cliff Kuang, *Free Music Now! Lala.com's Plan to Give Songs Away Could Upend the Industry*, WIRED, Oct. 23, 2007, *available at* http://www.wired.com/entertainment/music/magazine/15-11/ff_lala.

59. *Id*.

60. *See*, Joseph Menn, *Universal Music Group, Imeem Strike Deal*, LATIMES.COM, Dec. 10, 2007, *available at* http://www.latimes.com/technology/la-fi-universal10dec10,1,5516678.story?coll=la-head; Rob Kelley, *Making Music Free (and Legal)*, CNNMONEY.COM, Dec. 10, 2007, *http://money.cnn.com/2007/12/10/technology/imeem/index.htm*.

61. Menn, *supra* note 60.

62. *Id*.

choice among equally unappealing alternatives has fostered a culture in which many service providers consider it the better business practice to ask forgiveness from music industry rights holders for infringement rather than to seek permission from them in advance of launching a new service.

The Internet and related technologies have rendered certain traditional rights in musical works and sound recordings unenforceable and blurred the distinctions between others. This has injected uncertainty into the digital music marketplace that the industry has sought to turn to its advantage.

For example, music publishers and the public performance and mechanical rights licensing organizations they control demand double payments where only a single transmission of a work is involved. Both a mechanical and a public performance license fee are charged even where the only "copies" made reside on the transmission servers or are otherwise transitory and incidental to transmissions that are nothing more than performances, such as in on-demand streaming. Both fees are also charged even if the music is transmitted only for downloading and is not audible while being sent, such as in podcasting. Service providers have difficulty navigating this confusing and counterintuitive paradigm, and in accepting the industry's rationale for the double payments it demands.

In April, 2007, in a rate setting proceeding brought under the antitrust consent decree that governs ASCAP's operations, the United States District Court for the Southern District of New York held that there is no public performance in an Internet transmission that is nothing more than a download of the musical work being transmitted.[63] Under this decision, the PROs, which are only chartered to license public performances of copyrighted musical works, would be precluded from licensing audio service providers to the extent that they offer downloads. The authority to license downloading, which implicates the reproduction and distribution rights—but not the public performance right—in the musical works involved has been reserved by music publishers for themselves.

The District Court's decision highlights the manner in which songwriters and composers would be disadvantaged by continuation of the traditional distinction between the public performance and the mechanical rights in musical works. The court's decision will impair the ability of songwriters and composers to earn royalties from digital

63. United States v. Am. Soc'y of Composers, Authors & Publishers, 485 F.Supp.2d 438 (S.D.N.Y. 2007).

transmissions of their musical works. For example, services may arise that offer consumers a full day of musical programming to be downloaded to a home entertainment system for later playback. If this programming were streamed instead of downloaded, songwriters who belong to PROs would receive 50 percent of the public performance royalties available for distribution. If, however, the programming is transmitted as a download and not as a streaming performance, songwriters will receive whatever—likely lesser—amount that is provided for in their agreements with their music publishers for the reproductions and distributions involved.

Finally, music industry rights holders also have been unable to grant licenses that are co-extensive with the worldwide reach of Internet transmissions.

The music industry operates globally, but rights in musical works and sound recordings are administered by local interests on a territory-by-territory basis. For example, music publishers enter into agreements with publishers in other countries, called subpublishers, who, in exchange for a percentage of the revenue collected, license rights in the publisher's songs in the subpublisher's territory. Similarly, record labels enter into agreements with distributors in other countries for the sale or other exploitation of the label's recordings in the distributor's territory. For their part, PROs throughout the world are linked through a network of reciprocal administration agreements.[64] These authorize each PRO to license public performances in its own territory of the musical works in the catalogs of all the PROs with which it is affiliated.

This structure provides a consistent basis by which the industry administers rights in musical works and sound recordings for uses that begin and end in a single territory. In those instances, a license from a local entity granting domestic reproduction, distribution or public performance rights, as the case may be, is sufficient to authorize the activities in question. This structure also establishes the principle that the party who owns local rights in a work for the territory in which the licensed use takes place is entitled to receive whatever royalties are generated by that use.

64. *See*, *e.g.*, http://www.ascap.com/about/affiliated.html (list of PROs in 91 territories with which ASCAP is affiliated through reciprocal administration agreements) (last visited Dec. 9, 2007); http://www.bmi.com/international/entry/C2257 (list of PROs in other territories with which BMI is affiliated) (last visited Dec. 9, 2007); http://cisac.org/CisacPortal/afficherArticles.do?menu=main&item=tab2&store=true (last visited Dec. 9, 2007).

Internet transmissions, on the other hand, are worldwide in origin and in reach. Every Internet transmission brings with it the possibility of worldwide liability. Internet transmissions are infringing if not authorized for the territory from which they originate. They also may be infringing if not authorized for the territories in which they are received. Audio service providers, whose transmissions traverse the global communications network, need licenses that grant worldwide rights. These are unavailable, however, because rights holders have been unable to resolve their conflicting claims regarding transborder transmissions.

For example, rights holders for the territory from which an Internet transmission originates and those for the territory in which it is received may both assert that all of the legally cognizable acts involved take place in their own territory. Accordingly, both may demand authority to license the transborder transmission in question. And regardless which party issues the license for the transmission, rights holders in the territory of origin and those in the territory of reception may both insist that the license fees prevailing in their respective territories should be charged.

This is problematic for service providers. As a practical matter, it is Internet users, not audio service providers, who determine the territory in which Internet transmissions will be received. Thus, if the license fees prevailing in the territory of reception are used, service providers will be unable to develop well-informed business strategies because they will be unable accurately to predict their music license fee costs. And while service providers can employ Internet protocol filtering to inhibit users located in particular territories from accessing their transmissions, a license requirement mandating the use of such filtering would deny service providers access to the worldwide market that the Internet otherwise affords them. This, in turn, would reduce the revenue base from which these licensed service providers could pay music industry license fees. In any event, mandating the use of Internet protocol filtering would not protect music industry rights holders from loses occasioned by unauthorized transborder transmissions of recorded music by services that operate without license agreements.

A further complicating factor had been the agreement among many PROs that they each would retain the right to license public performances on the Internet rendered by service providers whose economic residence was in the PRO's territory regardless of the territory from which the service's transmissions originate or in which those transmissions are received (the "Santiago Agreement"). A similar agreement was adopted by the world's affiliated mechanical rights licensing organizations (the "Barcelona Agreement"). These agreements were suspended as of

December 31, 2004, following the opening of an investigation by the European Commission as to whether they violated EC competition law.[65] Accordingly, other than on a work-by-work or catalog-by-catalog basis, it is not possible at this time to obtain worldwide rights from a single source for Internet transmissions of copyrighted musical works.[66]

In April, 2007, the IFPI announced that it and various European-based sound recording rights collecting societies had put into place a framework for collective licensing of sound recordings "for certain streaming and podcast services across several territories."[67] According to the IFPI press release, "Until now, obtaining cross-border online rights licenses for these services has involved dealing with each territory separately or approaching the rights holders directly. This new framework will offer users the alternative to obtain a license for broad repertoire and for all the participating territories from a single collecting society."[68] Though IFPI's press release fails to say so, the licenses to be offered under this new arrangement contain business model limitations, program content restrictions and user interface requirements similar to those imposed by the statutory license for webcasting in the United States.[69] Moreover, the license fees to be charged will be those that prevail in the territories in which each licensed Internet transmission is received.[70]

The effect of the music industry's position with respect to transborder transmissions of musical works and sound recordings is to compel service providers either to enter into separate agreements with the rights holders of each work in every territory; to enter into agreements with rights holders in their own territory granting worldwide rights but with payment of license fees dependent on the whims of rights holders in each territory in which the service's transmissions are received; or

65. European Commission Opens Proceeding into Collective Licensing of Music Copyrights for Online Use, IP/05/586, May 3, 2004, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586&format=HTML&aged=0&language=EN&guiLanguage=en.

66. See EurActiv.com Collecting Societies Split Over Online Music Royalties (July 20, 2007), http://www.euractiv.com/en/infosociety/collecting-societies-split-online-music-royalties/article-165739 (updated July 24, 2007) (discussion of recent developments among European PROs involving rights administration for transborder Internet transmissions of musical works).

67. Press Release, IFPI, Major Step Forward in Cross Border Music Licensing Regime (Apr. 27, 2007), *available at* http://www.ifpi.org/content/section_news/20070427.html.

68. *Id*.

69. Telephone interview with an IFPI Spokesperson, in London, England, Aug. 16, 2007.

70. *Id*.

to enter into agreements with rights holders in their own territory for domestic transmission rights only and risk an unknown quantum of infringement liability under foreign legal regimes.

* * * * *

Music's success is also its undoing; at least as far as the industry's traditional business models are concerned. People regard music differently than they do other forms of cultural content. Music is portable. Music is ubiquitous. Music appears to be free. Everyone is a music consumer, whether they buy CDs, go dancing or to concerts, listen to radio and watch television, or network online while playing a previously downloaded podcast. People develop an ownership interest in the music they most like to hear. "They're playing *our* song," is a heartfelt refrain. The psychological effect on consumers of this sense of personal entitlement to other people's property should not be overlooked.

The market forces at work at the intersection of the Internet and the music industry's traditional business models are wildly asymmetrical and to the disadvantage of music industry rights holders. The network is everywhere and music is everywhere a part of it. Thus, despite the industry's efforts, the unauthorized digital distribution of recorded music continues unabated; P2P file- and stream-sharing networks proliferate; and new means of mass distribution, such as podcasting, blogging, RSS feeds (really simple syndication), and social networking services have arisen. If anything, the industry's efforts to date have resulted in fewer licensed transmissions of fewer recordings and slowed the growth of royalties that songwriters, music publishers, recording artists, and record labels otherwise may have earned.

In 1998, the year that the Digital Millennium Copyright Act became law,[71] there were five major record labels in operation: Sony Music, BMG, EMI Recorded Music, Warner Music Group, and Universal Music Group. In 2003, Sony and BMG merged to form SBMG.[72] In August, 2007, Terra Firma, a private equity firm, succeeded in a takeover bid for EMI.[73]

71. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 1, 112 Stat. 2860 (1998).

72. Reuters, *Sony, BMG Agree on Music Merger*, CNN INTERNATIONAL.COM, November 7, 2003, http://edition.cnn.com/2003/BUSINESS/11/06/sony.bmg.reut/.

73. Associated Press, *Private Equity Firm Succeeds in Takeover Bid for Music Group EMI*, INTERNATIONAL HERALD TRIBUNE, August 1, 2007, *available at* http://www.iht.com/articles/ap/2007/08/01/business/EU-FIN-COM-Britain-EMI.php.

In May, 2007, Pali Research in New York reaffirmed a sell rating it had previously placed on the stock of Warner Music Group.[74] The Pali analysts reported that:

> "[T]he music business is eroding faster than [record label] management expected and that recent cost cutting measures are dire measures to mitigate the pain of severe and completely unanticipated revenue declines. The recorded music business is in 'freefall' and the risk going forward is that the relative stability of music publishing revenues begins to crack. . . ."[75]

One factor that may have favored the music industry has been the relatively slow deployment of broadband connections for the consumer market. Nevertheless, the rate at which consumers worldwide are subscribing to broadband has increased dramatically.[76] Of the approximately 1.1 billion people with Internet access, almost one-third use one or another type of broadband connection.[77] With a broadband connection instead of telephone dial-up access to the Internet, consumers may be inclined to connect more often and stay connected longer per session. Moreover, the faster their connection to the Internet the more quickly consumers can download music and pass it along to others. The worst outcome for the music industry would be extensive worldwide broadband penetration before a full, fair and feasible solution for the digital music marketplace is in place. The explosive growth of WiFi and web-enabled mobile communication devices highlights how urgently such a solution is needed.

II. A Newly-Created Right, Specific to the Digital Music Marketplace, is Needed for Musical Works and Sound Recordings

An alternative to the existing rights structure and corresponding business models is needed for digital transmissions of musical works and sound recordings.

I suggest this:

A. *Definition and Scope*

Congress should aggregate the rights of songwriters, music publishers, recording artists and record labels in their respective musical works and sound recordings and create a single right for digital transmissions

74. Richard Greenfield & Mark Smaldon, Warner Music Group (WMG)—Court Documents Point to Mgmt's Overstated Industry Forecasting; SELL (Pali Research, May 23, 2007).

75. *Id.*

76. Richard Wray, *Broadband Spreads Across Globe*, Guardian Unlimited, June 13, 2007, *available at* http://business.guardian.co.uk/story/0,,2102304,00.html.

77. *Id.*

of recorded music. I call this right the "digital transmission right." It could just as well be called the "X" right.

The digital transmission right would be a new right, not an additional right. It would replace the parties' now-existing reproduction, public performance and distribution rights.[78] These would no longer have separate or independent existence for purposes of digital transmissions of sound recordings or the musical works embodied in them.

Under the digital transmission right the only acts that would require a license, or payment of a license fee, would be the digital transmission, retransmission, or further transmission of recorded music.[79] Every such transmission that is not subject to exemption would require authorization in order to be lawful. This does not mean that separate payment would be due for each transmission of each recording; only that, regardless how license fees may be calculated, all non-exempt transmissions, retransmissions, and further transmissions would require authorization.

Licenses under the digital transmission right would be made available unconstrained by the concerns that have driven the music industry's failed-campaign to salvage its sales-based revenue model. The determinative consideration would be whether or not recordings had been digitally transmitted, not whether particular transmissions resulted in sales, are more or less likely to promote sales, or may cause sales of recordings to be lost. When digital transmissions occur, licenses will be needed; and, when needed, licenses should be made available free of the limitations and restrictions that have characterized the industry's licensing efforts to date. Under the digital transmission right, all that will matter is the rate of compliance and the price of a license.

Accordingly, licenses under the digital transmission right would be made available without regard to whether recordings are transmitted for streaming, or downloading, or by some other means not yet devised; whether music programming is interactive or non-interactive, or contains this, that or another recording; whether the service that provides the transmission accepts or does not accept user-generated content, frames other sites, or facilitates the embedding on its site of content transmitted from another site or service. It will not matter if the service is advertiser supported, employs a subscription model, charges users on a per-listen or per-download basis, or has no revenue at all. How many copies, if any, that are made in the course of transmissions (including any server copies, or ephemeral, transitory or buffer copies that are necessary to effect a transmission), the

78. 17 U.S.C.A. § 106 (West 2005).

79. The digital transmission right could also be applied to analog transmissions of over-the-air broadcast radio stations. *See infra* Part II.H.

type of transmission technology used, and the file format in which recordings are transmitted will not be of concern. The presence or absence of any of these factors will not affect the availability of a license.

B. *Ownership*

Ownership of the digital transmission right in each recording will be held jointly by the songwriter(s), music publisher(s), recording artist(s) and record label(s) who contribute to it. Each of these parties will be treated as a co-owner of the digital transmission right of the recording in question whether their contribution was made intentionally and voluntarily (such as where the recording artist is also the writer of the song being recorded) or without purposeful intent and involuntarily (such as where the songwriter and music publisher are compelled by application of the compulsory mechanical license to allow cover recordings of their works by others[80]).

C. *Authority to Grant Non-Exclusive Licenses; Accounting for Royalties Earned*

The interests of all co-owners of the digital transmission right in a recording would be implicated by every digital transmission of that recording. No one co-owner would be permitted to act as gatekeeper of the rights of all, with sole discretion to determine, by way of a veto, if, when, how, and by whom this newly-established right may be exploited. Rather, regardless of the nature of their relationships to each other under pre-existing agreements, or to particular recordings under current law, under the digital transmission right each rights holder would have independent and sufficient authority to grant non-exclusive licenses for digital transmissions of those recordings on any terms that they and their licensees find to be mutually acceptable.

By way of example, a record label, acting without the consent or, for that matter, prior knowledge of the songwriters, music publishers and recording artists involved, could license its entire catalog of recordings, or any part of it, on a non-exclusive basis to a digital audio service provider who offers subscription streaming. A recording artist could authorize fan sites to promote an upcoming concert by offering downloads of the artist's latest recording in exchange for voluntary contributions from consumers. And a songwriter could offer a Creative Commons license for digital transmissions of every cover recording of one of his or her compositions.[81] (Why a songwriter might choose to do this is another matter entirely.)

80. *See* 17 U.S.C.A. § 115 (West 2005, Supp. 2007).

81. Model licenses for such purposes are available at the Creative Commons' web site. *See*, http://creativecommons.org/license (last visited Dec. 18, 2007).

Under the digital transmission right, the only limitation on the authority of individual rights holders to grant non-exclusive licenses would be the obligation to account to their co-owners for royalties earned. Rights holders of individual recordings should be free to make whatever arrangements they wish among themselves regarding this division of royalties. No doubt, the Internet will influence the dynamics of these negotiations.[82]

There may be circumstances in which rights holders will not be able to reach voluntary agreement on the division of royalties; and others in which negotiations themselves may not be possible (e.g., with older works where rights holders have lost contact with each other; or in the case of cover recordings where, because of the compulsory mechanical license, the recording artist and record label involved will not necessarily ever have had direct contact with those who own rights in the

82. Recently, some established superstars who are no longer bound to the record labels whose backing helped create them have experimented with alternative means of distributing their recordings. These include, for example, Nine Inch Nails (which offered its latest CD, *The Rise and Inevitable Liberation of Niggy Tardust*, through its own web site for free download in MP3 format at 192Kbps, or for purchase for $5.00 at 320Kbps or in FLAC lossless audio (*see* http://niggytardust.com/saulwilliams/download (last visited Dec. 15, 2007))), Radiohead (which released its latest CD, *In Rainbows*, through its own web site, allowing fans to pay whatever they wished, only to find that 62 percent of those who downloaded the CD chose to pay nothing for it at all (*see* For Radiohead Fans, Does "Free" + "Download"="Freeload"? (Nov. 5, 2007), http://www.comscore.com/press/release.asp?press=1883)), and Prince (who gave away his latest CD, *Planet Earth*, by including it for free in the June 28, 2007 edition of the MAIL ON SUNDAY newspaper. He also sold out 21 concert dates in the U.K that summer (Alexa Baracaia and Andre Paine, *Prince £31-A-Ticket Shows Sell Out in Minutes*, DAILY MAIL, May 11, 2007, *available at http://www.dailymail.co.uk/pages/live/articles/showbiz/showbiznews.html?in_article_id=454090&in_page_id=1773*)).

In addition, unsigned artists who produce their own recordings have been able to obtain widespread early recognition of their work—though little, if any, direct financial benefit—through P2P file- and stream-sharing and the use of viral marketing. These efforts at self promotion may result in drawing more fans to concerts. In the mean time, however, CD sales will have been lost. I doubt that many of these emerging artists expect to build their careers through the use of P2P in its current debased form. More likely their hope is that this exposure will bring them to the attention of a major record label and result in a recording contract.

The major record labels continue to dominate what remains of the market in the context of the sales-based revenue model through their control of traditional distribution channels. However, the exigencies of a hit-driven market have already made the notion that record labels nurture artists' careers an anachronism. Moreover, new businesses may arise to displace record labels as the source of funds to underwrite concert tours but without acquiring ownership of the artists' creative output in exchange. And, as the digital music marketplace matures, the network itself will become the primary channel of "distribution," and licensed transmissions (whether downloads or streams) will displace sales as the principal source of music industry revenues.

All of this suggests that the relative importance of the roles played by the major record labels—and music publishers for that matter—may diminish. On the other hand, record labels and music publishers may recreate themselves to serve some as yet undefined but enhanced role within the digital music marketplace. Whatever changes do occur, one would expect them to be reflected in the division of royalties among rights holders.

underlying musical work that was the subject of the recording in question). Therefore, as a starting point for negotiations generally, and as a default when voluntary agreement is not possible, I suggest that the interests of songwriters, music publishers, recording artists and record labels should each be allocated a 25 percent share of the total royalty earned from licensed digital transmissions of their recordings. In this way, singer-songwriters would receive 50 percent of all royalties earned from licensed transmissions of their recordings, and 100 percent of those royalties if they also self-publish and produce their own recordings.

D. *Authority to Grant Exclusive Licenses*

Co-owners of the digital transmission right in individual recordings would also be free to coordinate their licensing efforts. If all agree, they may license their jointly owned recordings to a single audio service provider for all purposes on an exclusive basis, or to multiple service providers, each on a different exclusive basis (e.g., time, territory, or type of service). Exclusive licenses, however, derive value from the ability of the license holder to exclude others from using the work in the same manner and during the period of exclusivity. The music industry's experience to date demonstrates the futility of efforts to restrict uses of recorded music on the Internet. Because of this, the useful lifespan of exclusive rights in the digital music marketplace will be short, their value uncertain. Audio service providers may do better being the first source of particular content rather than trying to maintain their status as the only source of it.

E. *Conduct for Which a License Would Be Required; Parties Who Would Be Liable*

The digital transmission right would be enforceable only against those involved in providing digital transmissions, retransmissions, or further transmissions of recorded music.

Accordingly, consumers would not incur any liability merely for surfing the web, accessing streaming media, or downloading music files. Copying for personal use also would not require authorization. Consumers still may be required to pay network operators for Internet access, and to pay audio service providers for their activities in connection with particular web sites or services. But whether consumers listen to streams or download recordings; make one or many copies of a recording for personal use; or use recordings on one or several playback devices would have no effect on their obligation to music industry rights holders. None of this conduct would require consumers to obtain licenses or to pay license fees under the digital transmission right.

Similarly, software developers and distributors, technology firms, consumer electronics makers, and telecommunications and Internet service providers, as such, would have no liability under the digital transmission right.[83]

On the other hand, service providers would need licenses if they operate web sites or other services that provide digital transmissions of recorded music. Consumers, too, would need licenses whenever they act as digital audio service providers in their own right; that is, whenever they are responsible for the digital transmissions at issue. By way of example, consumers would need authorization if they operate personal music-enabled web sites, including "hobby" sites; if they upload music files to a web site or service that accepts user-generated content but that does not have its own license under the digital transmission right authorizing such activity by users of its service (known as a "through-to-the-user license"); or if they offer recordings to others through participation in a P2P file- or stream-sharing network, or similar service, that does not have a through-to-the-user license.

Most web sites and services that offer musical programming only allow users to access music, either through streaming, downloading, or both. They do not allow users to upload recorded music; they do not accept user-generated content. In these circumstances, only the service provider (or a consumer acting as a service provider in the case of a personal web site) would be engaged in providing digital transmissions of recorded music; and only the service provider would need authorization under the digital transmission right. Consumers, as transmission recipients, would not have any liability for these transmissions.

Other sites and services are configured specifically to enable users to upload recorded music and other content, as well as to access streams or download music files or programs from the service. Uploading to services such as these would involve the digital transmission of the recordings involved; and any consumer from whose computer or other device such uploads originate would need a license under the digital transmission right. Subject to the availability of a safe harbor from infringement liability, the service provider who enables the uploading of user-generated content would be jointly and severally liable with its users for their conduct.[84]

83. *But see infra* Part III.I., where I suggest that a temporary levy should be imposed on consumer electronics and technology products to assist the music industry to maintain its financial wellbeing during a brief period of transition from its traditional ways of doing business to the rights administration structure proposed in this article.

84. Under the digital transmission right, safe harbors would be necessary only in very limited circumstances. *See infra* Part III.E.

For services that accept the upload of user-generated content, a license held either by the Internet user or by the service provider would suffice to authorize uploading to that service by that user of the recordings covered by the license. Alternatively, a single through-to-the-user license held by the service provider would authorize all transmissions for which the service provider and users of the service would be jointly and severally liable (e.g., user-generated uploading to the service), as well as all transmissions for which the service provider alone would be liable (e.g., streaming and downloading from the service to its users). A through-to-the-user license held by a service provider would eliminate the need for individual consumers who wish to upload recorded music to that service to obtain licenses in their own right.

It stands to reason that Internet users would seek out services that obtain through-to-the-user licenses that authorize their uploading of content to the service. Moreover, licensed services, being lawful, would be able to operate openly, attract investment capital (without exposing investors to copyright infringement liability), and offer consumers the sophisticated functionalities they desire. And there being no reason remaining for music industry rights holders to undermine them, licensed services would be free of many of the security, privacy, and related concerns that plague users of their black market counterparts.

Service providers who obtain through-to-the-user licenses would have a competitive advantage over those who do not, even though they would be required to pay license fees. The availability of through-to-the-user licenses would provide a positive economic incentive for service providers to secure the authorization they need. The issuance of through-to-the-user licenses should be standard practice under the digital transmission right.

A similar analysis applies to the P2P file- and stream-sharing context. P2P participants who only download music files or access streams through the network but who do not offer works to others would not need a license under the digital transmission right. On the other hand, individuals who facilitate transmissions of recordings to others through the network would need authorization.

Operators of centralized P2P networks would be jointly and severally liable with their network participants who share recorded music with others through the network. These operators would also be liable for the further transmissions or retransmissions through their centralized servers of the transmissions of recorded music initiated by users of their networks. For centralized P2P networks, a single through-to-the-user license held by the network operator would suffice to authorize all transmissions,

retransmissions and further transmissions of the licensed recordings through the network in question. In such circumstances, individual network participants would not need to obtain licenses in their own right, and yet would be free to share the licensed recordings through the network whenever they wished.

The situation is different for decentralized P2P networks; these do not have centralized servers through which file-sharing transmissions must pass. Moreover, by and large, the tens of millions of copies of file-sharing software for decentralized networks that already have been downloaded by Internet users are beyond the control of the distributors who released the software in the first place. Under the digital transmission right, developers and distributors who do not exercise control over the decentralized P2P networks that their software spawns would not incur any infringement liability by reason of the use of that software on those networks. Because of this, however, there would be no single entity through whom a network-wide through-to-the-user license could be made available. Accordingly, each participant in such a decentralized P2P file- or stream-sharing network would be responsible for securing authorization for his or her own conduct on that network.

On the other hand, distributors of file-sharing software for decentralized networks who wish to secure licenses for their services could do so if they configured future releases of their software to allow them to exercise certain key measures of control over the file- and stream-sharing that the software enables. For example, they would be required to use filtering to prohibit the sharing of specific recordings (which, as generally discussed in Part III, *infra*, will likely only rarely be necessary under the digital transmission right), and they would be required to monitor which recordings had been shared so that the rights holders-in-interest could receive royalties (as discussed in Part III.G, *infra*). By the same token, if the software distributor were able to monetize use of the network through advertising or other means, it would be deemed to exercise sufficient control to be liable under the digital transmission right; and this would be so even if the software distributor failed to filter and/or monitor uses of recordings on the network, though, in that case, the distributor would not be eligible for a license. Nevertheless, if the software distributor obtains a license, the authorization thereby granted would inure to the benefit of those network participants who accept and use the software that enables the needed filtering and music use monitoring to be conducted.

This approach favors users of licensed P2P networks (both centralized and decentralized), but also provides an opportunity for individuals who participate in otherwise unlicensed networks to act lawfully. Again,

however, it stands to reason that the vast majority of consumers who are interested in P2P would likely seek out networks that had secured licenses that authorize their file- and stream-sharing activities; especially if the sharing that is permitted actually offers consumers whatever it is that they want from the P2P experience at any given moment.

There are certain transmissions, retransmissions, and further transmissions for which more than a single site or service would be separately and independently liable. These include, for example, the further transmissions of recorded music through sites that use in-line linking and framing technology to incorporate content from a third-party site and to make it appear as if that content were part of the first site's overall offering. (Framing is different from Internet links which when clicked merely instruct the user's browser to open a new window in which the third party site appears.) Insofar as the site that is framed transmits recorded music, it would need authorization under the digital transmission right without regard to the fact that it is being framed by another site. In addition, however, the site that frames transmissions of recorded music that originate from another site also would need authorization for that further transmission whether or not the site that is being framed has a license in its own right. In my view, it would be manifestly unfair to music industry rights holders not to require both such sites to be licensed. However, while both sites would need a license, each site would pay a license fee based only on the benefit it realized from the transmission in question.[85]

Similarly, when an audio player that is resident on one site becomes embedded in a third-party site such that the transmissions of recorded music that originate from the first site are further transmitted by the third-party site to its users, both sites would need authorization under the digital transmission right. Again, however, each site would pay a license fee based only on the benefit it realized from the transmissions in question.

F. *Copyright Infringement Would Not Significantly Impair the Market for the Digital Transmission Right*

The digital transmission right would not depend on the efficacy of access restrictions and anti-copying measures for its success. It would be all but impervious to copyright infringement.

Unlike the reproduction and distribution rights that underlie the sales-based revenue model, but like the public performance right, the digital

85. *See infra* Part III.F., for further discussion of license fees under the digital transmission right.

transmission right cannot be subverted by one or more unlicensed digital audio services, webcasters, P2P networks, social networking services, or the like. Whether or not particular transmissions are licensed would not significantly affect the market for the digital transmission right over all.

This is shown by the experience of ASCAP and BMI, in the United States, and their sister PROs around the world, with the licensing of over-the-air broadcast radio stations to publicly perform the copyrighted musical works that these PROs represent. Even if the largest radio station or group of stations was not licensed at a particular time, the ability of the PROs to license the thousands of other broadcasters would not be impaired. Despite infringement by the few, the overwhelming majority of broadcasters would continue to operate lawfully—as they have done for decades—by securing the public performance licenses they need. Those who act outside the law can and should be sued for copyright infringement.

So too would it be under the digital transmission right. If music industry rights holders made licenses available on reasonable terms that authorize the uses of recorded music that people want, the overwhelming majority of those whose digital transmissions would require authorization—audio service providers and, where applicable, individuals alike—would pay the license fees that are due. If this is not the case, then all is surely lost for the music industry. No doubt, no matter what is done, a "Darknet" of unauthorized uses of recorded music disguised by encryption will continue to operate. However, if licenses are made readily available to those who wish to comply with their obligations under the digital transmission right, there would likely be little, if any, public outcry over the industry's litigation campaign against those who continue to infringe.

G. *Effect on Other Rights and Other Works*

For all purposes other than digital transmissions, current law relating to the ownership of rights in musical works and sound recordings would continue in effect without change. Nothing in this proposal is intended to grant songwriters or music publishers any right in any recording other than an interest in the digital transmission right in recordings embodying their own musical works. And nothing is intended to grant recording artists or record labels any right in any musical work other than an interest in the digital transmission right in their own recordings of particular songs. It is also not intended that the division of ownership of rights in musical works and sound recordings under the digital

transmission right be used as precedent when songs or recordings are incorporated into other works, such as motion pictures (e.g., the synchronization right, or the master use right), or for treatment of any other categories or types of copyrighted works that incorporate contributions from more than a single rights holder.

The compulsory mechanical license for the making of cover recordings would continue in force;[86] although the digital transmission right would govern the relations of the parties for purposes of digital transmissions of those recordings. On the other hand, the statutory licenses under existing law for eligible non-subscription transmission services (e.g., webcasters),[87] new subscription services,[88] and pre-existing subscription and pre-existing satellite digital audio radio services[89] will have been superseded.

H. *Application of the Digital Transmission Right to Over-the-Air Broadcast Radio Stations, As Well As to the Web Sites They Operate*

Under current law in the Unites States, as elsewhere, over-the-air radio broadcasters are required to secure authorization for their public performances of copyrighted musical works. Typically, broadcasters fulfill this obligation by obtaining licenses from the PROs; although licenses are also available directly from the copyright holders-in-interest. However, unlike elsewhere, US-based radio stations are not required to secure authorization for their over-the-air broadcast performances of copyrighted sound recordings. Because of this, US-based sound recording copyright owners do not earn royalties from these analog broadcast performances. The lack of a performance right in sound recordings applicable to over-the-air radio broadcasts, and the record labels' longstanding efforts to obtain one, have been an enduring cause of controversy.[90]

On the other hand, when radio broadcasters make their over-the-air programming available on the Internet, they are required to obtain au-

86. 17 U.S.C. § 115 (West 2005 & Supp. 2007).
87. *Id*. § 114(f) (West 2005 & Supp. 2007).
88. *Id*.
89. *Id*.
90. *See. e.g*., *Internet Streaming of Radio Broadcasts: Hearing before the Subcomm. On the Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary*, 108th Cong. (2004) (statement of David O. Carson, General Counsel, United

thorization both from the owners of the copyrighted musical works involved as well as from the owners of the copyrighted sound recordings in which those musical works are embodied. Typically, broadcasters fulfill their obligation to secure the needed rights for over-the-Internet transmissions of musical works by obtaining licenses from the PROs. They also may be eligible for the webcasting statutory license for their over-the-Internet transmissions of sound recordings. However, to the extent that a radio station's Internet transmissions do not comply with the requirements of the statutory license (e.g., if the station's web site offers music on demand or archived programs that are less than 5 hours in duration), it must secure licenses directly from the individual record labels that own the sound recordings in question.

At the time of this writing, Congress is again considering extension of the existing performance right in sound recordings to cover analog, over-the-air radio broadcasts.[91] On September 27, 2007, Representative Howard Berman (D-Cal.), Chairman of the House Judiciary Subcommittee on

States Copyright Office), *available at* http://www.copyright.gov/docs/carson071504.pdf.

For their part, the record labels (who own the copyrights in the sound recordings they produce), seek treatment equivalent to that of their counterparts in other territories who are empowered to license analog performances of their recordings. They also point to the fact that songwriters and music publishers receive royalties for the same analog radio performances for which US-based recording artists and record labels receive nothing. Moreover, in the labels' view, it is performance of the popular recordings that the labels produce and own that allows radio stations to attract listeners and, because of them, advertisers and their dollars. *See generally* http://musicfirstcoalition.org (last visited Dec. 12, 2007).

For their part, broadcasters claim that record labels seek this new and additional right as a means to offset the revenue losses the labels continue to suffer because of unauthorized distribution of CDs through P2P file-sharing and other means entirely unrelated to radio broadcasting. In addition, broadcasters claim that it is the repeated play of music on their stations that makes any particular recording popular; that their performances promote sales of sound recordings; and that the success of the record labels' sales-based revenue model has been based on the exposure recordings are given through much repeated radio airplay. This, they say, justifies the historic lack of a separate analog performance right for sound recordings. In addition, broadcasters claim that they are not in a position at this time to absorb additional license fees for their analog performances of sound recordings. *See generally* http://www.freeradioalliance.org (last visited Dec. 12, 2007).

For their part, the PROs are concerned that if the performance right in sound recordings is extended to cover over-the-air radio broadcasts, the songwriters and music publishers they represent may be forced to accept a reduction in the public performance license fees that the PROs collect from the broadcast radio industry.

And, for their part, webcasters chafe at being required to pay record labels for the right to digitally transmit sound recordings while over-the-air broadcast radio stations are not required to pay for their analog performances of the same recordings.

91. Hearing on Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century, *available at* http://judiciary.house.gov/oversight.aspx?ID=363 (last visited on Oct. 27, 2007).

Intellectual Property, Courts and the Internet, announced that he would soon introduce legislation granting a "long overdue 'performance right' for music played by terrestrial radio stations."[92] On the other hand, on October 31, 2007, several members of the House of Representatives submitted a concurrent resolution stating that, "The Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air, or on any business for such public performance of sound recordings."[93] No doubt, the question of whether and under what circumstances a performance right in sound recordings may be extended to over-the-air radio broadcasts will attract a great deal of Congressional attention in 2008.

I suggest that the digital transmission right should be applied to all transmissions of recorded music made by traditional broadcast radio stations; that the entire operation of traditional radio broadcasters—both their over-the-air and their over-the-Internet transmissions—should be treated as a single transmitting entity under the digital transmission right.

By applying the digital transmission right to both analog and digital transmissions made by traditional radio broadcasters, record labels would enjoy rights that are equivalent, for all intents and purposes, to the extended performance right in sound recordings that they seek. Songwriters, music publishers, recording artists and record labels would share royalties generated by license fees paid by radio stations to the same extent that they will share in license fees paid by all other digital audio service providers under the digital transmission right.

Radio stations may well be required to pay slightly more under the digital transmission right than they do under current law (where they pay nothing for the right to perform sound recordings over-the-air). However, the total combined license fee liability of radio stations to songwriters, music publishers, recording artists and record labels under the digital transmission right (for both over-the-air and over-the-Internet transmissions) would be calculated on the same basis and in the same manner as that of all other digital audio service providers including, for example, webcasters.

92. A Performance Right for Over-the-Air Radio: Berman Sets the Record Straight—Plans Special Accommodations for Small and Religious Broadcasters, *available at* http://www.house.gov/apps/list/press/ca28_berman/perf_rts_small.shtml (last visited on Oct. 27, 2007).

93. Concurrent Resolution Supporting the Local Radio Freedom Act, H. Con. Res. 244, 110th Cong. (submitted October 31, 2007).

III. The Most Efficient and Effective Way to Administer the Digital Transmission Right Is Through a Combination of Direct Licenses and Voluntary Collective Rights Management

Through the digital transmission right, authorized transmissions of recorded music could be made available from the largest number and widest array of licensed sources, anytime, anywhere, to anyone with network access. The matter that remains is how best to monetize this new right; how to convert the vast base of audio service providers into licensed accounts; and how to convert the license fees they pay into royalties for those songwriters, music publishers, recording artists and record labels whose recordings these services transmit.

As I suggested earlier, the digital transmission right would be implemented through a combination of license agreements freely negotiated by individual rights holders and audio service providers (known as "direct licenses") and voluntary collective rights management.

In principle, direct licenses are to be preferred. Therefore, subject to the co-ownership rules discussed in Part II, above, individual rights holders and service providers should be free to agree upon whatever terms they wish for digital transmissions of recorded music. In practice, however, reliance on direct licenses alone will produce little more than a free-for-all. Some rights holders and service providers will benefit greatly; while others, perhaps most, will be all but excluded from participating in the lawful market for digital transmissions. The intermediation of collective rights management organizations is needed to avoid this undesirable result.

Collective management has been standard practice in the music industry since 1851, when the Societe des Auteurs, Compositeurs et Editores de Musique ("SACEM"), the French musical works rights society, was established.[94] Of the rights that the digital transmission right would replace, only the record labels' right to sell recordings (the distribution right, which would no longer have separate or independent existence for purposes of digital transmissions) is not already administered to one degree or another by a collective. Under current law and corresponding music industry business models, collectives represent song-

94. *See SACEM*, SACEM: a love story between music and authors' rights, http://www.sacem.fr/portailSacem/jsp/ep/contentView.do?pageTypeId=536886881&contentTypeId=2&programId=536887001&contentId=536884208&from=MR&param=retourListe (last visited Dec. 18, 2007).

writers, composers and music publishers for public performance[95] and reproduction and distribution ("mechanical") rights licensing of their musical works.[96] Collectives also represent record labels for webcasting[97] and, in those territories where it applies (among which the United States is not included), public performance rights licensing of sound recordings when played by over-the-air broadcast radio stations.[98] Each collective serves as a clearinghouse, making markets between the rights holders it represents and the multitude of those whose various uses of music and sound recordings require authorization.

Under the digital transmission right, the best results for rights holders and service providers alike (and, through them, consumers as well) would flow from a marketplace in which collective management was the norm and direct licensing the exception. In this regard, it would be ideal if there were at least one collective in each territory whose catalog encompassed all or nearly all recordings and which was authorized to grant worldwide rights at its local rates for all digital transmissions, retransmissions, and further transmissions of recorded music that originate in its territory.

A. *The Advantages of Collective Rights Management*

Generally, the Copyright Law requires those who wish to use protected content to secure authorization for the use in advance of undertaking the conduct in question. Accordingly, under the digital transmission right,

95. Three such PROs operate in the United States: ASCAP, http://www.ascap.com/ (last visited Dec. 10, 2007); BMI, http://bmi.com (last visited Dec. 10, 2007); and SESAC, http://sesac.com (last visited Dec. 10, 2007). PROs also operate throughout the world. *See*, *e.g.,* http://www.ascap.com/about/affiliated.html (last visited Dec. 12, 2007) (list of PROs in 91 territories with which ASCAP is affiliated through reciprocal administration agreements); http://www.bmi.com/international/entry/C2257 (last visited Dec. 12, 2007) (list of PROs in other territories with which BMI is affiliated). *See also* International Confederation of Societies of Authors and Composers, http://cisac.org/web/content.nsf/Builder?ReadForm (last visited Dec. 12, 2007).

96. In the United States, the Harry Fox Agency ("HFA") is the "foremost mechanical licensing, collection and distribution agency for music publishers." *See* http://harryfox.com/ (last visited Dec. 10, 2007). Similar mechanical rights collectives operate throughout the world. The Bureau International Des Societies Gerant Les Droits D'Enregistrement Et De Reproduction Mecanique ("BIEM"), the international organization representing mechanical rights societies, has 50 member organizations operating in 54 territories. *See*, http://biem.org/SocietyShow.aspx (last visited Dec. 10, 2007).

97. In the United States, SoundExchange fulfills this function. *See* http://soundexchange.com (last visited Dec. 18, 2007).

98. *See*, *e.g.,* What is PPL?, http://www.ppluk.com/ppl/ppl_cd.nsf/PDFs/$file/PPLinformationSheets.pdf (last visited Nov. 15, 2007) at 6 (discussion of licensing over-the-air broadcast radio stations for their performances of sound recordings); *id* at 8 (list of sound recording rights management organizations in other territories with which PPL is affiliated).

as under existing law, audio service providers would need to secure authorization to digitally transmit recordings prior to transmitting them. Failure to secure advance authorization would expose those responsible for the transmission to liability for copyright infringement.

Even though the legal burden is on service providers to secure advance authorization for their transmissions, the rate of compliance will continue to be low unless rights holders actively seek to license digital transmissions of their recordings. In order to maximize compliance, rights holders should make it as easy as reasonably possible for audio service providers to obtain and to administer the licenses they need. The over all burden of compliance, including the cost of license fees and the effort needed to fulfill music use reporting requirements, should be light enough so that a service provider's knowing non-compliance can only come from a willful and unjustifiable refusal.

There are hundreds of thousands of copyrighted songs and recordings. New works are created every day. Many different songs can share a common title; and popular songs often are recorded many times by different artists. There are also tens of thousands of music industry rights holders. Many of these are individual songwriters or recording artists. Others are small music publishing firms or record labels. Still others are larger independents. And, setting the industry's agenda is a handful of multinational entertainment conglomerates.

There is no quick and reliable way to determine who owns rights in which works. Registration of works is not required in order to secure copyright protection. Moreover, the identity of the music publisher or record label owning an interest in any particular song or recording will change as rights are assigned, publishing catalogs are bought and sold, and record labels come and go. So-called "label copy," information printed on a recording's label, jacket or liner notes identifying the rights holders, and its recent manifestation as metadata encoded in digital audio files, even if accurate on the day it was created (which may well not be so with respect to metadata created by service providers or end users) becomes unreliable as time goes by. And while the identity of the songwriter and recording artist of a particular recording cannot change once the recording has been completed, these people may not wish to be contacted by service providers or individual Internet users seeking licenses.

In the absence of collective management, each service provider who needs a license under the digital transmission right would be required to identify, locate and successfully negotiate a license with at least one rights holder of each recording that they wish to transmit. Some rights

holders will seek to facilitate the licensing process. Nevertheless, the time and effort necessary to clear rights in even a single recording may be beyond the capacity of many of those who will need a license.

It would be especially burdensome to clear rights in more than a few recordings, or in new works by emerging artists, or older works, or works of foreign ownership. By and large, service providers would not be able to obtain prior authorization for transmissions of recordings that they do not directly select and cannot identify in advance (e.g., those contained in user-generated content, those that originate from a third-party site and that have been framed by or embedded in the service provider's site, or those contained in transmissions through P2P networks).

In addition, in the absence of collective management, different rights holders will likely demand different terms and conditions for licenses to digitally transmit their recordings. These may include different start and ending dates for the licensed term; different periods for financial reporting and payment obligations; different data fields and formatting requirements for music use reports; different metrics for calculating license fees owed; and the obligation to employ possibly incompatible DRM regimes. Some rights holders will require most-favored-nations treatment; others will not.

The administration of inconsistent license agreements with multiple rights holders is complicated and costly. Service providers with the most resources to devote to rights clearance activities will have an advantage, though it will by no means be an easy matter even for them. The task will be more difficult for those with fewer resources, and most difficult for individual consumers when they, too, need licenses under the digital transmission right.

A marketplace that operates wholly without the intermediation of collective rights management organizations would not necessarily be a boon to music industry rights holders either. In the absence of collective management, each rights holder would need to undertake its own licensing efforts and establish its own rights administration infrastructure. Given the multitude of far-flung service providers and, possibly, individuals who will need authorization under the digital transmission right, success at licensing will require a systematic and comprehensive approach. This will be beyond the means of many individual rights holders when acting alone. Moreover, the effort needed to effectively monitor licensed transmissions to determine which recordings were transmitted and, therefore, who among rights holders is entitled to receive payment of royalties, will be no less daunting a task. Many larger rights holders are already unable to process the tremendous amounts of music use data generated by their limited Internet and mobile licensing successes to date.

In addition, because many digital transmissions will either originate from or be received outside of a rights holder's home territory, it will be necessary to establish and maintain a means by which to license digital transmissions and monitor music uses in foreign territories. This may involve regulation under foreign legal regimes.

In the absence of collective management, licenses for digital transmissions of many recordings may—by default—not be made widely available. Few audio service providers will be able to obtain licenses for all or even most of the recordings that they transmit. This does not mean that digital transmissions of recorded music would not occur in great abundance; only that a large portion of them will not be authorized. And, of course, transmissions that are not licensed cannot generate royalty payments for rights holders; they can only enrich free-riders and lawyers who litigate copyright infringement claims.

B. *Formation and Regulation of Collectives*

As a starting point, rights holders should be free to establish as many collective management organizations as they wish; and, as a general matter, collectives should be permitted to operate in any manner that they choose. For example, collectives should be permitted to restrict their membership on any lawful basis; treat some members one way and other members another; license service providers on whatever terms and conditions the market will bear; offer different terms and conditions to services that otherwise operate on the same bases; refuse to license certain service providers altogether; and use any basis that they wish to determine how to divide royalties among those they represent.

On the other hand, it may be necessary to establish criteria by which to determine whether by reason of their market position certain collectives should be subject to some degree of regulation. Consideration might be given to the number of rights holders a collective represents, the number of recordings in its catalog, or the proportion of all digital transmissions attributable to those recordings. Collectives that meet the threshold criteria for regulation, which should be low, should be required to accept into membership all songwriters, music publishers, recording artists and record labels who wish to join and who own an interest in at least one protected recording; treat all members on an equal and non-discriminatory basis, especially with respect to the manner in which music use is monitored and royalties are calculated and paid; license any service provider who requests authorization and who does not have an outstanding and indisputable license fee balance under a prior agreement with the collective; and offer the same terms and conditions of licensure to all service providers.

Regulated collectives should be required to operate in all respects on a transparent basis in order to further protect the interests of individual rights holders, service providers, and the public at large. Each collective should provide an accurate, current, and easily searched online database identifying every recording in its catalog, together with information identifying each rights holder of each such work (though contact information for rights holders who are individuals—as opposed to business entities—should only be made publicly available if the individuals in question unequivocally authorize such disclosure). The identity of licensed services, total license fee collections (though not the amounts paid by individual services), the collective's gross operating budget, the basis for its calculation of royalties, the total royalties paid (though not the amounts paid to particular rights holders), and all rules relating to governance of the organization should also be made publicly available. Finally, regulated collectives should be subject to government agency oversight or court supervision.

C. *Relationship of Collectives to the Rights Holders They Represent; and the Right to License Transmissions of Particular Works*

Within this general framework, individual songwriters, music publishers, recording artists and record labels should be free to affiliate with a collective, or not to join any collective at all. It would not be necessary for all rights holders with an interest in the same recording to belong to the same collective. They may each belong to a different organization. However, no individual rights holder should be permitted to belong to more than a single collective at any one time. Moreover, inasmuch as digital transmissions of their works can originate from any territory, rights holders should be free to join a collective in any territory that they wish. They should not be limited in this regard either by their nationality, by the territory in which they reside or by the territory in which they are incorporated or have their principal economic residence. In addition, existing collectives to which rights holders may belong for the administration of rights in their works under current law should not be permitted to interfere, either directly or indirectly, with their members' affiliation decisions for the newly-established digital transmission right. By the same token, existing collectives should be permitted to repurpose themselves to operate under the digital transmission right and to solicit any and all music industry rights holders to become members.

Each rights holder who joins a collective would grant it the non-exclusive worldwide right to license digital transmissions of all recordings

in which the rights holder has an ownership interest. This would include all recordings of songs written by a songwriter, or administered by a music publisher; all recordings made by a recording artist; and all recordings in the catalog of a record label. The grant would extend to all works in existence at the time the rights holder joins the collective. The only exception would be those recordings, if any, for which the digital transmission right was subject to a pre-existing grant of exclusive rights made by all of the rights holders-in-interest in the recording in question.[99] The non-exclusive grant to the collective would also include any additional recordings which are newly-created or in which the rights holder otherwise acquires an interest while a member of the collective (e.g., by assignment of a single work, or acquisition of an existing publishing catalog or record label). These would automatically become part of the collective's catalog upon their creation or upon the rights holder's acquisition of its interest in them, as applicable.

Each collective's catalog would be composed of all recordings in which any songwriter, music publisher, recording artist, or record label who is a member of the collective has an ownership interest. This would include recordings in which one or more co-owners had granted non-exclusive rights to whichever other collective(s) they may belong.

Rights holders should be free to terminate their membership in a collective. In the event of such termination, the collective would lose the right to license digital transmissions of the recordings in which the terminating-rights holder has an interest; but only to the extent of that rights holder's interest in those recordings. If other co-owners of such recordings are (and remain) members of the collective, then rights in those recordings themselves would remain in the collective's catalog and be available for licensing by that collective.

Collectives in different territories should be free to enter into reciprocal administration agreements; or to refrain from affiliating with each other. If a collective in one territory has reciprocal administration agreements with collectives in other territories, then the catalog of the local collective would also include the recordings in the catalogs of those affiliated foreign collectives; and the local collective would represent the interests of the songwriters, music publishers, recording artists and record labels who are members of the affiliated foreign collectives when their recordings are contained in digital transmissions that originate in the local collective's territory.

99. As discussed *supra* in Part II.D., given the nature of the global digital communications network, the expected useful lifespan of exclusive rights in the digital music marketplace will be short, their value uncertain. Because of this, exclusive licenses likely will be few and far between.

If all rights holders of a particular recording belong to the same collective, then that collective would be the only organization in its territory with authority to license digital transmissions of that recording that originate locally. If they belong to different collectives, then each of those collectives would have non-exclusive rights with respect to the recording in question. A license from any collective whose catalog contains a particular recording would be sufficient, standing alone, to authorize digital transmissions of that recording by any service provider holding the license. There would not also be a need for a license from any of the other collectives to which other rights holders of the work may belong.

D. *The Role of Direct Licensing in the Context of Collective Rights Management*

The opportunity for direct licensing would be preserved. Individual songwriters, music publishers, recording artists and record labels that join a collective would retain the right to issue direct licenses for digital transmissions of their recordings to any service providers with whom they choose to do business. Subject to whatever limitations rights holders of particular works may voluntarily agree to among themselves, and subject to the obligation of rights holders to account to their co-owners for royalties earned, individual rights holders and service providers should be permitted to agree upon any terms and conditions for direct licenses that they find to be mutually acceptable.[100]

Direct licensing by rights holders who are members of collectives must be transparent. At a minimum, rights holders should be required to advise their collectives of the existence of any direct licenses they grant, the works that are involved, and the identity of the service provider whose transmissions have been authorized. These disclosures are necessary so that the collective will know not to seek to license the service provider in question insofar as the works that are subject to the direct license are concerned; and not to distribute royalties for transmissions of those works by that service provider. Such disclosures also will tend to safeguard the interests of co-owners of works who are not parties to the direct license.

In my view, the best practice would be for collectives to directly administer direct licenses issued by their members. The collective would

100. To be clear, rights holders of particular recordings should be free to agree among themselves that none of them will grant direct licenses with respect to their jointly-owned works. On the other hand, regulated collectives should not be permitted to deny their members the right to issue direct licenses.

collect the license fees specified in the direct license and distribute royalties to the relevant rights holders. The out of pocket expenses incurred by the collective in the administration of direct licenses could either be absorbed by all members of the collective as a cost of its doing business, or be deducted from the royalties otherwise due to the rights holders whose works are the subject of the direct license.

E. *Treatment of Service Providers; One-Stop Shops; Worldwide Rights*

Each collective would be authorized to issue licenses under the digital transmission right that grant worldwide rights for transmissions, retransmissions, and further transmissions that originate from its own territory. In this way, each collective would offer those whose digital transmissions require authorization a single source, a "one-stop-shop" with respect to the recordings in the collective's catalog. I contemplate a single, simple form of license agreement to be offered by regulated collectives that would cover all service providers regardless of the business models they employ or the manner in which they transmit recorded music. The agreement would contain uniform terms and conditions applicable to digital transmissions of all covered recordings. These would include provisions relating to the calculation of license fees that would correspond to the fee categories discussed in Part III.F., *infra*, financial reporting and payment procedures, and standardization of the technology to be employed for identifying recordings, tracking how often they are transmitted, and reporting this music use data to the collective.

The license fees charged, including those for transborder transmissions, should be based on the rates prevailing in the territory of the collective issuing the license. As I mentioned earlier, if the license fees of the territory of reception are charged, service providers would be unable to develop well-informed business strategies because they would not be able accurately to predict their music license fee costs.

For their part, service providers should be free to operate their services from any territory that they wish, and to obtain needed authorization from the collective(s) operating in that territory. The license fees charged under the digital transmission right by local collectives in different territories may well be a factor that service providers consider in determining where to locate their services. On the other hand, if, as I suggest in Part III.F. *infra*, license fees are based on the *benefit realized* by service providers from their digital transmissions, the rates charged by collectives that wish to be affiliated with collectives in other territories may tend to equalize around a particular percentage. This would

discourage forum shopping for lower license fee rates. The choice of where to locate a service may also be influenced by the nature of the hosting services and the telecommunications infrastructure available in a given territory. On the other hand, by locating its service in a foreign territory, a service provider may become subject to the local law of that territory including, for example, for purposes of civil and criminal jurisdiction, and taxation. In any event, service providers should not be limited to obtaining licenses for their digital transmissions only from the collective in the territory in which they are incorporated or in which they have their principal economic residence.

The central question for service providers will be with how many sources they must deal in order to obtain the digital transmission rights they need on reasonably acceptable terms. The presence in each territory of at least one "one-stop-shop" from which to obtain a single license agreement granting worldwide digital transmission rights to nearly all recordings will be key to service provider compliance. In the absence of such a collective, service providers would be required either to enter into agreements with all collectives operating in their territory or to devote the time and resources necessary to scrutinize the recordings they transmit to assure that all are included in the catalog(s) of the collective(s) with which they do have agreements. A license from a "one-stop-shop" with an all-inclusive catalog would effectively eliminate the need for service providers to engage in such close scrutiny of their musical programming. If there were only two or three collectives in operation in a territory whose catalogs, taken together, included all recordings, service providers may well take licenses—albeit begrudgingly—with all of them rather than to incur the additional cost necessary to avoid even unintentionally infringing conduct. It is problematic, however, if there are ten or twenty or two hundred collectives in operation in a territory but no single collective with an all-inclusive catalog.

I suggest that a service provider who enters into a license agreement with a "qualifying" collective (one that has greater than a specified market share) should be entitled to assume that it has secured authorization through that license to digitally transmit any and all recordings.[101] Such a service provider would not be liable for monetary damages as

101. For purposes of this safe harbor, the market share necessary for a collective to "qualify" should be high; and, again, the determination of market share could be based on either the number of rights holders a collective represents, the number of recordings in its catalog, or the proportion of all digital transmissions attributable to those recordings.

an infringer of the digital transmission right in any recording that is not in that collective's catalog unless, and until, a rights holder of such recording serves a notice demanding removal of the recording from the service. Only if the service provider fails to remove the work within a reasonable time after receiving the notice would it be liable for such damages. Moreover, once a work has been removed pursuant to a notice for takedown, the service provider must use commercially reasonable efforts including, for example, the use of industry standard filtering technology, to keep that recording from again being offered on the service without a license.

The structure I am proposing would allow service providers who transmit many different recordings, or who do not select or control the recordings they transmit, to obtain licensed access to what is essentially a worldwide catalog of recordings through an agreement with a single collective operating in the territory from which the service's transmissions originate. It also would allow those who transmit fewer recordings and who control their programming lineup to deal either with any specialty collectives that may exist and whose catalogs include the recordings that the service provider wishes to transmit, or to avoid collectives altogether, relying instead on direct licenses from the music industry rights holders-in-interest.

F. *License Fees*

One of the most contentious aspects of music rights management is the setting of license fees. Conflict is inherent in the process. Rights holders want to charge as much as possible and rights users want to pay as little as they can.

In the past, record labels were able to set the sale price for recordings because they controlled the channels of distribution. The "value" of music was the cost to consumers expressed as a per-unit charge. Today, the industry no longer controls the market for distribution of its products. Nevertheless, it continues to seek per-unit license fees from online retailers for their sales of recordings.

In addition, the industry uses license fees for streaming as an indirect means of giving life support to its moribund sales-based revenue model. It treats every streaming performance as if it displaced sale of the recordings involved. It seeks license fees from audio service providers based on the greater of a specified and often quite high percentage of revenue and either a unit payment per-song/per-stream/per-listener or payment based on the aggregate number of hours that users receive streaming transmissions of recorded music.

License fees calculated on either a per-stream or aggregate tuning hours basis can quickly exceed a service provider's revenue. They do not provide an incentive to comply. They penalize use and, therefore, discourage it. They will lead to fewer licensed transmissions as service providers are driven out of business or underground. And for it all, the music industry will not have saved its sales-based revenue model.

What consumers want—full, unfettered, DRM-free access to music—is not available at any price; yet it is available to everyone for free. In the digital music marketplace rights holders are not willing sellers, audio service providers and end users are not willing buyers, and the value of recorded music is effectively zero.

A reference other than a per-unit charge or its variant, the aggregate tuning hours model, is needed to set license fees in the digital music marketplace. I suggest that the *benefit realized* by audio service providers from their digital transmissions of recorded music should be the basis for calculating license fees due under the digital transmission right. The greater the *benefit realized* the higher the license fees that will be owed.

A *benefits realized* standard will allow music industry rights holders to participate in the growing bounty that will be created by digital transmissions of recorded music. It also will provide service providers with a license fee obligation that scales with the benefit they derive from their transmissions of music. It will encourage licensed transmissions.

As I mentioned earlier, I will suggest a structure for calculating license fees under the digital transmission right, though I will not recommend specifically how much license fees should be. My interest is in the elements that will comprise the base against which license fees will be calculated and not with the rate to be applied to that base to calculate the fee owed in particular instances. That later function is properly the subject of negotiations between rights holders and/or their collectives and audio service providers.[102]

I think that the vast majority of those needing a license under the digital transmission right will fall into one or more of seven general categories. These include (1) service providers who charge users to receive transmissions of recorded music; (2) those who transmit recorded music

102. In the event that voluntary agreement on rates cannot be reached, an adjudicated rate setting proceeding will be needed. For this, the parties will have to rely on either the Copyright Royalty Board, or some other similar body such as the federal courts that conduct fee setting proceedings under the anti-trust consent decrees that govern the operations of ASCAP and BMI.

in connection with advertising; (3) those who transmit recorded music in connection with the sale of goods or services other than recorded music; (4) those who do not charge consumers to receive transmissions of recorded music, do not carry ads, and do not sell goods or services; (5) over-the-air broadcast radio stations and the web sites that they operate; (6) operators of centralized P2P file-sharing networks, and distributors of software for decentralized networks who exercise control over the file-sharing that their software enables (as discussed in Part II.E. *supra*); and (7) individual Internet users when they are responsible for the transmissions in question (e.g., when they operate their own web sites; or when they upload recorded music to services that accept user-generated content or offer recordings on P2P networks or similar services that do not have through-to-the-user licenses).

1. CATEGORY NO. 1: SERVICES THAT CHARGE USERS TO RECEIVE TRANSMISSIONS OF RECORDED MUSIC

Under a *benefit realized* standard, payments received from users for their receipt of transmissions of recorded music would be included in the base against which the service provider's license fee is calculated. Reportable revenue would include, for example, revenue derived from subscription music streaming or subscription download services; one-off charges for the download or streaming of individual songs, entire CDs, or musical programming containing one or more recordings; and an allocated portion of revenue derived from the sale of bundled products of which recordings comprise a part.

This Category should be construed to include revenue generated by any business model that might be devised by the entrepreneurial genius of audio service providers to induce consumers to pay to receive transmissions of recorded music.

Moreover, as this Category will only include commercial services, those that earn revenue directly from their transmissions of music, the license fee should be subject to a substantial minimum payment.

2. CATEGORY NO. 2: SERVICES THAT TRANSMIT RECORDED MUSIC IN CONNECTION WITH ADVERTISING

A site's advertising revenue may not be as clearly connected to its transmissions of recordings as is revenue directly derived from consumer payments to receive those transmissions. Therefore, under a *benefit realized* standard, it will be necessary to distinguish between ads that are—and ads that are not—sufficiently connected to transmissions of music so that the revenue generated from them can fairly be deemed attributable to those transmissions and, therefore, properly included in the license fee base.

I suggest that the base include all advertising revenue earned from areas of a site from which transmissions of music (whether streams or downloads) originate. It would also include advertising revenue from those areas in which streaming transmissions can be heard even though the music stream was launched from elsewhere on the site. If a service provider configures its site so that the music that is made available can be heard throughout the site, then all advertising revenue earned from the site would be included in the license fee base. Revenue from in-stream ads, and ads contained in pop-up or pop-out players (including ad revenue earned if the player continues to operate after the user has left the web site in question) would also be included; as would revenue from ads included in files containing recorded music that are downloaded by consumers for subsequent playback off line. On the other hand, revenue from ads that appear in areas of a site from which no transmissions of music originate and in which music cannot be heard would not be included in the base against which the license fee is calculated.

If a service in this Category also has revenue identified in Category No. 1, the service's license fee base would include the cumulative reportable revenue earned for both Categories.

In addition, insofar as this Category will only include commercial services, those that earn advertising revenue in connection with their transmissions of recorded music, the license fee should be subject to a substantial minimum payment. I suggest that the same minimum fee be applied to this Category as is applied to Category No. 1, but that only a single non-cumulative minimum payment would be required from services that fall into both Categories.

3. CATEGORY NO. 3: SERVICES THAT TRANSMIT RECORDED MUSIC IN CONNECTION WITH THE SALE OF GOODS OR SERVICES OTHER THAN RECORDED MUSIC

In my view, a service in this Category will have benefited from its transmissions of music if there is a sufficient connection between those transmissions and its sale of goods. However, I find it difficult to justify any effort to leverage ownership of rights in music into a share of revenue derived from the sale of goods other than music (such as cat food, cars or Christmas trees) merely because the Internet service through which the goods are sold happens to offer transmissions of music. An alternate means is needed to measure the *benefit realized* by services in this Category from their digital transmissions of music.

In this context, the aggregate tuning hours model can play a useful role. I suggest that license fees for services in Category No. 3 should be based on the aggregate number of hours that music is streamed to

consumers while they are accessing those portions of the site where goods or services are sold or offered for sale. If a service in this Category offers recorded music for downloading from an area of the site where such other goods and services are also offered for sale, the length of the work itself (the time it would take to stream the music file that is downloaded) should also be included in the total aggregate tuning hours reportable by the service.

To be sure, the aggregate tuning hours model may cause some services in this Category either to limit their transmissions of recorded music or to discontinue the use of music altogether. This is not necessarily a bad result. The services in this Category will be engaged in e-commerce. Music has an appeal for e-commerce sites, but music is an input without which such sites can continue to operate. On the other hand, use of the aggregate tuning hours model to calculate license fees payable by Internet radio sites (e.g., webcasters) and other music-centric services operates to deprive them of access to an input—recorded music—without which they cannot operate at all.

In any event, services in this Category No. 3 may also charge consumers to receive digital transmissions of recorded music (Category No. 1), and/or offer advertiser-supported streaming and/or downloading (Category No. 2). In such event, the service's total license fee would be the cumulative amounts due for all the Categories that apply.

In addition, because this Category will only include commercial services, the license fee should be subject to a substantial minimum payment. I suggest that the same minimum be applied to this Category as is applied to commercial services in Categories No. 1 and 2. However, though only a single non-cumulative minimum payment would be required from music-centric services that fall into both Categories No. 1 and 2, I suggest that the minimum to be paid by e-commerce services under Category No. 3 should be in addition to any minimum that may also be due for such services under Categories No. 1 and/or 2.

4. CATEGORY NO. 4: SERVICES THAT DO NOT CHARGE USERS FOR THEIR RECEIPT OF DIGITAL TRANSMISSIONS OF RECORDED MUSIC, DO NOT CARRY ADS, AND DO NOT SELL GOODS OR SERVICES

Services that fall into this Category do not operate on a commercial basis. Under a *benefit realized* standard, only a minimum license fee would be warranted.

I suggest that distinctions should be drawn with respect to the amount of the minimum license fee to be paid by services in this Category that are operated by businesses and those that are operated by individual

Internet users. Again, I do not have specific recommendations as to how much these minimums should be. I do suggest, however, that the minimum for noncommercial services that are operated by businesses should be less than the minimum to be charged to commercial services that fall into Categories No. 1, 2 and/or 3. The minimum for noncommercial services that are operated by individual consumers should be even less than that.

5. CATEGORY NO. 5: OVER-THE-AIR BROADCAST RADIO STATIONS AND THE WEB SITES THAT THEY OPERATE

Each over-the-air broadcast radio station and any web site it may operate would be treated as a single audio service provider for purposes of calculating license fees due under the digital transmission right. They would only be required to pay a single license fee to cover both their over-the-air and their over-the-Internet transmissions. They would no longer be required to pay separate public performance license fees to the PROs or to SoundExchange; nor would a new and additional performance right in sound recordings be imposed on them for their analog over-the-air broadcasts.

For purposes of calculating the fee due, advertising revenue earned by the station from its over-the-air broadcasts would be included as revenue under Category No. 2. If the station also operates a web site, additional license fees under Category No. 2 would only be due if the web site carried Internet-only advertisements or if over-the-air advertisers paid a premium for the further transmission of their ads on the station's web site. If the station charges Internet users to receive transmissions of recorded music (e.g., if it offers a subscription streaming service or the opportunity for consumers to pay-per-download-per-podcast) the station's license fee also would include a calculation under Category No. 1. And if the station's web site directly offers goods for sale other than recorded music, a calculation would also be required under Category No. 3.

The requirements regarding minimum fees would apply to radio stations in this Category No. 5 in the same manner and to the same extent as they apply to all other audio service providers regardless of the Category or Categories in which they fall.[103]

103. It may be appropriate to have separate fees for non-commercial radio stations and for those operated by non-profit educational institutions or religious organizations.

6. CATEGORY NO. 6: FEES IN THE CONTEXT OF P2P FILE-SHARING

Operators of centralized P2P file-sharing networks, and qualifying distributors of software for decentralized networks who obtain licenses under the digital transmission right (see the discussion at Part II.E. *supra*), would pay license fees based on revenue they derive from charges made to network participants for their file- and stream-sharing of recorded music (Category No. 1), and/or revenue they derive from advertising in connection with file- and stream-sharing activities on their networks (Category No. 2), and/or a calculation under Category No. 3 to the extent that goods or services are directly offered for sale through the network. In addition, operators of centralized networks would pay a flat dollar annual fee for each unique participant who engages in file- or stream-sharing through the network at any time during the year. Software distributors for decentralized networks also would pay such a minimum but only on the basis of the number of unique network participants who qualify for coverage under a through-to-the-user license (e.g., only those who engage in file- and/or stream-sharing of recorded music by means of software that enables filtering and monitoring to be conducted).

7. CATEGORY NO. 7: FEES FOR INDIVIDUALS

As mentioned in Part II.E. *supra*, under the digital transmission right individual users would not incur any liability merely for surfing the web, accessing streaming media, or downloading music files. Whether end users listen to streams or download recordings, make one or more copies of a recording for personal use, or use recordings on one or several playback devices would have no effect on their obligation to pay license fees to music industry rights holders.

On the other hand, Internet users would need authorization, and be required to pay license fees, whenever they act as digital audio service providers in their own right; that is, whenever they operate a web site or other audio service. In such instances, Internet users would be required to pay license fees (including any minimum fees) on the same basis as any other service provider, applying the factors identified in connection with Categories No. 1 through 4, *supra*, as appropriate.

Internet users would also need licenses if they upload music to sites or services that accept user-generated content but that do not have through-to-the-user licenses; or if they offer recordings to others through P2P networks or similar services that do not have such licenses. I suggest that these users should pay a flat-dollar annual license fee for the authorization needed so that their conduct may be lawful under the

digital transmission right. Again, I do not have a specific suggestion how much this fee should be. But, whatever the fee, payment could be made either directly to the rights holders-in-interest, to the collective(s) that administer rights in the recordings in question, or through Internet service providers who would pass-through music license fee charges to their subscribers.

An alternative to this approach would be to impose a universal license fee on all Internet users whether or not they ever access music online, let alone whether they ever transmit recorded music to others. Vis-à-vis Internet users this approach would operate as a tax that would be collected by Internet service providers. Such a tax would require Internet users to subsidize other people's entertainment for the support of private business interests (e.g., music industry rights holders). Vis-à-vis music industry rights holders this approach would operate as a compulsory license. The quid pro quo for the obligation that Internet users must pay a universal license fee would be that it authorized their digital transmissions of any and all recorded music. If, on the other hand, rights holders are given the opportunity to opt-out of the scheme, then Internet users are left without the assurance that their payment of the tax completely relieves them of the possibility of infringement liability. Moreover, if the Internet access tax were also extended to cover content categories other than recorded music, music industry rights holders may well find themselves in competition with other rights holder groups over a limited fund. In any event, neither a tax nor a compulsory license is a desirable end point for public policy on the matter. The need for an Internet access tax and/or a compulsory license could be avoided under the digital transmission right if only those who engage in digital transmissions of recorded music are required to pay license fees.

G. *Music Use Monitoring*

Collective management in the digital music marketplace begins and ends with the ability to monitor transmissions of the protected works in question. Knowing which recordings have been digitally transmitted and by whom underlies licensing, enforcement, contract administration, and royalty distribution. Initially, it is necessary to determine which web sites, audio services, P2P file- and stream-sharing networks, social networking services and, where applicable, individuals, are engaged in digital transmissions of protected recordings in order to know who may need a license. If a license is refused, identification of recordings transmitted without authorization is necessary for an infringement action. Once licensed, transmission data including, where applicable,

the aggregate tuning hours involved, may be needed to calculate license fees due. And, knowing specifically when and how often particular recordings were transmitted by each licensed entity, and the territories from which those transmissions were sent and in which they were received, will all be necessary in order to know which rights holders are entitled to receive royalty payments, and how much.[104]

Internet transmissions are digital and occur in a networked environment. Therefore, at least in theory, it should be possible to identify every recording each time it is transmitted. A census-based royalty distribution system would assure that all rights holders, large and small, receive that share of royalties that is proportionate to the fees paid by licensed service providers for transmissions of their recordings. The principal drawbacks of such a system are the costs to develop and to administer it.

The alternative is to base royalty distribution on sampling. Sample surveys credit only a fraction of the transmissions that occur. Royalties generated from transmissions of recordings that fall within the sample would be paid to the owners of those recordings. However, royalties for licensed transmissions of recordings that do not fall within the sample would not be paid to the owners of those works; rather, they would be paid to owners of recordings that do fall within the sample. A royalty distribution system based on sampling necessarily results in the possibility that some rights holders—particularly those whose recordings are not regularly played on large commercial web sites—may never receive royalties for any licensed transmissions of their recordings. It also will result in payment of royalties to some right holders for licensed transmissions of recordings in which they have no ownership interest whatsoever.

Currently, music industry rights holders require audio service providers to shoulder the entire burden of music use monitoring for purposes of royalty distribution. However, as between rights holders and service providers, rights holders have the greater need to know how many times any particular recording has been transmitted. To be sure, this information may be useful to some service providers in planning future programming, but it is entirely irrelevant to most, and the obligation to gather and report it is an obtrusive and costly burden. Moreover, if license fees are linked either to the number of times a recording is transmitted or to the number of listening hours accumulated, service providers will have even less incentive to provide accurate use data.

104. *See infra* Part III.H., for discussion of specific rules relating to royalty distribution.

Rights holders need to find a way to maximize the depth and accuracy of monitoring while reducing the burden of it on service providers. One possible solution involves encoding recordings with copyright management information and using complementary software that would allow for automatic tracking of the encoded files by licensed service providers when they transmit them. I suggest that any such tracking software should be provided free of charge to licensed service providers. In addition, each collective might also directly provide licensed service providers with online access to encoded digital files of all recordings covered by the collective's license. These, too, should be provided free of charge.

On the other hand, service providers should not be required to use either the encoded files or the industry-standard tracking software. Rather, they should be offered a reduction in license fees as an incentive for their cooperation in music use monitoring through use of these preferred tools. Service providers who elect not to use these tools would not be offered a reduction in license fees but would still be required to meet the monitoring and reporting requirements of their license agreements.

H. *Suggested Rules for Royalty Distribution*

Each collective would pay royalties only to those rights holders whose interests it represents. Thus, if the rights holders of a particular recording belong to different collectives, they would each look only to their own collective for payment of royalties earned from that collective's licensing efforts on their behalf. Thereafter, and unless they have agreed otherwise among themselves, each rights holder would have the obligation to account to their co-owners for royalties received from their respective collectives. If all rights holders of a particular recording belong to the same collective, they would each receive their full share of royalties directly from that collective and there would be no need for later accounting and reconciliation among them.

The rules that govern royalty distribution under the digital transmission right would take into account that the catalog of the collective that licensed the transmission that gave rise to the royalty in question (the "local collective") will contain recordings regarding which one or more rights holders is a member of the local collective (recordings of "local origin") as well as recordings that are in the local collective's catalog because one or more rights holders with an interest in them is a member of an affiliated foreign collective (recordings of "foreign origin").

The royalty distribution rules also would take into account that some licensed transmissions will begin and end entirely within the territory of

the local collective, while others will begin in the territory of the local collective and end in another territory.

For royalty distribution purposes only, I suggest that transmissions should be treated as if they were composed of two legally cognizable and equal acts, one occurring in the territory from which the transmission originates, and the other in the territory in which the transmission is received. This will assure that rights holders in the territory from which a particular transmission originates as well as those in the territory where it is received will share in the royalties earned from that transmission.

Accordingly, royalties under the digital transmission right would be distributed as follows:

- If the recording is of local origin and the transmission giving rise to the royalty begins and ends entirely within the territory of the local collective, then the local collective would pay all the royalties available to those of its own members who have an interest in the recording. For example, if only the music publisher were a member of the local collective, then the music publisher would receive all royalties payable by the local collective for the transmission in question. On the other hand, if the songwriter, music publisher and recording artist were all members of the local collective, but the record label was a member of some other collective, or was not affiliated with any collective at all, then the local collective would pay the songwriter, music publisher and recording artist each one-third of the royalty available for distribution.
- If the recording is of foreign origin and the transmission begins and ends entirely within the territory of the local collective, then the local collective would pay the songwriter's share and the recording artist's share to the affiliated foreign collective to which those rights holders belong for subsequent distribution to them, and would pay the music publisher's share and the record label's share to those of its own members who have been granted local rights to the recording. If no local music publisher (subpublisher) and/or record label (distributor) has been designated, then the local collective would pay the music publisher's share and the record label's share to the affiliated foreign collective to which those rights holders belong for subsequent distribution to them.
- If the recording is of local origin and the transmission begins in the territory of the local collective and ends in the territory of an affiliated foreign collective, then the local collective would pay one-half of the music publisher's share and one-half of the record

label's share to those of its own members who have an interest in the recording, and the other half of the music publisher's share and the other half of the record label's share to the affiliated foreign collective (but only if that collective has members who have been designated to represent the music publisher's interest and the record label's interest in its territory). The local collective would pay the songwriter's share and the recording artist's share directly to the songwriter and the recording artist, but only if they were its own direct members.

- If the recording is of foreign origin and the transmission begins in the territory of the local collective and ends in the territory of an affiliated foreign collective, then the local collective would pay one-half of the music publisher's share and one-half of the record label's share to those of its own members who have been granted local rights to the recording. If no local music publisher (subpublisher) and/or record label (distributor) has been designated, then the local collective would pay the one-half shares in question to the affiliated foreign collective(s) to which the music publisher and the record label belong for subsequent distribution to them. The local collective would pay the other half of the music publisher's share and the other half of the record label's share to the affiliated foreign collective in the territory in which the transmission was received (but only if that collective has members who have been designated to represent the music publisher's interest and the record label's interest in its territory). And, finally, the local collective would pay the songwriter's share and the recording artist's share to whichever affiliated foreign collective they belong for subsequent distribution to them.

I. *A Period of Transition*

It is my intention that music industry rights holders in the aggregate should do at least as well financially under the digital transmission right as they have done under the system that the digital transmission right would replace. Therefore, as a near-term objective, industry revenues under the digital transmission right should equal the sum of total net profits for record labels and music publishers and total royalty income for songwriters and recording artists derived from sales and licensed public performances of their musical works and sound recordings.

Although the industry was unable to make the digital music marketplace safe for its traditional ways of doing business, its various Internet strategies have effectively suppressed the market for music-enabled

web sites and other audio services. Therefore, in the short-term, there may well be a short-fall between the base revenue amount (however much that turns out to be) and the amount that rights holders will collect in license fees under the digital transmission right.

I expect that service providers, who are eager to meet consumer demand by lawful means, will rush to enter into license agreements under the digital transmission right. To increase the likelihood of this favorable result (and, as I suggested earlier), the overall burden of compliance, including the cost of license fees and the effort needed to fulfill music use reporting requirements, should be light enough so that knowing non-compliance can only result from a willful and unjustifiable refusal. If these conditions are met, the duration of any revenue short-fall likely will depend on how quickly and how well music industry rights holders organize and roll-out the structures needed to implement their new right.

In the meantime, steps should be taken to make up any short-fall that may occur. For this limited purpose, I suggest that a temporary levy should be imposed on consumer electronics and technology products.

Consumer electronic makers and technology firms, as such, would have no liability under the digital transmission right. Nevertheless, because of the digital transmission right, they will be free to innovate in whatever ways and to whatever extent necessary to satisfy ongoing consumer demand for new music-related products and services. I think it is appropriate, therefore, that these businesses should bear the burden of the levy; they should not be permitted to pass the levy through to consumers.

It is not intended that the levy result in a windfall for music industry rights holders; it is only meant to make them whole during transition to the digital transmission right. Therefore, the levy should be adjusted downward in response to increases in music industry license fee collections. In addition, the levy should be subject to sunset; a definite date (I suggest two to four years from implementation) by which the music industry would be expected to thrive in the digital music marketplace without subsidies.

Conclusion: Though the End Is Near, the Music Industry May Not Yet Have Passed the Point of No Return

On October 4, 2007, the RIAA won its first jury verdict in a copyright infringement action against an individual file-sharer. The jury in Duluth, Minnesota, found Jammie Thomas liable for copyright infringement

arising out of her participation in the Kazaa P2P file-sharing network. It awarded $222,000.00 in damages to the plaintiff record labels (although the RIAA, which conducted the litigation, will retain whatever money it is able to collect from Ms. Thomas, a single mother of two).[105]

The music industry's victory in the *Thomas* case likely will serve only to encourage it to continue its efforts to salvage its traditional ways of doing business. Ironically, however, the industry may have been better off had it lost the *Thomas* trial or, perhaps more importantly, had it lost the *Grokster* case in the Supreme Court.[106] Commenting on the verdict in *Thomas*, Paul Resnikoff, editor of *Digital Music News* observed: "In the face of a negative precedent, majors would be forced to craft more consumer-friendly approaches, accelerate their shift away from content protection, and adopt radically different access and pricing models. And they would stop committing valuable financial and legal resources towards an incredibly unsuccessful product preservation strategy."[107]

The music industry is in free fall and, to date, all that it has accomplished through its brute force efforts is to waste time, lose money, and squander goodwill. No time remains for stop-gap measures. There can be no justification for further delay in the implementation of needed change.

To be sure, the digital transmission right, administered as I have suggested, would represent a major shift in leverage and economics within the music industry, and it almost goes without saying that those rights holders—and the organizations that represent them—who have enjoyed the strongest position historically, will likely be reluctant to embrace such a change. Nevertheless, the digital transmission right would provide songwriters, music publishers, recording artists and record labels, in the aggregate, with their best opportunity to do as well—if not better—financially than they have done under the system that the digital transmission right would replace.

105. Eric Bangeman, *RIAA Trial Verdict Is In: Jury Finds Thomas Liable for Infringement*, ARS TECHNICA, Oct. 4, 2007, *available at* http://arstechnica.com/news.ars/post/20071004-verdict-is-in.html; David Kravets, Jury Finds Minnesota Woman Liable for Piracy, Awards $222,000, WIRED Blog Network (Oct. 4, 2007), http://blog.wired.com/27bstroke6/2007/10/riaa-jury-finds.html.

106. *See supra* note 23 and accompanying text.

107. Paul Resnikoff, *Resnikoff's Parting Shot: Why Major Labels Just Lost*, DIGITAL MUSIC NEWS, Oct. 4, 2007, *available at* http://digitalmusicnews.com/stories/100407parting/view.