

EXECUTIVE SUMMARY
On Music Licensing In the Digital Age
By Bennett Lincoff

The Internet is fundamentally incompatible with the music industry's sales-based revenue model. Despite this, the industry pursued a digital strategy based on the false hope that it could make the Internet safe for the sale of recorded music. Because it wasted the last decade chasing this unattainable goal, the industry failed to undertake the transformation now needed for success. Moreover, the industry's failed strategy also negatively impacted most, if not all other stakeholders in the digital music marketplace.

It is now widely acknowledged that the music industry needs a new business model specifically adapted to digital transmissions of recorded music. It is my purpose to propose such a new model; one that will not only reverse the music industry's decline but that will also simultaneously promote technological innovation, enhance the free markets for consumer electronics and technology products, facilitate the growth of all manner of licensed music services (including licensed streaming and download services, and licensed P2P and social networks), and allow consumers to lawfully enjoy music, how, when, and where consumers themselves decide.

I suggest this: Lawmakers should aggregate the rights of authors, publishers, artists and producers in their respective musical works and sound recordings and create a single, unified right for digital transmissions of recorded music. This "digital transmission right" would replace the parties' now-existing reproduction, distribution, and public performance rights (and, where applicable, the making available right and the right of communication to the public).

Going forward, the only act that would require authorization or payment of a license fee would be the digital transmission of recorded music. Licenses would be issued without regard to whether recordings were streamed or downloaded, or transmitted by some means not yet devised; whether programming was interactive or non-interactive; whether a service accepted user-uploaded content, operated as a P2P or social network, or retransmitted recordings that originated from some other site or service.

Ownership of the digital transmission right in each recording would be held jointly by the author(s), publisher(s), artist(s) and producer who contribute to it.

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 authority to grant non-exclusive licenses.

Rights holders of individual recordings would be free to make whatever arrangements they wish among themselves regarding the distribution of royalties. However, as a starting point for such negotiations, and as a default when voluntary agreement is not possible, I suggest that the interests of authors, publishers, artists and producers each should be allocated a 25% share of royalties earned from digital transmissions of their recordings. In this way, singer-songwriters would receive 50% of all royalties earned, and 100% if they also self-publish and produce their own recordings.

The digital transmission right would be enforceable only against those directly involved in providing digital transmissions of recorded music. Consumers would not incur any liability to rights holders merely for accessing the Internet, listening to streaming media, or downloading music files. They may be still be required to pay network operators for Internet access, and to pay service providers in connection with their activities on particular sites and services. But, as transmission recipients, consumers would not have any liability to rights holders.

Similarly, software developers, technology firms, mobile service providers, and ISPs, when operating as such, would not have any liability under the digital transmission right. However, any of these (ISPs, for example) would need licenses if they provide transmissions of recorded music.

Any entity that operates a web site or other service that provides digital transmissions of recorded music (a “music service provider”) would need a license. Consumers would need licenses if they are responsible for the transmissions in question, such as when they upload music files to web sites or services that accept user-generated content but that do not have licenses authorizing such transmissions by their users; or when they offer recordings to others through participation in unlicensed P2P networks, or similar services.

Sites and services that enable consumers to upload music files would be jointly liable with their users for this conduct. However, a single license held by such a service provider would authorize all transmissions for which the service provider and users of the service would be jointly liable (e.g. uploading to the service by its users), 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).

Similarly, P2P participants who download music files or access streams through the network but who do not offer works to others would not need a license. Individuals who facilitate transmissions of recordings to others through the network would need authorization.

For centralized P2P networks, the network operator and all users of the network would be legally responsible for the file sharing that goes on. (Each user for his or her transmissions to the network servers. The operator for enabling the conduct of its users and for its own further transmissions of recordings to users.) A single license held by the operator would suffice to authorize all transmissions of the licensed recordings through the network. In such a case, individual network participants would not need to obtain licenses in their own right.

The situation is different for decentralized P2P. For these there is no single entity to which a network-wide license could be issued. Accordingly, each user who shares recordings through decentralized P2P would be responsible for securing authorization for his or her own conduct. (Licenses for individual file sharers would be issued by the collective rights management organizations operating in their local territory; and the license fees they pay (a modest flat fee per month) would be collected by their ISPs as part of monthly subscription charges.)

It stands to reason that the vast majority of consumers who are interested in P2P would likely seek out centralized 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. In addition, those who participate in decentralized P2P would have the

opportunity to act lawfully by securing licenses in their own right. In this way, the digital transmission right would foster a culture of compliance in place of a culture of defiance.

The manner in which rights in musical works and sound recordings are administered is as complicated and controversial as how those rights are defined.

The digital transmission right would be implemented through a combination of voluntary collective rights management and direct licenses. Collecting societies would continue to play the key role; and existing collectives would be positioned to lead the way. To do so, however, they must adapt to the new relationships that authors, publishers, artists and producers will have with each other and to their respective musical works and sound recordings under the digital transmission right. Collectives must reexamine the assumptions upon which they operate and repurpose themselves accordingly.

In order to maximize compliance, collecting societies should make it as easy as reasonably possible for music service providers to obtain and to administer the licenses they need. The overall burden of compliance, including the cost of license fees and the effort needed to fulfill music use reporting requirements, should be so obviously fair that knowing non-compliance could only come from a willful and unjustifiable refusal.

In my view, the best results for rights holders, music service providers, and consumers would flow from a marketplace in which collective management was the norm and direct licensing the exception. And 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, or further transmissions of recorded music that originate in its territory.

In this regard, I discuss the formation and regulation of voluntary collective rights management organizations; offer suggestions regarding governance, transparency, accountability and regulation; 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 music 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 in the context of collective management; license fees; 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.

The digital transmission right would not depend on the efficacy of access restrictions and anti-copying measures for its success. Its monetization would not involve the imposition on rights holders of a statutory, compulsory or legal license. It would not require that a broadband access levy or tax be imposed on Internet users. And it would not require the compelled enlistment of ISPs as enforcers on behalf of music industry rights holders.

IFPI recently acknowledged that, to date, the industry has only managed to license around 400 music services worldwide. By contrast, 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. This, in turn, would provide authors, publishers, artists and producers, 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.

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

The digital transmission right will bring about change that is directly and proportionately responsive to the challenges presented by the Internet; change that creates a new and fair balance between the rights of creators and those of music users; change that is technologically neutral; change that meets the needs of all the many competing stakeholders in the digital music marketplace. The digital transmission right will foster a legal marketplace for digital transmissions of recorded music with rules that are as

simple, straightforward and clear as the context will allow; rules that are sufficiently flexible to adapt to the continually changing economic and technological environment of the global digital network.