

PAY WHAT YOU LIKE—NO, REALLY: WHY COPYRIGHT LAW SHOULD MAKE DIGITAL MUSIC FREE FOR NONCOMMERCIAL USES

INTRODUCTION

In June 2006, *New Yorker* music critic Sasha Frere-Jones noted that major international rock band Radiohead had completed its contractual obligations to its record label, EMI.¹ Explaining that the band had announced its intention not to sign with another label, Frere-Jones suggested that it could still profit considerably from sales of merchandise and concert tickets.² He went on to propose that the band no longer needed the support of a large media corporation: “Labels spend a lot of time and money worrying about illegal downloading and file-sharing. What they should be worried about is more bands like Radiohead, which could make major labels a relic of the twentieth century.”³

In October 2007, Radiohead announced its intention to release its next album on the Internet, without the aid of any record label.⁴ Its website listed the price simply as a blank space, alongside a question mark.⁵ Fans clicking on the question mark received the message, “It’s up to you.”⁶ Those who clicked again were reassured, “No really. It’s up to you.”⁷ They could pay as little or as much as they liked for a download of the album.⁸ In response, the media variously announced the final death throes of the recording industry,⁹ denounced the maneuver as a publicity stunt,¹⁰ hailed the birth of a

¹ Sasha Frere-Jones, *Fine Tuning; Reassessing Radiohead*, NEW YORKER, June 26, 2006, at 86.

² *Id.*

³ *Id.*

⁴ Jeff Leeds, *Radiohead To Let Fans Decide What To Pay for Its New Album*, N.Y. TIMES, Oct. 2, 2007, at E1.

⁵ William Ferguson, *The Seventh Annual Year in Ideas: The Radiohead Payment Model*, N.Y. TIMES, Dec. 9, 2007, (Magazine), at 40, 41.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Robert Sandall, *The Day the Music Industry Died*, SUNDAY TIMES, Oct. 7, 2007, at 9.

¹⁰ Andrew Edgecliffe-Johnson, *Radiohead MP3 Release a Tactic to Lift CD Sales*, FIN. TIMES, Oct. 11, 2007, at 15.

revolution,¹¹ and generally provided a great deal of free advertising for the band. What really happened in those first weeks is still unclear. Initial reports of the number and price of downloads varied greatly, but they certainly numbered in the hundreds of thousands and garnered the band a good deal of money.¹² When the album was released in a physical medium in early 2008, it rose quickly to the top of the Billboard charts.¹³ Recently released sales figures put the total sales at about 3 million, including both physical units and downloads, the latter of which alone exceeded total sales for the band's previous album.¹⁴

There is a great deal of scholarship about the incredible impact that new forms of digital technology continue to have on intellectual property in general and music in particular. The music industry seems to have been most deeply affected thus far by the Internet's rapid growth.¹⁵ Though movies and television programs are beginning to appear online, recorded music has been traded—and, occasionally, sold—on the Internet for at least a decade now, and the music industry has sustained real damage as a result.¹⁶ But, despite this obvious shift in the marketplace and a plethora of suggestions for legislative action, regulatory intervention, and the like, change has been slow to come to the music industry.¹⁷

This Comment examines the industry's failure to adapt to radically changing circumstances. It argues that the current structure of the recording industry, which consists of just a few large companies owned by even larger companies that control vast swaths of the infrastructure needed to create and

¹¹ Michael S. Malone, *Silicon Insider: The Radiohead Revolution*, ABCNEWS.COM, Oct. 11, 2007, <http://abcnews.go.com/Business/IndustryInfo/story?id=3742719&page=1>.

¹² Jon Pareles, *Pay What You Want for This Article*, N.Y. TIMES, Dec. 9, 2007, at AR36. The band did not release figures, but a widely reported analysis suggested that perhaps a million people paid an average of \$2.26 per download, considerably more than the band would have made per album under a standard recording contract. *Id.* The band denied the accuracy of this analysis, though. *Id.*

¹³ Jonathan Cohen, *Radiohead Nudges Blige from atop Album Chart*, BILLBOARD, Jan. 9, 2008, http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003694375. The album reached the number one position, but not until its second week due to its release on an unusual day of the week. *Id.*

¹⁴ Greg Kot, *Radiohead's 'In Rainbows' Experiment Pays Off with 3 Million Sales*, CHICAGOTRIBUNE.COM, Oct. 20, 2008, http://leisureblogs.chicagotribune.com/turn_it_up/2008/10/radioheads-in-r.html.

¹⁵ Mark G. Tratos, *Entertainment on the Internet: The Evolution of Entertainment Production, Distribution, Ownership and Control in the Digital Age*, in *THE IMPACT OF THE INTERNET & DIGITAL MEDIA ON THE ENTERTAINMENT INDUSTRY* 127, 152–54 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. 8874, 2006), available at WL 862 PLI/Pat 127.

¹⁶ *Id.*

¹⁷ *Id.* at 132.

distribute content, is outmoded and inefficient. This industry continues to thrive, though, due to the support of a similarly outmoded copyright system. As a result, there exists a real need for change, for the benefit of the industry and the U.S. economy as a whole. In a world where nearly ubiquitous technologies allow individuals with very little capital or experience to create and distribute a product rivaling the quality of that created by the existing industry,¹⁸ copyright law should adapt to promote such activity. It is, after all, the purpose of copyright to promote the creation and dissemination of expression in the marketplace, not to protect large, existing industries from new competition.¹⁹ Ultimately, this Comment argues that the market structure of the music industry is broken, and that the current copyright scheme for recorded music is overly complex and far too deeply intertwined with that broken structure. As a result, the breadth and scope of copyright protection for recorded music should be radically restricted to ensure the development of a more efficient and productive new paradigm in the music industry. And, although there are many well-informed proposals for copyright reform, there are good reasons to reject all of them. In their stead, this Comment suggests an absolute privilege against copyright liability for noncommercial reproduction and distribution of sound recordings by individuals.

Part I provides an overview of copyright law's application to recorded music and its implementation by the recording industry. It details the structure of the industry and the distribution of rights among the major players, showing where the revenues generated by recorded music actually go and highlighting the lopsided structure of the industry. Part II demonstrates the recording industry's failure to adapt to the new digital paradigm. Part III explores the fundamental problems of the current system. It then examines some possible alternatives to the current copyright protection scheme for recorded music, including administrative models of compulsory licensing for digital distribution;²⁰ hands-off free-market approaches;²¹ and methods of revising and narrowing copyright protection so as to allow for broader noncommercial

¹⁸ *Id.* at 133–34.

¹⁹ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 296 (2004).

²⁰ *See, e.g.*, WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004); Jessica Litman, *Sharing and Stealing*, 27 *HASTINGS COMM. & ENT. L.J.* 1, 39 (2004).

²¹ *See, e.g.*, Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 *VAND. L. REV.* 813, 909 (2001); Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 *HASTINGS COMM. & ENT. L.J.* 259, 319 (2007).

use by non-licensees.²² Although these approaches would ultimately fail, elements of all of them inform this Comment's proposed solution: an absolute privilege for noncommercial use of sound recordings.

I. THE CURRENT COPYRIGHT SCHEME FOR RECORDED MUSIC

A. *The Rights Accorded to Sound Recordings by the Copyright Act of 1976*

1. *Copyright Basics*

Copyright law has always been driven by technological development. It arose with the invention of the printing press, because there was no real need to protect an author's right to make copies of her work when such copies came about only from the prolonged labor of monks over their illuminated manuscripts.²³ Once mass production became possible, though, so did a commercial market in reproductions of original works, and the need arose to protect the ability of the owners of those works to exploit them.²⁴ So, starting in sixteenth-century England, the Crown began to grant exclusive rights to individuals to print certain works.²⁵ Those rights-holders became powerful and organized, and over the next couple of centuries a now-familiar conflict began to play out between a content-producing industry intent on monopolizing its market and the public need for content unfettered by ownership restrictions.²⁶ This is the fundamental tension of copyright: It must create an incentive for authorship by giving potential authors the ability to exploit their works, but it must do so for the purpose of enriching society with those works.²⁷ It thus must balance the monopoly power of copyright ownership with the demand for availability of works of authorship to the public.²⁸

In the United States, this tension is written into the Constitution, which grants Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive

²² See, e.g., LESSIG, *supra* note 19.

²³ WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:6 (2007).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* § 1:18 (discussing Charles Pinckney's, James Madison's, and Thomas Jefferson's views on the purpose of federal intellectual property law).

²⁸ *Id.*

Right to their respective Writings and Discoveries.”²⁹ How, exactly, these exclusive rights will promote progress is a detail left to Congress to work out. It has attempted to do so through dozens of statutory revisions, up through today’s prevailing law, the Copyright Act of 1976 and its amendments.³⁰

The Copyright Act protects “original works of authorship fixed in any tangible medium of expression.”³¹ It provides for six exclusive rights of copyright owners: reproduction, preparation of derivative works, distribution, public performance, public display, and public performance “by means of a digital audio transmission.”³² This last right obviously pertains only to sound recordings, and then only under certain circumstances; most of the other rights pertain to music in various ways that are discussed later in this Comment. The six exclusive rights are all divisible; copyright owners can subdivide and sell or license any or all of them, in any combination.³³ Federal copyright protection did not actually extend to sound recordings—which encompass not just music but any other recorded sounds—until 1972,³⁴ though it applied to musical compositions themselves much earlier.³⁵

2. *Copyright in Musical Compositions and Sound Recordings*

The Copyright Act interacts with music in various ways. The Act defines not just how music can be protected but also creates schemes for licensing its use under certain circumstances. To begin with, it distinguishes audio recordings of music, which are given the anachronistic name “phonorecords,” from copies of other types of works, which are simply called “copies.”³⁶ Copies are still relevant to music, though. They may embody a musical composition, as distinct from a sound recording.³⁷ This distinction is an important one when it comes to licensing sound recordings, but is nonetheless unusual on its face.

This apparent strangeness is traceable to an important, and essentially metaphysical, dichotomy in copyright: the distinction between the

²⁹ U.S. CONST. art. I, § 8, cl. 8.

³⁰ PATRY, *supra* note 23, § 1:1. Copyright in the United States is solely a matter of federal statute, though it was dealt with in some aspects by state law prior to the Copyright Act of 1976. *Id.*

³¹ Copyright Act of 1976, 17 U.S.C. § 102 (2006).

³² *Id.* § 106.

³³ PATRY, *supra* note 23, § 8:1.

³⁴ *Id.* § 1:70.

³⁵ *Id.* § 3:92.

³⁶ 17 U.S.C. § 101 (2006).

³⁷ PATRY, *supra* note 23, § 3:160.

copyrightable work itself and the medium in which it is fixed.³⁸ Copyright law protects only the expression of ideas; these expressions can be embodied in any number of ways. So, for instance, this Comment is protected by U.S. copyright law at the moment that it is fixed in a medium—in this case, written down—but what is protected is not the paper it is written on. If the sole extant copy of this Comment is a ream of paper, and that paper is stolen, no copyright infringement has occurred, even though the text is essentially gone. There has simply been a theft of physical property. Conversely, there is, of course, no need for one to take a physical copy of this Comment to infringe the copyright; rewriting its text based solely on memory would still constitute infringement.

As applied to music, then, this scheme means that there are important differences between a *song* and a *recording* of a song. When a songwriter imagines a new song in his head, he has no copyrightable material, regardless of how detailed or original the imaginary conception is. Once he writes the song down, though, it is fixed, and thus can be protected.³⁹ If he has written the song down in musical notation—though this is likely a rarity now—he has created a *copy* of his *musical composition*. The copy is just the piece of paper with notation on it; the song is the musical composition, which has no material existence on its own apart from the copy. And it is not the copy that is protected by copyright law, but rather the musical composition that is embodied, or “expressed,” in the copy.

When the songwriter records a performance of the song to a tape or some other medium, though, he has created a *sound recording*, and the situation becomes more complicated. Even if the song were never fixed in the paper notation just discussed, it is now fixed in the recording medium, and is thus protectable.⁴⁰ So, there is now a song (the ephemeral “musical composition”) and an audio recording of it (a “phonorecord,” the physical medium in which the song is embodied, be it a tape, disk, or the like). But there is also something more: In performing the song for the recording, the songwriter has created another thing entirely, the “sound recording.”⁴¹ This sound recording—an audio recording of a particular performance of a particular

³⁸ *Id.* § 3:23.

³⁹ This assumes that other criteria are met, as well. “Fixation,” as noted above, is a basic requirement of copyright protection under the Copyright Act of 1976. 17 U.S.C. § 102. Some of the reasoning for this is obvious, and some of it less so, but the issue is beyond the scope of this Comment.

⁴⁰ PATRY, *supra* note 23, § 3:93.

⁴¹ 17 U.S.C. § 101.

song—is eligible for a separate copyright.⁴² Thus, any phonorecord containing a single recording of a single song embodies two copyrights: the copyright in the sound recording and the copyright in the musical composition. And each of these copyrights implicates the array of exclusive rights provided by the Copyright Act, which may be divided and assigned in any number of ways.

The preceding example is confusing enough, and it assumes a single person is writing, performing, and recording the song. In practice, of course, the situation is often far more complex. The average popular song is likely written by a professional songwriter, who may not even be able to perform the song, and who may work with others, who then share some part of the copyright in the musical composition. This song is then performed by another person or group (often popularly referred to as the “artist”), and this performance is captured onto a recording medium by one or (usually) more people, including producers, engineers, and mixers, any or all of whom may have a stake in ownership of the copyright in the sound recording (though not in the musical composition, unless they participate in its creation, as well). To complicate matters further, the business of exploiting the musical composition and sound recording typically involves at least a few other parties, including publishing companies, record labels, and performing rights societies. And thus the rights implicated by the musical composition and sound recording at issue are quickly divvied up among a host of parties, with further complications introduced by their private, contractual agreements,⁴³ and still others resulting from the Copyright Act’s unique treatment of the rights to sound recordings.⁴⁴

B. Who Really Owns the Rights? The Creation and Ownership of Rights in Sound Recordings

1. History and Structure of the Recording Industry

Prior to the invention of the phonograph in 1877,⁴⁵ the primary way to record musical compositions was through musical notation on paper, though mechanical rolls for player pianos were also an important technology around

⁴² *Id.* § 102(a)(7).

⁴³ See generally DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (6th ed. 2006). Despite the “self-help” tone of the title, Passman’s book is widely considered to be the “Bible” of music-related entertainment law.

⁴⁴ See 17 U.S.C. §§ 114–115.

⁴⁵ PEKKA GRONOW & ILPO SAUNIO, AN INTERNATIONAL HISTORY OF THE RECORDING INDUSTRY 1 (Christopher Moseley trans., 1999).

the beginning of the twentieth century.⁴⁶ The notion of listening to recorded music seemed far-fetched, even to Thomas Edison, who invented the phonograph but thought it mainly useful for stenography.⁴⁷ At the time, people enjoyed music solely through live performances, either attended publicly or simply performed at home for the entertainment of the family, using widely available sheet music that sold in the millions just as recordings do today.⁴⁸ Over time, though, phonograph technology became better and cheaper, and its widespread use for music reproduction soon followed. Edison himself got into the industry that rose up around the new device, eventually signing recording deals with the stars of the day.⁴⁹ His main competitors were also companies that controlled the technology and its content; this would eventually begin to change, although oligopoly in the recording industry would always remain the prevalent system.⁵⁰

The recording industry became an important part of the economy: in 1920, almost 150 million records were sold in the United States,⁵¹ and by 1978 sales reached a peak of 762 million.⁵² By that time, a complex, multilayered industry had grown up around the business of recording and selling music.⁵³

Today, the main players in the recording industry are the four major record companies, Universal Music Group, Warner Music Group, EMI, and Sony BMG,⁵⁴ which are responsible for the creation of most commercial sound recordings.⁵⁵ These corporate entities sign recording contracts with artists,

⁴⁶ See *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 9 (1908). The development of piano rolls led to a whole host of issues, not least of which was whether a “copy” of a song that could not be read without mechanical assistance was a “copy” under copyright law. The Supreme Court thought not, but Congress quickly righted this wrong in the Copyright Act of 1909. Unfortunately, the solution nearly created a monopoly in the piano-roll business, a problem that seems unimportant today but that led directly to sweeping changes in copyright law, including the creation of compulsory licensing. See PATRY, *supra* note 23, § 1:45.

⁴⁷ GRONOW & SAUNIO, *supra* note 45, at 3.

⁴⁸ PETER TSCHMUCK, *CREATIVITY AND INNOVATION IN THE MUSIC INDUSTRY* 1–2 (2006).

⁴⁹ GRONOW & SAUNIO, *supra* note 45, at 36.

⁵⁰ *Id.* at 135–36.

⁵¹ *Id.* at 37.

⁵² *Id.* at 135.

⁵³ Tratos, *supra* note 15, at 133–34.

⁵⁴ See Louis Hau, *Apple to Big Music: Set It Free*, FORBES.COM, Feb. 6, 2007, http://www.forbes.com/business/business-tech/2007/02/06/jobs-apple-drm-tech-media-cx_lh_0206apple.html.

⁵⁵ Tratos, *supra* note 15, at 197. Many records are, of course, made by independent musicians or record labels that operate outside of the major-label system. PASSMAN, *supra* note 43, at 61. However, as these recordings account for a relatively small number of total sales and already embody various alternative approaches to creation and distribution of recorded music, they are considered in detail later in this Comment. See *infra* Part II.C.2–3.

who may or may not also write the songs they record and perform.⁵⁶ The record companies typically advance money to the artists for the purpose of making a record, and arrange for the recordings to take place.⁵⁷ Each recording is supervised by a producer, who is usually independent of both the label and the artist, and who typically employs at least one engineer at a recording studio that is likely rented from yet another entity.⁵⁸ Once a recording is created (an often lengthy and costly process), the record company handles its distribution through a distribution company, which is likely a part of the record company.⁵⁹ Each record company also handles sales, marketing, promotion, and so on.⁶⁰

Thus, the creation of a single sound recording typically involves dozens of people and corporations, with a web of relationships defined in part by copyright law and largely by contract. The picture remains a complex one, but ownership of the rights in songs and sound recordings typically follows a standard pattern.

2. *Ownership and Licensing*

As discussed above, the combined effort of the many entities involved in making a record ultimately creates a phonorecord, the material object in which both a musical composition and a sound recording are embodied. In the simplest example, in which a songwriter/musician writes, performs, and records a song herself, she owns all the exclusive rights to both the sound recording and the musical composition, and can exercise those rights as she wishes. In reality, though, under the existing music industry system, ownership of rights is more dispersed at the outset. As discussed in the following subsection, industry-standard recording agreements dictate much of the complexity in ownership and revenue flow involving sound recordings, but part of the story comes from the Copyright Act itself.

Sound recordings are a special sort of work under the Copyright Act, in large part because they do not carry all of the exclusive rights imparted to copyrighted works by the Act. In particular, § 114 of the Act limits the exclusive rights in sound recordings to reproduction, the preparation of

⁵⁶ PASSMAN, *supra* note 43, at 61.

⁵⁷ *Id.* at 78.

⁵⁸ *Id.* at 114–26.

⁵⁹ *Id.* at 61–64.

⁶⁰ *Id.* at 61–62.

derivative works, distribution, and public performance through digital transmission.⁶¹ The right of public performance is specifically excluded from this type of work.⁶² And the remaining rights are further limited: The owner of the copyright in a sound recording can prevent only the actual, exact copying of the sound recording, not any imitation, regardless of how precisely it mimics the original.⁶³ It should not be forgotten, though, that such a close imitation may infringe the copyright in the underlying musical composition.⁶⁴ The Copyright Act provides for this too, though: Section 115 limits the rights of reproduction and adaptation in non-dramatic musical compositions through a device called a compulsory license.⁶⁵ Under this licensing scheme, the public dissemination of musical compositions embodied in sound recordings is ensured by requiring songwriters whose works have been recorded with their authorization and then publicly distributed in the United States to allow the reproduction and distribution of such recordings at a set, statutory royalty rate.⁶⁶ Those who wish to make use of such a compulsory license need only meet certain notice requirements.⁶⁷

In the real-world music industry, this distribution of rights usually plays out as follows: The record label gives the songwriters and musicians involved in creating a song an advance of money to be used for recording the song, in exchange for granting the label exclusive rights to exploit the resulting sound recording by reproducing and distributing it.⁶⁸ The songwriters, meanwhile, typically grant their rights to the musical composition to a publishing company in exchange for administration of those rights.⁶⁹ The record label then licenses use of the compositions from the publisher at a rate determined by the statutory compulsory licensing rate.⁷⁰ Issuance of mechanical licenses from publishers to record labels is generally handled by a third party, the Harry Fox Agency.⁷¹

⁶¹ Copyright Act of 1976, 17 U.S.C. §§ 106, 114(a) (2006).

⁶² *Id.* § 114(a).

⁶³ *Id.* § 114(b).

⁶⁴ *See infra* Part II.A.2.

⁶⁵ 17 U.S.C. § 115. This mandatory licensing scheme arose as a direct result of the fears of monopolization generated by the piano-roll case, *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908). *See* PATRY, *supra* note 23, § 1:45.

⁶⁶ 17 U.S.C. § 115; PATRY, *supra* note 23, § 1:45.

⁶⁷ 17 U.S.C. § 115(b).

⁶⁸ PASSMAN, *supra* note 43, at 61–64.

⁶⁹ *Id.* at 206.

⁷⁰ *Id.* at 204. Record companies and publishers almost always opt for private agreements rather than use of the compulsory licensing scheme, but the statutory licensing rate still sets the standard for mechanical royalty rates actually used. *Id.*

⁷¹ *Id.* at 213.

Finally, the performance right in the musical composition must also be administered, since it is impractical for each end user (radio stations and nightclubs, predominantly) to license each of the thousands of songs it might “perform publicly” by playing the recordings in public.⁷² So, administration of the performance rights is handled by even more entities, called performing rights societies, the most important of which are BMI and ASCAP.⁷³ These societies obtain performance rights from publishers (to whom the rights have been assigned by writers), grant these rights to end users through blanket licenses allowing for performance of all works handled by the society, and administer the division and payment of fees from these licenses to the publishers.⁷⁴

The various rights embodied in sound recordings are thus split up among the players in a complex and deeply rooted system that accounts for the basic structure of the music industry. And this structure has arisen, at least in part, in response to the nuances of copyright law. The law thus has a direct influence on another complex facet of the industry, as well: its system of accumulating and distributing revenue.

3. *Where the Money Goes*

The preceding subsections make clear that both copyright law and the music industry are exceedingly complex; as a result, the profits from the creation and sale of recorded music do not necessarily flow to those parties one may expect to be the beneficiaries of the creative process. Instead, the general tendency of the current market structure is to accumulate profits in the hands of the few large entities that control the industry.

Ownership of intellectual property has always been controlled by the industries that exploit it rather than the individuals who create it.⁷⁵ In part, this control has been exercised through broad influence over and manipulation of intellectual property law, as well as through the law of contract.⁷⁶ Even in the days of sheet music, music publishers protected their investment in infrastructure by requiring assignment of copyright from songwriters in exchange for the distribution of their works and the attendant payment of

⁷² *Id.* at 224–25.

⁷³ *Id.*

⁷⁴ PASSMAN, *supra* note 43, at 224–25. Individual writers also contract with the performing rights societies for administration of their shares of the proceeds from their performance rights. *Id.* at 226.

⁷⁵ See generally Tratos, *supra* note 15.

⁷⁶ *Id.* at 129.

royalties.⁷⁷ This practice was so widespread that the Copyright Act of 1909 gave business entities the right to be designated “author/owners” of creative works.⁷⁸ After this change, most entertainment-related copyrights in the United States would be registered by business entities rather than individuals.⁷⁹ And, as these entities advanced their respective segments of the entertainment industry and accumulated more control, they began to develop standardized approaches to contracting the various rights associated with their products.⁸⁰ In the music industry specifically, control of the market by a very few entities has led to the standardization of the recording contracts that govern the relations of songwriters, performers, record labels, and the other parties that contribute to the creation of recorded music.⁸¹ Because of this standardization, a general account of the typical revenue breakdown for the creation and sale of sound recordings is possible.

Since the 1960s, recording agreements have ballooned in size and complexity due to the increasing sophistication of both labels and artists in dealing with new technologies; while they were once just a few pages, they now often extend to as much as one hundred pages.⁸² Nonetheless, given the principles discussed above, their basic structures can be explained summarily. It should be noted at the outset that recording agreements essentially deal only with the rights to sound recordings. As discussed above, the rights to the underlying musical compositions are typically handled separately by publishing companies, from whom record labels must license them like any other entity.⁸³ As a result, recording agreements between artists and record companies primarily deal with the copyright in the sound recording, which is

⁷⁷ *Id.* at 138.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 136–42.

⁸¹ Stuart Talley, *Performance Rights in Sound Recordings: Is There Justification in the Age of Digital Broadcasting?*, 28 BEVERLY HILLS B. ASS'N J. 79, 93 (1994).

⁸² Gary Stiffleman & Bonnie Greenberg, *Exclusive Recording Agreements Between an Artist and a Record Company*, in 8 ENTERTAINMENT INDUSTRY CONTRACTS ¶ 159.03 (Donald C. Farber & Peter A. Cross eds., 2009).

⁸³ Shereen Daly, *Musical Compositions and Sound Recordings: Who Owns the Music?*, 5 INTELL. PROP. L. BULL. 34, 34 (2000). When the rights to a musical composition recorded under a recording contract are retained by the artist, licensing of those rights is dealt with in the contract by what is known as a “controlled composition clause.” PASSMAN, *supra* note 43, at 215. As is typical in such agreements, record companies usually reduce the statutory mechanical royalty rates paid on such compositions by a number of factors, substantially limiting the payments required. *Id.* at 215–16. Though very well-established artists may be able to negotiate these terms, for most they are fixed by the record companies. *Id.*

almost always assigned by the artist to the record company.⁸⁴ This simple transaction is the core of the agreement, but the contract's complexity arises from its thorough approach to the division of income from sale of the recordings, which determines the artist's royalties.⁸⁵

The artist's royalty is initially defined as a percentage of the wholesale price of all records sold.⁸⁶ This simple equation is complicated by a host of deductions, starting with "free goods."⁸⁷ Record companies give away a percentage of the records shipped to retailers as a means of shipping larger numbers; since these records are not sold, royalty calculations exclude this 5%–10% of records shipped.⁸⁸ Similarly, promotional records, which are given away to radio stations and record stores to promote the record, are not counted in royalty calculations.⁸⁹ Further, a percentage of royalties payable to the artist are withheld for a period of time as a reserve against returns.⁹⁰ Records are sold to retailers on a return privilege, allowing them to be reimbursed for unsold records that are returned to the record company.⁹¹ Accordingly, the record company withholds some portion of the potential royalties until its sales to retailers are finalized.⁹² Recording contracts written prior to recent moves toward simplification included deductions for packaging costs, shipping breakage, "free goods" included in shipments solely to lower the royalty calculation, and other reductions.⁹³ Finally, until very recently

⁸⁴ Samuel J. Fox, *The "Paterno Form"—The World's Greatest, Most Sensible and Versatile Exclusive Recording Artist Agreement with Commentary*, in 8 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 82, form 159-3 cmt. 26. Only in rare cases can very powerful artists have the copyright revert to them at some point after the contract term expires. *Id.*

⁸⁵ PASSMAN, *supra* note 43, at 68. Though Passman notes that recording agreements have become less complex in recent years, largely in response to the dissatisfaction of artists, they nonetheless remain highly complicated as a result of their treatment of nearly every conceivable contingency. *Id.*

⁸⁶ *Id.* at 69. The definition of the term "record" is an important element in the typical recording contract. *Id.* at 65. This issue will arise again later in this Comment, but at this point it suffices to note that the term generally includes audio and audiovisual devices, including such devices not yet known that are capable of transmitting sound or sound with visual images. *Id.* at 65–66.

⁸⁷ *Id.* at 69.

⁸⁸ *Id.*

⁸⁹ *Id.* at 69–70.

⁹⁰ *Id.* at 71.

⁹¹ *Id.* at 70.

⁹² *Id.* at 71. The amount of reserves depends on the expected sales of the record, so again more established artists fare better than new ones. *Id.* at 72.

⁹³ *Id.* at 72–77. Some record companies still use some of these procedures. *Id.*

most contracts reduced royalties for newer formats, on the theory that such formats were more expensive to produce.⁹⁴

Beyond the calculation of royalties, the economics of a recording agreement become still more complicated. Recording agreements frequently provide for payment of an advance to the artist, which is then deducted from the first income that would otherwise be payable as royalties.⁹⁵ Additionally, recording costs, monies paid on behalf of the artist, independent promotional expenses, and some part of video production costs may also be recoupable from royalties.⁹⁶ Recording costs include not just studio time and equipment rental, but also union scale paid to the artist and any other performers for the recording sessions.⁹⁷ Finally, record producers are usually paid their own percentage of the artist's royalties.⁹⁸

Given this explanation of the structure of a typical recording agreement, it is possible to construct an example of the actual revenue from a hypothetical record's sales. For an album that sells 500,000 copies at a wholesale price of \$12.05 per copy, on which the artist has a typical new-artist royalty rate of 14% and recording and touring costs of \$300,000, the artist's royalty payment after deducting these costs along with free goods, promotion, the producer's royalty, and the other costs discussed above, amounts to about \$100,000.⁹⁹ When the record company holds back its 35%–50% reserve of the gross royalties against returns, the artist initially receives *nothing*.¹⁰⁰ And this is for a record that has sold well by industry standards, attaining "gold" status by selling 500,000 units, and at a gross wholesale receipt of more than \$6 million.¹⁰¹ Most people—and likely most aspiring musicians, as well—would probably be surprised that such sales lead to no royalty payments for the artists involved.¹⁰² Nonetheless, the numbers are accurate: The Backstreet Boys, for example, who sold millions of records in the 1990s, reportedly received no

⁹⁴ *Id.* at 76. This practice continued long after the newer formats, such as CDs, became standard and thus no longer more costly. *Id.*

⁹⁵ *Id.* at 78.

⁹⁶ *Id.* at 80.

⁹⁷ *Id.*

⁹⁸ *Id.* at 88.

⁹⁹ *Id.* at 94.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.* (noting that a sampling of individuals produced guesses ranging from \$500,000 to \$2 million on the artist's proceeds from a gold record).

royalties whatsoever.¹⁰³ Meanwhile, consumers face suggested retail prices in the neighborhood of \$18 per compact disc (CD).¹⁰⁴ Even without competition from freely distributed music on the Internet, it is little wonder customers seek alternatives. Within the music industry, dissatisfaction with this scheme of record production has been palpable for years.¹⁰⁵

Despite concern from artists, though, the music industry is seeking still other ways to increase its share of the profits from music sales. At present, due to the current downturn in the industry, some record companies have been pursuing partnerships or “career co-ventures,” often known as “360 deals,” with artists.¹⁰⁶ Under these new agreements, artists receive higher payments, and record companies receive percentages in areas they have never before been involved in, including merchandise, sponsorships, touring proceeds, and some of the other most lucrative revenue streams for artists.¹⁰⁷ Such agreements raise a host of new issues,¹⁰⁸ and they represent a further consolidation of power in the hands of the already very large record companies. Perhaps most importantly, though, record companies are attempting to adjust to the challenges they face as a result of new technologies not just by restructuring their own contracts, but by lobbying Congress for copyright-related legislation that benefits the existing structure of the industry.¹⁰⁹ To understand these developments, it is necessary to focus on how the recording industry practices described above handle new digital technologies.

4. *Recording Agreements and Digital Distribution*

Recording agreements currently in use define the term “records” explicitly to include Internet and other electronic transmissions, so the basics of

¹⁰³ Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. TIMES, Sept. 14, 2003, at 33.

¹⁰⁴ PASSMAN, *supra* note 43, at 72–73.

¹⁰⁵ Prominent recording engineer Steve Albini makes the point somewhat grotesquely in a well-known essay that blames the industry for a decline in the quality of music and provides an even drearier account of typical royalty payments than does Passman. See Steve Albini, *The Problem with Music*, 5 THE BAFFLER (1993), reprinted in COMMODIFY YOUR DISSENT: SALVOS FROM *THE BAFFLER* 164 (Thomas Frank & Matt Weiland eds., 1997), available at <http://www.negativland.com/albini.html>.

¹⁰⁶ PASSMAN, *supra* note 43, at 92–93; see also Robert A. Rosenbloum & Steven S. Sidman, Presentation at the 16th Annual Entertainment Law Institute: *Sorting Through the Confusion* Revisited: A Further Look at Recording Agreement Provisions in the Digital Era (Oct. 20–21, 2006), available at <http://www.gtlaw.com/NewsEvents/Publications/PublishedArticles?find=83228>.

¹⁰⁷ PASSMAN, *supra* note 43, at 93.

¹⁰⁸ *Id.*

¹⁰⁹ See Corey Field, *New Uses and New Percentages: Music Contracts, Royalties, and Distribution Models in the Digital Millennium*, 7 UCLA ENT. L. REV. 289, 292 (2000).

recording agreements discussed above apply to various means of digital distribution.¹¹⁰ However, exactly what types of digital delivery are encompassed by recording contracts and what rights are implicated remains an open question in the music industry.¹¹¹

The definitions of the term “record” used in recording agreements have long been worded so as to encompass new and undeveloped technologies,¹¹² but by the late 1990s they explicitly included digital deliveries.¹¹³ As technologies have developed, so have the contracts; record companies now explicitly include in their definition of “records” not just digital downloads but also such ephemeral means of distribution as the streaming of audio.¹¹⁴ While this trend may seem simply to represent the constant process of adapting to changing technology, it should be noted that such developments begin to expand the record companies’ domain beyond just sound recordings to include means of delivery that seem more like performances, which have always been outside the reach of the recording agreement.¹¹⁵ And, while inclusion of new methods of digital distribution in recording agreements might appear to provide artists with secure means of acquiring income through these channels, record companies instead are generally moving to minimize royalties paid on these “new technology configurations.”¹¹⁶

One way recording agreements funnel the benefits of digital distribution solely to record companies is by excluding digital sales from the “normal retail channels” on which royalty payments are based.¹¹⁷ Such measures are also important in determining sales thresholds at which royalty payments are often increased in recording contracts.¹¹⁸ As the music industry moves away from traditional physical sales and toward digital downloads,¹¹⁹ artists should be compensated fairly for such sales.¹²⁰ As another example, artists traditionally receive reduced royalties for foreign sales, to compensate the record company

¹¹⁰ PASSMAN, *supra* note 43, at 66.

¹¹¹ *See* Rosenbloum & Sidman, *supra* note 106, at 2.

¹¹² PASSMAN, *supra* note 43, at 66.

¹¹³ Rosenbloum & Sidman, *supra* note 106, at 4.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 7–8.

¹¹⁸ *Id.* at 8–9.

¹¹⁹ *See id.* at 2.

¹²⁰ There is some progress being made in this area, though the general practice still favors record companies. *Id.* at 9.

for the increased cost of making such shipments.¹²¹ With digital distribution, this practice continues, despite a total lack of such expenses where nonphysical media are distributed.¹²²

Recording agreements have also traditionally provided for reduced royalty rates for sales of “new media,” and they exclude such sales from royalty escalation calculations, as well.¹²³ The traditional purpose of such deductions is to compensate the record company for the increased costs associated with bringing new technologies to market.¹²⁴ Though there may be some such costs associated with digital distribution, such as research and development,¹²⁵ such new technologies are likely far more cost-effective to bring to market than the physical media they are displacing, because they do not require packaging or shipping.¹²⁶ Nonetheless, “new media” reductions often apply to digital distribution along with the other deductions discussed above, leading to double- or triple-reduced royalties, so that royalties paid on digital sales may be less than 70% of the rate paid on physical distribution.¹²⁷ Some recording agreements may even still apply explicit “packaging deductions” or “container charges” to new media, including digital distribution, despite the lack of packaging inherent in such media.¹²⁸ Such practices are obviously unfairly advantageous to large record companies, but they still remain the norm, although there has been some movement toward more simple and sensible contracts.¹²⁹

Finally, there is ongoing debate as to whether digital exploitation of sound recordings constitutes a sale of the recordings or a license.¹³⁰ Artists typically receive a much larger payment for licensing of their sound recordings than for sales of records.¹³¹ As a result, major labels have typically structured deals with online retailers so as to make clear that their sales are treated like physical sales rather than licenses, despite the fact that the process by which entities like iTunes acquire the rights to reproduce and distribute the master copies of

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 6.

¹²⁴ PASSMAN, *supra* note 43, at 76.

¹²⁵ Rosenbloum & Sidman, *supra* note 106, at 11.

¹²⁶ *Id.* at 12.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 13.

¹³⁰ *Id.*

¹³¹ *Id.* at 13. Artists typically split net receipts from licensing fifty-fifty with labels, as opposed to the 20% or less they receive from royalties. *Id.* at 13–14.

sound recordings are more similar to traditional licensing arrangements.¹³² Such agreements have led to several high-profile lawsuits, as artists attempt to force courts to deem such distributions licenses rather than sales.¹³³ So far, though, this practice has continued to compensate record companies more than artists for a form of distribution that is less costly to the industry than other means.¹³⁴

Record companies continue to protect their own interests by contracting for as large as possible a percentage of the income they receive from the sale of an artist's work, even while digital distribution, which costs the companies far less, takes on increasing market share.¹³⁵ This situation has led to increasing dissatisfaction among artists, and it has been further compounded by the success of record companies in manipulating U.S. copyright law to their own advantage.¹³⁶ These developments are dealt with in the following Parts.

II. HOW THE INTERNET HAS CHANGED MUSIC DISTRIBUTION AND HOW RECORD COMPANIES HAVE FAILED TO ADAPT

A. *Recent Developments in Technology and the Music Business*

1. *Space and Speed in the New Digital World*

Given the ubiquity of the Internet in everyday life today, it is easy to forget how rapidly technology has changed in recent years. A brief look at the speed and nature of this development clarifies just how much the current media landscape differs from that of only a few years ago.

The ongoing crisis in the music industry over digital distribution has its source in three technological developments. First, the amount of data that can be stored on computers, MP3 players, and other digital devices has increased immensely since the technology first became available.¹³⁷ The first commercially available hard drives were physically huge but could barely hold

¹³² *Id.* at 13–18.

¹³³ *Id.* No major case has yet reached a result; another high-profile artist sued its label over this issue as recently as August 2008. Stephanie Condon, 'Digital Exploitation' in *Play in Allman-UMG Suit*, CNET NEWS, Aug. 12, 2008, http://news.cnet.com/8301-13578_3-10015319-38.html.

¹³⁴ Condon, *supra* note 133.

¹³⁵ *Id.*

¹³⁶ See Field, *supra* note 109, at 292.

¹³⁷ Steven Levy, *The Perfect Thing*, WIRED, Nov. 2006, at 2, available at <http://www.wired.com/wired/archive/14.11/ipod.html>.

a couple of average-length song files.¹³⁸ Now, pocket-sized hard drives and other forms of memory can hold thousands of times that amount of data.¹³⁹ Consequently, a currently available iPod, which retails for only \$349, can hold 40,000 songs; the first iPod held only 1,000.¹⁴⁰

Second, available network speeds have increased dramatically in the past decade. While downloading a single MP3 file can take up to thirty minutes on an old-fashioned, dial-up modem, it takes only seconds on a high-speed Internet connection.¹⁴¹ And such connections have now become commonplace worldwide,¹⁴² with wireless systems bringing high-speed Internet access to unprecedented numbers of users.¹⁴³ As a result, more people can acquire more data more quickly and easily, and thus more content can be freely exchanged.

Finally, the amount of space required to store digital music became much smaller with the introduction of the MP3 file format.¹⁴⁴ The MP3 format uses a compression algorithm to reduce the size of audio files by a factor of twelve without noticeable reduction in sound quality.¹⁴⁵ And, like all digital formats, MP3 files can be copied essentially an infinite number of times without the degradation in quality that accompanied older, analog duplication methods.¹⁴⁶ In combination with increased storage capacity and enhanced network speeds, the obvious potential of MP3 files quickly led to their widespread popularity, with now-famous results.

¹³⁸ *Id.* The original Macintosh computer did not include a hard drive, but one was available, for \$2,000. It held only ten megabytes of data. *Id.*

¹³⁹ *Id.* The first iPod design in 2001 contained a five-gigabyte hard drive. *Id.*

¹⁴⁰ Wilson Rothman, *Apple's iPod Classic Is Overgrown, Hard-Drive Equipped Nano*, GIZMODO, Sept. 5, 2007, <http://gizmodo.com/gadgets/apple/apples-ipod-classic-is-overgrown-hard+drive-equipped-nano-296675.php>.

¹⁴¹ Aric Jacover, Note, *I Want My Mp3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2225 (2002).

¹⁴² See WORKING PARTY ON THE INFO. ECON., ORG. FOR ECON. CO-OPERATION & DEV., BROADBAND AND ICT ACCESS AND USE BY HOUSEHOLDS AND INDIVIDUALS 9–12 (2007), available at <http://www.oecd.org/dataoecd/44/11/39869349.pdf> (noting that “broadband is spreading extremely rapidly”).

¹⁴³ See, e.g., Stephen Labaton, *Airwaves, Web Power at Auction*, N.Y. TIMES, Jan. 22, 2008, at C1 (“[I]n 2006, mobile wireless high-speed subscribers grew nationwide by more than 600 percent . . .”).

¹⁴⁴ *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1073–74 (9th Cir. 1999).

¹⁴⁵ *Id.* at 1074.

¹⁴⁶ *Id.* at 1073.

2. *Really Free Markets: The Rise of Peer-to-Peer File Sharing*

One of the earliest legal confrontations between the recording industry and these new technologies came in a familiar form. In *Recording Industry Ass'n of America v. Diamond Multimedia Systems Inc.*, the Recording Industry Association of America (RIAA), a music industry lobbying group, sought to enjoin the manufacture and distribution of Diamond's Rio, a portable MP3 player and predecessor to the iPod.¹⁴⁷ The RIAA argued that Diamond's Rio violated federal law because it allowed the copying of copyrighted material without regard for its copyright status.¹⁴⁸ This case recalled an earlier and more significant one dealing with similar issues, *Sony Corp. of America v. Universal City Studios, Inc.*¹⁴⁹ In *Sony*, major film companies sued Sony to challenge its new videotape recording technology, which arguably facilitated copyright infringement by allowing consumers to make copies of films and television shows.¹⁵⁰ The Supreme Court in *Sony* ultimately held not only that such copying was fair use, but that the makers of devices like the VCR could not be subject to contributory liability for copyright infringement resulting from use of technology that is otherwise capable of "substantial non-infringing uses."¹⁵¹ Similarly, the Ninth Circuit in *Diamond* deemed the Rio's music-copying capability analogous to that of a VCR, and thus acceptable.¹⁵² This precedent would play an important role in more famous cases to come.

By 1998, the digital technologies described above had converged sufficiently that people were sharing music online, but there were no sophisticated outlets for this activity.¹⁵³ This problem was confronted that year by Shawn Fanning, a Northeastern University freshman studying computer science.¹⁵⁴ Fanning developed a software program that allowed users to share files on the Internet more conveniently than was previously possible.¹⁵⁵ His "peer-to-peer" approach created a network of users that could each share

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1075 (dealing specifically with the Audio Home Recording Act of 1992 rather than the Copyright Act, but following analogous principles).

¹⁴⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 416 (1984).

¹⁵⁰ *Id.* at 419–20.

¹⁵¹ *Id.* at 456.

¹⁵² *Diamond Multimedia*, 180 F.3d at 1079.

¹⁵³ Darrin Keith Henning, "The Big Chill": *The Supreme Court Adopts an Inducement Standard for Third-Party Copyright Infringement Liability, Leaving Innovation in the Cold*, 29 U. ARK. LITTLE ROCK L. REV. 165, 167–68 (2006).

¹⁵⁴ David L. Wardle, *Broken Record: Revisiting the Flaws in Sony's Fair Use Analysis in Light of the Grokster Decision*, 26 LOY. L.A. ENT. L. REV. 1, 7 (2005).

¹⁵⁵ *Id.*

content and search the content of all other users through a central indexing computer.¹⁵⁶ The program quickly became popular among other students, and by 1999 Fanning had formed a company and begun public distribution of the Napster software.¹⁵⁷

This new problem was considerably more distressing to content owners than the comparably limited infringement capability of devices like the VCR or the Diamond Rio. This was especially true because, though the technology could be used for sharing any type of files, music MP3s were by far the most popular on Napster.¹⁵⁸ Worse, Napster quickly developed a network of millions of users.¹⁵⁹ And these users were largely college students, who were otherwise a major market segment for physical sales of CDs.¹⁶⁰ In response, the major record companies wasted little time in taking legal action, initiating what would become the first in a series of major peer-to-peer file-sharing cases, *A&M Records, Inc. v. Napster, Inc.*¹⁶¹

Though *Napster* had moved beyond issues concerning physical means of copying content, *Sony* and *Diamond* still loomed large in the case's development.¹⁶² As in those cases, the record companies in *Napster* based their claim on the concept of contributory liability.¹⁶³ Napster, after all, did not copy or distribute any infringing content.¹⁶⁴ However, all the file-sharing activity on Napster flowed through the centralized indexing system, which facilitated the process of searching files and connecting users.¹⁶⁵ Thus, although Napster users ultimately shared music files with each other directly rather than turning them over to Napster, most of the traffic peripheral to these transactions passed through Napster's own network.¹⁶⁶ Perhaps more importantly, the record companies were able to convince the courts that the

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 7–8.

¹⁵⁸ *Id.* at 8.

¹⁵⁹ *Id.*

¹⁶⁰ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 909–10 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

¹⁶¹ *A&M Records*, 239 F.3d 1004.

¹⁶² *See generally id.* (*Sony* and *Diamond* form the basis for several elements of the decision).

¹⁶³ *Id.* at 1011.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1011–12.

¹⁶⁶ *Id.*

vast majority of content traded through the Napster system was copyrighted content for which the users had not acquired any rights to copy or distribute.¹⁶⁷

The Ninth Circuit easily found that Napster had the requisite knowledge of infringing activities for a finding of contributory infringement.¹⁶⁸ It then had to address Napster's argument that it was protected by the holding in *Sony*, since the Napster system was capable of significant non-infringing uses.¹⁶⁹ Taking care to recognize *Sony*, the court noted that simply providing technology that is capable of infringing uses could not lead to contributory liability.¹⁷⁰ The court also clarified that the percentage of actual, existing use of the technology that is infringing is not relevant to this analysis, but rather that courts applying *Sony* must consider the possible uses of a technology.¹⁷¹ All of this would seem to suggest a favorable outcome for Napster, which provided for a wealth of possible non-infringing uses, but the court instead added a significant qualification to its *Sony* analysis.

The Ninth Circuit ultimately distinguished *Napster* from *Sony* on the basis of actual knowledge.¹⁷² In *Sony*, the defendant lacked any specific knowledge that its technology was being used for infringement—Sony had constructive knowledge, at best, that its machines were being used for infringement.¹⁷³ Napster, however, had actual knowledge about specific infringing activities occurring within its system.¹⁷⁴ In addition, the Napster system would have allowed it to prevent infringing uses, but it failed to take action against those uses.¹⁷⁵ Finally, the court found that Napster materially contributed to the infringing activity by providing the support services that allowed users to find and distribute infringing material easily.¹⁷⁶

¹⁶⁷ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 903 (N.D. Cal. 2000). The Ninth Circuit would later reject the relevance of this evidence, but it nonetheless likely encouraged the result in this case on appeal.

¹⁶⁸ *A&M Records*, 239 F.3d at 1020.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1020–21.

¹⁷¹ *Id.* at 1020.

¹⁷² *Id.* at 1021.

¹⁷³ *Id.* at 1020.

¹⁷⁴ *Id.* at 1022.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (finding that Napster provided the “site and facilities” for direct infringement under the standard in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996)). The district court in *Napster* was persuaded of this, at least in part, because Napster actually advertised its usefulness for trading music files. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 919 (N.D. Cal. 2000).

Finally, the Ninth Circuit went on to find Napster liable under a vicarious liability framework, as well.¹⁷⁷ The court found that Napster had the right and ability to supervise activities conducted using its system and yet failed to police infringing uses.¹⁷⁸ And, although it did not actually profit from use of its system for infringement, the court found that Napster did derive a financial benefit from the future revenue it could generate due to its large user base.¹⁷⁹ Based on these elements, then, the court held that Napster could be vicariously liable in addition to its contributory liability, and thus granted the plaintiffs an injunction.¹⁸⁰

This was a major success for the record companies, and the first important step in regulating peer-to-peer file-sharing technologies. As a result of the injunction granted in *Napster*, Napster ceased operations and was eventually purchased by Bertelsmann Group for \$8 million.¹⁸¹ But peer-to-peer would not be defeated so easily. As Napster was being converted to a legitimate business venture, new, more sophisticated systems were being developed to take its place, many of them openly aiming to take on the Napster mantle.¹⁸² Several lawsuits would follow, but the next file-sharing service to be involved in a high-profile decision would be a company called Grokster.¹⁸³

Grokster's initial success in the courts led to a reexamination of contributory liability doctrine by the Supreme Court.¹⁸⁴ At first, though, Grokster's position seemed much stronger than Napster's had been, due to a fundamental difference in the architecture of its system.¹⁸⁵ In both Napster's and Grokster's systems, users ultimately exchanged data directly, without any content actually being copied by the host system.¹⁸⁶ Grokster's innovation, though, was to develop a completely decentralized system over which it had limited supervisory power.¹⁸⁷ This proved to be a critical difference from the centralized, hierarchically controlled Napster system.¹⁸⁸ As a result, Grokster

¹⁷⁷ *A&M Records*, 239 F.3d at 1024.

¹⁷⁸ *Id.* at 1023.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1024.

¹⁸¹ Alec Foege, *Bertelsmann's Quest to Harness the Napster Genie*, N.Y. TIMES, May 26, 2002, § 3, at 4.

¹⁸² Wardle, *supra* note 154, at 8. To their future chagrin, some of these companies even explicitly referred to themselves as "the next Napster." *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005).

¹⁸⁵ Wardle, *supra* note 154, at 9.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

could not be found to possess the “site and facilities” for infringing activity, as Napster had been.¹⁸⁹ Ultimately, the company’s liability would arise from the Supreme Court’s introduction of an intent element to the contributory liability analysis.¹⁹⁰

Both the district court and the Ninth Circuit in *Grokster* held, following *Sony*, that Grokster could not be liable because of its decentralized structure, which prevented it from having actual knowledge of infringing activities.¹⁹¹ But the Supreme Court took notice of Grokster’s advertising, which promoted it as the file-sharing alternative for former Napster users.¹⁹² As a result, the Court introduced an inducement rule for copyright, borrowing it from other areas of law as it seemed “sensible” to do so.¹⁹³ The Court thus added to the *Sony* analysis for contributory liability a new element, one that disregards the potentially non-infringing uses of a technology. Instead, 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.”¹⁹⁴ Grokster, the Court held, had taken just such steps.¹⁹⁵ This ruling would not, however, be a decisive blow to the peer-to-peer trend.

Some companies operating under the same model as Grokster continue to fight their battles in court.¹⁹⁶ One such company, Limewire, even countersued its music industry opponents on anti-monopoly grounds.¹⁹⁷ And just as the Grokster model represented a direct reaction to the basis for liability in *Napster*, new technologies that attempt to skirt the sort of liability ultimately found in *Grokster* have already become widespread.¹⁹⁸ One such technology, BitTorrent, is far more decentralized than any of its predecessors.¹⁹⁹ It uses a

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 927–28 (2005).

¹⁹² *Id.* at 938.

¹⁹³ *Id.* at 936.

¹⁹⁴ *Id.* at 936–37.

¹⁹⁵ *Id.* at 938–40.

¹⁹⁶ William Sloan Coats & Melissa Keyes, *Recent Developments in Vicarious Liability and Copyright Licensing for Music*, in UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE 257, 266 (Marcelo Halpern et al. eds., 2007), available at WL 915 PLI/Pat 257.

¹⁹⁷ *Id.* Limewire’s antitrust claims were eventually dismissed, *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007), but the litigation is ongoing, *Arista Records LLC v. Lime Group LLC*, No. 06 Civ. 5936, 2008 WL 1752254 (S.D.N.Y. Apr. 16, 2008).

¹⁹⁸ Coats & Keyes, *supra* note 196, at 266–71.

¹⁹⁹ *Id.* at 266–67.

highly complex system that shares pieces of media files among many users, and the software needed to access those users is available in various forms from various sources.²⁰⁰ As such, it may be far more difficult to establish liability for these systems than for more hierarchical structures like those in *Napster* and *Grokster*.²⁰¹ Suits against BitTorrent operators are already underway,²⁰² but, perhaps tellingly, some major media companies are also beginning to collaborate with these operators, as well.²⁰³ The industry fight against file sharing is far from over, but its rules may well be changing.

B. The Aftermath: Litigation Against Individuals and Technological Methods of Enforcing Copyright Restrictions

In part because of its early failures in *Napster*, the recording industry began to expand its efforts against file sharing in 2003.²⁰⁴ To the surprise of many commentators, in September of that year the RIAA sued 261 individuals for copyright infringement resulting from their use of various file-sharing services.²⁰⁵ By 2005, there were more than 9,000 such suits underway.²⁰⁶ This new tactic is surprising for two reasons. First, it is highly inefficient. The cost of filing so many lawsuits is far greater than that of suing the service providers used by these individuals, which the recording industry is also pursuing.²⁰⁷ Second, it is bad public relations, likely to lead to consumer outrage at the prospect that the industry is suing its own potential customers.²⁰⁸ Moreover, the legitimacy of the accusations in at least some cases may be questionable due to the technological barriers to accurate identification of infringers.²⁰⁹ Still, the industry continues to pursue such cases, in a strategy that may be understood as a sign of desperation or as demonstrating a lack of confidence in the possibility of preventing file sharing by shutting down service providers like *Napster* and *Grokster*.²¹⁰

²⁰⁰ *Id.* at 267–70.

²⁰¹ *Id.* at 270–71.

²⁰² *Id.* at 278.

²⁰³ *Id.* at 269.

²⁰⁴ Andrew C. Humes, Note, *The Day the Music Died: The RIAA Sues Its Consumers*, 38 IND. L. REV. 239, 239 (2005).

²⁰⁵ *Id.*

²⁰⁶ Brett J. Miller, Comment, *The War Against Free Music: How the RIAA Should Stop Worrying and Learn to Love the MP3*, 82 U. DET. MERCY L. REV. 303, 312 (2005).

²⁰⁷ Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473, 490 (2002).

²⁰⁸ *Id.*

²⁰⁹ Miller, *supra* note 206, at 313.

²¹⁰ Humes, *supra* note 204, at 239.

In addition to its pursuit of individual infringers, the music industry has also undertaken technological means of attempting to prevent file sharing in the form of digital rights management (DRM).²¹¹ DRM involves embedding software within media content, such as CDs or MP3 files, which prevents copying of the files without permission.²¹² This may seem an obvious answer to the problem of file sharing, but it has proved to be virtually unworkable in practice. DRM systems impose many of the costs of copyright enforcement on the end user, and thus may actually encourage attempts to circumvent copyright protection.²¹³ DRM also may be defeated by relatively unsophisticated efforts, and it often leads to a whole set of other problems, both technological and legal.²¹⁴ In response to these realities, the recording industry is beginning to move away from the use of DRM, albeit with great reluctance.²¹⁵ As a whole, the industry still views unrestricted distribution of music files as an unacceptable risk to its business model, even as such distribution continues to displace traditional sales.²¹⁶

C. The Root of the Problem: Why the Existing Music Industry Cannot Cope with Digital Distribution

In light of the ongoing conflict between the music industry and new Internet-based technologies, many commentators now consider it settled that the existing structure of the industry is fatally flawed.²¹⁷ On this view,

the risks posed by the new technologies are considerably exaggerated. The reality is that the new technologies do not threaten the position of musicians and other creative actors but . . . rather the embedded capital of an elaborate, sophisticated, and arguably bloated system of intermediation that was designed to deal with old technologies. The system that the RIAA and MPAA are suing schoolchildren to protect is obsolete, and never had much to do with creative effort.²¹⁸

²¹¹ Monika Roth, Note, *Entering the DRM-Free Zone: An Intellectual Property and Antitrust Analysis of the Online Music Industry*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 515, 522 (2008).

²¹² *Id.*

²¹³ See, e.g., Perritt, *supra* note 21, at 319.

²¹⁴ Roth, *supra* note 211, at 523. DRM may implicate antitrust and privacy issues, as suits against record companies have shown. *Id.* For example, consumers responded to Sony's attempts to include DRM software on its audio CDs with general outrage and even lawsuits. *Id.*

²¹⁵ See Victoria Shannon, *Record Labels Contemplate Unrestricted Digital Music*, N.Y. TIMES, Jan. 23, 2007, at C5.

²¹⁶ *Id.*

²¹⁷ See, e.g., Perritt, *supra* note 21.

²¹⁸ *Id.* at 262.

In *Grokster*, the Ninth Circuit noted that the “introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms.”²¹⁹ The court went on, though, to explain “that time and market forces often provide equilibrium in balancing interests,”²²⁰ and many commentators agree that market forces will ultimately solve the current crisis in the music industry.²²¹ But, as the remaining sections of this Comment demonstrate, this optimistic view is unfounded. The music industry’s tremendous efforts to preserve itself through aggressive enforcement and even expansion of existing copyright law have been largely unsuccessful, and have served only to slow the development of a new paradigm in the media market. Because the entrenched structure of the industry is outmoded, the increasing tendency of both consumers and creators to find ways to operate outside that structure will continue to create widespread inefficiency until the law becomes more flexible.

1. *The Current Market Structure Is Broken*

The existing structure of the music industry is faulty for two fundamental reasons. First, it is inefficient in the manner of a monopoly, because it benefits a few major corporations at a cost to both consumers and the artists who generate content.²²² Second, and in large part because of the first failing, the industry is too inflexible and conservative with regard to technology. It neither exploits technology to its full commercial potential nor allows it to develop according to market need.

That the music industry is structured in favor of the large corporations that ultimately own most content is a commonplace, demonstrated in part by the complex, slanted contracts that pervade the industry.²²³ The distribution of wealth and income in the industry further bears this out. The handful of major labels controls 85% of the market, while hundreds of “independent” labels have the remainder.²²⁴ The actual performers of most popular music receive only a small percentage of the income their sales generate, while most of the income goes to the record companies and their affiliated distribution channels

²¹⁹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1167 (9th Cir. 2004), *rev'd*, 545 U.S. 913 (2005).

²²⁰ *Id.*

²²¹ See Perritt, *supra* note 21, at 357.

²²² See generally *id.*; LESSIG, *supra* note 19.

²²³ See *supra* Part I.B.

²²⁴ Honigsberg, *supra* note 207, at 477.

and retail outlets.²²⁵ And the most important artists make the lion's share of their money from sources like concert revenue.²²⁶ But the problem goes beyond simple unfairness or exploitation; the system is economically inefficient.

In 2007, physical album sales in the United States decreased 15% from the prior year, continuing years of decline.²²⁷ But empirical studies have concluded that the ineffectiveness of the major label business model—rather than illegal file sharing—is the cause of the industry's declining fortunes.²²⁸ The industry is far too consolidated.²²⁹ Only 10% of major-label album releases are profitable.²³⁰ A huge percentage of the price of those albums goes to various elements of overhead, and profit margins are small.²³¹ And still the Federal Trade Commission has found the industry liable for substantially overcharging consumers.²³²

To a great degree, these failings result from the industry's inability to capitalize on the benefits of new technology. Modern means of recording music are more efficient than they once were.²³³ Digital distribution is far more cost-effective than physical methods.²³⁴ Technology decreases the costs of advertising and reproduction, as well.²³⁵ Furthermore, new technologies have actually helped to increase the demand for recorded music by making its consumption more convenient and reducing search costs.²³⁶ Digital downloads have increased dramatically in recent years, and still the industry continues to lose profits.²³⁷ Such paradoxical outcomes have prompted even some insiders to decry the industry as merely protecting its entrenched capital, defending its outdated methods in court rather than updating them.²³⁸ Neither consumers nor artists, however, are waiting for the existing industry to catch up.

²²⁵ *Id.* at 505; Perritt, *supra* note 21, at 283.

²²⁶ Perritt, *supra* note 21, at 283.

²²⁷ *U.S. Album Sales Fell 9.5% in 2007*, N.Y. TIMES, Jan. 4, 2008, at C4 [hereinafter *U.S. Album Sales*].

²²⁸ Perritt, *supra* note 21, at 324. Perritt cites studies from Princeton and Forrester Research. *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 286.

²³¹ *Id.*

²³² Honigsberg, *supra* note 207, at 477–78.

²³³ Perritt, *supra* note 21, at 292.

²³⁴ *Id.* at 324.

²³⁵ *Id.* at 302.

²³⁶ *Id.* at 320–24.

²³⁷ *U.S. Album Sales*, *supra* note 227.

²³⁸ Honigsberg, *supra* note 207, at 478–79.

2. Consumers and Content Creators Are Embracing New Technologies

Despite the barriers erected by the music industry, consumers continue to embrace new technologies, especially digital distribution. While physical album sales continued to decrease in 2007, the number of songs downloaded from legal outlets increased by 45%.²³⁹ This is largely due to the greatly increased convenience of MP3s compared to CDs and other physical media, which require both physical space to carry and travel to a store to purchase.²⁴⁰ The proliferation of online music-related content on sites such as MySpace also contributes to this growth by allowing consumers to discover and sample new artists with greater convenience.²⁴¹ The increasing number and sophistication of legitimate online retailers has also helped spur growth in this sector, because the potential costs of downloading content illegally—legal liability or exposure to computer viruses—are high.²⁴² Young consumers are especially committed to downloading; nearly half of American teenagers did not even purchase a CD in 2007.²⁴³ Much of this trend can be attributed to the popularity of Apple's iPod MP3 player and its iTunes online music store, which became the second-largest music retailer in the United States in 2007.²⁴⁴ Despite the growth of legitimate online retail, though, estimates suggest that nearly 60% of music downloaded in 2007 was acquired illegally.²⁴⁵ Despite their increasing use of legitimate pay services, many consumers still find it more convenient, or more attractive, to acquire their music outside official channels.²⁴⁶

Those who create content for the music industry are also finding more attractive technological alternatives to traditional means of creating and disseminating music. For years, digital technology has made it possible for individuals to produce near-professional quality music recordings for little more than the cost of a computer.²⁴⁷ It also allows music fans to create endless derivative online content that can serve to promote otherwise obscure artists on

²³⁹ *U.S. Album Sales*, *supra* note 227.

²⁴⁰ Perritt, *supra* note 21, at 311.

²⁴¹ *Id.* at 310.

²⁴² *Id.* at 311.

²⁴³ Brian Garrity, *Apple's iTunes Now 2nd in Sales*, N.Y. POST, Feb. 27, 2008, at 33.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Alex Mindlin, *Peer-to-Peer Downloaders Gorge on Songs*, N.Y. TIMES, Apr. 2, 2007, at C3. Although the number of households using legitimate services increased 65.8% in 2006, those 12.6 million total households were still outnumbered by the 14.9 million that used peer-to-peer software like BitTorrent. *Id.* The latter group grew at a much smaller rate, though, increasing only 7.2%. *Id.*

²⁴⁷ See Eric A. Taub, *Homemade Music with a Professional Sound*, N.Y. TIMES, Dec. 21, 2000, at G11.

a worldwide stage.²⁴⁸ For example, thanks in part to such activity, independent Canadian musician Dan Snaith, who records under the name “Caribou,” made an album by himself, entirely on his home computer, which climbed onto the Billboard charts in 2007.²⁴⁹ And worldwide star M.I.A., who began her artistic career as an obscure Sri Lankan immigrant in Britain, first rose to prominence due to the widespread trading of MP3 copies of her first rudimentary musical efforts.²⁵⁰ There are countless such examples of independent artists, but established stars are also beginning to capitalize on the possibilities offered by digital technology.

The British band Radiohead’s stunning success with a free download of its 2007 album was just the latest example of a growing trend among major artists to reap the publicity benefits of distributing their music for free.²⁵¹ Longtime superstar and major-label critic Prince angered brick-and-mortar retailers the same year by including his new CD, for free, bundled with copies of a British tabloid newspaper.²⁵² In a more telling story, the Chicago rock band Wilco secured its own place at the forefront of digital marketing through a shrewd maneuver with nearly absurd results.²⁵³ When the band’s label, Reprise, a subsidiary of AOL Time Warner, refused to release its latest record, the band responded by leaving the label and releasing the album online, for free.²⁵⁴ The album quickly generated enough interest to start a bidding war among labels for the right to release the album.²⁵⁵ Wilco, with enhanced bargaining power, ultimately signed a deal with Nonesuch Records.²⁵⁶ Like Reprise, Nonesuch was also an AOL Time Warner subsidiary.²⁵⁷ Wilco had improved its position against a major label simply by giving away its record, and the album’s

²⁴⁸ See generally Jessica Litman, *Creative Reading*, LAW & CONTEMP. PROBS., Spring 2007, at 175.

²⁴⁹ See Wade Tatangelo, *Extra Texture: Caribou’s Dan Snaith Crafts Complex, Compelling Pop*, CREATIVE LOAFING (Tampa), Oct. 10, 2007, http://tampa.creative loafing.com/gyrobase/extra_texture/Content?oid=316788.

²⁵⁰ Josh Timmerman, *M.I.A. Arular Review*, STYLUS MAG., Feb. 24, 2005, <http://www.stylusmagazine.com/review.php?ID=2772>.

²⁵¹ See *supra* notes 1–14 and accompanying text.

²⁵² *Prince Puts Music Retailers in a Spin with Free CD Giveaway*, INT’L HERALD TRIB., July 12, 2007, <http://www.ihl.com/articles/ap/2007/07/12/business/EU-GEN-Britain-Prince-Giveaway.php>.

²⁵³ See Timothy K. Andrews, Comment, *Control Content, Not Innovation: Why Hollywood Should Embrace Peer-to-Peer Technology Despite the MGM v. Grokster Battle*, 25 LOY. L.A. ENT. L. REV. 383, 410–11 (2005).

²⁵⁴ *Id.* at 411.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

physical release debuted higher on the charts than any of the band's prior releases.²⁵⁸

3. *Arguments for Change*

The foregoing sections of this Comment show that the current structure of the music industry is failing in practice. But it is also theoretically untenable, both in economic terms and on the basis of fundamental principles of copyright law.

Economically, the prevailing situation is bad not just for consumers and artists but also for the long-term health of the major media companies themselves, who will continue to lose money as they fail to adapt. This, in turn, is bad for the U.S. economy, which increasingly relies on intellectual property in general, and entertainment content in particular.²⁵⁹ And it is the confluence of an outmoded industry and overly complex copyright law that creates these problems.

Because recorded music is so easily transferred among people, parties other than the creator of value are able to reap its benefits, encouraging free-riding.²⁶⁰ This creates high transaction costs, because creators will want to protect themselves against this possibility by demanding a higher price.²⁶¹ Law and technology, though, can help decrease these transaction costs by making free-riding more difficult, more costly, and thus less likely.²⁶² Copyright law should adjust to changes in transaction costs that arise from new technologies.²⁶³ And, although the music industry claims otherwise, digital technology has actually reduced the risk of free-riding.²⁶⁴ It has done so both by reducing costs and by increasing demand for recorded music, making music that much easier to acquire legitimately and thus decreasing the relative risk of free-riding.

²⁵⁸ Xeni Jardin, *Music Is Not a Loaf of Bread*, WIREd, Nov. 15, 2004, <http://www.wired.com/culture/lifestyle/news/2004/11/65688>.

²⁵⁹ See Press Release, International Intellectual Property Alliance, IIPA's New Economic Study Reveals the Copyright Industries Continues to Be a Driving Force in the U.S. Economy (Oct. 7, 2005), http://www.iipa.com/pressreleases/2004_Oct7_Siwiek.pdf. According to the study, the copyright industries accounted for 12% of the U.S. gross domestic product for 2002, employed over 8% of U.S. workers in 2002, and showed growth exceeding that of the U.S. economy as a whole over the previous five years. *Id.*

²⁶⁰ Perritt, *supra* note 21, at 266.

²⁶¹ *Id.* at 267.

²⁶² *Id.* at 265–69.

²⁶³ *Id.* at 270.

²⁶⁴ *Id.*

Digital technology has reduced transaction costs for creators and consumers of music.²⁶⁵ As discussed above, modern recording technology saves capital.²⁶⁶ Internet-based promotion and distribution are more cost-effective than traditional methods.²⁶⁷ Digital music is more portable and less costly to acquire for consumers.²⁶⁸ It is also more conducive to network effects, in which an artist's popularity leads to increasing popularity, and it decreases search costs for consumers.²⁶⁹ All of this reduction in cost and creation of new alternatives increases demand for music.²⁷⁰ And, despite the music industry's decline, there is actually unmet demand in the market.²⁷¹

Record companies, though, are resisting these changes because they have a great deal of capital invested in more traditional means of performing these functions.²⁷² Recruiting and testing new talent, overseeing the recording process, and promoting and distributing products are all becoming radically more cost-effective.²⁷³ As a result, the economies of scale and scope on which the traditional music industry is constructed are disappearing.²⁷⁴ Due to all of this, the industry should be adjusting and prices should be declining for consumers.²⁷⁵ This has not, however, been the case.²⁷⁶

The music industry and its consumers have not reaped the full benefits of these technological advances in part because copyright law has operated to preserve the status quo.²⁷⁷ Technology has created the possibility for streamlining the industry and reducing costs. And because technology reduces costs for acquiring new music from legitimate sources, it does not significantly increase the greatest transaction cost for recorded music, that of free-riding.²⁷⁸ Because of this generalized reduction of costs, law should play a diminished

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 292.

²⁶⁷ *Id.* at 298–99.

²⁶⁸ *Id.* 311.

²⁶⁹ *Id.* at 313–14.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 306.

²⁷² *Id.* at 298.

²⁷³ *Id.*

²⁷⁴ *Id.* at 300.

²⁷⁵ *Id.* at 303.

²⁷⁶ Mark Jenkins, *Hit Charade: The Music Industry's Self-Inflicted Wounds*, SLATE, Aug. 20, 2002, <http://www.slate.com/?id=2069732>. CD prices have grown faster than the inflation rate. *Id.*

²⁷⁷ See Perritt, *supra* note 21, at 282 (“[C]opyright law has grown into a thicket of thorns that threatens creators of new music and distributors of old music with new transaction costs.”).

²⁷⁸ *Id.* at 328.

role in the market.²⁷⁹ Instead, copyright law's current obscurity and complexity actually increase transaction costs by propping up an outmoded industry and making the risks of infringement and liability less clear for both artists and consumers.²⁸⁰

All of this is not just an economic ill; it flies in the face of copyright's basic function. Copyright law is rooted in the Constitution as a means of incentivizing creative activity.²⁸¹ Thus the purpose of the Copyright Act is to construct an incentive for the creation of works that will benefit the public.²⁸² Instead, copyright law now serves primarily to protect the copyright owner's control over its intellectual property.²⁸³ And, as this Comment has shown, the effect of this control has been to exploit the artists who create content, rather than to give them an incentive to create. Copyright law is stronger than ever, having increased dramatically in scope and duration in recent decades.²⁸⁴ In fact, the strong copyright protections now in effect favor major content owners with large portfolios of copyrighted property.²⁸⁵ Smaller players of the sort that are enabled by new digital technologies, such as individual artists themselves, have far less need for copyright protection.²⁸⁶ For them, strong copyright merely increases the potential pitfalls of doing business, and thus acts as a disincentive to creation, because it increases the chances that they will unwittingly infringe another's rights and imposes high costs to protect one's own rights.²⁸⁷ This is a negative outcome both for artists and for society, one that is increasingly widely recognized.²⁸⁸ Various commentators have offered solutions to this problem; the remainder of this Comment categorizes and evaluates them.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 282.

²⁸¹ See *supra* note 29 and accompanying text.

²⁸² Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution Is Being Downloaded: Why and How the Copyright Act Must Change To Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 274 (2006).

²⁸³ *Id.* at 275.

²⁸⁴ LESSIG, *supra* note 19, at 161.

²⁸⁵ Perritt, *supra* note 21, at 304.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 282.

²⁸⁸ See *infra* Part III.

III. ALTERNATIVES FOR CONFRONTING THE PROBLEMS OF DIGITAL DISTRIBUTION

A. *The Major Schemes*

The major solutions to the problem of digital distribution that have been advanced by scholars can be arranged roughly into three basic categories: the administrative view, the free-market view, and the statutory reform view.

Though details obviously vary, proponents of the popular administrative view advance the theory that an organization should be formed to track and administer royalties for digital distribution.²⁸⁹ These methods generally track the model of the existing performing rights societies in that they gather blanket license fees from users which are then distributed to content owners according to the amount of use.²⁹⁰

Professor Jessica Litman, perhaps the most prominent advocate of the administrative view, proposes blanket licensing for file sharing, with a government agency administering royalties.²⁹¹ The system would be skewed toward free distribution, with incentives for distributing music for free and burdens on the ability to opt out of the licensing scheme.²⁹² Similarly, Professor William Fisher suggests a system based on statistical tracking of free digital distribution under which taxes would provide the funds for payouts to content owners based on actual consumption.²⁹³ On Fisher's view, the system would be administered by a government agency.²⁹⁴ Both of these systems would lead to a greatly attenuated or even eliminated role for copyright law.²⁹⁵

In a similar vein, Professor Neil Netanel proposes a tax on products whose value is enhanced by file sharing, such as MP3 players.²⁹⁶ The proceeds from this tax would be distributed to compensate for the spread of content that goes

²⁸⁹ See, e.g., Litman, *supra* note 20, at 41–42.

²⁹⁰ *Id.* at 41–44.

²⁹¹ *Id.*

²⁹² *Id.* at 40, 45.

²⁹³ FISHER, *supra* note 20, at 203.

²⁹⁴ *Id.* at 195.

²⁹⁵ *Id.* at 202; Litman, *supra* note 20, at 45.

²⁹⁶ Neil Weinstock Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 43 (2003).

unpaid for, with monitoring of sales and use determining the recipients and their shares.²⁹⁷

The administrative view is facially appealing, especially as it relies on the apparently proven model of performing rights societies to fairly distribute the proceeds of taxes or licenses. However, in practice such societies will inherently favor larger content owners, thus privileging the existing structure in the same way the current system does.²⁹⁸ Litman believes this problem can be avoided through the use of a government agency rather than a private one,²⁹⁹ but the opportunity for influence by major corporations remains. Her contention that this influence can be counterbalanced by the combined efforts of the millions of individuals who engage in file sharing would be more convincing if any such effort were actually underway.³⁰⁰

The free-market approach to the problem is somewhat simpler. Proposed by Professor Glynn Lunney and, to a lesser extent, by Professor Henry Perritt, this position holds that, as consumers continue to engage in civil disobedience by violating overly restrictive copyright norms, the system will eventually adapt of its own accord.³⁰¹ As more consumer-friendly technologies develop and lure new users back from illegal file sharing, an economic equilibrium will ultimately occur.³⁰²

It seems likely, and trends support the idea, that an equitable outcome may eventually come to pass. But, as discussed above, the recording industry continues fighting to preserve its existing structure, and will likely do so for quite some time. And, if and when the industry does come around, it may have suffered greatly and lost much value unnecessarily. In the rapidly changing economy of the twenty-first century, and with the great importance of intellectual property to the U.S. economy, the idea that inaction is the best course lacks much appeal.

Perritt's view goes beyond a simple free-market wait-and-see, as it advocates a privilege for noncommercial exchanges of content among friends.³⁰³ This is a move in the right direction, but it has two major flaws.

²⁹⁷ *Id.* at 4.

²⁹⁸ Litman, *supra* note 20, at 43.

²⁹⁹ *Id.* at 42.

³⁰⁰ *Id.* at 39–40.

³⁰¹ Lunney, *supra* note 21, at 821–22; *see also* Perritt, *supra* note 21, at 357.

³⁰² Perritt, *supra* note 21, at 357.

³⁰³ *Id.* at 348.

First, it leaves too little breadth for noncommercial use, and would likely result in the sort of narrow restrictions that now exist. Thus, for instance, it would likely continue to be the case that sharing a song with a dozen members of one's church might create liability, while doing the same with half a dozen members of one's own family would not. Such a circumstance fails to confront the realities of the digital marketplace. More damagingly, though, Perritt would place the burden of showing noncommercial use on the defendant.³⁰⁴ Unless the costs of litigation were somehow radically restricted, this would amount to a de facto prohibition on all but the most obviously limited and noncommercial use by any party smaller than a major corporation with a large amount of capital. As with so many alternatives, Perritt's hybrid approach would, in practice, change little.

Most of these commentators favor some degree of statutory change, but not so much as to amount to real statutory reform. Lessig, however, aims for a nuanced restructuring of the Copyright Act designed to solve many of the problems described in this Comment.³⁰⁵ Generally, he advocates streamlining the Act and weakening copyright protections.³⁰⁶ He wants to drastically shorten copyright terms and increase the formalities required to keep copyrights in effect.³⁰⁷ He especially wants to limit the duration and scope of the right to create derivative works, so that much of the adaptation of content made possible by digital technology becomes legal, as well.³⁰⁸ All of these reforms would improve the copyright landscape dramatically, leveling the playing field for content owners and creators at all levels. However, when it comes to the specific issue of digital music distribution, Lessig adopts a sort of hybrid of the free-market and administrative views.

Along with his proposed changes to copyright law, Lessig would adopt Fisher's proposal for a privately administered use-tracking and tax-distribution system.³⁰⁹ Unlike Fisher, Lessig would have the two systems coexist, complementing each other so as to ease the transition to a new technological landscape that would no longer require such close administration.³¹⁰ Lessig

³⁰⁴ *Id.*

³⁰⁵ LESSIG, *supra* note 19, at 287–304.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 287–93.

³⁰⁸ *Id.* at 294–96.

³⁰⁹ *Id.* at 301.

³¹⁰ *Id.*

believes such a system is needed only on a temporary basis because the nature of media consumption is changing so dramatically.³¹¹

In the end, Lessig's answer to the problem of digital distribution is simple: He insists that we just won't care about it for very much longer.³¹² His reasoning is that wireless, high-bandwidth Internet access will soon reduce the need to acquire and store content altogether, so that people instead will pay for the opportunity to stream content from service providers.³¹³ Like the argument that the market will eventually solve the digital distribution problem, this position is basically true. It suffers much the same failing, though. It ignores the loss everyone suffers as a result of the law propping up an inefficient industry. Again, change is needed sooner rather than later; though technology proceeds at an increasingly rapid pace, it will still be a long time until people no longer need or desire to own content. And, more importantly, it will be a very long time before *most* people have the sort of network access Lessig expects. His view privileges those wealthy few who will have such access sooner and thus for longer. It also continues to privilege the large corporations that currently own most content by giving them a sort of free pass, one they might be able to use to shift their control to the new market Lessig envisions. The addition of Fisher's scheme to his modified Copyright Act would do little to wrest control of the market from huge corporate entities that would still be able to manipulate the distribution of content in order to preserve their own embedded capital. The result might be just another, newer version of the same situation we face now.

B. A Workable Combination: Privileging Noncommercial Use Absolutely

The problems and advantages of the various solutions in the preceding section suggest a host of further possible alternatives, and some combination of all of these is likely the best solution. One feature of Perritt's argument, though, stands out as the most promising: privileging noncommercial use.³¹⁴ But Perritt does not go far enough. The central core of any truly effective response to the current crisis in the music industry should be an *absolute privilege* for all noncommercial reproduction and distribution of sound recordings. Such a privilege would allow individuals to copy and share any sound recording with as many others as they desire, at no risk of penalty, so

³¹¹ *Id.*

³¹² *Id.* at 297–99.

³¹³ *Id.* at 298.

³¹⁴ Perritt, *supra* note 21, at 348.

long as there is no commercial gain involved. This may at first seem an extreme solution, but it is one that could both fulfill the theoretical promise of copyright and serve the interests of all market participants in practice.

To begin with, a revision of the Copyright Act that privileges all noncommercial uses of sound recordings would be simple. Courts would have the usual discretion in applying it, of course, but careful drafting could clarify the rule's application.³¹⁵ And one tremendous cost would be removed from the market, as owners, creators, and users of content would be able to pursue their efforts with confidence as to their potential liability.³¹⁶ As Lessig has hoped, the need for lawyers would greatly decrease.³¹⁷

As such, the privilege would serve the basic function of copyright by immediately making a wealth of content freely available to the public.³¹⁸ And, despite appearances, it would do so through the classic mechanism of providing an incentive to creators. This is because sound recordings almost always serve the sole economic purpose of advertising.³¹⁹ They merely drive business for the other activities of creators, such as live performance and merchandising.³²⁰ This effect would be felt by established artists and upstarts equally, and the latter, without the need for outdated, capital-intensive methods to compete, would be in a much stronger position. And, in any case, inherent demand and noneconomic factors would continue to stimulate production of music even among those for whom it continues to be unprofitable.³²¹ Many such producers of music have long pursued their art despite a near total lack of real economic incentive;³²² this privilege could serve to change that.

³¹⁵ The rule would have to define commercial use clearly and in such a way as to avoid the currently overbroad approach to this issue in the public performance arena, which may really allow only close friends and relatives to watch a film together, for example. *See, e.g.,* Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59 (3d Cir. 1986) (video rental store found to infringe public performance right by renting videotapes and allowing customers to watch them in rooms on premises).

³¹⁶ *See* Perritt, *supra* note 21, at 315 (noting that probability of legal liability is an important cost to both creators and consumers of music).

³¹⁷ LESSIG, *supra* note 19, at 304. Lessig titles a section of his book *Fire Lots of Lawyers*; he believes that a more streamlined, user-friendly copyright system would better serve the purposes of copyright law. *Id.*

³¹⁸ The millions—or possibly billions—of songs currently available online in infringing formats, under this rule, would become legitimate. In 2006, though 509 million songs were downloaded from legitimate services, 5 billion were downloaded from illegitimate peer-to-peer services. Mindlin, *supra* note 246.

³¹⁹ Perritt, *supra* note 21, at 321.

³²⁰ *Id.*

³²¹ *See id.* at 302 (describing noneconomic incentives for music creation that include personal gratification, enjoyment, and enhanced social status).

³²² *See id.* at 301 (noting that “the actual economic rewards to musicians from the present system are miniscule”).

Of course, the major content owners that more highly value control of their intellectual property would be forced to focus their attention elsewhere.³²³ But this would merely hasten the already-occurring natural progression of the media market. Major media companies would be forced to compete with free products by providing better access to better products. This is already the key for those companies, like Apple, that are successfully navigating the transition to digital distribution.³²⁴ Forced to adapt, the major record labels would turn their resources to this task, and could likely find much success. And smaller innovators would be able to grab a toehold in a more even playing field.³²⁵ Transaction costs would be greatly reduced for all those involved.

In short, a privilege on noncommercial use would place the burden of preventing real free-riding on the only entities that suffer from the problem, which are the very ones with sufficient capital to do so. It would also place the burden on plaintiffs to show commercial use of their content by defendants in order to recover damages for infringement. Again, this would shift a burden from those who cannot afford it to those who can. It would also increase judicial efficiency, as it would discourage lawsuits except in those cases where real commercial infringement is clear. This would be just another way in which such a privilege would decrease transaction costs and increase efficiency.

Finally, such a solution would require no other major changes to the existing copyright scheme. No administrative body would need to be created, and no major revision of the statute would be required. Again, its cost of implementation would be very low, while its positive economic effects would be great in both quantity and breadth. An absolute privilege for noncommercial use of sound recordings would thus, in the long run, align with the basic principles of copyright to serve the interests of creators of content, owners of content, and the general public.

³²³ See *id.* at 304 (explaining that large companies, which own large “portfolios” of content, have greater need for certainty as to their property rights in that content, so they can better manage risk in an uncertain market).

³²⁴ Apple’s immense success with iTunes is in large part attributable to its unique approach to online music retail, which is to coordinate that business with its nearly ubiquitous iPod music players. Nick Wingfield & Robert A. Guth, *iPod, TheyPod: Rivals Imitate Apple’s Success*, WALL ST. J., Sept. 18, 2006, at B1. The smooth coordination of iTunes songs and the iPod is a major factor driving customers to the iTunes store, especially because downloads from iTunes will only play on iPods. *Id.*

³²⁵ See, e.g., Perritt, *supra* note 21, at 322. One effect of widespread distribution of digital music files would be to create new types of network effects that would increase demand for less established musicians as against already famous ones. *Id.*

CONCLUSION

One criticism of this scheme is that it decreases the incentive for developers to create innovative software like Napster, because they would be unable to profit from its use to aid file sharing. But this is actually a good outcome; a rule like the one proposed here would make clear that companies engaged in file sharing for profit would be liable for infringement. Such companies would thus be discouraged from competing with content owners, and the existing *Napster* and *Grokster* liability scheme would be left intact.³²⁶ But there would still be a great incentive for innovation in the area, as evidenced by the open source movement.³²⁷ Companies and individuals who demonstrated skill in creating and maintaining file-sharing networks could market those skills to others—say, major content owners. They could also profit from the ancillary services they could provide to users of file-sharing schemes.

Of course, as Litman, Perritt, and others note in regard to their relatively uncontroversial schemes, enactment of such a simple, narrow, yet radical revision of copyright law faces immense hurdles. It would be opposed, of course, by the immensely powerful big media companies, which possess a well-funded and well-organized lobby.³²⁸ Perhaps most importantly, it would run counter to the long-held notion that copyright is about protecting ownership.³²⁹ But, regardless of how widespread this belief is among legislators, content owners and the general public, it is nonetheless false. Such a view of copyright departs from the Constitution and from economic practicality, as this Comment has argued.³³⁰ And defeatism serves no purpose, in any case.

Ultimately, such a change in the law might be more politically expedient than it initially seems. After all, it would appeal to an untapped multitude of young people who enthusiastically engage in what is still the illegal activity of

³²⁶ See *supra* Part II.A.2.

³²⁷ The open-source movement, which produced popular software like the Linux platform, is built around providing innovative services at no cost to the end user; thus, it eschews economic incentives to creation altogether. Daryl Lim, *Beyond Microsoft: Intellectual Property, Peer Production and the Law's Concern with Market Dominance*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 291, 299 (2008).

³²⁸ The entertainment industry spent over \$27 million on lobbying efforts in 2007. Brooks Boliek, *Industry Pays a Lot to Play in D.C. Game*, HOLLYWOOD REP., Sept. 5, 2007, http://www.hollywoodreporter.com/hr/content_display/news/e3i7bddcf559ad7d626ce8a6d0b97436084.

³²⁹ Wagman & Kopp, *supra* note 282, at 275.

³³⁰ See *supra* notes 272–83 and accompanying text.

file sharing.³³¹ It would also find support among many innovators in the technology world, some of whom have found much success in providing content and services for free.³³² Perhaps an absolute right to noncommercial use of recorded music might be just the inspiration Litman's millions need to combine their efforts and seek their own best interests through something more than individual civil disobedience.³³³

JARED S. WELSH*

³³¹ See *supra* note 243 and accompanying text.

³³² See *supra* notes 251–58 and accompanying text.

³³³ See *supra* note 300 and accompanying text.

* Executive Articles Editor, *Emory Law Journal*; J.D., Emory University School of Law (2009); M.A., Georgia State University (2005); A.B., Georgia State University (2002). The author wishes to thank his wife, family, and friends for their help and support.

