



# Berkman

The Berkman Center for Internet & Society  
at Harvard University

## **RETHINKING MUSIC** A Briefing Book

*Compiled and Presented By*  
The Berkman Center for Internet & Society  
At Harvard University



**RETHINK  
MUSIC**

The Rethink Music Conference  
*Presented by* Berklee College of Music and MIDEM

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## **INTRODUCTION AND ACKNOWLEDGMENTS**

The Berkman Center for Internet & Society is pleased to present this briefing book to participants in the Rethink Music conference. The book includes the Center's own framing paper, which introduces a number of issues that will be discussed during the course of the conference. Following that paper are contributions from a wide range of contributors, addressing some of the most current and compelling issues in music law and policy. The first five of those contributions were conceived during an October 2010 meeting at Harvard Law School among a variety of stakeholders interested in helping to shape the agenda for the Rethink Music conference, and they reflect the individual authors' views on several cutting edge issues of the day. The last two papers reflect the existing or ongoing work of their respective contributors. The respective authors and/or copyright holders retain rights in each of the individual submissions. As noted, some of the submissions are licensed under Creative Commons licenses.

The Berkman Center thanks all of the individual authors of papers included in this briefing book for offering their valuable contributions to what is expected to be a vibrant conversation at the Rethink Music event. Josh Podoll, Editor in Chief of Harvard Law School's *Journal of Sports & Entertainment Law*, and the entire staff of *JSEL*, were enormously helpful in running the Call for Papers that resulted in the selection of Mary LaFrance's "From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings," which will be published in the Spring 2011 edition of *JSEL*. Berkman Center Faculty Co-Directors William Fisher and Yochai Benkler, along with Stuart Brotman, Harvard Law School Lecturer on Law and President of Stuart Brotman Communications, provided valuable advice and input in the evaluation process of the Call for Papers as well. The Berkman Center's Executive Director Urs Gasser and Managing Director Colin Maclay, along with the rest of the Berkman Faculty Co-Directors, were extraordinarily supportive of the Center's efforts throughout this project. Berkman Center Research Assistant Joey Seiler and Harvard Law School Cyberlaw Clinic student Adam Gottesfeld, both 2Ls at HLS, did the lion's share of the work on the Center's framing paper. Christopher Bavitz, Assistant Director of Harvard Law School's Cyberlaw Clinic and a Clinical Instructor and Lecturer of Law at HLS, oversaw the preparation of this briefing book, and Berkman Center Program Coordinator Amar Ashar offered indispensable assistance throughout the process of assembling the book. Christopher and Amar served as the Berkman Center's primary liaisons with Berklee College of Music in connection with the Rethink Music conference. The Center thanks Berklee and, in particular, Assistant Professor Allen Bargfrede, for their commitment to including discussions of law and policy in the Rethink event.

The Berkman Center is hopeful that this compendium of materials will help frame the issues, prompt consideration, and provoke discussion during the Rethink Music conference.



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## **RETHINKING MUSIC: A FRAMING PAPER**

The Berkman Center for Internet & Society at Harvard University





## INTRODUCTION

The music industry has been in a state of significant flux for more than a decade as music consumption has shifted online. From one perspective, this shift marks the downfall of the recording industry. Fans have little incentive to buy albums when they can instantaneously illegally download songs from peer-to-peer file sharing networks and other sources.<sup>1</sup> And, the attention of consumers is increasingly drawn from music to an enormous and growing array of competing media and entertainment products. According to an NPD group study, in the third quarter of 2010, only 16.5% of American Internet users over the age of thirteen purchased music.<sup>2</sup> When fans do purchase music, they would rather download individual tracks priced at \$.99 than full-length albums at ten times the cost.<sup>3</sup> As a result of all these factors and more, the value of the global recorded music industry has declined by one-third since 2004.<sup>4</sup>

On the other hand, the digital revolution brings new opportunities for growth and innovation in music distribution. There are now over 400 licensed digital music services worldwide, with thirteen million tracks licensed for digital use.<sup>5</sup> Since 2004, the value of the US digital music market has increased by over 1,000% to around \$4.6 billion.<sup>6</sup> New companies, like Rdio and Mog, give consumers an alternative to piracy by allowing them to stream the music of their choice on-demand. A large percentage of the subscription and advertising revenue from these services goes directly into the pockets of artists, songwriters, labels, and publishers. Smaller artists, music's new middle class, are leveraging social networking platforms to reach out to a global fan base. Through do-it-yourself distribution tools, artists can cut out middlemen and distribute music directly to their fans, earning more in royalties than they could have under traditional recording and publishing deals during the heyday of the compact disc.<sup>7</sup> Some artists even raise money directly from their fans to support the production of new music.<sup>8</sup>

To survive the digital transformation, all players in the music industry are rethinking music. Labels are rethinking their business models. Digital companies are rethinking channels of distribution. Artists are rethinking their relationships with fans and traditional sources of revenue. And, lawyers, academics, and policymakers are rethinking the legal landscape in an effort to meet the needs of creators and consumers in the digital age.

This introductory piece briefly describes the broad range of ways the music industry is reacting to and rethinking music and copyright law and policy. The accompanying papers included in this briefing book reflect the views of and provide additional context from a diverse range of stakeholders on some of today's most pressing legal and policy issues.

## SAMPLING, MASHUPS, AND THE EMERGENCE OF REMIX CULTURE

The intersection of music and law begins with the very creative process itself. That process is becoming increasingly individualized, particularly when it comes to recording and distributing music. It is now possible to produce professional-level music recordings using only an iPad and its GarageBand app at a total cost of \$505.<sup>9</sup> The rise of inexpensive recording tools and channels for self-distribution has led some to avoid producers, studios, and labels.<sup>10</sup> There may be fewer recording professionals, but anyone can record. Even more can remix.

A cursory review of popular music during the last twenty years reveals an increasing number of widely loved works that draw on or incorporate samples of pre-existing songs and recordings. YouTube is chock full of videos that mix and remix audio and visual elements, spawning entirely new genres of creative expression. Our culture increasingly places

an aesthetic premium on art that incorporates and builds upon pre-existing works. The Internet has allowed for such culture to flourish, providing the means of creation, distribution, and consumption of remixes, mashups, and works based on samples to a wide range of networked artists and consumers.

Girl Talk's *All Day*, a 71-minute album released to much positive attention in November 2010, is made up entirely of 373 overlapping samples. (The album was produced on a laptop using Adobe Audition, which sells for about \$350.)<sup>11</sup> As might be inferred from the name of his label, Illegal Art, Girl Talk's unlicensed sampling — the digital copying and reuse of the source songs and recordings — may constitute copyright infringement.

Some courts have held that sampling a small portion of a song does not infringe the rights of the composition owner.<sup>12</sup> On the recording side, the Sixth Circuit has notably held that “a sound recording owner has the exclusive right to ‘sample’ his own recording,” no matter how small the amount.<sup>13</sup> In addition to the simplicity of the “license or don't sample” model advocated by the *Bridgeport* court, observers have argued that a rule requiring licensing is economically efficient: it prevents the market from being flooded with unlicensed remixes of the most popular songs, wasting them in “a scramble to use them up as quickly as possible.”<sup>14</sup> Critics find the suggestion that fair use provides a defense to infringement in the case of samples troubling, as it provides no revenue to rights holders.

Samples may be used legally, by licensing sampled compositions and sound recordings from their owners. But, samplers often find the rights clearance process to be expensive and complex, slowing and stifling the creative process.<sup>15</sup> Some argue this has decreased artists' choice in samples, leading them to rely on “vanilla-wrap samples from sample libraries rather than on judiciously selected vintage records.”<sup>16</sup> More problematically, there seems to be an underlying tension between sampling culture, which savors remixes and reworkings, and current US copyright law, which privileges originality and the singular author.<sup>17</sup>

Advocates of a more liberal approach to sampling, remixes, and mashups argue that copyright owners may stifle creativity by refusing to license music because of a distaste for the new subject matter, simply out of whim, or a desire to extract maximum revenues from their superior bargaining positions.<sup>18</sup> One proposed solution is a compulsory license for sampling. Just as Congress has chosen to provide set licensing rates for digital audio transmissions of sound recordings (pursuant to Section 114 of the Copyright Act) and cover versions of musical compositions (pursuant to Section 115), advocates argue, there should set be set fees that allow artists to sample and remix copyrighted works.<sup>19</sup> Others prefer a liberalized fair use test that could incentivize creative sampling to transform works.<sup>20</sup> And, still others advocate a system of “free use,” at least for certain classes of uses and users, like the creative amateur.<sup>21</sup> No clear route forward has emerged, but most parties agree that it is important to strike a balance between allowing for the creativity of remixers and compensating the initial artists.

## **ARTISTS AND LABELS**

Individual artists have historically recorded under contractual relationships with record labels. The nature of those contractual arrangements has changed in important ways, along with the governing law and the digital distribution landscape.

### **TERMINATION OF COPYRIGHT TRANSFERS**

Record companies that control content pursuant to recording agreements signed during the past three-plus decades, a vast and enormously valuable library of recorded works, must consider the copyright termination provisions found in Section 203 of the Copyright Act.<sup>22</sup> When those provisions take effect in 2013, creative artists may force labels to relinquish copyrights they have owned and exploited for the past thirty-five years.<sup>23</sup> Debate around Section 203 centers

on two issues: (1) whether Section 203 applies to works created after January 1, 1978, the statutory starting date, by artists who entered licensing agreements prior to 1978; and (2) whether sound recordings are works-for-hire exempt from Section 203's termination requirement.

Section 203 allows artists to terminate transfers of copyright “executed” on or after January 1, 1978, thirty-five years after the initial grant. The artist or his heirs reacquire the copyright and have a second opportunity to exploit it, a “second bite at the apple.”<sup>24</sup> Works-for-hire are exempt from this provision, and ownership of all associated copyrights remains with the publisher or label. In inserting Section 203 into the 1976 Copyright Act, Congress recognized that the difficulty of determining the long-term economic value of a work led many newer artists to enter into disadvantageous contracts with established labels and publishers. Congress intended for this provision to protect artists from unprofitable transfers where, due to unequal bargaining power, the transferee reaps all the benefits of the copyright.<sup>25</sup>

Artists who executed transfers of their works in 1978 can begin to recapture their copyrights in 2013 and begin filing notices of termination this year, in 2011. Needless to say, artists and their representatives are enthusiastic about the opportunity to regain their copyrights and exploit them in the new digital market.<sup>26</sup> Labels, on the other hand, want to retain control of copyrighted recordings and hope to narrow the reach of Section 203 as much as possible.<sup>27</sup>

Controversy has arisen over the meaning of the term “executed” in Section 203. Representing labels, the Recording Industry Association of America (“RIAA”) has argued that Congress intended “executed” to mean “signed.”<sup>28</sup> This reading would narrow Section 203 to apply only to the works of artists who signed and entered into agreements after January 1, 1978.

The problem with such a reading, according to artists' advocates like the Future of Music Coalition, is that many works are created years after an agreement is signed. For example, many artists signed agreements before 1978, but recorded songs after January 1<sup>st</sup> of that year. Those artists would not have the benefit of termination rights under the RIAA's interpretation of Section 203 for the works they recorded in 1978 and beyond. Some argue that Congress expressly intended to safeguard artists from disadvantageous contracts and could not have intended this statutory “gap.”<sup>29</sup>

The United States Copyright Office recently proposed a rule-making that will allow artists caught in this gap to use the date of creation as the date of execution for the purposes of terminating transfer agreements.<sup>30</sup> The Copyright Office has not otherwise clarified the meaning of the term “executed.” This means that post-1978 artists who enter into transfer agreements before creating the works at issue can try to start the 35-year term with the earlier signing date.<sup>31</sup>

Labels are also trying to limit the effects of Section 203 by arguing that most sound recordings are works-for-hire, which are expressly exempt from the termination right. The Copyright Act classifies a creation as a work-for-hire if it: (1) is prepared by an employee in the ordinary scope of her employment; or (2) is specially commissioned for use in a “contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, and an atlas.”<sup>32</sup> There is general agreement that artists are not true employees of record labels and that the first prong does not apply, but the second prong is controversial.

Most traditional recording contracts state that all recordings made pursuant thereto constitute works-for-hire. By law, however, a sound recording is a work-for-hire only if it fits into one of the above-enumerated categories, leading labels to classify sound recordings as either contributions to collective works or compilations.<sup>33</sup> Sound recordings briefly were included as an enumerated category after an amendment tacked onto the Satellite Home Viewer Improvement Act of 1999 attracted little notice, but — upon discovery of this major change — protests prompted Congress to retroactively repeal the amendment.<sup>34</sup> Artists' representatives counter that “collective works” and “compilations” refer only to albums that contain recordings from a variety of artists, not albums created entirely by one artist and delivered

as a whole to the label.<sup>35</sup> The Copyright Office has taken the middle ground. According to Marybeth Peters, former Register of Copyrights, the work-for-hire doctrine encompasses everyone involved in a recording except for the key performers, who should retain their Section 203 transfer termination transfer rights.<sup>36</sup> In the coming years, labels will receive their first notices and likely move the debate to the courts, bringing eventual clarification.

## **PERFORMANCE RIGHTS AND SOUND RECORDINGS**

Increased public performance rights for sound recording rights holders may provide another new revenue stream for artists and labels. Composers are entitled to receive royalties each time a related recording is publicly performed by being broadcast on terrestrial radio or played in bars, stores, or other public places. Rights holders in sound recordings, including performers and record labels, are left out for now. During the 112<sup>th</sup> Congress, Representative John Conyers and Senator Patrick Leahy will likely reintroduce a version of the Performance Rights Act, which would extend public performance rights for sound recordings to terrestrial radio.<sup>37</sup>

In 1995, Congress elected to extend the public performance right to sound recordings, but only when they are performed by means of digital audio transmission (i.e., on satellite radio and Internet streams). Representative Howard Berman failed in 2007-2008 to expand the sound recording public performance right, but Senator Patrick Leahy revived the effort in 2009 to create a royalty for music played on AM and FM radio and cap the annual royalty payments of smaller radio stations. Despite passing both the House and Senate Judiciary Committees, the Act was not brought before the full House or Senate for a vote.<sup>38</sup>

The National Association of Broadcasters (“NAB”) has opposed expanded performance rights legislation for sound recordings, calling it a “performance tax” on radio.<sup>39</sup> According to NAB, radio play is free advertising, and the music industry earns substantial revenues as a direct result of this free promotion.<sup>40</sup> NAB has attempted unsuccessfully to craft its own legislative solution. Under the NAB proposal, a terrestrial broadcast radio station would pay artists and sound recording rights holders between .25% and 1% of the station’s net revenues. The royalty percentage would be directly linked to the penetration of radio chip-enabled cell phones in the market. Once radio capable cell phones reached 75% market penetration, broadcasters would pay the full 1% performance royalty.

MusicFirst, a coalition of twelve affiliated sound recording organizations, rejected the NAB plan.<sup>41</sup> They argued that digital transmissions are increasingly important in promoting songs and breaking new artists, making a special treatment for terrestrial radio unwarranted, especially when broadcast stations regularly play older songs that need little additional promotion. The US Department of Commerce, among others, has emphasized that the United States stands alone among industrialized nations in maintaining its public performance right exemption for sound recordings. By not complying with international copyright standards, the United States is depriving US artists of a significant revenue stream. Because of the lack of reciprocity, foreign countries will not pay US artists and labels public performance royalties for sound recordings, keeping tens of millions of dollars annually from artists.<sup>42</sup>

Some, including Rep. Conyers and musician George Clinton, frame the debate as a civil rights issue. Older, largely African-American performers whose songs are regularly played on the radio are receiving no compensation for their work while wealthy broadcasters profit.<sup>43</sup> Other supporters of the Performance Rights Act believe that maintaining the terrestrial radio exemption conflicts with the historic rationale of US Copyright law: “the encouragement of individual effort by personal gain.” As music industry revenues decline in the digital age, artists must be able to capitalize on all available revenue streams to receive the “personal gain” that motivates creation. The terrestrial radio exemption shuts down one significant incentive.<sup>44</sup>

The NAB responds that the labels are only pushing for sound recording performance rights because they are losing compact disc sales revenue. The Performance Rights Act punishes commercially successful broadcasters for the labels' flawed business model, they argue. Failing labels will be saved by forcing many local broadcasters, which provide the public news and entertainment, out of business because they can't afford to pay the sound recording royalties.<sup>45</sup>

## ANTI-PIRACY AND RIGHTS ENFORCEMENT ISSUES ONLINE

Rights holders' efforts to enforce their copyrights in the face of technological innovation have pushed and defined the boundaries of copyright law. From seminal cases on secondary copyright infringement liability involving proprietors of flea markets to the Supreme Court's foray into the world of file-sharing in *Grokster*, courts have struggled to balance the interests of content owners and the innovators who build businesses that rely on their content. Policymakers face these same considerations when crafting legislative solutions to these complex problems.

### VIACOM V. YOUTUBE AND THE DMCA

The Digital Millennium Copyright Act ("DMCA") was enacted in 1998 in part to bring the United States in line with two treaties negotiated under the auspices of the World Intellectual Property Organization. It affects the music industry in three significant ways: (1) the DMCA criminalized both the production of technology meant to circumvent digital rights management technology and the act of circumvention itself; (2) the DMCA raised the penalties for copyright infringement on the Internet; and (3) the DMCA created safe harbors for Internet service providers faced with claims of copyright infringement based on content uploaded by users.

The safe harbor provisions of the DMCA are, in the eyes of many observers, essential for the rise and legal security of services like YouTube that rely heavily on user-generated content. If a service provider complies with a variety of statutory obligations, including responding expeditiously to properly-framed takedown notices and preventing repeat infringement, it will not be liable for infringing content posted by its users.<sup>46</sup>

The service provider may not have "actual knowledge" of infringing material or be "aware of facts or circumstances from which infringing activity is apparent."<sup>47</sup> Just what constitutes requisite knowledge or awareness, however, is still a subject of some debate.

In June 2010, in a suit filed by Viacom, a federal district court held that YouTube was not liable for infringing content posted by its users.<sup>48</sup> While YouTube was aware that some content on its site infringed on others' copyright, it was not obligated to remove that content without direct notice of infringement. The issue is now the subject of an appeal before the Second Circuit, and both parties have filed their initial briefs.<sup>49</sup>

The decision has divided commentators. Some view it as improperly burdening rights holders by requiring them to identify each and every piece of infringing content, allowing services like YouTube to profit in complicity with infringers.<sup>50</sup> Others view it as an important step in safeguarding a space for innovators to develop new media business models online without fear of secondary liability for copyright infringement.<sup>51</sup> Either way, the ruling and ongoing appeal are sure to affect rights holders doing business online or seeking to stop online infringement.

Independent of *Viacom*, much criticism has been leveled at the DMCA. President Clinton signed it into law with the express purpose of balancing rights protection and safety for online services, but both sides have claimed the shorter end of the stick. When a rights holder wishes to send a takedown notice, it must certify that the notice is directed at infringing material, not, for example, material that would be covered by the fair use doctrine. Some critics have

argued that the fear of being charged with bad faith prevents rights holders from exercising their takedown options.<sup>52</sup> Others argue the exact opposite: overzealous rights holders file takedown notices that result in legitimate works being removed from the Internet, stifling creativity.<sup>53</sup> Such a takedown process could create a system of censorship by proxy.<sup>54</sup> Suffice it to say, the DMCA safe harbor remains a battleground for copyright litigation, scholarship, and potential legal reform.

## **INVESTOR LIABILITY**

Investment is key to innovation in the online world. Investors provide needed capital, giving those who develop online content delivery mechanisms the financial wherewithal to foster and grow their businesses and meet the demands of consumers. But investors in services that violate copyright laws are appealing legal targets for rights holders seeking compensation for use of their content. Recent litigation has helped to define the scope of investor liability.

In 2007, Bertelsmann AG paid \$130 million to publishing affiliates of the Harry Fox Agency to settle a class action suit alleging that Bertelsmann was liable for direct or secondary copyright infringement due to its investment in Napster.<sup>55</sup> A pair of recent district court opinions, *UMG v. Veoh I*<sup>56</sup> and *II*,<sup>57</sup> has made it more difficult for rights holders to go after investors in companies that facilitate copyright infringement. Current law provides two theories of investor liability for copyright infringement: (1) contributory infringement; and (2) vicarious infringement. Under the first theory, an investor is liable if he (a) has knowledge of the infringing conduct and (b) induces, causes, or materially contributes to the infringing conduct.<sup>58</sup> The *Veoh II* court held that merely funding a company did not equate to materially contributing its users' copyright infringement, ruling out contributory infringement.<sup>59</sup>

The *Veoh* court also found UMG's vicarious infringement liability arguments unpersuasive. Under the vicarious infringement theory, an investor is liable if he (a) had the right and ability to supervise the infringing activity and (b) had an obvious and direct financial interest in such activities. UMG argued that investors had a direct financial interest in Veoh's users' uploading of infringing content: the more users who watched the infringing content, the more ad impressions Veoh could sell, and the more revenue and profits Veoh would generate for its investors. The court found that investors reap returns only from their sale of stock in Veoh, creating a financial interest only in the stock price, not in the sale of ad impressions.<sup>60</sup>

This is problematic if the recording industry looks to recover lost revenue via litigation, as investors tend to have deeper pockets than the typical lightly capitalized startup. It will now be difficult to go after investors for copyright infringement without evidence of their involvement in a company's day-to-day operations.<sup>61</sup> Still, *Veoh* is only a district court opinion that other courts may find persuasive, but need not follow. Some scholars want change in the opposite direction: they say the statutory copyright law itself should be amended to give investors a more predictable sense of potential liabilities. Otherwise, investors may let the prospect of litigation deter them from funding the new digital music companies.<sup>62</sup>

## **STATUTORY DAMAGES AND THE COPYRIGHT ACT**

Copyright law allows copyright owners to recover actual damages they can prove or statutory damages between \$750 and \$30,000 per infringed work and up to \$150,000 per work for "willful" infringement.<sup>63</sup> Copyright owners may also recover their costs of litigation as well as reasonable attorney's fees.<sup>64</sup> Certainly, these statutory damages create the potential of high costs for defendants and thus are a useful tool for copyright holders to enforce their rights.

Some courts and critics, though, believe they are too high. For example, in March, a court rejected a theory of statutory damages that would have made Limewire liable for over a billion dollars in statutory damages,

“an award that is ‘more money than the entire music recording industry has made since Edison’s invention of the phonograph in 1877.’”<sup>65</sup> Likewise, an ongoing appeal in the First Circuit seeks to change the way statutory damages are assessed by juries in lawsuits against individual users of peer-to-peer file-sharing services.<sup>66</sup> Additionally, many observers argue that the risk of such high damages may chill expression,<sup>67</sup> even expression by well-intentioned speakers who would otherwise be protected by fair use defenses.

## THE ROLE OF ISPS IN RIGHTS ENFORCEMENT

The recording industry has increasingly pressed for Internet Service Providers (“ISPs”) to adopt graduated response programs to assist in combating copyright infringement that occurs over their networks. Under a graduated response program, rights holders identify for ISPs the IP addresses of infringing users and provide ISPs with evidence of infringement. ISPs then take a series of escalating responses, beginning typically with warnings. If a user’s IP address is flagged a second time, the ISP reduces the user’s bandwidth. A third strike may lead to termination of the user’s account.<sup>68</sup>

Supporters of graduated response programs tout their efficiency.<sup>69</sup> As the gatekeepers of Internet access, ISPs can most easily stop persistent infringers by slowing or terminating their accounts. In contrast, rights enforcement via individual lawsuits is costly and fails to deter. Rights holders do not have the resources to prosecute all infringers, so many Internet users do not fear being caught and will continue to infringe.<sup>70</sup>

Some governments require ISPs to adopt graduated response programs. In 2007, France created an independent agency, HADOPI, responsible for enforcing a three-strike graduated response program. Each time a rights holder files a claim of copyright infringement, the relevant ISP must hand over the offending user’s IP address and send a warning email notice to the infringing user. If there is a second offense within six months of the first warning, the ISP must send a certified warning letter to the user’s home. After the third offense, the ISP must suspend the user’s Internet connection for a period from two months to one year. In 2009, France’s highest court struck down the third step of the law for violating citizens’ basic civil right to Internet access. The modified third step now requires judicial review prior to termination of Internet access.<sup>71</sup>

In contrast, the United Kingdom’s Digital Economy Act, enacted in April 2010, imposes less responsibility and costs on ISPs. Rights holders track the IP addresses of infringers and pass them along to ISPs, who are responsible for sending warning notices to the infringing users. ISPs are required to give rights holders lists of users who have reached a certain level of infringement. Rights holders then have the discretion to file suits against the infringers. ISPs will absorb only 25% of the costs of this process; rights holders will absorb the remaining 75%. If this program fails to reduce total UK online copyright infringement by 70% or more, however, ISPs may have to implement technical solutions to limit specific users’ frequent infringement.<sup>72</sup>

In the United States, record companies are lobbying for similar graduated response programs. Currently, some ISPs are cooperating with rights holders on notice programs where ISPs send infringing users warning notices. But, ISPs have pushed back against adopting more stringent regulation, like France’s three-strikes law. It is not in an ISP’s interest to terminate the accounts of paying customers.<sup>73</sup>

The Anti-Counterfeiting Trade Agreement (“ACTA”) — an international, multilateral intellectual property trade agreement — may require the United States to adopt graduated response regulations. Leaked early drafts drew criticism for explicitly requiring them. While the October 2010 final draft does not expressly mention a graduated response, it does contain broad language encouraging ISPs to use “fair and proportionate” remedies to enforce copyright laws. Some organizations argue that this language implies a graduated response requirement.<sup>74</sup>

Many critics have focused their attacks on three-strikes programs that terminate persistent infringers' Internet access, like France's HADOPI, for imposing a punishment disproportionate to the crime of infringement as Internet access is increasingly important for basic economic and social activities. Moreover, say critics, termination reaches too broadly as a punishment, affecting entire households and not just individual infringers. Other critics worry that these programs place too much enforcement power in the hands of ISPs and would prefer a system that gives consumers recourse if they feel they have been wrongfully accused of infringement.<sup>75</sup>

Some detractors attack the economic efficiency of graduated response programs. They argue that the ISPs' will pass the costs of sending notices and ensuring they are received on to the consumers, making it more difficult for low-income families to afford Internet access.<sup>76</sup>

### **GOVERNMENT-SANCTIONED RIGHTS ENFORCEMENT MEASURES**

US senators have promised to introduce legislation targeting rogue websites facilitating illegal file sharing and other methods of copyright infringement, similar to last year's failed Combating Online Infringement and Counterfeits Act ("COICA").<sup>77</sup> The Obama Administration is also drafting new proposals to combat digital piracy.<sup>78</sup>

COICA cracks down on foreign websites that traffic in counterfeit and stolen American intellectual property. The bill authorizes the US attorney general to target any domain name of a website that is "primarily designed" to infringe copyrights and serves no other "commercially significant purpose"<sup>79</sup> and require the register of the domain to suspend its operation. The bill would also require the Department of Justice to compose and issue a blacklist of domain names dedicated to infringing activities. The DOJ could then issue court orders requiring ISPs, search engines, payment processors, and online advertising networks to stop servicing these rogue websites.

Critics of COICA object to the bill as authorizing Internet censorship, creating a blacklist without judicial review, and potentially undermining free speech when targeted domains contain blogs or discussion boards. There is also concern that COICA will hurt US credibility in foreign policy by making the US appear hypocritical when criticizing Internet censorship while itself blocking foreign domain names. Other countries may feel more justified and emboldened to block websites if they see the US doing the same.<sup>80</sup> The ISPs also argue COICA is overbroad and would overburden service providers.<sup>81</sup>

The major music labels have joined members of the film, television, fashion, and software industries in supporting COICA. They contend that these rogue websites will be impossible to stop if search or advertising companies like Google and payment processors like Visa can continue to do business with them and provide them with the tools to thrive financially.<sup>82</sup>

### **LAW, POLICY, AND DIGITAL MUSIC DELIVERY**

Perhaps no aspect of the music industry has changed so radically or so quickly during the past decade as the means of distributing music to consumers. Large chain music stores like Tower Records have shut their doors, electronics and big-box retailers are shrinking shelf space devoted to compact discs, and distributors of music at all levels have radically re-tooled their manufacturing and supply chains to deliver to an ever-increasing variety of digital services.<sup>83</sup> Meanwhile, consumer consumption has changed, increasing demand for singles and moving away from ownership of physical (and even digital) recordings in favor of subscription services and web-based radio. These transformations prompt reevaluation and reconsideration of fundamental aspects of our copyright laws.



## MUSIC IN THE CLOUD

As broadband and high-speed mobile networks proliferate, consumers are increasingly turning to the cloud to store and stream their music to home and portable devices. Both Apple and Google are rumored to be getting into the cloud-based music space, following numerous younger entrants. Less than a month ago, Amazon joined the race to the cloud with its Cloud Drive and Cloud Player services.<sup>84</sup> The goal is a system of anytime, anywhere access to music stored not on a user's device, but on the servers of a third party. Such a system allows for more control over the distribution of content as well as, ideally, access by consumers to a wide range of music. Beginning in the early 2000s, however, legal issues emerged, highlighting challenges surrounding intellectual property rights and cloud-based storage and delivery systems.

In January 2000, MP3.com launched My.MP3.com, which allowed users to register their personal CDs, either in their personal computers or purchase through retail affiliates, then stream the albums from a website. MP3.com argued that because it acted as a personalized music locker, allowing users to listen only to music they had registered, it was merely storing the CDs.<sup>85</sup> Record companies commenced a lawsuit, arguing that MP3.com created unlicensed copies of CDs.<sup>86</sup> The court agreed, holding that a so-called "space shift" (i.e., allowing listeners access to their music from any Internet-connected location), would not qualify MP3.com for a fair use defense in the same way that the "time shifting" capabilities of VCR taping did for Sony.<sup>87</sup>

MP3Tunes, launched in 2006 by MP3.com founder Michael Robertson, allows users to upload music from their computers or "sideload" music from the web. EMI and others are suing for infringement, but Google has joined the fray to revive the argument that "space shifting" is a legitimate fair use.<sup>88</sup> This argument received extra support in the form of Amazon's new cloud service, which Amazon launched without obtaining licenses from the major labels. Instead, the company has asserted that its service is "like any number of existing media management applications. We do not need a license to make Cloud Player available."<sup>89</sup> The legal validity of this argument remains to be seen.

In 2008, the Second Circuit held that copies produced in and streamed from a remote digital video recorder system were made lawfully by the customers, and temporary (1.2-second) copies made for buffering were not infringing copies.<sup>90</sup> As such, playing back the videos did not violate the copyright owners' rights to publicly perform their works. Views of this holding are mixed. Some observers see it as "as an end-run around copyright liability."<sup>91</sup> Others, like Google, see it as laying the groundwork for personal transmissions from and storage in the cloud, something "[c]onceptually ... no different than what users do when they store music purchased on CDs on their personal computer hard drives, or on their iPods or other digital music players."<sup>92</sup>

The law in this area is far from settled. The Supreme Court denied *certiorari* in part because then Solicitor General Elena Kagan argued that the Second Circuit's case was the first among many potential similar cases in an evolving technology. She specifically singled out music lockering and "[t]he general development of cloud computing...may generate similar issues."<sup>93</sup> Now Justice Kagan may ultimately be forced to revisit the matter.<sup>94</sup>

## INTERNET RADIO AND STATUTORY LICENSE RATES

While locker services store and transmit users' music, other services simply stream music, for free or on a subscription basis, to users regardless of an initial *a la carte* purchase. These services include Rhapsody (which has licensed a large number of works to stream as subscribers choose), Pandora (which serves as a free radio station streaming licensed music according to its own algorithms), and Hype Machine (which aggregates music from blogs posted around the world). All are frequently referred to as Internet radio or music streaming services. For purposes of the law, though, they must be divided between interactive and non-interactive services.

In order to offer the former, providers must negotiate individual licenses with sound recording copyright holders. Non-interactive services, on the other hand, require only that providers pay “compulsory” license fees to SoundExchange at rates (and pursuant to license terms) set by statute.<sup>95</sup>

Many observers believe the compulsory license rates are too high for webcasters, particularly when compared to the disproportionately low rates charged to satellite broadcasters (and outright exemption for terrestrial radio stations).<sup>96</sup> Rights holders counter that statutory fees are reasonable to compensate those involved in the creation of sound recordings and administer the statutory licensing regime.<sup>97</sup>

## **SECTION 115 REFORM**

Digital music services struggle to offer catalogs of songs large enough to attract consumers. One key obstacle in the music clearance process is Section 115 of the Copyright Act, which governs compulsory licensing of the composition rights of nondramatic musical works. Section 115 contains byzantine procedural requirements, requiring extensive documentation for each individual song that a service would like to distribute.<sup>98</sup>

Critics of Section 115 argue that these high transaction costs discourage investment in new digital music services.<sup>99</sup> Services also complain that it can be torturous locating the rights holders that they are required to notify.<sup>100</sup> Additionally, advocates of reform hope that a new version of the law will clarify ambiguities affecting digital services, such as whether incidental buffer or cache copies stored in a server during streams require a separate Section 115 license in addition to a public performance license.<sup>101</sup>

Labels, publishers, and songwriter representatives also support Section 115 reform, criticizing the compulsory license provision for no longer fulfilling its purpose of making musical compositions readily available.<sup>102</sup> A 2006 attempt at reform failed, however, partially because of disagreement between music industry representatives and digital music advocates over the industry’s insistence on licensing incidental “buffer” copies of songs. Some, like the Electronic Frontier Foundation and Public Knowledge, argue that such copies fall under fair use. If digital music services had to pay an additional royalty for these copies, they would either struggle to survive or pass on the extra costs to consumers. In either case, consumers looking for new ways to legally listen to music online would suffer.<sup>103</sup> On the other side, songwriter and publisher representatives argue that buffer copies have intrinsic economic value.<sup>104</sup> Unlicensed, they give value to digital music services without providing any corresponding benefit to copyright owners. Without this revenue stream, songwriters will continue to struggle to support their art.<sup>105</sup>

## **COLLECTIVE LICENSING AND ALTERNATIVE COMPENSATION**

With new entrants chomping at the bit to find ways to use music in a complex rights landscape, and with rights holders open to an increasing array of business models, non-traditional modes of compensating creators and rights holders may become key. Some argue that rights holders should be open to voluntary collective licensing regimes that cut through the complexity of license negotiations by offering users access to a wide range of content at pre-established rates. Others go further, arguing that a more radical policy shift away from a copyright system that allows one-off, piecemeal licensing through mechanisms controlled by rights holders and toward a system that allows a wide range of content uses supported by “taxes” will strike the balance between compensating creators and promoting innovation in music delivery.

## VOLUNTARY COLLECTIVE LICENSING

Voluntary collective licensing regimes generally work within the confines of current copyright laws and keep rights holders in control.

The Electronic Frontier Foundation advocates an all-you-can eat subscription for users licensed voluntarily by music industry “collecting societies.”<sup>106</sup> The distinction from the tax-based plan described below is that artists choose to enter the society and may opt to license some works individually, and listeners choose whether or not to pay the collectively negotiated rate. In that way, according to the EFF, the project is much like traditional terrestrial radio broadcast.<sup>107</sup>

Such a solution will necessarily involve small groups of stakeholders organizing licensing and pricing and, therefore, may come into conflict with antitrust laws. In spite of the fact that one major advantage claimed by collective licensing advocates is the lack of government control, some regulation will be necessary to prevent abuse. There currently exist three major performance rights organizations on the composition side (i.e., ASCAP, BMI, and SESAC) and one major performance rights organization on the sound recording side (i.e., SoundExchange) in the United States. Some see that fact as enough to provide competition. Others see potential for either an antitrust exception or antitrust regulation.<sup>108</sup> Regardless, some observers point to a slippery slope leading from voluntary licensing schemes to government intervention and mandatory regimes.<sup>109</sup> For example, if an ISP seeks to acquire rights on behalf of all of its customers, creating a collective to bargain on each side, the lack of ISP competition in many areas may make participation essentially mandatory: if an individual wants Internet access, he must also buy all the music that the ISP thinks he wants.<sup>110</sup> Such an arrangement would likely lead to government scrutiny, at the very least.

## ALTERNATIVE COMPENSATION MODELS AND TAXATION

Governments can supply public goods themselves, pay private actors to produce those goods, issue *post-hoc* rewards to incentivize that production, protect those producers from competition, or assist private individuals to create technology that helps make their goods more excludable. Copyright law takes the fourth track by stopping third parties from copying or performing artists’ works. Professor William Fisher argues in his book, *Promises to Keep*, that taking the second path through tax-supported music may better promote the interests of a broad range of stakeholders.<sup>111</sup> Beyond providing reliable compensation to artists in an environment otherwise susceptible to theft or piracy, a tax-based alternative compensation scheme may lower costs to music consumers; flatten the costs to access works, which may lead to more variety in consumption; decrease costs of litigation; and, maybe most importantly, promote an environment unlike our current reality where a significant number of an artists’ audience are criminals engaged in piracy.<sup>112</sup> Professor Neal Netanel offers a similar proposal, limited to a noncommercial use levy on peer-to-peer-related goods and services rather than Fisher’s more general tax.<sup>113</sup>

Resistance to a tax-supported music industry has emerged on all sides.<sup>114</sup> Many fear a world where government subsidizes and registers art. Critics also suggest that promoting a set source and level of revenue may stifle innovation<sup>115</sup> and that any organizer would have to overcome technical and global challenges of abuse<sup>116</sup> and comply with existing rights frameworks.<sup>117</sup>

At least one country is pushing forward with an alternative compensation scheme. As described by Volker Grassmuck’s article, *infra*, in Brazil, the Ministry of Culture is prepared to introduce an Internet Sharing License that would give Brazilian ISP users the freedom to share published works in exchange for a collected levy.

## NET NEUTRALITY

Many artists and providers of digital music have advocated vigorously for the adoption of “net neutrality” rules that would prevent ISPs and telecom companies from blocking their access to listeners online.<sup>118</sup> Although the Federal Communications Commission has moved to implement new net neutrality rules, many are unsatisfied with the Commission’s efforts.<sup>119</sup>

Net neutrality is the idea that the Internet should treat all information and content delivered through it equally.<sup>120</sup> For example, a user should be able to access a niche music blog like Pitchfork.com and a large music store like iTunes at the same bandwidth speeds. On the other side, advocates of net neutrality argue that an ISP, like Comcast, should not be allowed to strike an exclusive distribution deal with a large online radio conglomerate like Clear Channel and prevent its subscribers, who rely on Comcast as their exclusive means of Internet access, from accessing Pandora.<sup>121</sup>

Many artists and digital music companies believe that FCC rules codifying the net neutrality principles are vital for artistic creation to thrive. The Internet enables artists to skip the gatekeepers and directly reach their fans. Music aficionados can more easily find and explore new categories of music. This means that smaller, regional artists or niche musicians (say a zydeco accordion player) can create distributed, global fan bases that will result in increased revenue opportunities. Likewise, many companies — like Pandora or Rhapsody — have leveraged the Internet to create new models for consuming music. But, for small artists and innovative digital companies to thrive, equal access to online listeners is essential. These smaller artists and cash-strapped startups would likely be unable to afford to pay ISPs for prioritized access while major labels could absorb the cost as part of promotion. Consequently, audiences may not be able to find David with Goliath in their way.<sup>122</sup>

Many larger rights holders — like the labels, publishers, and performance rights organizations — also support net neutrality to the extent that the principles do not apply to digital piracy.<sup>123</sup> These organizations believe that ISPs should be allowed to throttle down or prohibit access to file-sharing services and sites primarily designed to infringe copyrights.

Opponents of net neutrality rules contend that this regulation will constrict ISPs’ flexibility to adopt traffic prioritization strategies needed to manage their networks and guarantee working service for their customers. Some fear that consumers will ultimately suffer, as ISPs will require them to pay for faster networks or larger bandwidth uses.<sup>124</sup>

On December 21, 2010, the FCC promulgated “open Internet” rules, codifying the principles of transparency, non-blocking, anti-discrimination, and reasonable network management. The rules apply only to lawful content, so ISPs may still block digital piracy as discussed above.<sup>125</sup>

These rules, however, pose two problems for the digital music. First, the full rules do not apply to wireless Internet.<sup>126</sup> In the case of digital music services, this means that carriers like Verizon or AT&T can provide prioritized access to select music content providers and block access to other music services. This is especially problematic for the digital music industry, where many consumers access services primarily through mobile devices. Without net neutrality rules in place for mobile Internet, new services like the cloud-based music lockers discussed above may struggle to get off the ground.

Second, the net neutrality rules permit ISPs to offer content-neutral, use-agnostic discrimination. This means that ISPs can offer subscribers differently priced bandwidth plans and allocations.<sup>127</sup> These plans may not directly discriminate against content providers, but some network neutrality advocates fear that users will self-discriminate. To avoid going over their bandwidth allocations, users are unlikely to try new, bandwidth-heavy streaming music services. Without users, these services cannot survive, and creative new business models for the music industry may be killed in their infancies by ISP policies.

## CONCLUSION

This brief look at just some of the issues facing the creators, distributors, and consumers of music is intended to serve as a broad overview of the key policy questions of the day. Many more will be explored over the course of the Rethink Music Conference.

At the heart of many of the controversies addressed in this framing paper — and, indeed, in all of the submissions to this briefing book — lies the same tension between balancing the interests and rights of those involved in creating music and fostering innovation and progress in the means and media of music delivery and consumption. A key takeaway is that the law and policy surrounding the creation, delivery, and consumption of music are in flux as stakeholders rethink how to protect copyright while innovating new models for distributing and experiencing music. Because technology and accompanying new business models will continue to evolve faster than the law, this state of flux is here to stay. Artists, labels, entrepreneurs, lawyers, and policymakers will always be rethinking music.

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<sup>22</sup> See 17. U.S.C. § 203 (2006).

<sup>23</sup> *Id.*

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<sup>100</sup> *Music Licensing Reform: Hearing Before the H. Sub. Comm. On Courts, the Internet and Intellectual Property*, 109<sup>th</sup> Congress (2005) (statement of Marybeth Peters, the Register of Copyrights).

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<sup>109</sup> Ed Felten, *The Slippery Slope from Voluntary to Mandatory*, CENTER FOR INFORMATION TECHNOLOGY POLICY, PRINCETON UNIVERSITY (Apr. 9, 2008, 11:12 AM), <http://citp.princeton.edu/symposium/?p=31>.

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<sup>111</sup> WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004).

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<sup>114</sup> *See Michael Arrington, The Music Industry's New Extortion Scheme*, TECHCRUNCH (Mar. 27, 2008), <http://techcrunch.com/2008/03/27/the-music-industrys-new-extortion-scheme/>.

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<sup>120</sup> Tim Wu, *Network Neutrality FAQ*, [http://www.timwu.org/network\\_neutrality.html](http://www.timwu.org/network_neutrality.html).

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<sup>122</sup> *See Shane Wagman, I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace*, 17 J. INTELL. PROP. L. 95, 111 (2009).

<sup>123</sup> *The Google-Verizon Internet Pact*, MUSIC NOTES BLOG (Aug. 11, 2010), [http://www.riaa.com/blog.php?content\\_selector=Internet\\_Pact](http://www.riaa.com/blog.php?content_selector=Internet_Pact).

<sup>124</sup> Faith Fried, *FCC's Net Neutrality Stance Draws Praise, Criticism*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, <http://csis.org/blog/fcc%E2%80%99s-net-neutrality-stance-draws-praise-criticism> (last visited Apr. 4, 2010).

<sup>125</sup> Kyle Bylin, *Overview: Newly Adopted FCC Net Neutrality Rules*, HYPEBOT.COM (Dec. 21, 2010).

<sup>126</sup> See Future of Music Coalition, *Rock the Net: The Future of the Open Internet*, <http://futureofmusic.org/issues/campaigns/rock-net>.

<sup>127</sup> See *id.*



## **VOLUNTARY PAYMENT MODELS**

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In October 2007, Radiohead released *In Rainbows* online, without DRM, available for download for a tiny transaction fee plus a flexible payment option to pay what you thought the album was worth. Radiohead did not release sales figures, but their release launched a wide public discussion of the possibility of online voluntary payment models. Trent Reznor was less reticent to share the good news that his online, voluntary payment release of *Ghosts I-IV* brought him 1.6 million dollars in revenue in 2008. Many others have developed a range of models to take advantage of two facts. First, musicians have always gotten a tiny share of the revenue generated from selling copies of their music. For artists to get as much from music downloads as they did from CD sales royalties doesn't take a lot. Second, people care much more about the artists whose music they love than about the taxi driver who just dropped them off at the airport, or the waiter who just served them dinner, however fancy. And yet we take for granted that voluntary payments, tips, will play a nontrivial part of the revenue of taxi drivers and servers, but think it ridiculous to think of voluntary payments as a part of the mix of revenues that artists can rely on to make a living.

## I. FANS PAY MORE THAN THEY HAVE TO WHEN GIVEN THE OPTION, RATHER THAN FORCED

One recently published study analyzed data from a period of three to five years, from three sites involving less widely-known musicians.<sup>1</sup> In the case of one artist, Jonathan Coulton, revenues were substantial and sustained throughout the period. In the case of the other two sites, Magnatune and Sheeba, revenues were stable and responded to events, for example increasing around release of albums; contributors showed wide variation in levels of giving, but total revenues were consistent with those that artists can expect from forced-payment systems, and fans exhibited greater willingness to pay, sustained over years of observed data, than the standard model would predict.<sup>2</sup>

The defining feature of this strategy is to make music available for download in high-quality format, without digital rights management, and with a payment option that includes anywhere from “free” to “pay a minimum of x, or more.” For example, Reznor includes: (a) a free stream of the music; (b) a free download of part of the tracks (in the case of *Ghosts I-IV*, one-quarter), with no minimal payment; (c) a \$5 full set download, a \$10 CD set; (d) \$75 deluxe edition; and a sold out \$300 ultra-deluxe limited edition. Coulton makes his music mostly downloadable in a range of quality formats, at a price of \$1 per track; some are available for free. He also sells a USB key with a cartoon of him and several albums for \$50.

A related concept is one that involves flexible payment systems. These will typically include a minimal price — it may be realistic (e.g., in Magnatune, this was \$5 per album) — or simply enough to require a transaction — in the case of the transaction fee required by Radiohead for *In Rainbows*. Beyond that users can name their own price. The basic approach is well implemented in Bandcamp. Amanda Palmer's site, for example, uses Bandcamp to sell music; *Amanda Palmer Goes Down Under*, for example, sells for “\$0.69 or more.”<sup>3</sup> Bandcamp claims that on “pay what you want” albums fans pay on average 50% more than what the artist requests. In the recent paper on Magnatune, the data revealed that over a five year period, 48% of users paid \$8 per album where \$5 was the minimum, and only 16% paid the minimum. Another 15% paid \$10, 7.3% \$12, etc., up to 2.6% who paid \$18 per album. Payments were highly anchored around coordination focal points — for example, the drop down menu called “\$8” the “typical” donation. While 48.05% of fans paid \$8, only 2.93% paid \$7.50 and 0.34% paid 8.50.

Another related concept is raising funds from fans to support the creation of a new album. Jill Sobule made a relatively early effort, raising the \$75,000 she needed in under two months.<sup>5</sup> A more generalized approach in this vein is Kickstarter, which can be used to raise funds to support a wider range of art forms.<sup>6</sup> Kickstarter uses Amazon as a payment system to implement what is a current-day implementation of the street-performer protocol.<sup>7</sup> Unlike the other

models, it includes a threshold system—Kickstarter holds the pledges in a “lockbox” until enough money is raised and then cashes in on the pledges and pays the artist.

The overall structure of the voluntary payment system, then, is anchored in the practice of avoiding strict enforcement of payment. First, the music is made available in easily downloadable and usable formats. Second, the payment system is either completely voluntary or includes significant voluntary components in setting the price. While these experiments are generally new, what little systematic evidence there is suggests that these systems do elicit substantial levels of contribution. They will not make an artist with a small following wealthy, any more than the CD-sales-based system did. But they will also not impoverish the successful artist, as the traditional response of the recording industry over the past decade and a half would suggest. Rather, they appear, at present, to provide an important component of the overall strategy that artists can adopt to make a living by making the music they love.

## II. BUILDING A COLLABORATIVE RELATIONSHIP WITH FANS

While the voluntary payment component is the focus of the present briefing, it is important to recognize that simply putting a static website up with a payment option is not what the practice is about. Observation of successful sites and artists suggest extensive engagement, trust, and reciprocity in the treatment of the artists.

*Communication to fans:* Coulton<sup>8</sup> and Reznor<sup>9</sup> provide model sites that include a wide range of affordances and have clearly done well. At a minimal level, this includes blogging and tweeting to fans.<sup>10</sup> At a more involved and detailed level, Reznor has multiple feeds for multiple aspects of his movement and performances, etc.<sup>11</sup>

*Communication among fans: building a community:* Reznor creates a (free with registration) membership forum that allows a chat function among members, forums, etc. These, in turn, serve to strengthen the connection among the fans, through the artist and the site. Similarly, Coulton includes forums and what appears to be a relatively low-activity Wiki.

*Collaboration with fans on music, performances, or funding:* One of the most creative and extensive projects involving collaboration with fans is Imogene Heap’s experiment with *Heapsong1*. Heap invites fans to upload audio samples, lyrical suggestions, photos, and videos for her to use and incorporate in a new, three-year project album. Less ambitious, but more widely used, are the invitations for fans to remix and create their own music videos. Both Reznor<sup>12</sup> and Coulton,<sup>13</sup> for example, prominently feature their fans’ remixes. Doing this involves licensing (both use Creative Commons Noncommercial licenses), technical affordances to download and upload remixes, and creating a fan culture of valuing these contributions, rather than seeing them as threats to the artist.

*Triggering reciprocity dynamics:* The collaboration efforts are likely an important part of the reciprocity dynamic underlying voluntary payment systems. Substantial work in behavioral sciences suggests that a majority of the population reciprocates trust with trust, and generosity with generosity. The creation of engaged communities, the practical taking of risk by trusting users, and the public expression of valuing the work of the fans in creating the experience of the music together with the artist would all be predicted, under prosocial models, to elicit cooperation.<sup>14</sup>

*Changing the moral tone of the conversation:* On the background of the decade-plus of moralizing and criminalizing from the industry that has sued its fans and tried to create heavy emotional and moral load by emphasizing terms like piracy and stealing, the sites we observe here explicitly eschew moralizing and demanding. They embrace an ethic of mutual respect and participation, as well as self-conscious light-hearted reduction of the emotional load. Coulton’s “MP3 Store” explicitly has a large headline: “Already Stole It? No problem. If you’d like to donate some cash, you

can do so through Amazon or Paypal. Or for something slightly more fun, purchase a robot, monkey or banana that will be displayed here with your message.”

### III. CONCLUSION

Voluntary payments for online downloads, alongside various special-edition physical copies and merchandising, appear to be developing as one important avenue for artists to pursue in trying to make a living and support their work. Experience to date has been relatively sparse, but there are certainly success stories to be told, and what limited data there is suggests these are not one-shot anecdotes but stable flows. The design of the interaction requires an engaged artist willing to communicate with his or her fans continuously; a trusting platform rather than a “trusted system,” at least technically and in many cases also in terms of Creative Commons licensing as well; and elements that are designed to elicit a dynamic of reciprocity rather than the antagonism that the traditional system, transposed to the digitally-networked environment, has tended to create.

### ENDNOTES

<sup>1</sup> Leah Belsky, Byron Kahr, Max Berkelhammer and Yochai Benkler, *Everything in Its Right Place: Social Cooperation and Artist Compensation*, 17 MICH. TELECOMM. TECH. L. REV. 1 (2010), available at <http://www.mttl.org/volseventeen/belsky.pdf>

<sup>2</sup> It is important to note that both of these sites changed strategies since the period covered by the study. Jane Siberry from Sheeba.ca seems to have reduced her engagement with this approach; Magnatune has shifted to a subscription model. These facts do not invalidate the data collected over the long period of observation; but they do suggest that these moderately successful efforts are far from settled.

<sup>3</sup> AMANDA PALMER, <http://music.amandapalmer.net/album/amanda-palmer-goes-down-under> (last visited Apr. 6, 2011).

<sup>4</sup> BANDCAMP, <http://bandcamp.com/> (last visited Apr. 6, 2011).

<sup>5</sup> HELP US MAKE JILL’S NEXT RECORD, <http://www.jillsnextrecord.com/faq.asp> (last visited Apr. 6, 2011).

<sup>6</sup> KICKSTARTER, <http://www.kickstarter.com/> (last visited Apr. 6, 2011).

<sup>7</sup> J. Kelsey and B. Schneier, *Electronic Commerce and the Street Performer Protocol* (1998) <http://www.schneier.com/paper-street-performer.html>.

<sup>8</sup> JONATHAN COULTON, <http://www.jonathancoulton.com/> (last visited Apr. 6, 2011).

<sup>9</sup> NIN, <http://www.nin.com/> (last visited Apr. 6, 2011).

<sup>10</sup> E.g., JONATHAN COULTON, *supra* note 8. For Amanda Palmer, see *amandapalmer*, TWITTER, <http://twitter.com/amandapalmer> (last visited Apr. 6, 2011); AMANDA PALMER, <http://blog.amandapalmer.net/> (last visited Apr. 6, 2011).

<sup>11</sup> *Feeds*, NIN, <http://www.nin.com/feeds/> (last visited Apr. 6, 2011).

<sup>12</sup> *Remix*, NIN, <http://remix.nin.com/> (last visited Apr. 6, 2011).

<sup>13</sup> *Stuff from you*, JONATHAN COULTON, <http://www.jonathancoulton.com/song-details/searchcontent/> (last visited Apr. 6, 2011).

<sup>14</sup> For a more detailed review of the literature and how site-design relates to the underlying behavioral research see Belsky, Kahr, Berklehammer and Benkler, *supra* note 1.







## **MUSIC RIGHTS CLEARANCES AND PUBLIC MEDIA**

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## I. INTRODUCTION

In recent years, innovative technologies have generated new methods for distributing creative content. With the advent of digital distribution, audiences today increasingly demand access to content anywhere, anytime, anyhow, on demand. In this transformed media landscape, public broadcasters must act more broadly as public media in order to fulfill their public service purpose.

As public media continues to evolve from broadcast-only to multi-platform, various rights clearance obstacles impede public broadcasters in their efforts to meet the changing needs of their audiences and serve their educational and cultural mission. This paper will explore the rights clearance problems encountered by producers of public media when licensing musical content and propose some possible solutions that also have application for commercial media producers.

## II. RIGHTS CLEARANCE OBSTACLES

Copyright law generally requires that public broadcasters and other media producers acquire all of the necessary distribution rights in the various creative elements, including music (compositions and recordings), visual works (such as photographs, paintings and film), literary works, and talent, that are contained in the television and radio programs, online content, and other materials they produce. Congress has long recognized the civic value, important educational mission, and limited resources of public broadcasters, and the Copyright Act of 1976 includes several provisions designed to benefit public broadcasting and its audience, including some that relate specifically to the use of music.<sup>1</sup> But these provisions were enacted at a time when distribution of public media content almost always meant over-the-air broadcast of full programs, and as a result they have only limited application to new technologies and distribution formats that public broadcasters must take advantage of in order to satisfy the demands of funders and fulfill their public service mission.<sup>2</sup> In spite of the original inspiration for these copyright law provisions, it remains extremely difficult, and often too expensive, for public broadcasters to acquire all the rights necessary to incorporate music into content intended for modern multi-media platforms.

One obstacle that public broadcasters continue to face when negotiating license terms and fees is the transactional inefficiency of negotiating a separate license for each copyrighted element contained in a program.<sup>3</sup> While rights holders frequently are responsive to the requests of public broadcasters and agree to fair fees and broad rights packages that fit their needs, at other times rights holders are less responsive and receptive to their offers, sometimes because public broadcasters are unable to offer the same fees paid by commercial producers. In recent years especially, when consolidation and downsizing among the major music companies have led to smaller staffs managing larger catalogs, it has become even more difficult to obtain licenses on a timely basis. As a result of these challenges, public media producers sometimes forgo use of works that are perceived as too difficult or expensive to license, thus sacrificing a program's quality and impact while also reducing the rights holder's revenue.

Another challenge posed by the current licensing scheme is that most rights holders practice a media-focused approach to licensing. Typically, licenses describe rights with reference to the technical platforms used to deliver content. When producers do not need or cannot afford to pay for all-media distribution, they must negotiate a separate fee for use on each desired media platform. In the new digital era of convergence, where programs move from platform to platform in an environment of constantly changing media formats, this approach to licensing has led to inconsistent rights definitions and inefficient business practices.

### **III. SOLUTIONS**

A system that eases the licensing process through the use of blanket licenses and standardized rights definitions would reduce transaction costs, promote access for media producers, and increase revenue for rights holders. Improved collective licensing arrangements might be achieved by means of marketplace solutions, statutory reform, or a combination of both approaches.

Mutually beneficial efficiencies in the licensing practices of public and commercial media producers and rights holders could be achieved, for example, under the present “opt-in” system by pursuing voluntary blanket license agreements between producers and rights holders. Additionally, it would make sense for producers and rights holders to establish a consistent and shared set of rights definitions that are not tied to particular technological formats for use when negotiating license terms and fees. Such definitions could be established or endorsed by entities such as collective rights organizations.

Inefficient and costly licensing practices could also be addressed by amending the Copyright Act, such as by updating the provisions that apply to public broadcasters or establishing an “opt-out” system for uses of creative content that serve an acknowledged public policy purpose.

#### **A. MARKETPLACE SOLUTIONS**

##### **1. Blanket License Agreements**

Inefficient and costly licensing practices compromise the ability of public broadcasters to gain access to value-adding musical works and maximize distribution of publicly-funded content. And when a producer foregoes use of a work because it is too difficult or expensive to license, the rights holder loses potential revenue. More widespread use of negotiated blanket license agreements that feature fair and predictable pricing models would benefit producers, increase revenues for record companies and music publishers, and reduce costs for all concerned.

Voluntary blanket license agreements between music rights holders and public broadcasters could take the form of industry-wide agreements, company-by-company or project-based agreements, or agreements administered through collective rights organizations.

Under an industry-wide agreement, all music rights holders would be able to opt into an agreement granting public broadcasters certain non-exclusive rights in their works. If this arrangement endeavored to establish fees, however, then it would likely raise antitrust concerns. In order to be feasible, an industry-wide agreement would have to refrain from setting fees or else secure some antitrust regulation or consent. A company-by-company agreement structure, whereby individual music publishers and record companies separately grant to public broadcasters certain rights in their respective repertoires for use generally or in particular projects, would avoid antitrust concerns.

Collective rights organizations that represent music rights holders can play a useful role in administering voluntary blanket licensing arrangements.<sup>4</sup> For example, collective rights organizations could negotiate and approve a blanket agreement and then notify their affiliated rights holders of potential licensing opportunities and allow them to opt in to the proposed agreement. Eventually, the agreements can also be used with rights holders not affiliated with such collective rights organizations.<sup>5</sup>

There are several challenges that need to be addressed when negotiating voluntary blanket licenses that allow for the

use of a catalog of compositions or recordings for pre-approved purposes. Most notably, it may be difficult to establish a fixed pricing model in light of the customary practice of music publishers and record companies of negotiating fees based on the perceived unique value of particular works. One solution to this challenge would be to establish a simple tiered rate structure under which, for example, famous works would be assigned a premium price and other works would be subject to a lower rate. Comprehensive licensing arrangements also must address the contractual approval rights of some writers and artists, perhaps by identifying in advance those works within a catalog for which writer/artist approval is not required or otherwise arranging for their pre-approval of certain kinds of uses, such as for publicly-funded projects designed primarily to serve a non-commercial educational purpose. In an online environment where copyright owners have already effectively ceded some control over their work to audiences that increasingly assert the right to interact with the content they consume, it can be expected that over time writers and artists (and their lawyers) may become more willing to relinquish a degree of control over their content in order to increase their income.

## **2. Standardized Rights Definitions**

Today most rights holders, including music publishers, record companies, and visual archives, base their licensing on the ever-changing technological platforms used to deliver content to viewers: broadcast, cable, internet, mobile devices, DVDs, etc. This has led to inconsistent rights definitions and inefficient business practices among producers and rights holders. Moreover, licenses that limit the rights granted to uses on specified delivery platforms do not acknowledge the rapid convergence among various forms of media best illustrated by the increasingly common practice of watching “television” programs on the Internet and mobile devices such as iPads.

In order to bypass the problems posed by technology-based licenses, commercial content producers often seek upfront unlimited distribution rights in the works embodied in their programs. This approach, however, is sometimes unavailable to public broadcasters unable to afford unlimited licenses that permit use in all media. For situations where “all rights” packages are unavailable or unaffordable, it would be helpful to establish a consistent and shared set of rights definitions. Reliance on a “common language” when negotiating license terms and fees, whether in individual or blanket licenses, would simplify transactions and reduce administrative costs for licensors and licensees. Updated criteria for describing rights and determining fees — perhaps based on the nature of the end-use rather than the particular delivery platform — might better serve the realities of a digital world.<sup>6</sup>

The expanded use of voluntary blanket license agreements that avoid technology-based rights definitions could lead to fair and predictable fees that take into account the special mission and economics of public broadcasting, and at the same time reduce costs and increase revenues for music publishers and record companies.

## **B. LEGISLATIVE SOLUTIONS**

Outdated copyright laws and current licensing practices make it difficult for public broadcasters to produce the highest quality programming and distribute their archival and new content by any and all means to the broadest possible audience. While public broadcasters pursue marketplace solutions to complicated rights clearance problems, consideration must be given to a variety of statutory changes, ranging from narrow updates of the provisions that apply to public broadcasters to more substantial reforms.

Recent developments, including legislative activity relating to the use of “orphan works” for which no copyright owner can be found and the rejected settlement of the copyright infringement class action brought against Google by the American Authors Guild and the Association of American Publishers (the so-called “Google Books Settlement”), suggest some movement away from the traditional “opt-in” licensing system towards an “opt-out” approach that creates a presumption in favor of certain uses of creative content for publicly beneficial purposes.<sup>7</sup>

The Google Books Settlement would have accomplished several goals that mirror those proposed in this paper (e.g., make valuable copyrighted content more readily available to the public, avoid countless negotiations of individual license agreements, increase revenues for copyright owners). If the recent judicial rejection of the Google Books Settlement leads to a legislative response, thought should be given to addressing at the same time issues relating to public media and rights clearances. At a time when government funding of public broadcasting is uncertain, it is worth considering new ways to support its educational mission.

Given the difficulty of amending the Copyright Act, marketplace solutions aimed at developing efficient comprehensive licensing arrangements are likely to be more practical, at least in the short term.

#### **IV. COMMERCIAL APPLICATIONS**

Commercial producers face some of the same transactional inefficiencies, costs and delays that public broadcasters encounter in the course of obtaining individual licenses for works under an opt-in system. They also run into the challenge posed by inconsistent rights definitions when budget constraints restrict their ability or desire to obtain all-media distribution rights. Therefore, some of the solutions explored in this paper, including voluntary blanket license models and standardized rights definitions, could also be adapted for use in the commercial context. Adoption of widespread voluntary blanket license agreements using standardized rights definitions will reduce transaction costs faced by all parties and increase the revenues of rights holders.

#### **V. CONCLUSION**

Public broadcasters work to produce the highest quality programming and fulfill their public service mission. The special kinds of programs they produce, which frequently include many different pre-existing creative elements such as musical compositions and recordings, present complex and troublesome rights clearance challenges. Outdated copyright law provisions with only limited application to new technologies and distribution formats compromise the ability of public broadcasters to maximize distribution of content across multiple platforms, including new and emerging media. Inefficient rights licensing practices lead to substantial transaction costs for both producers and rights holders and limit the value and reach of publicly funded content.

There is a need for an improved legal framework and collective licensing system that will facilitate the use of music and other pre-existing creative elements in public media, including news and public affairs programs, documentaries, and artistic performances, and enable the distribution of such content as widely as possible for the public benefit. An expanded use of blanket license agreements could lead to fair and predictable fees that take into account the special mission and economics of public broadcasting, and at the same time improve transactional efficiencies, reduce costs, and even increase revenues for music publishers and record companies, which in turn will benefit songwriters and recording artists.

## ENDNOTES

<sup>1</sup> As examples, Section 114(b) exempts public broadcasters from having to obtain licenses to use sound recordings in educational programs, and Section 118(d) provides a compulsory licensing scheme for non-dramatic musical compositions.

<sup>2</sup> Sections 114(b) and 118(d) both impose limits on a public broadcaster's distribution of programs produced in reliance on their terms, including a prohibition on the distribution of "copies" of programs such as by means of DVDs or digital downloads. While Section 114(b) does cover the online streaming of programs, it does not cover clearly all other uses of sound recordings on the websites of public broadcasters that continue to fulfill a valuable educational purpose that benefits the public long after the original television broadcast. Section 118(d) covers only "a transmission made by a noncommercial educational broadcast station" and thus excludes the distribution of copies of programs to schools or transmissions of programs via third party sites such as YouTube.

<sup>3</sup> This problem is especially troublesome for producers of historical documentaries, which typically are filled with a variety of pre-existing copyrighted works: popular music (songs and recordings) for the soundtrack, pieces of news footage, film clips, photographs and other images, and more. For a typical one-hour documentary, it may be necessary to negotiate and enter into fifty or more separate license agreements from rights holders around the world. Consider the number of documentaries produced by and for all public broadcasters, encompassing many hundreds of licenses needed within sometimes tight budgets and production schedules, and it is clear that substantial transaction costs are incurred — by both producers and rights holders — in order to produce and distribute this kind of content.

<sup>4</sup> For example, the British Broadcasting Corporation ("BBC") has voluntary blanket license agreements with collective organizations representing music rights holders: PRS for Music ("PRS") for rights in musical compositions; and Phonographic Performance Limited ("PPL") and Video Performance Limited ("VPL") for rights in recordings.


<sup>5</sup> One alternative to a traditional blanket license agreement is an extended collective license ("ECL"). ECLs operate as a hybrid between compulsory licenses and traditional collective agreements and are used in several Nordic countries. These arrangements allow collective rights organizations that represent a substantial number of rights holders to incorporate into their license agreements works that are not represented by the organization but are of same nature as those represented by the organization.

<sup>6</sup> The Association of Commercial Stock Image Licensors ("ACSIL"), a non-profit organization that includes many of the world's leading stock footage libraries, has developed a "Licensing Grid" that replaces the old system of technology-based licensing with a framework that flexibly takes into account a variety of relevant factors, including the project's intended audience, visibility in the marketplace, funding and production costs, and potential sources of revenues.

<sup>7</sup> In furtherance of its non-commercial educational mission, public broadcasters produce many kinds of materials that incorporate pre-existing copyrighted works besides traditional "programs." For example, WGBH's educational non-broadcast services include *Teachers' Domain*, the first online digital library that tailors segments from national broadcasts for K-12 classroom use, and *Open Vault*, an online source of important WGBH-produced archival content (video excerpts, full interviews, searchable transcripts, and resource management tools) designed for individual and classroom learning.







## **A COPYRIGHT EXCEPTION FOR MONETIZING FILE-SHARING: A PROPOSAL FOR BALANCING USER FREEDOM AND AUTHOR REMUNERATION IN THE BRAZILIAN COPYRIGHT LAW REFORM**

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## I. A NEW SOCIAL CONTRACT

*The dissemination of free music on radio and TV is regulated, they [the industry] get money for it, but nobody in the media is claiming that music is being given free to the consumer.*

—Pedro Alexandre Sanches

*They refused to understand the Internet as a means of communication. They refused to sit at the table and propose, discuss and collect money through ECAD [the Brazilian music collecting society]. They refused the right of ECAD to collect money on the Internet. If there is any, it's a tiny amount, when in fact they should have joined and forced ECAD to become a distributor.*

—Pena Schmidt<sup>1</sup>

Copyright law was the core element in the social contract between authors and audiences that was negotiated in the 18th and 19th centuries. It worked well in regulating the relationship between commercial parties in the culture industry. The digital revolution has fundamentally changed the media — technological basis of the production, distribution and consumption of cultural goods. Private persons, whose actions have until recently been outside the scope of copyright law, can now be producers and global distributors of creative works. Therefore a new social contract concerning culture has to be negotiated.

The overall goals of this contract remain the same: to ensure the possibility of all citizens to have access to and participate in the knowledge society and their freedom of expression, to ensure the freedom of a diversity of authors and artists to create and their right to an equitable remuneration for the use of their works, and to ensure the freedom of technologists to innovate, in particular the freedom of the Internet that has brought us a wealth of novel ways to communicate, cooperate, and do business.

Also the two core elements of this contract remain: the willingness of authors and artists to create works and the willingness of audiences to pay them for doing so. This payment will continue in a range of ways, from market transactions, donations, corporate sponsorship to forms of collective redistribution like public funding and collective rights management.

For a large number of uses by a large number of individuals of a large diversity of works the conventional response of copyright law is collective management. When in the 19th century composers were unable to individually collect a remuneration from each cafe house and bar that performed their music, they joined hands and formed the first collecting societies that since then collectively collect the money for the community of music authors. When in the 1950s audio tape recorders became available for private use, enabling people to make non-commercial reproductions in their homes, in response the private copying exception was invented in 1965. Neither could the technology or their use for making reproductions be prohibited, nor could authors or even their collectives go after each individual owner of a tape recorder to collect their fair remuneration. Therefore the German legislature decided to permit private copying and required the producers and importers of tape recorders to add a copyright levy to the price of their devices. The music collecting society collects this levy and redistributes it to its members. This private copying exception was quickly adopted throughout Europe and other droit d'auteur countries.<sup>2</sup> The levy was later extended to other recording devices like photocopying machines and video recorders and to recordable media.

Collective rights management organizations (CMOs) thus developed as crucial institutions in the social contract between authors and audiences, ensuring authors a fair remuneration for mass-scale secondary and tertiary uses of

their works<sup>3</sup> and ensuring audiences the informational freedom of private copying. Because of their special status, CMOs are subject to legal regulation and public approval and oversight. Internally they are membership organizations with democratic decision-making. Currently in Germany there are 13 CMOs for different work categories (music works, music recordings, text works, images, movies and other audio-visual works). Peer-to-peer (P2P) file sharing is a mass-phenomenon comparable to private copying, practiced by about half the Internet population.<sup>4</sup> The adequate response is again a collectively remunerated copyright exception.

## II. REPRESSION DOES NOT WORK

Today there is a discrepancy between copyright law and the widespread practice of file sharing. So far attempts to resolve this discrepancy were directed at repressive measures in order to make cultural practices conform to the law: in the form of technology (Digital Restrictions Management (DRM)), deterrent campaigns à la “Pirates are Criminals,”<sup>5</sup> and mass-scale civil and criminal proceedings. None of these have had any measurable impact on file sharing. But instead of recognizing the failure and changing the approach, the same logic is bringing forth evermore extremist forms of repression. Excluding infringing citizens from the Internet for up to one year was pioneered in France and is now being called for by culture industries in many countries, including Brazil. The secretly negotiated multi-lateral Anti-Counterfeiting Trade Agreement (ACTA) is intended to introduce this digital death sentence globally. Deep Packet Inspection (DPI)<sup>6</sup> for filtering file sharing out of the Internet is now being tested by UK Internet Service Provider (ISP) Virgin Media<sup>7</sup> and others.

All this is done under the unproven assumption that repression will improve sales opportunities for copyrighted products and with the proclaimed but equally unproven intention to increase revenues of authors and artists. A much more likely and, indeed, observable result of repression is not a decrease of file sharing but an increase of tracker-less P2P networks<sup>8</sup> encrypted and anonymous P2P file sharing,<sup>9</sup> of closed trackers,<sup>10</sup> file-hosting, sharing on Usenet, offshore hosting,<sup>11</sup> and hard disk-copying. Repression predictably calls in the next round of the technological arms race. As U.S. law scholar Lawrence Lessig explains, the criminalization of the whole generation of our children “can’t stop these activities, it can only drive them underground.” He points out one dramatic effect it does have: the erosion of the trust in the legal system.<sup>12</sup> If cultural reality cannot be made to conform to copyright law, then copyright law has to be adapted to reality by legalizing what can not be prevented anyway and at the same time ensuring an equitable remuneration to authors.

## III. THE FILE-SHARING EXCEPTION

The model has been discussed under different names: “alternative compensation system” (William Fisher<sup>13</sup>), “noncommercial use levy” (Neil Netanel<sup>14</sup>), “licence globale” (Alliance Public Artistes<sup>15</sup>), “culture flat-rate” (privatekopie.net and FairSharing.de), “contribution créative” (Philippe Aigrain<sup>16</sup>). Variations of its details are, of course, being discussed, but the contours of the general model have emerged by now. Following the precedent of the private copying exception, the goal is:

**a legal permission for private online sharing of published copyright protected works for non-commercial purposes subject to a collectively managed levy.**

The permission refers to private, natural persons, thus excluding companies and other legal institutions. It refers to published works, ensuring the right of first publication to the author. Secondary and tertiary uses are already regularly collectively managed. It refers to non-commercial uses: anybody earning money from the use of another’s work will

continue to be required to obtain a license. “Sharing” refers to both up- and downloading. While downloading is already covered by the private copying exception in some countries,<sup>17</sup> permitting uploading requires an exception to the exclusive right of making available. “Online” refers to networks using the Internet protocol, both wire-based and wireless. “Levy” refers to a fixed sum to be paid by the beneficiaries of the permission and allocated by CMOs to authors based on the measured popularity of their works. Finally the permission should be implemented in copyright law in order to achieve legal certainty for authors, performers, exploiters and Internet users alike.

## **A. THE CULTURE FLAT-RATE IN COPYRIGHT LAW**

Three models for implementing such a file-sharing permission in copyright law have been suggested.

### **Mandatory collective management of the exclusive making-available right**

This was first implemented by Hungary. Silke von Lewinski from the Max Planck Institute for Intellectual Property in Munich analyzed the Hungarian provision and found it in accordance with international and European copyright law.<sup>18</sup> The French Alliance Public-Artistes commissioned a legal study from France’s most renowned copyright scholar André Lucas who also found mandatory collective management compliant with French, European, and international law.<sup>19</sup> This model was supported by French Members of Parliament from both the socialists and the conservative parties who passed it into law in December 2005. Alas, the decision was reversed soon after.

### **Extended collective licensing**

This instrument has been widely used in Nordic European countries since the early 1960s for broadcasting and cable re-transmission and has recently been applied to the reproduction of works for educational purposes and the digitization of works in libraries, museums, and archives.<sup>20</sup> It extends a license concluded between a CMO and a group of users of certain rights to authors, performers and exploiters who are not a member of the CMO. These non-members usually have the right to opt-out of such an agreement. With respect to file sharing, this model has been discussed particularly in Italy,<sup>21</sup> leading to two bills introduced in parliament in July 2007 and in April 2008.

### **Copyright exception**

A third option is to model a file-sharing exception on the time-tested private copying exception. This has been tested by Alexander Roßnagel and his team at the Institute of European Media Law (EML) on commission from the German and European Parliament factions of the Green Party.<sup>22</sup> Their study has shown that such an exception is feasible within the framework of existing German and European law, even though it requires changes in both. They conclude that “[t]he introduction by law of a culture flat-rate therefore requires amendments to both national and European law, yet it remains nothing less than the logical consequence of the technological revolution ushered in by the internet.”

It seems that by subjecting the complete scope of the making-available right to mandatory collective management, the first model is going too far, while the second model is not going far enough. Permitting exceptions to the exception would still require policing the boundary between licensed works and those that have been opted-out of the agreement. Therefore a clearly defined copyright exception is the best option to achieve legal certainty for all parties involved.

## **B. WHICH WORKS TO INCLUDE?**

Empirical research shows that nearly all categories of copyright protected works are being shared to varying degrees depending on the characteristics of the different P2P protocols.<sup>23</sup> Therefore the permission should extend to all categories that are also covered by the private copying exception. Whether computer software and games that have been exempted from the private copying permission and thus also from receiving a share from the levy should be included is up for discussion with the respective industries.<sup>24</sup>

### **C. WHO SHOULD PAY?**

The beneficiaries of the permission, i.e., the individual private Internet users, owe the creators of the works they share. Internet Service Providers (ISPs) do not download music or movies, just as the makers and operators of photocopying machines, audio recorders, and MP3 players do not copy. The argument of a “contributory liability” is not convincing: by the same token the providers of electricity, search engines, computer monitors, chairs, etc., would contribute to file sharing. Conversely, no Internet users would cancel her broadband subscription if P2P were to disappear.

However, for practical reasons, one cannot expect consumers who acquire these devices, media and services to pay the copyright levy in a separate transaction. Therefore legislatures in many countries have tasked the producers and importers of devices and media with collecting the private copying levy. For reasons of transparency and fairness, German copyright law since its 2008 reform requires that end-consumer bills separately indicate the copyright levy included in the price for these products.<sup>25</sup> Likewise, ISPs and mobile phone companies that provide Internet access to private homes are the logical parties to add the file-sharing levy to their monthly customer bills and transfer the money to the CMOs. LAN houses provide a large number of Brazilians who cannot afford broadband at home with access to the Internet. Assuming that their clients actually use file-sharing applications for up- and downloading copyright-protected works (this needs to be empirically assessed), LAN houses, like ISPs, should add a copyright levy to the price they charge. The rate, however, cannot be so high as to exclude a significant portion of the population from Internet access altogether. Just as with the current plans for establishing a national broadband service, public policy has to balance the interest of society to include all citizen in the opportunities of the digital age with the interests of authors and publishers as well as those of ISPs and LAN houses.

### **D. ARE THEY WILLING TO PAY?**

The Swedish music collecting society STIM in a survey published in February 2009 found that 86.2% of responding Internet users are willing to pay a monthly copyright levy entitling them to file sharing.<sup>26</sup> This willingness has also been shown when bands like Nine Inch Nails and Radiohead released albums for free download and received significant amounts of voluntary payments from their fans. The online indie label Magnatune.com releases all its albums under a Creative Commons license expressly permitting file sharing, which effectively makes payment voluntary. Magnatune also allows its customers to pay a price of their own choice on a scale from 4-14 Euros. Rather than paying the lowest possible price, the average payment is between 8 and 9 Euros, clearly indicating that listeners are willing to pay creators a price they deem fair.

The same willingness was shown for computer games when in October 2009 the developer 2DBoy offered its game “World of Goo” on a pay-what-you-like basis. Remarkably, it found the average price paid higher for GNU/Linux users than for Windows users and, mapping average payment per country onto per capita GDP, it found the “generosity factor” to be exceptionally high in Brazil.<sup>27</sup> Quite the opposite from industry claims that what is gratis is considered worthless, one can conclude that people acculturated in free and sharing culture are more aware that creators need to be remunerated and more willing to behave accordingly.

### **E. BUT I DON'T SHARE**

The copyright levy should be mandatory for all Internet users. Just like permitting opt-out for individual works, making payment optional would require policing the boundary between those who pay and those who do not, which would largely defeat the public policy purpose of the file-sharing exception.

An objection often raised against a levy mandatory for all Internet users is: “I don’t file-share. Why should I pay?” This should be alleviated by differentiating the rate by access speed. Email-only dial-up access should be exempt. Given that half of all Internet users file-share already and nearly 90 percent are ready to pay for legalized P2P, one can expect the number of people to whom this objection applies to shrink even further once a file-sharing exception is introduced. Also non-file-sharers benefit from decriminalization and wider access by gaining a richer cultural sphere.

Cross-subsidizing is already common in many cases. Taxes of citizens without children are used for funding schools. Someone who buys a detergent in a supermarket pays for the advertising-funded movie on “Free TV” that she is not watching. The private copying levy on a recordable DVD is due even if the buyer uses it for a back-up copy of her own data. Finally, if 86.2% of the Internet population are willing to pay for the right to file-share, may the other 13.8% stop it? If so, by the same logic we would not have public broadcasting, opera, health care, police or national defense.

## **F. HOW MUCH?**

Objectively, it is impossible to determine the positive impact due to its “discovery effect” versus the “damage” of file sharing that a levy might compensate.<sup>28</sup> Subjectively, the pay-what-you-like models give an indication as to how much certain works are worth to certain people. In actuality, rate setting in collective management is a very difficult procedure. In case of the private copying levy, rates are negotiated between CMOs and the associations of device and media producers. For the file-sharing levy, negotiations would include not only ISPs but also artists and Internet users who are paying in the end. Also public mediation by the newly proposed Instituto Brasileiro de Direito Autoral (IBDA) would be helpful, if not even essential, for successfully concluding an agreement in the public interest.

Ever-since Fisher calculated the fair amount to be roughly US\$5 per month,<sup>29</sup> five has been the magic number in the debate, varying between dollars, pounds, euros, reais, etc. For a Brazilian household that can afford broadband Internet access, five reais per month is not a prohibitive amount. Assuming 6.6 million households with broadband Internet access in Brazil,<sup>30</sup> R\$5 per month yields an annual amount of R\$396 million.

Revenues for music CDs and DVDs reportedly decreased by 31.2% (or R\$141.7 million) to R\$312.5 million in 2007,<sup>31</sup> while in 2009 ECAD (Escritório Central de Arrecadação e Distribuição<sup>32</sup>) was able to distribute 17.06% (or R\$46.34 million) more revenues from collective management of music rights to its members than in the previous year.<sup>33</sup> Movies generated revenues of R\$966 million in 2008 at the box office, which was an increase of a full 25% over the previous year.<sup>34</sup> Movie DVDs reportedly saw a drop by 10.83% from 27.2 million units sold in 2007 to 24.7 million in 2008.<sup>35</sup> Conservatively assuming a sales price of R\$40.00 this amounts to a decrease by R\$120 million. The Brazilian book market showed a slight annual increase as well, by 6.03% to R\$2.286 billion in 2007.<sup>36</sup> The increases in cinema and book revenues occurred in spite of widespread file sharing, and there are reasons to assume that also the decrease for recorded music and movie DVDs are unrelated to it.<sup>37</sup> But even if one assumed that file sharing is the single cause for the decline of the market for music and movie discs (by approximately R\$261.7 million) and that the levy would have to compensate for it, the levy proceeds of R\$396 million would be more than sufficient to do so.

A realistic approach, of course, cannot start from such a simplistic and flawed assumption. It will have to take into account the complex dynamics in each of the sectors and include the whole range of revenue channels for creative works like live performances, cinema screenings, commissioned works, merchandizing, etc., that have been shown to be positively impacted by file sharing.

For the music industry it has been shown that the revenues from 2000 to 2008 remained stable, with the decrease in recorded music made up for by increased revenues from live music and collective management.<sup>38</sup> Recorded music

sales are shifting rapidly from CDs to digital distribution. Commercial download services, by ensuring quality, speed and freedom from malware, will be able to compete with legalized P2P, which, being open networks, will continue to suffer from these three issues. After all, iTunes was established at a time when P2P use was already widespread. In particular new business models based on fairness, benefit sharing, and transparency like Magnatune and those promoted by the Fair Music Initiative<sup>39</sup> will increasingly attract both artists and paying audiences. According to the International Federation of the Phonographic Industry's (IFPI) 2010 annual report, album downloads globally rose an estimated 20% in 2009, with Internet and mobile downloads and streams now accounting for more than a quarter of all recorded music industry revenues worldwide.<sup>40</sup> An important public policy goal is cultural diversity. Since 2000, the worldwide annual release of new music albums has more than doubled.<sup>41</sup> Thus the digital environment is clearly promoting diversity. The increase is due to the activities of independent labels and, since it occurred during the time of the rise of file sharing, one can conclude that file sharing is helping rather than hindering cultural diversity.

Last but not least, a realistic approach has to start from recognizing the fact that current levels of authors' income are far below the average national income in all professions, that a few stars gain a disproportionate percentage of the revenues, that female authors earn significantly less than their male colleagues, and that the typical author's income has been decreasing since 2000.<sup>42</sup> These facts are unacceptable for a society that defines the culture and creative industries as its central dynamic. In fact, audiences are aware of this unbearable situation of authors and artists, leading to voluntary payments that are on average higher than the forced payments in services such as iTunes.<sup>43</sup> Therefore, it is not unlikely that negotiations about fair rates for the file-sharing levy that primarily involve artists and audiences will result in higher rates than if collecting societies and industry associations were to conduct them alone.

Thus, rather than "compensation" of alleged "damages," the system should strive to create "sustainable resources for creative activities in the digital era" that ensure that this creativity can flourish and grow.<sup>44</sup> The seemingly simple question "How much?" actually leads to the core of the social contract between artists and audiences that is currently being negotiated.

## **G. WHO SHOULD RECEIVE PAYMENTS?**

The levy is due to those who create the works that are shared under the new exception, i.e., authors and performing artists as well as the "auxiliary service providers in the creative process" as German law professor Thomas Hoeren aptly called exploiters. Authors (composers and lyricists, literary authors, film makers, photographers, etc.) and publishers as well as musicians and record labels are joined together in their respective CMOs.

The pool of lump-sum payments by Internet users thus has to be distributed first to the CMOs for the different work categories (music, audio-visual works, text, images, etc.) based on the measured proportion of these work categories in file-sharing networks and then within the CMOs to the individual members based on the actual popularity of their works.

In Germany, the 13 existing CMOs pay at least 50% and up to 100% of their proceeds to authors, while the remainder goes to the exploiters (publishers or record labels).<sup>45</sup> In the case of ECAD, the situation is more confusing because its members are not authors, musicians, and exploiters directly, but ten associations of these groups.<sup>46</sup> This two-tiered structure creates additional obfuscation concerning money flows and leads to overall administrative costs of close to 30% that appear to be among the highest in the world.<sup>47</sup> While it is hard to understand in the analog world how authors and musicians are willing to accept a system in which nearly one third of the money due to them for the use of their works goes into the apparatus for collecting it, it is clear that in the digital online realm collective rights administration will be automated to a maximum degree, ensuring that the maximum amount possible reaches those who actually create cultural goods.



However, the most recent figures about the percentages of the proceeds that ECAD and its member associations actually distributed in 2005<sup>48</sup> indicate also that in Brazil more than two thirds of the money for author rights go to authors and more than half of the money for neighboring rights goes to musicians.

In order to counteract the star effect of very few artists receiving the largest share and to foster cultural diversity, the community of creators organized in the CMO might decide to make payouts regressive, i.e., the percentage per unit would decrease with increasing popularity.<sup>49</sup> In addition to the remuneration for creators, a part of the collective funds is used for cultural, educational, and social purposes: for supporting young artists, the production of new works, and the environment of creation and dissemination itself.<sup>50</sup> Record labels and publishers are not opposed to flat-rate licensing per se, as we can see in the growing number of contracts with telecommunications companies like Nokia (“Comes with Music”), Internet Service Providers like Neuf Cegetel in France and TDC in Denmark, and with service providers like Spotify in which complete music catalogs are licensed for a flat-rate paid by the user or embedded invisibly in the price for other products and services (like Nokia’s mobile phones or the products advertised on and paying for streaming services). These Business-to-Business (B2B) flat rates are expressly positioned as legal alternatives to P2P file sharing. In fact, they have nothing to do with the cultural practice of sharing. If users can download songs at all, these are usually wrapped in “terminator DRM”: if they leave their ISP, the license expires and they lose all the music they collected from the service.<sup>51</sup> For authors and musicians, these B2B flat rates make remuneration nontransparent because the contracts are clouded in non-disclosure agreements.

Secrecy and control of authors and consumers — that is what industry likes about these B2B flat rates, and this is why they dislike a copyright law-based file-sharing flat rate that is collectively managed and publicly supervised and ensures authors at least 50% of the revenues.

## H. MEASURING

In order to allocate the levy fairly to authors, performers and publishers, the number of downloads of their works needs to be measured as accurately as possible. CMOs are already distributing some of their proceeds based on actual usage data. Concert organizers and DJs, for example, have to produce playlists so that the artists whose works are performed can get paid. But performance rights on radio and TV are often, including in the case of ECAD, subject to “indirect distribution” based on a sample of broadcast stations and a sample of the most frequently played songs. In the case of music played in commercial establishments, such as restaurants and stores and in the case of the private copying levy, distribution is the most imprecise, based on conjectures from sales and airplay. The latter two methods lead to systematic distortions that favor the most popular artists to the disadvantage of independent label artists. In the Internet environment, empirical measurements can be much more precise, encompassing, and fair, avoiding the distortions of the so called black-box money of the analog age, ensuring payments to artists deep into the Long Tail and thereby supporting cultural diversity.

A number of methods have been suggested and tested for this purpose. P2P market researchers like Big Champagne<sup>52</sup> and infringement investigators like Logistep<sup>53</sup> monitor P2P from within, creating detailed reports for their clients. Big Champagne CEO Eric Garland leaves no doubt that the Internet is better empirically suited for close measurement than any other medium.<sup>54</sup> Once P2P has been legalized, cooperation from file-sharers themselves could be recruited as well. They would install a module that plugs into Vuze, BitTorrent, Miro, Ares, Mozilla Firefox, and other applications used for downloading. This module logs the metadata of each work<sup>55</sup> the user downloads from the Internet and sends an anonymized monthly report to an administrative site that then calculates the total number of downloads in a given territory. Audioscrobler is an example of such a voluntary reporting agent deployed by Last.fm.<sup>56</sup> Noank, a prototype

file-sharing flat-rate system developed by Fisher and field tested in Hong Kong, also includes a detection and reporting module that plugs into any media player of the user's choice, including iTunes and Windows Media Player.<sup>57</sup> Both of these log only music, and they log the songs the user listens to rather than downloads. Whether plays or downloads should be the measure of popularity on which to base payouts is up for debate. Nevertheless, how often a DVD is watched or a CD listened to in the private sphere is currently irrelevant to both copyright law and remuneration. A shift from number of reproductions to number of plays would need a solid justification.

A third method suggested, among others, by French economist Philippe Aigrain also uses plug-ins, but is based not on open participation but on a representative sample of households who volunteer to have their media use monitored.<sup>58</sup> Aigrain argues that fraud attempts, which this system would surely attract, can be countered by using the data of only 5% of the panel members, chosen randomly. Large-scale collusion or automated generation of fraudulent data is fairly easy to detect and will be subject to deterrent sanctions. He then calculates a feasible sample size that, even if 95% of the data were discarded, would still detect works that are downloaded only several thousand times per year, thus ensuring a positive impact on cultural diversity.<sup>59</sup> During the introduction of the file-sharing levy these and possibly other methods of measuring will be used concurrently in order to check the results against each other and optimize the methodology to ensure fraud prevention, remuneration of the greatest possible diversity of cultural expressions, and cost-effectiveness.

## **I. COLLECTIVE RIGHTS MANAGEMENT**

It is evident that the significance of collective rights management is greatly increasing in the digital age. When WIPO established its Copyright Collective Management Division (CCMD) in 1999, it explained its rationale thus: "The experience of recent years has increasingly confirmed that the individual exercise of rights is impractical; ... Collective management is an essential tool for the efficient exercise of rights; collective management societies therefore play an important and very useful role, both for authors/creators and for users. This is definitely why they have experienced considerable development in parallel to the increased use of works made possible by new technology."<sup>60</sup> A recent report by a French government commission urges the expansion of existing and the creation of new collective management arrangements in order to simplify online licensing, including the proposal to subject the making-available right to mandatory collective management.<sup>61</sup> The Brazilian Ministry of Culture (MinC) also made it clear in its discussion paper for the current copyright law reform<sup>62</sup> that it favors the extension of collective management. It proposes to expand the scope of the private copying exception and introduce a collectively managed levy on it. It also encourages the formation of a CMO for the public performance rights of audiovisual works, one for reprographic rights — hoping "to finally resolve the conflict between the owners of literary works and the teachers and students of educational institutions" — and additional CMOs for other categories of works.

At the same time, criticism in particular of music CMOs by their members and users is also increasing. In Germany concert organizer Monika Bestle initiated a public petition initiated in 2009 urging the Bundestag to review the conduct of the music CMO GEMA and start a comprehensive reform of that organization.<sup>63</sup> The petition received more than 100,000 signatures.<sup>64</sup> It will lead to a public hearing in the first quarter of 2010.

Like many other music CMOs across the globe, ECAD is criticized for its lack of transparency, internal democracy, and equity in distributing proceeds to its members. Its conduct gave rise to several parliamentary investigations. The most recent one by the Legislative Assembly of São Paulo in April 2009 led by congressman Bruno Covas concluded that the collective management of music rights is in a "state of institutional anarchy."<sup>65</sup> The final report states that "this anarchy allows ECAD to exceed its financial, legal and statutory obligations, giving rise to irregularities and evidence of crimes such as forgery, tax evasion, embezzlement, illicit enrichment, conspiracy, formation of a cartel

and abuse of economic power.”<sup>66</sup> To address this issue, the MinC proposes to create a new regulatory agency, the Instituto Brasileiro de Direito Autoral (IBDA) under the Ministry of Culture. It will supervise, regulate and promote the collective administration of rights, provide administrative dispute mediation and organize the registration of works. The latter would greatly aid in the identification of works in the measurement of downloads and in allocating the levy share to its beneficiaries.

If collective management is crucial for the future of creativity in the digital age, then an institutional framework ensuring internal democracy, fair representation, transparency in the allocation of funds, and public oversight is crucial for the future of collective management. The IBDA promises to be a key instrument on the way towards this goal.

### III. CONCLUSIONS

The MinC’s proposals for reforming the Brazilian copyright law constitute an important framework for the emerging new social contract between authors and audiences. However, the MinC has shied away from addressing the pressing issue of mass-scale user-distribution of copyright protected works.

This paper is intended to encourage the MinC and others involved in the copyright law debate to consider a collectively managed file-sharing exception as a model for striking a balance between authors’ rights and users’ rights with respect to this important digital challenge. The debate on this model was initiated ten years ago by copyright law scholars and soon joined by members of the music community and other creative sectors, members of CMOs, consumer and Internet user organizations, economists, technologists, and eventually by political parties. Today large-scale open debates take place on a new social contract over creativity: in the broad alliance of artists, consumers, and the Internet community “Création Public Internet” in France;<sup>67</sup> in the ongoing effort to negotiate an agreement between creative communities and the public that seeks to improve access to and income for knowledge goods under the name “The Paris Accord”;<sup>68</sup> and in the forum “Artists-to-fans-to-artists” initiated by musician Billy Bragg.<sup>69</sup> Members of Parliament in countries like France and Italy are tabling bills to implement file-sharing permission in copyright law. The Isle of Man is about to start a trial on it.<sup>70</sup> In Brazil the process of reforming copyright law exceptions and the collective management system is well underway. The country should seize the opportunity, adopt a model whose time has come, and lead the way into an equitable future that combines the freedom to create and the freedom to share.

The decisive question is how we as citizens of the knowledge society want to see ourselves: Do we prefer to see ourselves as consumers with the choices of products and services the market offers, and as objects of market research, advertising, surveillance, technological restrictions, deterrent campaigns and juridical repression? Or do we see ourselves as partners in an arrangement where we all provide creative artists, whose works we enjoy and share with each other, with decent working and living conditions to create them?

<sup>1</sup> Pedro Alexandre Sanches, *é pau, é pedra, é pena*, *Entrevista com Pena Schmidt*, PEDRO ALEXANDRE SANCHES (March 20, 2009), <http://pedroalexandresanches.blogspot.com/2009/03/e-pau-e-pedra-e-pena.html>.

<sup>2</sup> See Bernt Hugenholtz, Lucie Guibault & Sjoerd van Geffen, *THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT* 11-12 (Institute for Information Law, University Amsterdam 2003), <http://www.ivir.nl/publications/other/DRM&levies-report.pdf>.

<sup>3</sup> The primary use is the sale of a work by its author to a publisher or the sale of a recording by a band to a record label. A secondary use is the broadcasting of a music record by a radio station or the private copying of a record onto audiotape. A tertiary use is the recording of a radio broadcast of a record onto audiotape.

<sup>4</sup> *E.g.*, in a UK study from spring 2008 commissioned by industry organization British Music Rights (BMR),

63% of respondents admitted to downloading music from P2P file-sharing networks. Press Release, University of Hertfordshire, What does the MySpace Generation really want? (June 17, 2008), available at <http://www.herts.ac.uk/news-and-events/latest-news/MySpace-Generation.cfm>. In Brazil, according to Nielsen (IBOPE) NetRating in March 2008, 41.4% of all residential Internet users in the country were using P2P and file-hosters to download music, films and TV series. Guilherme Felitti, P2P: 9,4 mi de brasileiros baixam conteúdo pela internet, diz Ibope, IDG Now! (May 5, 2008), <http://idgnow.uol.com.br/internet/2008/05/05/p2p-9-4-mi-de-brasileiros-baixam-conteudo-pela-internet-diz-ibope/>. According to Ipoque's measurement, South America ranks third among the regions studied behind Eastern Europe and Southern Africa, with 65% of its Internet traffic generated by P2P. Hendrik Schulze and Klaus Mochalski, Internet Study 2008/2009 5, IPOQUE (2009) available at <http://www.ipoque.de/userfiles/file/ipoque-Internet-Study-08-09.pdf>.

<sup>5</sup> "Raubkopierer sind Verbrecher" is an ongoing campaign by the marketing company of the German movie industry. See <http://www.hartabergerecht.de/>.

<sup>6</sup> In contrast to shallow packet inspection, which only looks at header information, DPI devices inspect the actual content of Internet data packets and allow their users to report, redirect, rate limit, and block any content that meets pre-defined criteria. DPI is used by ISPs, enterprises, and governments for a variety of purposes, including the detection of spam, viruses and other forms of attacks, criminal investigations, prioritizing certain applications like Voice-over-IP while slowing down or blocking peer-to-peer traffic, injection of personalized advertising, surveillance, censorship, and copyright enforcement.

<sup>7</sup> Chris Williams, *Virgin Media to trial file-sharing monitoring system*, THE REGISTER (Nov. 26, 2009), [http://www.theregister.co.uk/2009/11/26/virgin\\_media\\_detica/](http://www.theregister.co.uk/2009/11/26/virgin_media_detica/).

<sup>8</sup> A technique known as distributed hash tables (DHT) makes it possible to locate files by querying other peers in the BitTorrent swarm, removing the need for centralized trackers. See Nate Anderson, *Pirate Bay moves to decentralized DHT protocol, kills tracker*, ARS TECHNICA (Nov. 17, 2009), <http://arstechnica.com/tech-policy/news/2009/11/pirate-bay-kills-its-own-bittorrent-tracker.ars>. The Pirate Bay has moved to this next-generation architecture. To a user, the index of The Pirate Bay (<http://thepiratebay.org/>) feels like before, but now it does not host torrent files any more, but only "magnet links." The Pirate Bay is thus nothing more than a search engine for .torrent files, like Google (<http://www.google.com/search?q=filetype%3Atorrent>).

<sup>9</sup> For example, OneSwarm (<http://oneswarm.cs.washington.edu/>) is a privacy preserving friend-to-friend network (F2F) developed at the Computer Science Department of Washington University with a grant from the US National Science Foundation (NSF). OneSwarm uses public-private keys to encrypt participant's IP addresses, manage them in a distributed hash table (DHT), and encrypt the file-exchanges with SSL.

<sup>10</sup> Adam Frucci, *The Secret World of Private BitTorrent Trackers*, GIZMODO, (Feb. 19, 2010), <http://gizmodo.com/5475006/the-secret-world-of-private-bittorrent-trackers>.

<sup>11</sup> Bobbie Johnson, *Internet pirates find 'bulletproof' havens for illegal file sharing*, THE GUARDIAN (Jan. 5, 2010), <http://www.guardian.co.uk/technology/2010/jan/05/internet-piracy-bulletproof>.

<sup>12</sup> See, e.g., Lawrence Lessig, Address at re:publica 09 (Mar. 2, 2009), quoted at: Volker Grassmuck, *The World Is Going Flat(-Rate)*, IP WATCH (May 11, 2009), <http://www.ip-watch.org/weblog/2009/05/11/the-world-is-going-flat-rate/>.

<sup>13</sup> WILLIAM W. FISHER III, PROMISES TO KEEP (Stanford University Press 2004).

<sup>14</sup> Neil Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARVARD J.L. & TECH. 1 (2003), available at <http://jolt.law.harvard.edu/articles/pdf/v17/17HarvJLTech001.pdf>.

<sup>15</sup> <http://www.lalliance.org/>

<sup>16</sup> Philippe Aigrain, *Internet & Création* (Editions InLibroVeritas 2008), available at [http://www.ilv-edition.com/pdf\\_ebook\\_gratuit/internet\\_et\\_creation.pdf](http://www.ilv-edition.com/pdf_ebook_gratuit/internet_et_creation.pdf); see also Patrick Zelnik, Réponse de l'UFC Que Choisir (2009), available at [http://www.creationpublicinternet.fr/blog/public/mission\\_C\\_I\\_reponse\\_UFC-Que\\_Choisir.pdf](http://www.creationpublicinternet.fr/blog/public/mission_C_I_reponse_UFC-Que_Choisir.pdf)

<sup>17</sup> For example, Switzerland and the Netherlands. S. Allard Ringnalda, Mirjam Elferink, and Madeleine de Cock Buning, *Auteursrechtinbreuk door P2P filescharen, Regelgeving in Duitsland, Frankrijk en Engeland nader onderzocht*

20(WODC 2009), available at <http://www2.law.uu.nl/priv/cier/Documenten/PDFned/RAPPORT%20Filesharing%20WODC%20DEF%2090902.pdf>.

<sup>18</sup> Silke von Lewinski, *Mandatory Collective Administration of Exclusive Rights – A Case Study on its Compatibility with International and EC Copyright Law*, UNESCO E.COPYRIGHT BULLETIN, No. 1, January – March 2004, available at [http://portal.unesco.org/culture/en/files/19552/11515904771svl\\_e.pdf/svl\\_e.pdf](http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf).

<sup>19</sup> Carine Bernault & Audrey Lebois, *Peer-to-peer et propriété littéraire et artistique. Etude de faisabilité sur un système de compensation pour l'échange des œuvres sur internet*, Institut de Recherche en Droit Privé de l'Université de Nantes, June 2005, available at <http://alliance.bugiwweb.com/usr/Documents/RapportUniversiteNantes-juin2005.pdf>; English translation, March 2006: [http://privatkopie.net/files/Feasibility-Study-p2p-acis\\_Nantes.pdf](http://privatkopie.net/files/Feasibility-Study-p2p-acis_Nantes.pdf).

<sup>20</sup> <http://www.kopinor.org/layout/set/print/content/view/full/2090>.

<sup>21</sup> Promoted by the researchers at NEXA: Center for Internet and Society at Politecnico di Torino; *Nexa 'position paper' su file sharing e licenze collettive estese*, NEXA: CENTER FOR INTERNET AND SOCIETY AT POLITECNICO DI TORINO, <http://nexa.polito.it/licenzecollettive> (last visited Apr. 9, 2011).

<sup>22</sup> Alexander Roßnagel, Silke Jandt, Christoph Schnabel, & Anne Yliniva- Hoffman, *The Admissibility of a Culture Flat-Rate under National and European Law*, Institute of European Media Law, Mar. 13, 2009, available at [http://www2.malte-spitz.de/uploads/emr\\_study\\_culture\\_flat\\_rate.pdf](http://www2.malte-spitz.de/uploads/emr_study_culture_flat_rate.pdf); the German original version is available here: [http://www.gruene-bundestag.de/cms/netzpolitik/dokbin/278/278059.kurzgutachten\\_zur\\_kulturflatrate.pdf](http://www.gruene-bundestag.de/cms/netzpolitik/dokbin/278/278059.kurzgutachten_zur_kulturflatrate.pdf).

<sup>23</sup> On eDonkey the largest category is music. BitTorrent supports larger files, so the largest categories are audio-visual and software works, including games. See, e.g., Hendrik Schulze & Klaus Mochalski, *Internet Study 2008/2009, IPOQUE* (2009), <http://www.ipoque.com/userfiles/file/ipoque-Internet-Study-08-09.pdf>.

<sup>24</sup> The German game developer association GAME supports both the file-sharing exception and the inclusion of games. See Interview by VRG with Malte Behrmann, Executive Director, GAME (June 19, 2009).

<sup>25</sup> For the same reason of transparency, some Brazilian movie theaters indicate on the movie ticket the copyright levy paid to ECAD for the music performed in the screening.

<sup>26</sup> Press release, STIM, *Music users willing to pay for legal file sharing* (April 20, 2009), available at <http://www.cisionwire.com/stim/music-users-willing-to-pay-for-legal-file-sharing>.

<sup>27</sup> *Pay-What-You-Want Birthday Sale Wrap-up*, 2D BOY (Oct. 26, 2009, 9:47 AM), <http://2dboy.com/2009/10/26/pay-what-you-want-birthday-sale-wrap-up/>.

<sup>28</sup> Studies have shown consistently that those who downloaded from P2P networks are significantly more likely to buy a CD or a game, go to a concert and go to a movie than non-file-sharing internet users. See, e.g., Dutch Ministry for Economic Affairs, *Ups and Downs. Economic and cultural effects of file sharing on music, film and games* (2009), available at [http://www.ivir.nl/publicaties/vaneijk/Ups\\_And\\_Downs\\_authorized\\_translation.pdf](http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf).

<sup>29</sup> WILLIAM W. FISHER III, *Chapter 6: An Alternative Compensation System*, PROMISES TO KEEP 21, available at <http://cyber.law.harvard.edu/people/ffisher/PTKChapter6.pdf>.

<sup>30</sup> Comitê Gestor da Internet no Brasil, *Pesquisa sobre o Uso das Tecnologias da Informação e da Comunicação no Brasil TIC Domicílios e TIC Empresas 2008*, São Paulo 2009, available at <http://www.cetic.br/tic/2008/index.htm>.

<sup>31</sup> Associação Brasileira dos Produtores de Discos (ABPD), *Estatísticas e Dados de Mercado* (2006), [http://www.abpd.org.br/estatisticas\\_mercado\\_brasil.asp](http://www.abpd.org.br/estatisticas_mercado_brasil.asp).

<sup>32</sup> <http://www.ecad.org.br/>.

<sup>33</sup> *Números do Ecad apontam recorde: Valor distribuído aos artistas em 2009 foi 17,06% maior do que no ano anterior*, Estadão (March 6, 2010, 12:00 AM).

<sup>34</sup> *Público de cinema cresce mais de 25% no País em 2009*, A TARDE (Jan. 13, 2010), <http://www.atarde.com.br/cultura/noticia.jsf?id=1337032>.

<sup>35</sup> (Source: Ancine and União Brasileira de Vídeo.) The majority of this drop is attributed to the concentration process in the rental sector by Lojas Americanas acquiring Blockbuster in 2007, leading to a sharp decrease in the number of video rental shops and a corresponding drop in sales of DVDs to these companies. End-consumer sales dropped

from an all-time high of 21.5 million units in 2007 to 20.1 million in 2008. The end of the novelty of the DVD and of the sales bubble it created is another factor in the complex market dynamics, leading to a drop of the retail price. Competition from Internet, computer games and other forms of home entertainment taking up ever more of consumers' time is yet another element. "Piracy" is only a marginal factor concludes Sousa in her analysis. See Ana Paula Sousa, *Efeito dominó – Como a queda do mercado de DVDs no Brasil pode afetar o cinema*, REVISTA FILME B (May 2009), <http://www.filmeb.com.br/portal/html/materia10.php>.

<sup>36</sup> Câmara Brasileira do Livro Sindicato Nacional de Editores de Livros, *Produção e Vendas do Setor Editorial Brasileiro*, Relatório, São Paulo 7 (Aug. 2008).

<sup>37</sup> See Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyright* (Harvard Bus. Sch. Working Paper, No. 09–132, 2009), <http://www.hbs.edu/research/pdf/09-132.pdf>.

<sup>38</sup> See, e.g., DANIEL JOHANSSON & MARKUS LARSSON, *THE SWEDISH MUSIC INDUSTRY IN GRAPHS: ECONOMIC DEVELOPMENT REPORT 2000–2008*, 6 (2009). The dynamics in other countries are comparable to those in Sweden, as the upcoming research report of GPOPAI will show for the Brazilian music industry.

<sup>39</sup> <http://fairmusic.net/manifest/lang-pref/en/>.

<sup>40</sup> IFPI, *DIGITAL MUSIC REPORT 2010* (2010), <http://www.ifpi.org/content/library/DMR2010.pdf>.

<sup>41</sup> Oberholzer-Gee & Strumpf, *supra* note 37, at 1.

<sup>42</sup> Martin Kretschmer & Philip Hardwick, *Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers* (CIPPM / ALCS, 2007), available at [http://www.cippm.org.uk/alcs\\_study.html](http://www.cippm.org.uk/alcs_study.html). This study is the largest of its kind, and one of the first that systematically sets authors' income in a context of earnings data available for other professions, and in other countries. It is also the first study able to control the results against collecting society payments, as well as tax, insurance and labour force data held by government statistical offices.

<sup>43</sup> Leah Belsky, Byron Kahr, Max Berkelhammer & Yochai Benkler, *Everything in Its Right Place: Social Cooperation and Artist Compensation*, 17 MICH. TELECOMM. TECH. L. REV. 1 (2010).

<sup>44</sup> Philippe Aigrain & Suzanne Aigrain, *Sharing and the Creative Economy: Culture in the Internet Age* 23 (January 29, 2010), [http://paigrain.debatpublic.net/?page\\_id=171&lp\\_lang\\_view=en](http://paigrain.debatpublic.net/?page_id=171&lp_lang_view=en).

<sup>45</sup> Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), the German CMO for music works, pays roughly two thirds to authors, i.e. composers and lyricists, and one third to publishers. GEMA, *GEMA Jahrbuch 2009/2010*, 279 (2010), available at [bignmusic.com/Services/Docs/GEMA\\_Jahrb\\_09\\_10.pdf](http://bignmusic.com/Services/Docs/GEMA_Jahrb_09_10.pdf). Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), the German CMO for music recordings, pays 50% to performers and 50% to record labels for broadcast and rental, and 64:36 in favor of musicians for public performance. GVL, *GVL Verteilungspläne 2008*, 2 (2008), <https://www.gvl.de/pdf/verteilungsplaene-2008.pdf>. Verwertungsgesellschaft Wort (VG Wort), the German CMO for text works, pays 70% to authors and 30% to publishers; revenues from clipping services go to 100% to authors. VG Wort, *Verteilungsplan der Verwertungsgesellschaft Wort 2009*, 1 (2009), [http://www.vgwort.de/files/verteilungsplan\\_vgwort\\_2009.pdf](http://www.vgwort.de/files/verteilungsplan_vgwort_2009.pdf).

<sup>46</sup> See *Associações Integrantes*, ECAD.ORG, <http://www.ecad.org.br/ViewController/Publico/conteudo.aspx?codigo=21> (last visited April 8, 2011) (listing the six "effective" and four "administrative" member associations). The two associations that receive by far the largest share of ECAD's distributions are União Brasileira de Compositores (UBC) and Associação Brasileira de Música e Artes (ABRAMUS).

<sup>47</sup> Neither ECAD nor its member associations publish annual reports. ECAD states on its website that of the total proceeds, 17% is intended for ECAD and 7.5% for its member associations for their administration expenses. The remaining 75.5% are paid out to the affiliated rights holders. *Distribuição*, ECAD.ORG, <http://www.ecad.org.br/ViewController/publico/conteudo.aspx?codigo=25> (last visited April 8, 2011). This yields a total administrative overhead of 24.5%. Calculating the differences between annual arrecadação and distribuição from 2004–08 yields actual administrative costs withheld by ECAD varying from 23.26% in 2006 to 16.44% in 2005. *Resultados*, ECAD.ORG, <http://www.ecad.org.br/ViewController/publico/conteudo.aspx?codigo=52> (last visited April 8, 2011). The total amount distributed by member associations in the years 2003–05 shows that the administrative overhead

of the member associations has grown from 7.83% in 2003 to 12.75% in 2005, leading to total administrative costs of between 31.07% in 2003 and 26.29% in 2004. See *PERCENTUAIS SOBRE O VALOR TOTAL DISTRIBUIDO - AUTORAL E CONEXO*, ABRAMUS.ORG (2003, 2004, and 2005), available at <http://www.abramus.org.br/arquivos/2003.pdf>, <http://www.abramus.org.br/arquivos/2004.pdf>, and <http://www.abramus.org.br/arquivos/2005.pdf> (last visited April 8, 2011).

<sup>48</sup> *PERCENTUAIS SOBRE O VALOR TOTAL DISTRIBUIDO - AUTORAL E CONEXO*, ABRAMUS.ORG (2005), <http://www.abramus.org.br/arquivos/2005.pdf> (last visited April 8, 2011).

<sup>49</sup> This is how GVL, the German CMO for music recordings, pays its artist members. Based on the reported income from the primary exploitation of their works, musicians and vocalists who earn up to € 50,000 per year get 100%, artists with an income between € 150,000 and 200,000 receive only 25%, and artists with an income beyond that receive only 10%. GVL, GVL Verteilungspläne 2008, 1 (2008), <https://www.gvl.de/pdf/verteilungsplaene-2008.pdf>.

<sup>50</sup> As required by law, German CMOs currently set aside 10–25% of the common funds for such purposes; Aigrain proposes to use 50%. Aigrain, *supra* note 16.

<sup>51</sup> This creates a strong lock-in effect. When a customer is dissatisfied with her current ISP or gets a better cost/performance ratio from a competitor, she will think twice about moving if the price is the loss of large parts of her music collection. These terminator DRM policies call for scrutiny as anti-competitive activities.

<sup>52</sup> BIGCHAMPAGNE: MEDIA MEASUREMENT, <http://bigchampagne.com/> (last visited April 9, 2011).

<sup>53</sup> LOGISTEP: ANTIPIRACY SOLUTIONS, <http://www.logistepag.com/> (last visited April 9, 2011).

<sup>54</sup> See Interview by Music Ally with Eric Garland, Chief Operating Office, BigChampagne.com, (Jan. 12, 2010), MUSIC ALLY, <http://musically.com/blog/2010/01/12/metrics-eric-garland-bigchampagne/> (last visited April 9, 2011).

<sup>55</sup> *E.g.* based on audio- and video fingerprints, i.e. digital summaries of works that allow their identification without the need to embed identifiers like digital watermarks into files. Compare AUDIBLE MAGIC, <http://www.audiblemagic.com> (last visited April 9, 2011) (detailing a commercial P2P service), with MUSICBRAINZ, <http://musicbrainz.org/doc/AudioFingerprint> (last visited April 9, 2011) (describing a free P2P software implementation).

<sup>56</sup> Last.fm: audioscrobbler plugin, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/Last.fm#Audioscrobbler\\_plugin](http://en.wikipedia.org/wiki/Last.fm#Audioscrobbler_plugin) (last visited April 9, 2011) (“Last.fm can optionally build a profile directly from a user’s music played on their personal computer. Users must download and install a plugin for their music player, which will automatically submit the artist and title of the song after either half the song or the first four minutes have played, whichever comes first. When the track is shorter than 30 seconds (31 seconds in iTunes) or the track lacks metadata (ID3, CDDDB, etc.), the track is not submitted. To accommodate dial-up users, caching of the data and submitting it in bulk is also possible.”).

<sup>57</sup> See *generally How It Works*, NOANK MEDIA, <http://www.noankmedia.com/howitworks.html> (last visited April 9, 2011) (explaining how the Noank system works technologically).

<sup>58</sup> Aigrain, *supra* note 16, at 93.

<sup>59</sup> *Id.*

<sup>60</sup> World Intellectual Property Organization, Permanent Committee on Cooperation for Development Related to Intellectual Property: Promotion and Development of Collective Management of Copyright and Related Rights, 3 (May 31–June 4, 1999), [http://www.wipo.int/edocs/mdocs/mdocs/en/pcipd\\_1/pcipd\\_1\\_7.doc](http://www.wipo.int/edocs/mdocs/mdocs/en/pcipd_1/pcipd_1_7.doc) (last visited April 9, 2011).

<sup>61</sup> See *generally* Patrick Zelnik, Jacques Toubon, & Guillaume Cerutti, Creation et Internet, Rapport au Ministre de la Culture et de la Communication, (January 2010), <http://www.culture.gouv.fr/mcc/Espace-Presse/Dossiers-de-presse/Rapport-Creation-et-Internet> (last visited April 9, 2011).

<sup>62</sup> Diagnóstico das discussões do Fórum Nacional de Direito Autoral e subsídios para o debate. Documento apresentado no III Congresso sobre Direito de Autor e Interesse, 10.11.2009.

<sup>63</sup> Deutscher Bundestag, Petition: Civil Law – Society for Musical Performing and Mechanical Reproductions, <https://epetitionen.bundestag.de/index.php?action=petition;sa=details;petition=4517> (last visited April 9, 2011) (“Der Deutsche Bundestag möge beschließen...dass das Handeln der GEMA auf ihre Vereinbarkeit. mit dem

Grundgesetz, Vereinsgesetz und Urheberrecht überprüft wird und eine umfassende Reformierung der GEMA in Hinblick auf die Berechnungsgrundlagen für Kleinveranstalter, die Tantiemenberechnung für die GEMA-Mitglieder, Vereinfachung der Geschäftsbedingungen, Transparenz und Änderung der Inkasso-Modalitäten vorgenommen wird.”).

<sup>64</sup> *Id.* (listing as of April 9, 2011, 107,816 signatures).

<sup>65</sup> *CPI do Ecad chega ao fim*, BRUNO COVAS, <http://brunocovas.com.br/CPI-do-Ecad-chega-ao-fim/> (last visited April 9, 2011).

<sup>66</sup> *Id.*

<sup>67</sup> Création Public Internet, <http://creationpublicinternet.fr/> (last visited April 9, 2011).

<sup>68</sup> See generally Paris Accord Discussion Draft (Oct. 20, 2009), [http://www.tacd-ip.org/files2/paris\\_accord\\_2009\\_oct20.pdf](http://www.tacd-ip.org/files2/paris_accord_2009_oct20.pdf) (last visited April 9, 2011), and Working Discussion Draft For: The Paris Accord (June 17, 2006), <http://www.tacd-ip.org/files2/ParisAccord-june17draft.pdf> (last visited April 9, 2011).

<sup>69</sup> a2f2a, <http://a2f2a.com> (last visited April 9, 2011); Jennifer Ditchburn, *Billy Bragg, Canadian songwriters push for new approach to downloading*, THE STARR, (Nov. 20, 2009), <http://www.thestar.com/news/canada/article/728763--billy-bragg-canadian-songwriters-push-for-new-approach-to-downloading> (last visited April 9, 2011).

<sup>70</sup> See John Timmer, *Inside the Isle of Man's £1/month unlimited music plan* (Feb. 25, 2009) <http://arstechnica.com/media/news/2009/02/inside-the-isle-of-mans-1month-unlimited-music-plan.ars> (last visited April 9, 2011).





**RETHINKING MUSIC:  
THE FUTURE OF MAKING MONEY AS A PERFORMING MUSICIAN**

Panos Panay

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## I. INTRODUCTION

If you take to heart what's been written in the press about the “music business” of the past 10 years, you may quickly conclude that there's not much hope left for 21st-century performers.

The record business is in free fall, with U.S. sales and licensing revenues plummeting by half in the past decade.<sup>1</sup> Rampant piracy and a disinterested and disaffected public have savaged reliable artist income from record sales. Young consumers are reportedly turning their backs on emerging artists, preferring to “steal” music rather than pay for it. (According to a recent study by the University of Hertfordshire, 61% of consumers aged 14 - 24 admit to illegally downloading music.<sup>2</sup>) Radiohead is giving away its albums, previously reliable high sellers like Bruce Springsteen and U2 have peaked commercially, and, for the first time since the SoundScan era began in 1991, the number one selling album on the Billboard Top 200 charts sold just 40,000 units (Amos Lee with “Mission Bell”; by contrast, in its heyday in 2000, ‘N Sync sold over 2.4 million units with “No Strings Attached”).

At first glance, things don't look much better on the live music side. The world's largest concert promoter, Live Nation, is bleeding money, reporting that its 2010 fourth quarter revenue declined by 2%; ticket sales were down by 10%; cash flow dropped 15%; and quarterly losses more than doubled to \$86 million.<sup>3</sup> More than 40% of its ticket inventory remained unsold last summer.<sup>4</sup> And, if you take a quick look at the average age of touring concert performers — with the one exception being Lady Gaga — you'd be forgiven if you thought that the concert business' better days are behind it. This is the list of the highest-grossing 10 tours of the last 10 years: Rolling Stones, U2, AC/DC, Madonna, U2 (again), The Police, Celine Dion, Cher, Bruce Springsteen, Bon Jovi.<sup>5</sup> (No, the last ever concert tour did not take place in 1986.)

And radio? Don't ask. Although 2010 provided an unexpected bright spot with a slight revenue uptick, listenership is down, audiences are more and more fragmented, advertisers are, accordingly, harder to attract, and, if you ask most listeners, radio has stopped being their primary source of new music discovery and its pop culture relevance is quickly evaporating.

A closer look, however, reveals that the music business is not so much imploding as — like any other industry that has been around for more than a dozen years — it is *evolving*. Consumer tastes are changing, and record labels and radio are no longer the cultural arbitrators they once were. Music listeners are moving away from the mass-produced music consumption habits of the broadcast media to the more tailored and personalized experiences of the social media age. Just as importantly, artists are migrating away from the mass-market revenue model of the broadcast era to the *mass of niches* model of the new, Internet era. They are not antagonizing their customers (as the record industry did with its lawsuits), but they are collaborating and dialoguing with them in new and, sometimes, surprising ways.

As the founder of Sonicbids, the leading matchmaking site for bands and people who book or license music, with a membership of 300,000 bands and 25,000 music promoters, I have a front row seat to all these changes and shifts. I launched the site almost exactly 10 years ago out of my apartment with the express mission of empowering a new class of artists (we call it the *Artistic Middle Class*) by helping every band get a gig and by giving artists the tools they need to develop a sustainable audience.

Perhaps what's been most amazing has been the way that the music performer community has adjusted to all of these changes both by seizing opportunities that did not exist a few years ago as well as by adapting to the new landscape of the industry — and by adopting and co-opting revenue generating ideas from other industries and applying them to their trade. Far from dying, the music business is alive and ever resourceful in finding new ways of making money and evolving.

## II. THE NEW LIVE MUSIC BUSINESS (LIVE PERFORMANCE REVENUE)

Yes, the traditional concert business is having a hard time adjusting to the new realities of less disposable consumer incomes, smaller (or non-existent) record label tour funding, lack of sustainable new megastars and the aging demographic of its best sellers. But “live music” is not just what’s performed in stadiums and arenas — and it doesn’t always entail a show that involves a consumer buying a ticket.

Last year on Sonicbids, nearly 80,000 gigs were booked between artists and promoters that would traditionally fall “under the radar.” (Internal estimates put the total number of U.S. live gigs at close to 8 million). This is a vibrant and expanding list of people that are taking advantage of new tools such as Sonicbids to bring live music to their consumers — and often not as the “end product,” but as a means to another experience. This includes bars, coffee houses, art galleries, cruise ships, wineries, amusement parks, breweries, restaurants, cinema lobbies, ski resorts, corporate retreats, museums, colleges, street fairs, and countless others. It’s a nearly \$10 billion market that’s expanding at a rate of 11% a year.<sup>6</sup> You just won’t read about it in any mainstream press.

According to the National Association of Campus Activities, U.S. colleges eager to entertain their student bodies with live music spend nearly \$250 million each year. Most of this goes to artists that generally earn less than \$3,000 per show (read: members of the middle class).<sup>7</sup> The UK Performing Rights Society (PRS) has recently published a study that shows that the live music festival sector is the most quickly growing sector of the music business. This is also evident by the fact that even in the worst recession in a generation, festivals such as Coachella, South By Southwest, and Bonnaroo have been routinely selling out. The oft-derided wedding band market has grown. Nearly 83% of Sonicbids’ bands indicate that they make at least part of their annual income from playing private events such as weddings and increasingly do so by playing original music instead of “cover” songs.

The live music business is not dead. It’s simply fragmenting, evolving, becoming more organic, less mass produced, and more homegrown.

## III. CONSUMER BRANDS: THE NEW ARTS PATRONS (SPONSORSHIP AND MARKETING REVENUE)

**As long as there’s been art, there have been wealthy patrons that have sponsored artists.** Many of the world’s classic masters would have never seen their work produced had it not been for some rich family who funded their creativity. Van Gogh, Mozart, Da Vinci — all had wealthy backers.

**In the modern music business, these patrons were once major record labels that plucked artists from obscurity and made them into mass-consumed mega stars.** Labels funded artists’ time in the studio (production), paid money to distribute their records in retail stores (distribution), paid money for promotion through outlets like radio and TV (promotion), and hired managers, agents, and publishers to help maximize each artist’s income potential (professional connections). In return, they kept the lion’s share of each artist’s income and held the keys to the kingdom called “viable music career.”

With the advent of the Internet and the **shift of consumer tastes from mass to niche**, labels have experienced a steady erosion of their incomes over the past eight years. Consequently they have ceased playing the traditional role of art patron for up and coming musical artists.

In their place — as both art patrons as well as popular taste curators — major (and niche) consumer brands have stepped in and figured out that **music can help them sell whatever product they produce** (coffee, electronics, carbonated beverages, clothing, video games, hand bags, financial services, insurance, etc.). In North America alone total sponsorship spending by consumer brands for such marketing programs was projected to exceed \$1 billion in 2010, almost double what it was six years earlier.<sup>8</sup>

Even more promising for emerging artists, there's been a steady shift of this sponsorship money in recent years towards more “niche” artists who do not yet have an entrenched public image like, say, Taylor Swift or Lady Gaga. Why? Because more and more companies are realizing that the **coveted young consumers coming of age today demand authenticity from the brands they will endorse — a trait most associated with independent, non-major label artists. It doesn't hurt that these artists tend to be less expensive and carry less PR risks than artists with large public profiles. Given that social media is the venue that most young consumers are spending their time on, marketers are eager to engage these customers on this turf, and no one knows social media marketing better than emerging artists — their careers literally depend on it.**

In the past couple of years, large consumer brands ranging from Diesel, Converse, Gap, Ford, and Levis to more niche ones like Midas, Zippo, Jagermeister, and JanSport have all spent millions creating programs that use emerging music as the primary marketing means of their wares to social media. Just as importantly, artists are showing an increased eagerness to work with these brands to get their music out to the public — a sharp contrast to the cries of “sell out” that accompanied such acts in the '70s, '80s, and all through the '90s.

Could it be that these brands with all of their marketing muscle and deep pockets are becoming the new record labels? I think so.

#### **IV. FAN AS COLLABORATOR (FAN-GENERATED AND MERCHANDISE REVENUE)**

I was talking with a friend of mine from MTV recently, and we were chatting about how MTV no longer plays music videos. He turned and said something that never occurred to me: “No one who watches MTV today complains about music videos because no one under the age of 30 even remembers MTV playing music videos. People today turn to MTV to watch *Jersey Shore* and *Skins* and *16 & Pregnant* and discover new music through these programs. MTV does not age with its audience, it adapts to its audience which is forever the young.” I think the same way about “music piracy.” The music industry is trying to age its morals with its original audience when our paradigm should shift to the new audience's preferred ways of engagement with music.

Much fuss has been made by the industry about the “new music fan.” The 16-year-old who refuses to pay for music, who routinely downloads gigabytes of “illegal” music, the one who spends hours and hours on bit torrent sites — the music thief, the pirate, the one who if you can't educate through public service announcements, you go after with a legal sledge hammer and sue them out of existence.

But the music fan that most emerging artists see is not an antagonist. They're a collaborator. Over the past two years, more and more artists like Amanda Palmer, Kristin Hersch, and Kat Parsons are using fan-funding sites to finance their records, tours, and other marketing activities. Even in 2001, eighties rockers Marillion funded their album *Anoraknophobia* with 12,674 pre-orders from fans.<sup>9</sup> More recently, Jill Sobule raised some \$80,000 from about 500 fans to record her album *California Years*.<sup>10</sup>

Sites like Pledge Music and Kickstarter and even on-demand merchandise sites like Zazzle and Café Press are helping artists raise money not in the form of donations, but by selling album credits, unique experiences, exclusive concert tickets, one-of-a-kind merchandise, and more. These are not acts of charity, but acts of collaboration, co-creation, and co-development. Very much the way that young, urban consumers are turning to Community Supported Agriculture programs that help support local farmers, young music fans are supporting their favorite artists not necessarily by buying records and downloading “legal” music, but by contributing to these artists in very different ways.

The new music consumer’s relationship with music is not declining. It’s changing. And smart artists are taking advantage of it and leading the way in finding ways to monetize it.

## **V. AND MUSIC LICENSING FOR ALL (LICENSING AND PERFORMING RIGHTS REVENUE)**

Each year, MTV contributes to the market for emerging artists by integrating them into its programming. True, MTV pays little for this content, but having your song aired in a program like Jersey Shore that reaches over 8 million viewers a week can reap all kinds of benefits — not to mention lucrative performing rights revenues. ASCAP alone has distributed over \$2.5 billion in performance rights revenue to its members over the last three years.<sup>11</sup> At Sonicbids, last year we identified over \$4 million in unclaimed royalties that we distributed to some 10,000 of artist members through SoundExchange, the non-profit performance royalties collection agency.

More encouragingly, even large advertisers like Coca Cola, Dell, JC Penney, and Chevrolet are turning to new artists to find and license music for their commercials. (Sonicbids artist Temper Trap’s song “Sweet Disposition” is the featured song in the Diet Coke commercials aired during the recent Academy Awards broadcast.)

And this does not stop at advertising. Recent licensees of up-and-coming artists without major label affiliations include video game publishers like Electronic Arts and Activision; toy companies like Fisher-Price and Mattel; specialized music broadcast companies like Cinema Sounds who broadcasts music in 15,000 US movie theater lobbies; airlines like Delta Airlines and Virgin who are looking for unique content for their seatback channels; and movie studios like Paramount and Universal.

Music consumption is not curtailed. It’s shifting venues from the record store to your TV set — or your next elevator ride.

## **VI. THE NEW ENTREPRENEURS (ADVERTISING AND SUBSCRIPTIONS REVENUE)**

In the last two years, companies like Pandora, Spotify, Rdio, MOG, and countless others have raised over \$200 million from investors with the promise of generating money primarily by offering music listening for free in exchange for advertising and subscription revenue.<sup>12</sup>

Early numbers are encouraging: According to *Digital Music News*, Spotify has over 650,000 paid subscribers, approximately four percent of its total listener base.<sup>13</sup> Pandora has over 80 million listeners and just filed for its initial public offering expecting to raise some \$100 million.<sup>14</sup> and even companies like Shazam boast a user base of more than 100 million.<sup>15</sup>

These are early days of course, and it's still unclear how much of this revenue will find its way back to the actual performer and what form that revenue will take. (Regional legislation surrounding this matter is very much evolving and varying by continent and country.) One thing is inevitable: whatever industry attracts money and talent (sadly, that is no longer the record business), inevitably will succeed. And there's a lot of money and a lot of people betting that the model of online, ad supported radio will succeed. I would not bet against it.

Amidst all the noise, we tend to forget that the modern music business has only existed for less than 60 years, propelled in earnest first by Frank Sinatra, taken to the next level by Elvis Presley and then the Beatles, and culminating in the mega stadium tours of the '70s and '80s and the blockbuster record sellers of the '90s.

In most industries, it is rare that a new form of innovation and revenue generation will completely supplant the incumbents. In the transportation business, for example, ships, railroads, automobiles, and airlines all happily coexist. The same holds in the entertainment business with theater, radio, film, TV, and now the Internet all overlapping. In each of these examples, there have been clear losers (the horse and buggy for example, or the VCR and soon the DVD player), but the basic, underlying need for, respectively, movement and entertainment has ushered in new innovations by new breeds of entrepreneurs that led to the creation of new sub-industries and, very importantly, new ways of wealth creation.

The music business is at a similar moment and has a similar opportunity for reinvention.

## ENDNOTES

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<sup>2</sup> Press Release, University of Hertfordshire, What does the MySpace Generation really want? (June 17, 2008), available at <http://www.herts.ac.uk/news-and-events/latest-news/MySpace-Generation.cfm>.

<sup>3</sup> Ben Sisario, *Weak Ticket Sales Contribute to Large Loss for Live Nation*, N.Y. TIMES, Feb. 28, 2011, at B8, available at <http://www.nytimes.com/2011/03/01/business/media/01live.html>.

<sup>4</sup> Ray Waddell, *Live Nation Drops Service Fees for June*, BILLBOARD.BIZ (June 1, 2010), [http://www.billboard.biz/bbbiz/content\\_display/industry/news/e3i9a9ec43069ab4f97ca78c8fe0f683797](http://www.billboard.biz/bbbiz/content_display/industry/news/e3i9a9ec43069ab4f97ca78c8fe0f683797).

<sup>5</sup> *List of Highest-Grossing Concert Tours*, WIKIPEDIA (April 4, 2011), [http://en.wikipedia.org/wiki/List\\_of\\_highest-grossing\\_concert\\_tours](http://en.wikipedia.org/wiki/List_of_highest-grossing_concert_tours).

<sup>6</sup> Sonicbids Corporation internal research compiled from number from sources including the U.S. Census Bureau, the American Federation of Musicians, The PRS, National Association of Campus Activities, and others.

<sup>7</sup> NATIONAL ASSOCIATION OF CAMPUS ACTIVITIES, NACA SELF STUDY (Jan. 7, 2011).

<sup>8</sup> Damian Kulash Jr., *The New Rock-Star Paradigm*, THE WALL STREET JOURNAL (Dec. 17, 2010) at D1, available at <http://online.wsj.com/article/SB10001424052748703727804576017592259031536.html>.

<sup>9</sup> *Anoraknaphobia*, MARILLION.COM, <http://marillion.com/music/albums/anorak.htm> (Last visited April 6, 2011).

<sup>10</sup> James Reed, *Lighters Down, Checkbooks Up*, THE BOSTON GLOBE (April 12, 2010) at Living Arts 1, available at [http://www.boston.com/ae/music/articles/2009/04/12/lighters\\_down\\_checkbooks\\_up](http://www.boston.com/ae/music/articles/2009/04/12/lighters_down_checkbooks_up).

<sup>11</sup> Press Release, American Society of Composers, Authors, and Publishers, ASCAP 2010 Financial Results Reflect the Challenging Music Licensing Environment (March 31, 2011), available at [http://www.ascap.com/press/2011/0331\\_Financial\\_Results.aspx](http://www.ascap.com/press/2011/0331_Financial_Results.aspx).

<sup>12</sup> Spotify recently raised \$100 million. Michael Arrington, *DST About to Lead Huge Spotify Funding*, TECHCRUNCH (Feb. 20, 2011), <http://techcrunch.com/2011/02/20/dst-about-to-lead-huge-spotify-funding/>. In June 2010 Pandora raised an unspecified fifth round of funding on top of an existing \$56.3 million. David Kaplan, *Pandora Raises*

*Its Fifth Funding Round*, PAIDCONTENT.ORG (June 2, 2010), <http://paidcontent.org/article/419-pandora-raises-its-fifth-funding-round/>. Rdio recently raised \$17.5. Robin Wauters, *Exclusive: Social Music Startup Rdio Raises \$17.5 Million, Adds Rob Cavallo To Board*, TECHCRUNCH (Feb. 3, 2011), <http://techcrunch.com/2011/02/03/exclusive-social-music-startup-rdio-raises-17-5-million-adds-rob-cavallo-to-board/>. Last year MOG brought its funding to over \$21 million. Paul Bonanos, *MOG Takes in \$9.5M More in Advance of Mobile Launch*, GIGAOM (Feb. 25, 2010), <http://gigaom.com/2010/02/25/mog-takes-9-5-million-more-in-advance-of-mobile-launch/>.

<sup>13</sup> Alexandra Osorio, *Spotify's Paying Subscribers Up 160% This Year...*, DIGITAL MUSIC NEWS (Nov. 19, 2010), <http://www.digitalmusicnews.com/stories/111910spotify160>.

<sup>14</sup> Ryan Kim, *Pandora Files for IPO to Keep the Music Playing*, GIGAOM (Feb. 11, 2011), <http://gigaom.com/2011/02/11/pandora-files-for-ipo-to-keep-the-music-playing/>.

<sup>15</sup> Press Release, Shazam, Shazam Surpasses 100 Million Users and Becomes One of World's Leading Discovery Services (Dec. 6, 2010), available at <http://www.shazam.com/music/web/newsdetail.html?nid=NEWS20101206124027>.





## **CLOUD-BASED MUSIC SERVICES: LEGAL ISSUES TO CONSIDER**

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*The authors appreciate the very significant contribution to this article by Victoria Sheckler, Deputy General Counsel of RIAA.*



## I. INTRODUCTION

If all the buzz and hype in the media are to be believed, cloud-based services are the “next big thing” on the Internet generally, and for music services in particular. These services are intended to enable music fans to access any music they want, whenever they want, wherever they want. But what exactly is a “cloud-based music service”? How does it differ from the less-excitedly-named “locker services” that have been around for years?

Some believe that a simple locker service involves the storage of an individual’s media files, with the opportunity to access those files from any location and on multiple devices. Cloud-based music services, by contrast, are viewed as much broader in scope, offering subscribers access to music they don’t already own (and music services they want, like recommendation engines and the like).

There has been a lot of publicity about forthcoming cloud-based music services from companies like Google and Apple, and Amazon scored a public relations coup when it announced the launch of its locker service on March 29, 2011. Yet even these relatively modest offerings (in terms of functionality) have given rise to a frenzy of speculation among certain stakeholders and in the media about the need for licenses by such services. This paper attempts to identify the issues that are raised by locker services and also issues raised by more robust cloud-based services.

## II. STAKEHOLDERS

The most obvious stakeholders in a locker music service include the music service provider, the owners of the copyright in the sound recording (generally the record label) and the musical composition (generally the music publisher), and the end user. But there are many more stakeholders lurking in the background that can have a profound impact on a service’s legality, licensing arrangements and economics.

- Music creators (both the artist and the songwriter) may have contractual rights that are implicated by the service. The attitudes of their managers may be critical.
- Performing rights organizations and mechanical licensing organizations may administer certain rights.
- ISPs and telecommunications networks may be impacted by the service, especially if it involves high-bandwidth audiovisual streaming.

Thus, even though the number of negotiators “in the room” may be small, numerous parties have a role and stake in the outcome of these services, and may become litigants or influence negotiations. In addition, we should note the very real possibility that freeloaders and commercial pirates may seek to take advantage of the service’s structure to acquire or distribute music in a manner not authorized by the service.

## III. WHAT IS A CLOUD-BASED OR LOCKER MUSIC SERVICE?

There has been a lot of discussion in the media about cloud-based music services, and as stated above, relatively little agreement on terminology to describe different types of services. Both cloud-based and locker music services share the characteristic that music files are stored remotely, but that is often where the similarities end. Business models for these services may include one or more of the following attributes:

**Remote storage that is:**

- Secure, authenticated and limited for back-up of purchased / legitimately acquired files for a single, unique user
- Storage of all files acquired by a user without consideration of source
- Unauthenticated storage that permits several users to store files in an account
- Storage that permits acquisition of music from multiple sources (i.e. sideloading as well as uploading)
- Storage that is populated by the service provider (directly or via links to master copies) based on files owned, possessed or selected by the user
- Storage that is populated by the service provider based on service provider recommendations based on user preferences / known user buying history

**Optimization**

- Files uploaded to the cloud are replaced or supplemented by the service provider with better quality files (i.e. higher quality format, inclusion of proper metadata, etc.)
- Service provider provides additional versions of the file that are optimized for particular uses on particular devices

**Access/Consumption**

- Streaming to one or multiple devices
- Downloading to one or multiple devices
- Simultaneous access from multiple devices
- Number of devices to which simultaneous access is offered, over what period of time

**Ancillary Services**

- Access to millions of additional tracks, not owned by the user.
- Access to additional content, such as lyrics, liner notes, artwork, music videos, premium fan content, games, VIP access to events, etc.
- Interactive services, such as ability to create mashups, videos, etc. for personal, non-commercial use
- Ability to create/share playlists, etc.
- Social networking features
- Linking to a user's other accounts for other services (to either give the service additional information to make user recommendations, to permit user to supplement his library with music purchased from other sources, to permit users to share their mashups with friends, etc.)

**Security and Authentication**

- Registration of devices; ability to change registration of devices
- Registration of user, number of authorized users permitted to access an account
- Security to avoid abuse, theft of content, theft of personal information, etc.

## IV. LEGAL ISSUES

The scope, nature, features, technical operations and restrictions of the service will bear a critical impact on the legal analysis regarding licensing. Below are some of the issues one should consider in making this analysis. Exhibit A includes a list of statutes and cases that may be relevant in this inquiry.

**Reproduction – Uploading or Side Loading Content Into the Cloud.** When a copy of a work is made and stored remotely: Who has “made” the copy – the end user, or the service? Was the original copy lawfully acquired by the party that is “making” the new copy? If the originating copy was licensed, does the license permit the additional reproduction? More generally, is it lawful for a user to make a copy of a musical recording absent an express license to do so (i.e. under a fair use or alternative implied (e.g., personal) license theory)? Is it lawful for a third party to make such a copy on the user’s behalf? Do commercial third parties have the right to stand in the shoes of the user and make copies?

**Streaming.** Once copies have been placed into the locker, who will have access to the music, and what type of access is permitted? For example, if a user or the service places a copy of a legitimately purchased musical recording into remote storage, does the service have the right to stream the recording (i) to one device, (ii) to multiple devices, or (iii) to multiple devices / multiple accounts at the same time? Does the service have the right to stream the recording (i) just to the user who uploaded the file, (ii) to others who have access to the user’s account, (iii) to friends or family of the user, (iv) to strangers who have no relation to the user? Is there a limit on the number of streams that can be offered? Are streams to the initial uploader and/or other users/devices considered public or private performances? If a stream qualifies as a public performance, does it fall within a compulsory license, or within the exclusive rights held by the rights owners? Who is responsible for the performances? When is the service provider responsible for acts by its users?

**Downloading/Distribution.** Further issues arise if the service permits downloading – essentially distribution – of the file. Is distribution occurring from a central or limited number of files (i.e. not the actual file uploaded by the user, but a reference copy held by the service)? What if the original file was not legitimately acquired, or the circumstances of its acquisition are not known? Does the service have the right to distribute the recording (i) to one device, (ii) to multiple devices, or (iii) to multiple devices/multiple accounts at the same time? Does the service have the right to distribute the recording (i) just to the user who uploaded the file, (ii) to others who have access to the user’s account, (iii) to friends or family of the user, (iv) to strangers who have no relation to the user? Is there a limit on the number of downloads that can be made? Who is responsible for the distribution? When is the service provider responsible for acts by its users?

**Optimization/Creating a Derivative Work.** To optimize the user’s experience, a service could modify the music file, or provide a copy of a different file, to ensure it is optimized for playback on the particular requested device. However, this involves changing the file that was uploaded by the user and as it was originally distributed by the rights holder. Are such modifications (and additional reproductions) permissible absent authorization from the rights holder?

**Liability of the Service Provider.** Is the service provider liable for direct infringement in any of the scenarios noted above if it is unlicensed? What about secondary liability? In which scenarios can the service provider take advantage of the safe harbors in the DMCA, and when are those safe harbors unavailable? Does the service have an obligation to take steps to avoid abuse of the service? What liability exists if the service does not take meaningful steps to avoid abuse?

**Other Legal Issues.** In addition to the core copyright issues noted above, a service needs to consider other implications of providing cloud based services to users. For example:

- Tax Implications. What are the tax implications of providing a downloading or streaming service? States have varying laws on when taxes are imposed on digital goods or services.
- International Implications. Copyright law is inherently territorial. What happens if a service has users outside the United States? While there is some harmonization, different jurisdictions nonetheless have different rules on what is and isn't permissible absent a license, and how licenses are issued. Also, it is often the case that the rights in the same work may be held or administered by different parties in different jurisdictions.

## **V. CONCLUSION**

As this paper is intended for legal background, it identifies only the legal issues raised by locker/cloud music services. We have not addressed any business issues – most notably whether a user experience can possibly be optimized by an unlicensed service.

For example: will a consumer prefer having to manually upload each recording to a cloud server, or will a consumer prefer having the music service scan her hard drive, identify the music in her collection, and then instantaneously declare her locker filled with the highest-quality versions of all the music in her collection? Similarly, would a music service prefer having to provide server space for hundreds of millions of copies (one copy of each user's separately uploaded recording), or would the service prefer maintaining one pristine copy of that recording to be made accessible to every user who wants to hear it?

That is why, notwithstanding all the legal questions identified above, we believe the issues will ultimately be driven by user preferences, business priorities, and ultimately common sense licensing. The challenge for all stakeholders will be whether licenses can be negotiated quickly, and on economic terms that work for all interests, so that legal uncertainties do not delay introduction or impede success of exciting new offerings.

## **EXHIBIT A**

### **RELEVANT STATUTES AND CASES**

#### **STATUTES**

- 17 USC §101
- 17 USC §103
- 17 USC §106
- 17 USC §107
- 17 USC §108(c)
- 17 USC §109
- 17 USC §114
- 17 USC §115
- 17 USC §117(2)
- 17 USC §512
- 17 USC §1001 et. seq.
- 17 USC 1201 et. seq.

#### **CASES**

- *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)
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## **INFLATION AND US MUSIC MECHANICALS, 1976–2010**

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## Inflation and US music mechanicals, 1976–2010

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**Abstract:** Recorded music is a commodity bundled with a number of intellectual property rights. This paper illustrates the conflict over the value of one of the most important rights of music, the so-called mechanical rate that the record labels pay to songwriters and their publishers for the reproduction, in a recorded medium, of their work. There has been a serious devaluation of the US mechanical rate against inflation since the Copyright Act of 1976. As Congress and the CARP Tribunal are ultimately involved in setting terms, the implication is that songwriters and their publishers are losing power in the USA against the record labels. For a variety of reasons, the phenomenon seems to be particular to the USA. It has also gone unnoticed in the current music business literature. Scholars who succeed in clarifying musicians' legal rights should also consider basic economics as a useful analytical tool.

**Keywords:** inflation; record labels; songwriters' income; mechanical royalties; US copyright law; Harry Fox Agency; music publishers; music trade; recorded music; European copyright law; USA.

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## 1 Introduction

Mechanical royalties<sup>1</sup> from sound recordings are one of the key income sources for musicians. In the days when recorded music ruled, and LPs or CDs represented the main cash crop of the music industry, revenues from mechanicals were a reliable source of receipts for songwriters and their publishers. Songwriters, in particular, knew that, by law, mechanicals had to be paid dutifully by the record labels. Whereas artist royalties on recorded music sales were always subject to the record label's break-even with the artist – and the label's 'recoupment' had to be considered before any payment to the performing musicians – mechanicals guaranteed immediate income for the songwriter.

Moreover, mechanicals loom large in the consideration of music creators, for they are one of the most important rights that the law recognises for recorded music. From the mid-1980s to the new millennium, in many of the most developed countries, songwriters and publishers collected money from mechanicals roughly in the same proportion as they collected money from performance rights on radio and TV broadcasting, sporting venues, clubs, and restaurants. This has changed since 2001, as recorded music sales have dropped, and the comparable figure is now \$1 of mechanicals for every \$2 or even \$3 of performance income.<sup>2</sup>

In 2008, Harry Fox, the organisation that reports the bulk share of the collection of mechanicals in the US, valued the market at \$307 million, a figure that was distributed almost in its entirety to music publishers.<sup>3</sup> Roughly half of this was then passed on to songwriters. The latter likely earned upwards of \$4 billion in mechanicals since 1976.<sup>4</sup>

Collections are based almost entirely on the application of the current statutory rate, presently at 9.1 cents per song under five-minute-duration per copy made and distributed. For lengthier songs, the rate is calculated at 1.75 cents per minute, but this exception tends to discourage record labels from recording longer material, because for them the mechanical rate is a cost of production. Digital downloads at iTunes pay the same statutory rate of 9.1 cents per 99-cent song. Other newer mechanical licences involve

ringtones and interactive streams and limited downloads from subscriptions services.<sup>5</sup> However, the combined revenue to Harry Fox from such activities is still relatively small.

## 2 A checkered history since 1976

A ‘new era’ of US mechanical collections was truly inaugurated with the Copyright Act of 1976, at a time when the recorded music business had reached a high point in sales. The rate was then set at 2.75 cents, and it has been periodically revised upwards to take marketplace conditions into account.

However, there seems to be some confusion in the existing music business literature about how inflation factors into the determination of the rate, which is key to overall collections. Depending on the year of the edition of a music business text, the rate is seen as determined by inflation only when it is declared so by the Copyright Arbitration Royalty Tribunal (CARP). The problem is that there have been many years since 1976 when the rate has been revised upwards with no reference to the rate of inflation. In that case, authors will often refer to the upward revision of the rate without reference to inflation. A few examples follow.

In the eighth edition of *This Business of Music*, William Krasilovsky and Sidney Shemel maintain that the increase in the statutory mechanical royalty rate is based on the Consumer Price Index.<sup>6</sup> By the ninth edition, in 2003, there is no mention at all of any CPI adjustment.<sup>7</sup> For Jeff and Todd Brabec’s *Music, Money and Success*, the CPI correction was always on the table. As they write in the 2009 edition, their sixth, “[mechanical] rate adjustments were provided for in the legislation based on the US Consumer Price Index”.<sup>8</sup> Harold Vogel, author of *Entertainment Industry Economics* cuts through the middle in his latest edition, suggesting that “to keep pace with marketplace conditions, [mechanicals] are now subject to upward revision over time and are either negotiated by the interested parties or go to arbitration by the Copyright Arbitration Royalty Panel”.<sup>9</sup> Vogel does not mention the CPI in the main text, although in a footnote, he adds: “after January 1988, [the] rate has been adjusted every two years in proportion to changes in the CPI”.<sup>10</sup> The source for the footnote, incidentally, is *Billboard* – a magazine that, historically, has not placed emphasis on inflation-adjusted data.

The question here is whether or not the statutory mechanical rate has really kept up with inflation since 1976. If so, songwriters and their publishers could be said to have obtained fair terms against the record labels. A table, below, shows the data.<sup>11</sup>

Inflation, in short, has not been accommodated properly. There has been a serious devaluation of the mechanical statutory rate against the Consumer Price Index since 1976. Moreover, the downward trend is steady throughout, suggesting that the periodic upward revisions of the mechanical rate – much publicised in the creative music community – are at best cosmetic.

The above data shows an overall decline in the inflation-adjusted mechanicals of 14% between 1976–2009. Year-in and year-out, this represents a real loss of a half percentage point in the value of the mechanical rate – quite a significant drop.

For illustrative purposes, we estimate the effect this had on US songwriters. If Harry Fox likely collected about \$300 million in mechanicals every year, a number well below the average collections of the 1990s and 00’s, then a half percentage drop in the mechanical rate implies a \$1.5 million loss in distributions every year. Presuming an

active recording catalogue for each of the 5,000 songwriters registered at the Songwriters Guild of America,<sup>12</sup> the data implies an annual per capita loss of \$300 in songwriting monies. Over the 33-year period of the study, the total is approximately \$10,000 per songwriter (half of this figure would have been appropriated by the publishers). It should be observed that the result is given without factoring a possible interest earning on the unpaid sum. Also, the distribution of mechanicals, like the sale of recorded music, is uneven, so that mid-level and established songwriters probably lost much more than that.

**Figure 1** Songwriters and inflation

<u>The Devaluation of Mechanicals, 1976-2009</u>				
	<u>Mechanical Rate</u>	<u>Inflation Adjusted</u>	<u>Mechanicals, 1976=100</u>	<u>Cost of Living, 1976=100</u>
1976	.0275	.0275	100	100
1988	.0525	.0253	191	208
1994	.0660	.0253	240	260
1998	.0710	.0248	258	286
2000	.0755	.0249	275	303
2002	.0800	.0248	291	323
2003	.0800	.0243	291	330
2004	.0850	.0251	309	339
2005	.0850	.0243	309	350
2006	.0910	.0252	331	361
2007	.0910	.0245	331	372
2008	.0910	.0236	331	386
2009	.0910	.0236	331	385

Conclusions

The mechanical rate was much higher in 1976 than it is today.  
It has dropped sharply since 2006, and there has been no adjustment since.

The evidence, in summary, suggests songwriters and their publishers were losing power in the USA against the record labels. Today, it is the mitigating circumstances of the current recession that perhaps justify the sway labels have on CARP – and on Congress. But in the golden mid-1980s and 1990s, proper artist representation could have addressed the decline in mechanicals at a time when the record business was financially strong.

### 3 US law and inflation, 1877–1976

There is nothing in the legislation of 1976 that explicitly says that upward revisions of the statutory mechanical rate be based on the Consumer Price Index. However, when viewed in an historical context, the mechanical royalty was never designed as a windfall for composers that would rise forever higher.

The mechanical reproduction of sound dates back to 1877, when Thomas Edison made a voice recording of the song ‘Mary Had a Little Lamb’ (Schoenherr, 2005). At that time, the US copyright law did not recognise such a reproduction as a ‘copy’ of a musical composition that would require permission of the composer (White-Smith Music Pub. Co. v. Apollo Co., 1908). This was confirmed by the Supreme Court when, in 1908, it ruled that neither piano rolls nor phonograph records constituted infringements of the musical compositions embodied within them (White-Smith Music Pub. Co. v. Apollo Co., 1908). Clearly, then, the USA did not recognise a mechanical right at the dawn of the early twentieth century.

This put the USA at odds with prevailing European copyright law. Back then, under Article 9 of the Berne Convention, most European composers enjoyed the right to control the reproduction of their work ‘in any manner or form’, including early mechanical reproductions of sound (Berne Convention, 1886). By the time that *White-Smith Music Pub. Co. v. Apollo* was decided in 1908, Belgium, Denmark, France, Germany, Italy, Luxembourg, Monaco, Norway, Spain, and the UK were all signatories to the Berne Convention and had thus brought their local copyright laws into parity with the treaty.<sup>13</sup>

The USA finally recognised a mechanical right of reproduction for composers with the passage of a new, comprehensive Copyright Act in 1909 (Copyright Act, 1909). The 1909 Act covered recordings of a musical composition, granting an author “the exclusive right ... to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced” (Copyright Act, 1909).

In addition to recognising this new right, the 1909 Act also created the first compulsory licence and statutory rate. Under the provisions of this new law, once a composer had knowingly allowed her composition to be reproduced mechanically, she was *required* to grant a licence to anybody else who wished to do the same; hence the compulsory licence was born. In addition, Congress gave the compulsory licence practical benefit by setting the price for which composers were required to grant a licence at two cents per unit, the first statutory rate.

However, while clearly a financial boon to composers, these new rights were created first and foremost as a means to prevent a potential monopoly in the piano roll industry. Anticipating a shift in the law following *White-Smith*, The Aeolian Company, a piano roll manufacturer, began entering into exclusive agreements with composers to position itself as a monopoly holder of mechanical reproduction rights [Kohn et al., (1996), pp.656–657]. Therefore, the compulsory mechanical licence coupled with the statutorily set rate of two cents was intended primarily as a bulwark against monopoly practices by companies entering the new market for mechanical sound reproduction rather than as a windfall for composers. It is therefore unsurprising that the statutory mechanical rate remained unchanged at two cents for more than 70 years.

#### 4 US law and inflation, 1976–2010

The statutory mechanical rate remained frozen until January 1, 1978 when the Copyright Act of 1976 went into effect (Copyright Act, 1976a). This new law greatly changed the function of the mechanical rate. By looking closely at the provisions of the Copyright Act, it is clear that Congress no longer intended for the rate to remain static.

In particular, section 801 of the Copyright Act establishes the functions of Copyright Royalty Judges, i.e., the officials who have the authority to set the mechanical royalty rate. In setting the rate, those judges have four considerations. They are (sic):

- 1 to maximise the availability of creative works to the public
- 2 to afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions
- 3 to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution,

technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication

- 4 to minimise any disruptive impact on the structure of the industries involved and on generally prevailing industry practices (Copyright Act, 1976b).

These considerations are a clear departure from the anti-monopoly role of the compulsory licence and statutory rate under the 1909 Act. However, there is no mention here about keeping pace with the rate of inflation. In fact, among the canons of legal interpretation, it is usual to fall back on the phrase *expressio unius est exclusio alterius* – which has the implication that if something is not accounted for explicitly, it should not be considered. As there is nothing about the Consumer Price Index, it can be argued that inflation need not be an official consideration for the tribunal of judges (still, inflation is such an important element of ‘existing economic conditions’ that it is difficult to imagine that Congress would have intended to exclude the subject).

Indeed, all of the objectives, but most particularly the fourth, seem to caution against raising the rates to keep in pace with the Consumer Price Index. A lower rate would maximise the availability of works to the public under the first objective. In addition, the investments made by record labels in recording and distributing sound recordings are almost always greater than those made by the composer in writing the song, leading the third objective to also weigh in favour of keeping the rate low. Finally, the fourth objective also plays against a periodic increase, as any rise would cause at least some disruption in the record industry. Overall, the four objectives may be considered somewhat of a sweetheart deal for the labels.

Under a provision of section 801, furthermore, when Copyright Royalty Judges set rates for compulsory music licensing in the secondary transmission of music by cable systems, only two factors may be considered and the first is ‘national monetary inflation or deflation’. Therefore, it is not as if monetary factors were entirely absent in the mind of Congress when the 1976 Copyright Act was drafted. The absence of inflation as a consideration in the setting of a mechanical rate is indeed conspicuous.

## 5 A special case

It seems reasonable to suggest, furthermore, that the US mechanical rate has probably lagged inflation more than in other developed music markets. Even though at the time of writing more detailed research is required to establish this firmly, a number of factors suggest that collections of mechanicals in European countries, for instance, are much less prone to ‘money illusion’, as historically witnessed in the USA.

Though the USA has entered into several key international treaties involving copyright, mechanical rights licensing remains an area in which the USA is at odds with the prevailing international model. The key differences are who has the power to licence mechanical rights, the existence of statutorily set mechanical royalty rates, and how those rates are calculated. Each of these points is discussed below.

In the USA, the Harry Fox Agency oversees the collection and disbursement of the majority of mechanical royalties; however, that fact belies the absence of a central clearing house for mechanical rights in the USA. For those musical compositions not administered by publishers and composers allied with HFA, record labels need to locate the rights holder in order to obtain a mechanical licence.



In contrast, under the prevailing international model, each nation has designated a mandatory mechanical rights collection society that not only oversees the vast majority of musical compositions within that territory, but holds in trust funds for the use of compositions where the rights holder cannot be found.<sup>14</sup> Mechanical licence fees notwithstanding, such a system of mandatory licensing bodies lowers the transaction costs associated with tracking down rights holders, particularly for older compositions of relatively low notoriety.

In addition to the absence of a mandatory licensing body, the presence of compulsory licences and statutorily determined rates set the USA apart from the rest of the world. As stated in the prior section, under the US Copyright Act once a composer allows his work to be mechanically reproduced, he must grant such a licence to anyone else who requests it at a rate set by the Copyright Arbitration Royalty Panel. In contrast, a majority of World Trade Organization member nations recognise neither compulsory licences nor statutorily set rates [Kohn et al., (2002), p.704].

Rather, composers are not required to licence their compositions for mechanical reproduction at specified rates; however, those who unreasonably deny such licences may nonetheless be forced to acquiesce by a local judicial authority.<sup>15</sup> In the UK, for example, if a record label wishes to obtain a mechanical licence and the Mechanical-Copyright Protection Society, that territory's mandatory mechanical licensing body, is unwilling to offer reasonable terms, the record label may ask the Copyright Tribunal to adjudicate its case and set a one-time rate for its use of the composition.<sup>16</sup> As a result, though there is no 'compulsory licence' created by most copyright legislation outside the USA, most nations nonetheless have some judicial framework by which such compulsory licensing is effected [Kohn et al., (2002), p.704].

Furthermore, the prevailing international copyright model does away with statutorily set rates in favour of licensing schemes arrived at through collective bargaining between record labels and composition rights holders [Kohn et al., (2002), p.704]. Historically, these licensing schemes were negotiated between record labels and the mandatory mechanical rights collection society of each nation [Kohn et al., (2002), p.318]. However, today these collective bargaining agreements take place on a larger scale, between the International Federation of the Phonographic Industry (IFPI)<sup>17</sup> and the *Bureau International des Societies Gerant Les Droits D'Enregistrement et de Reproduction Mecanique* (BIEM)<sup>18</sup>. The standard contract for mechanical licences is then used by the mandatory mechanical rights collection society of each territory.<sup>19</sup>

Finally, the manner in which mechanical royalties are calculated differs greatly between the USA and the prevailing international model. In the USA, the statutory rate is calculated as a set amount of money per musical composition per unit sold. Conversely, under the BIEM/IFPI Standard Contract, used by most mandatory mechanical rights collection societies throughout the world, royalties are calculated as a percentage of the Published Price to Dealers (PPD), the highest price that a record label or distributor charges to a retailer selling recordings directly to consumers.<sup>20</sup> Under the Standard Contract currently used by member societies, an average mechanical licence receives 9.009% of PPD.<sup>21</sup> As international mechanicals mimic movements in the retail price of recorded music, even if they were not meant to keep pace with national monetary inflation, they at least reflect inflationary/deflationary trends in the market for recorded music.

## 6 US mechanicals today

The US mechanical rate has remained at 9.1 cents since 2006, and will remain so until 2012. Because it has not been adjusted upwards to reflect inflation, it suggests more loss of power by songwriters and their publishers. Conversely, record labels continue to save on the cost of production of intellectual property.

However, a number of points need to be made.

An album is now \$9.99 at Apple iTunes, one of the main retail fronts of the business. Ignoring for a moment that most record label contracts now include controlled composition clauses that reduce payments of the mechanicals to 75% of the mechanical rate and pay mechanicals up to a maximum of ten songs per album, it is clear that the current mechanical rate is now a much greater percentage of the selling price of an album than it was in the 1990s – when wholesale prices, without a discount, were around \$12–\$15.

Many artists, moreover, wish to promote sales of their music on a variety of non-recorded platforms, including live music and merchandise sales. Jazz artists, in particular, may be happy that mechanicals have not risen much because their livelihood is not as dependent on recordings (besides, it makes covering other standards and newer outside compositions more affordable). But they may not be alone. Higher mechanicals might mean more expensive records for the consumer – a factor that is not lost on many artists in other genres and on Apple, who has opposed the increase of the mechanical rate.<sup>22</sup>

There is little evidence, moreover, that the Songwriters Guild and the National Music Publishers Association (for whom the Harry Fox Agency collects) are truly up in arms against the record labels for maintaining the 9.1 cents rate. The recorded music business is in retrenchment, so the struggle over mechanicals is not generating the excitement it might have engendered in better times.

Finally, mechanical concessions for new-recorded media may also be traded against the fixed and standard rate of 9.1 cents. Publishers and their songwriters were not able to change the 9.1 cents rate, but during the latest round of negotiations for a new schedule of mechanical levies, in force until December 31, 2012, they got a new mechanical rate approved for master ringtones. It was the first ever, and was set at 24 cents per download. The NMPA had done well. Although falling short of the 30 cents it wanted, i.e., 15% of a \$1.99 download, it was well over the NMPA's minimum position of 15 cents. Besides, a new compulsory licence for recorded music had been written into law, potentially redressing the continuing inequity of a poor treatment of inflation in the long-standing distribution of mechanical collections.<sup>23</sup>

## 7 Conclusions

This paper has suggested that the mechanical rate earned by songwriters and their publishers in the USA has been devaluing steadily against inflation since 1976. The music business has been largely oblivious to the phenomenon, which is first noted here.

It may be argued that the concessions made to music creators in 1976 had to be reversed somewhat. It might be further suggested that the record labels could prevail in the lobbying match over Congress and the CARP Tribunal, because they were the cash

cow of the business and enjoyed much deeper pockets. But there is a more fundamental reason behind the decline of songwriters' mechanicals.

US copyright law often seems at odds *philosophically* with copyright legislation found throughout Western Europe and the developed world. European copyright protection, for example, finds its roots in the French notion of *droit d'auteur*, i.e., the view that copyright legislation is necessary to protect the financial interests of the *artists* who create new works. Contrarily, the USA views copyright legislation as necessary to create a *market* in which as many artistic works as possible are disseminated to the public.<sup>24</sup>

The USA, in short, favours both content *users* and sound reproduction *manufacturers* and *distributors* at the expense of its creative talent. Intellectual property production costs are kept low, and to this day the price of recorded music is much lower than in Europe. This is not only a matter of better economies of scale and no value added taxes (which incidentally, proves the point that US consumers have a better deal). As well, per capita collections on the so-called performance, or broadcast, right associated with music are generally perceived to be higher in many European countries.<sup>25</sup>

A dwindling payment of mechanicals, moreover, may redress the slings and arrows of a hostile marketplace for sellers of recorded music product. Recorded music prices in fact devalued significantly in real terms at least since 1990, well before file sharing became prevalent with Napster at the start of 2,000 [Alhadeff, (2006), pp.13–27]. During this extended period, the major labels could do little to influence the retail price of music and, in the second half of the 1990s, endured the ignominy of seeing recorded music sold as a loss-leader item in mass merchant stores [Alhadeff, (2006), p.18]. Towards the end of the 1990s, the labels colluded to fix the price of music, but were taken to task by the Federal Trade Commission and desisted [Alhadeff, (2006), p.26].

In a prepared statement in Congress before the Subcommittee on Courts, the internet, and Intellectual Property, Rick Carnes, President of the Songwriters' Guild of America, complained that the modest increases in the mechanical rate to 9.1 cents had not addressed 'the longstanding bedrock inequity' that went back to 1909. Carnes had been invited to comment on a bill designed to better accommodate the digital delivery of musical works, but could not miss the opportunity to alert legislators on the plight of his fellow songwriters. He added: "I am getting 1936 wages in 2006!"<sup>26</sup>

Indeed, the music trade has been under the persistent grip of a buyers' market for at least a decade, and this has especially threatened the livelihood of sellers, including songwriters, on which the business depends. This will likely continue as long as there is no comeback in the fortunes of recorded music. In the meantime, writers' mechanicals have arguably become the forgotten casualty in the current landscape of barren music sales.

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## Notes

- 1 Mechanical royalties refers to income derived by a composer for the use of his work in audio reproductions. Though audio reproduction is usually no longer effected through mechanical means, e.g., the phonograph, the ‘mechanical’ has become a term of art referring to any audio reproduction, be it mechanical or not.
- 2 See, for example, *Music & Copyright* (2010a, 2010b), 10 February and 19 May, pp.7–9, 3–5, respectively.
- 3 Harry Fox Agency (2009a), 24 March, pp.1–4.
- 4 HFA’s collections over 30 years are estimates.
- 5 Harry Fox Agency (2009b), 5 March, pp.1–4.
- 6 Krasilovsky and Shemel (2000, p.176).
- 7 Krasilovsky and Shemel (2003, pp.98–99).
- 8 Brabec and Brabec (2008, pp.31–32).
- 9 Vogel (2007, p.239).
- 10 *Ibid.*, p.257.
- 11 US Copyright Office (2010). The inflation data is standard, and comes from the US Department of Labor (2010).
- 12 Songwriters Guild of America (2005), 16 May.
- 13 [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (accessed on 26 November 2010).
- 14 The mandatory mechanical rights collection societies for the four largest markets for recorded music after the USA, i.e., Japan, UK, Germany and France, are:
  - a the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC)
  - b the Mechanical-Copyright Protection Society (MCPS)
  - c Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)
  - d Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM).
 Other similar national organizations are listed at <http://www.biem.org/SocietyShow.aspx> (accessed on 26 November 2010).
- 15 See, for example, sections 149, 205B, and Schedule 6 Copyright, Designs, and Patents Act 1988 (UK as amended).
- 16 *Ibid.*
- 17 The IFPI is the trade group of the international record industry representing record label interests throughout the world. See, generally, <http://www.ifpi.org/> (accessed on 26 November 2010).
- 18 BIEM is an international trade group representing mechanical rights societies of 55 member nations. See, generally, <http://www.biem.org/Index.aspx> (accessed on 26 November 2010).
- 19 See Kohn et al. (2002, p.704) and BIEM/IFPI Standard Contract, available at <http://www.biem.org/downloads/MenuItems/109/BIEM/Standard%20Contract%20English2.pdf> (accessed on 26 November 2010). Cf. Kohn et al. (2002, p.705), in Japan and India the rates are set by local government.
- 20 See BIEM/IFPI Standard Contract.
- 21 It should be further noted that this is the percentage for an entire recording rather than a single song. A composer of a single song would receive a pro rata share of the royalty.

- 22 Eddie Cue, Apple's VP for iTunes, was quoted as saying that "[if] the iTunes Store were forced to absorb any increase in the mechanical royalty rates, the result would be to significantly increase the likelihood of the store operating at a financial loss – which is no alternative at all"; see <http://www.digitaltrends.com/computing/could-apple-close-itunes/> (accessed on 14 June 2010).
- 23 *Music & Copyright* (2008), 17 October, p.4.
- 24 Refer to US Const. art. I § 8 cl. 8. The purpose of the law was "[to] *promote the progress of science and useful arts*, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (emphasis added). While artists certainly benefit from copyright legislation in the USA, the ultimate beneficiary is intended to be the public.
- 25 As noted frequently by international experts, and the staff of *Music & Copyright* in particular. European Copyright Law also recognises more 'neighbouring' performance rights than the current US legislation. For instance, unlike the USA, sidemen in any broadcast recording are entitled to additional collections.
- 26 SGA (2005), 16 May.



## **ARTIST REVENUE STREAMS: A MULTI-METHOD RESEARCH PROJECT EXAMINING CHANGES IN MUSICIANS' SOURCES OF INCOME**

Kristin Thomson and Jean Cook

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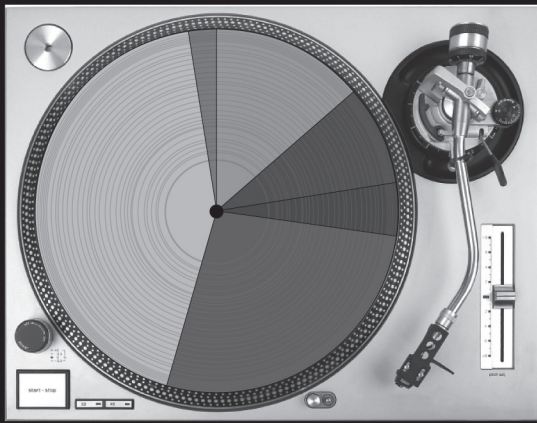
*Jean Cook is a musician, producer and Director of Programs for Future of Music Coalition. She is a founder of Anti-Social Music, a New York-based new music collective. She currently records and tours with Ida/Elizabeth Mitchell, Jon Langford, and Beauty Pill. Jean's administrative background includes working as a publicist and curator for Washington Performing Arts Society, producing and hosting radio programs for 89.9 WKCR-FM, New York, and producing dozens of new music performance projects. For FMC, she currently project directs initiatives to fix jazz and classical music metadata and understand how copyright impacts indigenous artists. She also co-directs FMC's Artist Revenue Streams research project, a comprehensive analysis of how musicians are being compensated in the digital age.*

*The nonprofit group Future of Music Coalition has launched Artist Revenue Streams, a multi-method research initiative to assess if and how musicians' revenue streams are changing in this new music landscape. The project is collecting information from a diverse set of US-based musicians about the ways that they are currently generating income from their recordings, compositions or performances, and whether this has changed over the past ten years. The project employs three methodologies: in-depth interviews with more than 25 different types of musicians — from jazz performers, to classical players, TV and film composers, Nashville songwriters, rockers and hip hop artists; financial snapshots that will show individual artists' revenue pies in any given year; and a wide ranging online survey in which we hope thousands of musicians will participate in fall 2011. This article outlines the project's goals, hypotheses, methodologies, and anticipated outcomes.*

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- performance royalties
- advances
- live shows
- licensing
- retail sales
- merchandise
- commissions
- fan support
- synch licensing
- grants

## Artist Revenue Streams

a multi-method research project examining changes in musicians' sources of income

### The Value of Measuring Musicians' Sources of Revenue

Meteoric transformations in the creation and distribution of music over the past ten years have drastically changed the landscape for musicians. New technologies such as digital recording studios, digital aggregators, online music stores, on-demand streaming services, webcasting stations and satellite radio have greatly reduced the cost barriers to the creation, production, distribution and sale of music, and a vast array of new platforms and technologies – from MySpace to blogs to Twitter feeds – now help musicians connect with fans.

Many observers are quick to categorize these structural changes as positive improvements for musicians, especially when compared with the music industry of the past. It's true that musicians' *access* to the marketplace has greatly improved, but how have these changes impacted musicians' ability to generate revenue based on their creative work? Almost all analyses of the effects of these changes rest purely on *assumptions* that they have improved musicians' bottom lines.

Since our inception in 2000, Future of Music Coalition has strived to provide artists from all backgrounds and genres with valuable information about the issues that affect their ability to earn a living. Consequently, these questions about musicians' ability to make a living from their music in the 21<sup>st</sup> century are critical. FMC has launched **Artist Revenue Streams** – a multi-stage research project to assess whether and how musicians' revenue streams are changing in this new music landscape. This paper explains the research project, and describes some emerging themes based on the first eight months of work.

## Research Questions

This multi-method research project is collecting information from a diverse set of US-based musicians<sup>1</sup> about the ways that they are currently generating income from their music or performances, and whether this has changed over the past ten years.

We seek to find out: what percentage of musicians' income comes from each possible revenue source? What is the ratio among different sources, whether it be royalties, money from gigs, t-shirt sales, or any of the 29 other meaningful revenue streams<sup>2</sup> that FMC has identified? Has the ratio changed over time and, if so, what are the factors that have conditioned these changes? Finally, are the revenue stream ratios different for artists working in different genres and at different stages of their careers?

## Hypotheses

Given FMC's work at the intersection of music, law, technology and policy – and our position as creators, musicians and independent label owners – we have some first-hand knowledge of the changes that today's musicians are experiencing. Thus, we propose the following hypotheses:

- 1. Musicians are relying on revenue from a variety of streams.** Until recently, the vast majority of musicians' revenue could be placed on one of four buckets: live performances, record sales, royalties from public performances and/or licensing, and merchandise. In some cases there were even fewer. For example, a non-performing songwriter typically relied only on the income associated with publishing, with mechanical royalties from record sales and public performance royalties being the most common sources of income, followed by licensing and sync licensing. While those revenue categories are still relevant, FMC suspects that today's musicians are participating in more streams, both because there are more streams available – some of which didn't exist until ten years ago<sup>3</sup> – and because the traditional streams like retail record sales have been in serious decline. The biggest questions are: just how many revenue streams are today's artists relying on? Has this number of revenue streams changed over the past ten years? And, do artists in different genres or at different stages of their careers participate in the same number of streams?
- 2. The overall revenue pie is smaller for each artist, but more artists have access to revenue.** Until about ten years ago, there was generally a more distinct split in the music industry: there were artists signed to major label deals that had access to recording advances, tour support and big budget promotion, and there were independent and unsigned artists who were largely shut out of commercial radio/broadcast media (and the subsequent performance royalties generated by airplay), and had meager resources to promote record sales. But because of the internet, many promotion and distribution avenues are much more accessible to all artists. Today's independent artists can now sell their music on the same digital platforms as any major label

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<sup>1</sup> In this paper, we use “musician” as an umbrella term that includes performers, recording artists, songwriters and composers.

<sup>2</sup> 29 Streams blog post <http://futureofmusic.org/blog/2009/10/14/29-streams>

<sup>3</sup> Public performance royalties were only paid to songwriters/publishers until 2001 when SoundExchange started the first distributions for recording artists and labels based on the digital performance royalty for sound recordings.

artist, 24/7, for a marginal cost. And, there has been an explosion of multimedia outlets and social networking services with negligible barriers to entry for the artists: satellite radio, specialized webcast stations, music discovery sites like Pandora and last.fm, and streaming services like Rhapsody and Napster. While it seems that technology has democratized the process and facilitated the creation of a “musicians’ middle class”, has the high tide lifted all boats equally? Are there a greater number of musicians making money today than ten years ago? FMC seeks to find out if there are, indeed, more full-time working musicians, and whether the changes in distribution of revenue have been modest or marked.

3. **For performers, money from touring or playing live shows is the biggest portion of their revenue pie.** Even with the high costs of gas, and percentages paid to booking agents and managers, existing data and musician self-reporting indicates that live shows are where artists are able to net the most money. However, is this true for all genres, or just for rock, pop and country artists where touring is expected? And is it as true for emerging artists as with established artists?
4. **Songwriters and composers are seeing diminished revenue from their compositions from record sales.** Music industry statistics point to a continued and sustained reduction in retail sales. In addition, music is more frequently purchased as individual songs instead of bundled into an album, which means “album cuts” are less likely to earn mechanicals. For songwriters and composers, these conditions correspond to a reduction in mechanical royalties. But is this true for all genres? Are jazz and classical artists – who are somewhat insulated from the commercial retail environment – experiencing something different? Plus, the current music landscape presents many new possibilities for composition driven income, including ringtones, increased synch license opportunities, digital sheet music and publishing royalties from digital sales. Are these new revenue streams based on licensing compositions making up for the significant reduction in traditional mechanical royalties?
5. **Location doesn’t mean as much as it used to.** There are traditional “music towns” in the United States: Los Angeles, New York, Nashville, Austin, Chicago, where musicians and the music industry have congregated. But now that the internet has largely removed regional barriers, especially for the promotion and distribution of music, what effect does an artist’s location have on their ability to make a living? We suspect that we’ll find that a number of artists are making a living outside of the traditional regional music industry structures, relying more on internet connections and virtual networks to sustain their careers. But has location been completely removed from the factors influencing an artists’ career? Does genre or type of craft influence location? Do classical musicians need a city of a certain size to capitalize on orchestral work? Do professional songwriters do better in Nashville or Los Angeles?

## Research Components

FMC is employing a three-step research process; in-person interviews with a small but diverse number of musicians in 2010-12; a review of financial records of some musicians; followed by a widely distributed online survey in fall 2011. We feel that this multi-method approach will help us to get the best snapshot of different musicians’ income streams and create a more robust and meaningful report.

**Artist interviews:** In step 1, FMC is interviewing a small but diverse set of musicians, (or, in some cases, their managers or accountants) to seek their direct input about their revenue streams, and how these have changed over the past ten years. FMC has identified about 25 musician types that we expect to have different musical revenue pies, and for which we seek interview candidates. For example, we know that the revenue streams available to a songwriter who doesn't perform are different than those available to a touring rock band member, a pit orchestra musician, a film and TV composer, a jazz performer who plays standards, a classical ensemble and a high profile hip hop artist. FMC is using networks and referrals to identify individuals that fit these musician types, then using a snowball sample<sup>4</sup> to find peers that also match these characteristics.

**Financial data:** FMC is also reviewing individual financial data from some of the musicians that we interview, with an understanding that any financial information is anonymous and not identifiable with any particular artist, band or label. Actual financial data can help us to quantify the amount of revenue generated in different categories, and changes from year to year. These are being presented as case studies with an individualized narrative/assessment that focuses on the reasons for fluctuations or changes in their revenue from year to year. The artists' income data will be displayed in various pie charts that will be compared against data collected during the survey, and from other sources. FMC also plans on making interactive/dynamic charts and graphs for review on our website.

**Online survey:** For step 3, FMC is creating an online survey that will present relevant questions about artists' revenue streams for US-based musicians. The survey will use skip logic to create a survey experience that matches the subject's role (songwriter, composer, performer) and recognizes the differences in how various communities operate and how creators are compensated. FMC will put the survey in the field in fall 2011 to capture information about musicians' revenue streams for 2010 and prior. We will then analyze the results not only on the macro level, but also by genre, by time spent/income generated, and other cross-tab measures.

## Objectives and Outcomes

Though we can't predict the actual results of the work, FMC sees at least five uses of the research data:

First, the results could provide musicians, the media and the music community at large with a comprehensive analysis of how musicians from many different genres are being compensated in the digital age. This data could serve as a vital benchmark for understanding the shifting revenue streams for musicians.<sup>5</sup>

Second, the data could help service organizations and advocacy groups understand how they can best serve their constituencies. Giving unions and service organizations data that captures the experiences of other musicians could help them identify trends, map policy objectives, and recruit more members.

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<sup>4</sup> Snowball sampling is a technique where existing study subjects recruit future subjects from among their acquaintances. The project's methodology is more fully described in a protocol document, available from the research team.

<sup>5</sup> It's unfortunate that we have no comparative data about musicians' revenue streams prior to the fundamental changes that began in the late 1990s. However, we hope this work can serve as a benchmark that could be replicated on a time series basis going forward.

Third, it could also help musicians and advocates (and the media) make a more informed case to the general public about the complex realities of being a musician in the current landscape. For instance, many music fans assume that “all artists make money from touring” or “all artists are wealthy” so they don’t feel guilty when downloading songs for free. Perhaps if the public better understood the complex nature of musicians’ revenue (and the relatively small numbers we’re talking about), we can enrich the public dialogue.

Fourth, this research could serve as an external assessment of the value of new technologies and services available to musicians and fans, for musicians. Many new business models have launched in the past ten years that use music to attract users. While many of these include a revenue component for rightsholders, there has not been any systematic effort put into examining if, or how, musicians as a whole have benefited from participating in these new models.

Fifth, the results of this research could have policy implications. Our research may highlight how policy decisions affect artists’ revenue, and serve as a way to leverage change. We may also realize that, despite the technological progress that these new business models represent, the vast majority of musicians live from gig-to-gig and struggle with middle-class issues like mortgages, gas prices and finding affordable health insurance. No matter what the outcome, FMC recognizes the immense value in undertaking this work as a fundamental part of understanding musicians’ earning capacity, now and in the future.

## **Population of Study**

One of the challenges in doing this work is estimating our population size. There is no definition for “musician”, nor certifications or qualifying tests. In addition, there is no one organization that represents the majority of musicians.

FMC has established some parameters to define our population of study. First and foremost, this study is constrained to US-based musicians. This is a reflection of our capacity, and a recognition that many revenue streams are highly dependent on national copyright law. An international or country-to-country comparison would be incredibly valuable, but it is outside the scope of this project.

To ensure that we’re focusing on musicians that have some credentials in the music community, all research participants must meet the following criteria:

1. US citizen or permanent resident
2. 18 +
3. Creative or technical credit on at least 6 commercially released tracks – physical or digital.  
Qualifying tracks can be on one album or on a combination of albums.

“Credit on 6 commercially released tracks” is the standard that the Recording Academy uses for membership. Practically, this means the musician has released something commercially, but the bar isn’t set so high that only career musicians will qualify for research participation.

In addition, we will ask participants:

4. Whether they are member of one or more of the following organizations: ASCAP, BMI, SESAC, SoundExchange, AFM, AFTRA, AGMA, SAG, Recording Academy, Songwriters Guild, Nashville

Songwriters Association International, American Composers Forum, American Music Center, Meet the Composer, Chamber Music America, Americana Music Association, Folk Alliance, Just Plain Folks, Gospel Music Association, Blues Music Association, Country Music Association, International Bluegrass Music Association, or Fractured Atlas

5. How much of their time they spend being a musician
6. How much of their annual personal income is derived from being a musician.

While specific answers to questions 4, 5 or 6 would not *eliminate* any particular participant, we would isolate any responses for individuals who are:

- not a member of *any* professional organizations; or
- spend less than 10% of their time *and* make less than 10% of their money being a musician.

These definitions not only help us to determine the types of musicians taking part in our research, but they also help us to put some parameters around our population of study.<sup>6</sup>

## Partnerships and Support

The ultimate value of this work depends greatly on the level of participation we can achieve among musicians, but we also know that musicians are a difficult population to count and measure. There's no clear definition of what a "musician" is, and there is no one association or organization that represents their collective interests. Because of the dispersion, reaching these various groups will take outreach to dozens of different liaisons: music managers, booking agents, record labels, performance rights organizations, unions, technology companies, social networking sites, service organizations and music schools – connections that FMC has been steadily developing for the past ten years through our event programming, collaboration on policy campaigns, educational efforts, and other shared values. FMC will seek the collaborative support from dozens of member associations and service organizations, which will in turn urge their members to participate in the project. For more information about how your organization or institution can establish a relationship with this research, please contact our Partnership Development Consultant, John Simson at [jsmusic@verizon.net](mailto:jsmusic@verizon.net)

FMC is also seeking institutional, organizational, funder-based and private donations to support this critical work. Through the support of the Doris Duke Charitable Foundation and YouTube, FMC has secured about 50 percent of the funds for this project as of December 2010, and will proceed as planned.

## Emerging Themes

Since July 2010, FMC has interviewed 21 artists, managers, attorneys, and others who work with artists, to gauge their feelings about how their revenue streams have changed over the last ten years. This initial group included those working in classical music, jazz, indie rock, and urban music. We also interviewed a film composer. All of those

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<sup>6</sup> Details about population of study, and related risks and limitations, are detailed in the research protocol available from the research team

interviewed spend 90-100% of their time on and receive 90-100% of their income from music. All have been active over the last ten years or more, and all but the film composer release records and tour regularly.

The interviewees' responses are informed by their specific experiences, which were each unique. We could not identify general up and down trends among such a small and diverse population of interviewees. Global experiences such as the economic downturn and the disruptive force of technology on the marketplace are extremely difficult to tease out within the context of individual career arcs – especially from the perspective of the interviewee, who has to be focused on more immediate concerns in his or her day-to-day work. In general, our conversations were most informative when focused on mapping out the various income streams rather than looking at income going up or down over time. When discussing the impact of larger trends such as the economy or technology, the responses tended to be less about whether income streams were positively or negatively impacted, but how opportunities for artists seemed to be shifting.

That being said, we were able to identify a few broad themes:

1. **Technology poses a double-edged sword.** Developments in websites, tools, online services, broadband deployment, wifi and portable technologies have certainly had an impact on musicians' ability to reach an audience and run their businesses, but technology can also increase competition, and the "noise" in the marketplace.
2. **Flexibility is key.** A number of musicians found themselves on different career arcs than they had been trained for, or had expected. Meanwhile, other groups have benefited from thinking beyond the assumed boundaries of their genre, experimenting with novel collaborations, distribution methods, or funding sources.

While upcoming reports and presentations will articulate these themes in much greater detail, here are some select quotes from interviewees regarding their ability to make a living:

As some artists progress in their careers, they make more active choices about what they want to do. Sometimes that means they take fewer and more lucrative gigs.

*I'm the type that I can get by on \$30,000 a year so as long as I can get that much it's like, 'Great, I'm making enough now that I can take less of those kind of gigs,' or 'I'm making enough now that I can take less day job work.' So **I think that the percentage that purely music-engaged projects are has been increasing, but my overall revenue has stayed about the same.** – jazz composer-bandleader 1*

Sometimes that means they pursue less lucrative, but more artistically satisfying gigs.

*When I was less involved with the nitty-gritty and with the creative process of the music I was making, when I was merely a cog, I was making much more money and working more—when I say working more I don't mean working harder I mean working more hours as a performer. I'm in this position now, which is partially from circumstances but also it's from my own desire, where I'm making a transition to a place where more I'm more creatively involved with what's happening in the music that I'm involved with. **At this point in the turn of my career, I'm working very, very hard but the income is much less. I don't see that as sustainable, of course, but I feel that it's a very important transition that I'm making and one that's very exciting.***  
– classical freelance musician

On the other hand, some artists continue to do more of the less lucrative work to stay ahead financially.

***What's frustrating this year is that I make more money doing video production, but I make more profit when I compose. The least profitable thing that I do is recording studio. If I charge \$40 an hour [in the studio] it is an actual hour that I'm actually working on it and I'm not making the \$60 or \$80 an hour I would make if I'm teaching and I'm not making the \$75 an hour that I'd make if I'm video editing, and I'm not making—the range is sometimes as much as \$125 or \$200 an hour if I'm composing. But it's the job that's in front of me right now, and sometimes that's the studio. The most profitable thing is composing, and the majority of my income comes from a combination [of these things].*** – film composer

Depending on the genre, artists have different strengths and assets available to them in making a living. Sometimes that means artists will take on work for hire or teach to supplement their income.

***It's pretty important that ensembles also have teaching residencies because the money they make from performing, even at the top level, rarely equals a good living. So all of our ensembles have teaching or residencies or some kind of other work to expand on what they do—to make money.*** – classical manager 1

Or, in more popular genres, they will leverage their brand.

***People in rap music have tremendous commercial appeal that translates into multiple streams of income very naturally and very easily. I have not seen that same level of success, based on my experience, with other genres of music. For example, if you see Dr. Dre with an HP commercial, if you see Dr. Dre with the new earphones, it's very natural. I think what's happening is, I think corporate America understands the influence of rap music and is using it to help promote their products. So obviously they get the win of extending their brand and these personalities or personas are actually making money because of their celebrity. They're not writing songs for the commercial, they are in fact appearing in the commercial, they're promoting the product.*** – urban music attorney 1

***A few of my clients have ventured into the apparel industry and have deals and have branding opportunities and branding deals so they've earned decent income in those areas. It's spread out a little bit more now than it used to be and they're certainly looking for more opportunities outside of just music to earn their income.*** – urban music attorney 2

Niche genres are aware that their use of some of the available tools – such as Twitter and Facebook – are not likely to lead to the same results as when used by mainstream acts:

***One thing is we're very aware that we exist in a niche. And I believe rather than presuming that we could have as many Twitter followers as Lady Gaga or as much revenue, we need to be realistic about the niche that we are in and the reasons we are making music, and the fact that the entire world is just not that into us. What we need to do is to bring people into the niche, deepen our relationship with them rather than flinging ourselves all over the place.*** – choral chamber group



Meanwhile, the convergence of technology, economy, mass media culture, and competition for mindshare has had an effect on the choices made by presenters and labels:

*Prior to 2000 I would say, more university series and performing arts series presented more classical music. A university series that I'm thinking of in Iowa used to have five classical concerts, and today I think they might have one classical concert and they also have theater and maybe an opera performance or dance or world music or something else. So I'm not saying that that series is less of a series, it's probably a great artist series and maybe they reach more people, but **as far as classical music is concerned I could count on their engaging one of our string quartets every year [before]; now I'm lucky if they do it every five years. At the same time there are many more touring string quartets than there were.** One of our artist management friends made a survey, I think he took a Musical America directory from 20 years ago and counted the string quartets and then he did it 10 years ago and then today. The list of string quartets that are touring is [increasing dramatically]. I think it's much harder for that young artist to break through when he's got so much competition. – classical manager 1*

There are also large disparities in income, and very different definitions of success.

*Most classical records, 5,000 units is considered the record made money, it didn't make a lot of money but it made money, nobody lost. So when you're looking at those kinds of numbers, even with royalties being paid on the upside, you're still not talking about a lot of money, as opposed to a \$10,000 concert performance. – classical manager 2*

*If they're selling at least 700,000 records, then they still are making a decent amount of income from record sales, and many of them are. – urban music attorney 2*

A reminder that these are select quotes from the first pool of interviewees, and we have many more interviews to complete. For the sake of brevity, we have included just one facet of their conversations. Future papers and presentations will examine interviewees' feelings on topics such as the effect of social media, the meaning of location, the value of radio airplay, label relationships, trends in record sales, and the necessary skills for adapting to this new landscape.

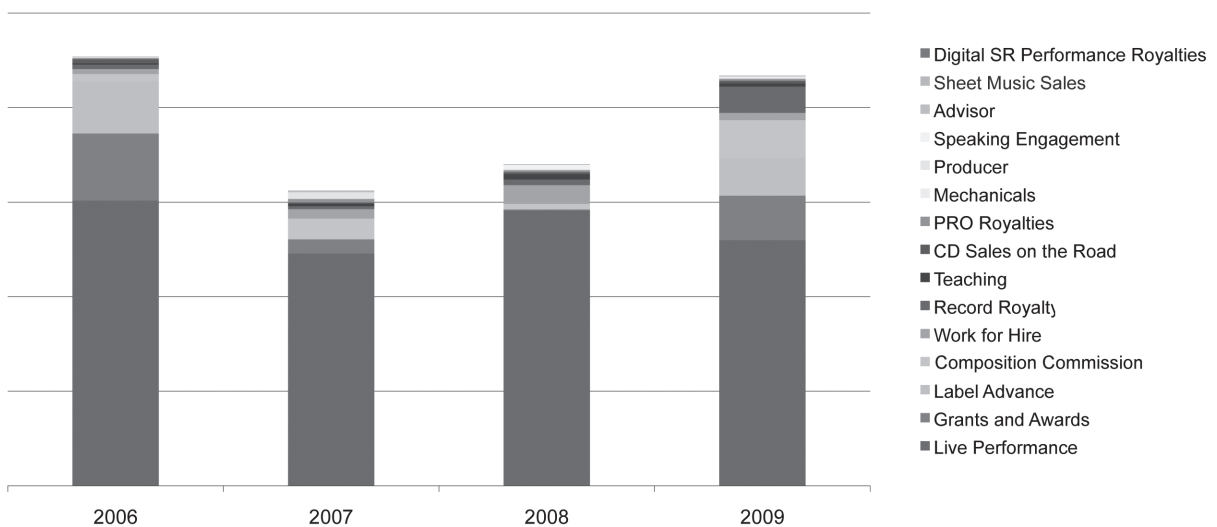
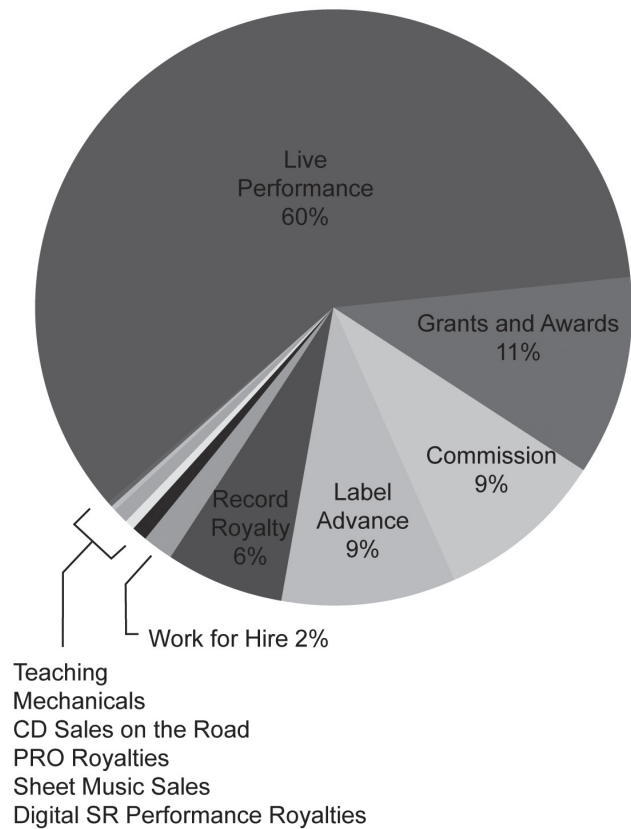
## **Financial Data Snapshots**

Since July 2010, FMC has analyzed the musician-based financial data for three different musicians: a jazz composer-performer-bandleader; an indie rock performer-composer-sideman; and a chamber music ensemble. In each case, we asked them for as many years of financial data as they were willing to give us. For some artists we have more than five years. For others we have just two. In all cases, the financial data provide a real-world snapshot of musicians' ability to make a living.

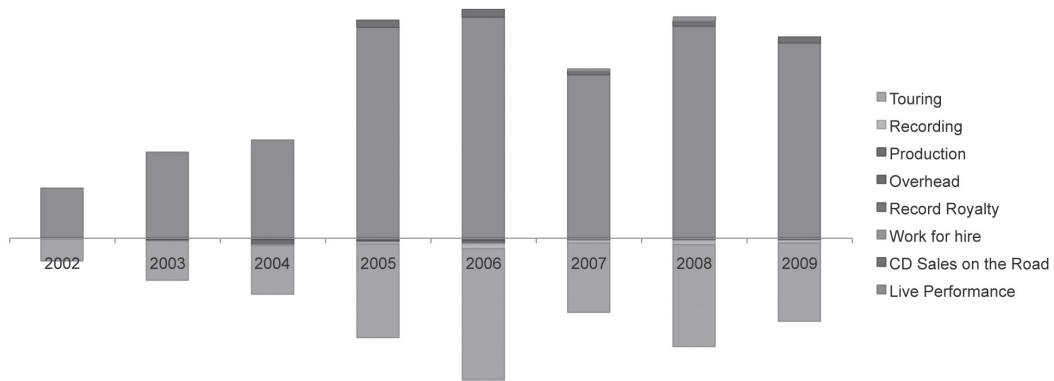
This data will be released as case studies in the coming months, but for the purposes of this paper, we have included a few examples of how the data is being presented.

**Gross income by year:** In all cases, we are presenting gross income by year. The income is segmented according to revenue stream. For most artists, we have pie charts for multiple years.

**Gross income across time:** We also illustrate the gross income in a time series chart, using stacked column graphs to show the different revenue streams. Note that there are no Y-axis values in order to protect the anonymity of the artists giving us data.

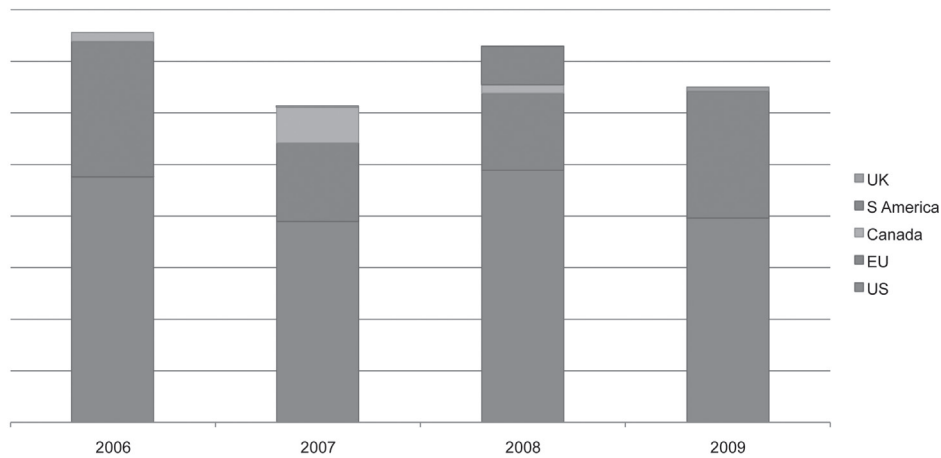


**Income v Expenses:** In some cases, we also have access to expenses. This is helpful in understanding the profitability of a particular artist or ensemble.



**Breakouts by region, details about specific streams:** For some artists, the details about their revenue according to a sub-set of criteria enriches the picture.

**C: Income from Performances, US and non-US, 2006-2009**



Throughout 2011-12, FMC will continue to gather and analyze financial information from a small but diverse set of artists. Already the financial data has informed our interview process, as well as our survey question development. We will release the case studies, along with an interactive version online, in the coming months.

## **Musicians as First Movers**

Today’s musicians are experiencing changes as profound as any since the invention of recorded sound in 1880. We are living in an era of unparalleled opportunity enabled by technology, where an individual musician can easily record a song, upload it to a server, distribute it across many platforms, and collect the revenue. It’s also a time of heady excitement among technologists, who have used music as the “flame” to attract millions of users to emerging services like YouTube and MySpace, to the hardware developed by companies like Apple, and to promote the adoption of broadband services for faster speed of content delivery. Yet these very conditions breed a sense of foreboding and concern among many stakeholders in the music industry who have witnessed a dramatic drop in physical music sales.

Technology has greatly improved musicians’ *access* to the marketplace but, to this point, measurements about the effect of these seismic changes on musicians’ ability to make a living have either been anecdotal or speculative. Even the most esteemed books about copyright in the digital age are largely based on theory, and lack qualitative data. FMC believes that this multi-method, cross-genre, musician-focused research is essential to understanding how changes in technology and the music landscape have actually affected US musicians. We hope it will not only educate the public about musicians as creators, but also inform the development of successful models of marketplace creativity in the future.

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