

The Sound of Money: Securing Copyright, Royalties, and Creative “Progress” in the Digital Music Revolution

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I.	INTRODUCTION	588
II.	U.S. COPYRIGHT LAW IN THE CONTEXT OF TECHNOLOGICAL AND MARKET CHANGE	591
A.	<i>The Existing Legal Framework</i>	591
1.	Constitutional and Theoretical Foundations of Copyright	592
2.	Strong Rights Granted to Composers and Recording Artists by Acts of Congress.....	594
3.	Licensing Versus Assignment for Royalties and Creative Control Rights	598
B.	<i>Revolution, Market Restructure, and Copyright Retention in the New Digital Music Industry</i>	601
1.	Self-Production.....	602
2.	Self-Publishing and Self-Distribution.....	603
3.	Self-Accounting and Royalty Collections	611
C.	<i>Access, Diversification, and the Rise of Niche Genres</i>	611

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D.	<i>Retention of Musical Work and Sound Recording Copyrights</i>	612
III.	STRONG COPYRIGHT LAWS ARE IMPERATIVE FOR “PROGRESS” IN THE DIGITAL AGE	616
A.	<i>Artist Empowerment Through Strong Copyrights</i>	617
1.	Greater Opportunities for Financial Rewards	617
2.	More Discretion Over the Artistic Integrity of Works.....	619
B.	<i>National Creative “Progress” Through Artist Empowerment</i>	620
C.	<i>Copyright Reforms in the New Digital Music Industry Are Unwarranted</i>	623
D.	<i>Enhancement of Transparency and Education</i>	628
IV.	LET IT BE: A SOUND POLICY FOR “PROGRESS”	630

I. INTRODUCTION

As part of his technology and innovation platform, Barack Obama broadly pledged to “update and reform” copyright laws in ways that strike a balance between promoting the public good and treating copyright owners fairly.¹ Sweeping legal reforms are advocated by popular critics and leading copyright scholars alike. Recognizing market paradigm shifts in the ways we produce, distribute, publish, and consume music, this Note argues that little change, if any, is necessary to achieve that beautiful balance. Much of the animosity toward our existing copyright framework stems from the unpopular tactics of the record industry, which tried to enforce copyright laws to sustain an increasingly outmoded system. What those calling for reform fail to notice, however, is that the digital music revolution is ushering in a monumental shift in copyright proprietorship that redefines the whole game: for the first time in history, musical artists can keep their copyrights. Consequently, as intellectual property becomes a more essential part of our national economy and infringement becomes easier,² it is in the best interests of both artists and the public to maintain

1. Organizing for America, Barack Obama: Connecting and Empowering All Americans Through Technology and Innovation, <http://obama.3cdn.net/780e0e91ccb6c6dbf6e6udymvin7.pdf> (“Barack Obama believes we need to update and reform our copyright and patent systems to promote civic discourse, innovation and investment while ensuring that intellectual property owners are fairly treated.”).

2. See e.g., *id.* (“Intellectual property is to the digital age what physical goods were to the industrial age.”); JESSICA LITMAN, DIGITAL COPYRIGHT 116 (2006); MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 1-2 (4th ed. 2005); Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 278 (2004). While parallel changes are similarly affecting print, movies, software, and other copyrightable works, this Note focuses on technology and copyright laws as they relate to the music industry. It is foreseeable that

and enhance the existing “strong” copyright system.

Compared to the costly production and distribution methods that characterized the age of tangible media (e.g., LPs, analog tapes, CDs, and DVDs), the advent of digitally compressed audio formats and online networks has opened superior channels for the proliferation of music. Wireless streams and downloads are now available anytime, anywhere, any way you want. This presents unlimited financial opportunities for copyright owners. Whether you buy that new single through the Rhapsody application on your BlackBerry, stream your personally tailored Pandora stations on your iPhone, hear the song synched to a video on YouTube, or download the entire album from Amazon.com to your desktop, copyright royalties will be raked in as you rock out.

So who will get the money? The past decade witnessed mass civil revolt against the old-guard record industry as consumers—especially those turning to online file sharing—felt that the high prices they were paying for CDs were lining the pockets of industry executives instead of the musicians they loved. Up until the turn of the century, record labels and music publishers added unparalleled value to music production, distribution, and royalty collection. An artist longing for international exposure, therefore, had little choice but to sign away his or her statutorily vested copyrights, if so “lucky” as to land a record deal. By acquiring artists’ copyrights through contractual assignment or “works made for hire,” middlemen corporations thrived off of phonorecord sales and licensing royalties for decades. That is all changing now.

The corporate oligopoly that reigned supreme in the age of tangible media is kneeling to a more efficient, dynamic, and democratic music industry run by composers, recording artists, managers, entrepreneurs, and consumers.³ This is because innovative technologies have set the stage for

artists in these other disciplines can gain similar benefits by retaining the copyrights over their original works and using flexible licensing solutions to turn profits and maintain as much or as little creative control over their original works as they like. By maintaining strong copyrights for all artists, we give them a broad range of incentives to release as many original works to the public as possible and, as argued here, advance the “Progress” of knowledge, culture, and civic discourse as envisioned by our nation’s founders.

3. See DAVID KUSEK & GERD LEONHARD, *THE FUTURE OF MUSIC: MANIFESTO FOR THE DIGITAL MUSIC REVOLUTION*, at x-xi (Susan Gedutis Lindsay ed., 2005).

Fans, artists, and all kinds of music communities *drive* the business, rather than *being driven* by corporate powers. . . . Right now, the music industry is viewed as being in great turmoil. Technology has brought powerful and disruptive changes to the ruling incumbents. The best-selling CD in the U.S. is a blank, recordable one. Profits at the big record labels have dwindled and the markets for recorded music have virtually collapsed in many other parts of the world. . . . A brave new world is waiting for those who can handle it—a world that very likely holds fantastic business opportunities for creative thinkers.

Id.

an inevitable shift in copyright proprietorship. With costs of production, publishing, marketing, and distribution being vaporized, industry middlemen no longer add necessary value to an artist's career. Additionally, the digital marketplace allows a larger number of artists and a wider spectrum of genres to reach consumers' ears. Despite the irreversible decline of tangible media sales, intangible digital formats and networks are fostering a freer marketplace, which creates lucrative opportunities for developing music that is specially targeted to the tastes of niche audiences. As a result, artists of all genres should no longer feel obliged to sign away their rights through standard record deals and publishing contracts; they can now use their copyrights to develop sustainable careers based on licensing royalties, touring, and merchandise sales.

For many artists, maintaining the sanctity and integrity of their original expressions is even more important than money. More artists will presumably create and disseminate original works if they have the peace of mind that they can bring infringement lawsuits against unlicensed, substantially similar derivative works that offend or degrade their originals. Because original works are arguably more valuable to a society's cultural progress than unauthorized derivative works, Congress and the courts should protect an artist's ability to fence off his original works from unlicensed trespassers (infringers). This may additionally benefit society by effectively encouraging those who would have otherwise made derivative works to create original works of their own.

In the digital age where artists have an unprecedented opportunity to retain their copyrights, maintaining strong legal protections with flexible licensing options will give artists more power to choose what they want—royalties and financial security, integrity and creative control, recognition and fame, or a combination thereof—in exchange for devoting themselves to the creation and dissemination of original works. Thus, strong copyright law, coupled with enhanced transparency and educated awareness of licensing options, is the best way to drive up national creative output. Such a legal and policy framework would lead to an artistic renaissance, fulfilling the constitutional call for “Progress of Science”—the advancement of knowledge, discourse, and culture.

Part II provides background information on the United States' characteristically strong copyright framework in the context of technological, economic, and popular developments that comprise the digital music revolution. It explores three exciting new ways music can be disseminated directly from copyright owners to consumers: (1) peer-to-peer file transfers (P2P), (2) online retail downloads, and (3) Webcasts through both “interactive” and “noninteractive” streams. Lastly, it discusses how these technologies and market dynamics bring about the new opportunity

for artists to keep their copyrights and how this will lead to the empowerment of more musicians and diverse genres.

Part III synthesizes the changing market structure, new opportunity for artists to keep their vested copyrights, and consequent power shift to set forth the argument in favor of maintaining strong copyright protections: because national creative “Progress” will be optimized through the natural empowerment of artists, there is no need to legislatively or judicially weaken our copyright laws. Prevalent counterarguments are outlined along with three suggested alterations to the existing copyright system: expanding compulsory license schemes, imposing levies, and expanding the fair use doctrine. Finally, this Note argues that such calls for drastic legal reforms should be scrapped in favor of a more sensible federal policy, such as promoting the practice of licensing through enhanced transparency and educational initiatives.

Part IV concludes that reforming our copyright laws would be premature and unwise without more forward-looking analyses, which at least take into account the inevitable historic shift in copyright proprietorship. Our existing legal framework is set to foster a more diverse and financially stable artistry that will maximize output of original works for the benefit of us all. Maintaining our strong copyright, therefore, would be the most sensible way to balance the interests of artists and the public good.

II. U.S. COPYRIGHT LAW IN THE CONTEXT OF TECHNOLOGICAL AND MARKET CHANGE

Copyright law in America is strung together by a web of constitutional authority, legislative acts embodying compromises between interest groups, and centuries of judicial interpretation. Powerful trade associations representing record labels and music publishers have, thus far, been able to enhance their business opportunities by successfully lobbying for strong copyright laws. But thanks to the digital music revolution, it is rather composers and recording artists who now stand to inherit the strong protections and incentives of our current legal framework.

A. *The Existing Legal Framework*

A copyright is a bundle of several intellectual property rights granted under law to protect an artist’s power to choose who can copy or use his original work.⁴ Copyright owners in the United States—who, up until now,

4. 17 U.S.C. §§ 102, 106; See LEAFFER, *supra* note 2, at 2-3 (“Although the term “copyright” highly descriptive in that sense, it is a misnomer in another. Today’s copyright goes much farther in protecting works against copying in the strict sense of the word. Much of what we protect in copyright law today, such as performance rights, display rights, and

have largely been publishers and record companies—enjoy strong legal protections. These protections include the following: exclusive rights to choose how the works will be reproduced, distributed, and digitally transmitted; exclusive rights to make and derive profits from adaptations (derivative works); exclusive rights to perform the works publicly; relatively long terms of protection; and favorable rules for litigating infringement.⁵ These laws are not as strong as those in Western European nations, like France, which grant artists inalienable moral rights (*droit moral*).⁶ But the protections in the United States have certainly grown stronger and longer over the decades.

1. Constitutional and Theoretical Foundations of Copyright

America is a country that values and incentivizes original creations that contribute to our national progress. Without positive legal protections in place, talented artists may feel disinclined to invest time and effort into creating new works or to release works they have already created to the public for fear of free riders, lack of remuneration or attribution, loss of creative control over their expressions, or degeneration of their originals by unauthorized derivative works.⁷

The ultimate source of our copyright laws is the United States

derivative works rights, are more akin to rights to *use* a work rather than to *copy* it.”).

5. See 17 U.S.C. §§ 106, 302, 303 (2006). To bring a suit for infringement, a copyright holder must show (1) ownership of valid copyright, (2) copying, and (3) improper appropriation of the copyrighted work without a license or authorization. See *Universal City Studios, Inc. v. Film Ventures Int'l, Inc.*, 543 F. Supp. 1134, 1140 (C.D. Cal. 1982). Copying is shown either through direct evidence or by proving there was access to the copyrighted work plus substantial similarity between it and the alleged copy. See *id.* Substantial similarity can be proven through either expert witnesses or by asking whether an average “ordinary observer” would recognize the alleged copy as being derived from the copyrighted work. See *id.* at 1140-41. Intent is not a requirement for showing copyright infringement. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180-81 (S.D.N.Y. 1976), *aff'd sub nom. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983) (holding that George Harrison’s *My Sweet Lord* infringed on a preexisting copyrighted song by the Chiffons, even though the apparent copying of the melodies occurred subconsciously).

6. See LEAFFER, *supra* note 2, at 3, 376 n.420-422, 377.

7. See generally LITMAN, *supra* note 2, at 15-21. The need to foster a bargain between society and its creative artists has been primarily justified by utilitarian, labor, and economic theories, though there are several other competing and supplementary explanations based on natural rights theory and other philosophies. See *id.* at 13; LEAFFER, *supra* note 2, at 17-25. See also, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993) (discussing natural right explanations of copyright law); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330-50 (1988) (advancing personality theory of copyright law); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (advocating the use of copyright laws to promote free speech and democracy). A full analysis of the justifications for having copyright laws is beyond the scope of this Note.

Constitution. Our revolutionary founders believed it important to preserve the British tradition of granting special rights to artists and inventors in order to incentivize creation and public dissemination of artistic works.⁸ “The Congress shall have Power . . . 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.”⁹ The utilitarian aim of promoting the “Progress of Science” generally means advancement of artistic knowledge, discourse, and cultural sophistication.¹⁰

Such language seems to imply that the primary objective of protecting artists with time-capped monopolies is to maximize the public’s ultimate access to more original creations. As applied to artistic works, Congress has instituted the copyright system: the public receives only restricted access to an artist’s work for a limited term of copyright, during which the artist may reap the fruits of his creation by exploiting a monopoly of exclusive rights over the work; when the copyright term expires, the work enters the public domain and the public receives unfettered access to it. This temporally limited monopoly is a necessary evil for balancing the need to incentivize artistic production of original works with the constitutional aim of advancing the public good through ultimate access to those enriching original works.¹¹

8. See LEAFFER, *supra* note 2, at 4-7 (concisely tracing copyright law from the Statute of Anne to the U.S. Constitution).

9. U.S. CONST. art. I, § 8, cls. 1, 8.

10. See Lydia Pallas Loren, *The Purpose of Copyright*, OPEN SPACES Q., Jan. 2000, available at <http://www.open-spaces.com/article-v2n1-loren.php> (“To fully appreciate this clause, one must understand ‘science’ in its eighteenth century meaning. At the time of the writing of the Constitution ‘science’ denoted, broadly, knowledge and learning. So the core purpose of copyright law, as expressly stated in the Constitution is: to promote the progress of knowledge and learning.”).

11. See Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 216 (2004).

Together, these premises have led most scholars to view copyright as mediating between the benefits flowing from the widespread dissemination of copyrighted works . . . and the need to provide authors with sufficient compensation to support the creation of their works. . . . The resulting tension between access and incentives has led most scholars to regard copyright as a necessary evil.

Id. At first, temporally limited monopolies may seem counterintuitive to free-market principles and antitrust laws, and a few economists have argued that intellectual property instead inhibits efficient “Progress.” See, e.g., MICHELLE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (2008) (arguing that the monopolies granted by intellectual property rights hinder rather than promote the competitive free-market regime that facilitates wealth and innovation). However, it is conceivable that at least some important works would never have been released to the public, let alone created, if this bargain was not in place to prevent free riders and second-generation innovators from undermining the creative and financial interests of artists. Exclusive intellectual property rights are therefore justified because they lead to the long-term procompetitive effects of incentivizing investment, creation, and dissemination of original works. See KENNETH L. PORT ET AL., *LICENSING INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 5-7 (2d ed.

2. Strong Rights Granted to Composers and Recording Artists by Acts of Congress

Beginning in 1790, Congress exercised its constitutional authority in enacting copyright statutes that promote the creation and dissemination of artistic works.¹² On the whole, these laws have been crafted increasingly in favor of copyright holders (as opposed to the public).

Under the basic federal law, a copyright protects an artist's *expression* of an *original* work of creative *authorship*.¹³ Musical works (including accompanying words) and sound recordings are two types of such works of authorship.¹⁴ While generally advised, registering with the United States Copyright Office is not a necessary step in copyrighting a work since an artist is automatically vested with a copyright as soon as an original work of authorship "fixed in any tangible medium of expression" is created.¹⁵

2005); Antitrust Guidelines for the Licensing of Intellectual Property, 34 I.L.M. 1115 §§ 2.0, 2.2, 3.1, 3.4.

12. The Acts which serve as the basis for our contemporary copyright laws are legislative codifications of over one hundred years of negotiations and compromise between copyright holders and other music industry players. See LITMAN, *supra* note 2, at 37-47, 51, 56-57 (detailing the history of the drafting and adoption process of U.S. copyright legislation in the past century, particularly how Congress has often deferred to privately negotiated deals between leaders and lobbyists of the record, publishing, broadcasting, and other interested industries). Unsurprisingly, almost 100 pages of exceptions and loopholes have been patch-worked into the law since the baseline Copyright Act of 1976. See *id.* at 14 n.1 (listing recent copyright legislation).

13. While ideas, facts, procedures, processes, systems, methods of operation, thoughts, algorithms, concepts, principles, discoveries, inventions, and trademarks cannot be copyrighted in and of themselves, see *Kern River Gas Transmission, Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990) (citing 17 U.S.C. § 102(b)), Congress codified the long-standing, judicially evolved rule that a copyright should protect fixed original expressions that contain any of these when it enacted copyright laws. See LEAFFER, *supra* note 2, at 80-81. Originality and creative authorship are fundamental elements in deciding whether an expression is copyrightable or not. *Id.* at 58. While these two terms are not defined in the Act, common law requires (1) independent creation and (2) a modest quantum of creativity. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 243 (1903); *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 59 (1884); *Baker v. Selden*, 101 U.S. 99, 102-103 (1880); *Atari Games Corp. v. Oman*, 888 F.2d 878, 882-4 (D.C. Cir. 1989); See also LEAFFER, *supra* note 2, at 59-61.

14. There are eight general categories of copyrightable works of authorship: literary, musical (including accompanying words), dramatic (including accompanying music), pantomime and choreographic, pictorial, graphic, sculptural, motion picture and audiovisual, sound recording, and architectural works. 17 U.S.C. § 102(a) (2006). See also Cydney A. Tune, *Music Licensing—from the Basics to the Outer Limits*, ENT. & SPORTS LAW, Fall 2003, at 1, 26.

15. 17 U.S.C. § 102(a) (2006). Registration, publication, and notice are no longer required to obtain a copyright. See LITMAN, *supra* note 2, at 15 (citing ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 4-9, 339-43, 383-97 (5th ed. 1999)). Nevertheless, it is generally advised to register with the Copyright Office since it is a prerequisite for statutory damages and attorney's fees in suits for infringement. See LEAFFER, *supra* note 2, at 280-281.

This generally means that a composer becomes a copyright owner over a fixed musical work¹⁶ (composition) by writing it down or having it recorded, while a recording artist becomes a copyright owner of a sound recording¹⁷ (but not the underlying musical composition) when he records a performance of the composition onto a phonorecord (e.g., a tape, CD, or hard drive).¹⁸ Each recorded song we hear therefore contains two separate copyright protections: a musical work copyright over the underlying composition and a separate sound recording copyright over a recorded performance of that composition.¹⁹

The owner of a musical work or sound recording copyright is vested with five exclusive rights over each of his protected works: reproduction (the right to make copies of the work); distribution (the right to sell, license, or give away the work); adaptation (the right to make derivatives of the work); public performance (the right to perform the work publicly); and digital audio transmission (the right to publicly perform a sound recording over digital networks).²⁰ Further, the Digital Millennium Copyright Act

16. A musical work copyright may include both the instrumental component of the work and any accompanying words. 17 U.S.C. § 102(a)(2) (2006).

17. 17 U.S.C. § 102(a)(7) (2006). Note that prior to the Sound Recording Copyright Act of 1971, there was no statutory protection for sound recordings under federal law. Pre-1972 sound recordings are still subject to state copyright laws and are not necessarily in the public domain. See LEAFFER, *supra* note 2, at 139-141.

18. The Copyright Act of 1976 (1976 Act) completely overruled the *White-Smith* doctrine, a strict-textualist approach to applying copyright law based on a 1908 case in which the Supreme Court held that a piano roll did not qualify for copyright protection because there must be a printed record readable to the naked eye in intelligible notation. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908). Today, sound recordings, computer programs, motion pictures, and other works embodied on objects that are incomprehensible without the use of a machine or device can all be copyrighted. It makes no difference if the work is written in words, numbers, notes, sounds, pictures, or other symbols, so long as it can be perceived either directly or by any machine or device existing now or developed in the future. 17 U.S.C. § 102(a) (2006); see *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982); LEAFFER, *supra* note 2, at 54-55.

19. See 17 U.S.C. § 102 (2006) (listing musical works and sound recordings as two separate copyrightable works of authorship).

20. See 17 U.S.C. § 106 (2006). Note that sound recordings earn a more limited copyright protection. The United States is one of the only countries in the world that does not have a copyright protection for public performance of sound recordings, thanks in large part to the strong lobbying powers of the terrestrial broadcasting companies. See LITMAN, *supra* note 2, at 44. A bill pending congressional approval seeks to amend Section 114 so it would not limit the performance right over sound recordings to digital broadcasts. Performance Rights Act, S. 379, 111th Cong. (2009); Performance Rights Act, H.R. 848, 111th Cong. (2009). This has sparked a bitter battle between the record and broadcasting industries. Compare Press Release, Recording Indus. Ass'n of Am., RIAA Applauds Introduction of New Performance Rights Legislation (Feb. 4, 2009), http://www.riaa.com/newsitem.php?news_month_filter=&news_year_filter=2009&resultpage=6&id=7BE7264B-5BC4-C823-777D-73D5B410805A, with Press Release, Nat'l Ass'n of Broadcasters, NAB Urges Congress to Oppose Record Label Bailout—50 State Broadcaster Associations Also Express Opposition (Feb. 4, 2009), <http://www.nab.org/>

(DMCA) added increased protection by imposing civil and criminal penalties on those who circumvent measures that control access to a work on a tangible medium.²¹ Because they can be assigned or licensed for consideration, these rights and protections are incentives for artists to produce original works that will advance knowledge and cultural sophistication.

These rights, however, are not entirely absolute. On the public's end of the copyright bargain, the law limits a copyright owner's five exclusive rights in several significant ways, including the following: a time cap,²² public domain,²³ compulsory license statutes,²⁴ the fair use doctrine,²⁵ the

documents/newsroom/pressRelease.asp?id=1726. A digital performance right for sound recordings, however, has existed since the late 1990s. The Digital Performance in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998, taken together, grant a digital performance right for sound recordings and create a licensing system for certain types of Webcast sound recordings. 17 U.S.C. § 106(6) (2006); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Digital Performance in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995). See Cydney A. Tune, *Webcaster Music Royalty Rates—in Flux and on the Rise*, CLIENT ALERT Vol. 1401 No. 4018 (June 15, 2007), available at <http://www.pillsburylaw.com/siteFiles/Publications/5EA3137178E2E2204487E5B973E75B47.pdf>. So when music is transmitted digitally, there is usually a performance right in both the underlying composition and the sound recording.

21. See 17 U.S.C. § 1204 (2006).

22. See 17 U.S.C. §§ 301-305 (2006).

23. See, e.g., RON SOBEL & DICK WEISSMAN, *MUSIC PUBLISHING: THE ROADMAP TO ROYALTIES* 147-48 (2008).

24. There are six compulsory licenses. See 17 U.S.C. § 111 (2006) (cable television license); *id.* § 112(e) (ephemeral recordings license); *id.* § 114 (digital performance right in sound recordings license); *id.* § 115 (mechanical license for making derivative “cover songs” so long as it does not change the basic melodies or fundamental nature of the song); *id.* § 118 (public broadcasting license); *id.* § 119 (general satellite retransmission license); *id.* § 122 (local to local satellite retransmission license). These statutes effectively take away the right of a copyright owner to say “no” to a prospective licensee. Any potential user is granted certain privileges to copyrighted material—like the right to perform or make derivatives of a work—without having to first obtain permission from the copyright owner so long as statutory formalities are followed and set royalties are paid. See, e.g., LITMAN, *supra* note 2, at 203. As of January 2006, compulsory license fees are set and readjusted once every five years by the Library of Congress's Copyright Royalty Board (CRB), which is comprised of three Copyright Royalty Judges who also hear cases concerning compulsory licensing disputes. See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (codified at 17 U.S.C. § 801 (2006)). See also Cydney A. Tune, *Licensing and Royalty Basics for “Broadcasting” Music over the Internet*, COMM. BROADCAST ADVISORY, 4 (Dec. 2006), available at <http://www.pillsburylaw.com/siteFiles/Publications/D283527A6557CBCA2E504BFB0E94E281.pdf>; *Copyright Royalty Board: Background*, <http://www.loc.gov/crb/background> (last visited Apr. 10, 2010). These fee rates, which were first set at two cents per piano roll by the Copyright Act of 1909, have been adjusted over the years by statutes and the CRB (or its predecessors). See LEAFFER, *supra* note 2, at 308-309; DON PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 88-89 (Free Press 6th ed. 2006). They are now set at the larger of (a) 9.1 cents or (b) \$1.75 per minute of playing time or a fraction thereof. *Id.* On October 1, 2008, the CRB additionally set rates for music downloads, ring tones, and other digital services for the first time. See *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 73

first sale doctrine,²⁶ the merger doctrine,²⁷ the Fairness in Music Licensing Act,²⁸ independent creation,²⁹ and anything outside the scope of an original work “fixed in any tangible medium of expression.”³⁰

Fed. Reg. 57,033 (Oct. 1, 2008) (codified at 37 C.F.R. pt. 385). See also Ben Sisario, *First Royalty Rates Set for Digital Music*, N.Y. TIMES, Oct. 2, 2008, at C8. The CRB’s October 2008 decision altered a similar deal struck between the recording industry, music publishers, and online music services. See Ed Christman, *Industry, Online Services Reach Royalty Deal*, BILLBOARD.BIZ, Sept. 23, 2008, http://www.billboard.biz/bbbiz/content_display/industry/e3i98078f6e2a02095d6a7c3bd7c952f8cd. Certain erroneous resolutions of material substantive law contained in the CRB’s decision, regarding adjustment of reasonable rates and terms of royalty payments for the making and distribution of musical work phonorecords, were later identified and corrected. Review of Copyright Royalty Judges Determination, 74 Fed. Reg. 4537 (Jan. 26, 2009).

25. 17 U.S.C. § 107 (2006) (defining fair use is a defense to an infringement claim depending on the following statutory factors: (1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount of the work used, and (4) the effect on the market for the work). See also SOBEL & WEISSMAN, *supra* note 23, at 149. Parodies often present strong cases for finding fair use. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that 2 Live Crew’s parody of Roy Orbison’s *Pretty Woman* may be considered fair use within the meaning of Section 107 despite its commercial nature).

26. 17 U.S.C. § 109 (2006); LEAFFER, *supra* note 2, at 319.

27. See LEAFFER, *supra* note 2, at 85-90. The merger doctrine provides that if an idea can be expressed in only one or a finite number of ways, the idea and expression merge, and all expressions should be rendered uncopyrightable. This doctrine can be traced back to the early case of *Baker v. Selden*, 101 U.S. 99 (1880) (denying copyright to a blank accounting book because of the close approximation between the useful idea and expressive explanation). The underlying logic is that, absent the merger doctrine, the copyright holder would effectively get a monopoly on the underlying idea, since no one else could develop an independent expression of the idea that would differ sufficiently from the copyrighted expression so as not to constitute infringement. See LEAFFER, *supra* note 2, at 86.

28. See 17 U.S.C. § 110 (2006) (exempting certain public places, like religious assemblies, places that use proceeds toward charity and not private financial gain, and certain smaller bars and restaurants from having to obtain licenses and pay royalties for performing musical works). See also SOBEL & WEISSMAN, *supra* note 23, at 151. It is unclear if this would apply to a new sound recording performance right if the pending legislation were to pass. See Performance Rights Act, *supra* note 20.

29. Independent creation is a defense to the “copying” element of an infringement claim. LEAFFER, *supra* note 2, at 59.

30. See 17 U.S.C. § 102(b). A principal example is the idea/expression dichotomy, which holds mere ideas are not copyrightable. See *id.* See also LITMAN, *supra* note 2, at 17-18. Copyrights have also been denied to words, phrases, names, titles, slogans, and slight variations of public domain musical works and business forms. See 37 C.F.R. § 202.1 (2010) (U.S. Copyright Office list of “[m]aterial not subject to copyright”). And, naturally, any expression which is not fixed in a lasting tangible medium will not enjoy any federal copyright protection. Fixation is sufficient if the work “can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device,” for more than a transitory duration. 17 U.S.C. §§ 101, 102. Some states, however, provide for copyright protection even if the work is unfixed. See, e.g., Cal. Civ. Code § 980(a); *Hemingway v. Random House, Inc.*, 23 N.Y.2d 341 (1968) (extending state copyright protection to the oral musings when it is clear the speaker intended to create a property interest in his oral work); See also LEAFFER, *supra* note 2, at 56-57.

3. Licensing Versus Assignment for Royalties and Creative Control Rights

The bundle of rights an artist acquires through an automatically vested copyright over her original work is incredibly flexible. The five exclusive rights can be divided into millions of large or small pieces and employed in three ways to derive the desired balance between financial rewards and creative control: assignment, licensing, or nothing at all. Theoretically, some artists may want to retain full exclusive rights over a composition, refuse to assign or license their work, and sue anyone who copies or uses their work. On the other extreme, artists who are motivated purely by recognition and the emotional benefits of having their music heard can share their works freely with everyone either through de gratis (royalty-free) licenses or by making it clear that they will not sue for infringement. Most artists, however, would presumably want either financial reward so they can support their lifestyle, creative control so they can protect the sanctity of their works, or some balance of the two. Artists should therefore choose between assignment, licensing, or a combination thereof for at least some of their vested rights.

Assignment entails a transfer of ownership over an exclusive right to another person. Up until now, artists have had little choice but to assign many of their rights. The high costs of traditional studio production, mass publicity, tangible media manufacturing, vast distribution networks, and brick-and-mortar retail meant that artists who aspired toward commercial success needed to enter into customary “work-made-for-hire” arrangements,³¹ or other contracts in which they assign most of their fundamental rights to large record labels³² and music publishers.³³ By contractually acquiring copyrights, music publishers and record labels enjoy the full protections, creative controls, and financial rewards that come with ownership of those rights. In exchange, they provide artists with business services, cross-industry connections, and royalty allowances.

31. A “work-made-for-hire” provides that the employer of the artist will be the copyright holder by contract. These copyrights carry a different expiration: 95 years after publication or 120 years from creation, whichever is shorter. 17 U.S.C. § 302 (2006).

32. In addition to covering necessary and expensive costs—including tangible format production, mass marketing, and physical distribution—large record companies were also crucial in providing artists with tens of thousands of dollars in recoupable advances on royalties to help pay for professional studio recording costs that could run up to several hundreds of thousands of dollars. See PASSMAN, *supra* note 24, at 88-89.

33. Publishing literally means making something available to the “public.” This practice implicates the distribution right of the copyright owner, which has traditionally been assigned to music publishing companies in return for their services. Publishers in the music industry make available, publicize, promote, and protect musical works as well as collect royalties from around the world for the use of their copyrights. See GEORGE HOWARD, MUSIC PUBLISHING 101, 3 (2005); PASSMAN, *supra* note 24, at 206-228.

Under such contracts, royalty allowances paid to musicians—especially sound recording artists—are highly diluted (typically, thirteen to sixteen percent of “net sales” for record deals and fifty percent of all income for music publishing deals).³⁴ While an initial advance on royalties may seem tempting, most artists hardly ever see a dime of royalty money because they do not sell enough records to recoup their advances—a bar that is typically set fairly high in record deals.³⁵ Even when they do meet sales quotas, artists must often wage legal battles just to collect royalty monies due to them.³⁶

Licensing, on the other hand, allows copyright holders to choose the rights a licensee may exploit without passing title. A copyright owner can choose to grant a license for one or all exclusive rights or grant more limited licenses based on geographic territories or other criteria. Each license can enumerate an array of terms, conditions, limitations, and royalty

34. See PASSMAN, *supra* note 24, at 86 (a 15 percent royalty allowance on a CD sold at a wholesale price of \$12.05 would yield \$1.81 for the recording artist, minus any special campaign-free goods); RUSSELL L. PARR, ROYALTY RATES FOR TRADEMARKS AND COPYRIGHTS 150 (3d ed. 2004) (“Andy Dodd, of Simply Red and Dire Straits manager Ed Bicknell described as a ‘myth’ suggestions that most recording artists themselves were making big sums on their royalties. They got less than 18 percent of the retail price of each record, he said.”). But the advent of digital network distribution should weaken the ability of corporate executives to cheat artists. See KUSEK & LEONHARD, *supra* note 3, at 126 (“Royalty accounting has long been the bane of artists, managers, and producers. Digital distribution is forcing the labels to move to a more transparent royalty accounting model, and this will lead to overall better compensation for artists.”).

35. PARR, *supra* note 34, at 134.

The typical music group is deeply in debt to its record label because the standard contract in the music business subtracts nearly all the money record companies advance to make and promote an album from royalties before the band sees a profit. The more money a group takes up front, the more money it owes its label and consequently, the more records it needs to sell before it gets a check. . . . Record executives say they generally lose money on about 85 percent of all acts contracted, losses that are offset by albums in their back catalogue and the remaining 15 percent of performers that hit the charts. A rule of thumb in the industry is that a band needs to sell between 400,000 to 500,000 records before it sees any royalties. . . .

Why do acts earn so little? The answer is that all recording costs and much of the promotional costs are charged against band royalties. Generally, the full price of making the album, touring, pitching the product to radio and half of the cost of videos, are siphoned off the band’s royalties from album sales until the band recoups the label’s advance. And when calculating band royalties, record companies make deductions from the album’s list price: 25 percent off for packaging costs and 15 percent off for promotional merchandise to retailers. Popular performers can negotiate better terms, but typically a band ends up making about \$1 on each CD.

Id.

36. See, e.g., *id.*, at 135, 141, 149 (recording artists Meat Loaf, The Kingsmen, B.J. Thomas, and The Shirelles obtained court orders against their respective recording companies for unpaid back royalties and licensing income fees).

arrangements as agreed upon in a licensing contract.³⁷ At a copyright owner's disposal is a broad spectrum of lucrative licensing solutions. For example, they can grant exclusive or nonexclusive licenses, including licenses for print, performance, electrical broadcasting, synchronization, videogram, sampling, musical product, and production of "canned music."³⁸ Moreover, businesses are increasingly paying synchronization license fees and public performance royalties to use music in their advertisements.³⁹ Licenses, therefore, can produce significant financial income for copyright owners.

Artists can also use licenses to flexibly pass off creative controls to licensees. Those who want to keep a tight leash on their original expressions can choose to decline licenses to those who may use their music in offensive or degrading ways. Others would gladly limit their own rights through creative licensing schemes that allow second-generation derivative artists to build upon their content with little or no compensation or legal risk. Lawrence Lessig's "Creative Commons" system,⁴⁰ for example, is a brilliant way for artists to limit their copyrights through four different licensing options (i.e., "Attribution," "Share Alike," "Non-Commercial," and "No Derivative Works").⁴¹ Another way to limit one's own vested rights is through a "copyleft" licensing scheme, which allows anyone to reproduce, adapt, or distribute the work so long as the same

37. Royalties may be arranged by actual rates, minimum rates, or flat fee payments, among others, on any agreeable basis. *See, e.g.*, GREGORY J. BATTERSBY & CHARLES W. GRIMES, LICENSING ROYALTY RATES 2 (Aspen Law & Business 2006) (2000). *See also* RUSSELL L. PARR, ROYALTY RATES FOR LICENSING INTELLECTUAL PROPERTY 35-51, 55, 124 (2007).

38. *See* Cydney A. Tune, *The Myriad World of Music Licenses*, 22 ENT. & SPORTS L. 5, 6-11 (2004). *See also* SOBEL & WEISSMAN, *supra* note 23, at 28-30.

39. *See, e.g.*, SOBEL & WEISSMAN, *supra* note 23, 136 (detailing how companies like Hallmark and Starbucks are using expensive music licenses to court customers to their products and services); PARR, *supra* note 34, at 15 ("A developing trend in recent years is the more creative use of copyrighted material to help 'brand' a product. For example, there has been an increased use of licensed music in radio and television commercials, at least partially supplanting the tradition [sic] practice of commissioning original music (the negative stigma musicians used to attach to such uses of their works is vanishing).").

40. *See* Creative Commons, <http://creativecommons.org/about/> (last visited Apr. 13, 2010).

Creative Commons is a nonprofit corporation dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright.

We provide free licenses and other legal tools to mark creative work with the freedom the creator wants it to carry, so others can share, remix, use commercially, or any combination thereof.

Id. (emphasis omitted).

41. Licenses - Creative Commons, <http://creativecommons.org/about/licenses/> (last visited Apr. 13, 2010).

freedoms are preserved in subsequent copies and modified adaptations.⁴² These solutions foster better transparency and public understanding of what uses are or are not acceptable, increase the administrative efficiency of the licensing process, and show how licensing can flexibly satisfy an artist's needs in exchange for the creation and dissemination of original works.

B. Revolution, Market Restructure, and Copyright Retention in the New Digital Music Industry

For years, Don Passman taught us everything we “[n]eed[ed] to [k]now [a]bout the [m]usic [b]usiness.”⁴³ As society moves beyond tangible media and into a decentralized, do-it-yourself digital marketplace, everything we thought we knew is changing. By constantly introducing more cost-effective technologies and services into the market, innovative entrepreneurs are driving us toward an entirely new music industry run by musicians and consumers through the Internet—the purest free market the world has ever seen.⁴⁴ These resulting shifts in market structure erode the various criticisms of the existing copyright framework and warrant fresh thinking about how it will affect artists and the public in today's world.

The digital format⁴⁵ was first introduced to consumers through CDs and digital audio tapes (DATs) in the early 1980s, kicking off a three-decade-long national transition from analog to digital.⁴⁶ Intangible digital file formats are now replacing CDs and DVDs as the most efficient way of acquiring high-quality music and causing an inevitable reformulation of the music industry. This Digital Music Revolution is not an overnight coup but

42. David M. Berry & Marcus McCallion, *Copyleft and copyright*, EYE MAGAZINE, 2005, <http://www.eyemagazine.com/opinion.php?id=117&oid=290> (last visited Apr. 13, 2010) (recounting use of copyleft licensing since the 1970s and citing recent examples, such as Linux and Wikipedia). Such blank-check licenses are most common in the software industry. See, e.g., What is Copyleft?, - GNU Project – Free Software Foundation (FSF), <http://www.gnu.org/copyleft/copyleft.html> (last visited Apr. 10, 2010).

43. PASSMAN, *supra* note 24.

44. See, e.g., LITMAN, *supra* note 2, at 19 (“Digital technology changed the marketplace.”); see also KUSEK & LEONHARD, *supra* note 3, at 7-8.

The music business is going through a massively disruptive sea change that shakes the very foundations of the long-serving cartels in the recorded music business. . .

When industries are forced to face extremely painful and sometimes counterintuitive changes, established companies often wither away, leaving room for more agile entrepreneurs.

Id.

45. Digital is the most versatile format for audio and video expressions ever known. It consists of recorded information encoded through algorithms consisting of “0” and “1” digits. The quality is second to none and it can be easily recorded, copied, transferred, and transformed. See KUSEK & LEONHARD, *supra* note 3, at 45.

46. *Id.* at 4.

a gradual industry transformation comprised of emancipating technologies, resulting market shifts, and public revolt against the outmoded tangible media system.⁴⁷ Production, reproduction, and distribution capabilities that were once accessible only through powerful record companies and publishers are now surprisingly affordable and at the disposal of artists themselves.

1. Self-Production

Gone are the days when artists needed massive advances on royalties from music companies in order to record their tracks professionally in expensive studios. A musician can now run a powerful digital recording studio for less than a thousand dollars in the comfort of his home.⁴⁸

Today's artists have access to an array of inexpensive yet quality hardware and software that allow them to record, mix, master, format, and save in MP3 and other formats.⁴⁹ All they need are their instruments, microphones, amplifiers, mixers, and recording modules or programs. Add any standard personal computer with broadband connection on top of that and—voilà!—a professional music studio plus digital publishing and marketing command center in one.

While expensive sound engineers and producers still offer skills that can add value to a sound recording's technical and commercial qualities, many artists have the talent to produce quality tracks on their own while

47. After all, it is in the American psyche to revolt against those who levy unjustified financial strains against our will. *See, e.g.*, John Perry Barlow, *The Next Economy of Ideas*, WIRED, Oct. 2000, at 240. (“What’s happening with global, peer-to-peer networking is not altogether different from what happened when the American colonists realized they were poorly served by the British Crown: The colonists were obliged to cast off that power and develop an economy better suited to their new environment.”)

48. *See* SOBEL & WEISSMAN, *supra* note 23, at 130.

This is digital, computer-based recording, and can readily be done in a home studio with consumer computer equipment. The negative impact on commercial studios has been significant, as many sophisticated recording projects can now be completed in home studios, and without any support from third-party recording budgets. . . . A single ‘producer’ can now assume the roles of composer, musician(s), engineer, and producer of the project.

Id.

49. *See, e.g.*, Sony Creative Software- ACID Pro Digital Audio Workstation and ACID Music Studio Loop-Based Music Creation Software, <http://www.sonycreativesoftware.com/products/acidfamily.asp> (offering home recording software at three levels of sophistication and price) (last visited Apr. 10, 2010); Pro Tools 8 Overview, <http://www.digidesign.com/index.cfm?langid=100&navid=507&itemid=35911&ref=pt8-hpb> (last visited Apr. 10, 2010); Recording & Computers – Sam Ash Music 1-800-4-SAMASH, http://www.samash.com/c/Recording-&-Computers_182425 (offering several categories of products) (last visited Apr. 10, 2010). Some, however, still prefer “warm” analog recording modules to the crisper sounds of digital hardware and computerized software. *See* Melena Riznik, *A Four-Track Guy in a Digital World*, N.Y. TIMES, Feb. 15, 2009, at AR23.

saving both money and creative control. One of the primary reasons for signing a record deal—high production costs—is thus no longer pertinent in today's world.

2. Self-Publishing and Self-Distribution

Intangible digital file formats, high-speed Internet, wireless mobile connections, music recognition sites, social networking programs, and intelligent recommendation technologies have contributed to the creation of a truly decentralized, interactive music community that can be run almost entirely by musicians, managers, and fans.⁵⁰

Instead of driving several miles to dig through CD racks at the local record store, consumers can now download the same music on intangible file formats through hundreds of online sources straight to their computers and mobile phones.⁵¹ While CDs have admittedly come down in price compared to other entertainment costs⁵²—and there may still be enough demand to keep milking them for profits⁵³—they are an increasingly inefficient way of distributing music. CD prices reflect manufacturing, packaging, shipping, retail, administrative, and overhead costs. Only established record companies had the means to invest such resources. It is not surprising, then, that artists earned only an eight- to twelve-percent royalty from their record labels.⁵⁴ Compare that to an artist in Seattle who can upload a dozen MP3s directly onto the Internet and transmit them to fans in Austin, Nashville, Los Angeles, and Milwaukee, within seconds and at almost zero cost. The fact that children are growing up connected to the Internet and downloading songs more than ever is a clear indication that the age of tangible media formats has just about run its course.⁵⁵

50. See KUSEK & LEONHARD, *supra* note 3, at 154, 156, 166.

51. *Id.* at 13-15, 34.

52. COMM. & STRATEGIC ANALYSIS DEP'T OF THE RECORDING INDUS. ASSOC. OF AM., RIAA, THE CD: A BETTER VALUE THAN EVER (2007) ("While many forms of entertainment have increased in price in both nominal and real costs, the cost of a CD has actually decreased in real terms, and is on an inflation-adjusted basis less expensive today than it has ever been."), available at <http://76.74.24.142/F3A24BF9-9711-7F8A-F1D3-1100C49D8418.pdf>.

53. Some retailers continue to sell only tangible music formats. See, e.g., Tower.com Music: Music, http://www.tower.com/surf/explore/nav_exp/nav_2_browse.cfm?div_id=2, (offering CDs, Cassette, Vinyl, VHS, DVD, Minidisc, DCD Audio, Audio, Laserdisc, DualDisc, DVD single, HD-DVD, and Video) (last visited Apr. 10, 2010).

54. KUSEK & LEONHARD, *supra* note 3, at 31-32; BATTERSBY & GRIMES, *supra* note 37, at 69.

55. Our grandparents had player pianos and gramophones; our parents had vinyl LPs, 8-tracks, and analog tapes; we were sold CDs; and our kids will not know what any of that is. See KUSEK & LEONHARD, *supra* note 3, at 146 ("Forrester Research analysts, for one, predict that physical media like CDs and DVDs will soon become obsolete as consumers multi-access entertainment through computers, cell phones, WiFi, PDAs, and other portable devices.").

In the new market structure, publishing, marketing, and distribution can be done simultaneously and directly by artists through three main categories of Internet-based avenues: P2P file sharing, online retail sales, and Webcasts. Rights to quid pro quo royalties for the artist's music will arise through retail, subscription fees, advertising dollars, or a combination thereof. While these powerful digital channels present new challenges, artists may hire a good manager, publicist, or public relations firm to help them effectively maximize their exposure to target consumer markets and collect royalties without ever signing away their copyrights.

a. *P2P File Sharing*

While it remains difficult to come up with a way to monetize file transferring as a source of copyright royalties, P2P networks present vast opportunities for artists to disseminate their songs to targeted fans at virtually no cost.

Digital technologies facilitate easy dissemination on a massive scale by enabling anyone with a computer to reproduce, publish, and distribute millions of works.⁵⁶ P2P digital networks, like Napster, LimeWire, iMesh, Audiogalaxy, Kazaa, Soulseek, Morpheus, DC++, and many others blossomed between file sharers primarily as a black market for the transmission of unlicensed copyrighted material in revolt against the obstinate record industry that is seen as trying to squeeze the tangible media age for its last drops of revenue.⁵⁷ Artists who are willing to forego licensing royalties to seek international exposure have already utilized P2P, torrent, and other file sharing channels to distribute their music for over a decade. Unfortunately, much of the reproduction and distribution of works that occurs through these sites is without the consent of copyright owners, and is, therefore, illegal infringement.⁵⁸

56. See *id.* at 4-5; Richard C. Chused, *Rewrite Copyright: Protecting Creativity and Social Utility in the Digital Age*, 38 *ISR. L. REV.* 80, 81 (2005) ("In advanced countries, millions of people have in their homes and offices the equivalent of what was considered a major publishing enterprise a couple of decades ago.").

57. See Robert J. Delchin, J.D., *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 *CARDOZO ARTS & ENT. L.J.* 343, 349-350 (2004) (describing how the development of the Internet contributed to constant copyright infringement like music file sharing). By the mid-1990s, the combination of the Internet, "ripping" software, and new digital audio formats, like MPEG and MP3 files, made it possible for savvy consumers to "rip" music off of their CD collections and transfer them online while downloading music from others. See *id.* at 385 (describing how file sharing works); KUSEK & LEONHARD, *supra* note 3, at 4-5, 144. On the receiving end, file sharers could listen to downloaded songs by plugging their computers into high-quality headphones or receivers. CD-R and DVD-R drives also allowed millions to burn downloaded music onto blank CDs and DVDs and play them in their cars. This "started to tear the very heart out of the control that the music industry had over its product." *Id.* at 5.

58. See Delchin, *supra* note 57, at 350, 385.

While the Recording Industry Association of America (RIAA)⁵⁹ continues to fight an unwinnable battle⁶⁰ against this resilient phenomenon, P2P communities⁶¹ are ripe to convert into excellent distribution channels for the legal transmission of music.⁶² Instead of trying to get millions of file sharers to comply with copyright laws, which some consider “misguided,”⁶³ let us ask: How can we make new legal alternatives as appealing as the illegal ones? Given a choice between a legal option and an illegal option of equal utility, law-abiding people would choose the former. A torrent site that draws advertisement revenue and in turn pays timely royalties to copyright owners would be one such legal P2P model.

While those who wish to reap royalties through P2P transmission await a new business model that can generate pools of money from file transfers, high growth in the areas of online retail downloading and Webcasting already shows promising legal alternatives to illegal file sharing.

b. *Online Retail Downloading*

As entrepreneurs struggle to legitimize and monetize P2P, burgeoning online retail stores offer copyright owners more familiar models for selling

59. The RIAA is the trade association representing about ninety percent of the U.S. music industry. RIAA - Who We Are, <http://www.riaa.com/aboutus.php> (last visited Apr. 10, 2010); Recording Industry Association of America- Company Profile from Hoover's, http://www.hoovers.com/riaa/--ID__110848--/free-co-profile.xhtml (last visited Apr. 10, 2010).

60. The RIAA apparently realized that mass litigation is proving uneconomical when it recently announced a strategic change in dealing with online infringement. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, available at <http://online.wsj.com/article/SB122966038836021137.html>; Nate Anderson, *Hypocrisy or necessity? RIAA continues filing lawsuits*, ARS TECHNICA, Mar. 9, 2009, <http://arstechnica.com/tech-policy/news/2009/03/hypocrisy-or-necessity-riaa-continue-s-filing-lawsuits.ars> (explaining that RIAA spokesman Jonathan Lamy said new suits are not being filed following the policy change announced in the summer of 2008, but litigation of pending cases will continue). For a more recent example, see, e.g., Andre Paine, *Avast Ye Hackers*, BILLBOARD, Feb. 28, 2009, at 9 (“The charges against the Pirate Bay stemmed from a March 2006 raid by police in Stockholm. Yet the service was up and running again within three days and has received support from the Scandinavian media.”).

61. P2P communities, such as “Napster, Aimster, Kazaa, Grokster, and their imitators allow computer users to pool and search huge libraries of digital files, select ones they want and download them in seconds.” Chused, *supra* note 56, at 81.

62. See KUSEK & LEONHARD, *supra* note 3, at 100-03, 124.

63. Xenia Jardin, *Congress Moves to Criminalize P2P*, WIRED, Mar. 26, 2004, <http://www.wired.com/entertainment/music/news/2004/03/62830> (“It’s unfortunate that the entertainment industry devotes so much energy to supporting punitive efforts at the federal and state level, instead of putting energy into licensing their content for P2P distribution so those same people could be turned into customers,” said Philip Corwin, an attorney with Butera and Andrews in Washington, D.C., who represents Kazaa distributor Sharman Networks.”).

licenses to units of music. Retail sites like iTunes, Amazon MP3, Amie Street, MP3.com, Rhapsody, Lala, and many others have created user-friendly shopping experiences that offer high-quality digital music downloads at much better prices and variety than brick-and-mortar CD retailers ever could.⁶⁴ And, thanks to consumer outcry, restrictive DRM protections⁶⁵ and the format wars between Sony, Apple, Real Networks, and Microsoft⁶⁶ appear to be coming to an end.⁶⁷ This would finally give consumers what they can expect in the new efficient marketplace: content that is more flexible and reasonably priced than what they were offered under the old tangible media retail system.

It should not come as a surprise that global CD sales continued to decline after 2000, while digital downloads increased.⁶⁸ Apple's online iTunes store surpassed Wal-Mart in early 2008 to become the nation's top music retailer⁶⁹ and Atlantic Records is now the top-selling label thanks in

64. See, e.g., Apple - iTunes - Everything you need to be entertained, <http://www.apple.com/itunes/> (last visited Apr. 10, 2010); Amazon.com MP3 Downloads: Free music, bestselling albums from \$7.99, bestselling songs from \$.99, <http://www.amazon.com/MP3-Music-Download/b?ie=UTF8&node=163856011> (last visited Apr. 10, 2010); Amie Street - Music Lives Here - Independent Music Download Website, <http://amiestreet.com/> (last visited Apr. 10, 2010); MP3 Music Downloads - Buy MP3 Music Online - Digital Music Downloads, www.MP3.com (last visited Apr. 10, 2010); Music, Downloads, Music Videos, Lyrics and Photos - Rhapsody, www.Rhapsody.com (last visited Apr. 10, 2010); Lala - Where music plays, www.lala.com (last visited Apr. 10, 2010).

65. See Bobbie Johnson, *Apple drops DRM copy protection from millions of iTunes songs*, THE GUARDIAN, Jan. 6, 2009, available at <http://www.guardian.co.uk/technology/2009/jan/06/apple-drops-itunes-copy-protection>.

DRM was originally designed to prevent downloaders from sharing files illegally, but it has become a divisive issue.

Customers can already download some unprotected files from iTunes, and from other retailers, but the news marks a significant shift for Apple. It has struggled to convince the record labels to agree to drop DRM for iTunes downloads in a power struggle over who controls the future of the music industry.

Id.

66. See KUSEK & LEONHARD, *supra* note 3, at 91-92.

67. Even if these corporate giants cannot agree on one universal format, Apple's move away from DRM shows that the day when consumers can play different digital formats on any digital device is approaching and is evidence of the democratizing effects of digital technology and the Internet's free market. See Ed Christman, *A Tipping Point for MP3s*, BILLBOARD.BIZ, Nov. 3, 2007, http://www.billboard.biz/bbbiz/content_display/industry/e3i6efb69eb2243cb842be35f0eab40082d.

68. See SOBEL & WEISSMAN, *supra* note 23, at 135 ("Sales of digital music are rising sharply, but they do not compensate for the decline of CDs, which have been the recording industry mainstay for two decades. . . . Clearly, digital music sales are having a significant, positive impact on traditional music industry business models."). See also *Album sales plunge, digital downloads up: Trend is troubling for struggling music industry as sales fall in all genres*, ASSOCIATED PRESS, Jan. 1, 2009, available at <http://www.msnbc.msn.com/id/28463074> [hereinafter *Album sales plunge*].

69. Eric Bangeman, *Apple passes Wal-Mart, now #1 music retailer in US*, ARS

part to the fact that its digital revenues exceeded its physical CD sales for the first time ever.⁷⁰ In this kind of digital market, artists can retain their copyrights and contract directly with online retail stores and others for the licensing of their music to consumers.

c. Interactive and Noninteractive Webcasting

Webcasting is the wave of the future.⁷¹ After deregulation and corporate acquisitions of local stations, FM radio is saturated with commercials and arguably homogenous playlists.⁷² As a result, consumers are increasingly turning to Webcasts⁷³ and podcasts⁷⁴ for the music they crave. Thanks to the proliferation of broadband, streaming Webcasters present fields of gold for music fans.⁷⁵ There is already a wide variety of

TECHNICA, Apr. 2, 2008, <http://arstechnica.com/apple/news/2008/04/apple-passes-wal-mart-now-1-music-retailer-in-us.ars>.

70. *Album sales plunge*, *supra* note 68.

71. “Webcasters” include both Internet startups and broadcasters that operate FCC-licensed radio stations who simultaneously stream (“simulcast”) their on-air-broadcasts over the internet. *See* Tune, *supra* note 14. *See also* Amy Miller, *Face the Music*, CORPORATE COUNSEL, Nov. 2008, at 88, 90 (“It’s no secret that the old ways of doing business in the music industry are dying. CD sales are plummeting. Online piracy and counterfeiting are robbing artists of income. Meanwhile, Internet radio is booming. About 60 million listeners tune in to an Internet station every month.”).

72. Terrestrial radio has been largely homogenized thanks to acquisitions of the majority of radio stations across the country by Clear Channel Communications and Infinity Broadcasting. *See* BEFORE THE MUSIC DIES, at 20:19-29:02 (BSide Entertainment 2006), available at <http://www.hulu.com/watch/62945/before-the-music-dies> (last visited Mar. 22, 2010). *See also* KUSEK & LEONHARD, *supra* note 3, at 60.

73. KUSEK & LEONHARD, *supra* note 3, at 102.

Radio used to be where the kids heard new songs, but today they largely feel that radio has become a monotonous top-40 loop, and that it has mutated into a giant advertising delivery machine. . . .

[s]o, the kids turn to the ‘Net, which they use for many hours every day as a ‘next-generation radio,’ digging for new music and finding their own treasures.

Id.; *see also* BEFORE THE MUSIC DIES, *supra* note 72.

74. “Podcasting” is an alternative way of listening to prerecorded and live content, derived from the words “broadcast” and “iPod.” This type of Web offering is different from streaming radio in that it can be syndicated, subscribed to, and downloaded automatically when new content is available from a personal computer to any mobile digital media player. *See, e.g.*, Podcasts from the IU Jacobs School of Music, <http://www.music.indiana.edu/iuusiclive/authorize/podcasts.shtml> (last visited Apr. 10, 2010); Music Podcasts, News Podcasts by KCRW and NPR – KCRW 89.9 FM, <http://www.kcrw.com/podcasts> (last visited Apr. 10, 2010).

75. At the time of this writing, the following include examples of prevalent Webcasters: Pandora Internet Radio, Slacker Radio, Lala, The Filter, Grooveshark, Last.fm, iLike, Charts.fm, Deezer, Musicoverly, Live 365, MySpace Music, AOL Internet Radio Network (including Winamp and Shoutcast), MusicMatch, Yahoo! Launch, Jango, MSN Radio, Radiopass, VirginRadio, NBC Radio, National Public Radio, Educational Media Foundation, and KillerOldies. *See also* 200 digital music startups from 2008, <http://musically.com/blog/2008/12/17/200-digital-music-startups-from-2008> (Dec. 17, 2008, 03:08).

Web-based and freeware interfaces, organized music databases, and playlist generators, with a range of interactivity levels⁷⁶ available for users. Some Web sites have recommendation features, which allow users to find other music that fans with similar tastes enjoy, while others acoustically match songs—using complex algorithms—similar to those that a user likes.⁷⁷ Google’s entry into the music market—through partnerships with MySpace, Lala, Imeem, and others—allows fans to instantly stream virtually any song off of the search engine.⁷⁸ Sites may also feature convenient links for fans to purchase tickets to an artist’s upcoming local concerts, read lyrics and biographies, and see pictures and videos.⁷⁹

User-friendly mobile phones now come integrated with digital media players which have the capability of streaming Webcasts from any remote location.⁸⁰ With the advent of 3G network capabilities, Webcasting is set to

76. Generally, “interactive” sites invite the listener to type in the name of a song she likes and hear unabated high-quality streams at no charge while noninteractive sites function more like radio stations with randomized playlists that are tailored to the listener’s tastes. See 17 U.S.C. § 114(j)(7) (2006) (defining “interactive service”); *Arista Records, Inc. v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir., 2009) (holding that Webcaster LAUNCHcast was not an interactive service since it did not provide copyrighted sound recordings on request or transmit a program specially created for the user within the meaning of 114(j)(7); the fact that the Webcaster’s playlists were uniquely created for each user did not render it an interactive service). Whether a site is deemed interactive determines if it must pay individually negotiated licensing fees for the digitally performed sound recording, since noninteractive sites may be either exempt from the copyright owner’s exclusive right in sound recordings or qualify for a compulsory license safe harbor under the DMCA. 17 U.S.C. § 114(d) (2006); *Tune*, *supra* note 20. Some Webcasters offer both interactive and noninteractive streams as well as downloads. See, e.g., Last.fm – Listen to free music with internet radio and the largest music catalogue online, www.Last.fm (last visited Apr. 10, 2010) (offering both noninteractive radio and interactive on-demand streams); Lala, *supra* note 64 (offering songs in both downloadable MP3 and interactive streaming versions). But “noninteractive components shall not be treated as part of an interactive service.” 17 U.S.C. § 114(j)(7) (2006).

77. See Fredrick Lardinius, *Four Approaches to Music Recommendations: Pandora, Mufin, Lala, and eMusic*, REALWRITEWEB, Jan. 26, 2009, http://www.readwriteweb.com/archives/music_recommendations_four_approaches.php.

78. See BBC, *Google Opens OneBox Music Service*, Oct. 29, 2009, <http://news.bbc.co.uk/2/hi/8331290.stm>. See also Google Enters Music Market with MySpace, Lala and Others, http://www.bnet.com/2448-14061_23-358460.html (Oct. 28, 2009, 21:07:01).

79. See, e.g., Similar artists to Mastodon, <http://www.last.fm/music/Mastodon/+similar> (last visited, Apr. 10, 2010) (heavy metal band page on Last.fm Web site notes that the band is on tour at the top of the page and features various useful tabs on left side, including tabs entitled “Events” (leads to a list of tour dates), “Tracks” (offers both free streams and purchasable downloads through Amazon.com), “Videos,” “Pictures,” “News,” “Biography,” and more).

80. See, e.g., Touch Phone - BlackBerry Storm 2 Touch Screen Phones, <http://worldwide.blackberry.com/blackberrystorm/> (last visited Apr. 10, 2010); Apple – iPhone – Mobile phone, iPod, and Internet device, <http://www.apple.com/iphone> (last visited Apr. 10, 2010). Many cellular phone service providers give their customers easy access to partner digital music services. See, e.g., Entertainment and Apps from Verizon

dominate the way we listen to music no matter where we go: all four of the largest American carriers offer mobile networking;⁸¹ cars come equipped for the new wireless digital signals;⁸² citywide WiFi, WiMAX, and LTE connections are becoming available;⁸³ and “white space” wireless broadband Internet access⁸⁴ and 4G networks⁸⁵ are on the horizon.

Royalty money may be generated either through subscription-based or advertisement-based models. Innovative sites like Lala offer a combination of interactive Webcasting and retail, allowing consumers to hear one full performance of a song for free plus the chance to download an MP3 or save an infinitely streamable Web version of the song (i.e., “Web song”) for a

Wireless - Music, http://products.vzw.com/index.aspx?id=music_vcast (last visited Apr. 10, 2010) (offering customers the opportunity to buy and download individual tracks or subscribe to get unlimited access to millions of songs on the Rhapsody catalogue straight through pre-loaded Rhapsody software on their Verizon mobile phones); AT&T – AT&T Mobile Music is your 1-click access to the ultimate music experience, <http://www.wireless.att.com/source/music/mobilemusic/?wtSlotClick=1-001O4S!CIRM01-1-9&rel=nofollow> (last visited Apr. 10, 2010) (offering customers itemized downloads and subscription services from Napster and eMusic).

81. See Mark Sullivan, *A Day in the Life of 3G*, PC WORLD, June 28, 2009.

82. Posting of Brian Cooley to Car Tech Blog, http://reviews.cnet.com/8301-13746_7-10199833-48.html (Mar. 29, 2009, 04:00 PDT) (“Connect a few dots, and you soon arrive at a future in which almost every service in a car--entertainment, navigation, communication--is cloud-based, and not dependent on computation or data that are captive in the vehicle. BMW has shown us something like that, Mercedes is pursuing the idea with its MyCommand prototype, and Blaupunkt is about to roll out the first Internet-streaming car stereos.”). Consumers can alternatively add WiFi to their cars for a small monthly charge. See, e.g., it’s what your car has been waiting for - Autonet Mobile, <http://www.autonetmobile.com/service/> (last visited Apr. 10, 2010) (offering a router and 3G compatible data service for as little as \$29 per month).

83. See, James Anderson, *Citywide Wi-Fi Service Months Away*, MINN. DAILY, Feb. 2, 2009, available at <http://www.mndaily.com/2009/02/02/citywide-wi-fi-service-months-away>; Tony Barboza & James S. Granelli, *L.A. Mayor Wants Citywide Wireless Access*, L.A. TIMES, Feb. 14, 2008, available at <http://articles.latimes.com/2007/feb/14/business/wi-wifi14>; Nancy Gohring, *Philadelphia Wi-Fi Network Saved*, NETWORK WORLD, June 17, 2008, <http://www.networkworld.com/news/2008/061708-philadelphia-wi-fi-network.html>; *Muniwireless updates list of cities and counties with large Wi-Fi networks*, MUNIWIRELESS, Mar. 28, 2009 (linking to PDF filer which lists cities and counties offering or planning to offer Wifi network and hotzones for public and government access).

84. See Eric Bangeman, *The White Spaces Coalition's Plans for Fast Wireless Broadband*, ARS TECHNICA, Apr. 17, 2007, <http://arstechnica.com/hardware/news/2007/04/white-space.ars>; Darlene Darcy, *Tech Companies Weigh in on 'White Spaces'*, DAYTON BUS. J., Feb. 9, 2009, available at <http://www.bizjournals.com/dayton/stories/2009/02/09/daily7.html>; Priya Ganapati, *FCC White Spaces Decision Kicks Off the Next Wireless Revolution*, WIRED.COM, Nov. 5, 2008, <http://blog.wired.com/gadgets/2008/11/fccs-decision-t.html>.

85. Stacey Higginbotham, *Countdown to 4G: Who's Doing What, When*, GIGAOM, Aug. 13, 2008, <http://gigaom.com/2008/08/13/countdown-to-4g-whos-doing-what-when>; Paul Kapustka, *Sprint WiMAX phone is here and it looks fabulous*, MUNIWIRELESS, Mar. 23, 2010, <http://www.muniwireless.com/2010/03/23/wimax-phone-is-here-and-looks-fabulous/> (analyzing Sprint’s first 4G phone through Clearwire’s WiMAX network).

low price. Advertisers are also beginning to move their efforts online as they notice the growing public interest in Webcasts.⁸⁶ Advertising dollars are helping legitimate Webcasters to pay royalties to both copyright holders and artists through SoundExchange.⁸⁷ Consumers may prefer to see and hear limited numbers of commercials in exchange for Webcasts personalized to their tastes at no expense. This mirrors terrestrial radio's advertisement-based model but, so far, at a more tolerable frequency of commercials.

The Copyright Royalty Board has set a schedule of compulsory license royalty rates for Webcasters based on size, commercial/noncommercial entity status, and user-playlist interactivity level.⁸⁸ While consumers are flocking to sites like Pandora, Slacker Radio, and Last.fm,⁸⁹ some argue that territoriality issues⁹⁰ and compulsory licensing rates are putting a damper on the profitability of these budding business models. Fortunately for Webcasters, SoundExchange has been rather flexible in cutting them some slack on royalty payments as they get

86. See, e.g., *Online Advertising Spending Will Keep Growing*, ASSOCIATED PRESS, Feb. 5, 2008, available at <http://www.msnbc.msn.com/id/23019048>.

87. SoundExchange is a spin-off enterprise from the RIAA and was congressionally appointed as the compulsory royalty-fee collection agency for the 2006–10 term. See Miller, *supra* note 71, at 90–91. SoundExchange recommends royalty rates to the CRB, administers the licenses for performances of digitally transmitted sound recordings, collects the royalties and pays them to over 6,000 sound recording copyright owners and performers. See *id.* See also SOUND EXCHANGE DRAFT ANNUAL REPORT FOR 2007—PROVIDED PURSUANT TO 37 C.F.R. § 370.5(D), at 4–5 (detailing the disbursement scheme of collected royalties under 17 U.S.C. § 114(g)(2)(A–D)), available at http://soundexchange.com/wp-content/uploads/2009/12/SX_Annual_Report-20071.pdf. After subtracting administration, dispute settlement, and license enforcement costs incurred from the royalties collected for a particular copyright, SoundExchange must pay out fifty percent to the sound recording copyright owner of the digitally transmitted/performed recording. *Id.*

88. Rates vary for commercial Webcasters, small commercial Webcasters, subscription service Webcasters, and noncommercial Webcasters (per performance rates versus per aggregate tuning hours rates). See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 73 Fed. Reg. 57,033 (Oct. 1, 2008) (to be codified at 37 C.F.R. pt. 385). Service Home - SoundExchange, <http://soundexchange.com/service-provider/service-home/> (last visited Apr. 10, 2010) (listing rates for licensing periods); Tune, *supra* note 20 (discussing how the size and nature of a Webcaster affect its royalty dues).

89. See, e.g., David Given, *A Modern Pandora's Box—Music, the Internet, and the Dilemma of Clearing Public Performance Rights*, 26 ENT. & SPORTS LAW. 1, 21 (2008) (“According to comScore, Pandora had 4.8 million unique U.S. visitors to its Web site, and 56 million minutes of online engagement by users, during the months of June and July 2008.”); Erick Schonfeld, *Last.FM Needs More Than A Redesign To Catch Up To Imeem*, TECHCRUNCH, Aug. 15, 2008, <http://www.techcrunch.com/2008/08/15/lastfm-needs-more-than-a-redesign-to-catch-up-to-imeem>.

90. See Given, *supra* note 89, at 21 (“Pandora’s online terms of use state that the service is still not operational outside the United States.”); Pandora Radio -Terms of Use, www.pandora.com/legal/ (last visited Apr. 10, 2010) (“Pandora can only be used if you are in the United States.”).

off the ground.⁹¹

3. Self-Accounting and Royalty Collections

Royalty tabulation and collections can now be done effectively without ever having to sign away copyrights to middlemen. While royalty accounting has typically been plagued with inaccuracies, easily traceable digital transmissions are improving the accounting of royalties for artists.⁹²

Tracking programs like the ones pioneered by MediaGuide, RoyaltyShare, YesNetworks, Big Champagne, and YaCast are allowing copyright owners to monitor digital performances on broadcast networks with ninety-nine percent accuracy.⁹³ Enterprises, like Performance Rights Organizations (PROs)—ASCAP, BMI, SESAC—and the Harry Fox Agency, are well prepared to serve composers in the enforcement of licenses and collection of royalties.⁹⁴ However, unlike in the past, empowered artists can assert their desire to retain their copyrights and instead offer to pay service fees for these agencies' efforts in bringing in the royalties.

C. Access, Diversification, and the Rise of Niche Genres

The democratization of the music market is exciting for both artists and audiences because “[h]aving more options will lead to more diversity, more niche markets, and more opportunities for artists, writers, and music

91. See Miller, *supra* note 71, at 90, 93 (“SoundExchange has negotiated deals so that some Webcasters can pay lower rates temporarily. . . . In August 2007, it worked out a deal with small commercial Webcasters earning less than \$1.25 million a year that lets them pay royalties of 10-12 percent of their revenue through 2010.”)

92. See SOBEL & WEISSMAN, *supra* note 23, at 135-136; KUSEK & LEONHARD, *supra* note 3, at 26, 133 (recognizing that “[N]ow, we can pay each songwriter for the actual performance of their song on any monitored network.” and how this more transparent accounting will increase the likelihood of accurate royalty payments to artists).

93. See, e.g., LITMAN, *supra* note 2, at 13. This is an incredibly more efficient ratio than those generally produced by the sample- and survey-based accounting methods utilized by PROs to track public performances of musical works. KUSEK & LEONHARD, *supra* note 3, at 26, 110. There are already companies that provide accounting services and other business solutions to help independent labels and artists face the challenges of digital distribution. See, e.g., RoyaltyShare, Inc., <https://www.royaltyshare.com/corp/company> (last visited Apr. 10, 2010).

94. See, e.g., PARR, *supra* note 34, at 136.

BMI® . . . announced The BMI Digital Licensing Center (DLC), the first totally digital music copyright licensing system for Internet sites. . . . The digital rights system is aimed at making it easier for small Internet site owners and managers to gain access to the performing rights to BMI’s repertoire, while allowing BMI to license many thousands of [I]nternet sites more cost effectively. . . .

Through the DLC, sites will be able to gain instant online access to public performance copyrights to BMI’s entire catalogue of more than three million musical works.

Id.

businesses.”⁹⁵ While record labels and radio stations traditionally provided technically and commercially superior music for society, their recent output has dulled society’s musical imagination with stale hits designed to sell based primarily on provocative images and lyrics.⁹⁶ Instead of the music driving the business, the business is driving the music. Fortunately, cost-slashing production, distribution, and networking technologies enable vastly expanded access to broader varieties of musical genres.

Wireless networks allow easy access to vast amounts of diverse music wherever and whenever consumers want. These networks also give rise to interactive communities of users; users who swap playlists, make personal recommendations, and generate grassroots enthusiasm for both mainstream and niche artists.⁹⁷ The traditional way of making deals in the music business is fading; artists that once had little chance of being discovered under the hit-generating machine of the almighty record industry can now get their material heard by marketing it directly through Internet sources. In contrast to the Top 40 loops of image-driven clichés that have been spoon-fed to us in recent years, these niche artists and genres will broaden our knowledge and appreciation of music’s infinite possibilities. Of course, teenagers will still hear about the next Justin Timberlake single on the E! Channel and download it for their playlist, but they just might be blown away by a singer-songwriter about whom only fifteen college kids in Athens, Georgia know. They might explore genres, such as Argentinean tango, Chinese pop, Delta blues, progressive metal, or eighteenth-century Baroque.

A potential downside of this trend toward cultural sophistication is market fragmentation; our nation may develop fewer popular icons and less cultural cohesion.⁹⁸ Who knows if such a decentralized marketplace can produce another Beatles or Michael Jackson to bring us together in mutual appreciation? Nevertheless, the social benefits of enhanced access to and understanding of the endless spectrum of musical creativity likely outweigh that speculative cost.

D. Retention of Musical Work and Sound Recording Copyrights

Artists have always been the main attraction of the music business, and people harbor intense personal emotions toward those whose music

95. KUSEK & LEONHARD, *supra* note 3, at 15.

96. See BEFORE THE MUSIC DIES, *supra* note 72.

97. KUSEK & LEONHARD, *supra* note 3, at 34 (“Mobile music players will connect to digital music services . . . to stream or download music content . . . [and] support interactivity between users, enabling playlist sharing and other community features.”).

98. See *id.* at 165 (“[T]he aggregate power of niche markets will exceed the importance of mass markets, and diversity will be the default setting.”).

they admire.⁹⁹ In that sense, artists already command quite a bit of power. But developing technologies and network channels are empowering artists with the flexibility to choose their own balance of financial rewards and creative controls by enabling them, for the first time in history, to retain and to license their musical work and sound recording copyrights.

Industry middlemen do not add nearly as much value to music production, marketing, distribution, accounting, and royalty collection as they once did.¹⁰⁰ With the reduction or elimination of many traditional transaction costs, their long-standing business models are becoming outdated as artists realize that music publishers¹⁰¹ and record companies¹⁰² are no longer critical for a successful career in today's music industry.¹⁰³

Now that vast exposure can largely be attained through digital networks, artists have more reason than ever before to retain their publishing and musical work copyrights. While music publishers have long-standing, cross-industry connections, tools for increasing public awareness, and proven methods of collecting royalties, it seems a bad bargain for today's composers to assign their exclusive rights to publishers in return for a fraction of the royalties. Musicians can write and publish their own music while reaping full licensing royalties from their retained

99. *Id.* at 21-22.

100. The industry is already consolidating to stay alive: "Major studios such as Viacom and Sony have revamped and downsized their licensing departments due to merger or consolidation." BATTERSBY & GRIMES, *supra* note 37, at 206. It is no stretch to forecast mergers between publishers and record labels. See KUSEK & LEONHARD, *supra* note 3, at 26 ("Ultimately, publishing will, by default, become inseparable from distribution. The tasks performed by what used to be 'record labels' will be morphed into the publishing business. . .").

101. Unlike the ailing record industry, the publishing business has been booming in recent years thanks to the new media of digital distribution. See SOBEL & WEISSMAN, *supra* note 23, 138-140 ("New media royalties generated from audio and visual streaming sites, [legal] download sites, cell phone ringtones and ringbacks, and ancillary wireless devices have become a significant new source of income for writers and publishers."). See also KUSEK & LEONHARD, *supra* note 3, at 24-25.

102. Record labels are trying to make up for their losses on record sales and stay relevant in the music industry by signing artists to so-called 360 deals, which give them a cut in artist touring, merchandise, and publishing. See Interview with Roger Goff, Partner, Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP (May 21, 2008) (on file with author) (noting that, with retail sales coming down, "record companies have had to flip the longstanding business model on its head. They used to use touring and merchandise sales as marketing tools for boosting CD sales. Now it is the other way around.").

103. See KUSEK & LEONHARD, *supra* note 3, at 109 ("Digital content networks now provide the opportunity and exposure for artists to drive their own careers, as musicians and artists, without being under the de-facto control of an international cartel"); LITMAN, *supra* note 2, at 19 ("It's a cliché that digital technology permits everyone to become a publisher. If you're a conventional publisher, though, that cliché doesn't sound so attractive. If you're a record company, the last thing you want is a world in which musicians and listeners can eliminate the middleman.").

copyrights.¹⁰⁴ Publicity and royalty collections through fee-based contracts seem more sensible and cost-effective in today's world.

Likewise, there is no longer a need to contract away sound recording copyrights. Artists who are offered a major record deal may be better off turning it down and going at it alone, considering the long-term tradeoffs. Why assign copyrights to record companies when artists could produce their own music at little cost, disseminate it to targeted circles of fans all over the world, and contract directly with PROs and other royalty collection agencies to retrieve their income?

Some artists will undoubtedly need help from managers, lawyers, and publicists.¹⁰⁵ Moreover, as streaming content upload sites, like YouTube, and social networking sites, like Facebook, become the most important channels of publicity, specialized independent labels, public relations firms, and boutique online marketing agencies may be more helpful than big record companies in dealing with the biggest problem in the new decentralized marketplace: maximizing exposure to the right target audiences.¹⁰⁶ All of these professionals and firms can be contracted for at service fees that are much less costly in the long run than the royalty percentages given by the labels. While assignment of copyrights still remains an option, it is no longer an unquestioned condition for commercial success; artists would be wise to choose licensing and service-

104. Don Passman recognizes that

[m]any writers [already] keep their own publishing. Examples are well-established writers who don't need a publisher because people are constantly begging them for songs (such as Diane Warren), and writer/artists who record their own works. In fact, if you're a writer/artist whose material doesn't lend itself to being recorded by others (such as rap, jazz, or heavy metal), then you should only part with your publishing if you need (or want) money up front. Otherwise, you can hire people relatively cheaply to do the administration. . . .

Passman, *supra* note 24. Thanks to digital tracking and accounting technologies discussed above, many more artists will be able to keep their publishing in-house without assigning away their copyrights.

105. PASSMAN, *supra* note 24, at 3 (Unfortunately, a "large number of artists, including major ones, have never learned such basics as how record royalties are computed, what a copyright is, how music publishing works, and a number of other things that directly affect their lives."). *But see* Posting of Linda to Beatblogging.org, <http://beatblogging.org/2009/05/12/internet-killed-the-video-star-a-decade-in-music-journalism/> (May 12, 2009, 14:50) ("In 1979, The Buggles declared that 'Video Killed the Radio Star.' In 2009, the latest music casualties seem to be the publicists, dead at the hands of social networking sites. . . . [I]ncreasingly, bands have learned a cheaper way to promote themselves: the Internet.").

106. *See* SOBEL & WEISSMAN, *supra* note 23, 142; BILLBOARD, *Maximum Exposure List*, Sept. 27, 2008 (enumerating the top 100 ways for musicians to get noticed, including desirable online and commercial synchronization licensing opportunities). Independent record labels are well positioned to evolve into leaders in digital niche marketing. *See* KUSEK & LEONHARD, *supra* note 3, at 111 ("More than ten thousand independent labels exist today, with many more on the way. . . . Most of the innovation in music has always come from the independent labels that were willing to take risks.").

fee-based contracts that allow them to keep ownership of both their compositions and recordings.

If a singer-songwriter records his own composition, he automatically owns two copyrights for that one song. Albums generally contain eight to fourteen compositions and an artist may produce between three and thirty albums in a professional lifetime. This may amount to roughly 60 to 1,000 copyrights that an artist can generate and keep over his entire life plus 70 years. For each of his copyrights, the artist can draw upon multiple sources of royalty revenue.¹⁰⁷

Perhaps the promising benefits of copyright retention can be better explained with an illustration. Instead of praying to sign a major record deal written in dense legalese,¹⁰⁸ an obscure jazz guitarist from Austin, Texas, named Rick Ryder, decides to retain his copyrights. From his personal computer, he uploads an album he just recorded in his basement studio onto several Webcasting and retail sites. Jazz lovers who are into similar guitarists, such as George Benson and Pat Metheny, will be directed to Rick's music through recommendation blogs and targeted radio stations. When one of his songs is played by fans in Idaho, Alabama, and New York, musical work performance and sound recording transmission royalties accumulate.

Rick can collect royalties for his mechanical license through agencies that already facilitate easy licensing for a small administrative fee without assigning away his exclusive rights to a publisher. By retaining his copyrights, Rick can derive *all* of the royalties from the mechanical licenses of his songs every time they are played during his lifetime. Moreover, his estate will continue earning all royalty income for seventy years after his passing.

107. Royalties will automatically be reaped by sound recording copyright holders through compulsory "mechanical" reproduction licenses and certain digital transmission licenses. See KUSEK & LEONHARD, *supra* note 3, at 25, 108; SOBEL & WEISSMAN, *supra* note 23, at 29. Musical work composers can derive "mechanical" royalties from the Harry Fox agency if their song is covered or used in a collective work. See PASSMAN, *supra* note 24, at 211-213. They may also obtain public performance royalties from "blanket" licenses, as collected from restaurants, supermarkets, football stadiums, malls, bars, concert stadiums, and terrestrial AM and FM radio stations by the three major performance rights organizations (PROs): ASCAP, BMI, and SESAC. See *id.* at 224-228. Many other noncompulsory "master use" and synchronization license royalties may be negotiated by the enterprising artist of today. See *supra* Section II.A.3.

108. For an explanation of the traditional record and publishing deals, see PASSMAN, *supra* note 24, at 12, 61-150, 191-272. Major artists are already recognizing the trend away from major labels. See, e.g., Jon Pareles, *David Bowie, 21st-Century Entrepreneur*, N.Y. TIMES, June 9, 2002, at AR30 ("I don't even know why I would want to be on a label in a few years, because I don't think it's going to work by labels and by distribution systems in the same way," [David Bowie] said. "The absolute transformation of everything that we ever thought about music will take place within 10 years, and nothing is going to be able to stop it.").

When it comes to Rick's exclusive digital transmission right over his sound recording, he will receive both the forty-five percent of all relevant royalties collected by SoundExchange for being the recording artist of that song *plus* the fifty percent that statutorily must go to the copyright owner.¹⁰⁹ Ninety-five percent of royalties rather than forty-five percent, on top of all the other royalties he is collecting, should make it so that he does not have to take on a second or third job to cover the bills while waiting to make it big, as "starving" artists typically had to do under the old system.

Talented artists, like Rick, stand to gain, not only unprecedented financial rewards by collecting the entire range of available royalties for their musical works and sound recordings, but also creative control benefits that will enable them to protect their original expressions to the extent they feel necessary in exchange for publicly distributing their works. Under publishing and record deals, artists usually had to abide by certain creative demands and timing requirements enumerated in their contracts. By retaining their copyrights instead of signing oppressive deals, artists can now create and record original works whenever and however they want.

Ultimately, the difference between yesterday's and today's music industry is that, thanks to cost-slashing, user-friendly technologies, artists now have leverage. Even if they decide to use the services of well-established labels and publishers, artists may be able to bargain for a reasonable service fee arrangement instead of an all-out assignment of copyright. By retaining and licensing their copyrights, artists will gain an unprecedented array of incentives to produce original works.

III. STRONG COPYRIGHT LAWS ARE IMPERATIVE FOR "PROGRESS" IN THE DIGITAL AGE

The digital music revolution presents a host of legal questions regarding how best to configure our copyright laws in order to optimize "Progress." Long-standing copyright protections, like the exclusive rights of public performance, derivative use, reproduction, and distribution were formulated at a time when digital media technologies were beyond imagination.¹¹⁰ These protections were expanded over the past century thanks largely to the efforts of record companies and music publishers. But with the changing realities in copyright proprietorship discussed above, these strong legal protections are poised to help empower artists as they begin retaining their copyrights. This natural empowerment of artists, in

109. See 17 U.S.C. § 114(g)(2)(A-D) (2006). See also Miller, *supra* note 71, at 88 (describing how SoundExchange General Counsel Michael Huppe is getting Internet radio stations to pay royalties to the artists they play and crusading to educate musicians about the money they might be owed from digital transmissions of their works).

110. See Chused, *supra* note 56, at 82.

turn, will incentivize the creation of more original works. Heightened output of creative original expressions that explore new possibilities of musical thought will be a strong basis for promoting the knowledge, discourse, and cultural sophistication envisioned by our founders.

While there is room for sensible alterations, such as solutions to the territoriality issues that must be addressed in coming years,¹¹¹ there is little need to expand limitations on copyrights. A national innovation policy that maintains strong copyright laws as they now exist, while enhancing the marketplace with transparency and education, will best fulfill our basic constitutional objective of national creative “Progress” in the digital age.

A. *Artist Empowerment Through Strong Copyrights*

As artists begin retaining their copyrights, they will come to enjoy the entire spectrum of financial and creative incentives our copyright laws have to offer. It is, therefore, in their best interests to keep the strong protections of the 1976 Act, DMCA, and other copyright laws intact and free from legislative or judicial curtailment.

Keeping copyrights strong for artists does not mean making them inalienable, as is the case in some Western European states.¹¹² Because licensing is a more attractive option than assignment in the digital age of music, guaranteeing the strongest possible copyright protections to artists ensures that they will have the freedom to license their works however they want—whether in ways that maximize their royalty income, protect their artistic integrity, or any way they feel comfortable—in exchange for releasing their works to the public. Giving copyright holders the broadest rights possible therefore accounts for the fact that there is more than one way in which artists are motivated to create and record music. Not all artists will charge exorbitant prices (like major record labels once did) for the dissemination of their works nor will they all put heavy restrictions on derivative uses of their original expressions. As they stand now, our strong copyright laws let owners decide how they will use their rights to achieve what they want in exchange for their original works. It is this freedom and flexibility that we must guard for artists.

1. Greater Opportunities for Financial Rewards

Strong copyright protections in the digital age of music will give artists the choice of how they want to be compensated for their works—a

111. See Given, *supra* note 89, at 19 (arguing that it is currently too difficult and too complicated to stream music into foreign jurisdictions). See also Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 410 (2008).

112. See LEAFFER, *supra* note 2, at 376.

big step forward from the times when labels dictated what miniscule royalties artists were to receive. While some might argue that the emotional rewards of public exposure and live performance are what many musicians value most,¹¹³ those naturally gifted artists who need financial security in their lives can finally start getting more appropriately compensated for their original works.

We do not know how many talented musicians forego a career in music because of the low standard of living that characterizes the profession. But the impoverished lives of musicians who never made it to stardom under the old system is surely a fatal disincentive to some talented would-be musicians who would rather not end up working two or three dead-end jobs in order to play the record-deal lottery. Our society will certainly miss out on many great works if these artists choose to pursue other, more stable professions.

Of course, due to the range of music already available on the Internet, getting noticed and raking in large revenues will not come easily. It may take months of persistent marketing and even professional help from experienced online publicists. But even if someone in Alaska or Rhode Island listens to a Webcast of one full song, both the musical work copyright holder and the sound recording copyright holder of that song will get paid various royalties.¹¹⁴

Realistically, most artists will never rise to the level of stardom and extreme wealth enjoyed by some of today's hit artists, but at least they may be able to secure more-comfortable lifestyles based in part on royalties from their creative outputs—even if just a few people listen to their music each week. With the advent of targeted online marketing, there is a good possibility that somewhere in the world, fans will be listening.

Keeping their copyrights not only means the possibility of multiple streams of royalty revenues for the rest of artists' lives, it means income for their estates up to seventy years after they pass away. Critics argue that this is a very long period that goes beyond the constitutional cap of a "limited time."¹¹⁵ But looking at it from the perspective of the artist, this could help pay medical expenses, fund college educations, and serve as a steady flow of money to a favorite charity. Creative financial instruments can also enable copyright owners to take lucrative risks with their royalties in order to leverage for debt and equity capital based on future income.¹¹⁶ All of this

113. *See generally* HANS ABBING, WHY ARE ARTISTS POOR?: THE EXCEPTIONAL ECONOMY OF THE ARTS (2004) (arguing that art is considered sacred by both professional artists and consumers, who are loath to think that their work is about commerce or commodity exchanges).

114. *See supra* note 107; *supra* Sec. II.A.3.

115. *See infra* note 125.

116. *See, e.g.,* PARR, *supra* note 34, at 143-145 (describing how creative Wall Street

should strike one as a potent incentive for many more artists to create socially valuable musical works and recordings. It is especially true for smaller artists, who would never have had a chance of signing with major labels, which take entrepreneurial risks and aggressively market their music.

Having strong copyright laws in place does not mean that every single artist would exercise each of their rights to the fullest extent. Some may choose to accept a smaller royalty payment or none at all.¹¹⁷ De gratis reproduction licensing would allow music to be downloaded for free and be heard by a broader population. This may be a good option for some startup artists because more people hearing their music means larger audiences and, consequently, increased revenues from shows, merchandise, and future albums.¹¹⁸ Others, however, may gladly welcome the prospect of collecting licensing royalties, and at least some may have needed such a financial incentive to make music in the first place. While some revenues may be precluded by limitations already carved out in the interest of the public's end of the copyright bargain,¹¹⁹ maintaining strong copyright laws can make the once-unfathomable idea of self-sufficient artists a reality.

Strong copyright laws will, therefore, maximize the flexibility of licensing, allowing artists of all different motivations to choose whether or not they want the full benefits of financial rewards for their original expressions.

2. More Discretion Over the Artistic Integrity of Works

For many artists, the integrity of their original expressions is far more important than commercial success or economic stability. To make sure all artists are comfortable with releasing their works to the public, it is

bankers have assisted artists like the Isley Brothers and Iron Maiden to securitize future royalties on their copyrights); About The Pullman Group, <http://www.pullmanbonds.com/about.htm> (last visited Apr. 10, 2010) (describing investment bank and specialty finance company which is best known for its pioneering securitization of entertainment and intellectual properties, most notably its structuring of bonds backed by the future royalties of David Bowie's music catalogue, as well as those of Motown Records, James Brown, the Isley Brothers, and Marvin Gaye).

117. See, e.g., Jennifer Netherby, *More bands embrace the option of giving away music*, REUTERS, Mar. 15, 2008, available at <http://www.reuters.com/article/idUSN1543936020080315> (comparing how bands like Radiohead, Nine Inch Nails, and the Charlatans UK utilize free music giveaways in their alternative business marketing strategies).

118. Jonathan Kim, *Artists Break With Industry on File Sharing*, WASH. POST, Mar. 1, 2005 (“[A]rtists opposing the industry's position said shutting down the major file-sharing services, which are used by tens of millions of people worldwide, would instead rob them of a chance to gain exposure and income . . . One musician, Jason Mraz, said half of the fans who pay to see him in concert heard about him through illegal downloading, according to the court filing.”).

119. See *supra* Sec. II.A.2 (listing the limitations on copyright owners).

imperative that our copyright laws place the full gamut of creative control in the hands of the original artist.

This is not to suggest that our copyright laws follow the path of inalienable moral rights as provided by the laws of some European nations.¹²⁰ But it does mean that we should allow artists to include in their licensing agreements as stringent a moral right or other creative restriction as they like. Without this possibility, it is reasonable to hypothesize that at least some artists would be reluctant to release their works for fear of warped derivative versions which artistically, politically, ethically, or morally corrupt their original expressions.

Artists and middlemen corporations have different interests. Because record labels and publishers are profit-driven entities that are inherently interested in protecting their business investments, they may not always license a copyrighted work the same way as that with which the artist would have been comfortable. In certain circumstances, hypothetically, the publisher or label will not permit an unlicensed derivative work to be sold without a license and royalty agreement; whereas, the artist would have. In another hypothetical situation, a label may view infringement litigation as too costly an endeavor while the artist would have been so offended by the derivative work that he would have pursued the lawsuit anyway. The new opportunity for artists to fully retain their vested exclusive rights over their own works changes everything by placing the decision to license derivative works in the artists' hands.

Many free-spirited artists will choose to limit their own exclusive adaptation right using Creative Commons, copyleft, or de gratis licensing. But at least some artists absolutely need to make sure their works are not used in objectionable ways, and that is certainly their prerogative. Those who are genuinely concerned about the integrity of their original works will want more creative control in order to feel comfortable releasing them. Other than a small number of existing First Amendment-based exceptions—such as parodies under the fair use doctrine—there is no reason to undermine the comfort of any artist in disseminating their works to the public. If an artist needs full creative control over the artistic integrity of his works to feel comfortable publishing those works, why not give it to him? Our laws would, therefore, best benefit artists if they allowed for the maximum amount of flexibility in artists' decisions to maintain creative rights over their original works.

B. National Creative “Progress” Through Artist Empowerment

Empowerment of artists through strong copyright protections with

120. See LEAFFER, *supra* note 2, at 376.

flexible licensing options should result in a more vibrant and diverse artistry which maximizes output of original works to the public.¹²¹ The increased distribution of original works will best advance the cultural knowledge and sophistication of our nation.

First, from a quantitative perspective, the nation stands to gain from an explosion of musical output from a self-sufficient artistic sector. By inheriting the strong copyright laws traditionally exploited by the old-guard corporations, artists who create more original works may be able to profit by licensing them in multiple ways.¹²² This can produce a steady source of income for artists and persuade more talented musicians to devote themselves to the music profession. Other artists, who are more concerned with the integrity of their works, would also be encouraged—by strong copyright protections that provide for stringent creative controls in licensing—to release more works. The more works distributed, the more “Progress” we will make toward knowledge, wisdom, and cultural sophistication.

One potential drawback of maximizing output of artistic expression is information overload. Some might question whether society would be better off limiting the number of artists in our national economy to those who are going to contribute the *optimal*, rather than the *maximum*, amount of quality works. Considering the subjective nature of art, this would be a terrible policy, as it is impossible to select a handful of the “best” artists instead of allowing anyone to try their hand at creating original expressions that at least some members of our society would enjoy. Not everyone will want to hear the most commercially and technically superior works; some may find genius in the strangest music. It makes the most sense, therefore, to give anyone who loves making music the chance to make a decent living by appealing to niche markets and then to let market forces decide what works are more valuable to society. The works that have negligible social value will fail in the marketplace and thus drive their authors to seek other professions. Chances are that most serious artists would find some niche market that considers their works valuable. Therefore, more niche musicians would rise to meet special tastes and benefit a greater portion of the public if we staunchly protected artists’ control over their financial and creative interests.

Second, from a qualitative perspective, copyrights rightly protect and promote *original* expressions over unoriginal ones. Original works are arguably preferable because they help society pioneer into uncharted territories of musical possibility. As each new work fences off an area in the infinite spectrum of musical expression with a wall of copyright

121. See KUSEK & LEONHARD, *supra* note 3, at 23, 109.

122. See *supra* Sec. III.A.1.

protection, artists must creatively explore new frontiers and develop works that expand our collective musical knowledge and imagination. In other words, safeguarding original works from unwanted derivative uses would effectively force more artists to focus on creating their own original works, instead of spending time substantially copying the expressions of others.

Without strong protections for originality, our imaginations would go stale and deprive us of our full potential for “Progress.” Large record companies have already contributed to such a tired state of musical culture by promoting works that closely resemble cliché songs that have proven commercially successful in the past. While some derivative and interpretative works admittedly add value to our cultural progress,¹²³ artists may fear releasing original works to the public because they resent degrading second generation uses of their original works. Direct licensing between the original artist and the licensee can strike the proper balance. Is it too much to ask that a band seek permission (license) prior to sampling or recording an altered version of a song? Definitely not. Second-generation users should realize that their product would be practically useless without the value of the original work and should have the decency to negotiate terms of a derivative use license with the original artist. As discussed in Section D below, the federal government can take meaningful steps to reduce the administrative costs and delays of licensing by facilitating enhanced licensing transparency and copyright education.

Additional reasons in favor of keeping the old copyright laws intact persist: over 200 years of copyright statutes and case law allow practitioners to deal with a familiar framework; businesses and licensing agencies would incur major transaction costs to change all of their processes and forms to correspond with major reform; and changing copyright laws now might undermine the contractual bargains that were struck, fairly or not, between record labels, music publishers, and musicians. Whether or not these difficulties would be outweighed by benefits of copyright reform, one thing is certain: there is a new, decentralized, and democratic music industry, and it is one that will be driven by musicians, fans, and forward-thinking entrepreneurs. Staying the course with our existing copyright laws is, thus, far preferable to assuming all of the risks and transaction costs of renovating a system that shows promise of natural improvement.

To reiterate, it is imperative that our copyright laws provide those artists with peace of mind that the full range of options for both collecting potential royalties from licensing and setting creative controls over their

123. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 22-25 (2004) (describing how Walt Disney built his Mickey Mouse empire largely through derivatives based on the original works of others).

original works remains in their hands. If we do not offer artists of diverse motivations flexibility to choose their own incentives, we may deprive ourselves of what could have been some of our most culturally treasured works. By maintaining strong copyright laws, we allow artists to choose what they want in return for the dissemination of their original works and therefore maximize artistic creation and dissemination. The resulting spike in gross national output of diverse and original works by financially stable artists would allow us to expand our musical horizons and meet our constitutional aim.

C. *Copyright Reforms in the New Digital Music Industry Are Unwarranted*

“The underlying structure of contemporary copyright law is broken—badly broken. It doesn’t work in this digital age.”¹²⁴ Critics and scholars have attacked the existing copyright framework from multiple angles. Among other things, they challenge the length of copyright terms,¹²⁵ complexity of the laws,¹²⁶ failure of the laws to account for the consumer’s interest,¹²⁷ and market inefficiencies caused by the stifling of second-

124. Chused, *supra* note 56, at 82.

125. See, e.g., LESSIG, *supra* note 123, at 134-135, 214-221. KUSEK & LEONHARD, *supra* note 3, at 45-50.

The term of copyright has been extended not less than twelve times in the past forty years . . .

In our view, this window would need to be adjusted to reflect the speed of society in general, of course, since a faster-moving world is likely to make faster use of entertainment content.

Id. LITMAN, *supra* note 2, at 23-24. *But see* SOBEL & WEISSMAN, *supra* note 23, at 144 (stating that, while there have been efforts by critics to challenge copyright law and the 1998 Sonny Bono extension, such efforts “have only gained the serious attention of a relatively small number of scholars and practitioners.”). While the current copyright term of life of the author plus seventy years may be argued up or down by any number of years, this Note argues that the longer the copyright lasts, the better. The longer works remain proprietary, the slower they will enter the public domain; the slower they enter the public domain, the more creative artists will have to be if they would rather not pay licensing royalties to make less original derivative works. Professor Lessig’s *Free Culture* may well have been titled “Free to be a Stale Culture” for its support of unlicensed derivative works that substantially copy others’ originals.

126. Professor Jessica Litman suggests that copyright laws are unsuitable for the basic infrastructure of our information policy in part because they are “longer, more specific, and harder to understand.” LITMAN, *supra* note 2, at 25, 57, 63. To the contrary, it can just as easily be argued that this complexity represents negotiations between interested parties that strike fine balances between interested parties. U.S. culture is treasured around the world and we are one of the leading producers of creative works. Our dynamically negotiated copyright laws may have something to do with that success.

127. *Id.* at 70 (“Most of [the 1976 Act] was drafted by the representatives of copyright-intensive businesses and institutions, who were chiefly concerned about their interaction with other copyright-intensive businesses and institutions.”). The public’s growing consciousness in the copyright debate is evident from the publicity garnered from the RIAA

generation innovation.¹²⁸ The common theme underlying these criticisms is the prevailing argument that existing copyright laws stifle creative progress because they are archaic and out of date with the modern world.¹²⁹ Expanding compulsory licensing schemes,¹³⁰ instituting levies,¹³¹ and

lawsuits and its influence at the negotiation table is likely to grow. Moreover, the public's interest will be greatly represented through their participation in the free market of the new digital marketplace, where they can pressure many artists to take a lax approach to licensing, royalties, and enforcement litigation.

128. Some argue that copyright control creates inefficiency toward cultural progress by stifling next-generation innovations that would add value on top of their works. *See* Mark Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 993, 1013-1023, 1073-1084 (1997) (suggesting extending blocking patents doctrine to copyright law); Mark Lemley & Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2003); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007) (arguing that fan fiction writers should not have to obtain derivative use licenses from copyright owners if they simply use attribution disclaimers). This Note argues, to the contrary, that strong copyrights make the music market more efficient because they allow the most flexible options for financial rewards and creative control, which can effectively be adjusted according to the values and needs of the artists, licensees, and consumers in the digital free market. *Contra* KUSEK & LEONHARD, *supra* note 3, at 48 (“Surely [it] does little to stimulate creativity, when the only works that can be legitimately copyrighted cannot be based in any way on any previously copyrighted work without permission. The natural process of creation just does not work this way—just ask Bob Dylan or the Beatles.”). The flaw in this reasoning is that many works often can and will be based on previously copyrighted works because the copyright owners either will be happy to or feel compelled by market forces to grant derivative use licenses.

129. *See, e.g.,* Antony Bruno, *The Billboard Q & A: Lawrence Lessig*, BILLBOARD, Feb. 14, 2009, at 19, which notes the basic condemnation of copyright law in the words of Professor Lessig:

The [copyright law] system doesn't make sense for the existing structure of technology. So let's sit down and find a system that would . . . actually create the kind of freedom that people should be able to agree is necessary, while on the other hand making sure artists get compensated when their work gets used.

See also Christian Engström, *Copyright Laws Threaten Our Online Freedom*, FIN. TIMES, July 7, 2009.

What we think of as our common cultural heritage is not ‘ours’ at all.

On MySpace and YouTube, creative people post audio and video remixes for others to enjoy, until they are replaced by take-down notices handed out by big film and record companies. Technology opens up possibilities; copyright law shuts them down. . . .

The [I]nternet is [sic] still in its infancy, but already we see fantastic things appearing as if by magic. Take Linux, the free computer operating system, or Wikipedia, the free encyclopedia. Witness the participatory culture of MySpace and YouTube, or the growth of the Pirate Bay, which makes the world's culture easily available to anybody with an [I]nternet connection. But where technology opens up new possibilities, our intellectual property laws do their best to restrict them. Linux is held back by patents, the rest of the examples by copyright.

Id.

130. Several scholars, practitioners, and critics have suggested a compulsory licensing system is necessary to twist the arms of obstinate copyright holders (namely record companies and music publishers) into embracing revolutionary new technologies. *See* KUSEK & LEONHARD, *supra* note 3, at 127-135; Chused, *supra* note 56. The administrative

broadening the fair use doctrine¹³² are three primary solutions critics have

efficiencies created by such a statutory scheme would fruitfully produce revenues for more copyright owners, especially those newer artists who may not have enough star power to be able to negotiate a good price for the licensed use of their works. But compulsory licenses come with significant costs to both artists and innovative licensees like Webcasters. First, they restrict the possibility of copyright holders to control fully their exclusive rights over the distribution and derivative use of their own works. Moreover, they might help some artists at the expense of others. "At first, Artists thought 'compulsory licenses are wonderful things.' But later figured out . . . 'If I am successful, it's not such a wonderful thing.'" Steven Hildebrandt, Vice President, CBS Radio, Remarks at the FCBA CLE panel on "The Copyright Act and Statutory Licensing: Yesterday, Today, and Tomorrow" (Jan. 26, 2008).. This sounds strikingly like wealth redistribution and encroaches on the process of natural selection that would have otherwise flowed from the free market forces of the Internet. More compulsory licensing is not the answer; it is useful only in cases of market failure and our current laws already contain enough compulsory and statutory licensing schemes. See *supra* note 24. The Internet-based free market will naturally respond to consumer demands. There is little need to compel a property owner to license away rights when natural profit incentives already make licensing an attractive option. If we keep taking away the artist's right to say "no" to a potential licensee in more circumstances, we get closer to the point where artists will not want to create and disseminate the work—an outcome contrary to our basic underlying constitutional objective.

131. The levy model seeks to impose tax-like fees into the prices of technology. Scholars who promote this alternative revenue collection model suggest that we need a more user-friendly and efficient copyright system that can compensate copyright holders while maximizing universal access to works. See, e.g., WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT, 199-265 (2004); Chused, *supra* note 56. Such levies would be imposed on reproduction and distribution devices, such as computers, CD and DVD burners, iPods, mobile phones with media players, P2P and torrent file sharing services (if possible), and/or Internet service providers (ISPs). See FISHER, *supra* note 131, at 199-265; Chused, *supra* note 56, at 103-107, 119; Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 35-42 (2003); Digital Media Project, *Alternative Compensation System Scenario*, <http://cyber.law.harvard.edu/media/scenario4> (last visited Apr. 10, 2010). The problem with levies is that they raise massive administrative problems, like deciding how much money to collect and how to divide the money collected to individual artists. They also run the risk of technology companies passing the extra levy costs onto consumers in the form of higher prices, whether the consumers use the music content or not. It will, therefore, adversely affect both the ability of consumers to purchase new technologies and the profit incentives entrepreneurs have for developing certain recording, storage, or transferring technologies that have a higher likelihood of getting hit with these proposed levies.

132. Broadening fair use seems to be the most popular answer for "fixing" copyright law. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 255-256 (2008); Marcy Rauer Wagman and Rachel Ellen Kopp, *The Digital Revolution is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 311-313 (2006); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525, 1687-1690 (2004); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587-589 (2004). Targeting the exclusive right of derivative use as too burdensome on potentially innovative users, such an expansion would essentially reduce the scope of the copyright owner's exclusive adaptation right and increase the availability of a fair use defense for those who make adaptations or use the original work to make new works. These arguments generally assume that second generation works are just as important to national creative "Progress" as original works of expression. See, e.g., LESSIG, *supra* note 132, at 91-94, 255 (arguing that

suggested to correct the above flaws they see with the existing copyright system.

Much of the modern criticism of our copyright laws stems from the record industry's aggressive defense of its dominant position in the increasingly outdated status quo.¹³³ With the Internet and new digital music formats came the reasonable sentiment that music can be distributed more efficiently than in prices charged for CDs, which were in practically the only available legal format being offered to the public at that time.¹³⁴ Further, confusing retail pricing strategies, such as loss leading, led consumers to infer that CD prices were being inflated by the same companies that were getting rich while musical artists remained

derivative works, such as "remixes" and "mash-ups," can be immensely creative); Madison, *supra* note 132, at 1682-1687 (arguing that creativity is inherently a communal phenomenon) As argued above, they are not, because they do not contribute to broadening our knowledge of music's infinite possibilities as effectively as pioneering original works do. Because many artists likely care about the sanctity of their creations, giving second-generation users the expanded fair use right to have free reign over an author's work would be damaging to the incentives intended by copyright laws—for artists to create original works. Additionally, there may certainly be many artists who would gladly limit their own rights through creative licensing schemes to allow some or all downstream users to add to or subtract from the original work at little to no compensation or legal risk. *See* Creative Commons, *supra* note 40. *See also* Berry & McCallion, *supra* note 42. But for others, who can and want to retain more control so that they make more income or preserve certain creative controls when licensing their copyrights, it would be unfair and unnecessary to take away that freedom of choice.

133. First, the RIAA lobbied Congress for the Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified at 17 U.S.C. §§ 109, 115 (2006)), which outlaws the rental of phone records. By 1998, their lobbying and negotiation efforts had led to the passage of the Digital Millennium Copyright Act (DMCA), Digital Millennium Copyright Act, Public L. 105-304 (1998) (codified at 17 U.S.C. §§ 101, 104, 114, 512, 1201-1204 (2006)), which gives copyright holders the right to obtain the identities of individual file sharers from ISPs, file takedown notices for potentially infringing material, and seek both civil and criminal sanctions against those who circumvent technological (digital rights management) measures. *See* Leaffer, *supra* note 2, at 391-402, 433-438.

134. With P2P networks offering fast and limitless channels to download high-fidelity music, the available legitimate alternatives for acquiring the same music seemed like a rip off, even considering the possible legal risks involved. *See* KUSEK & LEONHARD, *supra* note 3, at 29, 32. Aggravating this situation was the fact that the number of independent record retailer outlets declined from 7,000 to 2,000 between 1991 and 2006. SOBEL & WEISSMAN, *supra* note 23, at 136. As record companies and top-selling artists found more profitable distribution arrangements through larger retailers, such as Tower Records, Best Buy, and Wal-Mart, mom-and-pop record shops began to close, leaving niche genres nowhere to be found in many localities. (There was only so much shelf-space for the hits at the big retailers.) KUSEK & LEONHARD, *supra* note 3, at 86-88; *see also* Ethan Smith, *Born to Run—and Promote*, WALL ST. J., Jan. 16, 2009, at W6. Simultaneously frustrating to many music lovers was the homogenization of terrestrial radio. Clear Channel stations now reach over one third of the nation's population with their nationally standardized playlists. KUSEK & LEONHARD, *supra* note 3, at 60; Peter Lauria, *Clear Channel Plans Revamp*, N.Y. POST, Jan. 16, 2009, at 46.

penniless.¹³⁵ As the RIAA sued technology manufacturers, P2P ventures, like Napster, and dozens of young individual file-sharers for infringement of their copyright catalogues, the RIAA began losing the sympathy of the general public. The loss of respect for the record industry has unfortunately led to a loss of faith in our copyright laws.¹³⁶

Unfortunately, most calls for massive reform are based on the shortsighted presumption that the record and music publishing companies' dominance of the broader music industry will continue well into the digital age.¹³⁷ As argued above, the relevance of these industry players in the new digital market is doubtful. Thus, proving that any large scale reforms are necessary must involve more up-to-date and forward-looking understandings of how artists will be affected by copyright laws in the restructured marketplace.

Some argue that monopolies are inherently anticompetitive and that giving copyright owners increasingly extended monopolies over their copyrighted works is unfair to the public.¹³⁸ This view overestimates the role of copyright protection in the bigger picture of the marketplace. An expression's underlying ideas are not copyrightable. Therefore, under our existing laws, anyone can hear a copyrighted expression, appropriate all of its ideas, and come up with their own expression so long as it is not substantially similar to the first. Thus, in actuality, a copyright grants a monopoly fence around a very precise sliver of property: the expression as fixed on a tangible medium. There are millions of copyrighted expressions that compete with each other and drive prices down for the public. At the same time, there are infinitely more expressions which are yet to be expressed or fixed in a tangible medium; we are by no means dealing with monopolies over scarce resources. Giving artists the chance to retain

135. The record industry (as the argument goes) created a monopoly on the sale of music, which they used to create artificial scarcities and drive up prices, lobby for longer and stronger copyright laws, and pocket the vast majority of revenues from consumer purchases. Millions of file sharers used this inference as a primary justification for their mass infringement of copyrighted materials through decentralized P2P networks. SOBEL & WEISSMAN, *supra* note 23, at 135-136. *See also* KUSEK & LEONHARD, *supra* note 3, at 94, 108-109, 135-136 (explaining that the reason why people were taking music without paying for it was because they knew the artists were not going to see a dime of the \$16.99 CD they bought).

136. *See* KUSEK & LEONHARD, *supra* note 3, at 124 (“[W]hen people feel duped by the [labels], rightly so or not, they may feel equally free to ‘steal’ from them.”).

137. Most of these popular and scholarly critics of the current legal copyright framework base their claims on an understanding of how the music industry *used to* work as well as their own scornful sentiments toward the record industry's abuses and shortcomings. *See, e.g., id.* at 7 (neglecting to consider how the impact of our copyright laws will change when, as they recognize, record companies and publishers no longer serve as the gatekeepers and primary beneficiaries of the music industry).

138. *See* Boldrin & Levine, *supra* note 11.

monopolies over their expressive works, therefore, creates the possibility for creative control and financial rewards that some artists need to disseminate original works. This is procompetitive.

Finally, in response to those skeptics who believe that it is too late to encourage those accustomed to free P2P file sharing to start paying for their music again,¹³⁹ there will at least no longer be the argument¹⁴⁰ that their money will be going into the pockets of corporate executives and not the actual artists. If fans knew that they were directly hurting the livelihood and creative interests of their endeared artists in a world where only the artists get the royalties and creative controls of copyright protections, many should feel little justification in using the music without permission.¹⁴¹ Moreover, with so many free (advertisement-based) or inexpensive alternatives developing in digital retail and Webcasting,¹⁴² there will soon be no point in stealing music.

D. *Enhancement of Transparency and Education*

Entering the digital music age, we must recognize that markets are most efficient when information is readily available among all parties. Promotion of licensing through the enhancement of transparency and education, in addition to our strong and flexible copyright framework, would help to spread information between copyright holders and the public. This would be a more effective, innovative federal policy than rewriting copyright law.

There is a general lack of transparency and understanding when it comes to an artist's preferences as to his or her copyrights. As discussed above, some artists and copyright holders care only about exposure and recognition, while others are entirely concerned with the financial incentives. Many more are worried about the integrity of their original works being jeopardized by unlicensed derivatives. Some may want to retain all of their rights, while others will not care to litigate even the clearest case of infringement. The way a potential user of a work can find out what is permissible and what is not is by seeking a license directly from the copyright holder.

139. LITMAN, *supra* note 2, at 116 ("We can't rely on voluntary compliance because the great mass of mankind will not comply voluntarily with the current rules.")

140. See KUSEK & LEONHARD, *supra* note 3, at 94, 108-109, 135-136 (explaining that the reason why people felt justified taking music without paying for it was because they could feel the artists were not going to see a dime of the \$16.99 CD they bought).

141. With both more accurate royalty accounting methods and artists foregoing middlemen to retain and license their own copyrighted works, fans should feel less justified engaging in massive unauthorized file sharing when they realize that it directly hurts the artists whose music they love. See *supra* Secs. II.B.3., II. D.

142. See *supra* Sec. II.B.2.

Critics argue that licensing a work can take too long and get too expensive and rightfully so.¹⁴³ By encouraging artists to be transparent with their copyrights, we can strike a more fine-tuned balance between artists' real interests and the public good. As outlined above, there already are a number of innovative licensing tools to achieve that end (e.g., Creative Commons and copyleft). An artist can, for example, make it clear that fans are free to make derivative works without obtaining a special license and without fear of litigation. Others may waive their exclusive reproduction right and allow anyone to make as many copies as they like while forbidding derivative works. The bottom line is that artists and fans could benefit from a better communication of what rights and values are expected in exchange for certain uses of a work.

The Copyright Office could aid in fostering better communication and transparency by developing a user-friendly, searchable online licensing index that enumerates the rights artists have chosen to retain over their copyrighted works. This information may be collected simply by asking artists to disclose their licensing preferences through a series of checkboxes on its "PA" and "SR" registration forms.¹⁴⁴ The Copyright Office already has a card catalog index containing over 50 million copyright registration and renewal entries, an Assignment and Related Documents Index pertaining to the recordation of assignments, licenses, and other ownership interests in a copyright, and a central online catalog of records for copyrights registered since 1978.¹⁴⁵ Adding a Creative Commons-spirited index feature to their online catalog would facilitate far greater understanding between artists and potential users.¹⁴⁶ There may be some

143. See, e.g., Thomas Wilburn, *Online music distributors: song licensing a painful and expensive process*, ARS TECHNICA, Sept. 20, 2007, <http://arstechnica.com/old/content/2007/09/song-licensing-still-a-painful-and-expensive-say-online-music-distributors>. ars. Wilburn discuss the following:

Speaking for the Digital Media Association (DiMA), which represents Napster, Youtube, Rhapsody, iTunes, and a number of other services, Jonathan Potter told the panel audience that lawyers and licensing issues are enormous financial drags on his association's member companies. Finding the owners for the song publication rights for a given song is extremely difficult, he said, and the \$150,000 possible penalty for infringement makes any mistake extremely costly. . . . Tim Quirk, executive editor for Rhapsody, explain[ed] that his [sic] company has been forced to create an extensive database of creators, owners, and granted rights, because the licensing companies themselves do not track this information, or regard it as secret and won't share it. . . .

Id.

144. U.S. Copyright Office, Forms, <http://www.copyright.gov/forms/> (last visited Apr. 10, 2010).

145. U.S. Copyright Office, About the Catlog,, <http://www.copyright.gov/records/about.html> (last visited Apr. 10, 2010); See LEAFFER, *supra* note 2, at 272-273.

146. The Copyright Office does not need to go so far as opening an in-house license clearing department in the vein of what the Copyright Clearance Center already does for

limitations to implementing this scheme; it will be difficult to apply to old, unregistered copyrights as well as already registered orphan works. But going forward, displaying artists' basic licensing intentions and licensing contact information displayed on a centralized location on the Copyright Office's Web site should be a positive step toward reducing administrative costs and promoting licensing.

Closely related to enhancing transparency is the need to increase basic copyright education for children in middle schools, high schools, and colleges around the country. While the Copyright Office has basic information available for the public,¹⁴⁷ informational Web sites are not enough. Children in middle school and high school can be provided with a mandatory segment about copyright in a short seminar in their English, music, or arts classes.

Children should learn that in the modern music industry—where artists are more often going to be the copyright owners of their music—file sharing through illegal sites, which do not compensate rights holders, basically robs the artists whose music they are enjoying. Also, we must teach them that there are now excellent legal alternatives for listening to the same music while ensuring the artist is compensated. For example, if you play the new MGMT song by streaming it from a legitimate Webcaster instead of downloading a pirated version of the same quality off a torrent site, you will ensure royalty compensation for the band through advertising dollars or a small subscription fee. Without this basic education, illegal file sharing would likely continue unabated for no good reason. Moreover, people who are educated about copyright basics will better understand how they can obtain a license from the author for protected uses. Education is, therefore, a cornerstone in facilitating a legitimate digital music industry.

IV. LET IT BE: A SOUND POLICY FOR “PROGRESS”

New digital technologies are restructuring the market in which music is produced, published, marketed, distributed, and consumed. Almost everything that used to be done by publishers and record companies before the turn of the century can now be done either directly by the artist or for a reasonable service fee. As a result, artists can finally retain their

text-based works in order to promote more transparent licensing. Copyright Clearance Center, www.copyright.com (last visited Apr. 10, 2010); *See also* LEAFFER, *supra* note 2, at 492-493. All that is needed is a searchable index for potential licensees to find basic licensing terms and contact information to willing licensors.

147. *See, e.g.*, U.S. Copyright Office, Frequently Asked Questions about Copyright, <http://www.copyright.gov/help/faq/> (last visited Apr. 10, 2010); Library of Congress, Teachers, *Taking the Mystery Out of Copyright* (featuring interactive cartoons that convey basic copyright lessons designed for children), <http://www.loc.gov/teachers/copyrightmystery/> (last visited Apr. 10, 2010).

constitutionally mandated copyrights and control the way they license and derive royalties from their original works.

Considering the apparent abuses of artists and consumers by major record companies in yesterday's music industry, it is not surprising to see the many calls for drastic reforms, such as expanding compulsory licenses, imposing levies, or broadening the fair use doctrine, in the pages of academic journals or popular blogs. However, in light of the given changes in technology, market structure, and copyright proprietorship, the argument that we still need sweeping judicial or congressional overhaul of our existing laws is left without foundation, and critics must therefore bear a heightened burden of proving why our laws are problematic. Importantly, as we move ever toward this new democratic digital music industry, chipping away protections granted under our strong copyright laws based on lingering spite against an increasingly obsolete record industry may shortsightedly dilute artists' rights and hamper cultural growth.

There is no need to perform heart surgery on our copyright laws. The Obama administration, the Congress, and the courts should recognize that the best federal innovation policy for promoting our nation's musical knowledge and cultural sophistication is simple: (1) secure strong copyright laws for artists now so that they have the power to retain their copyrights and derive both financial rewards and creative control benefits; (2) give artists maximum freedom and flexibility to choose what they want in exchange for producing more original works for the benefit of us all; (3) promote licensing by facilitating transparent disclosure of how an artist is willing to license certain uses of a copyrighted work; and (4) educate Americans from an early age of the importance of copyright law, licensing, and growing abundance of legal options for music consumption. Moving ahead, let us remain confident that our existing strong copyright framework will incentivize artists in the digital marketplace to create and disseminate more diverse original works as we strive toward "Progress of the Sciences and useful arts."

