

## Better Mousetraps: Licensing, Access, and Innovation in the New Music Marketplace

Casey Rae-Hunter

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# Better Mousetraps: Licensing, Access, and Innovation in the New Music Marketplace

## I. INTRODUCTION

BEFORE THE TURN OF THE MILLENNIUM, RECORDED MUSIC WAS largely seen as a physical good, subject to the economic, legal, and behavioral standards of a marketplace built on a distribution chain from manufacturer to retailer to consumer.<sup>1</sup> All of this changed with the advent of file sharing platforms such as that exemplified by the original Napster, which appeared in 1999.<sup>2</sup> Seemingly overnight, the recorded music industry was confronted with seismic change that challenged long-held operating methodologies and business models.<sup>3</sup> In this new landscape for music, traditional industry gatekeepers would no longer be the sole arbiters of which artists reached listeners and how.<sup>4</sup> New intermediaries would eventually arise; however, many emerged from the same technologically networked environment that caused such uncertainty among music industry incumbents.<sup>5</sup>

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\* Casey Rae-Hunter is the Deputy Director for Future of Music Coalition, a national nonprofit organization for musicians, and an adjunct professor of music and technology at Georgetown University.

1. See Olufunmilayo B. Arewa, *YouTube, UGH, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431, 437–38 (2010) (explaining that the rise of digital music created a different cultural landscape than its non-digital predecessor); see also Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 270 (2002) (“Unlike traditional analog, print, or video, in which music, writings, and images respectively were captured and conveyed as physical representations of what was recorded, digital technology reproduces those same sights, sounds, and words as numbers.”).

2. See Anna Wilde Mathews, Martin Peers & Nick Wingfield, *Off-Key: The Music Industry Is Finally Online, But Few Listen*, WALL ST. J., May 7, 2002, at A1 (stating that in 1999, Napster became the new vehicle for transferring music online).

3. See Arewa, *supra* note 1, at 437 (“The impact of the digital era on cultural industry business models is generally recognized. . . . Events in the digital era have also highlighted the existence of varied cultural models of creation that may not fall easily within the assumptions of predigital era cultural industry businesses.”).

4. Damien Kulash, *The New Rock-Star Paradigm*, WALL ST. J., Dec. 17, 2010, at D1.

5. See *The Digital Music Aggregator List*, INDUSTRY INSIDER MUSIC SUMMIT, [http:// industryinsidermusic.com/2011/04/digital-music-aggregator-list.html](http://industryinsidermusic.com/2011/04/digital-music-aggregator-list.html) (last visited Sept. 24, 2011) (providing a comprehensive list of the online tools currently available to musicians and consumers).

The disruptions heralded by new digital technologies were seen by many in the music industry as a threat, and rightfully so.<sup>6</sup> The loss of control of the distribution pipeline meant that major labels would face tremendous difficulty in maintaining their dominance over the recorded music marketplace.<sup>7</sup> Other industry actors, such as music publishers, were in a somewhat more advantageous position, due to the unique contours of their businesses.<sup>8</sup> Yet they, too, grappled with the impact of technology-driven change.<sup>9</sup>

Innovation became the watchword of today's music business, as revenue streams and marketplace conditions for artists and the industry continue to evolve.<sup>10</sup> There is little doubt that this dynamic has upended traditional business models in the music sector and beyond, but it has also created the ability for musicians to directly engage with fans without having to navigate through a complex system of bottlenecks and gatekeepers.<sup>11</sup> A true digital utopia built on access, innovation, and compensation has yet to emerge, however. This is partly due to a paucity of vision on behalf of some industry stakeholders, but also a result of domestic and international laws' inability to keep pace with technological change.<sup>12</sup>

Establishing a legitimate digital music marketplace that rewards creators and other rights-holders while providing fans with the level of access and interoperability they have come to expect is the key challenge for those building a sustainable twenty-first century music ecosystem. Technology, with its promise of instant gratification and perpetual connectivity, is enticing, but compensation for

6. See Ethan Smith & Nick Wingfield, *In a Turnabout, Record Industry Releases MP3s*, WALL ST. J., Dec. 6, 2006, at B1 (explaining that the record industry was weary of digital music formats because they lack protections against endless illegal duplication); see also John Stossel, *Can the Music Biz Adapt to File Sharing?*, ABC NEWS, May 9, 2003, <http://abcnews.go.com/2020/GiveMeABreak/story?id=123714&page=1> (stating that new technology has routinely been seen as a threat to major players in all media industries).

7. Gary Graham, Bernard Burnes, Gerard J. Lewis & Janet Langer, *The Transformation of the Music Industry Supply Chain: A Major Label Perspective*, 24 INT'L J. OPERATIONS & PRODUCTION MGMT. 1087, 1090 (2004).

8. See Yinka Adegoke, *Music Publishing's Steady Cash Lures Investors*, REUTERS, Apr. 23, 2009, available at <http://www.reuters.com/article/2009/04/23/us-publishing-analysis-idUSTRE53M6TK20090423> (explaining how music publishers profit from the rights to their song catalogs).

9. See David Bernstein, *Songwriters Say Piracy Eats Into Their Pay*, N.Y. TIMES, Jan. 5, 2004, at C6 (discussing the unique challenges faced by songwriters whose incomes are directly tied to record sales).

10. See Kulash, *supra* note 4 (discussing change in artists' approach to earning revenue through their music); see also *Artist Revenue Streams*, FUTURE OF MUSIC COAL. (Sept. 6, 2011) <http://futureofmusic.org/article/research/artist-revenue-streams> (discussing change in the music industry landscape and the need for a comprehensive study to determine the predominant sources of artists' income).

11. Kulash, *supra* note 4; see also Jason Feinberg, *The Time Is Right for Direct-To-Fan Marketing of Music*, PBS, June 24, 2009, <http://www.pbs.org/mediashift/2009/06/the-time-is-right-for-direct-to-fan-marketing-of-music175.html> (explaining that direct-to-fan marketing works now because the traditional distribution model of physical goods has been outmoded).

12. Shih Ray Ku, *supra* note 1, at 264 (quoting COMM. ON INTELLECTUAL PROPERTY RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFO. AGE* (National Academy 2000)); see also Milo Yiannopoulos, *The Law Must Learn to Keep Up with Technology*, DAILY TELEGRAPH (Nov. 12, 2010), <http://www.telegraph.co.uk/technology/twitter/8128252/The-law-must-learn-to-keep-up-with-technology.html> (explaining that outdated laws and technological advances in the United Kingdom have led to absurd results like an individual obtaining a criminal record for posting a joking bomb threat on Twitter).

creators must remain at the forefront of any discussions regarding digital music business models.<sup>13</sup> Since compensation and payment mechanisms are subject to contracts, market value, and other factors (some experimental or technological in nature), finding the appropriate balance between artists' rights and innovation is not an easy task.<sup>14</sup> Still, it is a challenge that must be met on the road to a functional marketplace for creative commerce.

This article will examine historic and current tensions between protecting rights-holders and experimentation in digital business models.<sup>15</sup> It will also identify some of the more significant proposals for legal and policy reform, along with attempts at market-oriented solutions.<sup>16</sup> Lastly, this article will pinpoint broader technological and policy issues that will undoubtedly impact the entire music marketplace and shape the extent to which any novel business model will succeed.<sup>17</sup>

Part II will relate in greater detail as to how creators and rights-holders have been impacted by digital technologies, while illustrating where new opportunities for musicians and music entrepreneurs are circumscribed by marketplace and legal uncertainties.<sup>18</sup>

Part III will describe the current licensing environment for music's dual copyrights in modern music services and outline the pros and cons of policy prescriptions and market remedies to address inefficiencies.<sup>19</sup>

Part IV will indicate how telecommunications policy and intellectual property enforcement will have an outsized impact on the form and function of tomorrow's music industry and will present the core values necessary for an inclusive, competitive, and viable digital music marketplace.<sup>20</sup>

The conclusion will demonstrate why creators must be included in any discussions about the structure of the new music marketplace, and how many of the concerns about copyright and licensing may be best resolved by direct consultation with practitioners.<sup>21</sup>

13. See Jon Pareles, *A World of Megabeats and Megabytes*, N.Y. TIMES, Jan. 3, 2010, at AR1 (stating that the 2000s have allowed for audiences to be continually connected to unfathomable amounts of music while musicians now have to work harder for less money).

14. See Kristin Thomson & Jean Cook, *Artist Revenue Streams: A Multi-Method Research Project Examining Changes in Musicians' Sources of Income*, in BERKMAN CENTER FOR INTERNET & SOC'Y, RETHINKING MUSIC: A BRIEFING BOOK 87, 90–91 (2011), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking\\_Music\\_Artist\\_Revenue\\_Streams.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking_Music_Artist_Revenue_Streams.pdf) (discussing the various potential revenue streams for music artists).

15. See *infra* Parts II–III.

16. See *infra* Part III.B.

17. See *infra* Part IV.

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part V.

## II. DIGITAL TECHNOLOGY: HISTORY AND IMPACT

The transition to a largely digital platform for music has not been a smooth one for some stakeholders.<sup>22</sup> This includes major labels whose dependence on traditional broadcasting and brick-and-mortar retail outlets undermined their ability to fully comprehend and respond to the sea change in the consumptive behaviors of music fans.<sup>23</sup> Before Napster rewrote the rules for the entire industry, the major labels and publishers could count on widespread commercial radio airplay to generate strong CD sales in traditional retail outlets and big box stores.<sup>24</sup> While this arrangement worked for some, it also foreclosed most musicians from having any real shot at reaching potential audiences.<sup>25</sup> Independent and niche musicians faced tremendous barriers to entry to the marketplace, particularly following the widespread consolidation in radio station ownership facilitated by the 1996 Telecommunications Act.<sup>26</sup>

For more than a decade, rights-holders have been coping with this shift in a variety of ways.<sup>27</sup> On one front, they have utilized American copyright law to battle unauthorized file sharing, shutting down infringing peer-to-peer networks and suing individuals for uploading.<sup>28</sup> Meanwhile, emerging technology companies have established a variety of services for the lawful distribution and discovery of music.<sup>29</sup> These new digital business models are a product of open Internet structures,<sup>30</sup> which allow unprecedented innovation in the promotion, distribution, and access

22. See Arewa, *supra* note 1, at 438–39 (discussing difficulties encountered by music industry players in the face of digital music).

23. Robert LaRose et al., *Sharing or Piracy? An Exploration of Downloading Behavior*, J. COMPUTER-MEDIATED COMM. (2005), <http://jcmc.indiana.edu/vol11/issue1/larose.html> (illustrating the sea change by showing that in 2003, thirty-five million adults used the Internet to download music and fifty-two percent of those aged 18–29 downloaded music). Major labels responded to the behavior shift toward online music consumption with litigation against customers, and anti-downloading marketing campaigns. *Id.*

24. See JAMES N. DERTOUZOS, RADIO AIRPLAY AND THE RECORD INDUSTRY: AN ECONOMIC ANALYSIS 26–38 (2008), available at [www.nab.org/documents/resources/061008\\_Dertouzos\\_Ptax.pdf](http://www.nab.org/documents/resources/061008_Dertouzos_Ptax.pdf) (discussing the music industry's approach to radio airplay and music sales, and the effect of Napster).

25. See Alex Berenson & Matt Richtel, *Heart Breakers, Dream Makers; Despite Digital Upstarts, Big Labels Still Rule the Music Industry*, N.Y. TIMES, June 25, 2000, <http://www.nytimes.com/2000/06/25/business/heartbreakers-dream-makers-despite-digital-upstarts-big-labels-still-rulemusic.html?scp=2&sq=heartbreakers+dream+makers&st=cse&pagewanted=all> (discussing the dominance of record companies on artist access to fans prior to MP3 file sharing).

26. Christopher H. Sterling, *Transformation: The 1996 Act Reshapes Radio*, 58 FED. COMM. L.J. 593, 600 (2006); see also TELECOMMUNICATIONS ACT, S.652, 104th Cong. (1996) (enacted to promote competition and allow anyone to enter any communications business).

27. See *infra* notes 30–31.

28. See MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (holding that one who distributes devices promoting its use to infringe copyright is liable for subsequent infringements by third parties); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (holding that Napster could be held liable for contributory infringement and vicarious infringement of copyright); Sony BMG Music Entm't v. Tenenbaum, 672 F. Supp. 2d 217 (D. Mass. 2009) (finding the defendant liable for copyright infringement for downloading and distributing 30 songs).

29. See David Pogue, *Online Music, Unshackled*, N.Y. TIMES, July 28, 2011, at B1 (noting of Internet music service Spotify's emergence in the U.S.).

30. *Get Informed About the Open Internet*, FED. COMM'N'S COMM'N, <http://www.openInternet.gov/get-informed.html> (last visited Sept. 18, 2011).

of music and other media.<sup>31</sup> Currently, there are a plethora of platforms for lawful music discovery, including webcasters such as Pandora, online vendors such as iTunes and eMusic, and on-demand streaming services such as Rhapsody, Spotify, and MOG — all of which compensate rights-holders.<sup>32</sup> It is still in the early days for these new business models, and their viability will depend on consumer adoption and whether operational and licensing costs can be balanced against revenue generation.<sup>33</sup> Still, the fact that these services have emerged over the last ten years has been a promising development for creators, not to mention an indication of the value of the open Internet and the business potential facilitated by widespread broadband adoption.<sup>34</sup>

As these new digital services take shape, many musicians are embracing business models that allow greater independence and facilitate direct contact with their fans.<sup>35</sup> Independent labels and artists can now take advantage of the vast reach of the web, and many are successfully using blogs, YouTube, Facebook, Twitter, and other fan development tools to route around traditional marketing, public relations, and sales mechanisms.<sup>36</sup> The technological developments over the past ten years have made it possible for an increasing number of savvy and talented musicians to flourish outside of the major label system.<sup>37</sup> There is, of course, understandable skepticism that legitimate digital distribution structures can be monetized at a level that would replicate revenue streams generated by physical media.<sup>38</sup> Although monetization schemes for traditional industry stakeholders are certainly worthy of discussion, it is equally important to consider the independent and niche music artists for whom access to the marketplace has historically been restricted. For these musicians, composers, and songwriters, the Internet and related technologies have been enormously beneficial in terms of exposure and the ability to sell a range of goods — including but not limited to music — directly to fans.<sup>39</sup>

31. See *id.* (discussing how public and open Internet access has enabled anyone to communicate and innovate world-wide online).

32. See, e.g., Pogue, *supra* note 29.

33. Ben Sisario, *Investors Are Drawn Anew to Digital Music*, N.Y. TIMES, Mar. 1, 2011, at B1.

34. See Letter from Future of Music Coalition to U.S. House of Representatives Committee on Energy and Commerce (Feb. 14, 2011), available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Future%20of%20Music%20Letter.pdf>.

35. See Kulash, *supra* note 4 (detailing how musicians have used various business models to generate revenue: raising money directly from fans, licensing, and sponsorship deals).

36. See *id.* (reporting that music videos by OK Go have been viewed over 120 million times on YouTube as of December 2010).

37. See Jeff Leeds, *Nine Inch Nails Fashions Innovative Web Pricing Plan*, N.Y. TIMES, Mar. 4, 2008, at E (illustrating that bands like Nine Inch Nails and Radiohead are succeeding after having cut ties with their respective major record labels).

38. Michelle Castillo, *Just One More Year Until Digital Music Beats Physical CD Sales*, TECHLAND (Mar. 31, 2011), <http://techland.time.com/2011/03/31/just-one-more-year-until-digital-music-beats-physical-cd-sales/> (explaining that some analysts postulate that digital music will never outpace the revenue generated by CDs).

39. See Feinberg, *supra* note 11 (showing an example of how an unknown band and studio drummer used direct-to-fan online marketing techniques to launch an album and sell music downloads and services, respectively).



The mainstream recorded music industry was slow to understand and exploit the dynamics of the emerging digital music marketplace.<sup>40</sup> From early efforts to de-legitimize popular file formats such as the MP3 to pursuing technological restrictions and legal remedies, the major record labels undertook broad efforts to gain control of an unforeseen and unpredictable digital environment.<sup>41</sup> When it became clear that the advent of network technology made it practically impossible to return to the old system of scarcity and near-exclusive control of distribution,<sup>42</sup> the music industry sought to clarify or expand its rights within the emerging framework.<sup>43</sup> This, at least, had peripheral benefits for creators in the establishment of at least one new right and its attendant revenue stream.<sup>44</sup>

The Digital Performance Right in Sound Recordings Act of 1995<sup>45</sup> (DPRSRA) amended the Copyright Act to create a sixth exclusive right — the public performance right for “digital audio transmissions” of sound recordings.<sup>46</sup> Previously, sound recording copyright owners and performers did not have the right to receive public performance royalties for broadcasts of their work.<sup>47</sup> The DPRSRA gave them this right, albeit restricting it to digital broadcasts.<sup>48</sup> Still, as evidenced by the popularity of such digital broadcasting services as Pandora and the growth of satellite radio, the digital public performance right has become an increasingly important source of revenue for sound copyright owners and performers.<sup>49</sup>

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40. See Julie L. Ross, *A Generation of Racketeers? Eliminating Civil RICO Liability for Copyright Infringement*, 13 VAND. J. ENT. & TECH. L. 55, 68–69 (2010) (noting that the music industry was slow to develop business models that provided consumers with easy access to digital music).

41. See Stacey M. Lantagne, *The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack*, 18 HARV. J.L. & TECH. 269, 276 (2004) (exploring the music industry's two-pronged attack against music downloading; using the courts to shut down peer-to-peer networks and using moral arguments to encourage the continued purchase of records).

42. See Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise*, 55 UCLA L. REV. 143, 178 (2007) (noting the impact of Napster on the increased availability of music on the Internet).

43. See, e.g., H.R. 1506, 104th Cong. (1995) (enacted) (The Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA) amended the Copyright Act to create a public performance right for “digital audio transmissions” of sound recordings.).

44. See Todd E. Saucedo, *The Quandary of Being Interactive: The Impact of Arista Records v. Launch Media on the Viability of Webcasting Services*, 6 OKLA. J.L. & TECH. 50, 12 (2010) (recognizing how DPRSRA extended a limited public performance right to sound recordings, “allowing the owner of a copyright in a sound recording to receive royalty payments for the first time” (quoting Allison Kidd, *Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid*, 4 N.C. J.L. & TECH. 338, 348 (2003))).

45. H.R. 1506, 104th Cong. (1995) (enacted).

46. Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 273 (2007).

47. Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J.L. & TECH. 161, 172 (2005).

48. Camalla Kimbrough, *Launch Away: Second Circuit Rules That Degree of User Influence Determines Whether A Webcasting Service Must Obtain Individual Licenses for Performing Sound Recordings*, 12 TUL. J. TECH. & INTELL. PROP. 293, 295 (2009).

49. See RECORDING INDUS. ASS'N OF AM., 2010 YEAR-END SHIPMENT STATISTICS (2010), available at [http://www.riaa.com/keystatistics.php?content\\_selector=2008-2009-U.S-shipment-Numbers](http://www.riaa.com/keystatistics.php?content_selector=2008-2009-U.S-shipment-Numbers) (indicating a three percent growth of total U.S. digital music from 2009 to 2010).

In 1998, Congress made a controversial change to the Copyright Act that sought to strike a balance between protection for rights-holders, free speech, and technological innovation.<sup>50</sup> Among other things, the Digital Millennium Copyright Act<sup>51</sup> (DMCA) established content restrictions by criminalizing the act of circumventing Digital Rights Management technology (DRM) — a broadly-defined term for the technological “locks” through which rights-holders aimed to control the extent to which their works could be duplicated and distributed.<sup>52</sup> In addition to these pro-rights-holder provisions, the DMCA also provided a safe harbor for Internet service providers who take steps to block access to or remove infringing material on their sites when notified.<sup>53</sup> Exactly which sites and services qualify for safe harbor protections under the DMCA (and under what conditions) has been a matter of court scrutiny.<sup>54</sup>

Regardless of whether the DMCA has had its intended effect on the environment for rights-holders and innovators, it is clear that peer-to-peer (P2P) networks and other file sharing technologies have had an impact on traditional music business models.<sup>55</sup> Record labels and artists are now forced to “compete with free,” as P2P networks across the globe continue to facilitate the unauthorized exchange of files.<sup>56</sup> The initial industry response to the rapid growth of digital networks and P2P file sharing was to try to shut them down via copyright infringement lawsuits.<sup>57</sup> In a number of cases, the labels and movie studios were successful in doing so,<sup>58</sup> yet each shuttered network was quickly replaced, oftentimes with servers hosted in other countries with marginal interest in enforcing U.S. intellectual property laws.<sup>59</sup>

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50. See Astle, *supra* note 47, at 173 (discussing the increased operating difficulties for webcasters since the enactment of the Digital Millennium Copyright Act).

51. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998); see also 17 U.S.C. § 1201 (2006).

52. Christopher D. Kruger, *Passing the Global Test: DMCA §1201 as an International Model for Transitioning Copyright Law into the Digital Age*, 28 HOUS. J. INT'L L. 281, 283 (2006).

53. See Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 235 (2009) (explaining DMCA's safe harbors).

54. See Kuruvilla J. Olasa, Note, *Two Conflicting Approaches to § 512(c): Io v. Veoh and UMG v. Veoh*, 25 BERKELEY TECH. L.J. 347, 348, 367 (2010) (discussing how different courts have interpreted the question of whether Internet service providers qualify for a safe harbor).

55. See Arewa, *supra* note 1, at 433–36 (2010) (recognizing that “[t]he rise of Web 2.0 . . . poses significant challenges to predigital era cultural industry business models” and, that “[p]eer-to-peer (P2P) file sharing has negatively affected cultural industry business models”).

56. See Lawrence B. Solum, *The Future of Copyright*, 83 TEX. L. REV. 1137, 1146–47 (2005) (reviewing LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004)) (discussing the ease of access to P2P file sharing).

57. See John A. Fedock, Comment, *The RIAA v. The People: The Recording Industry's Misguided Attempt to Use the Legal System to Save Their Business Model*, 32 PEPP. L. REV. 947, 948–50 (2005) (discussing the prevalence of legal action by the music industry against alleged song-swappers).

58. See Christian E. Mammen, *File Sharing Is Dead! Long Live File Sharing! Recent Developments in the Law of Secondary Liability for Copyright Infringement*, 33 HASTINGS COMM. & ENT. L.J. 443, 455–56 (2011) (noting that the court found that the “mere creation of LimeWire was evidence of purposeful conduct to encourage infringement”).

59. Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 153 (2010); see also Tara Touloumis, Comment, *Buccaneers and Bucks from the Internet: Pirate Bay and the Entertainment Industry*, 19 SETON HALL J.



Additionally, record labels attempted to prevent consumers from uploading or sharing musical content by placing “locks” on music tracks through Digital Rights Management (DRM) technologies.<sup>60</sup> However, most of these attempts were soundly rejected in the marketplace.<sup>61</sup> Sony’s DRM on CDs was a high-profile fiasco,<sup>62</sup> and even Apple — which initially benefited from industry-imposed proprietary DRM on its iTunes offerings — has since done away with digital locks.<sup>63</sup>

Rights-holders have employed other tactics as well: suing alleged individual infringers, which has resulted in a number of out-of-court settlements and some high profile victories,<sup>64</sup> but also resulted in mounting legal costs and a negative reaction among consumers;<sup>65</sup> creating geographic restrictions for streaming media;<sup>66</sup> placing pressure on college campus IT administrators to deter infringement via the Higher Education Opportunity Act;<sup>67</sup> and protesting the development of technologies that would enable format or place-shifting of music content.<sup>68</sup> Most recently, rights-holders — including major and independent labels, as well as film and TV studios — have entered into an agreement with America’s

SPORTS & ENT. L. 253, 266 (2009) (recognizing that the Pirate Bay case involved an international contender and that “more than just a United States judgment is needed to stop” music piracy).

60. Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 982 (2006); see also Kruger, *supra* note 52, at 283 (explaining the barriers to copying or sharing digital music imposed by DRM).

61. Arewa, *supra* note 1, at 443–44. The recording industry eventually dropped DRM, reflecting on “an important step in recording industry accommodation of customer demand: customers did not like DRM, which was in any case fairly easy to circumvent.” *Id.*

62. Jeremy Stanley, Article, *Managing Digital Rights Management: Effectively Protecting Intellectual Property and Consumer Rights in the Wake of the Sony CD Copy Protection Scandal*. 4 I/S: J.L. & POL’Y FOR INFO. SOC’Y 157, 161 (2008).

63. See Nicola F. Sharpe & Olufunmilayo B. Arewa, *Is Apple Playing Fair? Navigating the iPod Fairplay DRM Controversy*, 5 NW. J. TECH. & INTELL. PROP. 332, 333 (2007) (describing Apple’s early dominance in the digital music marketplace and noting that when Apple was sued for antitrust violations, “this type of legal pressure [] likely played a role in Apple’s decision to sell digital music without DRM”).

64. See Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 666 (2005) (noting that “RIAA had filed three rounds of lawsuits targeting 382 individuals in 2003,” many of whom “had approached industry lawyers for settlements”); see also Jonathon Salzman, *Student Appeals Award of \$67,500*, BOSTON GLOBE, Aug. 26, 2010, at 1.

65. See Fedock, *supra* note 57, at 949 (noting individual RIAA lawsuits against a twelve-year-old honor student, several grandparents, a Yale professor, and a deceased woman who they claimed were sharing over 700 songs on the Internet).

66. See Martin Bryant, *Will Licensing Issues Spoil the Online Media Party Forever?*, THE NEXT WEB (July 16, 2011), <http://thenextweb.com/media/2011/07/16/will-licensing-issues-spoil-the-online-media-party-forever/> (highlighting how country-specific licensing obstructs the ability of Spotify, Pandora, AppleTV, Netflix, and Amazon to expand streaming services to new countries).

67. See Isaac Williamson, Comment, *Arrrgh! Rough Copyright Waters Ahead: Rights Holders’ Attempts to Shift the Copyright Policing Burden to Public Institutions*, 46 IDAHO L. REV. 307, 318 (2009) (discussing the 2008 Higher Education Opportunity Act’s requirement of institutions to address the unauthorized distribution of copyrighted material on campus networks); see also Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297, 298 (2003) (discussing responses by schools to threats from the recording industry).

68. See Tiffany A. Parcher, Comment, *The Fact and Fiction of Grokster and Sony: Using Factual Comparisons to Uncover the Legal Rule*, 54 UCLA L. REV. 509, 543–45 (2006) (exploring the problems presented to copyright holders, especially the National Football League, by place-shifting devices that allow users to watch content downloaded at their homes or on portable devices away from the home).

largest Internet Service Providers (ISPs) to enact a Copyright Alert System (CAS),<sup>69</sup> which aims to educate customers about infringement through a series of “graduated response” mechanisms, including letters, site redirects, and even bandwidth reductions.<sup>70</sup> Although this accord was achieved outside of the legislative process, it has the endorsement of high-ranking members of the Obama administration.<sup>71</sup>

While it is clear that peer-to-peer technology and other mechanisms for the unauthorized distribution of content have negatively impacted industry business models,<sup>72</sup> it is difficult to know how effective any deterrent measures have been.<sup>73</sup> First, there are concerns that data often presented by major rights-holders may be flawed.<sup>74</sup> In April 2010, the Government Accountability Office (GAO) released its report “Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods,”<sup>75</sup> which questioned the metrics and methodology the government commonly uses to describe the extent of the file sharing problem.<sup>76</sup> The GAO investigation found that reported damages to the American economy “cannot be substantiated or traced back to an underlying data source or methodology.”<sup>77</sup> Second, consumers and creators alike are embracing licensed platforms for music access and discovery, including satellite radio, digital subscription services, Internet radio, licensed video sites, and digital download stores.<sup>78</sup> Increasingly, the public is displaying a willingness to adopt legitimate services, which reinforces the critical notion that the combination of technical innovation, access to the underlying delivery mechanisms, and reasonable licensing

69. Ethan Smith & Geoffrey A. Fowler, *Ganging Up on Internet Pirates: Hollywood, Telecom Providers Unite to Target Those Who Share Copyrighted Films, Music*, WALL ST. J., July 8, 2011, <http://online.wsj.com/article/SB10001424052702303365804576432270822271148.html>.

70. *Memorandum of Understanding*, CTR. FOR COPYRIGHT INFO. (July 6, 2011), available at <http://kluwercopyrightblog.com/2011/08/22/us-memorandum-of-understanding-on-fight-against-online-piracy/>.

71. See Victoria Espinel, *Working Together to Stop Internet Piracy*, THE WHITE HOUSE BLOG (July 7, 2011, 12:15 PM), <http://www.whitehouse.gov/blog/2011/07/07/working-together-stop-Internet-piracy> (endorsement of the agreement reached between ISPs and entertainment companies by the U.S. Intellectual Property Enforcement Coordinator).

72. Arewa, *supra* note 1, at 433, 436.

73. See Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565 (2009) (discussing the limited deterrent effect lawsuits and education campaigns have had on piracy).

74. See, e.g., Tim Lee, *Texas-Size Sophistry*, THE TECH. LIBERATION FRONT (Oct. 1, 2006), <http://techliberation.com/2006/10/01/texas-size-sophistry/> (discussing methodologies used by stakeholders to inflate alleged costs of piracy including counting every illegal download as a lost sale).

75. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS (2010).

76. *Id.*

77. *Id.* at 18.

78. See Victoria R. McDonald, Note, *Stirring the Waters: Whether the Pirate Bay Case and the Thomas-Rasset Case Will Impact File Sharing and Piracy in Sweden and the United States*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 563, 592–93 (2011) (discussing the increased accessibility of digital music via a plethora of streaming services).

terms can create a revitalized industry that serves musicians, rights-holders, and music fans.<sup>79</sup>

The tremendous ease with which music can be shared via blogs, social networking sites, and other content-sharing platforms brings a host of issues regarding the dual copyrights in music to the fore.<sup>80</sup> The rapidity of public performance and distribution, combined with inefficiencies in licensing, make infringement more likely and, according to some rights-holders, place a burden on content owners to provide notice to services as required by the DMCA.<sup>81</sup> For their part, online intermediaries may have a strong counter-incentive to remain ignorant of specific violations.<sup>82</sup> This may be an unintended consequence of the safe harbor provisions in the DMCA, or it may be a natural tension in the marketplace merely brought into sharper relief by statute. Either way, there are open questions about how to best bring the consumptive behaviors of millions of Internet users into line with the law.<sup>83</sup> One way to achieve this outside of major surgery to the DMCA is to seek greater licensing efficiencies to reduce the risk of litigation and allow services to amass attractive music catalogs.<sup>84</sup> Additionally, the standardization of metadata — the information used to identify aspects of a digital music file such as the composer or the performer label — and improved database technologies would help ensure that payouts to musicians and rights-holders are transparent and equitable.<sup>85</sup>

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79. See *Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. of the Judiciary*, 110th Cong. 1–2 (2007) (statement of Marybeth Peters, Registrar of Copyrights) (discussing the role of music licensing reform in enticing consumers to abandon piracy).

80. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 173 (2003) (discussing the complications presented by the distinct copyrights, in the musical composition and in the sound recording separately, underlying all sound recordings); see also Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 360 (2002) (noting the relatively new and complex copyright issues presented by the Internet).

81. Declan McCullagh, *RIAA: U.S. Copyright Law "Isn't Working."* CNET (Aug. 23, 2010, 2:48 PM), [http://news.cnet.com/8301-13578\\_3-20014468-38.html](http://news.cnet.com/8301-13578_3-20014468-38.html).

82. See Alexis Allen, Comment, *Battling in the Name of Balance: Evaluating Solutions to Copyright Conflict in Viacom Int'l v. YouTube*, 2007 B.Y.U. L. REV. 1023, 1049–50 (2007) (discussing the incentive created by DMCA's safe harbor provisions for Internet companies to remain ignorant of the existence of infringing content on their sites).

83. See John Eric Seay, Note, *"Hang 'Em High": Will the Recording Industry Association of America's New Plan to Posse up with Internet Service Providers in the Fight Against Online Music Piracy Finally Tame the Wild Internet?*, 16 J. INTELL. PROP. L. 269, 274 (2009) (explaining concerns regarding potential obstruction of legal online content and contravention of network neutrality surrounding RIAA's new plan to search P2P applications for material sent online that potentially infringes a copyright of one of its member recording labels).

84. See Shane Wagman, *I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace*, 17 J. INTELL. PROP. L. 95, 108 (2009) (explaining that reduced transaction costs and clarification of license requirements would increase lawful access to the digital music marketplace).

85. See *infra* Part III.B.iv.

## III. THE CURRENT LICENSING ENVIRONMENT

## A. Copyrights, Licenses, and Digital Services

In order to legitimately offer digital music to consumers, services must license two separate copyrights: the sound recording copyright and the underlying musical composition copyright.<sup>86</sup> Typically, record labels control the former (though it is sometimes the performing artist);<sup>87</sup> publishers and songwriters own the latter.<sup>88</sup> There is often discontinuity between the sound recording and composition copyrights held by the label and publishing divisions of said companies.<sup>89</sup> Meaning, a recording controlled by the EMI label may not have its composition copyright with EMI Publishing.<sup>90</sup> The picture is even more complicated when you factor in the numerous independent labels, publishing companies, individual performing artists, and songwriters whose licenses add tremendous perceived and actual value to a digital music service.<sup>91</sup>

Often, a work has multiple owners, which makes the process of obtaining licenses that much more difficult.<sup>92</sup> In addition to determining who owns what, there is the issue of not being able to license a work due to disagreements among the various owners of a copyright (or their heirs).<sup>93</sup>

86. See generally 17 U.S.C. § 102(a)(7) (2006).

87. Michael Huppe, *You Don't Know Me, but I Owe You Money: How SoundExchange Is Changing the Game on Digital Royalties*, 28 ENT. & SPORTS LAW. 3, 28 (2010).

88. See Matthew J. Astle, *Stop the Music: Podcasting's Licensing Conundrum*, 10 J. INTERNET L. 12, 14 (2006) (discussing the assignment of copyright by composers and performers).

89. See Jonah M. Knobler, *Public Performance Rights in Music Downloads: United States v. ASCAP and Beyond*, 11 J. INTERNET L. 11, 13 (2008) (noting that there are often intermediary organizations that handle publishing licenses).

90. *Id.* Copyright contains a host of enumerated exclusive rights, each of which may be administered separately. A single piece of music can, in its lifetime under the terms of copyright law, be owned by several different entities, including separate publishing companies and record labels. *Id.* Bulk and individual catalog sales as well as mergers and acquisitions further complicate the landscape for music rights. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), at 27.

91. See, e.g., Todd Martens, *Amoeba Music to Open Download Site*, L.A. Times, Jan. 29, 2010, at D14 (reporting that the independent music store chain's plans to open an online site that would offer downloads of rare, out-of-print, and deep catalog material to appeal to music collectors). The appeal to consumers of any digital music service whether it is streaming, download, or otherwise, is the robustness of its catalog. In order to present the most attractive array of musical content to potential users, a service must license the broadest amount of music possible, including that of major, independent, and unaffiliated artists. Jasmine France, *Online Music Store Guide*, CNET (Mar. 3, 2008, 9:14 AM), [http://reviews.cnet.com/2719-11297\\_7-284-3.html?tag=page;page](http://reviews.cnet.com/2719-11297_7-284-3.html?tag=page;page).

92. See Knobler, *supra* note 89, at 13 (discussing the steps download providers must take in order to obtain the required licenses needed to sell digital music).

93. See Jeff Price, *The Three Licenses Holding Back the Music Industry*, TUNECORE BLOG (May 12, 2011), <http://blog.tunecore.com/2011/05/the-three-licenses-holding-back-the-music-industry.html> (explaining the difficulties encountered when attempting to license works with various rights-holders). It is common for music rights to be owned by multiple parties. *Id.* The composition copyright in particular is often co-authored by multiple parties, which can result in the separate administration of each enumerated portion. See, e.g., *Janky v. Lake County Convention and Visitors Bureau*, 576 F.3d 356 (7th Cir. 2009) (holding that the licensee had the right to use the song on the co-author's permission when other co-authors objected). In such instances, ownership can be complicated by the need for a service to obtain a separate license for each. See Mark Holloran & Edward R. Hearn, *Collaborator/Songwriter Agreements*, LAW OFFICES OF EDWARD R. HEARN, <http://>



The following is a description of the two copyrights inherent in a musical work and how they interact with certain digital services,<sup>94</sup> excerpted from *I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace*, by Shane Wagman and Future of Music Coalition:

*Copyright exists in a world of dualities. There are two separate copyrights within each musical work: the sound recording copyright and the musical composition copyright. Each type of copyrighted work is licensed separately depending on whether it is being “publicly performed” (i.e., broadcast) or reproduced and distributed. To further complicate matters, these two types of copyrights operate differently in the terrestrial world versus the digital world. A digital music service must obtain separate licenses depending on the means of distribution it facilitates. There are two primary means of digital distribution: “streaming” and “downloading.” Each requires a different set of licenses. However, these two distribution types can be further segmented into interactive streaming, tethered downloads, and limited downloads. It is sometimes unclear what types of licenses digital music services need to have the proper permission to distribute music via these methods.*

*Digital music services that offer music downloads or “DPDs” must obtain mechanical licenses from the musical composition copyright owner and master use licenses from the sound recording copyright owner. A download is a complete transfer of audio content from the Internet onto a computer hard drive, where it can then be listened to on demand. It is the digital equivalent to buying a physical recording, such as a CD, from a brick and mortar record store.*

*Therefore, a digital download triggers the reproduction and distribution rights granted to the copyright owner by the Copyright Act. Section 115 of the Copyright Act provides a compulsory mechanical license for the musical composition, i.e., it allows anyone to obtain permission to reproduce and distribute “nondramatic musical works” so long as they abide by certain requirements, most notably paying a royalty rate, set by law, to the composition’s owner. There is no compulsory license for sound recording copyrights. The digital music service must negotiate with the sound recording copyright owners – usually the record labels – individually.<sup>95</sup>*

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Internetmedialaw.com/articles/Collaborator-Songwriter-Agreements/ (last visited Sept. 22, 2011). The inability of multiple owners to come to terms on a particular use can frustrate the appearance of a piece of music on a particular service or platform. *Id.*

94. Wagman, *supra* note 84, at 100–02.

95. *Id.* at 100–01 (footnotes omitted).



This means that if a download store such as iTunes or eMusic is to operate, they must secure the individual licenses from every sound recording they offer.<sup>96</sup> There is also the matter of the “mechanical license,” which labels pay to publishers and songwriters when a “copy” of a song is sold.<sup>97</sup> This reproduction right is administered by the Harry Fox Agency (HFA), which represents a large number of music publishers.<sup>98</sup> The current statutory mechanical royalty rate is 9.1 cents per song per unit for recordings of compositions of up to five minutes in length.<sup>99</sup> HFA also licenses the publishing mechanisms for full album downloads, on-demand streams, limited downloads, ringtones, mastertones and ringbacks, digital jukeboxes, and digital background music services.<sup>100</sup>

The economies so far described are complex, but they still to a large degree mimic the world of physical transactions.<sup>101</sup> Download stores are hardly the only kind of digital music services, however.<sup>102</sup> There are also those that broadcast “streams,”<sup>103</sup> such as webcasters, which must obtain public performance licenses from both the sound recording copyright owner and the musical composition copyright owner.<sup>104</sup> Here, the picture is somewhat more straightforward: webcasters operate using blanket licenses obtained from composition copyright owners through various Performance Rights Organizations (PROs), such as ASCAP, BMI, and SESAC.<sup>105</sup> As previously mentioned, sound recording copyright owners and performers were unable to collect a royalty for public performances until 1995, which was when the Digital Performance Royalty in Sound Recordings Act (DPRSRA) became law.<sup>106</sup> However, this right does not exist for terrestrial or over-

96. See Astle, *supra* note 88, at 15 (noting that online retailers such as iTunes must obtain master use licenses from the copyright holders if the retailers wish to make copies of sound recordings and distribute them online).

97. See *Mechanical Licensing*, HARRY FOX, <http://www.harryfox.com/public/MechanicalLicenseslic.jsp> (last visited Sept. 9, 2011) (explaining that mechanical licenses authorize physical or digital reproduction of compositions embodied in sound recordings).

98. *About HFA*, HARRY FOX, <http://www.harryfox.com/public/AboutHFA.jsp> (last visited Sept. 9, 2011).

99. Licensing – General FAQ, *What is the Current Statutory Mechanical Rate? How is it Calculated?*, HARRY FOX, <http://www.harryfox.com/public/Licensing-GeneralFAQ.jsp#120> (last visited Sept. 9, 2011).

100. Licensing – General FAQ, *How Do I License for Digital Uses Other Than Single PDDs (Full, Permanent Digital Downloads)?*, HARRY FOX, <http://www.harryfox.com/public/Licensing-GeneralFAQ.jsp> (last visited Sept. 9, 2011).

101. See Wagman, *supra* note 84, at 100 (equating the download of audio content from the Internet to the physical purchase of a CD from a record store).

102. See Astle, *supra* note 88, at 16 (discussing the concept of streaming audio).

103. *Id.* Digital-era definitions are sometimes mutable, but for our purposes a stream is an online broadcast of music where no copy is made on the listener’s hard drive. See *id.* (explaining that streamed audio files are deleted after they are played).

104. See David D. Oxenford & Robert J. Driscoll, *The Basics of Music Licensing in Digital Media*, DAVIS WRIGHT TREMAINE, <http://www.dwt.com/LearningCenter/Advisories?find=395305> (last visited Sept. 9, 2011) (discussing digital transmission licensing requirements for companies who digitally stream music).

105. See Jim Puzanghera, *Online Royalties Deal Is Reached*, L.A. TIMES, Sept. 24, 2008, at C2 (reporting on agreed upon rates for blanket licenses among groups representing songwriters, music publishers, record labels, and digital music websites over interactive streaming royalties).

106. See generally *Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the S. Comm. on Courts and Intell. Prop. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Marybeth Peters, Register of Copyrights) (examining the Digital Performance Royalty in Sound Recordings Act).

the-air broadcasts.<sup>107</sup> In order to comply with federal statute, digital broadcasters must obtain blanket public performance licenses from sound recording copyright owners via SoundExchange, a digital-only Performing Rights Organization that exclusively collects and distributes digital performing rights royalties to sound recording copyright owners and performers.<sup>108</sup>

Having first split the digital music universe neatly in two by describing download services and streaming broadcast platforms, such concepts as interactive streaming and tethered downloads will now be introduced as two flavors of music access that may exist alongside Internet radio and permanent downloads in the very same service.<sup>109</sup> One of the early hybrid platforms still in business today is the subscription service Rhapsody.<sup>110</sup> Offering its users access to millions of licensed songs, Rhapsody operates as an interactive streaming service,<sup>111</sup> a tethered download service,<sup>112</sup> a permanent download store, and an Internet radio platform.<sup>113</sup> Because of the array of options, Rhapsody must obtain nearly every license under the sun.<sup>114</sup> This process is cumbersome and highly complex with permissions, restrictions, and other information captured in dizzying spreadsheets of highly variable data.<sup>115</sup> Although Rhapsody has a robust catalog, the lack of a streamlined licensing framework means that any song or album can be taken down due to disputes with rights-holders over payments for various uses.<sup>116</sup>

Despite the tremendous investment of time and money required to launch a digital music service, there have been a number of entrants into the marketplace since the beginning of the last decade.<sup>117</sup> Retailers such as iTunes, eMusic, and

107. Since well before the introduction of a sound recording copyright in 1972, U.S. broadcasters have enjoyed an exemption to paying royalties to performers and labels for over-the-air broadcasts of their music, a tradition that continues to this day. *See* 17 U.S.C. §§ 106, 114(d)(1) (2006) (codifying exempt transmissions and re-transmissions).

108. Oxenford & Driscoll, *supra* note 104; *see also* 17 U.S.C. § 114(d) (outlining exemptions to the sound recording copyright owner's exclusive public performance right).

109. *See* Knobler, *supra* note 89, at 13 (describing tethered downloads as conditional downloads that offer less than outright ownership of a copy); *see also* Puzzanghera, *supra* note 105 (noting that interactive streaming involves listeners choosing which specific songs they stream).

110. *See generally About Us*, RHAPSODY, <http://www.rhapsody.com/about-us#about> (last visited Sept. 21, 2011).

111. An interactive stream is a broadcast based on user inputs or selected by the recipient. *See* Knobler, *supra* note 89, at 13 (discussing "pure streaming").

112. A tethered download is a music download from a subscription that can only be played on an authorized computer or device, while a limited download can only be played for a specific period of time. Skyla Mitchell, *Reforming Section 115: Escaping From the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1246 n.41 (2007).

113. Michelle Quinn, *New Music Store to Take on iTunes*, L.A. TIMES, June 30, 2008, at C1.

114. *See generally* Astle, *supra* note 88, at 15 (describing how online retailers must obtain multiple licenses to sell audio recordings).

115. *See* Wagman, *supra* note 84, at 102 & n.31 (detailing the process used by Rhapsody to determine whether the company has the necessary licenses to sell a digital recording).

116. *Id.*

117. *See generally* John M. Guilfoil, *Listen for Less*, BOS. GLOBE, Feb. 7, 2010, at B2 (comparing numerous online music retailers).

Amazon MP3 offer permanent digital downloads.<sup>118</sup> Streaming services such as Rhapsody, MOG, Rdio, Napster, and Spotify provide access to millions of songs on-demand and on-the-go, with some variations in catalog and user experience.<sup>119</sup> Apple, whose familiar iTunes ecosystem is used by millions around the world, has now entered the “cloud music” game with a service that reads users’ digital music collection and offers re-downloads of anything in that collection from any Apple device.<sup>120</sup> Each of these services has had to negotiate licenses with labels and publishers in order to build a catalog vast enough to attract listeners.<sup>121</sup> Negotiations do not always produce results: search giant Google initially failed to secure licenses with the major labels for its music service and subsequently launched a truncated remote file storage system for which (it assumes) no licenses are necessary.<sup>122</sup> (The company has since launched a new music store with licenses from a majority of major rights-holders.)

Although webcasters are able to obtain blanket licenses which allow them to avoid time-consuming negotiations with uncertain outcomes,<sup>123</sup> there are still points of contention between Internet broadcasters and rights-holders.<sup>124</sup> Pandora, an ad-supported “predictive radio” service, functions under law as a webcaster, meaning it is required to obtain blanket licenses from SoundExchange for the digital public performance right and from the Performing Rights Organizations for the underlying composition copyright.<sup>125</sup> In recent years, the service waged a protracted battle with the Copyright Royalty Board (CRB) — the government entity that sets rates for compulsory licenses — to achieve a fee structure that would allow them to stay in business.<sup>126</sup> Stakeholders, including the labels, SoundExchange, and

118. *Id.*

119. See generally Claire Atkinson, *Musical Scares – Digital Service Spotify’s U.S. Launch Puts Rival On Notice*, N.Y. POST, July 15, 2011, at 34 (reviewing the introduction of Spotify into the U.S. market); see also Christopher Breen, *Four Music Subscription Services Compared: How Mog, Napster, Rdio, and Rhapsody Stack Up*, MACWORLD (Oct. 12, 2010, 5:00 AM), [http://www.macworld.com/article/154757/2010/10/music\\_subscription\\_compared.html](http://www.macworld.com/article/154757/2010/10/music_subscription_compared.html) (describing the differences between several music stream services).

120. See Ben Parr, *Apple Launches iCloud Beta*, MASHABLE, Aug. 1, 2011, <http://mashable.com/2011/08/01/apple-icloud-beta/> (discussing Apple’s introduction of the iCloud service); see also *iCloud Features*, APPLE, <http://www.apple.com/icloud/features/> (last visited Sept. 10, 2011) (listing the features of the iCloud).

121. See Ben Sisario & Miguel Helft, *Apple is Called Poised to Offer ‘Cloud’ Music*, N.Y. TIMES, May 21, 2011, at B1 (discussing Apple’s negotiations with record labels and publishers); see also Astle, *supra* note 88, at 15 (discussing the general practice of online music retailers negotiating individual deals with each record company to obtain a license for the reproduction of sound recordings).

122. See Claire Cain Miller, *Google to Unveil Service to Let Users Stream Their Music*, N.Y. TIMES, May 10, 2011, at B5 (describing Google’s new streaming service, the troubles Google has faced from the music labels, and Google’s belief that it does not need licenses to store music for users if the users already own the music).

123. See Astle, *supra* note 88, at 15 (noting how blanket licenses allow online music retailers to obtain the multiple licenses for a song all at once without having to obtain several different licenses).

124. See, e.g., Wagman, *supra* note 84, at 102 (describing how the royalty rates set by the Copyright Royalty Board have been contested by online music streaming services).

125. See generally 17 U.S.C. § 114 (2006) (codifying the compulsory license for digital audio transmissions); see also Vanessa Van Cleaf, Comment, *A Broken Record: The Digital Copyright Act’s Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio*, 40 STETSON L. REV. 341, 359–62 (2010) (discussing the role of SoundExchange as the statutory licensing representative).

126. See Claire Cain Miller, *Music Labels Reach Deal with Internet Radio Sites*, N.Y. TIMES, July 8, 2009, at B2 (discussing the new royalty rate agreement between record labels and online radio stations); see also John

other large webcasters, negotiated under the auspices of Congress to arrive at a compromise rate that, while likely not as low or as high as some would prefer, brings stability to a music industry sector that is growing, rather than shrinking.<sup>127</sup>

The point here is not to itemize every tense negotiation in today's music marketplace, but rather to illustrate "the structural inability to efficiently license vast numbers of musical works for a wide variety of uses, even when parties are generally amenable to that license[.]" to quote entertainment attorney Whitney Broussard.<sup>128</sup> The difficulties inherent in digital music licensing are numerous, from cost to time.<sup>129</sup> Yet the growth of a legitimate digital music marketplace to a large degree depends on stable and efficient licensing systems that allow for the building of robust catalogs that will be attractive to paying consumers.<sup>130</sup> The fact that such services exist despite an inconvenient environment for investment and innovation is encouraging.<sup>131</sup> Still, there is likely more that can be done to streamline the licensing process while maximizing opportunities for creator and rights-holder compensation.<sup>132</sup>

## B. Proposed Remedies

### 1. Collective Licensing

Since the dawn of the digital revolution, many industry experts and observers have called for any number of collective licensing arrangements to alleviate transactional pressures and achieve a wide-scale alternative to unauthorized file sharing.<sup>133</sup> Proposals exist (and continue to propagate) that describe collective licensing

Timmer, *Pandora Lives! SoundExchange Cuts Deal on Webcasting Rates*, ARS TECHNICA (July 7, 2009, 5:20 PM), <http://arstechnica.com/media/news/2009/07/soundexchange-cuts-deal-on-music-webcasting-rates.ars> (detailing the disagreements between streaming audio service companies and the Copyright Royalty Board).

127. See Miller, *supra* note 126, at B2 (discussing the nature of the negotiations between stakeholders); see also Arbitron/Edison Research, *The Infinite Dial: Navigating Digital Platforms* (2011), available at [www.edisonresearch.com/Infinite\\_Dial\\_2011\\_ExecSummary.pdf](http://www.edisonresearch.com/Infinite_Dial_2011_ExecSummary.pdf) (discussing growth trends in the online music industry).

128. Whitney Broussard, *The Promise and Perils of Collecting Licensing*, FUTURE OF MUSIC (Dec. 2, 2010), <http://futureofmusic.org/article/article/promise-and-perils-collective-licensing>.

129. See *Music Licensing: Hearing Before the Comm. on H. Judiciary Subcomm. on Courts, the Internet, and Intell. Prop.*, 109th Cong. (2006) (statement of Jonathan Potter, Executive Director, Digital Media Association) (describing the "enormous transaction costs" faced by companies having to obtain rights on a song-by-song basis as is required under current copyright laws).

130. See *id.* (discussing the prevalence of online piracy as a product of legal uncertainty and statutory copyright damages).

131. *Id.*

132. See *id.* (discussing the efforts of online music distributors to streamline the licensing of the reproduction rights of musical works).

133. See Matt Earp & Andrew McDiarmid, *An Investigation of Voluntary Collective Licensing for Music File-Sharing at UC Berkley*, UC BERKLEY SCH. OF INFO. (May 8, 2008), available at [http://www.ischool.berkeley.edu/files/earp\\_mcdiarmid\\_vcl\\_at\\_berkeley.pdf](http://www.ischool.berkeley.edu/files/earp_mcdiarmid_vcl_at_berkeley.pdf) (analyzing collective licensing models). Many of these proposals were rejected out-of-hand at the beginning of the last decade, but rights-holders have, in recent years, seemed more willing to at least entertain new concepts in licensing and digital distribution. See *id.* at 15–27 (providing a history of the music industry's approach to file sharing culminating in various calls for collective licensing models).



mechanisms for both the sound recording and the composition copyrights.<sup>134</sup> These include — but are not limited to — ISP surcharges immunizing users against infringement,<sup>135</sup> a flat fee for all online music file transactions,<sup>136</sup> a tax on certain consumer computing and electronics devices,<sup>137</sup> and the creation of a voluntary or compulsory blanket license for music files outside that which exists for non-interactive streaming.<sup>138</sup>

Although none of these proposals have been wholly embraced by a critical mass of rights-holders, it is important to note that collective licenses already exist in the music business.<sup>139</sup> In fact, public performance licenses for terrestrial broadcasts were key to the growth of one of the most historically significant sectors of the industry: over-the-air radio.<sup>140</sup> It is safe to say that without the establishment of a performance right for the composition copyright, terrestrial radio would not have been able to play such a pivotal role in the development of a recorded music industry.<sup>141</sup> The establishment in 1995 of a homologous right for digital broadcasts that covers the sound copyright can be seen as an important step in rights-holder compensation, although there is frequent debate regarding appropriate rates.<sup>142</sup> The benefits may offset any friction: if webcasters were required to individually

134. See, e.g., Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUND. (Apr. 30, 2008), available at <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing> (presenting a voluntary collective licensing mechanism that would allow consumers to download music via a P2P system in exchange for a monthly fee).

135. See Eric Pfanner, *A Fix for Piracy: Tack a Fee on Broadband*, N.Y. TIMES, Jan. 26, 2009, at B4 (documenting how the Isle of Man has instituted a policy where citizens are able to download an unlimited amount of music after paying a nominal fee).

136. See Paul Resnikoff, *The 5-Cent Download... Does It Need a Comeback?*, DIGITAL MUSIC NEWS (Sept. 24, 2009), <http://www.digitalmusicnews.com/stories/092409five> (discussing flat-rate pricing as an alternative to payments for individual MP3 downloads).

137. See Maija Palmer, *Tech Groups Break Off Copyright Levy Talks*, FIN. TIMES (Jan. 8, 2010, 1:45 AM), <http://www.ft.com/cms/s/0/980044d0-fba8-11de-9c29-00144feab49a.html#axzz1YbZ32ZaY> (reporting industry controversy over hardware levies to fund compensation for parties injured by copyright infringement).

138. Nate Anderson, *“Functionally Voluntary” Music May Lead to Blanket Licenses*, ARS TECHNICA, (Aug. 18, 2008, 10:40 PM), <http://arstechnica.com/old/content/2008/08/paying-for-music-has-become-functionally-voluntary.ars>.

139. As previously mentioned, *supra* note 105 and accompanying text, there are blanket licenses administered by PROs and SoundExchange for the public performance of the composition and sound copyrights. See 17 U.S.C. § 114(d)(3)(C), (E) (2011) (allowing collective licenses to be transferred to performing rights societies).

140. See Lohmann, *supra* note 134 (noting blanket licensing to radios by PROs as precedent for Internet-based collecting societies).

141. See, e.g., Stan J. Liebowitz, *The Elusive Symbiosis: The Impact of Radio on the Record Industry*, 1 REV. OF ECON. RES. ON COPYRIGHT ISSUES 93, 94–96 (2004) (discussing the historic significance of performance rights in the “symbiotic relationship” between the radio and recording industries).

142. See Vanessa Van Cleaf, *A Broken Record: The Digital Millennium Copyright Act’s Statutory Royalty Rate-Setting Process Does Not Work for Internet Radio*, 40 STETSON L. REV. 341, 362–78 (2010) (describing opposing motivations of the parties affected by setting royalty rates); cf. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 571 F.3d 69, 76–81 (D.C. Cir. 2009) (discussing whether high webcast royalty rates set by the Copyright Royalty Board were arbitrary and capricious).



negotiate licenses for sound recordings, that sector is unlikely to have experienced such remarkable growth.<sup>143</sup>

There are, of course, antitrust considerations when collective license schemes are enacted,<sup>144</sup> but history of the public performance license at least offers guidelines for how to balance competition with increased efficiencies within the scope of antitrust law.<sup>145</sup> Indeed, government will likely have a role to play in establishing the framework for any new collective licensing arrangement advanced by a critical mass of stakeholders.<sup>146</sup> It is also safe to say that any collective license that is non-voluntary would likely implicate sections 114 and 115 of the U.S. Copyright Code,<sup>147</sup> which would inherently necessitate active government participation.<sup>148</sup>

## 2. Ideas for Licensing Reform

It is beyond the purview of this article to describe in detail the precise requirements necessary for the establishment of a collective license that would cover digital phonorecord delivery or interactive streaming, to say nothing of the mechanical license. However, it does seem that such structures could be enhanced by technology, which would allow for the granularity in tracking common to per-use licensing while preserving the efficiencies of a collective regime.<sup>149</sup> Yet the ability of such a system to function smoothly would likely depend on standardization in metadata<sup>150</sup> combined with a centralized authentication database (or databases).<sup>151</sup>

143. See *Chart: Media Use Consolidated 2006–2012*, BRIDGE RATINGS (2010), available at <http://www.bridgeratings.com/Media%20Use%20Consolidated%202006-2012.JPG> (showing an increase in public consumption of webcasts since 2006); see also Karen Feassler, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L.J. 399, 402 (2003) (explaining the benefits of the mandated licensing model to webcasters).

144. See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 10 (1979) (reflecting that “though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a per se restraint of trade”).

145. See generally Whitney Broussard, *The Promise and Peril of Collective Licensing*, 17 J. INTELL. PROP. L. 19 (2009).

146. See Matthew Fagin, Frank Pasquale & Kim Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 517–20 (2002) (arguing that “[t]he law should promote fair competition via robust and diverse distribution channels”); see also Jonathan B. Wiener, *The Regulation of Technology, and the Technology of Regulation*, 26 TECH. SOC’Y 483, 495 (2004) (discussing government regulation as a necessary response to technology’s impact on market structure and copyright strength).

147. 17 U.S.C. §§ 114–15 (2006); see also *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990) (finding that a “copyright owner has the capacity arbitrarily to refuse to license” to a particular entity).

148. See *Stewart*, 495 U.S. at 228–29.

149. A great challenge of today’s music industry is to increase efficiencies in the tracking of uses, transactions, copyright ownership, and compensation; the ability for databases to “talk” to other databases with an appropriate level of inclusion and transparency is fundamental to the achievement of these goals. PETE O’DELL, *SILVER BULLETS: HOW INTEROPERABLE DATA WILL REVOLUTIONIZE INFORMATION SHARING AND TRANSPARENCY* 31–35 (AuthorHouse 2010); cf. Dan Pontes, *Rewinding Sony: Can the Supreme Court and Big Media Grok P2P?*, 9 INTELL. PROP. L. BULL. 159 (2005) (discussing the circuit split over whether use of peer-to-peer sharing networks, by allowing traceable copyright infringement, should be considered affirmative evidence of copyright infringement).

150. See NATIONAL INFORMATION STANDARDS ORGANIZATION, *UNDERSTANDING METADATA* 11 (2004). As music moves from a physical sales model to online platforms, it is increasingly important that we have systems for efficiently and accurately compensating artists. This means metadata — the “tags” associated with an audio

Such efficiencies are not yet in place, though there has been some encouraging progress on the latter from different corners of the industry and in several territories.<sup>152</sup>

There are also hints that those in the mainstream music industry are prepared to at least entertain such concepts.<sup>153</sup> At the 2010 Future of Music Policy Summit, Steve Marks, Executive Vice President and General Counsel for The Recording Industry Association of America (RIAA), spoke favorably about bundled service arrangements in which Internet Service Providers would offer users bulk access to a music catalog for a flat monthly fee.<sup>154</sup> “Have you ever tried getting your voicemail unbundled from your phone?” Marks asked.<sup>155</sup> “These people know how to bundle. ISPs could bundle music services, and that could go a long way. That’s the kind of thing that needs to happen. . . you gotta find something that scales, and ISPs have scale.”<sup>156</sup> Such comments are in stark contrast to the industry’s reaction when such experts as Sandy Pearlman, Jim Griffin, and Peter Jenner proposed similar ideas at the turn of the millennium.<sup>157</sup> It is safe to say that the implementation of an ISP-level music distribution platform would benefit from a fundamental re-conceptualization of the licensing protocols for both the sound and composition

file that enable proper tracking of how that music is used and that point back to who should get paid. *Id.* at 1–3. Technology offers opportunities for more accurate tracking, reporting, and royalty distribution, but a lack of standardization and accuracy — particularly in classical and jazz music — remains a significant barrier to a functional and comprehensive system. *Accord* Tim Crawford, Matthias Mauch & Christophe Rhodes, *Recognizing Classical Works in Historical Recordings*, 11 INT’L SOC’Y MUSIC INFO. RETRIEVAL CONF. 495, 495–96 (2010) (discussing difficulties of creating metadata standards for historic recordings and classical music).

151. See, e.g., *CAS 1 Architecture*, JASIG, [www.jasig.org/cas/cas1-architecture](http://www.jasig.org/cas/cas1-architecture) (last visited Sept. 24, 2011) (explaining the structure of a typical centralized authentication database).

152. See Glen Peoples, *Griffin Moving Forward with WIPO on Global Rights Registry*, BILLBOARD (June 16, 2011), [http://www.billboard.biz/bbbiz/industry/publishing/griffin-moving-forward-with-wipo-on-global1005238582\\_story](http://www.billboard.biz/bbbiz/industry/publishing/griffin-moving-forward-with-wipo-on-global1005238582_story) (reporting a music executive’s plans to develop a global rights registry); see generally INT’L MUSIC REGISTRY, <http://www.internationalmusicregistry.org> (last visited Sept. 13, 2011) (describing the World Intellectual Property Organization’s efforts to create a centralized authentication database).

153. See, e.g., Adrian Crookes, *So Little Time, So Many Databases*, WORLD COPYRIGHT SUMMIT, <http://www.copyrightsummit.com/2011/06/08/so-little-time%E2%80%A6so-many-databases/> (last visited Sept. 13, 2011) (reporting the industry’s response to several attempts at creating centralized authentication databases).

154. Future of Music Coalition, *Partly Sunny with a Chance of Fog (Part 2) @ Summit10*, VIMEO (Nov. 30, 2010), <http://vimeo.com/17335396>.

155. *Id.*

156. *Id.*

157. See Guy Dixon, *Would You Pay 5 Cents for a Song?*, GLOBE & MAIL, Mar. 9, 2005, at R1; Sam Gustin, *Warner/Griffin “Music Tax” Needs Public Debate*, PORTFOLIO (Dec. 8, 2008, 9:55 AM), <http://www.portfolio.com/views/blogs/the-tech-observer/2008/12/08/warnergriffin-music-tax-needs-public-debate>; Nigel Morris, *Music Industry to Tax Downloaders*, THE INDEPENDENT (July 24, 2008), <http://www.independent.co.uk/arts-entertainment/music/news/music-industry-to-tax-downloaders-875757.html>. Many of the ideas previously described were presented at the Future of Music Policy Summit that took place shortly after the turn of the millennium. At the time, many industry stakeholders were openly hostile to such concepts. See, e.g., Greg Sandoval, *Jim Griffin Says ISP Music Tax Only One Possibility*, CNET (Mar. 29, 2008, 6:00 AM), [http://news.cnet.com/8301-10784\\_3-9905952-7.html](http://news.cnet.com/8301-10784_3-9905952-7.html) (reporting backlash against Griffin and his employer, Warner Music, for suggesting a “download tax” in response to rampant copyright infringement).

copyrights.<sup>158</sup> In fact, it is difficult to imagine how such a scheme would work without some kind of blanket license, compulsory or voluntary.<sup>159</sup>

In June 2011, the president of the National Music Publishers Association (NMPA), David Israelite, spoke to Billboard about the relative dysfunction of the current licensing environment.<sup>160</sup> “If you look at the challenges of the industry, the way we license doesn’t work: it is broken,” he said.<sup>161</sup> Israelite went on to describe how he and other industry representatives (including major labels) are working on draft legislation that would establish a blanket license for both the mechanical royalty and the synchronization rights.<sup>162</sup> If enacted, such a policy would most certainly be a game-changer, as it would supplant legal and marketplace standards that have been in place for decades.<sup>163</sup> If properly implemented, it could help publishers and songwriters get paid for uses that have thus far been resistant to easy licensing solutions.<sup>164</sup> Yet there are questions about what entity would administer such a license and how payments to songwriters would be facilitated.<sup>165</sup> Although, it could be an opportunity to advocate for direct artist payments not subject to publisher-songwriter contracts,<sup>166</sup> such a move could also be an attempt to eliminate long-observed (and non-statutory) standards such as the 50-50 split between songwriter and publisher.<sup>167</sup> Moreover, some suggest that a blanket license could be implemented without legislation.<sup>168</sup> Basically, the existing PROs (ASCAP, SESAC, and BMI) could decide to provide blanket licenses on their own

158. See Corey Field, *New Uses and New Percentages: Music Contracts, Royalties, and Distribution Models in the Digital Millennium*, 18 ENT. & SPORTS L. 1 (2000) (discussing difficulties presented by using traditional music licensing schemes in a digital forum).

159. See, e.g., Fred von Lohmann, *Monetizing File-Sharing: Collective Licensing Good, ISP Tax Bad*, ELECTRONIC FRONTIER FOUND. (Mar. 20, 2008), <http://www.eff.org/deeplinks/2008/03/monetizing-file-sharing-collective-licensing-good-isp-tax-bad> (discussing the benefits of a voluntary collective licensing system).

160. David Israelite, *Why Music Publishers Must Adopt Blanket Licensing*, BILLBOARD (June 24, 2011), <http://www.billboard.biz/bbbiz/industry/publishing/david-israelite-nmpa-president-s-guest-post-1005250672.story>.

161. *Id.*

162. *Id.*

163. *Id.*; see also 17 U.S.C. § 115 (2006) (establishing a mechanical copyright license, as distinct from synchronization rights).

164. Accord Joel Waldfoegel, *Music Piracy and Its Effects on Demand, Supply, and Welfare*, NAT’L BUREAU ECON. RES. (Apr. 5, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1873793&](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873793&) (finding a correlation between the ease of illegal downloading and loss of “static” music industry revenue).

165. See, e.g., Adam Thierer, *Lessig’s Call for a “Simple Blanket License” in Remix*, TECH. LIBERATION FRONT (Dec. 1, 2008), <http://techliberation.com/2008/12/01/lessigs-call-for-a-simple-blanket-license-in-remix/> (arguing that a “blanket license” proposal, as advanced, leaves uncertainties in the areas of appropriate administration of royalties).

166. See *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010) (finding that artists may use direct payment models after implementation of blanket licensing).

167. Income from musical compositions is generally split on a 50-50 basis between the music publisher and writer. The publisher's half of this income is called the "publisher's share," and the writer's half is the "writer's share." Jill A. Michael, *Music Copublishing and the Mysterious “Writer’s Share,”* 20 ENT. & SPORTS L. 13, 14 (2002).

168. One way to facilitate such a license would be through the PRO agreements, which would not require statutory expression. See Lohmann, *supra* note 134, at 2 (outlining a non-governmental regulation model of blanket licensing by PROs).

through contractual agreements with individual members.<sup>169</sup> As is the case with many music industry proposals, the devil is in the details.<sup>170</sup> Still, it is noteworthy that many of the concepts once regarded with skepticism or outright derision by large stakeholders are now being entertained as potentially viable business models.<sup>171</sup>

### 3. Incremental Changes in Industry Practice

Some changes that may prove to be influential are occurring outside of Congress or the courts.<sup>172</sup> Take, for example, EMI Publishing's May 2011 decision to pull a significant portion of its digital music catalog from ASCAP.<sup>173</sup> Over the past decade, EMI's licenses for certain digital uses have been handled by ASCAP, who in turn paid songwriters and performers their half of applicable royalties which is typically fifty percent (the other half goes to the publisher).<sup>174</sup> EMI's move, according to CEO Roger Faxon, will "reduce the burden of licensing . . . create greater efficiency and, importantly, . . . reduce the barriers to the development of innovative new services."<sup>175</sup> By moving its publishing royalties in-house, EMI hopes to streamline aspects of their licensing process.<sup>176</sup> Perhaps, more importantly, they will also bypass the fees ASCAP collected for doing similar work.<sup>177</sup> There are also legitimate questions about how EMI would go about paying artists.<sup>178</sup> ASCAP's interests as a nonprofit will likely differ from that of a corporation whose primary

169. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20–21 (1979) (holding that blanket licenses were not a per se violation of the Sherman Act); see also Derek Slater et al., *Content and Control: Assessing the Impact of Policy Choices on Potential Online Business Models in Film and Music*, BERKMAN CENTER INTERNET & SOC'Y 18 (2005), [http://cyber.law.harvard.edu/media/files/content\\_control.pdf](http://cyber.law.harvard.edu/media/files/content_control.pdf) (explaining PROs' relationship to the proposed collective blanket licensing scheme).

170. See, e.g., Mike Masnick, *Warner Music Pitches Music Tax To Universities: You Pay, We Stop Suing*, TECHDIRT (Dec. 4, 2008, 3:44 PM), <http://www.techdirt.com/articles/20081204/1534153023.shtml> (outlining problems with Warner Music's proposed "download tax"); Thierer, *supra* note 165 (arguing that a "blanket license" proposal, as advanced, leaves uncertainties in the areas of appropriate administration of royalties).

171. See COMMENTS OF BROAD. MUSIC, INC. & THE AM. SOC'Y OF COMPOSERS, AUTHORS & PUBLISHERS, 2–3 (2011), available at <http://www.copyright.gov/docs/section302/comments/initial/042511-bmi-ascap.pdf> (expounding on the merits of blanket licensing as a possible industry model).

172. See Jim Routh, *Why Blanket Licensing Legislation Is Not the Answer to Publishing Quandary*, BILLBOARD (June 24, 2011), <http://www.billboard.biz/bbbiz/industry/publishing/jim-routh-from-smule-guest-post-why-blanket-1005250622.story> (arguing that government legislation is unnecessary for the implementation of blanket licensing).

173. Laura Sydell, *EMI Publishing Dumps ASCAP*, NPR (June 29, 2011, 4:00 PM), available at <http://www.npr.org/blogs/therecord/2011/06/29/137504092/emi-publishing-dumps-ascap>.

174. *Id.*

175. Ed Christman, *EMI Music Publishing Taking Over Licensing Digital Rights From ASCAP*, BILLBOARD (May 3, 2011), <http://www.billboard.biz/bbbiz/industry/publishing/emi-music-publishing-taking-over-licensing-1005167992.story>.

176. *Id.*

177. See Michelle E. Arnold, Comment, *A Matter of (Anti) Trust: The Harry Fox Agency, the Performance Rights Societies, and Antitrust Litigation*, 81 TEMP. L. REV. 1169, 1175 (2008) (explaining ASCAP and other PROs' licensing fee models).

178. Scott Oranburg, *EMI's In-House Licensing Move: What Does it Mean for Artists?*, FUTURE OF MUSIC COAL. (May 4, 2011, 5:51 PM), <http://futureofmusic.org/blog/2011/05/04/emi-house-licensing-move-what-does-it-mean-artists>.



goal is to increase its own profits.<sup>179</sup> Would the songwriter's half of the royalty be in jeopardy? Might their share of the revenue be held against their "recoupables" — or debt — to EMI? And finally, who would oversee EMI's artist compensation policy? Historically, individual artists have lacked the resources to ensure that the industry acts in compliance with agreements, and they often relied on third parties like ASCAP to protect their rights.<sup>180</sup> Are songwriters and composers simply expected to trust EMI that they will be paid in a timely and equitable fashion?

There is also the growing sector of unaffiliated musicians to consider. Some musicians exist comfortably in the digital marketplace without a label or publisher.<sup>181</sup> Of these artists, many use services such as CD Baby, ReverbNation, and TuneCore to populate their music to digital retailers for a nominal fee.<sup>182</sup> These services, in turn, pay the artists money for their sales, either in the full amount or in a pre-arranged percentage.<sup>183</sup> At least one such service is currently setting up its own publishing division so that its artist clients who aren't already members of a PRO can receive public performance monies for certain uses on consumer-facing platforms.<sup>184</sup>

#### 4. Registries and Metadata

Apart from changes in how licenses are facilitated, there is movement toward a structure — or structures — that would hopefully make it easier to know who controls which license, thereby making the licensing system more efficient, creating more opportunities for creators and rights-holders to be compensated.<sup>185</sup> Many of these discussions are happening within a global context, which is important since

179. *Id.*

180. See Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performance Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 354 (2001) (detailing how PROs were created "to protect the performance rights of writers and publishers in non-dramatic settings").

181. The lower barrier to entry for musicians, coupled with advances in distribution technology enables many artists to make their music available to audiences while remaining wholly independent. See Kembrew McLeod, *MP3s Are Killing Home Taping: The Rise of Internet Distribution and Its Challenge to the Major Label Music Monopoly*, 28 POPULAR MUSIC & SOC. 521, 527 (2005) (explaining benefits of digital music distribution by independent artists and small record labels).

182. *The Digital Music Aggregator List*, INDUS. INSIDER MUSIC SUMMIT (Apr. 13, 2011, 4:48 PM), <http://industryinsidermusicsummit.com/2011/04/digital-music-aggregator-list.html>; see also *FAQ: So What is a CD Baby Anyway?*, CD BABY, <https://members.cdbaby.com/whatwedo/faq.aspx> (last visited Sept. 11, 2011) (explaining the uses of the music distribution service for independent musicians).

183. See, e.g., *FAQ*, CD BABY, <http://members.cdbaby.com/whatwedo/faq.aspx#faq21> (last visited Oct. 1, 2011) (specifying that CD Baby pays musicians 60 cents per song downloaded, \$6.50 per full-album downloaded, and fractions or whole cents per streamed song).

184. Tunecore has announced its intention of establishing an opt-in publishing service for songwriter/performers who use the platform to populate their music to online retailers. Jeff Price, *The Hidden Money in Radio*, TUNECORE BLOG (Sept. 15, 2011), <http://blog.tunecore.com/2011/09/the-hidden-money-in-radio-except-radio-is-dying.html>.

185. See Kate Holton, *Music Industry Working on Global Copyright Database*, REUTERS, Jan. 21, 2011, available at <http://www.reuters.com/article/2011/01/21/us-global-rights-idUSTRE70K56420110121> (discussing the planned creation of a global repertoire database that would track publishing rights worldwide).



the Internet knows few geographic boundaries.<sup>186</sup> The complexities of multi-jurisdictional licensing would be eased with centralized databases that allow licensees to quickly identify who needs to be paid for which use.<sup>187</sup>

The European Union is taking an active role in these efforts.<sup>188</sup> The Global Repertoire Database Working Group (GRD WG) grew out of the Online Commerce Roundtable, which was instituted by then-European Competition Commissioner Neelie Kroes.<sup>189</sup> Members of the working group include Amazon, EMI Music Publishing, iTunes, Nokia, PRS for Music, SACEM, STIM, and Universal Music Publishing.<sup>190</sup> The GRD WG is currently working to identify a common framework for rights ownership information for musical works in the digital space.<sup>191</sup>

Digital music authority Jim Griffin is currently working with the World Intellectual Property Organization (WIPO) on a related concept called the International Music Registry (IMR).<sup>192</sup> This project also aims to arrive at database solutions to housing information regarding who owns a musical work.<sup>193</sup> As Griffin told Digital Music News in June 2011,

*[a] proper registry is a predicate for licensing progress, whether that involves permission, a voluntary blanket or a compulsory. After all, you need to know who to ask or who to pay. Even if the license is compulsory (a la SoundExchange), we need to know who and how to pay.*<sup>194</sup>

Another area in which today's music community could benefit from increased accuracy and efficiency is the metadata for digitally published works.<sup>195</sup> Currently,

186. See John Maloney, *A Collective Rights Society for the Digital Age*, 16 J. TRANSNAT'L L. & POL'Y 123, 123 (2006) ("Because geography is no longer a barrier to expression, decisions regarding the structure of digital entertainment law must be made with international implications in mind.").

187. See Ed Christman, *Licensed to Ill: Lack of a Centralized Song Database Stymies Digital Licensing*, BILLBOARD, Mar. 13, 2010, at 13 (discussing the development of a centralized database that would eliminate uncertainty caused by song titles and complex songwriting credits). It is important to clarify that authentication databases can be implemented apart from any novel collective license arrangement, but such schemes would almost certainly benefit from a common framework for digital licensing. See Maloney, *supra* note 186, at 139 (discussing how a global licensing structure will streamline the payment process for digital royalties).

188. Online Commerce Roundtable, *Rep. on Opportunities and Barriers to Online Retailing*, at 1 (May 26, 2009), available at [http://ec.europa.eu/competition/consultations/2009\\_online\\_commerce/roundtable\\_report\\_en.pdf](http://ec.europa.eu/competition/consultations/2009_online_commerce/roundtable_report_en.pdf).

189. *Id.*; Joint Statement, Global Repertoire Database Working Group, Working Group on a Common Framework for Rights Ownership Information (Oct. 19, 2009), available at [http://ec.europa.eu/competition/sectors/media/joint\\_statement\\_2.pdf](http://ec.europa.eu/competition/sectors/media/joint_statement_2.pdf).

190. *Work Begins on Global Music Repertoire Database*, RADIO & MUSIC (Dec. 21, 2010), <http://www.radioandmusic.com/content/editorial/news/work-begins-global-music-repertoire-database>.

191. Joint Statement, *supra* note 189.

192. *Who Should Take Lead in Building Global Databases of Musical Works, Sound Recordings?*, WASHINGTON INTERNET DAILY, June 29, 2011.

193. *Id.*

194. Paul Resnikoff, *Exclusive: Jim Griffin, WIPO Spearheading an "International Music Registry,"* DIGITAL MUSIC NEWS (June 15, 2011), <http://www.digitalmusicnews.com/stories/061511griffin> (quoting Jim Griffin).

195. Christman, *supra* note 187.

there are no hard-and-fast information requirements for digital audio files, although there are some in the music space that make the most out of open source data for the purpose of improving the digital music experience for artists and fans.<sup>196</sup> Still, there are huge gaps in how information is cataloged in digital music.<sup>197</sup> Artists and performers outside of the pop genres suffer most from the lack of appropriate data sets.<sup>198</sup> Many of the digital music services were built for the pop marketplace, which often leaves composers and performers unable to be properly identified.<sup>199</sup> For example, should Beethoven or the London Symphony Orchestra (LSO) be listed as the performing artist for the LSO's recording of Beethoven's Ninth Symphony? This may seem like a superficial difference, but such metadata is crucial to the accurate reporting of what music is sold and played on digital platforms, which in turn determines royalty payments.<sup>200</sup>

#### IV. BROADER POLICY AND TECHNOLOGY CONCERNS

##### A. *Open Internet Platforms and Telecommunications Policy*

###### 1. *Preserving an Open Internet*

The Internet has allowed musicians and other creators to reach audiences on their own terms and participate in potentially rewarding new revenue streams, and its open platform for innovation has been the driving force behind all of the legal, licensed services now enjoyed by consumers.<sup>201</sup> The continued development of the legitimate digital marketplace is in large part dependent on the continued openness of the Internet.<sup>202</sup> Musicians, in particular, depend on the web to engage in a variety of ways, including (but not limited to) direct interaction with audiences, booking tours, selling merchandise, and collaboration with other artists across the globe.<sup>203</sup> It seems clear that the continued innovation fostered by open Internet structures will benefit and expand the legitimate digital marketplace as more consumers

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196. See Aaron Swartz, *MusicBrainz: A Semantic Web Service*, IEEE INTELLIGENT SYSTEMS no. 1, 76 (2002) (MusicBrainz is a user-generated service that aggregates different metadata programs as a means to better categorize and properly label audio files.).

197. *Id.*

198. Steve Smith, *Classical Streaming's Fitful Baby Steps*, N.Y. TIMES, Aug. 28, 2011, at AR16.

199. *Id.*

200. See Alex Pham, *Take Your Royalty Checks Please*, L.A. TIMES, Mar. 13, 2011, at B1 (reporting that SoundExchange has \$50 million dollars in undistributed royalty payments resulting from "bad data").

201. See, e.g., Kembrew McLeod, *MP3s Are Killing the Home Taping: The Rise of Internet Distribution and Its Challenges to the Major Label Music Monopoly*, 28 POPULAR MUSIC & SOC'Y 521, 527 (2005) (discussing how the open nature of the Internet has allowed artists to reach listeners independently of record labels).

202. See *id.* at 529 (discussing how independent labels and lesser-known musicians use relatively inexpensive online technologies to disseminate their music and circumvent the major label system).

203. See Ben Sisario, *Online Tools Help Bands Do Business*, N.Y. TIMES, Oct. 3, 2011, at B1 (reporting on new online services that enable bands to record at home, sell music directly to fans, run fan clubs, sell concert tickets, and track royalty payments outside of the major label system).

discover robust, legal, and licensed services that provide lawful access to a broad array of high-quality content on different devices.<sup>204</sup>

For the creative community, the crux of the so-called “net neutrality” debate is this: telecommunications companies would like to charge content providers higher fees for the faster delivery of their sites and services, which would fundamentally alter the very principles the Internet was built on.<sup>205</sup> Without basic protections, the web could become a place where those content providers that could not afford to — or did not want to — pay a toll would be relegated to the slow lane.<sup>206</sup> This could severely undermine the marketplace for independent music and frustrate the development of new technologies useful to creative commerce.<sup>207</sup>

In December 2010, the Federal Communications Commission (FCC) issued its Open Internet Order (Order),<sup>208</sup> which was a result of several years of contentious debate — public and otherwise — within the public interest, telecommunications, and regulatory communities.<sup>209</sup> The Order goes some way toward establishing clear “rules of the road” for the Internet.<sup>210</sup> The rules aim to preserve the open Internet on the wireline side (laptops, desktops, etc.), yet are not as robust as many had hoped.<sup>211</sup> There are questions about whether the Order creates loopholes for Internet Service Providers to set up paid prioritization schemes.<sup>212</sup> Enforcement of this policy may also prove difficult since court challenges, as well as possible Congressional intervention, are practically guaranteed.<sup>213</sup>

204. See, e.g., Jenna Wortham, *Music Site Lets Users Play D.J. to Virtual, Yet Discerning, Crowds*, N.Y. TIMES, July 11, 2011, at B1 (describing the popularity of Turntable.fm, a newly launched website and mobile application that allows users to pick songs to play to virtual rooms of listeners who in turn rate and comment on the selections).

205. See FED. COMM’N COMM’N, *In the Matter of Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C.R. 17905, 17915 (2010) (discussing how the Internet was built as an “open platform” and how broadband providers can limit user access).

206. See *id.* at 17922 (discussing how broadband companies would give content providers “a choice between accepting low-quality transmission or paying fees for prioritized access to end users”).

207. *Id.*

208. *Id.* at 17905.

209. *Id.* at 17906.

210. See *id.* at 17906 (adopting “three basic rules” to protect consumers and innovators while ensuring continued freedom and openness of the Internet).

211. See, e.g., Kim Hart, *Verizon Sues to Scuttle Net Neutrality Rules*, POLITICO, Sept. 20, 2011, <http://www.politico.com/news/stories/0911/64851.html> (noting that interest group Free Press and telecom giant Verizon both petitioned to the U.S. Court of Appeals for the District of Columbia Circuit to hold that the FCC’s neutrality Order rules should apply to both wireline and wireless networks); see also Letter from American Association of Independent Music to The Honorable Fred Upton et al. (Feb. 14, 2011), available at <http://www.publicknowledge.org/letter-american-association-independent-music-oppo> (stating that the FCC order does not go “far enough to preserve the dynamics that make the Internet such a unique and promising marketplace for creative commerce”).

212. See Sean McLaughlin, *Access Humboldt Challenges FCC’s Open Internet Rules*, ACCESS HUMBOLDT, Sept. 28, 2011, <http://accesshumboldt.net/site/access-humboldt-challenges-fccs-open-Internet-rules> (observing that some in the industry believe the rules are riddled with loopholes as “cable and phone Internet Service Providers (ISPs) cannot let some websites load faster than others or block access to websites that do not pay the ISP a premium, the so-called ‘Pay-to-Play’ system”).

213. See Eliza Krigman, *FCC Hit with Second Legal Challenge*, POLITICO (Jan. 25, 2011), <http://www.politico.com/news/stories/0111/48128.html> (noting that there is disagreement within Congress as to whether the FCC overstepped its legal authority in promulgating the neutrality order); see, e.g., *Verizon v. Fed. Comm’ns*

The Order contains few protections for the wireless space.<sup>214</sup> Mobile has increasingly become a primary platform for music access,<sup>215</sup> and it is crucial that this developing marketplace can benefit from the same dynamics that have contributed to such innovation and growth on the wired web.<sup>216</sup>

## 2. Data Caps, Spectrum, and Competition

Currently, the music industry is exploring the potential of “cloud music”— from mobile apps to remote storage lockers to sites and services that facilitate discovery and collaboration.<sup>217</sup> Recent developments, some highlighted earlier in this article,<sup>218</sup> strongly hint that the future for digital music may be headed off of hard drives and into the cloud.<sup>219</sup> The FCC, too, recognizes the potential of cloud computing for a host of applications.<sup>220</sup> The National Broadband Plan, issued by the FCC in March of 2010, recognized the potential and power of the cloud by specifically acknowledging that, “[s]oftware based in the cloud may allow more

*Comm’n*, Mot. Int. D.C. Cir. R., Case No. 11-1014, available at <http://www.mediaaccess.org/wp-content/uploads/Motion%20to%20Intervene%20-%20Verizon%20-%20FNL.pdf> (filing of a motion to intervene by Access Humboldt and other constituencies in Verizon’s petition against the FCC Order).

214. See Barbara van Schewick, *Start-Up Video Company Asks FCC to Improve Open Internet Proposal*, STANFORD LAW SCHOOL’S CENTER FOR INTERNET & SOC’Y (Dec. 13, 2010), <http://cyberlaw.stanford.edu/node/6568> (observing that a letter proposal written by a start-up video company to the FCC was concerned with the minimal protections afforded to the wireless space and urged the agency “to extend the same protections to wireless networks that [the agency] intend to apply to wireline networks”).

215. See *Music Must Go Cross-Platform, Say Industry Chiefs*, TELECOMASIA (Nov. 15, 2007), <http://www.telecomasia.net/content/music-must-go-cross-platform-say-industry-chiefs-0> (“With little in the way of the equivalent of an Asian iTunes, the Asia-Pacific region has been considered a ripe market for mobile music services, not least because the mobile is often the primary Internet access device.”).

216. See FED. COMM’N COMM’N, *In the Matter of Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C.R. 17905, 17961 (2010) (observing the need for additional steps to protect the openness of the Internet when accessed through mobile broadband as a result of the increasing use of mobile broadband to access Internet platforms); see also Comments from Free Press to the FCC in the Matter of Preserving the Open Internet Broadband Industry Practices, at 125 (Jan. 14, 2010), available at [http://www.freepress.net/policy/Internet/net\\_neutrality](http://www.freepress.net/policy/Internet/net_neutrality) (observing that to promote growth of mobile broadband usage, wireless platforms “must receive nondiscriminatory network management to protect consumer choice, competition, and innovation in the markets for content, applications, services, and devices”); *Music Must Go Cross-Platform, Say Industry Chiefs*, TELECOMASIA (Nov. 15, 2007), <http://www.telecomasia.net/content/music-must-go-cross-platform-say-industry-chiefs-0> (stating that the growth and innovation of mobile music platforms depend on providing users with unrestricted platforms).

217. See Andrew Edgecliffe-Johnson & Tim Bradshaw, *Apple, Google and Spotify Race to Music Market*, FIN. TIMES, Feb. 24, 2011, [http://www.ft.com/intl/cms/s/14a64aba-404b-11e0-9140-00144feabdc0,dwp\\_uuid=cbad994c-3017-11da-ba9f-00000e2511c8,print=yes.html](http://www.ft.com/intl/cms/s/14a64aba-404b-11e0-9140-00144feabdc0,dwp_uuid=cbad994c-3017-11da-ba9f-00000e2511c8,print=yes.html) (reporting that Apple clarified its plans for using remote storage, known as the “cloud” and that Google had plans to “combine with a digital locker service that would allow users to keep copies of their media in the cloud”); see also Jon Pareles, *The Cloud That Ate Your Music*, N.Y. TIMES, June 22, 2011, at A1 (reporting on the push to offer music storage through networked servers).

218. See *supra* Part II.

219. See Pareles, *supra* note 217, at A1 (“Recent weeks have been filled with announcements about music taking residence in the cloud, the poetic name for online storage and software that promises to make lifetimes worth of songs available to anyone, anywhere, as long as those people and places have Internet connections.”).

220. FED. COMM’NS COMM’N, *CONNECTING AMERICA: THE NAT’L BROADBAND PLAN*, 21 (Mar. 16, 2010).



small businesses and consumers to access applications that were once only available to large corporations with sophisticated information technology departments.”<sup>221</sup>

This endorsement may not reflect current marketplace realities.<sup>222</sup> Take for instance the experiences of Andre Vrignaud, a Comcast customer recently blacklisted from the ISP for one year.<sup>223</sup> According to Vrignaud, he was notified that he had exceeded his monthly data cap after backing up twenty years worth of photos and music files to a remote server.<sup>224</sup> Yet Vrignaud’s use of his broadband connection represents the kind of cloud-based activity that is becoming increasingly commonplace.<sup>225</sup> What is more troubling is that ISPs are able to offer competing services that do not count against user data caps.<sup>226</sup> This could amount to a competitive disadvantage to those looking to offer legitimate, licensed music platforms apart from an ISP.<sup>227</sup>

Data caps with tiered pricing are, in theory, reasonable tools for managing network congestion.<sup>228</sup> ISPs have an interest in maintaining the quality of connection that service subscribers are accustomed to,<sup>229</sup> but Comcast’s hard data cap (as exhibited in the Vrignaud case) appears to be centered on controlling “excessive use.”<sup>230</sup> But what determines “excessive use?” It is entirely possible that

221. *Id.* at 17.

222. Ryan Singel, *Comcast Bans Seattle Man From Internet For His Cloudly Ways*, WIRED (July 13, 2011), <http://www.wired.com/epicenter/2011/07/seattle-comcast/>.

223. *Id.*

224. *Data Caps and the Cloud: What Do They Mean For Music*, FUTURE OF MUSIC COAL., <http://futureofmusic.org/blog/2011/07/27/data-caps-and-cloud-what-do-they-mean-music> (last visited Sept. 19, 2011).

225. See Data Memo from the Pew Internet & American Life Project Regarding use of Cloud Computing (Sept. 2008), available at <http://www.pewInternet.org/Reports/2008/Use-of-Cloud-Computing-Applications-and-Services/Data-Memo.aspx> (illustrating that sixty-nine percent of Americans use cloud computing services for storing personal photos, videos, and other files).

226. See, e.g., Matt Hartley & Jamie Sturgeon, *Shaw Clarifies Position on Netflix Rival, Eases Net Neutrality Concerns*, FIN. POST (July 15, 2011, 3:51 PM), <http://business.financialpost.com/2011/07/15/shaw-clarifies-position-on-netflix-rival-eases-net-neutrality-concerns/> (observing Shaw president Peter Brissonette stating that “movies streamed using its new service will not count against a subscriber’s monthly Internet data caps, unlike movies streamed from competing outlets such as Netflix Inc., which continue to count against a user’s cap”)

227. See Rich Karpinski, *Netflix Says Telcos Not Playing Fair with Bandwidth; Could Buying Hulu be the Response?*, CONNECTED PLANET (July 11, 2011), <http://blog.connectedplanetonline.com/unfiltered/2011/07/11/netflix-says-telcos-not-playing-fair-with-bandwidth-could-buying-hulu-be-the-response/> (discussing the anti-competitive nature of how ISPs use data caps to block users from using video streaming services like Netflix, while simultaneously developing their own streaming services which would not count toward a data cap); see also Editorial, *To Cap, or Not: Broadband Limits Need to Be Carefully Monitored to Promote Innovation and Competition*, N.Y. TIMES, July 22, 2011, <http://www.nytimes.com/2011/07/22/opinion/22fri2.html> (discussing the anti-competitive temptation to limit data caps in order to prevent streaming and promote subscribers to use the ISPs’ services as opposed to competitors’).

228. See Daniel Havivi, *Metered-Usage Billing and the Broadband Internet Fairness Act*, 11 N.C. J. L. & TECH. 214, 216–19 (2010) (explaining both Time Warner Cable’s and Comcast’s attempts to use tiered pricing to prevent users from overloading the system and to charge users appropriately for their respective data use).

229. See *id.* at 217 (explaining that Time Warner Cable (TWC) claimed that the high prices were to improve the network, but in comparison to prices from other industry leaders, TWC’s tiered prices were likely well above actual costs).

230. *Id.* at 218–19.



the routine uploading of data to remote servers at off-peak times could easily trigger a hard data cap of 250 GB/month (Comcast's cap since 2008).<sup>231</sup> Normally, legitimate content up-and-downloads on today's high speed connections could trigger that 250 GB limit in a little more than five hours.<sup>232</sup>

The concerns extend to the mobile space, where a combination of spectrum-related issues and a lack of policy provisions preventing discrimination in content delivery may create uncertainty in a crucial and developing marketplace.<sup>233</sup> Competition in broadband providers is already scarce on the wireline Internet, and there is a legitimate worry that this will soon become the case on the wireless web.<sup>234</sup> AT&T recently sought to acquire T-Mobile, which, had government not moved to deny the merger, would have given AT&T tremendous market power.<sup>235</sup> Under such conditions, just two providers would have controlled more than eighty-three percent of all mobile subscriptions.<sup>236</sup> Without meaningful policies to prevent nondiscrimination in both the emerging application marketplace and in data transmission generally, there could be a deleterious impact on the independent music sector.<sup>237</sup> Innovators would also be disadvantaged: rather than generating

231. See, e.g., Network Management Policy, *Announcement Regarding an Amendment to Our Acceptable Use Policy*, XFINITY, <http://xfinity.comcast.net/terms/network/amendment/> (last visited Aug. 31, 2011) (announcing the new 250 GB data cap for residential users per month).

232. See *id.* (explaining that downloading 62,500 songs at 4 MB/song, downloading 125 standard-definition movies at 2 GB/movie, or uploading 25,000 hi-resolution digital photos at 10 MB/photo would put a user above the allotted 250 GB data cap).

233. See Hannibal Travis, *The FCC's New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417, 508 (2011) (explaining that tiered pricing based on speed or data caps should address minority organizations' concerns about poor users cross-subsidizing wealthy downloaders); see also Jo Best, *Mobile Music to Top Online by 2010*, BLOOMBERG BUS. WEEK (June 16, 2006), [http://www.businessweek.com/globalbiz/content/jun2006/gb20060616\\_152546.htm](http://www.businessweek.com/globalbiz/content/jun2006/gb20060616_152546.htm) (explaining that analysts predict that in the next few years more people will get their music over their mobile phones than on their computers); France Cannes, *Mobile-Phone-Makers Hoping Music Players Will Add Profits*, PHILA. INQUIRER, Feb. 15, 2005, at E12 (discussing the future of a mutually beneficial relationship between the wireless mobile phone and music industries).

234. See Coleton Bragg, Case Commentary, *Internet Service Providers Are Not Liable Under Anti-Competition Statutes for Controlling Prices When They Owe No Duty to Competing Providers*: Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009), 11 TRANSACTIONS: TENN. J. BUS. L. 215, 215 (2009) (noting how the "industry structure allows the incumbent ISP to control both the retail price it charges its own DSL customers and a portion of the cost incurred by its competitors (the non-incumbent ISPs) in their efforts to provide DSL service to customers," therefore minimizing competitive pricing between ISPs); see also Simon M. Lorne & Joy Marlene Bryan, 11A ACQUISITIONS & MERGERS § 9:43 (2011) (noting how many of the recent mergers and acquisitions in the wireless mobile telephone industry have been scrutinized by federal regulators for anticompetitive conduct).

235. See Edward Wyatt, *U.S. Files Lawsuit to Block Merger of Phone Rivals*, N.Y. TIMES, Sep. 1, 2011, A0 (explaining how the Department of Justice filed a lawsuit on August 31, 2011 to stop the merger so that consumers, businesses, and the government continue to get high quality, competitively priced mobile wireless products and services); see also Nate Anderson, *Analysis: Higher Prices, Fewer Choices if AT&T Swallows T-Mobile*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2011/03/analysis-higher-prices-fewer-choices-once-att-swallows-t-mobile.ars> (explaining the negative side effects for consumers if AT&T and T-Mobile were to merge).

236. Steven M. Davidoff, *AT&T's Battle for T-Mobile Is Political as Well as Legal*, N.Y. TIMES DEALBOOK (Sept. 6, 2011, 6:58 PM), <http://dealbook.nytimes.com/2011/09/06/atts-battle-for-t-mobile-is-political-as-well-as-legal/>.

237. *AT&T and T-Mobile: Bad for Creators, Entrepreneurs, and the Public*, FUTURE OF MUSIC COAL. & CTR. FOR MEDIA JUSTICE, 2 (June 20, 2011), <http://futureofmusic.org/sites/default/files/ATT%20%20T-Mo.pdf>.

money from providing access to a vibrant ecosystem of applications for their customers, they may find themselves in the unfortunate position of having to pay mobile gatekeepers to access the millions of actual and potential customers controlled by a wireless duopoly.<sup>238</sup>

Affordability and accessibility in quality, high-speed broadband is crucial to the further development of a legitimate digital music marketplace.<sup>239</sup> Competition is essential to the former, as is borne out by economic studies concerning a range of markets.<sup>240</sup> The latter requires a baseline of openness with which all actors in the marketplace are free to innovate.<sup>241</sup> Both can be preserved and enhanced by informed and thoughtful public policy.<sup>242</sup>

### B. Intellectual Property Enforcement

There are currently multiple efforts underway to expand the range of tools available to enforce intellectual property (IP) protections online.<sup>243</sup> Although these initiatives — both public and private — are meant to apply to all IP in the digital realm, there is a particular focus on copyright among major corporations in the music and motion picture industries.<sup>244</sup> Some independent industry groups, including the American Association of Independent Music (A2IM) have also expressed support for specific stratagems.<sup>245</sup> Many of these policies are well intentioned but may have unintended consequences.<sup>246</sup> It would be advantageous

238. *Id.* at 3.

239. See Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 111–12 (2010) (explaining that accessibility issues can be caused by an absence of net neutrality and other problems borne from unaccountable Internet service providers).

240. See Bragg, *supra* note 234, at 215 (explaining how the current industry structure and persistent dominance of incumbent ISPs do not lend itself to competitive pricing).

241. See Pasquale, *supra* note 239, at 120 (explaining that in the absence of network neutrality rules, carriers may be able to squeeze out disfavored content providers).

242. The D.C. Circuit Court had previously held that the FCC lacked authority to regulate ISPs. See *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 644 (D.C. Cir. 2010) (holding that the FCC failed to justify exercise of ancillary authority to regulate Internet service provider's network management practices). However, the FCC then issued an order for "Preserving the Free and Open Internet," which adopts network neutrality rules that give the Commission broad authority to regulate the Internet, wireline, and wireless networks. 1 JOSEPH B. FAZIO, *INTERNET LAW AND PRACTICE* § 1:21 (2011).

243. See Jon Healey, *FCC Cracks Down on Piracy*, L.A. TIMES, Nov. 5, 2003, at C3 (discussing a recent FCC order requiring consumer electronics and computer manufacturers to redesign their products to help deter piracy of digital television programs); see also Editorial, *Internet Piracy and How to Stop It: A Senate Bill Has Commendable Goals, But Needs Some Work Before It Can Be Law*, N.Y. TIMES, June 9, 2011, at A26 (discussing a senate bill, the PROTECT IP Act, short for "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act," that would create even more new tools for the battle against illegal online commerce).

244. See Peter Shinkle, *Movie Industry Sues File Swappers*, ST. LOUIS POST-DISPATCH, Nov. 17, 2004, at A1 (discussing lawsuits filed by movie industry corporations against private parties, comparing them to similar suits filed by the music industry).

245. *A2IM Applauds Senate Judiciary Committee's Passing of the PROTECT IP Act*, AM. ASSOC. OF INDEP. MUSIC (June 1, 2011), <http://a2im.org/2011/06/01/a2im-applauds-senate-judiciary-committees-passing-of-the-protect-ip-act/>.

246. *PROTECT-IP Fact Sheet*, FUTURE OF MUSIC COAL. (June 27, 2011), <http://futureofmusic.org/article/fact-sheet/protect-ip-fact-sheet> (discussing the consequences of the Protect IP Act including its freedom

for all stakeholders to seek an enforcement plan that preserves and encourages innovation in the legitimate digital marketplace while protecting the rights of creators.<sup>247</sup> At the very least, enforcement strategies should allow for ongoing experimentation around business models and promotion, both of which are crucial to the establishment of a sustainable twenty-first-century music industry.<sup>248</sup>

A separate article could easily be written on this subject alone; the many complex factors in public and private IP enforcement efforts make a detailed account of these policies impractical in this context. Still, the implementation of any individual or combined strategies will undoubtedly impact the marketplace for music in both the United States and abroad.<sup>249</sup> Therefore, it is worth stating the importance that any policy meant to inhibit unauthorized file sharing must:

- Reflect the needs of independent creators;<sup>250</sup>
- Encourage the growth of legitimate, licensed services;<sup>251</sup>
- Provide flexibility, control, and accessibility for artists;<sup>252</sup> and
- Coexist with streamlined database and licensing structures.<sup>253</sup>

of expression implications, creating the belief that America endorses censorship, and that innocent websites could be blocked); *see also* Editorial, *supra* note 243 (discussing the unintended consequences and inadequacies of the bill).

247. *Id.*; *see also* U.S. CONST. art I, § 8, cl. 8 (stressing the importance of authors' interests in guaranteeing exclusive rights to their respective works).

248. *See* Linda Pickering & Mauricio F. Paez, *Music on the Internet: How to Minimize Liability Risks While Benefitting from the Use of Music on the Internet*, 55 BUS. LAW. 409, 434 (1999) (discussing how emerging e-commerce markets and developing Internet technologies challenge the legal system to maintain regulations in a way that promotes progress while respecting the rights of property owners); *see also* Amy Harmon, *Piracy, or Innovation? It's Hollywood vs. High Tech*, N.Y. TIMES, Mar. 14, 2002, at C2 (discussing the tension between protecting intellectual property and promoting technological innovation, and how lawmakers struggle to strike a balance).

249. *See* Armen Boyajian, Note, *The Sound of Money: Securing Copyright, Royalties, and Creative "Progress" in the Digital Music Revolution*, 62 FED. COMM. L.J. 587, 630–31 (2010) (discussing how copyright reform should react to the current paradigm shifts in the way music is produced, distributed, published, and consumed, and ultimately, the financial outcomes for the industry players); *see also* David Barboza, *Google and the Big Music Labels Are Betting on Free Downloads in China*, N.Y. TIMES, Apr. 6, 2009, at B4 (discussing the major record labels' plan to offer free music downloads to everyone in China, where illegal downloading is rampant).

250. *See* David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 373, 435–52 (2010) (discussing the increasingly independent role artists play in the music industry and how independent artists' interests play out with several possible legislative reforms).

251. *See* Aric Jacover, Note, *I Want My Mp3! Creating A Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2247 (2002) (discussing how if superior legitimate services can be created, then they may be more attractive to consumers than lower quality, illegal services); *see also* Possible Alternative, COLUMBUS DISPATCH (Ohio), August 6, 2003, at 3F (discussing how legitimate Internet services can help guarantee a higher quality of music).

252. *See* Troutt, *supra* note 250, at 435 (explaining how iTunes and other legitimate music download sites have facilitated inexpensive means by which even independent artists can market their work).

253. *See* Christman, *supra* note 187 (discussing the benefits of a global database containing metadata as a means to streamline the licensing process); *see also* Music Licensing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on House Judiciary, 109th Cong. (2006) (statement of Jonathan Potter, Executive Director, Digital Media Association) (describing how the Digital Media Association has long been advocating for streamlining licensing rights).

In order for these values to be a part of emerging IP policy, decision-makers must hear from a wider set of stakeholders than just the legal and lobbying divisions of the major entertainment conglomerates.<sup>254</sup> There are encouraging developments on this front, with nonprofit arts and service organizations such as the Future of Music Coalition, Fractured Atlas, and the National Alliance for Media Arts and Culture taking lead roles in assisting creators in directly engaging in crucial policy matters.<sup>255</sup>

## V. CONCLUSION

Discussion about how to best deal with the myriad of concerns facing the music industry is ongoing.<sup>256</sup> Too often, however, these debates take place without input from those with the most at stake: creators.<sup>257</sup> It is therefore important that any effort to adjust, improve, or reform music business models and attendant public policies is informed by direct consultation with these key stakeholders.<sup>258</sup> In fact, a better understanding of what is and is not working for artists in the new landscape for music is crucial to decision-making at all levels.<sup>259</sup> Many observers have categorized structural changes as positive improvements for musicians, particularly when compared with the music industry of the past.<sup>260</sup> Some of these assessments

254. See Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 914–17 (2011) (discussing how the music industry needs to include artists in the discussion about reform and how greater visibility of the creator changes Americans' perceptions about paying for music).

255. See *About FMC*, FUTURE OF MUSIC COAL., <http://futureofmusic.org/about> (last visited Sept. 6, 2011) (establishing its mission to ensure a diverse musical culture where artists flourish, are compensated fairly for their work, and where fans can find the music they want); see also *About Fractured Atlas*, FRACTURED ATLAS, <http://www.fracturedatlas.org/site/about> (last visited Sept. 6, 2011) (establishing its mission to serve a national community of artists and arts organizations through offering programs and services that facilitate the creation of art by offering vital support to the artists who produce it); *About NAMAC*, NAT'L ALLIANCE FOR MEDIA ARTS & CULTURE, <http://www.namac.org/about-namac> (last visited Sept. 6, 2011) (establishing its mission to foster and fortify the culture and business of independent media arts through dialogue, collaboration, research, and advocacy).

256. See Sam Bowman, *Evidence-Driven Intellectual Property Laws*, ADAM SMITH INST. BLOG (May 23, 2011), <http://www.adamsmith.org/blog/media-and-culture/evidence%11driven-intellectual-property-laws/> (discussing the challenges of updating IP law and some of the most recent reports and strategies utilized to do so); see also Michael Cieply, *Support for Antipiracy Bill*, N.Y. TIMES, May 16, 2011, at B4 (discussing the entertainment industry's support for recent proposed legislation, specifically the PROTECT IP Act that would "give law enforcement officials and others new authority to move against Internet sites that traffic without permission in copyrighted material").

257. See Yu, *supra* note 254, at 914–17 (lamenting on the music industry's failure to treat creators fairly); see also Wagman, *supra* note 84, at 120 (discussing how artists must be represented in policy debates and negotiations).

258. *Id.*

259. See Stan J. Liebowitz & Richard Watt, *How to Best Ensure Remunerations for Creators in the Market for Music? Copyright and Its Alternatives*, 20 J. OF ECON. SURVEYS 513, 513–14 (2006) (discussing how remuneration for creators usually relies on copyright royalties, but how infringement problems and lack of solutions may force artists to use alternative mechanisms for generating revenue).

260. See Yu, *supra* note 254, at 901–02 (noting that some commentators have suggested that artists should switch to a new business model that relies solely or primarily on alternative compensation to copyright royalties); see also Boyajian, *supra* note 249, at 601–12 (discussing how copyright retention, royalty collection,



are correct.<sup>261</sup> Yet, almost all analyses of the effects of these changes rest purely on assumptions that they have improved musicians' bottom lines or improved top-level appraisals of the music industry based on traditional metrics: number of albums sold, number of spins on radio, and even stock price valuations.<sup>262</sup> Any attempt at moving forward should be informed by data that reflects the actual experiences of musicians.<sup>263</sup>

To this end, the Future of Music Coalition has embarked on an ambitious Artist Revenue Streams project (ARS).<sup>264</sup> ARS is based on a very basic research question: What percentage of musicians' income originates from each possible revenue source? What is the ratio among different sources, whether it is royalties, money from gigs, t-shirt sales, or any of the twenty-nine other meaningful revenue streams<sup>265</sup> that FMC has identified? Has the ratio changed over time and, if so, what are the factors that have conditioned these changes? Finally, are the revenue stream ratios different for artists working in different genres and at different stages of their careers?

The project, currently underway, is collecting information from a diverse set of U.S.-based musicians about the ways that they are currently generating income from their recordings, compositions, or performances, and whether this has changed over the past ten years.<sup>266</sup> ARS employs three methodologies: in-depth interviews with more than twenty-five different types of musicians — from jazz performers to classical players, TV and film composers, Nashville songwriters, rockers, and hip hop artists; financial snapshots that will show individual artists' revenue pies in any given year; and a wide ranging online survey launched in 2011.<sup>267</sup> FMC hopes that data collected will prove useful in areas ranging from cultural policy to investment to new business models to greater public discourse around artists' rights.

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self-production, self-publishing, self-distribution, file sharing, online retail downloading, and webcasting have all contributed to financial shifts in the music industry).

261. See Music Forte Changes Industry Standards by Providing Artists with 100 of Their Profits, RADIO & MUSIC (July 23, 2010) (discussing a music service that gives artists a way to sell their music and receive 100 percent of the profits).

262. See, e.g., Boyajian, *supra* note 249, at 612–16 (explaining how an artist may earn money through royalties through copyright retention, now possible due to changes in infrastructure).

263. See, e.g., Reginald F. Davis & Rachel M. Zahorsky, *Law of Code: Regulation Needs New Direction*, Lessig Says, 97 A.B.A. J. 30 (2011) (discussing Lawrence Lessig's promotion of modifications to copyright law that reflect the new innovation and technology in the industry, while also making sure artists are getting paid).

264. *Artist Revenue Streams*, FUTURE OF MUSIC COAL. (Oct. 28, 2010), <http://futureofmusic.org/article/research/artist-revenue-streams>.

265. *The 29 Streams*, FUTURE OF MUSIC COAL. (Oct. 14, 2009), <http://futureofmusic.org/blog/2009/10/14/29-streams>.

266. See *Artist Revenue Stream: Population of Study*, FUTURE OF MUSIC COAL., <http://futureofmusic.org/article/research/artist-revenue-streams-population> (last visited on Sept. 5, 2011) (describing the study population).

267. See *supra* note 237 (discussing the research methodologies).



Regardless of the results of this historic undertaking, there is a continued need for the creative sector to become informed and to empower self advocates.<sup>268</sup> The music industry was always complex and difficult to navigate; persistent questions raised by emerging technology make it more so.<sup>269</sup> A main goal for artist advocates will be finding ways to educate creators, policymakers, and the public about many of the issues outlined in this article.

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268. See Wagman, *supra* note 84, at 120 (discussing how artists must be represented in policy debates and negotiations); see also Yu, *supra* note 254, at 914–17 (lamenting the music industry’s failure to treat creators fairly); see also Ben Sheffner, *Legal Matters*, BILLBOARD (Apr. 3, 2010) (commenting on how all the major players in the debate about copyright reform have profound disagreements over what to do).

269. See Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 675 (2003) (noting how the inundating progression of the digital revolution, the layering of copyright ownership, and the complexity of copyright law plays a major role in the inability of the music industry to respond).