Fixing What's Badly Broken:
A Proposal to Maximize the Licensed Availability of Recorded Music for Digital Transmissions and to Make the Music Industry Whole Again as the Digital Music Marketplace Develops

By Bennett Lincoff[1]

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"We stand here confronted by insurmountable opportunities." Pogo

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The music industry is in crisis. It does not control the market for digital distribution of its products. Revenue from the sale of recorded music has been steadily declining. The industry's efforts to salvage its legacy business model have not only failed they have caused a public relations backlash. The industry is now held in such low esteem that otherwise law-abiding consumers find it far too easy to rationalize what is, by current legal standards, simply stealing, and nothing more. Ironically, the music industry's predicament is largely of its own making. It results from the industry's failure to respond constructively to the changed circumstances imposed on it by emergence of the global digital communications network.

In particular, the Internet is fundamentally incompatible with a sales-based revenue model for works of popular culture, especially music. Prior to the Internet, large-scale piracy of physical products, such as records, tapes and CDs, required an organizational infrastructure, manufacturing facilities, distribution channels and lots of capital. It was cumbersome at best and vulnerable at every turn to the industry's anti-piracy campaigns. Also in the past, the copying of music by individual consumers was limited to the making of analog tape recordings, the sound quality of which degraded significantly with each successive generation of copy. Moreover, the means by which consumers were able to distribute these tapes was limited to face-to-face transactions between individuals who handed-off copies to each other. This conduct, while troubling, never imperiled the music industry.

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Today, music piracy is cheap, quick and easy. Record labels have already made nearly all recorded music lawfully available in digital format through the sale of CDs. Practically anyone can turn these recordings into digital audio files and make them available on the Internet. Every Internet user, whether or not involved in peer-to-peer ("P2P") file-sharing, and every webcaster, podcaster, or other digital audio service provider in the world is a potential source of unauthorized mass distribution of recorded music in pristine and unprotected form.

Through the Internet, the market for sale of individual recordings can be saturated in a moment's time and without payment of any royalties to songwriters, music publishers, recording artists and record labels. The dollar amount at risk may well be greater for larger right holders; but all rights holders, large and small, are impacted to the extent they seek to sell their music. Given this, the industry's traditional revenue model, based on the sale of hit recordings at thin margins, will soon no longer be sustainable. Neither law, nor technology, nor moral suasion will change this result.

Music was the first killer app among consumer products on the Internet, and the threat to the industry's sales-based revenue model was apparent from the outset. Unfortunately, though music has been available online for more than ten years, the industry has failed to undertake the transformation needed to succeed in the digital music marketplace. Instead, it has sought to preserve the established relationships upon which its past successes were based and to extend its sales-based revenue model well beyond what has turned out to be its effective reach.

To these ends, the industry has experimented with a variety of access restrictions and anti-copying measures. All of these efforts have engendered effective technological countermeasures and news of each successful hack quickly found its way to everyone who cared. Those who create digital rights management ("DRM") tools for the music industry have proven to be no match for smart kids with computers, many of whom are beyond the easy reach of the law. Nor is it desirable that the technology used to protect recordings should be beyond the grasp of young people. Public policy limits the nature of DRM that can be applied to entertainment content. It is not permissible to protect music as if it were national security information. And while it is generally illegal to circumvent technological measures used to prevent unauthorized access to and copying of entertainment content, there are circumstances in which circumvention is entirely lawful. In any event, punishing kids as criminals has not brought about the principal result that the industry seeks. The landscape is littered with failed DRM schemes and abandoned security initiatives. There is no reason to believe the result will be different next time, or ever.

The industry has also used its substantial lobbying resources to persuade lawmakers to protect music and other entertainment content according to current and sometimes inapposite legal mechanisms that effectively chill the development and distribution of new products and services. Specifically, the industry has pursued legislation banning hardware and software that might undermine the sales-based revenue model by inducing infringement. As a result, consumer electronics makers, fearing liability, have been slow to offer greater interoperability between the many recording, playback, and communications devices that are available. They have also been reluctant to offer new products with next generation capabilities, such as web-enabled home entertainment systems or embedded device recording capabilities. In addition, as a result of industry sponsored litigation, technology firms and their investors, also fearing liability, have withdrawn support for certain of their own previously released software products, or moved their operations off-shore.

The industry has also sought to ban the use of digital audio file formats that cannot be configured to inhibit consumers from downloading music without authorization. It proposed legislation that would prohibit the use of such file formats -- especially the widely popular MP3 file format -- by audio service providers who wish to avail themselves of the existing – albeit limited -- statutory license in the United States for webcasting.

Efforts to limit the market to copyright "friendly" files, players, and other devices and systems may raise fair use and free speech concerns depending on whether and how they impede individuals from communicating with each other. Besides, consumers want devices that accept all works, and recordings that play on all devices; they want to enjoy music when, where and how they themselves decide.

The industry has steadfastly refused to authorize services – especially P2P file-sharing networks -- that offer consumers full, unfettered, DRM-free access to music. To be sure, the industry supports services that offer DRM-encumbered music files; files in obscure formats, such as MPQ; files that are tethered to particular playback devices; files that cannot be shared; files that time-out; are only available while the consumer remains a subscriber of the service from which the music was obtained; or that are subject to other use restrictions. These are, at best, alternatives to the services that consumers demand, not substitutes for them. Because these offerings fall short of responding to consumer demand, they leave the sales-based revenue model vulnerable to widespread infringement by consumers who refuse to accept less than they already know they can have.

By its refusal to meet consumer demand, the industry has relegated consumers to unlicensed services where adware, spyware, and privacy violations abound. In turn, the industry uses technological measures in an effort to disrupt these services. It seeds them with corrupted music files that damage consumers'

computers. It also engages in a practice known as “spoofing” by which consumers – including, no doubt, some young children – who search P2P networks for music files have been sent pornography instead. And, of course, the industry has launched a campaign of infringement litigation against consumers seeking ruinous damages and imposition of criminal penalties for conduct occurring in the privacy of people’s homes.

Another element of the industry’s strategy is the imposition of unprecedented program content restrictions on webcasters. The industry fears that webcasting will allow consumers to make unauthorized digital copies of recordings if they know -- or are reasonably able to anticipate -- when particular recordings will be streamed. Accordingly, in the U.S. by statute, and in Europe by contract, webcasters may not offer interactive programming by which consumers can request that particular recordings be transmitted; may not offer programming dedicated to particular artists, or even containing more than a few songs by the same artist or from the same recording; may not make prior announcements of the recordings they will stream; and may not offer archived programs shorter than five hours duration. This interference in the programming decisions of webcasters has no counterpart in the music industry’s relationship with non-digital program services. It diminishes webcasting unnecessarily, rendering it less compelling in many ways than ordinary broadcast radio.

The music industry’s treatment of webcasters exemplifies its approach to the licensing of digital audio services generally. By and large, rights holders are unwilling to offer licenses for digital uses of music that do not have an identifiable counterpart and associated business model in the analog world with which they are comfortably familiar. Audio service providers who wish to offer music in ways that do not comply with the stringent music use restrictions and business model limitations imposed on webcasters find it nearly impossible to obtain licenses for their services. When rights holders refuse to make licenses available, compliance is only possible by service providers who either forego the use of copyrighted music or cease doing business altogether. This choice among equally unappealing alternatives has fostered a culture in which many service providers consider it the better business practice to ask forgiveness from music rights holders for infringement rather than to seek permission from them in advance of launching a new service.

Music industry rights holders also refuse to grant licenses that are co-extensive with the worldwide territorial scope of Internet transmissions.

The music industry operates globally, but rights in musical works and sound recordings are administered by local interests on a territory-by-territory basis. For example, music publishers enter into agreements with publishers in other countries, called subpublishers, who, in exchange for a percentage of the

revenue collected, license rights in the publisher's songs in the subpublisher's territory. Similarly, record labels enter into agreements with distributors in other countries for the sale or other exploitation of the label's recordings in the distributor's territory. For their part, musical work public performance rights licensing organizations ("PROs") throughout the world are linked through a network of reciprocal administration agreements. These authorize each PRO to license public performances in its own territory of the songs in the catalogs of all the PROs with which it is affiliated.

This structure provides a consistent basis by which the music industry administers rights in musical works and sound recordings for uses that begin and end in a single territory. In those instances, a license from a local entity granting domestic reproduction, distribution or public performance rights, as the case may be, is sufficient to authorize the activities in question. This structure also establishes the principle that the party who owns local rights in a work for the territory in which the licensed use takes place is entitled to receive whatever royalties are generated by that use.

Internet transmissions, on the other hand, are worldwide in origin and in reach. Every Internet transmission brings with it the possibility of worldwide liability. Under current law and industry licensing practices, these transmissions are infringing if not authorized for the territory from which they originate. They also may be infringing if not authorized for the territories in which they are received; and this, despite that it is end users, not service providers, who determine the territory in which any particular Internet transmission will be received. In the absence of the right and ability to compel local network access providers to block services whose transmissions originate from another territory, it is not possible to stop digital transmissions from crossing national boundaries. Nor is it desirable to institutionalize this form of censorship by including it as a tool for the management of rights in entertainment content.

Audio service providers, whose transmissions traverse the global communications network, need licenses that grant worldwide rights. These are unavailable, however, because rights holders have been unable to resolve their conflicting claims regarding transborder transmissions. For example, rights holders for the territory from which an Internet transmission originates and those for the territory where it is received both demand authority to license it. And regardless who licenses the transmission, rights holders in the territory of origin and those in the territory of reception both insist that the license fees prevailing in their respective territories should be charged. Of course, if the rates of the territories of reception are used, service providers, who are unable to control where their transmissions are received, would be unable to develop well-informed business strategies because unable accurately to predict their music license fee costs. Rights holders are also unable to agree who among them

should be entitled to receive royalties earned from transborder Internet transmissions. A further complicating factor is the demand of many PROs that they retain the right to license Internet transmissions of all service providers whose economical residence is in the PRO's territory regardless of the territory from which the service's transmissions originate or in which those transmissions are received. Whatever the reason for it, the effect of the refusal of music industry rights holders to grant worldwide rights for Internet transmissions of their works is to compel service providers either to enter into separate agreements with the rights holders of each work in every territory, or enter into agreements with rights holders in their own territory for domestic transmission rights only and risk an unknown quantum of infringement liability under foreign legal regimes.

The Internet and related technologies have rendered certain traditional rights in music unenforceable and blurred the distinctions between others. This has injected uncertainty into the digital music marketplace that the industry has turned to its advantage. For example, music publishers and the public performance and mechanical rights licensing organizations they control demand double payments where only a single transmission of a work is involved. Both a mechanical and a public performance license fee are charged even if the music is transmitted only for downloading and is not audible while being sent, such as in podcasting. Both fees are also charged even where the only "copies" made are transitory and incidental to transmissions that are nothing more than performances, such as in on-demand streaming or retransmissions of over-the-air broadcast radio transmissions. Service providers have difficulty navigating this confusing and counterintuitive paradigm, and in accepting the industry's rationale for the double payments it demands.

The industry has caused additional uncertainty in the marketplace by taking inconsistent positions as to whether consumers who access music online are purchasing that music or merely obtaining a license for its use.

On the one hand, record labels and music publishers treat these transactions as licenses, not sales, because they want to maintain as much control as possible over use of their works by consumers. Rights holders can limit the ways in which licensed content may be used. Licenses can be terminated and all rights that had been granted will revert. Those who persist in unlicensed uses are subject to liability as copyright infringers. Moreover, application of the first sale doctrine to the digital context remains unclear: It is not yet settled whether consumers who lawfully acquire a digital file containing recorded music may transfer that file to another person with the same impunity as they may give away or sell a CD, tape or vinyl record from their collection. In any event, terms of service typically provide that consumers only acquire a license to music that most of them no doubt believe they purchased outright.

On the other hand, for purposes of calculating royalties to be paid to recording artists and songwriters, record labels and music publishers treat these same consumer transactions as sales. When a recording is sold the recording artist and songwriter typically receive a royalty of only a few percentage points of the retail sale price. However, if use of the recording were subject to a license, and not treated as a sale, the recording artist and songwriter could receive royalties up to 50% of the revenue derived from the license.

Music's success is also its undoing; at least as far as the industry's sales-based revenue model is concerned. People regard music differently than they do other forms of cultural content. Music is portable. Music is ubiquitous. Music appears to be free. Everyone is a music consumer, whether they buy CDs, go dancing or to concerts, listen to radio and watch television, or network online while playing a previously downloaded podcast. People develop an ownership interest in the music they most like to hear. "They're playing our song," is a heartfelt refrain. The psychological effect on consumers of this sense of personal entitlement to other people's property should not be overlooked.

The market forces at work at the intersection of the Internet and the music industry's sales-based revenue model are wildly asymmetrical and to the disadvantage of music industry rights holders. The network is everywhere and music is everywhere a part of it. Thus, despite the industry's efforts, the unauthorized digital distribution of recorded music continues unabated; P2P file-sharing networks proliferate; and new means of mass distribution, such as podcasting, blogging, and social networking services, have arisen. If anything, the industry's efforts have resulted in fewer licensed transmissions of fewer recordings and slowed the growth of royalties that songwriters, music publishers, recording artists, and record labels otherwise may have earned.

One factor that has favored the music industry has been the relatively slow deployment of broadband connections for the consumer market in the United States. Initially, consumers were reluctant to pay more for broadband service because so little of the entertainment content they most wanted was lawfully available on the Internet. Lately, however, the rate at which consumers are subscribing to broadband has increased dramatically. The faster their connection to the Internet the more quickly consumers can download music and pass it along to others. The worst outcome for the music industry would be if worldwide broadband penetration overwhelms the industry's ability to police unauthorized distribution of recordings before a full, fair and feasible solution for the digital music marketplace is in place. The explosive growth of WiFi and web-enabled mobile communications devices highlights how urgently such a solution is needed.

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Public policy should strongly support the opportunity of music industry rights holders to derive ample rewards from their contributions to culture and commerce. By the same token, however, the music industry has no right to demand that public policy support its desire to do business in a particular way. The problem lies with the industry's addiction to the sales-based revenue model. As long as its fortunes are tied to sales, it must continue punitive litigation against consumers, and interference in the free markets for technology, consumer electronics, and telecommunications and digital audio services.

What is needed is an alternative to the sales-based revenue model for musical works and sound recordings; a comprehensive approach to rights licensing and rights management that does not depend on the efficacy of exclusionary technologies for its success; a solution that simultaneously protects the integrity of copyright, promotes technological innovation, facilitates the growth of all manner of digital audio services, and meets consumer demand.

I would like to suggest a specific means by which to bring about these salutary results. My proposal relies on free market mechanisms and voluntary collective rights administration, and, if implemented, would maximize the lawful and licensed availability of recorded music for digital transmissions.

I suggest this: The rights of songwriters, music publishers, recording artists and record labels in their respective musical works and sound recordings should be aggregated so as to create a single right for digital transmissions of recorded music. I call this right the "digital transmission right." It could just as well be called the "X" right.

The digital transmission right would be a new right, not an additional right. It would replace the parties' now-existing reproduction, public performance and distribution rights (and, in those territories where it applies, the communication right). These would no longer have separate or independent existence for purposes of digital transmissions of sound recordings or of the musical works embodied in them.

Under the digital transmission right the only act that would require a license, or payment of a license fee, would be the digital transmission of a recording. Every such transmission that is not subject to exemption would require authorization in order to be lawful. This does not mean that separate payment would necessarily be due for each transmission of each recording; only that, regardless how license fees may be calculated, all non-exempt transmissions would require authorization.

Licenses under the digital transmission right could be made available unconstrained by the concerns that have driven the music industry's campaign to salvage the sales-based revenue model. The determinative consideration would be whether or not recordings had been digitally transmitted, not whether particular transmissions are more or less likely to result in sales, or may cause sales of recordings to be lost. When digital transmissions occur, licenses will be needed; and when licenses are needed, they should be made available free of the limitations and restrictions that have characterized the industry's licensing efforts to date. All that will matter is the rate of compliance and the price of a license.

Accordingly, licenses under the digital transmission right should be made available without regard to whether recordings are transmitted by streaming, or downloading, or by some other means not yet devised; whether music programming is interactive or non-interactive, or contains this, that or another recording; whether the service that provides the transmissions is advertiser supported, employs a subscription model, charges users on a per-listen or per-download basis, or has no revenue at all. How many copies, if any, that are made in the course of transmissions (including any server copies, or ephemeral, transitory or buffer copies that are necessary to effect a transmission), the type of transmission technology used, and the file format in which recordings are transmitted would not be of concern. Certain of these factors, such as those relating to revenue, may be relevant to calculation of license fees, but their presence or absence should not affect the availability of a license.

Ownership of the digital transmission right in individual recordings would be held jointly by the songwriters, music publishers, recording artists and record labels who contribute to the recording. Each of these parties would be treated as a co-owner of the digital transmission right whether their contribution to the recording was made intentionally and voluntarily (such as where the recording artist is also the writer of the song being recorded) or without purposeful intent and involuntarily (such as where the songwriter and music publisher are compelled by application of the compulsory mechanical license to allow recordings of their works by others).

The interests of all co-owners of the digital transmission right in a recording would be implicated by every digital transmission of that recording. No one co-owner would be permitted to act as gatekeeper of the rights of all, with sole discretion to determine by way of a veto if, when, how, and by whom this newly-established right may be exploited. Rather, regardless of the nature of their relationships to each other under pre-existing agreements, or to particular recordings under current law, under the digital transmission right each rights holder would have full and independent authority to grant non-exclusive licenses

for digital transmissions of those recordings on any terms that they and their licensees find to be mutually acceptable.

By way of example, a record label, acting without the consent or even prior knowledge of the songwriters, music publishers and recoding artists involved, could license its entire catalog of recordings, or any part of it, on a non-exclusive basis to a digital audio service provider who offers subscription streaming. Recording artists could authorize fan sites to promote an upcoming concert by offering downloads of the artist's latest recording in exchange for voluntary contributions from consumers. And songwriters could offer Creative Commons licenses for digital transmissions of every cover recording of one of their compositions. The only limitation on the authority of individual rights holders to grant non-exclusive licenses would be the obligation to account to co-owners pursuant to whatever arrangements they make among themselves for the division of royalties earned from this newly-established right.

The Internet will influence the dynamics of these royalty negotiations. Recently, and for the first time, unsigned artists who produce their own recordings have been able to obtain widespread early recognition of their work – though little, if any, direct financial benefit -- through P2P file-sharing and the use of viral marketing. These efforts at self promotion may result in drawing more fans to concerts. In the mean time, however, CDs sales will certainly have been lost. I doubt that many of these early adopters expect to build their careers through the use of P2P file-sharing in its current debased form. More likely their hope is that this exposure will bring them to the attention of a major record label and result in a recording contract. This strategy correctly recognizes the continuing market dominance by the majors in the context of the sales-based revenue model through their control of traditional distribution channels. However, the exigencies of a hit-driven market have already made the notion that record labels nurture artists' careers an anachronism. Moreover, new businesses may arise to displace record labels as the source of funds to underwrite concert tours but without acquiring ownership of the artists' creative output in exchange. And, as the digital music marketplace matures, the network itself will become the primary channel of "distribution," and licensed transmissions will displace sales as the principal source of music industry revenues. These circumstances suggest that the relative importance of the roles played by the major record labels -- and music publishers for that matter -- may diminish over time. One would expect that any such change would be reflected in the division of royalties among the rights holders involved.

In any event, there will be circumstances in which rights holders will not be able to reach voluntary agreement on the division of royalties; and others in which negotiations themselves may not be possible (e.g., with older works where rights holders have lost contact with each other, or in the case of cover recordings

where, because of the compulsory mechanical license, the recording artist and record label involved will not necessarily ever have had direct contact with those who own rights in the underlying musical work that was recorded). Therefore, as both a starting point for negotiations generally, and as a default when voluntary agreement is not possible, I suggest that the interests of songwriters, music publishers, recording artists and record labels should each be allocated a 25% share of the total royalty earned from licensed digital transmissions of their recordings. In this way, singer-songwriters would receive 50% of all royalties earned from licensed transmissions of those recordings to which they will have made the overwhelmingly greatest contribution.

Co-owners of the digital transmission right in individual recordings would also be free to coordinate their licensing efforts. If all agree, they may license their jointly owned recordings to a single audio service provider for all purposes on an exclusive basis, or to multiple service providers, each on a different exclusive basis (e.g., time, territory, or type of service). Exclusive licenses, however, depend for their value on the ability to exclude others from using the work in the same manner and during the period of exclusivity. The music industry's experience to date demonstrates the futility of efforts to restrict uses of recorded music on the Internet. In the digital music marketplace, the useful lifespan of exclusive rights will be short; their value uncertain. Service providers will do better being the first source of particular content rather than trying to maintain their status as the only source of it.

For all purposes other than digital transmissions, current law relating to the ownership of rights in musical works and sound recordings would continue in effect without change. For example, the compulsory mechanical license for the making of cover recordings would continue in force; although the digital transmission right would govern the relations of the parties for purposes of digital transmissions of those recordings. Moreover, nothing in this proposal is intended to grant songwriters or music publishers any right in any recording other than an interest in the digital transmission right in recordings embodying their own musical works. And nothing is intended to grant recording artists or record labels any right in any musical work other than an interest in the digital transmission right in their own recordings of particular songs. It is also not intended that the division of ownership of rights in musical works and sound recordings under this proposal should be used as precedent when songs or recordings are incorporated into other works, such as motion pictures, or for treatment of any other categories or types of works that incorporate contributions from more than a single rights holder.

The digital transmission right would be enforceable only against those directly involved in providing digital transmissions of recorded music.

Accordingly, consumers would not incur any liability merely for surfing the web, accessing streaming media, or downloading music files. Copying for personal use also should not require authorization. To be sure, consumers still would be required to pay network operators for Internet access, and they may be required to pay audio service providers for their activities on particular web sites or services. But whether consumers listen to streams or download recordings; make one or many copies of a recording for personal use; or use recordings on one or several playback devices would have no effect on their obligation to music industry rights holders. None of this conduct would require consumers to obtain licenses or pay license fees under the digital transmission right; and should not otherwise.

Similarly, software developers, technology firms, consumer electronics makers, and telecommunications and Internet access providers, as such, would have no liability under the digital transmission right.

On the other hand, audio service providers would need licenses if they operate web sites or other services that provide digital transmissions of recorded music. Consumers, too, would need licenses whenever they act as digital audio service providers in their own right; that is, whenever they are responsible for the digital transmissions at issue. By way of example, consumers would need authorization if they operate personal music-enabled or hobby web sites; or if they upload music files to a web site or service that does not have its own license under the digital transmission right authorizing this activity by users of its service (known as a “through-to-the-user licnese”); or, if they offer recordings to others through participation in a P2P file-sharing network, or similar service, that does not have such a through-to-the-user license.

Most web sites and other services that offer musical programming only allow users to access music, either through streaming, downloading, or both. They do not allow users to upload content. In these circumstances, only the service provider (or a consumer acting as a service provider in the case of a personal web site) would be engaged in providing digital transmissions of recorded music; and only the service provider would need authorization under the digital transmission right. Consumers, as transmission recipients, would not have any liability for these transmissions.

Other services are configured specifically to enable users to upload recorded music and other content to the service, as well as to access streams or download content from the service. Examples include social networking and other online communities, music locker services, and those sites and services that allow users to upload content but which do not otherwise offer opportunities for user-to-user interaction that characterize social networks. Uploading to services such as these would constitute the digital transmission of the recordings involved; and the

user from whose computer or other device such uploads originate would need a license under the digital transmission right. The service provider who enables the uploading would also be liable for its users' conduct. (Implementation of the digital transmission right may require reexamination of the circumstances under which statutory safe harbors from infringement liability will be available to service providers; as well as reexamination of application of the fair use doctrine to digital transmissions of recorded music initiated by individual consumers.)

For services such as these, a license held either by the user or by the service provider would suffice to authorize uploading to that service by that user of the recordings covered by the license. Alternatively, a single through-to-the-user license held by the service provider could authorize all uploads of licensed recordings to the service by any and all of its users. This would eliminate the need for individual users who wish to upload recorded music to that service to obtain licenses in their own right. However, the most efficient and effective way to license such a service would be to issue a single license to the service provider authorizing all transmissions for which the service provider alone would be liable (e.g., streaming and downloading from the service to its users) as well as all tansmissions for which the service provider and users of the service would be jointly and severally liable (e.g., user-initiated uploading to the service).

It stands to reason that consumers would seek out services that obtain licenses that authorize their activities in connection with the service. Licensed services, being lawful, would be able to operate openly, attract investment capital (without exposing investors to copyright infringement liability), and offer users the most sophisticated functionalities. Moreover, there being no reason remaining for music industry rights holders to undermine them, licensed services would be free of many of the security and related concerns that plague users of their black market counterparts. Service providers who obtain through-to-the-user licenses would have a competitive advantage over those who do not even though they would be required to pay license fees. The availability of through-to-the-user licenses under the digital transmission right would provide a positive economic incentive for service providers to secure the authorization they need.

A similar analysis applies to the P2P file-sharing context. P2P participants who download music files through the network but do not offer works to others would not need a license under the digital transmission right. Individual P2P participants who configure their computers to enable transmissions of recordings to others through the network would need authorization. Operators of centralized P2P networks would be jointly and severally liable with their network participants who share recorded music with others on the network. For centralized P2P networks, a license held by each participant who makes recordings available to others would suffice to authorize all sharing of licensed recordings on that network by each such participant. Alternatively, a single license held by the operator of the

network could authorize all digital transmissions of the licensed recordings through the network. In such circumstances, individual network participants would not need to obtain licenses in their own right, and yet would be free to share the licensed recordings through the network whenever they wished.

Decentralized P2P file-sharing networks, on the other hand, do not have network operators, as such, through whom a network-wide license could be made available. Accordingly, each participant in a decentralized P2P file-sharing network would be responsible for securing authorization for their own conduct on that network. Licenses for these individual file-sharers should also be made readily available.

This approach favors licensed centralized P2P file-sharing networks. And again, it stands to reason that the vast majority of consumers who are interested in P2P would likely seek out networks that had secured licenses that authorize their file-sharing activities; especially if the file-sharing that is permitted actually offers consumers whatever it is that they want from the P2P experience at any given moment.

The digital transmission right would be impervious to copyright infringement. Unlike the reproduction and distribution rights that underlie the sales-based revenue model, but like the public performance right, the digital transmission right cannot be subverted by one or more unlicensed digital audio services, webcasters, P2P file-sharing networks, social networking services, or the like. Whether or not particular transmissions are licensed would not affect the market for the digital transmission right over all.

This is proven by the experience of ASCAP and BMI, in the United States, and their sister PROs around the world, with the licensing of over-the-air broadcast radio stations to publicly perform the copyrighted musical works that these PROs represent. The license fees collected from U.S. broadcasters constitute a major portion of ASCAP's and BMI's annual revenue. However, even if the largest radio station or group of stations were not licensed at a particular time, the rights organizations' ability to license the thousands of other broadcasters would not be impaired. Despite infringement by the few, the overwhelming majority of broadcasters continue to operate lawfully by securing the public performance licenses they need. Those who act outside the law can, and should be sued for copyright infringement.

So too would it be under the digital transmission right. If music industry rights holders made licenses available on reasonable terms that authorize the uses of recordings that people want to make, the overwhelming majority of those whose digital transmissions would require authorization – audio service providers and individuals alike – would pay the license fees that are due. Under these

circumstances there would be no justification for public outcry over the industry's litigation campaign against those who continue to infringe.

Through the digital transmission right, licensed transmissions of recorded music could be made available from the largest number and widest array of sources, anytime, anywhere, to anyone with network access. Whether, and to what extent, rights holders will be able to convert this vast base of potentially licensed transmissions into royalty payments will depend on how the digital music marketplace is organized.

As I suggested earlier, the digital transmission right should be implemented through a combination of free market transactions between individual rights holders and audio service providers (known as "direct licenses") and voluntary collective rights administration. The best results for rights holders and service providers alike will flow from a marketplace in which collective licensing is the norm and direct licensing the exception. In this context, over all success will depend on the presence in each territory of at least one collective whose catalog encompasses all or nearly all recordings and which is authorized to grant worldwide rights at its local rates for all digital transmissions of recorded music that originate in its territory.

In principle, free market direct licenses are to be preferred. Therefore, subject to the co-ownership rules discussed above, individual rights holders and service providers must be free to agree upon whatever terms they wish for digital transmissions of recordings in which the rights holder has an interest. In practice, however, a free market for the digital transmission right will produce little more than a free-for-all. Some rights holders and service providers will benefit greatly; and others, perhaps most, will be all but excluded from participating in the lawful market for digital transmissions. The intermediation of collective rights licensing organizations is needed to avoid this undesirable result.

Collective licensing has been standard practice in the music industry since 1851, when the Societe des Auteurs, Compositeurs et Editores de Musique ("SACEM"), the French musical works rights society, was established. Of the rights that the digital transmission right would replace, only the record labels' right to sell recordings (the distribution right, which would no longer have separate or independent existence for purposes of digital transmissions) is not already administered to one degree or another by a collective. Collectives represent songwriters and music publishers for public performance and mechanical rights (or communication rights) licensing of their musical works. Collectives also represent record labels for webcasting and, in those territories where it applies, public performance rights licensing of their sound recordings. Each collective serves as a clearinghouse, making markets between the rights holders it

represents and the multitude of those whose various uses of music or recordings require the owner's authorization.

The Copyright Law requires those who wish to use protected content to secure authorization for the use in advance of undertaking the conduct in question. Accordingly, under the digital transmission right, audio service providers would need to secure authorization to digitally transmit recordings prior to transmitting them. Failure to secure advance authorization would expose those responsible for the transmission to liability for copyright infringement.

There are hundreds of thousands of copyrighted songs and recordings. New works are created every day. Many different songs can share a common title; and popular songs often are recorded many times by different artists. There are also tens of thousands of music industry rights holders. Many of these are individual songwriters or recording artists. Others are small music publishing firms or record labels. Still others are larger independents. And, setting the industry's agenda, is a scant handful of multinational entertainment conglomerates.

There is no quick and reliable way to determine who owns rights in which works. The identity of the music publisher or record label owning an interest in any particular song or recording will change as rights are assigned, publishing catalogs are bought and sold, and record labels come and go. So-called "label copy," information printed on a recording's label, jacket or liner notes identifying the rights holders, and its recent manifestation as metadata encoded in digital audio files, even if accurate on the day it was created, becomes unreliable as time goes by. And while the identity of the songwriter and recording artist of a particular recording cannot change once the recording has been completed, these people may not wish to be contacted by service providers or individuals seeking licenses. The privacy concerns of songwriters and recording artists must take precedence over the licensing needs of service providers.

In the absence of collective licensing, each service provider would be required to identify, locate and successfully negotiate a digital transmission right license with at least one rights holder of each recording that they wish to transmit. Some right holders will make it easy to obtain licenses. However, depending on who is involved, the time and effort necessary to clear rights in even a single recording may be beyond the capacity of most of those who will need a license. It would be especially burdensome to clear rights in more than a few recordings, or in new works by emerging artists, or older works, or works of foreign ownership. By and large, service providers would not be able to obtain prior authorization for transmissions of recordings that they do not directly select and cannot identify in advance, such as those contained in retransmissions of over-the-air broadcast

radio transmissions, or instances in which users upload recordings to the service, or for transmissions through P2P file-sharing networks.

In addition, in the absence of collective licensing, different rights holders will likely demand different terms and conditions for licenses to digitally transmit their recordings. These may include different start and ending dates for the licensed term; different periods for financial reporting and payment obligations; different data fields and formatting requirements for music use reports; different metrics for calculating license fees owed; and the obligation to employ possibly incompatible DRM regimes. Some rights holders will require most-favored-nations treatment; others will not. The administration of inconsistent license agreements with multiple rights holders is a complicated and costly undertaking. Service providers with the most resources to devote to rights clearance activities will have an advantage; though it will by no means be an easy matter even for them. The task will be more difficult for those with fewer resources, and most difficult for individual consumers when they, too, need licenses under the digital transmission right.

A market that operated wholly without the intermediation of collective licensing organizations would not necessarily be a boon to music industry rights holders either. In the absence of collective licensing, each rights holder would need to undertake its own licensing efforts and establish its own rights administration infrastructure. Given the multitude of far-flung service providers and individuals who will need authorization under the digital transmission right, success at licensing will require a systematic and comprehensive approach. This will be beyond the means of many rights holders. Moreover, the effort needed to effectively monitor licensed transmissions so as to determine which recordings were transmitted and, therefore, who among rights holders is entitled to payment of royalties, will be no less daunting. Many larger rights holders are already unable to process the tremendous amounts of music use data generated by their limited Internet and mobile licensing successes to date. In addition, because many digital transmissions will originate outside of a rights holder's home territory, it will be necessary to establish and maintain a means by which to license digital transmissions and monitor music uses in foreign territories. This may involve regulation under foreign legal regimes.

In the absence of collective licensing, licenses for digital transmissions of many recordings may – by default - not be made widely available. Moreover, few audio service providers will be able to obtain licenses for all or even most of the recordings that they transmit. This does not mean that digital transmissions of recorded music will not occur in great abundance; only that a large portion of them will not be authorized. And, of course, transmissions that are not licensed cannot generate any royalty payments for rights holders; they can only enrich attorneys who litigate copyright infringement claims.

Even though, as a matter of law, the burden is on service providers to secure advance authorization for their transmissions, the rate of compliance will be low unless rights holders actively seek to license digital transmissions of their recordings. In order to maximize compliance, rights holders must make it as easy as reasonably possible for audio service providers to obtain and to administer the licenses they need. The over all burden of compliance, including the cost of license fees and the effort needed to fulfill music use reporting requirements, must be light enough so that knowing non-compliance can only come from a willful and unjustifiable refusal.

As a starting point, rights holders should be free to establish as many collective licensing organizations as they wish; and, as a general matter, collectives should be permitted to operate in any manner that they chose. For example, they should be permitted to restrict their membership on any lawful basis; treat some members one way and other members another; use any basis that they wish to determine how to divide royalties among those they represent; license service providers on whatever terms and conditions the market will bear; offer different terms and conditions to services that otherwise operate on the same bases; and refuse to license certain service providers altogether. However, depending on the number of collectives that operate in any given territory, it may be necessary for policy makers to establish criteria by which to determine whether, by reason of their market position, certain collectives should be subject to some degree of regulation. In this regard, consideration might be given to the number of rights holders a collective represents, the number of recordings in its catalog, or the proportion of all digital transmissions attributable to those recordings. Collectives that meet the threshold criteria for regulation – which, I think, should be low -- should be required to accept into membership all songwriters, music publishers, recording artists and record labels who wish to join and who own an interest in at least one protected recording; to treat all members on an equal and non-discriminatory basis, especially with respect to the manner in which royalties are calculated and paid; and to offer the same terms and conditions of licensure to all similarly situated service providers. In order to further protect the interests of individual rights holders, service providers, and the public at large, regulated collectives should be required to operate in all respects on a transparent basis and should be subject to government agency oversight.

Within this general framework, individual songwriters, music publishers, recording artists and record labels must be free to affiliate with a collective, or not to join any collective at all. It would not be necessary for all rights holders with an interest in the same recording to belong to the same collective. They may each belong to a different organization. However, no individual rights holder should be permitted to belong to more than a single collective at any one time. Moreover, inasmuch as digital transmissions of their works can originate from any territory,

rights holders should be free to join a collective in any territory that they wish. They should not be limited in this regard either by their nationality or by the territory in which they reside. In addition, existing collectives to which rights holders may belong for the administration of rights in their works under current law should not be permitted to interfere, either directly or indirectly, with their members' affiliation decisions for the newly-established digital transmission right.

Each rights holder who joins a collective would grant it the non-exclusive worldwide right to license digital transmissions of all recordings in which the rights holder has an ownership interest under the digital transmission right. This would include all recordings of songs written by a songwriter, or owned by a music publisher; all recordings made by a recording artist; or all recordings in the catalog of a record label. The grant would extend to all works in existence at the time the rights holder joins the collective. The only exception would be those recordings, if any, for which the digital transmission right was subject to a pre-existing grant of exclusive rights made by all of the rights holders-in-interest in the recording in question. The non-exclusive grant to the collective would also include any additional recordings which are newly-created or in which the rights holder otherwise acquires an interest while a member of the collective. These would automatically become part of the collective's catalog upon their creation or upon the rights holder's acquisition of its interest in them, as applicable.

Each collective's catalog would be composed of all recordings in which any songwriter, music publisher, recording artist, or record label that is a member of the collective has an ownership interest. This would include recordings in which one or more co-owners had granted non-exclusive rights to whichever other collective(s) they belong. If a collective in one territory has reciprocal administration agreements with collectives in other territories, then the catalog of the local collective would also include the recordings in the catalogs of those affiliated foreign collectives; and the local collective would represent the interests of the songwriters, music publishers, recording artists and record labels who are members of the affiliated foreign collectives when their recordings are contained in digital transmissions that originate in the local collective's territory.

If all rights holders of a particular recording belong to the same collective, then that collective would be the only organization in its territory with authority to license digital transmissions of that recording. If they belong to different collectives, then each of those collectives would have non-exclusive rights with respect to the recording in question. A license from any collective whose catalog contains a particular recording would be sufficient – standing alone - to authorize digital transmissions of that recording. In such instances, there would not be a need for a license from any of the other collectives to which other rights holders of the work may belong. In all circumstances, however, the opportunity for direct licensing must be preserved: Individual rights holders must retain the right to

directly license digital transmissions of their recordings on any terms that they and the service providers with whom they do business find to be mutually acceptable.

Each collective would be authorized to issue licenses under the digital transmission right that grant worldwide rights for all transmissions that originate from its own territory. The license fees charged, including those for transborder transmissions, would be based on the rates prevailing in the territory of the collective issuing the license. In this way, each collective would offer those whose digital transmissions require authorization a single source, a "one-stop-shop," for their licensing needs with respect to the recordings in the collective's catalog. Licenses would contain uniform terms and conditions applicable to digital transmissions of all such recordings. These would include uniform provisions relating to license fee calculation, and financial reporting and payment procedures, as well as standardization of the technology to be employed for identifying recordings, tracking how often they are transmitted, and reporting this music use data to the collective.

Each collective would pay royalties only to those rights holders whose interests it represents. Thus, if the rights holders of a particular recording belong to different collectives, they would each look only to their own collective for payment of royalties earned from that collective's licensing efforts on their behalf. Thereafter, and unless they have agreed otherwise among themselves, each rights holder would have the obligation to account to their co-owners for royalties received. On the other hand, if all rights holders of a particular recording belong to the same collective, they would each receive their full share of royalties directly from that collective and there would be no need for later accounting and reconciliation among them.

The rules that govern royalty distribution under the digital transmission right must take into account that the catalog of the collective that licensed the transmission that gave rise to the royalty in question (the "local collective") will contain both recordings of "local origin" (that is, recordings regarding which one or more rights holders is a member of the local collective) as well as recordings of "foreign origin" (that is, recordings that are in the local collective's catalog because one or more rights holders with an interest in them is a member of an affiliated foreign collective). In addition, the rules must also take into account that some licensed transmissions will begin and end entirely within the territory of the local collective, while others will begin in the territory of the local collective and end in another territory. For royalty distribution purposes only, I suggest that such transborder transmissions should be treated as if they were composed of two legally cognizable and equal acts, one occurring in the territory from which the transmission originates, and the other in the territory where the transmission is received.

Accordingly, royalties under the digital transmission right would be distributed as follows:

- If the recording is of local origin and the transmission giving rise to the royalty in question begins and ends entirely within the territory of the local collective, then the local collective would pay all the royalties available to those of its own members who have an interest in the recording. For example, if only the music publisher were a member of the local collective, then the music publisher would receive all such royalties payable by the local collective. On the other hand, if the songwriter, music publisher and recording artists were all members of the local collective, but the record label was a member of some other collective, or was not affiliated with any collective at all, then the local collective would pay the songwriter, music publisher and recording artists each one-third of the royalty payable for the digital transmission in question.

- If the recording is of foreign origin and the transmission begins and ends entirely within the territory of the local collective, then the local collective would pay the songwriter's share and the recording artist's share to the affiliated foreign collective to which they belong for subsequent distribution to them, and would pay the music publisher's share and the record label's share to those of its own members who have been granted local rights to the recording. If no local music publisher (subpublisher) and/or record label (distributor) has been designated, then the local collective would pay the music publisher's share and the record label's share to the affiliated foreign collective to which they belong for subsequent distribution to them.

- If the work is of local origin and the transmission begins in the territory of the local collective and ends in another territory, then the local collective would pay one-half of the music publisher's share and one-half of the record label's share to those of its own members who have an interest in the recording, and the other half of the music publisher's share and the other half of the record label's share to the affiliated foreign collective in the territory in which the transmission was received (assuming that that collective has members who have been designated to represent the music publisher's interest and the record label's interest in its territory). The local collective would pay the songwriter's share and the recording artist's share directly to the songwriter and the recording artist, but only if they were members of the local collective.

- If the work is of foreign origin and the transmission begins in the territory of the local collective and ends in another territory, then the local collective would pay one-half of the music publisher's share and one-half of the record label's share to those of its own members who have been granted

local rights to the recording. If no local music publisher (subpublisher) and/or record label (distributor) has been designated, then the local collective would pay the one-half shares in question to the affiliated foreign collective to which the music publisher and the record label belong for subsequent distribution to them. The local collective would pay the other half of the music publisher's share and the other half of the record label's share to the affiliated foreign collective in the territory in which the transmission was received (assuming that that collective has members who have been designated to represent the music publisher's interest and the record label's interest in its territory). And finally, the local collective would pay the songwriter's share and the recording artist's share to whichever affiliated foreign collective they belong for subsequent distribution to them.

For their part, service providers should be free to operate their services from any territory that they wish. The license fees charged for licenses under the digital transmission right by local collectives in different territories may well be a factor that service providers consider in determining where to locate their services. So, too, might the nature of the hosting services and the telecommunications infrastructure available in a given territory. On the other hand, by locating its service in a foreign territory, a service provider may be subject to the local law of that territory for all purposes. Nevertheless, service providers should not be limited to locating their service in the territory in which they are incorporated or in which they have their economic residence; or, if an individual, the territory where they reside.

The central question for service providers is with how many sources they must deal in order to obtain the digital transmission rights they need on reasonably acceptable terms. The presence of a single collective from which to obtain a single license agreement granting worldwide digital transmission rights to nearly all recordings will be key to service provider compliance. In the absence of such a collective, service providers would be required either to enter into agreements with all collectives operating in their territory or to devote the time and resources necessary to scrutinize the recordings they transmit to assure that all are included in the catalog(s) of the collective(s) whose recordings they are authorized to digitally transmit. A license from a collective with an all-inclusive catalog would effectively eliminate the need for service providers to engage in such close scrutiny of their musical programming. If there were only two or three collectives in operation whose catalogs, taken together, included all recordings, service providers may well take licenses – albeit begrudgingly -- will all of them rather incur the additional cost necessary to avoid even unintentionally infringing conduct. It is problematic however if there are ten or twenty or two hundred collectives in operation but no single collective with an all-inclusive catalog.

The structure I am proposing would allow service providers who transmit many different recordings, or who do not select or control the recordings they transmit, to obtain licensed access to what is, essentially, a worldwide catalog of recordings through an agreement with a single collective operating in the territory from which the service's transmissions originate. It also would allow those who transmit fewer recordings and who control their programming lineup, to deal either with specialty collectives, if any, for the recordings that the service provider wishes to transmit, or to avoid collectives altogether, relying instead on direct license from the music industry rights holders-in-interest.

Collective management of digital rights begins and ends with the ability to monitor transmissions of the protected works in question. Knowing which recordings have been digitally transmitted and by whom underlies licensing, enforcement, contract administration, and royalty distribution. Initially, it is necessary to determine which web sites, services, P2P file-sharing networks and individuals are engaged in digital transmissions of protected recordings in order to know who may need a license. If a license is refused, identification of recordings transmitted without authorization is necessary for an infringement action. Once licensed, transmission data may be needed to calculate license fees due. And, knowing specifically which recordings were transmitted by each licensed service, and how often, is necessary in order to know which rights holders are entitled to receive royalty payments.

Internet transmissions are digital and occur in a networked environment. Therefore, at least in theory, it should be possible to identify every recording each time it is transmitted. A census-based royalty distribution system would allow license fees earned from each licensed service to be distributed as royalties to those rights holders – and only those rights holders -- whose recordings were transmitted by the licensed service in question. Only in this way is it possible to assure that all rights holders, large and small, receive that share of royalties that is proportionate to the license fees earned from digital transmissions of their recordings.

The alternative is to base royalty distribution on sampling. Sample surveys, sophisticated as they may be, credit only a fraction of the transmissions that occur. Royalties generated from transmissions of recordings that fall within the sample would be paid to the owners of those recordings. However, royalties for licensed transmissions of recordings that do not fall within the sample would not be paid to the owners of those works; rather, they would be paid to owners of recordings that do fall within the sample. A royalty distribution system based on sampling necessarily results in no rights holders receiving royalties for all licensed transmissions of their recordings; some rights holders – particularly those in the long-tail – possibly never receiving royalties for any licensed transmissions of their recordings; and some rights holders receiving royalties for

licensed transmissions of recordings in which they have no ownership interest whatsoever.

Currently, music industry rights holders require service providers to shoulder the entire burden of music use monitoring for purposes of royalty distribution. One of the PROs, for example, requires service providers to report, for each work transmitted, the title of the work, the featured artist who recorded it, the record label involved, a unique identifier for the work (such as an ISWC or ISRC number), the length of the work, and the number of times the work was transmitted during the relevant reporting period. Under the statutory license for webcasting in the United States, the burden is on service providers to identify with particularity every sound recording that they transmit, including those embodied in retransmissions of over-the-air broadcast radio transmissions. However, as between rights holders and service providers, only rights holders have a need to know how many times any particular recording has been transmitted. This information may be useful to some service providers in planning future programming, but it is entirely irrelevant to most, and the obligation to gather and report it is an obtrusive and costly burden. Moreover, if license fees are linked to the number of times a recording is transmitted, service providers will have even less incentive to provide accurate data. Rights holders must find a way to increase the depth and accuracy of monitoring while reducing the burden of it on service providers.

The digital transmission right would not depend on access restrictions and anti-copying measures for its success. Rather than limiting access to their music, rights holders would have the incentive to encourage the most extensive uses possible. This would free the industry from pursuit of unbreakable technological measures, allowing it to focus instead on development of effective monitoring techniques to support royalty distribution. Tools to track digital transmissions will likely be far easier to create, use and maintain, and will cost less than those needed to exclude people from accessing, copying and further distributing protected works. Nevertheless, a means to conduct a survey of licensed digital transmissions will take time to develop and to deploy. The implementing technology must work on all systems and across platforms. It also must be as nearly ubiquitous as possible.

One possible solution involves encoding recordings with copyright management information and using complementary software that would allow licensed service providers to automatically track the encoded files when they are transmitted. Whatever software is developed for these purposes should be provided free of charge to licensed service providers. In addition, each collective should also provide encoded digital files of all recordings in its catalog free of charge to all service providers with whom it has a license agreement. Clearly, a single collective in each territory with an all-inclusive catalog would be in the best

position to implement such a solution. In any event, service providers must not be required to use either the encoded files or the industry-standard tracking software. Rather, they should be offered a reduction in license fees as an incentive for their cooperation in music use monitoring through use of these preferred tools. Service providers who elect not to use these tools would not be offered a reduction in license fees but would still be required to meet the monitoring and reporting requirements of their license agreements.

Finally, regarding license fees under the digital transmission right and how they might be determined: I do not have a specific license fee proposal, though I do have some general suggestions regarding structure and process.

In my view, music industry rights holders in the aggregate should do no less well financially under the digital transmission right than they do now under the system that the digital transmission right would replace. Therefore, as a near-term objective, industry revenues over all should equal the sum of total current net profits for record labels and music publishers and total current royalty income for songwriters and recording artists derived from sales and licensed public performances of their works. My sense is, however, that there will be a short-term short-fall between this amount and the amount that rights holders can reasonably expect the existing base of audio service providers (and, when required, individuals) to pay in license fees under the digital transmission right. Though the industry has not been successful in its efforts to make the digital music marketplace safe for the sales-based revenue model, its strategy and tactics to date have kept many from launching music-enabled services. To charge too high a license fee would only further suppress the market.

Steps should be taken to make up this shortfall during the industry's transition to the digital transmission right. I suggest that, for this limited purpose, a temporary levy should be imposed on consumer electronics and technology products, and telecommunications and Internet access services. Under the digital transmission right, the businesses that provide these products and services would have no liability, as such. Yet, because of the digital transmission right, they will be free to innovate in whatever ways and to whatever extent necessary to satisfy the ongoing demand of music consumers for new products and services. It is appropriate, therefore, that they alone should bear the burden of the levy. They must not be permitted to pass the levy through to consumers. The levy should be adjusted downward periodically in response to increases in music industry license fee collections under the digital transmission right. It should also be subject to sunset; a definite date by which the music industry will be expected to thrive in the digital music marketplace without subsidies.

Less generally, wherever possible, license fees should be based on a percentage of revenue attributable to digital transmissions of recordings covered by the license in question. A revenue-based fee would allow music industry rights holders to share proportionately in the growing dollar value of the bounty created by digital transmissions of their works. In this regard, it will be necessary to establish criteria by which to determine which revenue earned by a licensed web site or other audio service will be deemed attributable to its transmissions of licensed recordings and which will be deemed too indirectly connected to those transmissions to be fairly included in the base against which the license fee is calculated. And, of course, it will also be necessary to settle upon a rate to be applied to the base in order to calculate the license fee in each instance.

Many music enabled sites and services will operate without revenue of any kind, let alone any revenue fairly attributable to licensed transmissions of recorded music. In these instances, an alternate means of calculating license fees will be needed. One such alternative would be to base license fees either on the number of transmissions of licensed recordings, or on the aggregate tuning hours occupied by transmissions of music through the service during the reporting period in question. This approach is straight forward and easily applied. It also reflects the notion that one should only use as much of a thing as one can afford. However, it is regressive. It discriminates against smaller service providers and individuals. It also discourages the use of music. Moreover, if license fees are driven by music usage, service providers would have a strong disincentive to accurately report which works they transmit, and how often. This, in turn, would undermine royalty distribution. A second alternative would be to establish criteria by which to measure the economic value to a business (or to an individual, for that matter) of the self-promotion it obtains through operation of a music-enabled site or service. To be sure, establishing such a measure would be more difficult than simply applying either a pay-per-play or similar usage-based model, but it would avoid interference with royalty distribution. A third alternative would be to base license fees on the number of users of each licensed service. This would be most useful in the case of services that require their users to register or otherwise identify themselves.

Provision must also be made for determining how much will be paid in license fees by individuals who operate music-enabled personal web sites for non-commercial purposes, and by those who, without the benefit of a through-to-the-user license, either upload recordings to services operated by others or offer recordings through P2P file-sharing networks. I suggest that a flat dollar license fee should be paid by such individuals, although the amount of the fee may vary depending on the activities involved. The fee should be paid directly to the collective or to the individual rights holders who issued the license in question. Again, however, I do not have a specific proposal regarding the amount of the license fee that should be charged in any of these instances.

Other commentators have already proposed a levy structure to offset music industry losses due to unauthorized downloading, particularly those losses attributable to unauthorized P2P file-sharing. That levy is modeled on the levy imposed on owners of television sets in the UK for support of the BBC. In the present context, it is proposed that a universal flat-fee levy should be imposed on all Internet users. The levy would be collected by Internet access providers and later distributed as royalty payments to music industry rights holders. The levy would be a permanent element of the license fee structure for the digital music marketplace.

I do not support this approach. Whether or not a compulsory universal levy is appropriate for the support of public television, it is not appropriate, in my view, if the revenues generated will go to the support of private business interests. In addition, as I indicated earlier, consumers, as transmission recipients, should not have any payment obligations to music industry rights holders under the digital transmission right. A universal levy would impose a license fee on all Internet users whether or not they ever access music online. Requiring people to subsidize other people's entertainment – especially with respect to content that many may find offensive – is anathema. Moreover, a universal levy to be collected through Internet access providers would unnecessarily inject an element of competition in the marketplace for Internet access services. Some access providers will absorb their customers' levy payment obligations and others will pass them through. And finally, if a universal levy were imposed for the benefit of music industry rights holders, rights holders of other types of content including, for example, movies, text, graphics and broadcast archives each would have an equal claim to a universal levy of their own. Invariably, as the interests of other rights holders are added to the universal levy, rights holders of different types of content will be pitched against each other in a contest for their respective shares of a limited fund.

License fee rates should be set through voluntary free market negotiations between service provider representatives and the collectives that operate in each territory. Failing voluntary agreement, rates should be established through government-supervised arbitration proceedings.

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The music industry is marked by long-standing divisions, particularly between music publishers and record labels regarding ownership, valuation and administration of the different rights each group controls. Songwriters and recording artists also have deep concerns regarding their relationships with the music publishers and record labels that control the works they create. The digital transmission right, administered as I have suggested, would represent a major

shift in leverage and economics within the music industry; and it almost goes without saying that those rights holders – and the organizations that represent them – who have enjoyed the strongest position historically, will likely be reluctant to embrace such a change. However, more than ten years has already been largely wasted pursuing failed solutions. There can be no justification for further delay in the implementation of needed change in the consumer-facing side of the music industry.

The Internet directly links every constituency that is important to the music industry's success in the digital age. In this global network, no issue stands alone, nothing can be treated in isolation, and stop-gap measures will not work. By implementing the changes suggested in this paper, the music industry would bring a measure of predictability, rationality and fairness to the digital music marketplace. And only in so doing, will the industry be able to assure that it will flourish as that marketplace develops.

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