
FREE THE MUSIC: RETHINKING THE ROLE OF COPYRIGHT IN AN AGE OF DIGITAL DISTRIBUTION

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I. INTRODUCTION

“We are at a moment in our history at which the terms of freedom and justice are up for grabs.”¹ Every major innovation in the history of communications—the printing press, radio, telephone—saw a brief open period before the rules of its use were determined and alternatives were eliminated.² “The Internet is in that space right now.”³

The technology of the Internet has revolutionized communication and information distribution throughout the world. The direction of this revolution, however, will be determined in large part by how the law chooses to regulate this new medium.

Currently, one of the most important debates over the Internet involves the future of copyright law. The outcome of this debate will likely determine whether, as Stanford Law School Professor Paul Goldstein argues, property rights will extend “into every corner in which people derive enjoyment and value from literary and artistic works”⁴ with “a price

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1. Robert S. Boynton, *The Tyranny of Copyright*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 40 (quoting Yale Law School Professor Yochai Benkler).

2. *Id.*

3. *Id.*

4. *Id.*

tag attached to each use,”⁵ or whether, as Thomas Jefferson advised, ideas will “freely spread from one to another over the globe.”⁶

This Note examines the issue of copyright as it pertains to recorded music and demonstrates that copyright protection for recorded music can no longer be justified as necessary for the promotion of artistic creation.⁷

Part II discusses the problems inherent in the current system and shows how today’s copyright laws no longer benefit artists or the public, but instead merely protect the recording industry’s crumbling distribution model. It discusses how a few major record companies control the music industry, and how having this control allows them to manipulate artists, overcharge consumers, repress artistic diversity, and determine what the public hears. Finally, this Part shows how digital distribution renders copyright protection unnecessary to encourage distribution.

Part III looks at the two moral arguments often made by proponents of copyright protection and determines that neither argument shows particular legal or moral strength. Further, this Part examines the usefulness of considering such arguments in an industry where it is almost always major record companies, and not artists, that own the rights to works of music.

Part IV shows that an end to copyright for recorded music would likely have no meaningful negative effect on artists’ motivation to create music, but instead, may actually lead to greater creation, creativity, and variety. It shows that very few artists ever gain any monetary benefit from their recorded music and most rely on other sources of revenue, such as concerts and merchandise sales, to make a living. Further, it discusses the possible revenue sources for artists in a system without copyright protection and the likelihood that these revenue streams will increase in an economy allowing free digital distribution. Finally, this Part will show how

5. *Id.*

6. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in *THE COMPLETE THOMAS JEFFERSON* 1011, 1015 (Saul K. Padover ed., 1943) (hereinafter *THOMAS JEFFERSON*).

7. This Note deals only with copyright protection for the sound recording, it does not deal with copyright protection for the musical work itself, often owned by the songwriter or music publisher. Under the current system, the holder of the copyright for a musical work is able to profit mainly by licensing both the mechanical rights, which grant the right to produce and distribute a sound recording, and the performance rights, which grant the right to perform a work publicly. It is possible that copyright may need to be maintained to encourage songwriters to write music since they do not have the alternative sources of income available to performers. If that is the case, the means of providing for their compensation, which is now based largely on record sales, would need to be adjusted. Copyright protection for the musical work would also need to be maintained to ensure that one artist does not profit from another’s work without providing just compensation.

artists, consumers, and the cause of creative expression will benefit from an economic model no longer dominated by a few large record companies.

Part V concludes that the realities of the digital economy and the possibilities presented by digital distribution make the current copyright law a legal relic that must be changed in order to again reflect the constitutional intent to promote the progress of the useful arts for the benefit of the public.

II. THE NEED FOR CHANGE

A. FORMATION AND INTENT OF COPYRIGHT

Article I, section 8 of the U. S. Constitution gives Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁸ Thomas Jefferson expressed the limited intent of this section, writing,

[i]f nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone.⁹

Jefferson, like many at the time, viewed copyright as a necessary evil, a bargain between society and publishers to encourage the creation and distribution of artistic works.¹⁰ The first of these bargains was made in Venice in 1495 and granted printers, not authors, protection for the works that they published.¹¹ Without this protection, printers argued that they would have been less willing to make the initial investment necessary to print and distribute literary works.¹² Further, since the general public was unable to print works for themselves, they gave up little by providing printers with this protection. In essence, society agreed to allow printers the exclusive rights to produce works (which by nature should have been free ideas), and printers provided society with a service that only they could perform.

8. U.S. CONST. art. I, § 8, cl. 8.

9. THOMAS JEFFERSON, *supra* note 6.

10. *See* Boynton, *supra* note 1.

11. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 292 (1970).

12. *See id.*

The state of technology changed little between the introduction of copyright and the Founder's incorporation of this concept in Article I, section 8 of the U.S. Constitution, which basically provided Congress with the ability to make this same bargain for the benefit of society.¹³ In 1790, Congress made this bargain, granting copyright protection that would last fourteen years, with the right to renew only once before the work became part of the common domain.¹⁴ At this time, again, this law provided a benefit for both society and the copyright holder, and it was necessary to encourage not only the creation, but also the distribution of artistic works.

This bargain, however, has increasingly become one sided, giving the copyright holder (in the case of music, almost always major media companies) more protection without providing any clear additional benefits to society. As recently as 1998, after much lobbying from the major media companies, Congress increased the length of a copyright by an additional twenty years.¹⁵ As it stands today, exclusive copyright protection for an individual's work lasts for seventy years after the death of the author; for corporations, their works are protected for ninety-five years after publication, a far cry from the fourteen years initially considered reasonable in 1790.¹⁶ Even before examining the influence of changing technology, one might question the fairness of this new bargain and wonder whether Congress has forgotten its constitutional mandate to encourage the production of artistic works for the benefit of society, not to secure maximum profits for media companies.¹⁷

B. SEPARATING CREATION AND DISTRIBUTION: HOW TECHNOLOGY HAS CHANGED THE BARGAIN REGARDING DISTRIBUTION

The music industry recently began a public relations campaign designed to discourage the downloading of copyrighted music.¹⁸ An examination of the Web site established to support this effort, however,

13. See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 277 (2002).

14. Act of May 31, 1790, ch. 15, 1 Stat. 124.

15. See Boynton, *supra* note 1. The Recording Industry Association of America ("RIAA"), a powerful lobbying group, spent over \$45 million on lobbying efforts in 2001. Janis Ian, *The Internet Debacle—An Alternative View*, PERFORMING SONGWRITER MAG., May 2002, available at http://www.janisian.com/article-internet_debacle.html.

16. Boynton, *supra* note 1.

17. See Craig W. Dallan, *The Problem With Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 454–55 (2004).

18. Matthew Creamer, *Edelman Takes on Digital Piracy in PSA at Grammys*, PR WEEK (US), Feb. 16, 2004, available at 2004 WL 55295050.

reveals another clear goal: convincing the public that the rights of artists and the rights of the record industry are one.¹⁹ While this may have been true in the past, the Internet has drastically changed this relationship. This connection, however, remains essential to the record industry.

Before the Internet, copyright was necessary to encourage not only the creation, but also the distribution of music, with a significant investment needed to begin and maintain a distribution business.²⁰ “In 1984, estimates suggested that it cost \$125 million just to maintain a national record distribution operation.”²¹ Further, in addition to these fixed costs, for each record produced a company must invest in materials, printing, packaging and shipping, with the cost increasing as the number of units produced increases.²² Without the protection provided by copyright, other publishers could begin printing and distributing successful records, undercutting the price of the original distributor. This would greatly reduce the incentive to invest in new works, especially since most record companies depend on a small number of successful records to compensate for losses sustained on the majority of their releases.²³ Since the public was dependent on the record companies for the distribution of works, their unwillingness to invest would mean that the public would be denied access to many valuable works of music.

This dependence, however, has been eliminated by new technology that allows end users to download and print their own CDs, while internalizing all the costs of distribution.²⁴ In essence, every individual now has the ability to perform the primary function of a record company for a fraction of the price. An individual is now able to purchase a home computer with a CD-RW drive capable of writing CDs for under \$700,²⁵ Internet access for as low as \$9.95 per month,²⁶ and blank CDs at a cost of

19. See What's the Download.com, *The Lowdown: Downloading Music is Hot—Here's Your "Downloading 101" Resource*, at http://www.whatsthe-download.com/whats_the_controversy/the_low_down/index.aspx (last visited Jan. 31, 2005).

20. See Ku, *supra* note 13, at 295.

21. *Id.*

22. *Id.* at 295–96.

23. See Charles C. Mann, *The Heavenly Jukebox*, ATLANTIC MONTHLY, Sept. 2000, at 39.

24. See Ku, *supra* note 13, at 301.

25. For example, at the time of this writing, a computer and monitor could be purchased for under \$700 from Best Buy at the following links: Best Buy, *eMachines 330 Desktop With Intel® Celeron® D Processor 330*, at <http://www.bestbuy.com/site/olspage.jsp?id=1091101854076&skuId=6830922&productCategoryId=cat01172&type=product>; Best Buy, *Sony 15" TFT-LCD Flat Panel Monitor-White*, at <http://www.bestbuy.com/site/olspage.jsp?id=1093468978367&skuId=6853988&productCategoryId=cat01009&type=product> (last visited Jan. 31, 2005).

26. E.g., Netzero, at <http://www.netzero.net> (last visited Jan. 31, 2005).

about \$.40 per disk.²⁷ Even without the opportunity to access music, it is likely that the consumer would have spent the money on both the computer and Internet access, making the additional cost attributed to downloading music relatively insignificant. Further, the marginal cost of downloading each additional song is even less, with little being required other than time.

Not only is online distribution inexpensive for the consumer, it also virtually eliminates the costs for the distributor.²⁸ It is no longer necessary to make a large initial investment, to maintain a national distribution network, to print physical CDs, to package and ship to stores, or to pay an increased cost for each additional unit produced. Instead, in the digital world, all that is necessary to distribute a song is a computer with an Internet connection.²⁹ Once the song becomes available, the same force that the record companies fear, the millions of individuals who use peer-to-peer networks, will become the engine of distribution at absolutely no cost to the artist or distributor.

The court in *A & M Records, Inc. v. Napster, Inc.* attested to the power of online distribution in its ruling.³⁰ The court found that Napster, despite never marketing itself, would have 75 million users by the end of 2000, with over 10,000 files being shared every second.³¹ German music company Bertelsmann tried to take advantage of this new means of distribution by forming a partnership with Napster.³² Announcing this new partnership, Bertelsmann's E-Commerce Group President Andreas Schmidt stated "[i]f we do this, we will have almost no additional costs . . . all these delivery costs, all these distribution costs, go away."³³

With this new means of distribution being more efficient, more cost effective, and more consumer friendly than traditional means, it is easy to understand why the record companies do not want people to view the creation and the distribution of music as separate considerations. Once

27. For an example, see Best Buy, *Fuji 50-Pack 16x CD-R Disc Spindle*, at <http://www.bestbuy.com/site/olspage.jsp?id=1051384309197&skuId=4274779&type=product> (last visited Jan. 31, 2005).

28. See Ku, *supra* note 13, at 301.

29. See *id.* at 302.

30. See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

31. *Id.*

32. John Borland & Jim Hu, *Napster Model Could Make ISPs Subsidize Record Labels*, CNET NEWS.COM, Feb. 21, 2001, available at <http://news.com.com/2100-1023-252918.html?legacy=cnet> (last visited Jan. 31, 2005).

33. *Id.*

these interests are separated, however, it becomes evident that copyright protection is no longer necessary to provide an incentive for distribution.

C. MONOPOLISTIC CONTROL AND A DIFFERENT KIND OF PATRONAGE

Before copyright, artists were often dependent on and controlled by patronage.³⁴ This control tended to undermine their free expression and suppress the creation of new ideas by forcing them to cater to the tastes, interests, and agendas of the wealthy and powerful instead of seeking a broader public audience.³⁵ Voltaire once said that under this system, “[e]very philosopher at court becomes as much a slave as the first official of the crown.”³⁶

Therefore, along with encouraging the production of works, copyright was also intended to free artists from this slavery and allow for the free production of ideas by giving artists the opportunity to earn a living through the sale of their works to the public.³⁷ England’s first copyright law, the Statute of Anne of 1710,³⁸ did just that, ensuring that “[writers] have now no other patrons but the public, and the public collectively considered, is a good and a generous master.”³⁹ The Framers of the U.S. Constitution, similarly understanding the dangers of patronage by the powerful, viewed the free creation and expression of ideas as vital to fostering a democratic culture.⁴⁰ Thus, in providing constitutional protection for artists, they sought to ensure that free expression would not be stifled by powerful interests and artists would have no patron but the public.⁴¹

Today, however, the music industry displays a much greater resemblance to the precopyright times of patronage by the powerful than to the ideal envisioned by the Founders. Much like Voltaire, Courtney Love

34. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 353 (1996).

35. *See id.*

36. PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION: THE SCIENCE OF FREEDOM* 63 (1969) (quoting Francois Marie Arouet de Voltaire), *quoted in* Netanel, *supra* note 34, at 353.

37. *See* Netanel, *supra* note 34, at 355.

38. Statute of Anne, 1710, 8 ANN., c. 19 (Eng.).

39. OLIVER GOLDSMITH, *Letter LXXXIV*, in *THE CITIZEN OF THE WORLD* (1762), *reprinted in* 2 COLLECTED WORKS OF OLIVER GOLDSMITH 341, 344 (A. Friedman ed., 1966), *quoted in* Netanel, *supra*, note 33, at 355.

40. Netanel, *supra* note 34, at 357.

41. *See id.*

today describes musicians as “the slave class.”⁴² In fact, many musicians find that they must give up their own artistic expression and sell out in order to become successful. In one song, Pink complains, “LA told me, ‘You’ll be a pop star, All you have to change is everything you are.’”⁴³ Some artists, such as Ani DiFranco, have even given up the opportunity to be distributed by a major record label in exchange for the ability to stay independent and maintain their own artistic vision.⁴⁴

Ani DiFranco, however, is the exception, and despite having a relatively large fan base, it is unlikely that you will ever hear one of her songs played on the radio. Instead, you are much more likely to hear the Backstreet Boys, Britney Spears, or Jessica Simpson. This is not because of talent, or even because of public preference, but instead can be credited to the marketing power of the record companies and the use of independent promotion, often called payola, which essentially pays radio stations to play music.⁴⁵

Record companies are able to exert such control, both to market their own talent and prevent independent artists from gaining access to those same markets, due to their market dominance. Currently, five major labels control about eighty-five percent of the market for music in this country.⁴⁶ “The other fifteen percent is made up of independent labels, most of which use the major labels to distribute their music.”⁴⁷ They seek to maintain this control not by offering more music to the public, but instead by marketing only those musicians that they feel will appeal to the largest audiences. Moshe Adler, a Columbia University economist who has studied the music industry, notes that the industry’s “money is made by reducing diversity.”⁴⁸

One thing that helps the industry keep this control is the scarcity of promotional opportunities, especially on radio stations. By using their power and money to essentially bribe radio stations to play their artists’ songs, the major labels are able to monopolize much of the available airtime. This means that the public only hears what the major labels choose

42. Courtney Love, *Courtney Love Does the Math*, SALON.COM, June 14, 2000, at <http://dir.salon.com/tech/feature/2000/06/14/love/index.html> (last visited Jan. 31, 2005).

43. PINK, *Don't Let Me Get Me*, on MISSUNDAZTOOD (Arista Records 2001).

44. See Alexandra Burroughs, *Ani's Fan Co.: Devoted Admirers Travel Far and Wide to Hear Their Outspoken Idol*, CALGARY HERALD, July 26, 2003, (Arts & Style), at ESO1.

45. See Mann, *supra* note 23; Love, *supra* note 42.

46. Mann, *supra* note 23 (citing Warner, Sony, EMI, MBG, and Universal as the five major distributors). See also Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473, 477 (2002).

47. Honigsberg, *supra* note 46.

48. Mann, *supra* note 23.

to promote and artists are left with little choice but to become slaves to the record companies if they want any chance of being heard.

This control also means that the record labels can use their power to overcharge consumers for music. The five major labels recently settled with the Federal Trade Commission (“FTC”) after charges that the companies misused their control to force retailers to charge artificially high prices.⁴⁹ According to FTC Chairman Robert Pitofsky, “U.S. consumers may have paid as much as \$480 million more than they should have for CDs and other music because of these policies over the last three years.”⁵⁰

The labels, however, now fear losing that power to the Internet and many argue that recent lawsuits against Napster, MP3.com, and others were not only about money, but were even more about control.⁵¹ Napster offered many opportunities to settle, but the industry showed no interest in any settlement that required giving up any control over distribution.⁵² Mark Cuban, founder of Broadcast.com, noted that record companies were more concerned about control than even their own economic self-interest, stating “[t]he people who had the keys to the mall decided to burn it down rather than try to make money from it. The premium wasn’t on making money, the premium was on control.”⁵³ Eric Godtland, manager of the rock group Third Eye Blind, takes it one step further, stating

[r]ecord executives do not want a fast track to the consumer. They very carefully arranged the system for selling songs. They don’t want a digital design. They want to keep things just the way they are. Their faith is to ride the horse into the ground . . . until it has heart failure.⁵⁴

A free Internet, however, eliminates the scarcity problem and threatens to strip the major record labels ability to control what the public hears. Much like copyright originally freed artists from the control of patrons, technology is freeing artists from the control of record companies. “Now artists have options. [They] don’t have to work with major labels

49. Press Release, Federal Trade Commission, Record Companies Settle FTC Charges of Restraining Competition in CD Music Market (May 10, 2000), at <http://www.ftc.gov/opa/2000/05/cdpres.htm> (last visited Jan. 31, 2005).

50. *Id.*

51. See Honigsberg, *supra* note 46, at 477. The music industry, however, does not seem to mind keeping the money that it made from its lawsuit against MP3.com. While artists whose songs were on the site were supposed to get a distribution of the \$170 million received from MP3.com, artists’ representatives say they have not received any money. Neil Strauss, *Record Labels’ Answer to Napster Still Has Artists Feeling Bypassed*, N.Y. TIMES, Feb. 18, 2002, available at 2002 WLNR 4006427.

52. See Honigsberg, *supra* note 47, at 477.

53. Jon Pareles, *The Many Futures of Music, Maybe One of Them Real*, N.Y. TIMES, Jan. 10, 2002, at E1, quoted in Honigsberg, *supra* note 44, at 483–84.

54. Honigsberg, *supra* note 44, at 478–79 (quoting Eric Godtland, EGM, Inc.).

anymore, because the digital economy is creating new ways to distribute and market music.”⁵⁵

While copyright originally promoted this freedom, it is hindering this freedom today through laws that allow the major record companies to keep a tight control over the industry. It is important to remember that the file sharing currently thriving today is illegal under the current copyright laws and the Recording Industry Association of America (“RIAA”) has begun seeking to enforce this law by suing individuals and organizations participating in this practice.⁵⁶ If the music industry has its way, and if the law is followed as it is written, the trading of music over peer-to-peer networks will essentially come to an end and major record labels will maintain their control over what people hear and how they will be able to hear it.

D. THE INEVITABILITY OF DIGITAL DISTRIBUTION

It is likely that, regardless of the laws in place, eventually music distribution will be dominated by the Internet. When discussing its planned partnership with Napster, Bertelsmann noted that the company would likely save at least \$2.40 per CD through online distribution.⁵⁷ With this kind of cost savings, it would eventually become necessary for every music company to offer online distribution options in order to compete.

Furthermore, the technology today, even with copyright still in place, provides artists with the choice to market themselves online. The Smashing Pumpkins, Aimee Mann, and other artists have already released CDs online, with the Smashing Pumpkins printing only twenty-five hard copies of their work.⁵⁸ Even a relative unknown, Fisher, allowed users of MP3.com to download their music for free, resulting in over one million downloads of their songs before the band was signed by a major label.⁵⁹

The ability of artists to successfully distribute their music online, however, is in large part due to the popularity of the distribution sites, a result of the selection available on these sites. If the music industry is able

55. Love, *supra* note 42.

56. Jason Straziuso, *Lawsuits Scaring Some Downloaders, But Song Trading Still Popular*, DETNEWS.COM, Feb. 23, 2004, at <http://www.detnews.com/2004/technology/0402/25/technology-71313.htm> (last visited Jan. 31, 2005).

57. Borland & Hu, *supra* note 32.

58. Mann, *supra* note 23; Cecily Barnes, *The Smashing Pumpkins Take Music Directly to Napster Fans*, CNET NEWS.COM, Sept. 12, 2000, at <http://news.com.com/2100-1023-245620.html?legacy=cnet> (last visited Jan. 31, 2005).

59. See Mann, *supra* note 23.

to eliminate the ability of individuals to share and access currently copyrighted music on these networks, the networks' popularity will quickly diminish, as demonstrated by Napster's loss of users and eventual bankruptcy after its legal defeat.⁶⁰ A successful music industry will be able to use copyright protection to kill the vibrant online music networks and establish dominance on the Internet, much like they have in the traditional markets today. The industry's power comes from having nearly monopolistic access to the public and forcing artists to rely on them to gain this access. If the large labels are allowed to establish a similar dominance by becoming the only viable online distributors of music, they will maintain their same monopolistic power to control what the public hears and the price we must pay for it.⁶¹

The availability of these free networks is clear evidence that copyright protection is no longer necessary to encourage distribution of music, and allowing copyright protection to continue for the benefit of distributors is tantamount to a wealth transfer, taxing consumers for the benefit of music companies. Bertelsmann sold its shareholders on online distribution by saying, "[i]f we do this, we will have almost no additional costs but [will] have additional revenues coming in."⁶² In essence, the record industry will be able to externalize all of the distribution costs to consumers, while at the same time maintaining the ability to exercise monopolistic price controls. In a digital world, copyright becomes nothing more than corporate welfare for the music industry and does not hold true to copyright's intent of furthering creation for the benefit of the public.

E. CONSUMERS' SACRIFICE OF PRIVACY AND CHOICE TO ENABLE COPYRIGHT PROTECTION

Not only will continued copyright protection result in the public having fewer choices and paying higher costs, it will also likely mean that individuals must sacrifice their privacy. In 1998, Congress passed both the

60. Doug Isenberg, GigaLaw.com, *Internet Law Year in Review 2002*, at <http://www.gigalaw.com/articles/2002-all/isenberg-2002-12a-all.html> (last visited Jan. 31, 2005).

61. They will also be able to continue their exploitation of artists, as displayed by the music industries first ventures into online distribution, with Pressplay and MusicNet. The record labels license their artists' music to Pressplay, with the label and Pressplay keeping ninety-one percent of the money earned and artists getting approximately \$.0023 per downloaded song. Strauss, *supra* note 51. With most current artists objecting and asking for their songs to be removed from the service, record labels are now including a contract provision that allows the label full rights to sell songs online. *See id.* Jill Berliner, a prominent music attorney, notes, "from our perspective, if the technology is going to be out there and the artist isn't really going to make money, we'd prefer that our fans just get it for free." *Id.*

62. *See* Borland & Hu, *supra* note 32.

Copyright Term Extension Act, extending the length of copyrights an additional twenty years and the Digital Millennium Copyright Act (“DMCA”), giving copyright holders greater power than ever before to restrict content and invade the privacy of individuals.⁶³

The RIAA has filed hundreds of lawsuits against individuals participating in file sharing, originally using the DMCA to force Internet Service Providers to provide the names of suspected infringers with only the signature of a district court clerk.⁶⁴ While this means of obtaining individual’s names was found inconsistent with the power provided by the DMCA,⁶⁵ the music industry has not been deterred, recently suing 531 more individuals, for a total of 1445.⁶⁶ With defendants facing steep possible losses and large legal bills, it is likely that few of these cases will ever be heard in court. In fact, most of the previous lawsuits have already been settled, with the average settlement totaling about \$3000.⁶⁷ Of course, it is unlikely that any artist will ever see a cent of this money.

These lawsuits, however, have done little to curb file sharing and certainly are not a solution.⁶⁸ Hillary Rosen, President of the RIAA, has admitted that “there are not enough lawyers in the world to sue all the people we’d have to sue.”⁶⁹ Therefore, the industry is also looking to technology to restrict the ability of individuals to use information, many times to a greater extent than ever before. The RIAA has proposed the Secure Digital Music Initiative (“SDMI”), which would require all manufacturers of consumer electronics to adopt trusted systems on all equipment that plays music.⁷⁰ These trusted systems could prevent a user from ripping music from a CD to a computer, downloading music, transferring music to an MP3 player, or burning music to a CD.⁷¹ Basically, trusted systems could be used to restrict every possible use of recorded music, giving the industry complete control over what the public hears, what devices individuals may use to listen to music, how often an

63. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105- 298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.); Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

64. See Paul Roberts, The Industry Standard, *RIAA Sues 532 ‘John Doe’ File Swappers*, at <http://www.thestandard.com> (Jan. 21, 2005).

65. See Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1238–39 (D.C. Cir. 2003).

66. Straziuso, *supra* note 56.

67. *Id.*

68. *See id.*

69. Mann, *supra* note 23.

70. Ku, *supra* note 13, at 275.

71. *Id.* at 276.

individual may listen to a song, and how much an individual must pay for each different level of use.⁷²

The current rate of illegal file sharing illustrates that it is not possible to protect copyrighted music without giving the music industry more power. Allowing them this greater power will mean that the public will be restricted in its personal use of music like it has never been in the past. As opposed to the Internet opening a new age of free expression and access to music, its possibilities would instead be stifled by industry controls and monopolistic pricing schemes intended to maximize profits, not benefit the public.

F. A DIFFERENT KIND OF MUSIC INDUSTRY

The elimination of copyright protection for recorded music would almost certainly mean the end to the music industry as it stands today. It would also mean an opportunity for a new industry that responds to the new needs of consumers in a digital economy. In his work *Capitalism, Socialism and Democracy*, Joseph Schumpeter described a phenomenon that he called “creative destruction.”⁷³ Creative destruction is a process “that incessantly revolutionizes the economic structure. . . [by] incessantly destroying the old one, incessantly creating a new one.”⁷⁴ Much like the assembly line revolutionized manufacturing, the combustion engine revolutionized transportation, and the telephone revolutionized communication, the Internet has revolutionized the music industry, among other things. Assuming, that is, that copyright does not stand in the way.

While record companies claim that nobody would be willing to pay for music if it were available for free, consumers have shown a willingness to do just that in other areas. TiVo, its largest rival EchoStar, and new ventures from various cable companies now have up to 4 million subscribers paying a monthly fee as high as \$12.95 for a service that does little more than a VCR, record TV programs.⁷⁵ TiVo alone expects to see

72. For a more detailed discussion of trusted systems, see Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997).

73. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 83 (3d ed. Harper & Bros. 1950).

74. *Id.*

75. See Paul J. Gough, *TiVo Zips Ahead, Will Record 3 Million By Year-End, 10 Million By '08*, MEDIA DAILY NEWS, Mar. 5, 2004, at http://www.mediapost.com/dtls_dsp_news.cfm?newsID=240852 (last visited Jan. 31, 2005). See also Alyce Lomax, *TiVo Goes Hyper*, THE MOTLEY FOOL, Mar. 5, 2004, at <http://www.fool.com/News/mft/2004/mft04030508.htm?source=ptyholnk303100&logvisit=y&npu=y> (last visited Jan. 31, 2005).

over 10 million subscribers and over \$1 billion in yearly revenue within the next three to four years.⁷⁶ Likewise, XM Satellite Radio began offering satellite radio service in November 2001, charging \$9.95 per month on top of an initial investment in equipment, and already has signed up more than 1.5 million subscribers.⁷⁷ Analysts predict that the satellite radio industry, including XM Satellite Radio and its largest rival Sirius Satellite Radio, could grow to over 17 million customers within the next four years.⁷⁸ That would equate to revenues of over \$2 billion for a seven year old industry that offers an alternative to a free service.⁷⁹

Much like TiVo and XM Satellite Radio, digital music distribution services could develop features that entice individuals to pay a premium instead of using a free service. Further, a service that offers a platform enticing to consumers would be able to leverage its user base in order to profit from advertising dollars.

Services could also look to many other means to entice consumers to pay a premium, such as offering merchandise, chat rooms, contests, and access to concert tickets. Many artists already have their own fan clubs charging members a yearly fee, with the main draw being access to concert tickets before the general public.⁸⁰

The key to success for a distribution business will not be the music, but the ability of a service to add value to that music. Since the consumer is paying for the added value, there is no need for the law to protect the music itself.⁸¹ In the new economy of the music business, money will not be made by reducing diversity, but instead by offering it.

76. Franklin Paul, *Update-TiVo Sees Dramatic Subscriber, Revenue Growth*, REUTERS, Mar. 5, 2004.

77. Aude Lagorce, *Satellite Radio's Signals Get Stronger*, FORBES.COM, Feb. 13, 2004, at http://www.forbes.com/personaltech/2004/02/13/cx_al_0213sirius.html (last visited Jan. 20, 2005).

78. *Id.*

79. Calculation based on estimate of 17 million subscribers paying subscription fees of \$10 per month. Currently, XM Satellite Radio charges \$9.95 per month and Sirius Satellite Radio charges \$12.95 per month. *Id.*

80. Robert Lopez, *Perks Pay Off for Bands' Fans: Good Seats, Exclusive Merchandise and the Chance to Meet Musical Heroes Boosts Growth of Club Memberships*, CINCINNATI ENQUIRER, June 9, 2002, at http://www.enquirer.com/editions/2002/06/09/tem_perks_pay_off_for.html (last visited Jan. 20, 2005).

81. While it may seem unfair to allow a service to profit without paying the artist for their music, each download facilitated by the service would have marketing value for the artist. Each additional download will provide an artist with the opportunity to sell their live shows and merchandise, the main source of income for most musicians. Further, the service would not unfairly benefit from this arrangement because the consumer is not paying for the music, which they could get for free elsewhere, but for the service. For more about the benefits of online marketing, see Part IV.C.5.

With today's technology, copyright is no longer a necessary evil, but instead a roadblock to achieving the ultimate goal of promoting the progress of music for the benefit of society. The elimination of this roadblock will mean free competition instead of artificial monopolies and unlimited access instead of growing restrictions. With the availability of digital distribution, copyright protection is the one remaining thing that threatens the ability of music to "freely spread from one to another over the globe," as Thomas Jefferson imagined.⁸²

III. DO ARTISTS DESERVE TO OWN THE RIGHTS TO THEIR RECORDED MUSIC?

Regardless of economics, from a normative perspective, some may argue that copyright for recorded music should be maintained simply because artists have a right to possess works that they have created. The normative considerations for maintaining copyright protection, however, cannot be justified under the Supreme Court's interpretation of the copyright clause. Furthermore, as long as the instrumental considerations are satisfied, that artists are provided with a strong enough economic incentive to encourage creation, normative considerations would be unnecessary in order to ensure that artists receive fair compensation for their creations.

Even if normative considerations could be justified in theory, it is hard to argue that copyright should be maintained to protect the artists' rights in their own works when the realities of the music industry dictate that artists must almost always give up all of their rights to the major labels if they want to have any possibility of being successful. Maintaining the current copyright protection for recorded music, therefore, would not protect the artists' rights to possess their works, but would merely protect the profits of the major music labels that control the industry.

A. LABOR JUSTIFICATION THEORY

John Locke justified private property based on the theory that individuals should be rewarded for their labor.⁸³ From an instrumental perspective, one might argue that this theory is justified because society must provide rewards to individuals in order to induce them to work.⁸⁴ A

82. THOMAS JEFFERSON, *supra* note 6.

83. For a discussion of Locke's property theory and its application to intellectual property, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–300 (1988).

84. *See id.* at 296.

normative perspective, however, would dictate that an individual's labor should be rewarded simply because such a reward is deserved.⁸⁵

Many people today, and throughout history, have shown great support for the normative perspective, arguing that any individual who creates something deserves to possess that creation. Henry Clay argued that, "authors and inventors have, according to the practice among civilized nations, a property in the respective productions . . . and that this property should be protected as effectually as any other property."⁸⁶ More recently, Justice O'Connor declared that "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."⁸⁷

In almost all of its decisions on intellectual property, however, the Supreme Court has focused on the need to grant artists property rights as an encouragement to create.⁸⁸ In fact, when the normative argument is used, it often is merely an adjunct to the instrumental argument. For instance, in *Mazer v. Stein*, the Court stated:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.⁸⁹

The Constitution's copyright clause itself is clearly based on instrumental concerns, declaring that Congress may create intellectual property rights in order "[t]o promote the Progress of Science and useful Arts."⁹⁰ The Supreme Court has repeatedly recognized this to mean that "[t]he copyright law . . . makes reward to the owner a secondary

85. See *id.* at 296, 305.

86. Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 U.C.L.A. L. REV. 1100, 1100 n.3 (1971) (citing Report of Henry Clay, submitted with S. 223, 24th Cong., 2d Sess. 148 (1837)), quoted in Henry M. Gladney, *Digital Intellectual Property: Controversial and International Aspects*, 24 COLUM.-VLA J.L. & ARTS 47, 67 n.80 (2000).

87. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985), quoted in Gladney, *supra* note 86.

88. See Dallon, *supra* note 17, at 429–32.

89. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

90. U.S. CONST. art. I, § 8, cl. 8. For a discussion of the language and intent of the Copyright Clause, see Dallon, *supra* note 17, at 423–28.

consideration.”⁹¹ Most recently, in *Eldred v. Ashcroft*, the Court reaffirmed that the primary purpose of copyright protection is to provide for the public benefit.⁹²

Along with being inconsistent with the legal history of copyright, the normative considerations are also unnecessary in a free society and contrary to the free markets. While it seems fair to allow individuals to profit from their labor, copyright actually allows individuals to profit, in a way unlike every other industry, by maintaining a monopoly right to control their works.⁹³ In all other areas of the economy, monopolies are only allowed based on instrumental rational, and monopolies that develop that are not instrumentally beneficial to society, such as AT&T or Standard Oil, are forced to break apart without consideration for the normative rights of those whose labor created these monopolies.⁹⁴

Furthermore, as long as instrumental considerations are satisfied (in other words, artists are given an economic incentive strong enough to encourage production), normative considerations would seem unnecessary. Just like any job, musicians will only choose to produce music if they are paid their “persuasion costs.”⁹⁵ In essence, if the musician believes that the level of compensation is unfair, he or she will choose not to produce. Therefore, society would necessarily need to ensure that musicians receive fair compensation for their works, or the instrumental concern that society benefits from the creation of music would suffer.⁹⁶

91. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948). *See also* *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

92. *See Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

93. Industries with monopolies are regulated by the government. Some have argued that copyright does not actually create a monopoly. *See generally* Daniel B. Ravicher & Shani C. Dilloff, *Antitrust Scrutiny of Intellectual Property Exploitation: It Just Don't Make No Kind of Sense*, 8 SW. J. L. & TRADE AM. 83 (2001) (arguing that holders of copyrights do not have monopolies). However, these arguments tend to look at an overly large market and fail to recognize that the market for the individual copyrighted work does resemble a monopoly. With regard to each individual work, the holder of the copyright is able to completely exclude all others from the market and, therefore, resist the pricing pressures that would exist in a perfectly competitive market. The power of these individual monopolies becomes even stronger when only a few record labels control the majority of available works.

94. Standard Oil and AT&T represent two of the most prominent examples of the government using antitrust legislation to break apart a company. *See Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

95. *See* Breyer, *supra* note 11, at 285.

96. For a discussion on how musicians will be able to gain fair compensation under a regime with no copyright protection, *see infra* Part IV.

B. VALUE-ADDED THEORY

Another normative argument offered in support of copyright protection is that artists have a right to the value of their creation to society.⁹⁷ While there is room for argument regarding how to determine the value of a work to society, an economic perspective might say that the value of a work is whatever someone would be willing to pay instead of going without it. To a large extent, this is what the current law allows the holder of a copyright to do, providing the ability to exercise monopolistic price controls, and, thus, maximize profits.

This monopoly power, again, allows copyright holders a control that is nonexistent in any other industry or profession and completely contrary to the free market. In no other profession are salaries determined based on the value of an individual's contribution to society and no other industry is able to price its products using the power of a monopoly.⁹⁸ In fact, when instances arise that would allow individuals or industries to charge the total value of their services to society, competition is encouraged to bring down prices. Few people, however, complain that prices are too low and producers are being morally cheated by consumers benefiting from price competition.

C. LABELS, NOT ARTISTS, CONTROL MOST COPYRIGHTS

When considering the normative arguments for copyrights it is important to remember that in the music industry it is almost always the record label and not the artist that controls the copyright.⁹⁹ Unlike authors, who generally retain their copyright and license their work to the publisher, music labels force musicians to give up all the rights to their works.¹⁰⁰

Even an individual who supports the idea that an artist should have a moral right to possess their creation would seem hard-pressed to make that same argument for a record label's right to possess an artist's creation. While it could be argued that the artist willfully gives up that right, the current state of the recording industry gives artists few other options if they hope to become successful and reach the public with their music.

Instead of providing musicians with a reward for their labor or the value that they add to society, today's copyright regime allows record

97. See Hughes, *supra* note 83, at 305.

98. The few industries with monopoly pricing powers are strictly regulated by the government.

99. See *infra* Part II.C.

100. See *infra* Part II.C.

companies to use a musician for their own profit, often leaving the artist themselves making little or no money off of their recorded works.¹⁰¹ In many cases, it is likely that the elimination of copyright protection will actually result in artists having more control over their works than they do today and having the opportunity to reap even greater benefits.¹⁰²

IV. HOW AN END TO COPYRIGHT WILL CHANGE THE ECONOMICS OF THE MUSIC INDUSTRY AND ALLOW ARTISTS TO PROSPER

When asked who gets hurt by free downloads, recording artist Janis Ian responds, “[s]ave a handful of super-successes like Celine Dion, none of us. We only get helped.”¹⁰³ She explains that, “in the hysteria of the moment, everyone is forgetting the main way an artist becomes successful—*exposure*. Without exposure, no one comes to shows . . . no one enables you to earn a living doing what you love.”¹⁰⁴ In thirty-seven years as a recording artist, Janis Ian has created over twenty-five albums for major labels, and still has never received a single royalty check.¹⁰⁵ Therefore, like many artists, she sees free downloads very differently than the recording industry, “[b]ecause all of that gives me exposure to an audience that might not come [to my concerts] otherwise.”¹⁰⁶ She continues, “[s]o when someone writes and tells me they came to my show because they’d downloaded a song and gotten curious, I am thrilled!”¹⁰⁷

A. WHO IS MAKING MONEY NOW

According to the market survey firm Soundscan, about .03% of the compact disks on the market account for about twenty-five percent of all sales.¹⁰⁸ For the remaining 99.97%, “copyright is really just a way of earning less than they would if they received a fee from the record company.”¹⁰⁹ The way the system is designed, most musicians never make any money from their recordings and, thus, would suffer no financial loss if

101. See *infra* Part IV.A.

102. See *infra* Part IV.

103. Ian, *supra* note 15.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Mann, *supra* note 23.

109. *Id.* (quoting Simon Frith, a rock scholar in the film and media department at the University of Stirling and editor of *Music and Copyright* (1993)).

copyright did not exist.¹¹⁰ Instead, the real loser would be the music industry, which “is entirely structured around contracts that control intellectual-property rights—control them rather ruthlessly, in fact.”¹¹¹

Often, musicians must sell over a million copies of their albums before they ever see a royalty check.¹¹² Whitney Broussard, a music lawyer, explains, “[a] million units is a platinum record. . . . A platinum record means you’ve broken even—maybe.”¹¹³ At the same time, he adds, “the label would have grossed almost eleven million dollars at this point, netting perhaps four million.”¹¹⁴ Often, less than thirty records will sell this many copies each year and only about 250 of the over 32,000 releases each year will sell more than 10,000 copies.¹¹⁵

Few musicians ever make any money because the dominance of the labels allows them to force musicians into unconscionable contracts. According to *Billboard Magazine’s* Editor-in-Chief Timothy White, “[e]verything is charged against the musicians—recording expenses, marketing and promotional costs—and then when it’s all paid off, [the labels] still own the record It’s big companies making a naked grab of intellectual property from small companies and individuals.”¹¹⁶

While most artists see no money, even some of the most successful artists receive little from their recorded music. “TLC declared bankruptcy after they received less than [two] percent of the \$175 million earned by their CD sales.”¹¹⁷ At the same time, their management, production and record companies split a take that was about forty times that much.¹¹⁸ Toni Braxton also declared bankruptcy after she sold over \$188 million worth of CDs, but had a recording contract that paid her only \$.35 per album.¹¹⁹

Roger McGuinn, a musician and songwriter formerly with the Byrds, described his thirty years of experience in the music industry in testimony before the U.S. Senate Committee on the Judiciary.¹²⁰ Despite recording

110. See Ku, *supra* note 13, at 306–07.

111. Mann, *supra* note 23 (quoting Simon Frith).

112. *Id.*

113. *Id.*

114. *Id.*

115. Love, *supra* note 42.

116. Mann, *supra* note 23.

117. Love, *supra* note 42.

118. *See id.*

119. *Id.*

120. See *Music on the Internet: Is There an Upside to Downloading? Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Roger McGuinn, member and cofounder of The Byrds), available at http://www.judiciary.senate.gov/testimony.cfm?id=195&wit_id=253.

over twenty-five records in his career, including a top forty hit and a 1989 album that sold over 500,000 copies, he has never received a single royalty check from a record company.¹²¹ He explains, “My performing work is how I make my living. Even though I’ve recorded over twenty-five records, I cannot support my family on record royalties alone.”¹²² In 1994, he began placing new recordings on his Web site and allowing fans to download them for free.¹²³ Then, in 1998, he formed a relationship with MP3.com, which was not only willing to market folk songs that the major labels did not consider commercial enough, but also “offered [him] more artistic freedom than any of [his] previous relationships with mainstream recording companies.”¹²⁴

For less popular groups, the situation is even worse. The Judybats, an alternative rock group, sold over 200,000 albums in its four-year, three-record contract with Warner Records.¹²⁵ Still, at one point they owed the label \$750,000.¹²⁶ They Might Be Giants had even more success with their first release, “Flood,” selling over 750,000 copies.¹²⁷ Yet, according to the bands manager, between “Flood” and two other releases, which have sold a combined 1.5 million albums, “we’ve never seen a single royalty check from the company since we joined.”¹²⁸ Andre Johnson, leader of the D.C. based band Rare Essence described his time signed with labels Polygram and MCA saying, “[a]s a means of making money, it doesn’t work.”¹²⁹ In fact, as a band makes more records, they are often just increasing their debt to their record label.¹³⁰

The Judybats and They Might Be Giants, however, should be considered lucky compared to the majority of bands that get signed by a major record label. Only about five percent of artists signed to major labels each year will see their records make any major impact.¹³¹ This is almost always a direct result of the money and marketing that the labels are willing

121. *See id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. David Segal, *Aspiring Rock Stars Find Major-Label Deals—and Debts*, WASH. POST, May 13, 1995, available at 1995 WL 2093407.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See Money for Nothing and Your Chicks for Free*, MEMPHIS FLYER, Aug. 24, 1998, at http://weekliwire.com/ww/08-24-98/memphis_cvr.html (last visited Jan. 31, 2005).

to put behind the record.¹³² The rest get tagged as nonpriority bands, receive significantly smaller recording budgets and little or no promotional money.¹³³ These bands must then prove themselves on a grass roots level with little aid from the record company, much like an unsigned band. Unlike an unsigned band, however, the record company now owns and controls all of their recordings, including their ability to use their recorded songs for self-promotion.

B. THE COST OF MAKING A RECORD

In the past, recording an album could become very expensive, requiring money for recording, editing, printing, packaging, distribution, and promotion.¹³⁴ Today, however, the fixed costs associated with recording a CD can be minimal.

With the option for digital distribution, many of the costs associated with producing a record are eliminated completely, including printing, packaging, and distribution. Free file sharing services, like the peer-to-peer networks operating today, also provide a free means for promotion that could prove invaluable to an emerging band that otherwise would not receive label support.

With those costs eliminated, the main costs required to produce an album are recording and editing. Any individual with a personal computer can purchase recording and editing software for approximately \$150.¹³⁵ With this software, a musician is able to create music at home that has relatively good sound quality.¹³⁶ Even a professional recording studio is no longer prohibitively expensive, with many studios in the Los Angeles area charging rates lower than \$50 per hour and often providing a trained engineer as part of the fee.¹³⁷ Once the album is produced, only a personal computer is necessary to distribute an artist's music worldwide.

132. *See id.*

133. *Id.* These bands fall victim to the same artificial scarcities that help keep the music industry so profitable, and the industry is trying to protect and preserve in any digital distribution regime that may develop. Courtney Love argued that "[t]he present system keeps artists from finding an audience because it has too many artificial scarcities: limited radio promotion, limited bin space in stores and a limited number of spots on the record company roster." Love, *supra* note 42.

134. *See* Ku, *supra* note 13, at 306.

135. *Id.*

136. *See id.*

137. For Web sites providing examples of studio recording rates, see Infidelity Recordings, *Studio Rates*, at <http://www.infidelityrecordings.com/rates.html> (last visited Jan. 31, 2005); Spitshine Studios, *Rates and Services*, at <http://www.spitshinestudios.com/rates.htm> (last visited Jan. 31, 2005); and

Even before technology brought down the cost of recording, many unsigned bands produced demos of their music or CDs to sell at their concerts without the aid of any money from a record label. Today, the low-cost makes it possible for basically everyone to record and distribute their music online. The ease and affordability of recording and distributing music without the aid of a record company is proven by the large number of unsigned bands who have done just that, uploading their songs onto sites such as Mylocalbands.com, Garageband.com, and MP3.com, with MP3.com alone featuring music from over 250,000 artists before lawsuits forced it to shutdown.¹³⁸

C. HOW ARTISTS WILL MAKE MONEY

1. Concerts

“The top [ten percent] of artists make money selling records. The rest go on tour,” says Scott Welch, who manages singers Alanis Morissette and LeAnn Rimes.¹³⁹ While the recording industry has been complaining about lost revenue from album sales, concert receipts have been soaring. In 2003, North American concert revenues totaled \$2.5 billion, a twenty percent increase over revenues in 2002 and \$1 billion more in total revenues than in 2000.¹⁴⁰ It was an especially good year for big name artists, meaning that the top ten percent of artists that might be financially hurt by the loss of their copyright will likely continue to see huge revenues from their live performances.¹⁴¹ The ability to command \$100,000 per night, or more than \$1000 per minute, as Jay-Z was able to do on his “Rock the Mic” tour, is likely to be more than enough incentive to encourage top stars to continue creating music.¹⁴²

Valley Center Studios, *Valley Center Studios Recording Studio*, at <http://www.valleycenterstudios.com/recording.html> (last visited Jan. 31, 2005).

138. See Rick Aristotle Munarriz, *Sing a New Song*, THE MOTLEY FOOL, Mar. 12, 2004, at <http://www.fool.com/news/commentary/2004/commentary040312RAM.htm> (last visited Jan. 31, 2005).

139. Peter Kafka, *The Road to Riches: As CD Sales Sag Under Napster-Style Piracy, Jay-Z and Other Hot Acts—Especially Craggy Veterans—Turn to Concert Tours to Reap Their Real Fortunes*, FORBES.COM, Jul. 7, 2003, at <http://www.forbes.com/global/2003/0707/046.html> (last visited Jan. 31, 2005).

140. Brian McCollum, *Live and Kicking: The Concert Scene Soars Even as Other Parts of the Music Business Struggle*, DETROIT FREE PRESS, Jan. 18, 2004, at http://www.freep.com/entertainment/music/con18_20040118.htm (last visited Jan. 31, 2005).

141. See Kafka, *supra* note 139.

142. See *id.*

Despite pulling in \$3.3 million over his thirty-three city tour, Jay-Z is nowhere near the top when it comes to concert earnings.¹⁴³ A band like Fleetwood Mac is able to command a guarantee of \$650,000 per show and The Eagles forty-date Farewell I tour will earn them at least \$30 million in guarantees from ticket sales alone.¹⁴⁴ In stark contrast to their record deals, top acts are able to demand thirty-five percent of a night's ticket sales.¹⁴⁵ This provides great profits for performers, with Bruce Springsteen's latest tour grossing about \$116 million, the Dixie Chicks overcoming a national backlash to take in \$60.5 million, and Eminem selling over \$5.3 million worth of tickets for a show in his hometown of Detroit.¹⁴⁶

Therefore, without copyright, tour music will still provide great incentives to keep the top artists producing and smaller acts likely would see an increase in their ability to make money on tour. With the cost of acquiring music falling, or even becoming free, consumers will have more entertainment dollars to spend in other areas, including live shows. In addition, the Internet will provide less well known musicians with the ability to reach both a global and a local audience. While the music labels tend to spend a large amount of money marketing artists that they believe will be the most successful, smaller bands are often left with no access to the radio or other necessary promotion.¹⁴⁷ The Internet will give these artists the ability to take their music directly to the people, and customers will be more likely to sample a song when they are not required to pay \$13 before ever hearing it. When most musicians will never make any money off their recordings, there is nothing more valuable than access to the consumer and the ability to build a fan base that will pay to see live shows and buy merchandise.

This great source of revenue for artists, however, may be at risk, with the music labels also looking to take a piece of this pie.¹⁴⁸ While many top draws currently have no reason to give in to their labels, record companies would be able to take advantage of newly signed groups, much like they already do regarding album sales.

If the labels move in this direction, which many executives say is a logical next step, even tomorrow's top artists may benefit more under a

143. *See id.*

144. *See id.*

145. *See id.*

146. McCollum, *supra* note 140; Pollstar Online, *2003 Year End Top 20 Tours*, at <http://www.pollstaronline.com/2003yearend20.asp> (last visited Jan. 31, 2005).

147. *See Money for Nothing and Your Chicks for Free*, *supra* note 131.

148. *See Kafka*, *supra* note 139.

regime where they may lose some CD sales dollars, but will retain all of their concert and merchandise revenues.

2. Merchandise and Fan Clubs

Much like concert revenue, merchandise revenue has been on the rise, with retail sales of licensed merchandise totaling \$2.3 billion in 2002 and many acts able to command fifty percent of the dollar flow from merchandise at a show.¹⁴⁹ More successful bands can often average \$15 to \$20 per person in merchandise sales at a concert, which can add up to millions of dollars a night at large stadium shows.¹⁵⁰

Online fan clubs have also become a great source of income for many artists, with fans willing to pay up to \$100 yearly membership fees to gain access to exclusive content, contests, merchandise, message boards, and most importantly, concert tickets.¹⁵¹ Many consider the Dave Matthews Band's fan club the most successful on the Web, boasting 80,000 members and bringing in over \$2.8 million per year.¹⁵² While Dave Matthews was one of the first artists to embrace the web, many other bands have more recently established online fan clubs, with many clubs showing memberships in the five figures and more successful ventures averaging over 30,000 members.¹⁵³

While fan clubs today are mainly dominated by the more successful artists, this might not be the case in the future. Over The Rhine, a local Cincinnati band, had a fan club with over 3000 members.¹⁵⁴ Band member Linford Detweiler described it as "a good way for us to have revenues to put out underground records that wouldn't be put out by our label."¹⁵⁵ Ben Patterson, Director of The Firm, a music management company that operates fan clubs for bands like Korn, believes that "five years down the

149. See *id.*; Sue Zeidler, *Rock Stars Hawk Their Name 'N Fame as CD Sales Slip*, REUTERS, Oct. 1, 2003, available at <http://www.groovelily.com/press/industry/industry02.html> (last visited Jan. 31, 2005).

150. See Kafka, *supra* note 139; Marketplace (NPR radio broadcast, Sept. 12, 2003), available at 2003 WL 4380733.

151. See Lopez, *supra* note 80.

152. Revenue calculations based on 80,000 members paying \$35 per year. See *id.*; Warehouse: The Official Dave Matthews Band Fan Association, *Membership Benefits*, at <http://www.warehouse.davematthewsband.com/membership/join/default.asp> (last visited Jan. 31, 2005).

153. See Brian Garrity, *Online Fan Clubs Emerge as Potential Profit Centers*, BILLBOARD, Aug. 17, 2002, available at <http://www.dwsco.com/pdf/Billboard%20Reprint%20Aug%2017.pdf> (last visited Jan. 31, 2005).

154. See Lopez, *supra* note 80.

155. *Id.*

road . . . there will be a lot more of a chance that smaller acts could have successful online club sites.”¹⁵⁶

3. A Different Kind of CD

The Grateful Dead made waves in the music industry when they began allowing fans to record their live concerts and trade them for free.¹⁵⁷ Many in the industry claimed that they would be ruining themselves, with fans having no reason to pay for records and shows if they could get them for free.¹⁵⁸ But, instead, the Grateful Dead became arguably the most successful touring band in the history of music.¹⁵⁹

Today, many other successful bands allow, and even encourage, fans to record and trade their live performances, including The Dave Matthews Band and Phish.¹⁶⁰ Many are also realizing the potential to make money off the sale of recordings of live shows.¹⁶¹ Most notably, Phish fans have shown a great willingness to pay for shows that they otherwise would have been able to get for free.¹⁶² The band has begun offering fans the ability to download all of their live concerts from their Web site for a fee of \$12.95 per show.¹⁶³ Brad Serling, whose company runs the site, describes its success as, “beyond our expectations[,] . . . [i]t’s been profitable from day one.”¹⁶⁴ In fact, in a little over a year in operation, the site has brought in more than \$2.25 million.¹⁶⁵

Serling believes that it is not only big name bands that can have success selling their live shows online, and has also teamed up with three

156. See Garrity, *supra* note 153.

157. John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age. (Everything You Know About Intellectual Property is Wrong.)*, WIRED MAG., Mar. 1994, at <http://www.wired.com/wired/archive/2.03/economy.ideas.html>.

158. *Id.*

159. *See id.*

160. Rick Bird, *Buffett Recorded Live in Cincinnati*, CINCINNATI POST, Jan. 29, 2004, available at 2004 WL 58451536.

161. See Seth Schiesel, *Profit-Minded Bands Upload Straight to Web Bypassing Piracy / A New Online Economy*, N.Y. TIMES, Jan. 23, 2004, available at 2004 WL 57507968; Kevin Wack, *Fans Can Catch Phish Live Recordings Quickly*, CHI. SUN-TIMES, Aug. 13, 2003, available at 2003 WL 9564499. Along with bands that have used the Internet to sell their live shows, many have also been selling CDs of their live shows right at the venue after the performance. Early efforts have proved very successful, with up to twenty percent of an Allman Brothers Band audience purchasing CDs. Richard Harrington, *Instant Gratification*, WASH. POST, Nov. 21, 2003, available at 2003 WL 67887784.

162. The band has been offering its live concerts for sale on the Internet, while at the same time allowing members of the audience to tape and trade the shows. Wack, *supra* note 161.

163. *Id.*

164. *Id.*

165. Schiesel, *supra* note 161.

less-prominent bands: The Radiators, String Cheese Incident, and Yonder Mountain String Band.¹⁶⁶ Eventually, especially with the low-costs of online distribution, even small bands could offer fans the opportunity to purchase the exact show that they just enjoyed. The success of the Phish Web site shows that fans are willing to pay for this type of recording, even when the same show is available for free. Possibly, much like tipping a waiter, fans see this as a way to show appreciation to a band that they enjoy.

4. Sponsorships

While the recording industry produced U.S. sales of approximately \$11.5 billion in 2003, with only a small percentage of that trickling down to musicians, it is estimated that U.S. advertisers will spend \$248 billion in 2004.¹⁶⁷ Although the music industry has been late to embrace this avenue for revenue, the sports business has shown that sponsorships can mean big money for entertainment, with advertisers spending \$27.43 billion on sports in 2001, and \$6.4 billion on direct sponsorship of leagues, teams, stadiums, and events.¹⁶⁸

The music industry, however, is quickly moving to capitalize on this opportunity, with many artists striking sponsorship and promotion deals for their records and tours.¹⁶⁹ Just a few examples of recent big name deals include Celine Dion and Chrysler, Led Zeppelin and Cadillac, Jewel and Schick, Shakira and Pepsi, Jay-Z and Heineken U.S.A. and Reebok, Enrique Iglesias and Doritos, and Mya and Coca-Cola.¹⁷⁰

These deals not only provide artists with additional income, but also give them a new means to promote their music. With radio airtime becoming harder to come by, many artists will allow advertisers to use their songs on commercials without cost.¹⁷¹ Sting's hit song "Desert Rose" could not get traditional airtime on radio, but was featured in commercials for Jaguar and Compaq Computers.¹⁷² Likewise, Dirty Vegas's song "Days

166. *Id.*

167. MEDIA EDUC. FOUND., ADVERTISING: EXPOSURE & INDUSTRY STATISTICS, at http://www.mediaed.org/Marketing/E_Newsletter/Nov2003AdvertisingExposure.pdf (on file with the Southern California Law Review). See Kafka, *supra* note 139.

168. See *How \$194.64 Billion is Spent in Sports*, SPORTSBUS. J., March 11, 2002, available at <http://www.sportsbusinessjournal.com/images/random/SportsIndustry.pdf> (last visited Jan. 31, 2005).

169. See Marc Pollack, *Creative Collaboration—Destined to Duet: Music & Marketing*, ADVERTISING AGE, July 28, 2003, available at 2003 WL 9146759.

170. *Id.*

171. *Id.*

172. *Id.*

Go By” became a hit only after being featured in a Mitsubishi commercial, and every song off of Moby’s multi-platinum “Play” album has been used in a commercial.¹⁷³

While the most popular artists are able to demand the largest deals, even lesser known bands will be able to benefit from sponsorship deals. Upstart artists are finding sponsorship deals a great way to fund tours and promote their music, and many major companies are even sponsoring small local bands. Last summer, Tommy Hilfiger sponsored Tommy Jeans Stages: small stages featuring local acts at larger music venues.¹⁷⁴ Peter Connolly, Vice President of Worldwide Marketing and Communication for Tommy Hilfiger, explains, “[i]t gives us a way to reach the younger consumer in a different vehicle. . . [i]f you want to go into a local market, these are bands that are relevant to those kids.”¹⁷⁵

It is likely that corporate sponsors could eventually take the place of the major record companies today, funding recordings and tours and providing valuable promotional opportunities. Already today, many concert tours are funded in part or in full by corporate sponsors,¹⁷⁶ and Web sites like Mylocalbands.com and GarageBand.com work together with sponsors and local venues to fund shows for young local bands.¹⁷⁷

With most artists appealing to a certain classifiable subset of the population, music provides companies with an ideal opportunity to target specific demographics. Many large companies, like Coca-Cola and Pepsi, have already started making music an extensive part of their marketing strategy, both recently launching Web sites that feature free music downloads.¹⁷⁸ Coca-Cola alone has revenues greater than the entire music industry and spent over \$1.9 billion on advertising in 2003.¹⁷⁹ By capturing only a small piece of the overall sponsorship dollars in the United States, the music industry would see far greater revenues than record sales have ever produced.

173. *Id.*

174. Jill Radsken, *The Edge; Sense of Style; Rock the Gear; Rap, Rock Stars Bring Bling to Old-School Fashion Firms*, BOSTON HERALD, June 19, 2003, available at 2003 WL 3028676.

175. *Id.*

176. Pollack, *supra* note 169.

177. See, e.g., GarageBand.com, at <http://www.garageband.com> (last visited Jan. 31, 2005); MyLocalBands.com, at <http://www.mylocalbands.com> (last visited Jan. 31, 2005).

178. Jonny Evans, *Pepsi, Coke in Music Battle of the Brands*, MACWORLD DAILY NEWS, Jan. 28, 2004, at <http://www.macworld.co.uk/news/index.cfm?NewsId=7780> (last visited Jan. 31, 2005).

179. THE COCA-COLA CO., 2003 ANNUAL REPORT, at 33–36, available at http://media.corporate-ir.net/media_files/irol/94/94566/reports/ko_022704.pdf (last visited Jan. 31, 2005).

This source of funding would also help develop more diversity in the music industry. Instead of five major record labels, thousands of potential sponsors would seek different demographics. Furthermore, while the labels are only interested in artists that could potentially be major sellers, sponsors would find value in both a top selling artist that could reach millions and a young punk band with a strong local following. For a young band, a sponsorship deal would also mean valuable promotion and the ability to develop their music without facing the often insurmountable debt obligation of a record deal.

5. Marketing

In the music business, the most important commodity is the fans. Record labels realize this and spend millions of dollars to promote a single album, sometimes spending as much as \$300,000 just to get an artist's music played on the radio so consumers can listen to it for free.¹⁸⁰ Big3 Records President Bill Richards explains, "[i]f you don't hear something, how can you possibly know if you want it?"¹⁸¹ Under the current system, however, if an artist is not already popular enough to receive heavy promotion and gain playtime on the radio, the consumer is being asked to pay for the music before they have had the chance to hear it. This may explain why so few artists are able to sell enough CDs to make any money and why there is such a strong correlation between the artists that the label chooses to promote and those that have successful albums.

The Internet, however, provides every artist with an almost priceless opportunity to be heard by everyone with access to a computer and even a local band with no money can have its music spread across the globe. Janis Ian explains, "[t]he Internet means exposure, and these days, unless you're in the Top 40, you're not getting on the radio. The Internet is the only outlet for many artists to be heard by an audience bigger than whoever shows up at a local coffeehouse."¹⁸² While the music labels oppose this revolutionary opportunity because the recording is the only thing they have to sell, almost all working musicians make their money selling everything but the recording.

An unknown band, Fisher, had over one million people download their songs for free when they were placed on MP3.com.¹⁸³ For a band that

180. Love, *supra* note 42.

181. Pollack, *supra* note 169.

182. Janis Ian, *Don't Sever a High-Tech Lifeline for Musicians*, GNUTELLA NEWS, Feb. 2, 2003, at <http://www.gnutellanews.com/article/6047> (last visited Jan. 31, 2005).

183. Mann, *supra* note 23.

likely would never have seen any money from its recordings anyway, free distribution over the Internet meant one million chances to sell its concert tickets and merchandise and a chance to build a fan base to entice sponsors.

The music industry understands that consumers cannot realistically be expected to pay for a CD before they have heard the music. Nonetheless, regardless of the benefits to musicians, it cannot allow music to flow free over the Internet because that would mean an end to their business model. For musicians, however, the end to copyright would mean the opportunity to use their music to sell themselves, connect directly with their fans, and grow their fan base.

V. CONCLUSION

Companies will spend an estimated \$248 billion on advertising in 2004¹⁸⁴ in recognition of the fact that in order to sell a product, people must know that the product exists. The music industry certainly is not blind to this fact, with promotion being the main cost associated with most albums. The music industry, however, only spends meaningful money to promote its top artists, leaving the majority to basically fend for themselves with no access to radio airtime and no opportunity to market their music to the public. Having the right to make money from a record that never has a real chance to sell means little to artists and having labels restrict the public's access to their music means lost opportunities to gain fans who may buy concert tickets and merchandise, and increase the artists' appeal to sponsors.

Most musicians will benefit if recorded music is freed from copyright restrictions. Sources of revenue other than record sales, including concerts, merchandise and sponsorships could prove more profitable even for top acts. For upstart bands, new technology and possible sponsorship deals would mean the ability to reach an audience without facing the difficulty of signing with a major label and then facing immediate debt that only a small percentage of artists ever overcome. Even the most successful artists will never own their works.

Copyright may protect a record label's bottom lines, with its ability to make money despite a ninety percent failure rate, but it impedes musicians' ability to make money.¹⁸⁵ Musicians have many potential sources of income beyond record sales, which the majority of artists depend on to

184. See MEDIA EDUC. FOUND., *supra* note 167.

185. Eric de Fontenay, *Should Artists Pay for the Labels' Mistakes?*, MUSICDISH E-JOURNAL, Sept. 6, 2001, at <http://www.musicdish.com/mag/?id=4452> (last visited Jan. 31, 2005).

make a living, but all of them require that the public have a chance to hear their music. Lifting copyright restrictions will provide the opportunity for music to legally flow free across the Internet and allow all musicians access to their most important commodity, the fans.

Most importantly, however, copyright restrictions on recorded music must be lifted for the benefit of the public. With distribution costs shouldered by end consumers, copyright is no longer a necessary evil, but instead an unnecessary obstruction. Lifting this obstruction would mean more choices, easier access, and lower costs for consumers.

Copyright was created to ensure that the public had the greatest access to artistic works allowable by the technology of the time. The words of the Constitution, the writings of the Founding Fathers, and the decisions of the Supreme Court all affirm that “[t]he Sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”¹⁸⁶ Assuming artists will still have an incentive to create, as demonstrated in Part IV, it is hard to imagine that any action would create a greater benefit for the public than the elimination of copyright protection, allowing consumers free and easy access to all music over the Internet.

It is often said that all new advances in technology may be used for both positive and negative purposes. Today’s technology gives us the ability to create a free exchange of music and ideas never thought possible at the dawn of copyright. This technology, however, also threatens to restrict access, invade privacy, and give copyright holders powers never contemplated or intended by the drafters of the Constitution, who celebrated the power of free ideas, “incapable of confinement or exclusive appropriation.”¹⁸⁷

The recording industry will use its money, power, and influence to continue seeking harsher copyright laws that ultimately transfer more power from consumers to copyright holders. Congress, however, must not let campaign contributions prevail over its constitutional duty to create copyright laws for the public benefit. The laws made today will shape the look of the music industry for years to come, and we must fight to ensure that these laws lay the groundwork for a system of music creation and

186. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

187. THOMAS JEFFERSON, *supra* note 6. While unimaginable at the time, this is basically what trusted systems and SDMI seek to do, giving copyright holders the exclusive power to determine how, where, when, how many times, and with what devices an individual is able to listen to a song.

distribution, which benefits the public and allows the Internet to reach its full potential to “freely spread [ideas] from one to another over the globe.”¹⁸⁸

188. *Id.*

