



RETHINKING MUSIC: A FRAMING PAPER

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INTRODUCTION

The music industry has been in a state of significant flux for more than a decade as music consumption has shifted online. From one perspective, this shift marks the downfall of the recording industry. Fans have little incentive to buy albums when they can instantaneously illegally download songs from peer-to-peer file sharing networks and other sources.¹ And, the attention of consumers is increasingly drawn from music to an enormous and growing array of competing media and entertainment products. According to an NPD group study, in the third quarter of 2010, only 16.5% of American Internet users over the age of thirteen purchased music.² When fans do purchase music, they would rather download individual tracks priced at \$.99 than full-length albums at ten times the cost.³ As a result of all these factors and more, the value of the global recorded music industry has declined by one-third since 2004.⁴

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

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

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

SAMPLING, MASHUPS, AND THE EMERGENCE OF REMIX CULTURE

The intersection of music and law begins with the very creative process itself. That process is becoming increasingly individualized, particularly when it comes to recording and distributing music. It is now possible to produce professional-level music recordings using only an iPad and its GarageBand app at a total cost of \$505.⁹ The rise of inexpensive recording tools and channels for self-distribution has led some to avoid producers, studios, and labels.¹⁰ There may be fewer recording professionals, but anyone can record. Even more can remix.

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

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

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

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

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

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

ARTISTS AND LABELS

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

TERMINATION OF COPYRIGHT TRANSFERS

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

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

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

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

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

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

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

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

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

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

PERFORMANCE RIGHTS AND SOUND RECORDINGS

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

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

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

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

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

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

ANTI-PIRACY AND RIGHTS ENFORCEMENT ISSUES ONLINE

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

VIACOM V. YOUTUBE AND THE DMCA

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

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

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

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

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

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

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

INVESTOR LIABILITY

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

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

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

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

STATUTORY DAMAGES AND THE COPYRIGHT ACT

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

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

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

THE ROLE OF ISPS IN RIGHTS ENFORCEMENT

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

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

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

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

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

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

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

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

GOVERNMENT-SANCTIONED RIGHTS ENFORCEMENT MEASURES

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

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

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

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

LAW, POLICY, AND DIGITAL MUSIC DELIVERY

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

MUSIC IN THE CLOUD

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

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

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

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

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

INTERNET RADIO AND STATUTORY LICENSE RATES

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

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

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

SECTION 115 REFORM

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

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

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

COLLECTIVE LICENSING AND ALTERNATIVE COMPENSATION

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

VOLUNTARY COLLECTIVE LICENSING

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

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

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

ALTERNATIVE COMPENSATION MODELS AND TAXATION

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

Resistance to a tax-supported music industry has emerged on all sides.¹¹⁴ Many fear a world where government subsidizes and registers art. Critics also suggest that promoting a set source and level of revenue may stifle innovation¹¹⁵ and that any organizer would have to overcome technical and global challenges of abuse¹¹⁶ and comply with existing rights frameworks.¹¹⁷

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

NET NEUTRALITY

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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