

# Legislative Strategies for Enabling the Success of Online Music Purveyors<sup>+</sup>

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## I. INTRODUCTION

On October 7, 2008, the proprietary, peer-to-peer (p2p) music streaming service Spotify launched to near universal acclaim.<sup>1</sup> Initial users praised the downloadable application for its “speed, usability, and depth of songs.”<sup>2</sup> Commentators in America wondered if the service—still only available overseas<sup>3</sup>—would nevertheless heroically cross the Atlantic and apply a much needed tourniquet to the American music industry. Indeed, the music industry has seen better days. Ever since Napster reared its game-changing head in 1999,<sup>4</sup> music industry profits have declined precipitously. Compact disc sales are down 45% since 2004.<sup>5</sup> And, while digital sales are steadily increasing,<sup>6</sup> they still

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<sup>1</sup> While this paper does mention Spotify specifically, its scope is not only limited to music streaming services, but also extends to other varied online music purveyors such as Pandora, Rhapsody, Pressplay, Last.fm, etc. The point of this Comment is that licensing reform will benefit any online music purveyor, no matter the form of distribution.

<sup>2</sup> Jennifer Guevin, *Music streaming service Spotify wins early fans*, CNET NEWS, Jan. 3, 2009, [http://news.cnet.com/8301-1023\\_3-10130632-93.html](http://news.cnet.com/8301-1023_3-10130632-93.html).

<sup>3</sup> As of this writing, Spotify was available in Sweden, Norway, Finland, the U.K., France, and Spain. Spotify Frequently Asked Questions, <http://www.spotify.com/en/help/faq/#country-availability> (last visited Dec. 23, 2009).

<sup>4</sup> GREG KOT, *RIPPED: HOW THE WIRED GENERATION REVOLUTIONIZED MUSIC 25* (Scribner 2009).

<sup>5</sup> Vintage Vinyl News, *A Snapshot of the Current Music Industry*, <http://winkscollectibles.blogspot.com/2009/06/snapshot-of-current-music-industry.html> (last visited Dec. 23, 2009). The article cites figures culled from a recent National Association of Recording Merchandisers and Nielson SoundScan report. The report is available for download at <http://www.narm.com/services/research/research-reports/>.

<sup>6</sup> Digital music sales now account for 40% of the total music market, compared to just 8% in 2005. *Id.* The report projects that digital sales will hit 50% of the market by the end of 2010. *Id.*

do not compensate for the loss in profits resulting from physical sales declining.<sup>7</sup> With illegal downloading and streaming of music running rampant,<sup>8</sup> it is apparent that the music industry desperately needs a boost.

However, several forces are conspiring to forestall change. First, digital technology has irretrievably altered the modern rights landscape. The definitional lines separating the exclusive rights—once fairly clear—are now blurred. Confusion over which rights are implicated in online transactions has created uncertainty in the marketplace and chilled innovation.<sup>9</sup> Secondly, the existing statutory mechanisms for licensing rights are no longer effective, and preclude the kind of bulk licensing necessary to compete with illegal downloading services.<sup>10</sup> Yet while legislative change is needed, it is difficult to salve a wound when the patient will not submit to treatment. Entities like the Recording Industry Association of America (“RIAA”) and its member recording labels prefer to delay statutory reform in the hopes that Congress will disclaim network neutrality (NN)<sup>11</sup> and allow the RIAA—in conjunction with internet service providers (“ISP”s)—to herd music consumers back to the twentieth century by aggressively monitoring internet traffic.<sup>12</sup>

In order to combat online music piracy by making it easier for online music purveyors to offer music consumers the products they

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<sup>7</sup> Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, June 28, 2007,

[http://www.rollingstone.com/news/story/15137581/the\\_record\\_industrys\\_decline](http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline). This figure also includes digital sales of albums. *Id.* Specifically, the study found that albums declined from 785.1 million albums in the year 2000, to 588.2 million in the year 2006. *Id.* In 2007 there were 844.1 million downloaded tracks, a 45% rise from 2006, and 50 million digital albums sold, a 53.5% increase from 2006 numbers. Antony Bruno, *Downloads to the Rescue: Digital Commerce Hits Record High in '07*, BILLBOARD, Jan. 12, 2008, at 6. *But cf.* *Midyear Music Biz Report Card*, ROLLING STONE, Aug. 7, 2008, at 12 (reporting that while digital track sales had increased, “the rate of growth has slowed from 48 percent in mid-2007 to 30 percent” in 2008).

<sup>8</sup> Twenty billion songs were downloaded illegally in the year 2006. Also in that year, the ratio of illegal to legal song downloads was 40:1. Bennett Lincoff, *Common Sense, Accommodation and Sound Policy for the Digital Music Marketplace*, 2 J. INT’L MEDIA & ENT. L. 1, 5 (2008).

<sup>9</sup> See Fred Von Lohmann, *How Hollywood Has Been Trying to Disrupt Disruptive Innovation*, EE TIMES, <http://www.eetimes.com/disruption/essays/vonlohmann.jhtml>.

<sup>10</sup> See *Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary*, 109th Cong. 17 (2005) (statement of Marybeth Peters, the Register of Copyrights, United States Copyright Office), available at <http://www.copyright.gov/docs/regstat062105.html> (arguing that statutory reform is necessary to allow bulk licensing of music) [hereinafter Peters].

<sup>11</sup> See *infra* text accompanying note 39.

<sup>12</sup> See *infra* text accompanying note 38.

desire in the manner they desire them, Congress should clarify the rights landscape and establish a fair digital marketplace that allows online music purveyors to easily license the music they need at reasonable cost.<sup>13</sup> Statutory reform should also protect artists from rights-holders and administrators that wish to minimize modest losses they might incur secondary to statutory reform by unfairly taking advantage of artists.<sup>14</sup> Finally, Congress should corral record labels into backing statutory reform by shutting the door on the possibility of network monitoring as a method of stymieing piracy.

Part II of this Comment discusses what is required to ensure that start-up companies can enter the digital marketplace and provide dynamic services to consumers. Part III of this Comment discusses the legal impediments to achieving the kind of dynamic marketplace described in Part II. Finally, Part IV of this Comment provides legislative strategies for achieving these goals.

## II. DIGITAL MUSIC STOREFRONTS IN THE BEST POSSIBLE WORLD

To operate legally, online music purveyors must obtain certain distinct rights from many different licensing entities. The process of licensing those rights can be difficult and time-consuming, especially given the sheer number of rights-holders involved and the potential for negotiations to break down between parties.<sup>15</sup> Online music purveyors already have a difficult time competing with their illegal counterparts. Therefore, it is essential that they are able to effectively license music in bulk, thus attracting customers by offering them a wide variety of music available for purchase.<sup>16</sup> In order to help legal online music

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<sup>13</sup> Some sources estimate that Spotify currently pays almost \$10 million *per month* in licensing fees. Posting of Charles Arthur to Technology Blog, <http://www.guardian.co.uk/technology/blog/2009/oct/08/spotify-internet> (Oct. 8, 2009, 12:07 BST). According to Gerd Leonhard, “While Spotify may look...pretty, right now, no matter how hard they try and how much money they will raise, they cannot possibly succeed within the current music industry ecosystem.” *Spotify rocks—but without a compulsory, public digital music license they are doomed*, CULTURE FUTURIST, July 27, 2009, <http://www.mediafuturist.com/2009/07/i-love-spotify-but.html>. By way of stateside comparison, some estimate that Lala, an online music purveyor and CD trading website, will pay approximately \$160 million in licensing fees during its first two years. Lincoff, *supra* note 8, at 22.

<sup>14</sup> See *infra* Part IV.B.

<sup>15</sup> See Jeffery W. Natke, *Collapsing Copyright Divisibility: A Proposal for Situational or Medium Specific Indivisibility*, 2007 MICH. ST. L. REV. 483, 491-500 (2007).

<sup>16</sup> See Peters, *supra* note 10 (“Legal music services can combat piracy only if they can offer what the ‘pirates’ offer.”).

purveyors achieve this goal, Congress should clarify and streamline the licensing process and protect the open internet.

In a competitive digital marketplace, an online music purveyor would be able to calculate its costs of doing business before opening its doors, quickly change its business models to adapt to consumer demand, easily license vast amounts of music to sell at reasonable prices,<sup>17</sup> and establish digital shops that are not subject to discriminatory bandwidth provision by ISPs.<sup>18</sup> A dynamic marketplace should be effectuated through legislative change. As further explained in Part IV below, such changes should make it easier for start-up companies to compete against illegal downloading services by lowering the licensing and transaction costs associated with clearing bulk licenses.<sup>19</sup> The best way for Congress to do this is by establishing one-stop licensing for online music purveyors, whereby such a purveyor can obtain from one source all of the rights it needs to operate legally.<sup>20</sup> These changes would also encourage entry into the digital marketplace, and more market participants would mean a wider variety of options for music consumers.

Congress should also protect artists from the over-reaching of record labels and rights-administrators by establishing a minimum statutory rate.<sup>21</sup> If Congress adopts such a rate, then record labels and rights-administrators will be unable to coerce artists into contractually agreeing to lower rates.<sup>22</sup> Finally, Congress should protect the open nature of the internet in order to maintain a fair digital marketplace and prevent ISPs and the RIAA from indiscriminately blocking or degrading p2p traffic. So long as ISPs can institute monitoring techniques at the behest of—or in conjunction with—the RIAA, major industry players might be hesitant to support the kind of legislative changes necessary to streamline the licensing process.<sup>23</sup> While some

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<sup>17</sup> See generally Robert C. Piasentin, *Unlawful? Innovative? Unstoppable? A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom and Canada*, 14 INT'L J.L. & INFO. TECH. 195, 229-31 (2006) ("For owners to effectively compete with the current P2P networks on the basis of cost and services, they must revamp their business models."); see also Peters, *supra* note 10.

<sup>18</sup> See generally Future of Music Coalition, Network Neutrality Fact Sheet, <http://futureofmusic.org/article/fact-sheet/network-neutrality> (arguing that preserving NN is essential to maintaining a fair digital marketplace).

<sup>19</sup> See *infra* Part IV.A-D.

<sup>20</sup> See *infra* Part IV.A.

<sup>21</sup> See *infra* Part IV.B.

<sup>22</sup> See *infra* Part IV.B.

<sup>23</sup> See *The Internet Freedom Preservation Act of 2008: Hearing on H.R. 5353 Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 110th Cong. 3 (2008) (statement of Mitch Bainwol, Chairman and CEO,

theorists argue for a market-based solution to the problems identified herein, voluntary agreement among the parties seems highly unlikely given the history of dissension between them, and therefore statutory reform is appropriate.<sup>24</sup>

### III. WHY THE BEST POSSIBLE WORLD IS UNATTAINABLE

#### A. Navigating the Licensing Quagmire

The licensing quagmire begins with the creation of a song. When songs are written and recorded, two distinct categories of copyrightable works are created: musical works (i.e., copyright in the melody and lyrics) and sound recordings (i.e., copyright in the recorded version of the song).<sup>25</sup> Each of these rights is further bifurcated depending on how the song is being used. To reproduce or distribute<sup>26</sup> a song, a “mechanical” license must be obtained.<sup>27</sup> To publicly perform (i.e., broadcast) a song, a performance license must be obtained.<sup>28</sup> To the extent that a single use of a song implicates each of these rights, four rights must be obtained: from the owner of the musical work, the right to (a) reproduce the song and (b) authorize public performance of the song; and from the owner of the sound recording, the right to (c) reproduce the song and (d) authorize public performance of the digitally transmitted sound recording.<sup>29</sup>

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Recording Industry Association of America) (stating strong preference for “marketplace solutions”) [hereinafter Bainwol].

<sup>24</sup> Instead of a congressional solution, some theorists argue for a voluntary collective licensing (VCL) scheme in which parties would willingly enter into agreements with each other to facilitate en masse licensing of music. While several different iterations of the idea of VCL abound, perhaps the best example of how a VCL scheme would work is the Electronic Frontier Foundation’s *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*. See Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, Apr. 2008, <http://www EFF.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>. For more information on the history of dissension between the interested parties, see generally Peters *supra* note 10.

<sup>25</sup> See 17 U.S.C. §§ 102(a)(2), (7) (2006).

<sup>26</sup> Discussions of the reproduction right include the right of distribution.

<sup>27</sup> See DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 206-7 (6th ed. 2007).

<sup>28</sup> See AL KOHN AND BOB KOHN, KOHN ON MUSIC LICENSING 1241-4 (2nd ed. 1996).

<sup>29</sup> This right was conferred on digital sound recording copyright owners in 1995 by means of the Digital Performance Rights in Sound Recording Act (DPRSRA), 17 U.S.C. §§ 106, 114 (2000). The DPRSRA provides sound recording copyright owners with the right to receive royalties from the public performances of their works by means of digital transmission. However, this right *does not* extend to terrestrial radio play.

Although the rights described above may initially vest in the creator of the song and its recording (depending on the existence of certain contractual obligations), in many cases those rights are transferred to other entities who administer them. Therefore, potential licensees must contact each of those entities to obtain the appropriate clearances to use the song.<sup>30</sup> For example, the musical work copyright is usually assigned by the author of the work to a publisher, who represents the author's interests by further licensing those rights to a performing rights organization ("PRO").<sup>31</sup> The mechanical right in the musical work is often administered by the Harry Fox Agency ("HFA") and other non-affiliated publishers, while the mechanical right in the sound recording is usually administered directly by record labels or via other distributors.<sup>32</sup> Sound recording copyrights are typically transferred to a performer's record label as part of his or her deal.<sup>33</sup> Typically, various PROs administer performance rights in non-digital musical works, while SoundExchange, a specialized PRO, administers the performance right in digital sound recordings. Therefore, in order to operate legally, an online music purveyor must seek licenses from three separate licensors: (a) the HFA and other non-affiliated publishers; (b) record labels or other distributors; and (c) PROs.

Each of these rights-administrators licenses the rights it controls differently. Such non-standard licensing makes it more difficult for online music purveyors to license rights in bulk, and, the inability to license rights in bulk heightens the cost of doing business.<sup>34</sup> PROs and SoundExchange offer "blanket" licenses, which allow licensees to use all of the compositions in the PRO and SoundExchange's catalogs for one periodic fee. The blanket license is the most streamlined and efficient of the various licensing mechanisms, and it greatly facilitates bulk licensing. Furthermore, these PROs list the songs for which they

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<sup>30</sup> See Posting of Chris Castle to Music Technology Policy, <http://www.musictechpolicy.com/2006/07/solving-music-subscription-service.html> (July 3, 2006, 18:38 CST) (discussing the difficulty of locating multiple right-holders).

<sup>31</sup> See PASSMAN, *supra* note 27, at 201. Examples of PROs in America include Broadcast Music, Inc. (BMI), The American Society of Composers, Authors, and Publishers (ASCAP), and The Society of European Stage Authors & Composers (SESAC).

<sup>32</sup> David Kostiner, *Will Mechanicals Break the Digital Machine?: Determining a Fair Mechanical Royalty Rate for Permanent Digital Phonographic Downloads*, 27 HASTINGS COMM. & ENT. L.J. 653, 655 (2005).

<sup>33</sup> See KOHN, *supra* note 28, at 1241-42. If the author is unsigned or has a very good attorney, then these rights are sometimes retained by the author.

<sup>34</sup> See Les Watkins, *Indies Need Options Under Compulsory License Reform*, BILLBOARD MAG., Mar. 23, 2005, available at <http://www.royaltylogic.com/release/March-23-2005> (discussing heightened costs of doing business due to expensive or cumbersome licensing requirements).

administer the rights, so that online music purveyors know which rights they are clearing when they obtain blanket licenses.<sup>35</sup>

By contrast, licensing of the mechanical right in the musical work is governed by Section 115 of the Copyright Act, which establishes a compulsory license.<sup>36</sup> However, because of the cumbersome notice and reporting procedures licensees must abide by in order to avail themselves of the compulsory license, it is especially inefficient when applied to bulk licensing.<sup>37</sup> Instead, the HFA offers individual licenses for mechanical rights in the shadow of the compulsory scheme, using the compulsory rate as a price “ceiling.”<sup>38</sup> While the HFA administers the rights of roughly 60% of publishers, the rest are held by other non-affiliated publishers, each of which must be located.<sup>39</sup> Furthermore, the HFA does not catalog the songs for which it administers rights, forcing online music purveyors to engage in guess work.<sup>40</sup>

If the HFA does not administer the mechanical rights for a particular song, then an online music purveyor must expend resources and dedicate time to track down the appropriate rights-holder and negotiate the rights required. Some of these rights-holders will be hard to identify and find if the copyrights have been split, terminated, or reverted. In such cases, an online music purveyor may simply decide not to offer the song to the public at all, rather than risk suit should the rights-holder turn up at a later date. Similarly, record labels and other distributors usually administer only the sound recording mechanical rights for songs by artists with whom they have a recording agreement, and granting these licenses is strictly voluntary.<sup>41</sup> Because the rights landscape is so fragmented and non-intuitive, online music purveyors

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<sup>35</sup> NYMusicCopyright.org, Why Not go to the Harry Fox Agency Instead of Using Section 115? <http://nymusiccopyright.org/node/15> (last visited Mar. 27, 2010).

<sup>36</sup> 17 U.S.C. § 115 (2004). A compulsory license allows anyone to obtain automatic, statutory permission to reproduce “nondramatic musical works” or distribute digital downloads so long as certain requirements are met.

<sup>37</sup> See Peters, *supra* note 10 (noting difficulty of obtaining bulk licensing through the Section 115 compulsory license).

<sup>38</sup> *Id.*

<sup>39</sup> Watkins, *supra* note 34.

<sup>40</sup> According to Jonathan Potter, president of Digital Media Association, “between 40 and 60 percent of all license requests are denied by the [HFA] because the songs are not in its repertory—or because the agency isn’t sure if it holds the rights to the song.” NYMusicCopyright.org, Music Licensing, [www.nymusiccopyright.org/book/export/html/7](http://www.nymusiccopyright.org/book/export/html/7) (last visited Jan. 8, 2010).

<sup>41</sup> PASSMAN, *supra* note 27 at 206-11. The performance rights are also technically voluntary (or at least partially voluntary). Only the mechanical right in the musical work is subject to a compulsory license, although this rate is typically negotiated around.

waste valuable time and capital seeking out individual rights-holders and licensing rights.

But, even assuming perfect knowledge of the whereabouts of rights-holders, uncertainty over which rights must be licensed in a given digital transaction still create uncertainty in the digital marketplace, and lead overly-cautious online music purveyors to license all rights, an illogical outcome that potentially over-compensates rights-holders.<sup>42</sup> Indeed, the world of digital distribution is far different than the world of terrestrial distribution. Online, songs are usually either streamed on-demand or downloaded via digital phonorecord delivery (“DPD”).<sup>43</sup> Because streaming usually does not involve the permanent transfer of a song to a user’s hard drive, reason suggests one only needs to obtain a performance license to use the song. By the same token, because downloading usually does not involve a public performance, reason suggests that one only needs to obtain a mechanical license to use the song.

However, various rights-holders and administrators beg to differ. The HFA argues that because internet streams can sometimes be ripped and usually result in certain incidental or ephemeral copies being made, entities seeking to offer digital streams should also obtain mechanical licenses in addition to public performance licenses.<sup>44</sup> Similarly, PROs argue that because some DPDs can be played while they are being downloaded, entities seeking to offer DPDs should also obtain public performance licenses in addition to mechanical licenses.<sup>45</sup>

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<sup>42</sup> See generally Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 116 (2000). Furthermore, as the Register of Copyrights notes, even if two or more separate rights are implicated, “it seems inefficient to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owners to engage in a single transmission of a single work.” Peters, *supra* note 10.

<sup>43</sup> These uses can be further broken down into interactive streaming, tethered downloads, limited downloads, etc. While determining exactly what kind of service is being offered bears greatly on which licenses are required, this paper will refer only to the broader categories of streaming and downloading. Rules governing DPDs are contained in 17 U.S.C. § 115 (2000).

<sup>44</sup> Susan Butler, *Sony/ATV Stops Future Licensing of Digital Services*, BILLBOARD.BIZ, Jan. 8, 2008, [http://www.billboard.biz/bbbiz/content\\_display/industry/c3i21e063665c000c69f051af0c36f62dec](http://www.billboard.biz/bbbiz/content_display/industry/c3i21e063665c000c69f051af0c36f62dec).

<sup>45</sup> ASCAP’s Memorandum of Law Opposition to Applicant’s (AT&T) Motion For Partial Summary Judgment, at 1, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. 2009) (arguing that ringtone downloads are capable of being streamed and therefore require an ASCAP license). Some theorists refer to the tendency of rights-holders to demand payment for multiple rights as “double dipping.” However, to the extent multiple licenses are required, the major rights-holders should be compensated. See generally Peters, *supra* note 10 (stating that “[o]ne of the major frustrations facing online music purveyors today, and what I believe to be the most important policy issue that Congress must address, is the lack of clarity regarding which

Until Congress clarifies the rights landscape, risk-averse online music purveyors must continue to license any right that is arguably implicated in an online transaction, or risk increased liability.<sup>46</sup>

## B. The Temptation to Monitor Internet Behavior

On December 19, 2008, The Wall Street Journal reported the formation of agreements in principle between the RIAA and several major ISPs under which the two parties would work together to combat online music piracy.<sup>47</sup> While these agreements turned out to be somewhat illusory,<sup>48</sup> its recent conduct suggests that the RIAA is still exploring methods of monitoring internet traffic that would allow it to identify online music piracy and prosecute individual users.<sup>49</sup> However, tentatively preventing the RIAA from fully partnering with ISPs to monitor consumer traffic is the principle of network neutrality (“NN”). Although its proponents argue that NN’s informal presence has long contributed to the dynamic nature of the internet,<sup>50</sup> the concept is hotly debated. ISPs generally resist its application while content providers generally favor it.<sup>51</sup>

NN refers to the set of principles that protect the internet’s open protocol function, i.e., the ability of users to access the internet content of their choice, and to run the applications or devices of their choice.<sup>52</sup>

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licenses are required for the transmission of music”).

<sup>46</sup> See Helfer, *supra* note 42.

<sup>47</sup> Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1. For more information on the potential partnerships between the RIAA and ISPs, see John Eric Scay, “*Hang ‘Em High: Will the Recording Industry Association of America’s New Plan to Posse Up with Internet Service Providers in the Fight Against Online Piracy Finally Tame the Wild Internet?*” 16 J. INTELL. PROP. L. 269 (2009).

<sup>48</sup> See Greg Sandoval, *AT&T exec: ISP will never terminate service on RIAA’s word*, CNET NEWS, Mar. 25, 2009,

[http://news.cnet.com/8301-1023\\_3-10204514-93.html](http://news.cnet.com/8301-1023_3-10204514-93.html) (summarizing statement by AT&T executive denying the RIAA’s statements that AT&T would terminate the accounts of its users at the behest of the RIAA).

<sup>49</sup> While at first these lawsuits seemed successful only in creating a public relations disaster, and not actually stopping online music piracy, the RIAA has achieved some recent success in suing individual pirates that might encourage it to continue its efforts to sue individual internet users and suspected pirates. See Nancy Gohring, *Jury orders music swapper to pay \$1.92M*, COMPUTERWORLD, June 18, 2009, [http://www.computerworld.com/s/article/9134571/Jury\\_orders\\_music\\_swapper\\_to\\_pay\\_1.92M](http://www.computerworld.com/s/article/9134571/Jury_orders_music_swapper_to_pay_1.92M)

<sup>50</sup> JONATHAN D. HART, INTERNET LAW: A FIELD GUIDE 2006 850 (2006).

<sup>51</sup> *Id.*

<sup>52</sup> For more information on NN, see generally Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOM. & HIGH TECH. L. 141, 141 (2003) (explaining the origin of NN). In 2005 the Supreme Court upheld the FCC’s classification of broadband as an “information

NN embodies the belief that data packets on the internet should be “moved impartially, without regard to content, designation, or source.”<sup>53</sup> Principles of NN, if codified, would prevent ISPs from degrading internet traffic based on content, unless such degradations constitute “reasonable network management.”<sup>54</sup> While blocking or degrading illegal content on the web probably does constitute reasonable network management, an ISP would nevertheless run afoul of NN if it blocked or degraded traffic containing copyrighted songs that it believed were being transferred illegally, but were instead either not copyrighted or subject to fair use.<sup>55</sup> Thus, if NN is not protected, ISPs could theoretically block even legal transfers of copyrighted material.

But NN also potentially prevents ISPs from creating tiered levels of service based on content, a practice that could enable ISPs to give preferential treatment to the content of companies that pay more for service.<sup>56</sup> Because larger companies are better able to pay more money for a faster internet, such a practice would severely constrain the market by putting small businesses at a disadvantage. This practice could adversely affect the digital music marketplace, where speedy downloads are critical to the survival of digital storefronts. Start-up companies, which provide the kind of dynamic innovation essential to

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service” and not a telecommunication service, thus exempting cable and broadband internet companies from “common carriage” regulation. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). NN principles arose as a means of establishing non-discrimination regulation over ISPs in the absence of common carriage regulation.

<sup>53</sup> SearchNetworking.com, Definitions, Network Neutrality, [http://searchnetworking.techtarget.com/sDefinition/0,,sid7\\_gci1207194,00.htm](http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci1207194,00.htm) (last visited Apr. 12, 2010).

<sup>54</sup> *See generally* In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13,028 (Fed. Comm’n Comm’n 2008) [hereinafter FCC Comcast Order] (holding that degrading legal internet traffic during times of low internet traffic did not constitute “reasonable network management”). Currently, the RIAA and ISPs lack the technology to distinguish legal content from illegal content without either potentially violating fair use or actively managing traffic, which might result in ISPs being ejected from the safe harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512(k) (1999). While the technicalities surrounding this issue are beyond this paper’s scope, the reader should know that the issue of how to monitor internet traffic is thorny.

<sup>55</sup> *See generally* FCC Comcast Order, *supra* note 54. The Comcast case arose when Comcast degraded the traffic of Robb Topolski, a fan of old-time barbershop quartet music, which he enjoyed sharing online with other barbershop music enthusiasts. While Comcast thought the song was copyrighted and therefore being illegally transmitted, it was in fact not copyrighted.

<sup>56</sup> *See* Edward W. Felten, *Nuts and Bolts of Network Neutrality* 1–2 (July 6, 2006) (unpublished manuscript, available at <http://itpolicy.princeton.edu/pub/neutrality.pdf>) (explaining NN).

the development of the market, are likely to be affected most adversely.

The Federal Communications Commission (FCC) supports NN, and in fact protected it in its recent decision in the Comcast matter.<sup>57</sup> In that case, the FCC found that Comcast had engaged in an internet traffic management scheme in which it inspected material being sent across its servers in order to determine the content of that material, and then intentionally blocked material that was being sent or received via p2p applications.<sup>58</sup> In its Memorandum Opinion, the FCC voted to enforce principles of NN and monitor Comcast's behavior to ensure compliance with the Order.<sup>59</sup> However, on April 6, 2010 the United States Court of Appeals for the District of Columbia Circuit ruled in a unanimous decision that the FCC had no legal basis for enforcing NN against ISPs.<sup>60</sup> Therefore, congressional action is required to either give the FCC the authority to enforce NN, or to protect it by codifying its principles in a statute. Such codification would more clearly protect the open nature of the internet and the ability of small companies to compete on a level playing field with larger conglomerates, thus providing music consumers with more options, as well as protecting their daily internet activities.

#### IV. LEGISLATIVE STRATEGIES FOR APPROACHING PERFECTION

The RIAA and some commentators have argued for a "marketplace solution" to the music industry's woes.<sup>61</sup> However, copyright law itself is a statutory creation, and thus to the extent that problems exist in the statutory scheme, a statutory solution is required to address them.<sup>62</sup> Furthermore, it seems unlikely that the interested parties will themselves reach agreement on the thorny licensing issues described herein. In fact, at the behest of the House Judiciary Committee the Register of Copyright convened a meeting between the National Music Publishers' Association, Inc. and its subsidiary, the HFA, the Digital

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<sup>57</sup> FCC Comcast Order, *supra* note 54.

<sup>58</sup> See Farhad Manjoo, *How Comcast blocks your Internet traffic*, SALON, Oct. 19, 2007, <http://www.salon.com/technology/machinist/blog/2007/10/19/comcast/index.html>.

<sup>59</sup> FCC Comcast Order, *supra* note 54.

<sup>60</sup> See *Comcast Corp. v. Fed. Commc'ns Comm'n*, No. 08-1291, 2010 U.S. App. LEXIS 7039 (D.C. Cir. 2010).

<sup>61</sup> Bainwol, *supra* note 23.

<sup>62</sup> Lincoff, *supra* note 8, at 9 (expressing similar views as "there cannot be a 'free market' solution...to the crisis that grips the digital music marketplace.").

Media Association, and the RIAA in order to discuss the modernization of Section 115.<sup>63</sup> While the entities did reach agreement that Section 115 should be restructured, the group broadly disagreed over how to achieve that restructuring.<sup>64</sup> Given the immensity of the task, the interested parties' demonstrated inability to work together, and the fact that the problem arises out of statutory failure, it seems obvious that change should be effectuated statutorily, as described below.

#### A. Establish "One-Stop" Licensing

One of the Register of Copyright's suggestions for how to overhaul the licensing regime is to allow PROs to control *all* necessary licenses to record and distribute music.<sup>65</sup> Such a scheme should be adopted because it would create one-stop shopping for licenses, allowing online music purveyors to cut their transactional costs by negotiating with a handful of entities, instead of (potentially) thousands. To achieve effective one-stop licensing, Congress should allow PROs and the HFA to evolve into what the Register of Copyright has deemed Music Rights Organizations ("MROs") and administer all rights. In order to achieve such a transformation, exceptions must be made to the current antitrust regulations on the PROs.<sup>66</sup> Currently, whether for historical reasons or by antitrust consent decrees, neither the performing rights organizations nor the HFA license both the performance and reproduction rights.<sup>67</sup> To allow PROs to evolve into MROs, therefore, Congress should supersede any existing antitrust regulations prohibiting the administration of multiple rights by any PRO. Like SoundExchange, the MROs would then be authorized to bind all copyright owners under Sections 114 and 115. This would prevent record labels from withholding their rights, and acting as gatekeepers to the rights held by other parties such as music publishers and songwriters.

After forming, the MROs should offer blanket licenses modeled on the licenses offered by PROs.<sup>68</sup> In order to ensure that the newly

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<sup>63</sup> See Peters, *supra* note 10.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* These entities would be privately controlled with government oversight as described herein. They would administer all rights, including those associated with sound recording and musical works.

<sup>66</sup> For more information on what antitrust changes would be required, *see id.*

<sup>67</sup> *Id.*

<sup>68</sup> The idea of establishing a blanket license was promulgated in the Section 115 Reform Act of 2006, which was later incorporated into the Copyright Modernization Act of 2006, H.R.

formed MROs do offer blanket licenses, Congress could make blanket licensing a condition to qualify as an MRO and be exempt from the antitrust regulation that currently binds several of the PROs. The MROs should want to license rights on a blanket basis to attract licensees. Furthermore, the MROs should provide a catalog of the rights they administer, so that online music purveyors can determine which songs they are licensing. Although PROs might resist their new roles, arguing that they lack the capacity to act as MROs, they will rise to the occasion in an effort to remain viable. Even in a new regime, PROs would still be required for song placement purposes.<sup>69</sup>

#### B. Create a Minimum Statutory Rate

While some theorists argue that the Section 115 compulsory license should be abolished, arguing that the rate it established has only served as a ceiling beyond which private negotiations do not extend,<sup>70</sup> it would be unfair to artists to remove all governmental oversight on this issue. Artists lack leverage in the negotiating process, and if the statutory rate was abolished, artists would almost assuredly receive far less remuneration for assigning their copyrights to a record label. In order to avoid this problem, Congress should retain the statutory rate but make the rate a minimum instead of a de facto maximum. Such a change would benefit artists because it would prevent rights-administrators from licensing rights at a discounted rate, thus reducing the amount of money payable to artists. The rate should be periodically set by the Copyright Royalty Board (“CRB”) and should strive to achieve fairness for artists in order to encourage the creation of works, which is the purpose behind copyright law. The CRB should therefore preserve the penny-rate for licensing and adjust the rate regularly as the market fluctuates. The rate should then be applied to *all* rights administered by the MROs.

Private rates above the minimum statutory rate would still be negotiable if, for example, a licensee wished to license an individual song or a smaller selection of songs.<sup>71</sup> The minimum statutory rate, though, would ensure that rights-holders are suitably compensated. Furthermore, any contractual clause that attempts to circumvent the

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6052, 109th Cong. § 102 (2006). The Act, however, was a controversial one and did not pass.

<sup>69</sup> Synchronization and grand rights licenses would not be subject to any revised Section 115.

<sup>70</sup> See Peters, *supra* note 10.

<sup>71</sup> The statutory “floor” should also be applied to sound recording copyrights to further streamline licensing.

statutory minimum rate and reduce the amount payable to artists for assigning their rights should be strictly disallowed.<sup>72</sup> Although record labels will probably resist such a proposal, such language would be essential to protect artists from the labels over-reaching. While online music purveyors might theoretically pay more for licenses, the rates would be set at a price the market could bear, and money would ultimately be saved in transaction costs. More importantly, artists would be more fairly compensated.

The changes in this section are proposed to protect artists, who historically have had little leverage in record label negotiations. On the other hand, such changes might unnecessarily constrain the market. One could envision a situation where an artist might be better off voluntarily choosing to license his or her songs at a lower rate. However, if a minimum statutory rate is seen as an unwarranted constraint on the market, Congress could instead regulate contracts between artists and record labels directly, ensuring that record labels do not take advantage of artists. This Comment adopts the view that copyright is congressionally created, and thus should be congressionally controlled by way of establishing a minimum statutory rate.

### C. Clarify Which Activities Implicate Which Rights

When starting out, online music purveyors operate on shoe-string budgets, and must be able to calculate their costs of doing business. While the above suggestions would help if implemented, Congress should go a step further and clarify which rights are implicated when a given transaction occurs online. As music consumption steadily moves “into the cloud,”<sup>73</sup> and as tethered downloads, permanent downloads, interactive streaming, non-interactive streaming, ringtones, ring backs, etc., develop, questions will arise as to which rights are implicated for which services. For example, should incidental copies be licensed? Congress should codify the decision by the court in *U.S. v. ASCAP* that the act of downloading a music file does not implicate a public performance.<sup>74</sup> In that case, various digital music services had asked the court to issue an opinion as to whether or not DPDs constitute

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<sup>72</sup> For example, “controlled composition” clauses, long the bane of artists, would be disallowed.

<sup>73</sup> I.e., a web-based system where applications are accessed online, but information is stored on servers.

<sup>74</sup> See generally *United States v. Am. Soc’y of Composers, Authors and Publishers*, 485 F. Supp. 2d 438, 442 (S.D.N.Y. 2007) (holding that the downloading of a musical file does not constitute a public performance).

public performances. The court held that while a stream of a musical work *did* constitute a public performance, a download of the work did not.<sup>75</sup>

In 2007, the Copyright Office met to discuss—among other things—whether incidental copies created on a user’s hard drive whenever songs are downloaded or streamed are sufficiently durational to warrant licensing.<sup>76</sup> Due to conflicting opinions among the participating parties, the Copyright Office did not reach resolution of the issue. Nevertheless, Congress should definitively state that such incidental copies are not reproductions sufficient to warrant licensing. Congress should adopt a licensing scheme that accounts for the continued evolution of music and will allow online music purveyors to offer new services without worrying about whether rights-holders and administrators will argue that more licenses should be obtained. Congress can help forestall that unfortunate eventuality by clarifying and defining rights in a forward-thinking manner.

#### D. Codify Principles of Network Neutrality

Especially given the FCC’s inability to protect NN, Congress should codify principles of NN. Codifying principles of NN will first and foremost have the effect of promoting entry into the digital music marketplace. Start-up companies will be able to register web domains that will load just as quickly as those of larger, multinational media conglomerates. By encouraging diversity in the marketplace, NN will ultimately result in lower costs to consumers for digital music. And while increased competition in the marketplace does often lead to lower profit margins for companies, the statutory changes advocated for herein should result in more songs being licensed at lower costs, so that the net result would be a better deal for consumers as well as for online music purveyors. Because legal music purveyors must compete with free (but illegal) download sites, maintaining a low cost is essential. Furthermore, an open internet devoid of tiered service will mean that small companies will not be forced to pay more for access to the same internet.

Additionally, codifying principles of NN will show the RIAA and

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<sup>75</sup> *Id.* at 442.

<sup>76</sup> See generally Notice of Roundtable Regarding the Section 115 Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 72 Fed. Reg. 30039 (May 30, 2007), available at <http://www.copyright.gov/-fedreg/2007/72fr30039.html> (discussing which DPDs can be classified as “incidental” under the reformed Section 115).

others that aggressively monitoring internet traffic in the manner they heretofore have contemplated is no longer an option, as doing so would risk violating principles of NN. Therefore, the RIAA and others would be more likely to agree to licensing reform as described herein. Because concerns have arisen over the ability of legislators to pass licensing reform legislation that has not been heavily resisted by groups lobbying for the RIAA and others, passing NN legislation will help to encourage dialog and precipitate change.

## V. CONCLUSION

In 1999, the major recording labels had an opportunity to license Napster, but instead sued it out of existence, and by the time it resurged as a pay site, the opportunity to tap into a whole new generation of music listeners was lost.<sup>77</sup> Now, consumers are once again demonstrating support for a variety of online music purveyors like Spotify, and the major rights-holders in the industry and the statutory scheme itself are once again making it difficult for those services to flourish. Congress should overhaul the licensing regime to establish one-stop licensing while preserving a minimum statutory rate and clarify the rights landscape to prevent rights-holders from demanding payment for superfluous licenses. Currently, the RIAA hopes to salvage its sales-based business model by identifying and eliminating piracy at its source, instead of submitting to market changes. Until the legislature makes clear that blocking or degrading p2p activity does not constitute “reasonable network management,” the RIAA will be slow to back any proposed licensing changes. Finally, protecting NN will help preserve a fair digital marketplace conducive to start-up companies.

The major rights-holders should recognize that, as in the case of the Prisoner’s Dilemma,<sup>78</sup> pursuing rational self-interest is not always the best course of action. Instead, the industry should band together to support legislative change. By trading its current tactics for forward-looking legislation, the music industry will allow online music purveyors to more easily monetize the everyday, online conduct of millions of willing consumers and therefore more effectively combat

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<sup>77</sup> *Napster’s High and Low Notes*, BUSINESSWEEK, Aug. 14, 2000, at 113, available at [http://www.businessweek.com/2000/00\\_33/b3694003.htm](http://www.businessweek.com/2000/00_33/b3694003.htm); see *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001). However, Napster does still operate a pay service.

<sup>78</sup> For a description of the Prisoner’s Dilemma see Steven Kuhn, *Prisoner’s Dilemma*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2009), available at <http://plato.stanford.edu/entries/prisoner-dilemma/>.

online music piracy while providing the music industry with a much needed boost.

