WHEN YOUR RECORDING AGENCY TURNS INTO AN AGENCY PROBLEM: THE TRUE NATURE OF THE PEER-TO-PEER DEBATE

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ABSTRACT

This article examines the music industry, and particularly its reaction to the file-sharing phenomenon, through the prism of the agent-principal problem. The file-sharing phenomenon shined a spotlight on the divergence of interests between the artists of music and their ultimate representatives in copyright debates, the recording industry. The economic interests of creators are focused on maximizing revenues from their works. Record companies, in contrast, are not content with their share in the revenue pie, but are rather interested in maximizing their control over the exploitation of such works in order to secure the dominant position they currently hold in the market. The Constitution, however, is designed to protect creators' incentives to create, not the market-controlling position of record companies.

The article analyzes the measures taken to combat file-sharing and concludes that the source of the resistance to file sharing is not its effect on revenues as outwardly claimed by the recording industry, but rather its potential to decentralize the control over music distribution and use. In that sense, the war against file-sharing is an extreme expression of the agency problem stated above. At the same time, the article points to the potential of file-sharing to minimize agency costs by creating a more balanced power-relationship within the music industry. The article concludes that legitimizing file-sharing can produce circumstances that are most likely to be consistent with the interests of both artists and society at large.

I. INTRODUCTION

The debate over file-sharing is typically framed in terms of the "incentive-access paradigm"—the tension between the desire to provide artists with an incentive to create and the desire to provide the public and later artists with access to works that have already been created.[1] File-sharing, it has been ar-

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1 *See, e.g.*, Glynn S. Lunney Jr., *Reexamining Copyright's Incentive-Access Paradigm*, 49 VAND. L. REV. 483, 485 (1996); *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 73 (2003) (conceiving of artists as competitors and aiming to arrive at an optimal level of protection in order to provide space for both previous and later artists and to optimize creativity); Ryan Roemer, *Trusted Computing, Digital Rights Management, and the Fight for Copyright Control on Your Computer*, UCLA J.L. & Tech., Fall 2003, at 8 ("Copyright law strives to balance public access to

gued, increases access to existing works but at the same time evades compensating artists, thus reducing the incentive to create.[2]

This article, which focuses on the music industry, argues that although on the surface the focus of the resistance to file-sharing is on the compensation of artists, that resistance is really driven by the fight for control over the market of copyrighted works by the big record companies.

This article proposes that the anti-file-sharing course adopted by the music industry is best understood as an agent-principal problem. It is aimed at strengthening the control for the agents, namely the record companies' control over the market, to the detriment of the principals, namely the artists.

The result of this analysis is that the validity of anti-file-sharing measures should not be examined merely through the prism of the incentive-access paradigm as striking a balance between artists on the one hand and consumers on the other.[3] Instead, the analysis should identify the powers that initiate these measures and their motives, and point to the likelihood in which these measures truly represent artists' interests as opposed to merely benefiting the agents, namely the record companies.

The article proceeds as follows. Part II explains the nature of the agency problem in the music industry, its sources, and its development to date. Part III aims at showing that the methods utilized by the music industry in combating file-sharing are intended to strengthen the industry's grip on the market to the benefit of record labels rather than extract revenues out of the file-sharing phenomenon or to protect artists' rights. Part IV focuses on the impact file-sharing has on potential revenues. Building on existing economic and legal literature, Part IV will challenge the industry's claims regarding adverse economic effects of file-sharing, and will identify the various ways in which file-sharing in its current state, or with slight modifications, could potentially enhance the revenues for artists. Part V expounds on the effects file-sharing has on the control structure of the industry, and demonstrates that a decentralized market for musical works is preferable over a central structure controlled by the industry giants from the point of view of both artists and society at large.

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works with creating incentives to produce by giving content owners a limited monopoly on copyrighted works.").

2 *See, e.g.*, Katherine L. McDaniel, *Accounting for Taste: An Analysis of Tax-and-Reward Alternative Compensation Schemes*, 9 TUL. J. TECH. & INTELL. PROP. 235, 238 (2007) (analyzing the arguments that "file sharing actually hurts artists and art by reducing the revenue streams of musicians and destroying incentives to create music in the future").

3 *See* Roemer *supra* note 1, at 8.

Focusing on the issue of agency costs shifts the discussion from the incentive-access paradigm to whether the artists-principals' interests are adequately represented in this debate. The question then becomes, which file-sharing regime minimizes agency costs and produces circumstances that are most likely to be consistent with the interests of both artists and the public. The answer offered by this article is that such a result is reflected best in a regime that legitimizes file-sharing, which enhances both the economic incentives of artists and public access to their works.

II. THE AGENCY PROBLEM AND THE DICHOTOMY BETWEEN THE MARKET OF REVENUE AND THE MARKET OF CONTROL

In the file-sharing debate—as in other copyright-technology debates—the record companies, headed by the Recording Industry Association of America (RIAA), have taken the lead in representing the copyrights side of the equation.[4]

As a general matter, and despite its claims that it does not oppose technology as such,[5] the RIAA's reaction to technologies that affect music dissemination has been dogmatically negative, an attitude often shared by the entertainment industry at large.[6] Thus, from the invention of the piano roll,[7] through the development of the VCR,[8] and up until the current file-sharing technology, novel dissemination technologies have been fought with full force by the enter-

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4 *See* discussion *infra* Part III (analyzing the measures taken by record companies and the RIAA to combat file-sharing); *see also* RIAA For Students Doing Reports, http://riaa.com/faq.php (last visited Nov. 10, 2009) ("[W]e work to protect intellectual property rights worldwide . . . .").

5 *See, e.g.*, *File-Sharing Software Liability: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. (2005) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association of America) ("[S]tanding against theft in the digital world has provoked some to label us anti-technology or against innovation. . . . Such claims . . . are far from the truth.").

6 *See, e.g.*, W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 837 (2007).

7 White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 8–9 (1908).

8 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420–21 (1984); *see also Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. (1982) (statement of Jack Valenti, President, Motion Picture Association of America) ("[T]he VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.").

tainment industry even when, economically speaking, they were harmless and often highly beneficial.[9]

It was never seriously questioned whether the resistance to new dissemination technologies truly represented the interests of artists. For years, distributors in all areas of copyrights have led the fight for artists and carried out the copyright agenda.[10] Their interests were viewed as largely aligned with those of artists,[11] mainly due to the formerly high costs of distribution and the necessity for tangible forms of music consumption, such as records, audio tapes, and CDs.[12]

In fact, however, the relationship between artists and the record companies has routinely suffered from the costs associated with an agency problem. These have included, inter alia, the labels biting deep into the shares of artists' revenues, advancing their own narrow interests in Congress and in court, and primarily aiming at strengthening the companies' controlling position in the market.[13] These tactics were often executed at the expense of exploiting revenues for musical works, which are shared with the artists, to the fullest.[14]

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9 For example, the VCR, which was attacked by the movie industry in *Sony*, opened a whole new market for home video sales. By 2007, the revenue from home video sales was an estimated $25 billion, "nearly triple the roughly $9 billion in theatrical sales." *See* Russ Britt, *Home Video Comes of Age at this Year's Oscars*, MARKETWATCH, Feb. 20, 2007, http://www.marketwatch.com/story/home-video-comes-of-age-at-this-years-oscars; *see also* Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyright* 4 (Harvard Business School, Working Paper No. 09-132, May 15, 2009) *available at www.hbs.edu/research/pdf/09-132.pdf*:

> Music companies fought the introduction of radio in the 1920s, fearing the new medium would provide close substitutes to buying records. Since that time, the numerous attempts to bribe radio stations in the hopes of influencing playlists suggest the industry has come to see radio as an important complement to recordings.

See also Sony, 464 U.S. at 419–20; David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 166 (2009).

10 *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 282 (1970).

11 *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–27 (1989).

12 *See* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 294 (2002) ("[U]ntil now the bundling of interests was acceptable because the cost of producing the vessels—CDs, books, and DVDs—for content, and distributing those vessels, was an essential component of making content available to the public.").

13 *See* discussion *infra* Part III.

14 *See* discussion *infra* part III.

The agency relationship between artists and their labels is formed at the commencement of the contractual relationship between them. In essence, the nature of these contracts is to place the artist's works within the exclusive ownership and control of the label in return for services and a share in the revenues resulting from the works.[15] The labels constantly demand the copyrights on the work as a whole.[16] They further demand ownership of the original record—the "master"—from which every copy must be authorized.[17] The labels also usually indirectly acquire the full publishing rights of the album after encouraging the artist to publish the album through an affiliated company.[18] Typically, the artist is bound by an exclusivity provision that obliges her to record six more albums under the same contract if the label so wishes,[19] and prevents her from recording with other companies in parallel.[20] The long terms and wide scope of the contracts intensify the level of control exercised by the label over the artist.

Perhaps the most extreme mode of control that the record contracts provide is granting the label exclusive control over album content including the graphic art, the producer's identity, and most remarkably, the selection of

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15 *Recording Artist Exemption to Seven Year Statute (Labor Law Section 2855 (b)): Hearings Before Select Committee on the Entertainment Industry of the California State Senate*, (2001) (Statement of Ann Chaitovitz, Director of Sound Recordings, American Federation of Television and Radio Artists), *available at* http://www.musicdish.com/mag/?id=4451 (explaining the transfer of ownership of works to record labels and the royalties which the artists receive in return); s*ee also* Phillip W. Hall Jr., Note, *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189, 190–91 (2002).

16 Moreover, musical works are regularly registered as work-made-for-hire, although the legal status of such a claim is debatable at best. *See Sound Recordings as Works Made for Hire: Hearing Before Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Marybeth Peters, Register of Copyrights) [hereinafter *Sound Recordings Hearing*], *available at* http://www.copyright.gov/docs/regstat52500.html:

> Most contracts contain clauses specifying that the works . . . are works made for hire. Such contracts generally contain an additional clause providing that if the work created is found by courts to fall within neither prong of the definition of works made for hire, that the performer assigns all his rights to the record company.

17 Kaleena Scamman, Note, *ADR in the Music Industry: Tailoring Dispute Resolution to the Different Stages of the Artist-Label Relationship*, 10 CARDOZO J. CONFLICT RESOL. 269, 275 (2008).

18 If the artist turns to a different publisher, the label will typically jointly own publication rights. *Id.* at 276.

19 *See* McDaniel, *supra* note 2, at 280; Scamman, *supra* note 17, at 273–74.

20 *Id.* at 274.

songs.[21] The immediate result of such a contract is turning the label into the sole decision-maker regarding the work, including its content, promotion, distribution, pricing, and all other aspects it may entail.[22]

Drastic declines in record sales over the recent years[23] brought upon a new type of contract, usually referred to as "360 deals."[24] The name reflects the nature of these contracts, in which the label is entitled to a share of all the revenue streams which may stem from the artist's music—such as concerts, merchandise-sales, and fan club fees—and is given a final decision-making power over these activities as well.[25] In return, the label enlarges the advance to the artist.[26] This new type of contract, which is now widely utilized throughout the industry,[27] does not deviate from, and rather intensifies, the basic pattern that the label retains control over the artist's works while the artist is merely entitled to revenues from those works.

The economic rationale underlying these contracts is that the interests of the artists and the industry for maximizing revenues are aligned,[28] and therefore the labels will conduct business in a way that maximizes revenues to the benefit of both the company and the artists. However, this article argues that the transfer of control of the work from its original proprietor—the artist—to the label is the source of a considerable agency problem because the interests of these two groups are divergent far more than they are aligned.

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21 *See* Scamman, *supra* note 17, at 274.

22 *See* MARIE CONNOLLY & ALAN B. KRUEGER, ROCKONOMICS: THE ECONOMICS OF POPULAR MUSIC: HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 674–76 (2006).

23 *See infra* Part IV.

24 Sara Karubian, *360° Deals: An Industry Reaction to The Devaluation of Recorded Music*,18 S. CAL. INTERDISC. L.J. 395, 399 (2009).

25 *Id.*; *see also*, Ian Brereton, Note, *The Beginning of a New Age?: The Unconscionability of the"360-Degree" Deal*, 27 CARDOZO ARTS & ENT. L.J. 167, 194 (2009).

26 *See* Brereton, *supra* note 25, at 194.

27 *See* Janet Morrissey, *If It's Retail, Is It Still Rock?*, N.Y. TIMES, Oct. 28, 2007, Business Section, at 1, *available* at http:// www.nytimes.com/2007/10/28/business/28rockers.html (quoting Monte Lipman, president of Universal Republic Records: "I don't think there's a deal being made today where the 360 model doesn't come up."); *see also* Roger Friedman, *Warner Music No Longer a Record Company*, FOXNEWS.COM, Nov. 30, 2007, http://www.foxnews.com/story/0,2933,314102,00.html#4 (quoting Edgar Bronfman Jr., WMG's CEO: "We're not going to continue to sign artists for recorded music revenue only.").

28 *See* Ku, *supra* note 12, at 294.

In general, artists are motivated by economic as well as non-economic factors.[29] Among the non-economic motivations are the desire for expression, fame and reputation.[30] The economic interests include exploiting the revenues from the use of the works to support the artist's and her descendants' well-being, as well as to maintain her ability to continue to create.[31] The exploitation of musical works creates what can be termed *the market of revenue*, which includes all of the revenues that are potentially received through exploiting the musical works, including not only sales of music but also licensing for advertising, merchandise, videogames, etc.

The label's eye, however, is not focused solely, or even predominantly, on the market of revenue. Rather, the recording industry's main concern lies in maintaining its position in what can be termed *the market of control*, meaning a monopoly over the artists' work on the one hand, and over the supply of music to the market on the other. Indeed, the business of the recording industry is two-functioned: contracting and managing of artists, and providing authorizations and setting prices for virtually any exploitation of musical works.[32] These two functions are interrelated: strengthening the grip on artists increases the grip on the consumption side as consumers have fewer alternatives to access artists in

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29 *See, e.g.*, James Boyle, *The Public Domain: The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 46 (2003):

> One person works for love of the species, another in the hope of a better job, a third for the joy of solving puzzles, and so on. Each person has his own reserve price, the point at which he says, "Now I will turn off Survivor and go and create something."

See also LANDES & POSNER, *supra* note 11, at 331(citation omitted):

> Many authors derive substantial benefits from publication that are over and beyond any royalties. This is true not only in terms of prestige and other non-pecuniary income but also pecuniary income in such forms as a higher salary for a professor who publishes than for one who does not, or greater consulting income.

30 Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 11 (2008) ("Many artists, authors, musicians, poets, and other highly creative individuals create as a means of expressing themselves, rather than for an extrinsic reward.").

31 *See, e.g.*, Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 471 (1998) ("By guaranteeing authors certain exclusive rights in their creative products, copyright seeks to furnish authors and publishers, respectively, with incentives to invest the effort necessary to create works and distribute them to the public.").

32 *See* Vivek V. Mali, *An Alternative Operating Model for the Record Industry Based on the Development and Application of Non-Traditional Financial Models*, 15 UCLA ENT. L. REV. 127, 132–33 (2008).

any other way. Similarly, strengthening the hold among consumers increases the control over the artists, because the industry controls more of the channels to the artists' audience.

Most importantly, the source of the label's economic interests does not lie as much in maximizing the revenues from possible transactions as it lies in preserving its position as the entity that can conduct them. Indeed, control over the copyrighted works coupled with their exploitation is the only way record companies can preserve the powerful position they currently hold in the music business. In order to preserve their economic interests, the record companies cannot simply focus on expanding the market of revenue. Unlike the artists who would prefer to have the market of revenue exploited even at the price of decentralizing the market of control, the recording industry, supposedly representing the artists, would not protect the market of revenue at the cost of risking its status as the dominant power in the market of control.

For many years there was no conflict or clear distinction between the market of control and the market of revenue. As there were few alternatives to the channels of communication between artists and consumers offered by the labels, their principal possession of the market of control was secured and virtually every person or entity that wished to either produce or consume music had to pass through their tollbooth, pay the fee, and receive their approval. This concept thrived in an era when music was embedded in physical objects. Consumers were forced to purchase a full album, assembled and wrapped up at the labels' discretion, and pay the labels' prices at the labels' conditions.[33]

The agency problem has deepened as technology has developed, threatening to undermine the recording industry's monopoly over the channels of communication and effectively diminishing the importance of its role for both consumers[34] and artists.[35] As a result, while artists could well benefit both eco-

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[33] The prohibition on rental businesses for sound recordings completed that ideal picture. *See infra* note 41.

[34] Manifestly, recording devices were perceived as a severe threat to the recording industry's monopoly and fought against fiercely. *See Home Audio Recording Act: Hearing on S. 1739 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 99th Cong. 90 (1985) [hereinafter *Home Audio Recording Act Hearing*] (statement of Stanley Gortikov, President, Recording Industry Association of America) ("Are we to stand by passively and watch the greatest musical creative community in the world strangled by newer and newer generations of copyright killer machines?"). *See also infra* note 39.

[35] "Do it yourself" measures, which appeared unrealistic in the past, have become a viable option thanks to current technology. *See, e.g.*, Artists House Music, *The Role Of Technology In The Music Industry Today* (Whitney Broussard's interview), http://www.artistshousemusic.org/videos/the+role+of+technology+in+the+music+industry+today; *see also* David S. Morgan, *Real Band, No Record Company*, CBS NEWS, May 28,

nomically and non-economically from technologies that would increase the access to their works, the recording industry "dies a little" every time a new technology emerges that decentralizes its monopoly in the market of control.[36]

The ever-existing agency problem arrived at a critical point with the creation of the completely decentralized communication mode of file-sharing.[37] While the artist-concerned market of revenue remained unharmed, and probably has even been enhanced,[38] this technology created an earthquake underneath the power basis of music distributors more than any technology did before. Rather than merely making copying cheaper, as did the development of the Rio portable music playing device,[39] file-sharing eliminates the costs associated with it entirely.[40] Rather than merely adding new players to the market of dissemination, as did record rental stores—a business that was completely wiped out owing to the industry's legislative efforts[41]—file-sharing brings the

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2007, http://www.cbsnews.com/stories/2007/05/28/eveningnews/main2858961.shtml ("Sean Greenhalgh, the band's drummer, [said:] "The question that we asked record companies was essentially, 'What can you do for us that we can't do for ourselves?'").

36 Morgan, *supra* note 35.

37 Peer to peer file-sharing is a technology that allows users to directly access each other's hard drives and copy files from them without the need of central server. *See infra* text accompanying notes 144–145.

38 *See* discussion *infra* Part IV.

39 *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074, 1078 (9th Cir. 1999) (denying injunction sought by the RIAA against the manufacture and distribution of the Rio because under the Audio Home Recording Act of 1992, codified at 17 U.S.C. §§ 1001–1010, "computers[,] and their hard drives[,] are not digital audio recording devices [as] their 'primary purpose' is not to make digital audio copied recordings").

40 *See* Miriam Bitton, *A New Outlook on the Economic Dimension of the Database Protection Debate*, 47 IDEA 93, 127 (2006) ("[I]n the world of the internet, the marginal cost of production for the underlying raw data is zero; in other words, each additional copy of the data costs nothing to produce.").

41 Determined to protect the music industry from the threat contained in the improving and widely available analog cassette recorders, Congress enacted the Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified as amended at 17 U.S.C. § 109(b) (2006)), which prohibited the rental of sound recordings without authorization from the copyright holder, thus debarring this business entitlement to the application of the first-sale doctrine. The first-sale doctrine enables owners of a physical object containing copyrighted work to transfer it to third parties upon their own decision. 17 U.S.C. § 109(a) (2006); *see also* Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5134–36 (1990) (codified as amended at 17 U.S.C. § 109(b) (2006)) (extending the first-sale doctrine to computer software).

dissemination power to every household in an exponential rather than linear method of distribution.[42]

Thus, the emergence of file-sharing shined a spotlight on the divergence of interests between artists and distributors and shed light on the actual nature of the industry's quarrel over control. As the ultimate gate-keepers, the labels are fighting to eliminate the creation of a world without gates. At this critical point, the fight over control is for the recording industry a fight intended not only to maximize revenues, but also to prevent the fading of their power base. Most importantly, the argument is that the fight for control is not related to the market of revenue. This is not an attempt to increase market dominance in order to increase profits, but rather an attempt to achieve control in and of itself because in an uncontrolled market for music, record companies have an extremely more modest—if any—role.[43]

The big problem for the recording industry, however, is the absence of any basis to protect their interests independently. The source of the copyright protection in the United States is the constitutional clause that empowers Congress "[t]o *promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*."[44] This clause is now enshrined in the Copyright Act, which grants to authors certain exclusive rights to their works for a limited time.[45]

As the Constitution justifies the copyright regime solely by protecting authors' incentives, the divergence of interests between the record industry and the artists they supposedly represent threatens to pull the foundation out from under the firm footing of the record industry's control. The labels must therefore tie, at least for the sake of appearance, their own interests with the interests of artists. Therefore, in order to preserve their position in the market of control they must justify this control over the market with the notion of safeguarding artists' incentives, which, as shown above, is centered on the market of revenue and not on the market of control.[46]

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42 Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 331 (S.D.N.Y. 2000) ("Every recipient is capable not only of . . . perfectly copying plaintiffs' copyrighted DVDs, but also of retransmitting perfect copies . . . and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear.").

43 *See infra* Part V.

44 U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

45 17 U.S.C. §§ 102, 106 (2006).

46 Indeed, before technology changed the picture, it was assumed that extending the notion of incentives in the constitution was justified to enable the industry as a whole rather than mere-

Thus, record companies established the link between the market of control and the market of revenue. This link can be represented in two forms. In its "soft" version, the industry's control over the market is a necessary condition to assure artists' revenues, and therefore, artists' incentives to create. In its "hard" and preferable version for the record industry's interests, the industry's control over the market is not only a necessary condition for revenues, meaning that revenues will only be produced if the industry possesses control, but is also a sufficient condition, meaning that assuring their control over the market ensures artists' economic welfare.

Part III demonstrates the axiomatic use the industry has made of this link in order to justify its anti-file-sharing agenda. As demonstrated below, the key measures against file-sharing were in fact designed to strengthen the record companies' grip over the market by utilizing the perceived equation between their control and artists' compensation. Parts IV and V aim at severing this connection, by showing that file-sharing does not constitute a threat to the market of revenue (Part IV), yet it threatens to topple the record industry's market of control (Part V). The collapse of the centralized market of control is the key to minimizing the agency problem, to the benefit of both the artists and the public.

III. THE PRACTICALITY OF THE WAR AGAINST FILE-SHARING

As shown by the discussion in Part II, the music industry fiercely objects to file-sharing, overtly claiming that it is inherently detrimental economically to the artists, while being covertly concerned with preserving the market of control for the recording industry. Along the same lines, Part III is aimed at showing that the path taken by the music industry to combat file-sharing is not designed to increase revenues, but rather to eliminate competitors in the monopolistic market of music distribution, even at the cost of actually reducing revenues.

A. The Legislative Front

The music industry, headed by the RIAA and cooperating ad hoc with parallel industries such as the film and software industries, has constantly raised awareness of the copyright agenda in Congress—even before the rise of the

ly creation. Ku, *supra* note 12, at 266–67. However, advances in technology rendered such incentives unnecessary in view of this assumption. *Id.* at 267.

peer-to-peer phenomenon.[47] Since the Internet platforms penetrated the music dissemination market around the turn of the millennium, Congress has considered more than 150 copyright legislative initiatives, a considerable number of which touched on music copyrights in the digital world.[48] The majority of the legislative initiatives have been focused on regulating access to and limiting distribution of works, not on increasing revenues from the exploitation of these works.

The most palpable example is the 1998 Digital Millennium Copyright Act (DMCA),[49] which preceded the file-sharing revolution by approximately two years. As will be analyzed below, the DMCA in effect grants the labels a high level of control of all access to copyrighted works that they choose to protect by technological means, such as by encryption.[50] The direct subject matter of the DMCA is controlling access to and use of works, rather than increasing the prospect of revenues stemming from them.[51] This agenda demonstrates the focus on retaining the monopoly over distribution and access rather than on the method by which this access is actually translated into revenues.

Since the emergence of peer-to-peer, a torrent of bills was introduced in Congress and in state legislatures to address the file-sharing phenomenon, including many that were initiated by the RIAA.[52] As in the pre-file-sharing era, these bills were not designed to increase artists' revenues, even indirectly. Rather, as will be shown below, these bills regulated the market of control over works, i.e., the ways the public can access works, as opposed to assuring a secure revenue stream from such access.

In this framework, the RIAA initiated regulation on educational institutions to direct their students to obtain music exclusively from sites authorized by

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47 *See* Peter S. Menell & David Nimmer, *Legal Realism In Action: Indirect Copyright Liability's Continuing Tort Framework and* Sony's *De Facto Demise*, 55 UCLA L. REV. 143, 147 (2007).

48 *See* U.S. Copyright Office Archive of Legislation, http://www.copyright.gov/legislation/archive (last visited Nov. 10, 2009) (listing of legislative initiatives in the copyright arena); *see also* Cardi, *supra* note 6, at 874.

49 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

50 *See* Molly Shaffer Van Houweling, *The Digital Broadband Migration: Rewriting the Telecommunications Act: Communications Law Reform: Communications' Copyright Policy*, 4 J. ON TELECOMM. & HIGH TECH. L. 97, 103 (2005); *infra* text accompanying note 120.

51 Declan McCullagh & Milana Homsi, *Leave DRM Alone: A Survey of Legislative Proposals Relating to Digital Rights Management Technology and Their Problems*, 2005 MICH. ST. L. REV. 317, 318 (2005).

52 *See, e.g.*, *infra* text accompanying notes 111–130.

the industry.[53] More blatantly, the RIAA supported a bill to exempt copyright owners from criminal and civil liability for interfering with file-sharing activity.[54]

The RIAA's agenda has often been covertly slipped into bills which have been partially relevant at best, often concealed from the eyes of both the public and the artists. The most recent example of this was the clandestine attempt by Senator Feinstein of California to include in the 2009 Economic Stimulus Plan an amendment to declare internet service provider (ISP) monitoring for copyright violations to be reasonable network management.[55]

The agency problem is expressed through the RIAA's use of the same tortuous techniques to not only center its efforts in protecting solely the labels' interests in control as shown above, but also to directly harm artists' interests. Consider, for example, the 1999 bill designed to include musical works as categories of works that are deemed to be works made for hire.[56] This inclusion

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53 *See, e.g.*, S. Res. 438, 109th Cong. (2006) ("A resolution expressing the sense of Congress that institutions of higher education should adopt policies and educational programs on their campuses to help deter and eliminate illicit copyright infringement occurring on, and encourage educational uses of, their computer systems and networks."). Part of this initiative found its way into legislation in a recent amendment to the Higher Education Opportunity Act. *See* Higher Education Opportunity Act of 1965, Pub. L. No. 110-315, §§ 488(a), 493(a), 122 Stat. 3078, 3293, 3309 (2008).

54 H.R. 5211, 107th Cong. (2002):

> [This bill was designed to allow] disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader.

55 *See* Proposed Amendment to H.R. 1, 111th Cong., *available at* http://www.publicknowledge.org/pdf/GRA09175_xml.pdf; s*ee also* Posting of Alex Curtis to Public Knowledge, *Update: Copyright Filtering in Stimulus Bill*, http://www.publicknowledge.org/node/1985 (Feb. 10, 2009 17:41pm).

56 The amendment to H.R. 1 added "sound recordings" to the limited list of *per se* "works made for hire." *See* Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A544 (1999). It was inserted as a "technical amendment" to the existing copyright law at the RIAA's request, by a House staffer in the last days of the first session of the 106th Congress without any public hearing. *Id.* at 1501A543; David Nimmer, *Appreciating Legislative History The Sweet and Sour Spots of the DCMA's Commentary*, 23 CARDOZO L. REV. 909, 931 n.130 (2002); Kathryn Starshak, Notes and Comments, *It's the End of the World as Musicians Know It, or Is It? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71, 89 (2001). The law was changed back a year later. *See* Work Made For Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (2000).

effectively excluded musicians from the right to recapture the copyrights of their works from the labels' assignees thirty-five years after they were assigned.[57] As in the previous pattern, this bill was not designed to increase the labels' share in the revenue pie, but instead was designed to perpetuate the labels' controlling position over the artist in order to exploit the market of control.

It is troubling that these legislative processes often lack any equal representation of all relevant stakeholders even for the sake of appearance.[58] Consequently, this has led to a distorted result that is largely biased towards the interests of the labels, often at the expense of artists, consumers,[59] technology providers,[60] and the public at large.[61] Perhaps more disturbingly, these measures, as well as other measures against file-sharing, are taken supposedly "on behalf" of artists.[62] Such a process disregards the existence and destructive effects of the inherent agency problem within the music industry and results in adverse effects on the general societal welfare.

B. The Litigation Front

Lawsuits against file-sharing users and services were initiated on a wide scale after the penetration of file-sharing into the market. Throughout the years

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57 17 U.S.C. § 203 (2006).

58 *See, e.g.*, 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, 199 (2006).

59 *See* No Electronic Theft Act, Pub. L. No. 105-147, § 2(b), 111 Stat. 2678 (1997) (codified as amended at 17 U.S.C. § 506 (2006)); *see also* Piracy Deterrence and Education Act of 2004, H.R. 4077, 108th Cong. (2004) ("A bill to enhance criminal enforcement of the copyright laws, to educate the public about the application of copyright law to the Internet, and for other purposes.").

60 *See* Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004) ("A bill to amend chapter 5 of title 17, United States Code, relating to inducement of copyright infringement, and for other purposes."); *see also* Melvyn J. Simburg et al., *International Intellectual Property*, 39 INT'L LAW. 333 (2005).

61 *See* Niels Schaumann, *Intellectual Property in an Information Economy: Copyright Infringement and Peer-to-Peer Technology*, 28 WM. MITCHELL L. REV. 1001, 1006 (2002) ("Of course, neither the public nor industries based on technology arising after the adoption of a copyright statute are represented at these negotiations. Thus, they usually find themselves excluded from the elaborate scheme of statutory rights, licenses and exemptions embedded in the copyright law."); *see also* Piasentin, *supra* note 58, at 199.

62 MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW 127 (2009) (noting that the RIAA explained that a main reason for their refusal to allow Napster to operate was that artists were urging them not to "screw up [their] Wal-Mart sales").

in which these lawsuits were carried out, scholars and activists pointed to their ineffectiveness, economic inefficiency, and social harm.[63] Nevertheless, the lawsuits continued—because they were never designed to increase revenues as the critics assumed, but rather to fortify the ivory tower of the industry in the market of control.

1. Direct infringement litigation

From 2003 until the end of 2008, when the RIAA declared that for the most part it had ceased bringing new lawsuits against individuals,[64] more than thirty thousand lawsuits had been filed against file-sharers by the RIAA alone.[65] The exclusivity of the federal system in copyright law, which generally favors plaintiffs,[66] together with the resource gap between the parties, incentivized defendants to prefer unfavorable settlement agreements over expensive and time consuming litigation, which may lead to higher civil and criminal charges at the end of the day.[67] As a result, the courts have played a negligible role in these lawsuits. In fact, of the tens of thousands of lawsuits, only twelve resulted in

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63 *See, e.g.*, Ray Beckerman, *Large Recording Companies v. the Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations*, JUDGES' J., Summer 2008, at 22.

64 *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, *available at* http://online.wsj.com/article/SB122966038836021137.html?mod=testMod. *But see* Recording Industry vs The People, *RIAA Claim not to Have Filed New Cases "For Months" Is False*, http://recordingindustryvspeople.blogspot.com/2008/12/riaa-claim-not-to-have-filed-new-cases.html (Dec. 19, 2008, 18:08:00) [hereinafter Recording Industry vs The People, *RIAA Claim Is False*].

65 ELECTRONIC FRONTIER FOUNDATION, RIAA V. THE PEOPLE: FIVE YEARS LATER 1 (2008), http://www.eff.org/files/eff-riaa-whitepaper.pdf [hereinafter EFF REPORT]; *see also* David Kravets, *RIAA Copyright Campaign Finally Goes to Trial*, WIRED, Oct. 1, 2007, http://www.wired.com/politics/law/news/2007/10/riaa_trial; McBride & Smith, *supra* note 64.

66 *See* John Conyers, Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 506 (2003); *see also* Gregory M. Cesarano & Daniel R. Vega, *So You Thought a Remand Was Imminent?: Post-Removal Litigation and the Waiver of the Right to Seek a Remand Grounded on Removal Defects*, FLA. B.J., Feb. 2000, at 22, 23–24 ("Litigation in federal court is also generally more expensive and time consuming than most state court actions."); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 404 (1992) (finding that plaintiff lawyers generally prefer filing a suit in federal court rather than state court as it imposes higher litigation costs upon the defendant).

67 Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1002 (2008).

legal challenges by a defendant, and most cases died out before reaching the stage of a trial on the merits.[68]

Largely criticized as unfair, these lawsuits single out a random assortment of individuals for disproportionate sanctions while taking advantage of their financial and procedural inferiority.[69] Increasing the doubts associated with such a lawsuit-heavy path are reports of offensive lawsuits,[70] lawsuits that targeted "dead grandmothers,"[71] and lawsuits brought against individuals who never had internet service.[72]

Needless to say, the lawsuits did not increase the payments to artists by even one penny.[73] Overall, in terms of revenues these lawsuits had little, if any, effect. The majority of these cases were settled for amounts ranging from $3,000 to $11,000,[74] while the cost of pursuing these lawsuits has often exceeded these sums.[75] Indeed, the RIAA has initiated various programs intended

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68 *See* Ray Beckerman, *How the RIAA Litigation Process Works*, Apr. 9, 2008, http://info.riaalawsuits.us/howriaa_printable.htm.

69 *See* Kristina Groennings, Note and Brief, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 589–90 (2005); EFF REPORT, *supra* note 65, at 5.

70 *See* EFF REPORT, *supra* note 65, at 5 (discussing how the RIAA insisted on receiving a wealth of documents to verify the financial and health status of a fully disabled widow and veteran who downloaded songs she already owned, before it would reduce her debt to $2000); *see also* Cassi Hunt, *Run Over by the RIAA: Don't Tap the Glass*, TECH, Apr. 4, 2006, at 9, http://tech.mit.edu/V126/N15.pdf (discussing RIAA's suggestion that an MIT student withdraw from studies to pay her $3750 debt).

71 Nate Mook, *RIAA Sues Deceased Grandmother*, BETANEWS, Feb. 4, 2005. http://www.betanews.com/article/RIAA-Sues-Deceased-Grandmother/1107532260.

72 Recording Industry vs The People, http://recordingindustryvspeople.blogspot.com/2007/05/riaa-drops-another-case-in-chicago.html (May 3, 2007, 12:24) [hereinafter Recording Industry vs The People, *RIAA Drops Another Case*].

73 *See, e.g.*, Iain Thomson, *RIAA Faces Lawsuits from Artists*, COMPUTING.CO.UK, Feb. 29, 2008, http://www.computing.co.uk/vnunet/news/2210889/riaa-faces-lawsuits-artists.

74 EFF REPORT, *supra* note 65, at 5.

75 According to an economic survey by American Intellectual Property Law Association (AIPLA) in 2003, the median total costs of these suits is as follows:

Low-Stakes Case	(<$1 million)
Thru Discovery	$101,000
Thru Trial and Appeal	$249,000
Medium-Stakes Case	($1-25 million)
Thru Discovery	$298,000

to reduce the costs associated with filing and litigating these lawsuits to make the process more cost-effective.[76] However, even the record labels themselves admitted in the climax of the lawsuits-campaign that these lawsuits, economically, have been a loss.[77]

This lawsuits policy is counter-intuitive only under the assumption that the goal of the process is to extract revenues from them. However, it makes perfect sense in light of the understanding that this process is designed to inculcate the notion that file-sharing on the whole is illegal.[78] Instilling the notion of

Thru Trial and Appeal	$499,000
High-Stakes Case	(>$25 million)
Thru Discovery	$501,000
Thru Trial and Appeal	$950,000

Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1376 n.121 (2004); *see also* Kim F. Natividad, Note, *Stepping It Up and Taking It to the Streets: Changing Civil & Criminal Copyright Enforcement Tactics*, 23 BERKELEY TECH. L.J. 469, 478 (2008) ("The RIAA must pay SafeNet, as well as its own legal team, to investigate infringement and pay the legal fees associated with initiating the lawsuits.").

[76] Such as the creation of the website www.P2Plawsuits.com, which enabled payment for pre-litigation letters' settlements with a credit card. Eliot Van Buskirk, *RIAA Launches P2PLawsuits.com*, WIRED, Feb. 28, 2007, http://www.wired.com/listening_post/2007/02/riaa_launches_p/. Engaging the universities themselves in enforcement is an additional example for such a measure. *See, e.g.*, Jacqui Cheng, *Forget Party Schools: The RIAA Lists the Top Piracy Schools in the US*, ARS TECHNICA, Feb. 22, 2007, http://arstechnica.com/news.ars/post/20070222-8900.html.

> The RIAA recently named the top 25 music-pirating schools in the country, an act that involved sending over 14,500 copyright infringement notices (so far) during the 2006-2007 school year. . . . The group says, however, that they are taking advantage of new software tools to improve the tracking of illegal file sharing, which may be part of the reason why the numbers have skyrocketed.

Id.

[77] *See* Transcript of Record at 97, Virgin Records Am., Inc. v. Thomas, No. 06-CV-01497 (MJD/RLE), 2007 WL 2826645 (D. Minn. Oct. 2, 2007) (No. 220) (Jennifer Pariser, head of Sony BMG's litigation department, testifying that record companies have "lost money on this program," which refers to the lawsuits against direct infringers); *see also* Eric Bangeman, *RIAA Anti-P2P Campaign a Real Money Pit, According to Testimony*, ARS TECHNICA, Oct. 2, 2007, http://arstechnica.com/tech-policy/news/2007/10/music-industry-exec-p2p-litigation-is-a-money-pit.ars ("The RIAA's four-year-old lawsuit campaign is costing the music industry millions of dollars and is a big money-loser for the record labels.").

[78] *See* Marc Galanter, *When the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 100 (1974) (arguing that litigants who have the resources

illegality of alternative distribution means is designed to maintain control over the market by driving out competitors from the distribution arena. This goal was, to a large degree, successful. Hardly any voices remaining maintained that the copyright laws were never intended to be enforced on all kinds of personal uses,[79] or that file-sharing which includes copyrighted files may not be illegal per se.[80] Generally speaking, the position that every use, even personal use, of a copyrighted material must be authorized is now almost a truism.[81] The effect of such an understanding is within the realm of the market of control, not the market of revenue and represents the interests of the recording industry and not those of artists.[82]

2. Indirect infringement litigation

The concern for the industry's image, among others, made the option of suing indirect infringers—such as the providers of file-sharing services—more palatable.[83] The recording industry found an attentive ear in this regard within the court system, which added fire to its fight over control. Emblematic of this attitude are the following cases: *A&M Records, Inc. v. Napster, Inc.*[84] decided by the Ninth Circuit, *In re Aimster Copyright Litigation*[85] decided by the Seventh

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to be repeat players in the litigation arena seek to shape the law in ways that favor their interests).

79 *See* Symposium, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 597 (2008) [hereinafter *Billowing White Goo* Symposium]; *see also* Symposium, *Frontiers of Intellectual Property: Lawful Personal Use*, 85 TEX. L. REV. 1871, 1902 (2007).

80 *See* Schaumann, *supra* note 61, at 1002 (pointing to "[t]he breathtaking sweep of [the *Napster*] holding —that almost one-quarter of the population of the United States was engaging in illegal (and perhaps even criminal) activity"); *see also* Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1616 (2001) ("There is doctrinal support for the contention that copyright never assured authors even a limited monopoly over all forms of exploitation.").

81 Surveys show that file-sharers are "aware" of their conducts' illegality and about half of them even consider it as morally wrong. Herkko Hietanen et al., *Criminal Friends of Entertainment: Analysing Results from Recent Peer-to-Peer Surveys*, 5 SCRIPTED 31 (2008), http://www.law.ed.ac.uk/ahrc/script-ed/vol5-1/hietanen.pdf. *But see* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster contends that its users do not directly infringe plaintiffs' copyrights because the users are engaged in fair use of the material.").

82 *See* Loren, *supra* note 30, at 11; *see also infra* Part IV.

83 Nonetheless, suits against individual file-sharers continued in parallel. *See* Recording Industry vs The People, *RIAA Claim Is False*, *supra* note 64.

84 239 F.3d 1004 (9th Cir. 2001).

85 334 F.3d 643, 653 (7th Cir. 2003).

Circuit, and above all, *MGM Studios, Inc. v. Grokster, Ltd.*,[86] decided by the Supreme Court.

Napster's technology was the first file-sharing software designed for exchanging music files that allowed transfer of such files among its users without crossing its server.[87] Napster's site included only indexes of the songs that were actually residing on other users' hard drives.[88] About seventy percent of the materials exchanged utilizing Napster's platform were copyrighted works owned by record companies, who sued Napster for contributory and vicarious infringement.[89] As a defense for the suit, Napster emphasized its capability for substantial non-infringing uses,[90] namely: transfer of non-copyrighted files, files whose owners consented to their transfer, and promotion of new artists.[91] Both the district court and the Ninth Circuit rejected this argument and ruled for the record companies.[92]

Following the decision, Napster attempted to enter into a licensing agreement with the record labels—which by then had begun to organize their own internet distribution services, MusicNet and Pressplay—but the labels refused to tolerate any modified version of Napster.[93] Finally, in mid-2001, MusicNet was willing to enter into an agreement.[94] This agreement limited Napster from entering into parallel licensing agreements and mandated a separate pricing structure for any content licensed from another entity.[95] Napster filed a motion for additional discovery based on the unduly restrictive conditions imposed in the licensing agreement and on the anti-competitive nature of the plaintiffs' entry into the online market.[96] The court went so far as to state that "[t]he evidence . . . suggests that plaintiffs' entry into the digital distribution market may run afoul of antitrust laws."[97] Unfortunately for Napster, and perhaps not for

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86 545 U.S. 913, 919 (2005).

87 *Napster*, 239 F.3d at 1011.

88 *Id.*

89 *Id.* at 1013; *see also* Charles W. Adams, *Indirect Infringement from a Tort Law Perspective*, 42 U. RICH. L. REV. 635, 685–86 (2008) (discussing theories of secondary infringement).

90 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001).

91 *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 904 (N.D. Cal. 2000) (providing background on Napster's "New Artist Program").

92 *Id.*; *see also Napster*, 239 F.3d at 1019.

93 *In re* Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1094 (N.D. Cal. 2002) (discussing the record companies' "attempts to enter the market for digital distribution of music").

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 1102.

Napster alone, the motion was automatically stayed when Napster filed for bankruptcy in June of 2002.[98]

Napster opened a new world for enthusiastic consumers and clever programmers, who followed its lead. Aimster, for example, was a file-sharing service that operated within the framework of an instant messaging (IM) network that basically allowed simultaneous users of chat rooms to exchange files among themselves. Following the Napster decision, Aimster engaged in negotiations with record labels intended to constitute some form of business relationships.[99] The negotiation process proved fruitless and, subsequent to receiving a cease or desist letter from the RIAA, Aimster filed for declaratory relief for its legality.[100] The RIAA joined with other copyright owners to bring a countersuit against Aimster and its founder, programmer, and operator for indirect copyright infringement.[101] Akin to Napster, Aimster unavailingly argued for various defenses that were all rejected and consequently Aimster was forced to close down.[102]

In 2005, the Supreme Court unanimously decided *Grokster*. This case involved the defendants' distribution of free file-sharing software that led to a secondary liability suit by music and movie copyright owners.[103] Grokster was less of an ongoing service provider and more of a discrete product retailer who could not affect its users' conduct since, unlike the former services, it utilized no central server and had only one contact with the users: the moment of downloading the software. Accordingly, Grokster prevailed in the district court and in the Ninth Circuit.[104] The Supreme Court, however, reversed, concluding that Grokster was *inducing* users to utilize the technology in an infringing manner.[105] Thus, the Court concluded that Grokster's situation was not protected by the application of *Sony's* dual-use technology safe harbor.[106]

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98 Jim Hu, *Napster: Gimme Shelter in Chapter 11*, CNET NEWS, June 3, 2002, http://news.com.com/2100-1023-930467.html?tag=vn.

99 *See In re* Aimster Copyright Litig., 252 F. Supp. 2d 634, 662 (N.D. Ill. 2002).

100 *Id.* at 646.

101 *Id.* at 638, 646.

102 *Id.* at 649–50.

103 *See* MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1159–60 (9th Cir. 2004); MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1032 (C.D. Cal. 2003).

104 *Grokster*, 259 F. Supp. 2d at 1032; *see also* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 927–28 (2005).

105 *Grokster*, 545 U.S. at 941.

106 *Id.* at 939, 941.

Litigation against secondary infringers reflects the disparity of powers between the file-sharing services and the music industry. The resource disparity and the duration of litigation was a disincentive from carrying the lawsuits to a final judgment,[107] and the RIAA forced upon defendants extreme settlements that advanced the RIAA's interests in control.[108]

Suing peer-to-peer technology providers is another escalation in the fight to achieve control in the arena of distribution of copyrighted works. The lack of power that a technology provider has over the future uses of its product renders it impossible for providers to design a file-sharing program that will be completely invulnerable to illegitimate uses. Thus, the success of these lawsuits affects the likelihood of law-conscious companies entering the field of information dissemination. Such over-cautiousness serves well the interests of the recording industry in exclusive control over distribution.

At the end of 2008, the RIAA declared that it had largely ceased filing suits against individuals, except for—broadly defined—already initiated suits, suits against "heavy infringers," and suits against technology artists.[109] The RIAA abandoned the lawsuit path only after it had developed an alternative path using voluntary or coercive collaboration with ISPs and quasi-ISPs in tracking and preventing file-sharing.[110] When combined with the continuing use of indi-

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107 *See* Gary Gentle, *Details of Grokster Settlement Emerge*, LAW.COM, Nov. 9, 2005, http://www.law.com/jsp/article.jsp?id=1131457369803 ("Grokster lawyer Michael Page said outside of court Monday he believed the company would have prevailed at trial but could not afford a protracted legal battle.").

108 *See* Ciolli, *supra* note 67, at 1004–05:

> Most notably, Grokster, Ltd., the lead defendant in [the *Grokster* case], accepted a settlement that "required the company to stop giving away its software," pay $50 million, send anti-piracy messages to its current users, and change its website to read, "There are legal services for downloading music and movies. This service is not one of them. . . . Don't think you can't get caught. You are not anonymous."

But see BusinessWeek, StreamCast Networks, Inc. Snapshot, Company Overview, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=711922 (last visited Nov. 10, 2009) (indicating that StreamCast Networks Inc., the additional defendant in the *Grokster* case, continued fighting until it filed for Chapter 7 bankruptcy on April 30, 2008).

109 *See* Recording Industry vs The People, *RIAA Claim Is False*, *supra* note 64.

110 RIAA For Students Doing Reports, http://riaa.com/faq.php ("In light of new opportunities to deter copyright infringement, the record industry was able to discontinue its broad-based end user litigation program."); *see* Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15, 26–27 (2005).

rect and perhaps a few direct lawsuits, as well as the other methods discussed in this Part, this alternative can substantially increase the clutch over the market of control.

C. The Technological Front

In parallel to progressing on the path to achieve control through the legislative and litigation arenas, the industry has utilized its own technology to limit access and exploitation of its digital materials.[111] These technologies, collectively named Digital Rights Management (DRM), utilize various tools such as encryption, watermark, and metadata to control users' abilities to either access materials ("access control") or use them ("usage control"), for example, by limiting the possibility to print, copy, download, or modify the materials.[112]

The use of DRM is backed by the DMCA,[113] which implements the WIPO treaties of 1996.[114] The DMCA bans DRM circumvention[115] as well as manufacturing, trafficking, or marketing of DRM circumvention appliances,[116] and fixes criminal and civil sanctions for such actions.[117]

Unless there is a link between the market of revenue and the market of control, the DRM function and the legislation surrounding it have little effect on the market of revenue. The focus of the legislation is not to increase revenues, but rather to entirely block access to materials.[118] In fact, in terms of revenues, the profitability of copyrighted content markets may be unrelated to the effectiveness of DRM applications. For example, although the DeCSS technology

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111 Van Houweling, *supra* note 50, at 103.

112 *See* Yuko Noguchi, *Freedom Override by Digital Rights Management Technologies: Causes in Market Mechanisms and Possible Legal Options to Keep a Better Balance*, 11 INTELL. PROP. L. BULL. 1, 5 (2006).

113 17 U.S.C. § 1201 (2006).

114 World Intellectual Property Organization, Copyright Treaty art. 11, Dec. 20, 1996, 36 I.L.M. 65, 71; World Intellectual Property Organization, Performances and Phonograms Treaty art. 18, Dec. 20, 1996, 36 I.L.M. 76, 86.

115 17 U.S.C. § 1201(a)(1) (2006).

116 *Id.* §§ 1201(a)(2), (b)(1).

117 *Id.* §§ 1203–1204.

118 These characteristics of the DMCA attracted a vast amount of criticism. *See, e.g.*, Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 814–15 (2001); Symposium, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999).

for circumventing the DRM of DVDs is widely available online, the DVD industry continues to be quite profitable in the United States and abroad.[119]

In terms of control, however, the ability of copyright owners to track individuals' actions in order to enforce their financial interests imparts unprecedented control that is incomparable to other contexts or to the analog world.[120] The DMCA prohibitions are inclusive and, except for a few specific exemptions,[121] apply to DRM circumvention perpetually[122] and for any purpose,[123] including purposes that were acknowledged as legitimate prior to the enactment of the DMCA, such as fair use[124] or the first sale doctrine.[125]

The use of DRM is controversial. Advocates argue that it is necessary in order to prevent unauthorized duplication of copyrighted works and thus

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119 *See* Noguchi, *supra* note 112, at 22 ("DVD sales have continued to grow steadily in both the U.S. and Japan.").

120 *See, e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 422 (1999) ("Books simply cannot prevent you from flipping the page, but digital files can. Video cassettes cannot ask you for your name and password every time you watch them, but a digital video disk or a movie downloaded 'on-demand' can.").

121 17 U.S.C. § 1201(d) (2006) (allowing use of circumvention technologies by educational institutions in order to determine whether to purchase a copyrighted product); *Id.* § 1201(f) (allowing circumvention in order to achieve "interoperability" of computer programs through reverse engineering). The Copyright Office can further create new exemptions through its rulemaking proceeding. *See* June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385, 390 (2004).

122 Pamela Samuelson, *DRM {and, or, vs.} the Law*, COMM. ACM, Apr. 2003, at 41, 43, *available at* http://people.ischool.berkeley.edu/~pam/papers/acm_v46_p41.pdf (arguing that "the DMCA anti-circumvention protection is perpetual in duration").

123 Benkler, *supra* note 120, at 421 ("[The DMCA] does not prohibit circumvention for the purpose of infringement of the copyright owner's exclusive rights. It prohibits circumvention per se . . . ."); *see also* Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 48–54 (2001).

124 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001) (holding that the DMCA bans circumvention of DRM technologies even for the purpose of fair use); *see also* David Nimmer, *How Much Solicitude for Fair Use Is There in the Anti-Circumvention Provision of the Digital Millennium Copyright Act?*, *in* THE COMMODIFICATION OF INFORMATION 193, 210–15 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); Samuelson, *supra* note 122, at 41–43 (arguing that these exemptions "fail to recognize many legitimate reasons for circumventing technical measures").

125 *See, e.g.*, Cohen, *supra* note 31, at 472 (noting that DRM undermines the idea "in the nondigital world, [that] the first sale of an object embodying a copyrighted work exhausts the copyright owner's exclusive distribution right").

ensure continued revenue streams.[126] From a different angle, DRM helped to convince copyright owners to release their materials for digital commercialization.[127] Opponents maintain that it constitutes a harmful expansion of existing copyright law towards a nearly absolute protection of works,[128] creates a chilling effect on innovation,[129] and constitutes an anti-competitive practice.[130]

The effectiveness of DRM is also questionable, as clever programmers around the world love to play cat-and-mouse games with DRM artists by decrypting their DRM as soon as it is launched.[131] Nonetheless, until recently, in order to license its material to online stores, the recording industry has required DRM protection of the files,[132] a technique which reduces consumer satisfaction and which is costly to develop and maintain.[133] This technique has increased the costs associated with online distribution and harmed revenues, but nevertheless has helped enhance the industry's control over the market.

The industry has recently abandoned DRM for iTunes as well as other online stores,[134] undergoing a similar process to the one that the software

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126 *See* John M. Williamson, *Rights Management in Digital Media Content: A Case for FCC Intervention in the Standardization Process*, 3 J. ON TELECOMM. & HIGH TECH. L. 309, 314–16 (2005).

127 Noguchi, *supra* note 112, at 6 & n.15 ("Without DRM . . . , it will be very difficult for us to convince all the rights holders to give us access to commercialize the contents." (quoting Bob Ohlweiler, Senior Vice President of Business Development at Musicmatch, an online music store)) (alteration in original).

128 *See, e.g.*, Cohen, *supra* note 31, at 472–73 (noting that DRM can undermine important limitations on copyright law, and enable prohibition on "reuse of the ideas, facts, or functional principles contained in a work—all elements that copyright law expressly leaves unprotected in order to stimulate further creativity—or prohibiting reuse of formerly copyrighted expression that has fallen into the public domain"); *see also supra* notes 120, 124, 125.

129 *See* Noguchi, *supra* note 112, at 21.

130 *See* Posting of Fred von Lohmann to Deeplinks Blog, *Do You Need an Exemption from the DMCA?*, http://www.eff.org/deeplinks/2008/10/do-you-need-exemption-dmca (Oct. 16, 2008).

131 *See* Noguchi, *supra* note 112, at 21–22; Roemer, *supra* note 3; *see also* Jeff Goodell, *Steve Jobs: The Rolling Stone Interview*, ROLLING STONE, Dec. 3, 2003, http://www.rollingstone.com/news/story/5939600/steve_jobs_the_rolling_stone_interview/2 ("Pick one [digital] lock—open every door. It only takes one person to pick a lock.").

132 *See* Noguchi, *supra* note 112, at 6; Steve Jobs, *Thoughts on Music*, APPLE, Feb. 6, 2007, http://www.apple.com/hotnews/thoughtsonmusic.

133 Until 2009, Apple's contract with the record companies obliged Apple to solve any ineffectiveness of its DRM protection within six weeks. *See* Jobs, *supra* note 132.

134 *See* Apple, Changes Coming to the iTunes Store, Jan. 6, 2009, http://www.apple.com/pr/library/2009/01/06itunes.html; *see also* INTERNATIONAL

industry underwent during the 1980s. Still, like the litigation path against individuals, the technological control-protection did not cease to exist until alternatives were consolidated—not to achieve revenues but to control access.

D. The Control over the "Keys to the Internet" Front

The gate-keepers of the Internet are ISPs and quasi-ISPs, such as universities, which provide internet access to their customers. For years, ISPs were attractive deep-pocketed defendants for the music industry, and were frequently called to the litigation arena through secondary infringement suits and in response to subpoenas to reveal users' identities in direct infringement suits.[135]

Drawing ISPs into the litigation scene became harder over time. Beyond its function discussed above, the DMCA structured safe harbors for ISPs that exempted them from involvement in most infringement litigations.[136] Accordingly, the RIAA's attempts to sue ISPs after the DMCA enactment have failed,[137] even though courts have expressed dissatisfaction with the DMCA's unsuitability for the peer-to-peer era.[138] For the time being, ISPs have been left as an isolated island in the widening ocean of industry control.

Nevertheless, the industry's eye has never really moved from ISPs. Recently, ISPs are being dragged into the copyright waters again. The "role of ISPs" and "ISP cooperation" are the latest agenda topics for the music industry internationally,[139] and have been vigorously lobbied in Europe[140] and in the United States.[141]

FEDERATION OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 2009 10 (2009), http://www.ifpi.org/content/library/DMR2009.pdf [hereinafter IFPI REPORT].

135 Elkin-Koren, *supra* note 110, at 26–27.

136 *See* 17 U.S.C. §512 (2000).

137 *See, e.g.*, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1231 (D.C. Cir. 2003); *In re* Charter Commc'ns, Inc., 393 F.3d 771, 777–78 (8th Cir. 2005).

138 *See Charter*, 393 F.3d at 777; *Verizon*, 351 F.3d at 1238–39; *see also* Simburg et al., *supra* note 60.

139 *See* IFPI REPORT, *supra* note 134, at 24.

140 In Europe, the scale tilts constantly in this topic. For example, President Sarkozy endorsed the scheme desired by the International Freedom of the Phonographic Industry (IFPI). *See UK Government to Push for ISP Cooperation*, IFPI, Feb. 12, 2008, http://www.ifpi.org/content/section_news/20080212.html. The Conseil Constitutionne, however, declared a "Three strike rule" unconstitutional. *See* Posting of Danny O'Brien to Deeplinks Blog, *France Declares Three Strikes Unconstitutional*, http://www.eff.org/deeplinks/2009/06/three-strikes-dead-in-france (June, 10, 2009). However, a "three strike rule" then passed into law later in 2009. *See* Nate Anderson, *France*

While the heavy legislative hand has yet to come down on the matter in the United States, the RIAA claims that it is already negotiating voluntary covert agreements with ISPs regarding collaboration against file-sharing.[142] The scheme likely includes sending warning letters from the RIAA to file-sharers through ISPs, and, after three alerts, disconnecting their internet service.[143]

Although no ISPs have confirmed engaging in such negotiations to date,[144] ISPs' interests may be partially aligned with those of the music industry against peer-to-peer traffic. Peer-to-peer traffic reallocates costs from the distributor of content to ISPs due to the absence of a central server. Conventionally, digital communication takes place to and from centralized servers which host the information and transmit it to clients reactively. In a peer-to-peer network, the peers themselves simultaneously fulfill the functions of servers and clients among each other, initiating requests and reacting to other peers' requests for content. ISPs therefore must be able to support high bandwidth capacity for the consumers who transfer files simultaneously between them. For this very reason, Comcast recently attempted to block BitTorrent traffic—but was rebuked by the Federal Communication

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Passes Harsh Anti-P2P Three-Strikes Law (Again), ARS TECHNICA, Sept. 15, 2009, http://arstechnica.com/tech-policy/news/2009/09/france-passes-harsh-anti-p2p-three-strikes-law-again.ars. The British Recorded Music Industry ("BPI"), the British equivalent of the RIAA, introduced a bill to impose liability on ISPs for copyright infringements, full text available at http://www.iptegrity.com/pdf/p2p-BPI-amendment.pdf, but was ultimately rejected. *See also* Monica Horten, *UK Music Companies Demand ISP Liability in Copyright Law*, IPTEGRITY.COM, Jan. 28, 2009, http://www.iptegrity.com/index.php?option=com_content&task=view&id=235&Itemid=9.

141 *See supra* note 55 and accompanying text.

142 *See, e.g.*, Greg Sandoval, *RIAA President: No Talk of Blacklisting File Sharers*, CNET, Dec. 19, 2008, http://news.cnet.com/8301-1023_3-10127313-93.html. *But see* Posting of Ernesto to TorrentFreak, *RIAA, MPAA Copyright Warnings: Facts and Fiction*, http://torrentfreak.com/riaa-mpaa-copyright-warnings-facts-and-fiction-090328/ (Mar. 28, 2009) (arguing that a similar practice has been in use for years).

143 Posting of David Kravets to Threat Level, *MPAA Negotiates with ISPs to Disconnect or Penalize Copyright Offenders*, WIRED, http://www.wired.com/threatlevel/2009/03/mpaa-asking-isp/ (Mar. 27, 2009, 14:34). A British survey may support the effectiveness of such measures. *See* Nate Anderson, *Survey: Warnings from ISPs Could Slash File-Swapping by 70%*, ARS TECHNICA, Mar. 3 2008, http://arstechnica.com/old/content/2008/03/survey-warnings-from-isps-could-slash-file-swapping-by-70.ars.

144 Posting of David Kravets to Threat Level, *AT&T, Comcast Deny RIAA 'Three-Strikes' Participation*, http://www.wired.com/threatlevel/2009/03/att-comcast-den/ (Mar. 25, 2009, 15:48).

Commission (FCC) for engaging in network management and interfering with Net neutrality.[145]

If the mass lawsuits against individual file-sharers has blocked the justice system de facto, by spurring defendants to settle or driving them to bankruptcy, siding with ISPs blocks the justice system de jure. The degree of control the industry will have in this scheme is unprecedented. Absent even the theoretical possibility of court review, the RIAA, together with ISPs, will be the prosecutor, sole adjudicator, and co-executor of everyone they claim is engaging in file-sharing.

While commercial ISPs may hope for reduced congestion as a result of contracting with the RIAA, quasi-ISPs like universities largely do not. The RIAA's attempts to recruit universities to the file-sharing war began in 2005 when it sent "pre-litigation" letters to universities and requested university officials to forward them on to file-sharing students who were identified by their IP address.[146] The letters offered the student a "reduced" settlement of approximately $3000 and threatened to initiate legal actions with damages upwards of $750 per song if the offer was not accepted.[147] In parallel, the RIAA published a list of "top piracy schools," identifying the twenty-five institutions in which file-sharing is the most popular.[148] The reaction among faulted institutions varied, ranging from fully siding with the RIAA,[149] to partial assistance as a "passive conduit,"[150] to refusing to team up with the RIAA's effort.[151] In the last two

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145 *See* Deborah Taylor Tate, FCC Comm'r, United States Broadband Policy: From Sea to Shining Sea, Remarks at the Global Forum 2008: COLLABORATIVE CONVERGENCE: Users Empowerment in the Global Digital Economy (Oct. 21, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286177A1.pdf; *see also* Sascha D. Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward an Open Internet*, J. INTERNET L., Dec. 2008, at 1, 14.

146 Thomas Mennecke, *RIAA Announces New Campus Lawsuit Strategy*, SLYCK, Feb. 28, 2007, http://www.slyck.com/story1422.html; *see also* EFF REPORT, *supra* note 65, at 7–8.

147 EFF REPORT, *supra* note 65, at 7–8.

148 *See* Cheng, *supra* note 76.

149 Stanford University, for example, forwards letters to students, disconnects them from the Internet and charges them for reconnection. STUDENT DMCA COMPLAINT POLICY & RECONNECTION FEE (Stanford Univ. 2007), http://www.stanford.edu/dept/legal/Recent/DMCA_Reconnect_fee_Final1007.pdf. Michigan State University forces repeat offenders to watch an anti-piracy DVD, and threatens three-time offenders with one semester suspension. Cheng, *supra* note 76. The University of Tennessee cuts off Internet connections for repeated offenders until they physically take their computers to a lab to delete their file sharing programs. *Id.*

150 *See* EFF REPORT, *supra* note 65, at 8 ("Most universities . . . appear to be forwarding RIAA pre-litigation letters on to their students, apparently on the assumption that a student will be better off settling sooner, at the 'discounted' rate, rather than later.").

years, the industry has followed up by urging institutions' presidents to implement anti-file-sharing educational programs.[152]

In parallel, the RIAA has constantly lobbied Congress to compel universities to apply a system that will track and impede file-sharing activity and direct students to authorized music acquisition sites.[153] These efforts bore fruit in 2008 with the inclusion of anti-file-sharing provisions in the Higher Education Opportunity Act.[154]

Apparently, if higher education institutions, from which many of the file-sharing activities are conducted, will block file-sharing and direct the students solely to RIAA authorized channels, and if commercial ISPs will cooperate in cutting off file-sharers from the Internet, the RIAA is closer than ever to combat the threat of file-sharing. The path to complete control has yet to be paved, but the map is beginning to unfold.

E. The War on the Hearts and Minds

The RIAA and the record industry also fight file-sharing by the vague, though not less influential, tools of education, campaigns, and rhetoric. During its 2008 international "campaign for hearts and minds," the recording industry engaged in as many as seventy campaigns worldwide, including television advertising, documentary productions, and live debates.[155] The industry's efforts have focused on teachers and parents, and included production and wide distribution of guides, information, and additional resources furthering their agen-

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151 See, for example, Harvard's refusal to serve as "the unpaid enforcement arm of the provincial interests of the RIAA." Charles Nesson & John Palfrey, *Universities to RIAA: Take a Hike*, THE FILTER (published by the Berkman Center for Internet & Society at Harvard University), Jul. 9, 2007, http://cyber.law.harvard.edu/node/479; *see also* Wendy M. Seltzer & Charles R. Nesson, *Protect Harvard from the RIAA*, HARVARD CRIMSON, May 1, 2007, http://www.thecrimson.com/article.aspx?ref=518638. The University of Wisconsin, the University of Maine, and the University of Kansas exemplify a similar attitude. *See* EFF REPORT, *supra* note 65, at 8.

152 *See* Nesson & Palfrey, *supra* note 151; *see also* Timothy B. Lee, *Analysis: RIAA Wants Universities to do Its Dirty Work*, ARS TECHNICA, Sept. 3, 2007, http://arstechnica.com/news.ars/post/20070903-analysis-riaa-wants-universities-to-do-its-dirty-work.html.

153 Lee, *supra* note 152.

154 Higher Education Opportunity Act, Pub. L. No. 110-315, §§ 488(a), 493(a), 122 Stat. 3078, 3293–95, 3308–09 (2008).

155 IFPI REPORT, *supra* note 134, at 26.

da.[156] These communications were often endorsed by public and governmental bodies.[157]

In these efforts, as in other arenas, the industry has advanced its agenda largely by utilizing the metaphor of real property.[158] If copyright is akin to real property, such as land, then virtually any unauthorized use is forbidden.[159] Using this metaphor, it was asserted that: DRM deserves legal protection befitting locked doors;[160] circumvention of DRM equals breaking and entering someone's home;[161] new technologies are "copyright killer machines";[162] and file-sharing is both theft[163] and piracy.[164]

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156 *Id.*

157 *Id.* (indicating the European Commission endorsed the guide "Young People, Music and the Internet," which "explain[s] the world of music downloading to teachers and parents worldwide[,]" in order to "promote the safe and legal use of the internet [sic] and mobile phones to download music"); *see also* Katie Dean, *Copyright Crusaders Hit Schools*, WIRED, Aug. 13, 2004, http://www.wired.com/entertainment/music/news/2004/08/64543 (elaborating on anti-piracy based educational programs).

158 *See* Bill D. Herman, *Breaking and Entering My Own Computer: The Contest of Copyright Metaphors*, 13 COMM. L. & POL'Y 231, 232 (2008).

159 *But see* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1021–22 (1996) ("Even in the case of real property, the Supreme Court has recognized that ownership does not always mean absolute dominion, and that in some circumstances an owner's rights may become circumscribed by the statutory and constitutional rights of those who use the property.") (internal quotation marks omitted).

160 Herman, *supra* note 158, at 232.

161 *Id.*

162 *See Home Audio Recording Act Hearing*, *supra* note 34.

163 RIAA For Students Doing Reports, *supra* note 4 ("When you go online and download songs without permission, you are stealing.").

164 As was presented on the RIAA website in 2005:

> No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. *Today's pirates operate not on the high seas but on the Internet, in illegal CD factories, distribution centers, and on the street*.

David W. Opderbeck, *Peer-To-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1687 & n.1 (2005) (quoting RIAA statement on anti-piracy) (emphasis added). Today, however, the RIAA claims that the term piracy is "too benign" to actually describe its damages. *See* RIAA Piracy: Online and on the Street, http://riaa.com/physicalpiracy.php (last visited Nov. 10, 2009).

Legally, the equivalence of copyrights and real property is erroneous and misleading.[165] Although the copyright regime carries property-like features such as exclusivity and injunctive remedies, these characteristics exist alongside considerable non-property features and limitations, such as compulsory licensing schemes,[166] exemptions[167] and time limits.[168] Indeed, this metaphor, for the most part, originally supported the argument that copyright law *should* resemble the law of real property, rather than claiming that it already does.[169]

Regardless of its legal inadequacy, as a metaphor the equivalence of copyrights to real property is exceptionally powerful.[170] As observed by various legal scholars, within the spheres of culture, law and politics, the concept of "property" implies a particularly broad scope of rights.[171] The implications of this rhetoric are not only successful in shaping public positions, but also in designing the paradigms of the discussion and determining how copyrights are conceptualized.[172]

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165 *See* R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 999 (2003) ("[T]he control we offer owners of intellectual property rights is simply not the control we offer landowners."); *see also* Dowling v. United States, 473 U.S. 207, 216 (1985) ("The copyright owner, however, holds no ordinary chattel. A copyright . . . comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections."); Cohen, *supra* note 159, at 1022 ("Copyright, unlike real property, reflects a careful, expressly-drawn balance between private (author's) rights and public rights.").

166 *See, e.g.*, 17 U.S.C. § 115 (2006).

167 *See id.* § 107 (fair use doctrine); *see also* Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99, 158 (2000).

168 *See also* Richard A. Posner, *Do We Have Too Many Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 173, 175 (2005) ("In physical property, we don't have durational limitations. You own your house, your wristwatch, your clothing, and so on, in perpetuity.").

169 *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 134 (2004).

170 Herman, *supra* note 158, at 249 ("In a nation with remarkably deep respect for property rights, COPYRIGHTS ARE PROPERTY puts copyright holders on the side of both God and country, and those who violate this right are thieves, sinners, pirates and communists."); *see also* Lawrence Lessig, Dunwody Distinguished Lecture in Law at the University of Florida Fredric G. Levin College of Law, The Creative Commons (Apr. 26, 2002), *in* 55 FLA. L. REV. 763, 776 (2003) ("There thus emerges an equivalence in our culture between 'property' and 'intellectual property' because we are a property-loving nation.").

171 *See* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 54–55 (2008); Pamela Samuelson, *Information as Property: Do* Ruckelshaus *and* Carpenter *Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 398 (1989); Symposium, *Overcoming Property: Does Copyright Trump Privacy?*, 2002 U. ILL. J.L. TECH. & POL'Y 375, 379 (2002).

172 *See* Herman, *supra* note 158, at 238–39.

The metaphor of property does not promote the idea of revenues. The attempt to utilize someone's property does not entitle the latter merely to monetary compensation, but rather entitles them to prohibit such use altogether.[173] Therefore, choosing the metaphor of property sheds light on the real purpose of the record companies: to perpetuate their grip on the market of control.

Despite the record companies' achievements on all fronts, the file-sharing phenomenon flourished.[174] High levels of demand and rapid technological developments prevented any wide-ranging achievements resulting from litigation.[175] Apparently, shutting down Napster created the online equivalent of the California gold rush with scores of companies emerging to fill the void that Napster's demise created.[176]

If the market of revenue was the focus of the battle, this state of affairs would be quite paradoxical. The industry was pouring out a huge amount of resources for lobbying, lawsuits, contracts, propaganda, and campaigns in order to fight a technology that, as will be analyzed below, can provide a resource-efficient distribution mechanism in light of palpable evidence that this fight has harvested no fruits.[177]

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173 *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 358 (1999) ("[A]nalytically, property rights in information mean that the government has prohibited certain uses or communications of information to all people but one, the owner.").

174 *See* Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, J. POL. ECON., Feb. 2007, at 1, 2; *see also* Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1231 (D.C. Cir. 2003) ("[M]illions of people . . . continue to share digital .mp3 files of copyrighted recordings using P2P computer programs such as KaZaA, Morpheus, Grokster, and eDonkey."); William Sloan Coats & Melissa Keyes, *Recent Developments in Vicarious Liability and Copyright Licensing for Music*, *in* 915 PRACTISING L. INST., UNDERSTANDING THE INTELLECTUAL PROP. LICENSE 2007 257, 266 (2007) ("Even in the wake of the Supreme Court's decision in *MGM Studios, Inc. v. Grokster, Ltd.*, peer-to-peer file-sharing networks continue to proliferate and acquire users.").

175 It is widely believed, for example, that the agreement that included the closing down of eDonkey2000 had little, if any, impact on the eD2k network, as eMule (and Shareaza) had been the dominant client on the network since 2002, and already represented over 90% of the network at the time of the agreement. *See, e.g.*, Wikipedia, eDonkey Network, en.wikipedia.org/wiki/EDonkey_network; *see also* Symposium, *Three Reactions to* MGM v. Grokster, 13 MICH. TELECOMM. & TECH. L. REV. 177, 194 (2006); Bryan H. Choi, Note, *The Grokster Dead-End*, 19 HARV. J.L. & TECH. 393, 393 (2006); EFF REPORT, *supra* note 65, at 1.

176 Robert Menta, *Aimster: The Legal File Swap Program*, MP3NEWSWIRE.NET, Sept. 5, 2000, http://www.mp3newswire.net/stories/2000/aimster.html.

177 One of the reasons that the litigation war has failed is that the chances of being sued are viewed as extremely miniscule. *See* Hietanen et al., *supra* note 81, at 39 & n.40; *see also*

Moreover, there was readiness of some networks to negotiate with the recording industry in a way that would share the control over digital distribution, yet provide a stable stream of revenues for the music industry. However, the industry has refused any agreement that will in effect decentralize control, regardless of its economic value. Thus, file-sharing service LimeWire has argued that the record labels refused any agreement unless the service uses a labels-approved filtering system or reaches an agreement with iMesh, a rival file-sharing service that operates under the wing of the labels.[178]

Even the Napster and Aimster services attempted to negotiate with the labels in a way that would have allowed the services to survive while compensating artists through the record companies.[179] However, the labels refused any agreement which would divide the control over distribution.[180] Thus, Napster was forced to close down, and reopened only as a "shadow of its former self"[181] under the conditions of the labels,[182] and Aimster's attempt to negotiate with the labels prior to commencing a lawsuit proved futile.[183]

The record companies' explanation for this paradox is that they stand in an impossible position, because the market can only function if the recording industry does not have to compete with free distribution.[184] However, the evidence regarding the actual effects of file-sharing, which will be analyzed in Part IV, suggests that file-sharing is perhaps a gold mine rather than a mine field.

Indeed, the arguments that support the assertion regarding economic effects of file-sharing are based on the highly speculative equation between the market of control and the market of revenue in either "soft form," i.e., revenues

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Thomas Mennecke, *RIAA's Grand Total: 10,037—What Are Your Odds?*, SLYCK, May 2, 2005, http://www.slyck.com/news.php?story=769.

178 This argument was part of a counterclaim that was filed by LimeWire against the labels in *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007). *See* Complaint for Federal Copyright Infringement, Common Law Copyright Infringement and Unfair Competition, Arista Records LLC v. Lime Group LLC, 532 F. Supp. 2d 556 (S.D.N.Y. 2007) (No. 06 CV 5936), 2006 WL 2582075.

179 *See In re* Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1093 (N.D. Cal. 2002); *In re* Aimster Copyright Litig., 252 F. Supp. 2d 634, 662–63 (N.D. Ill. 2002); *see also supra* text accompanying notes 93, 99.

180 *See e.g.*, Carrier, *supra* note 62, at 126–27.

181 *See* William E. Lee, *Cable Modem Service and the First Amendment: Adventures in a "Doctrinal Wasteland"*, 16 HARV. J.L. & TECH. 125, 131 (2002).

182 *See supra* note 114 and accompanying text.

183 *See Aimster*, 252 F. Supp. 2d at 662–63; *see also supra* text accompanying note 99.

184 *See, e.g., File-Sharing Software Liability: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 109th Cong. (2005) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association of America).

can only be produced if the industry possesses control, or "hard form," i.e., framing industry control as sufficient to assure artists' revenues.[185]

Parts IV and V untie both forms of this knot. Part IV demonstrates that file-sharing can support an uncontrolled, decentralized market of revenue, thus rebutting the "soft" form of the equation, which implies that such a state of affairs is impossible. Part V demonstrates that the market of control has in fact created an adverse impact on artists' revenues, thus rebutting the "hard" form of this equation, which assumes that the grip of the industry in the market of control is translated into revenues for artists. Part V then concludes that a decentralized uncontrolled market is far more advantageous for both artists and society as a whole.

IV. FILE-SHARING AND THE MARKET OF REVENUE

In his cross-examination during the *Pirate Bay* trial in February 2009, International Federation of the Phonographic Industry (IFPI) chairman and CEO John Kennedy suggested that file-sharing is responsible for the thirty percent global decline in music revenues.[186] The argument, which echoes the industry's accusation over many years, is striking in its simplicity: consumers, who would otherwise purchase the music, consume it free of charge and distribute it to others who do the same, thus harming the market of revenue for artists.[187]

The market of revenue for artists is ostensibly the main concern of the anti-file-sharing line. However, the notion that file-sharing hampers revenues, inculcated by the music industry into common knowledge, is far from evident.[188]

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185 *See supra* text accompanying note 60.

186 *See* Nate Anderson, *IFPI Boss at TPB Trial: You're Either with Us or Against Us*, ARS TECHNICA, Feb. 25, 2009, http://arstechnica.com/tech-policy/news/2009/02/ifpi-boss-youre-either-with-us-or-against-us.ars. *See generally* IFPI Home Page, http://www.ifpi.org/ (last visited Nov. 10, 2009) ("IFPI represents the recording industry worldwide, with a membership comprising some 1400 record companies in 72 countries and affiliated industry associations in 44 countries."); *see also* Stockholms Tingsrätt [TR] [Stockholm District Court] 2009-4-17 (Swed.).

187 See, for example, the government's position in United States v. Chalupnik, 514 F.3d 748, 755 (8th Cir. 2008), and the RIAA's position in United States v. Dove, 585 F.2d 865, 870 (W.D. Va. 2008).

188 *See, e.g.*, Boyle, *supra* note 29, at 42–43:

> The Internet does lower the cost of copying and, thus, the cost of illicit copying. Of course, it also lowers the costs of production, distribution, and advertising, and dramatically increases the size of the potential market. Is the net result, then, a loss to rights-holders . . . ? A large, leaky market may actually

The RIAA reports showing a steady decline of sales-revenues since the year 2000[189] have raised speculations, resulting from, inter alia, its unconventional accounting methods.[190] Yet even ignoring those speculations, the attribution of claimed losses, particularly the *entirety* of these losses, to file-sharing is questionable.[191]

In order to empirically establish the connection between file-sharing and the music industry's losses, a set of presumptions which are not at all obvious must be set. It must be assumed, inter alia, that: file-sharing completely substitutes sales with free downloads;[192] file-sharers would otherwise purchase the music for the full price offered by the music industry;[193] and the resources

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provide more revenue than a small one over which one's control is much stronger.

189 RIAA, 2007 YEAR-END SHIPPING STATISTICS (2007), http://www.scribd.com/doc/6386390/RIAA-Annual-Music-Sales-Data-2007-Year-End [hereinafter RIAA 2007 SHIPPING STATISTICS].

190 *See* Martin F. Halstead, Comment, *The Regulated Become the Regulators—Problems and Pitfalls in the New World of Digital Copyright Legislation*, 38 TULSA L. REV. 195, 226 (2002) ("An accounting system in which possible but unrealized income is considered a loss appears an unrealistic basis for policy formulation, yet it is a primary accounting theory on the industry side of the piracy question."); *see also* Julian Sanchez, *750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy*, ARS TECHNICA, Oct. 7, 2008, http://arstechnica.com/articles/culture/dodgy-digits-behind-the-war-on-piracy.ars/1.

191 Even the RIAA and other plaintiffs in lawsuits against file-sharers prefer to base their claims of damages on punitive damages according to 17 U.S.C. § 504(c) rather than on actual damages, which they can neither measure nor prove. *See* Complaint at ¶ 18, Virgin Records Am., Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-CV-1497), 2006 WL 1431921.

192 *But see* Dove, 585 F. Supp. 2d at 870 ("Customers who download music and movies for free would not necessarily spend money to acquire the same product. . . . [B]ut . . . RIAA estimate[s] [its] losses based on this faulty assumption."); *see also Chalupnik*, 514 F.3d at 755 (finding that the government had failed to prove the losses to the copyright holder and vacated the restitution awarded in the district court).

193 *But see* United States v. Hudson, 483 F.3d 707, 710 (10th Cir. 2007):

> As an initial matter, we are very skeptical of the implicit suggestion that [the customer's] agreement to purchase 537 copies of the [counterfeit] software for a total price of less than $86,000 proves that [the customer] would have agreed to purchase the same number of copies from Microsoft for more than $321,000.

See also Oberholzer-Gee & Strumpf, *supra* note 9, at 3 ("At a price close to zero, many consumers will download music and movies that they would not have bought at current prices.").

not spent on music purchases are not spent on music through other channels not reflected in the sales charts.[194]

There are, however, sufficient reasons to challenge these assumptions. It is unclear whether file-sharing is indeed a substitute to the traditional channels of accessing music.[195] If history is any guide, then a skeptical approach should be applied to the strategy for fighting technologies which eventually prove to be important complements to existing products and have had positive effect on revenues.[196]

Moreover, attributing the *entire* decline in sales to file-sharing ignores various additional processes that have occurred over the last decades.[197] Such processes include, for example: the shift from audio cassettes to CDs and digital files, which do not degrade over time; the reduction of recording equipment prices, which resulted in the rise of independent and smaller recording companies, whose data is not reflected in the losses-chart;[198] and the availability of competing entertainment activities beyond music.[199] Above all, the rise of online music stores, whose success stands in reverse correlation with offline sales,[200] enabled what may have been desired by consumers all along—the purchasing of music on a single-track basis. Because of the change in the distribution model, the forced—and thus artificial—demand for albums has turned into a demand for songs. Because single-track music is cheaper than CDs, it

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194 It is possible, for example, that there is a correlation between the increased exposure to music through file-sharing, Wii games, and cellular purchases that share profits with the music industry. However, the "RIAA maintains that policymakers should only take into account the effect on record industry revenues, reflected in sales displacement." U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 173–74 (Government Printing Office 1989) [hereinafter U.S. CONGRESS REPORT], *available at* http://www.princeton.edu/~ota/disk1/1989/8910/8910.PDF.

195 "As the name suggests, substitutes are products that meet similar consumer demands. For two substitute goods, a price decline for one leads to a decline in the demand for the other." *See* Oberholzer-Gee & Strumpf, *supra* note 9, at 3.

196 *See supra* note 9–10.

197 *See* Seung-Hyun Hong, *The Effect of Napster on Recorded Music Sales: Evidence from the Consumer Expenditure Survey* 1 (Stanford Inst. For Econ. Policy Research, Discussion Paper No. 03-018, 2004), *available at* http://siepr.stanford.edu/publicationsprofile/379 (identifying additional factors that have greater influence on sales reduction).

198 *See* Ku, *supra* note 12, at 295–96 ("In 1984, estimates suggested that it cost $125 million just to maintain a national record distribution operation.").

199 Posting of Stephen J. Dubner to Freakonomics, *What's the Future of the Music Industry? A Freakonomics Quorum*, http://freakonomics.blogs.nytimes.com/2007/09/20/whats-the-future-of-the-music-industry-a-freakonomics-quorum/ (Sept. 20, 2007, 14:07) (interview with Koleman Strumpf).

200 *See* RIAA 2007 SHIPPING STATISTICS, *supra* note 189.

should come as no surprise that sales revenues are impacted. However, in this case, the smaller revenue market does not represent a problem, but instead implies that the larger market was inflated due to the lack of choice for customers.[201]

Empirically, the impact of file-sharing on sales is not consensual.[202] Some researchers maintain that file-sharing has a negative effect on music sales,[203] others estimate the effect is negligible at best,[204] and several scholars either observe that file-sharing has a positive influence on sales[205] or that there is a differential effect among groups of artists, with the majority incurring a positive effect.[206] Because the data regarding actual damages from file-sharing on the music industry is speculative, the severe and resource-thirsty measures currently taken to combat file-sharing are questionable at best, as discussed above

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201 *See also* Symposium, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 675 (2003) (arguing that digital technology is not the main factor in the industry's crisis, rather it "has laid bare the flaws of the current system that have been created by a process of accretion.").

202 Oberholzer-Gee & Strumpf, *supra* note 9, at 1 ("[T]he empirical evidence of the effect of file sharing on sales is mixed.").

203 *See* Stan J. Liebowitz, *A Comment on the Oberholzer-Gee and Strumpf Paper on File-Sharing* (Sept. 2007), *available at* http://ssrn.com/abstract=1017418 ("Felix Oberholzer-Gee and Koleman Strumpf, in their recent paper on file-sharing . . . conclu[de] that file-sharing has a benign impact on record sales. In this note I attempt to replicate their additional tests and check their facts. My replication finds results that contradict the claims of Oberholzer-Gee/Strumpf . . . ."); Norbert J. Michel, *The Impact of Digital File Sharing on the Music Industry: An Empirical Analysis*, 6 TOPICS ECON. ANALYSIS & POL'Y 1 (2006), http://www.bepress.com/cgi/viewcontent.cgi?article=1549&context=bejeap ("Using household-level data from the Consumer Expenditure Survey we find support for the claim that file-sharing has decreased sales."); Symposium, *File Sharing: Creative Destruction or Just Plain Destruction?*, J.L. & ECON., Apr. 2006, at 1, 2 ("The industry has blamed this sales decline on the rapid growth of file sharing . . . .").

204 *See, e.g.*, Oberholzer-Gee & Strumpf, *supra* note 174, at 1 (finding that file-sharing had "an effect on [music] sales that is statistically indistinguishable from zero").

205 BIRGITTE ANDERSEN & MARION FRENZ, THE IMPACT OF MUSIC DOWNLOADS AND P2P FILE-SHARING ON THE PURCHASE OF MUSIC: A STUDY FOR INDUSTRY CANADA 3 (2007), http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/IndustryCanadaPaperMay4_2007_en.pdf (finding that "P2P file-sharing tends to increase rather than decrease music purchasing").

206 *See* DAVID BLACKBURN, ON-LINE PIRACY AND RECORDED MUSIC SALES 45–46 (2004), http://www.katallaxi.se/grejer/blackburn/blackburn_fs.pdf (finding that three quarters of artists increased their sales as a result of file-sharing, while the most popular quarter's sales have declined).

in Part III. It strengthens the suspicion that the industry's fight is not centered on increasing revenues.

Even without deciding between the contradicting empirical analyses regarding its impact on sales, file-sharing probably causes the music business more benefit than harm.[207] Exposure to music can facilitate new opportunities and open new markets. The increase of music-related entertainment opportunities such as *Guitar Hero* and *Rock Band*, which license the music from the record companies, may well be the result of wider access to music.[208] Enhanced exposure can increase artists' recognition and facilitate new methods to obtain income as a result of increased fame, such as live performances,[209] licenses, commercial consumption, sponsorship, and advertisements.[210] Recent evidence in England shows that artists' revenues indeed increased simultaneously with the decline of sales-revenues.[211] Eventually, these new markets may even lead to an increase in CD sales, mainly due to the promotional effect of the exposure to a high volume of consumers.[212]

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207 Ku, *supra* note 12, at 311; *see also* Posting of Oscar Swartz to Threat Level, *Entertainment Lawyers Attack Pirate Bay Witness' Qualifications*, http://www.wired.com/threatlevel/2009/02/entertainment-lawyers-attack-pirate-bay-witness-qualifications/ (Feb. 26, 2009, 19:34); *see also* Posting of Enigmax to TorrentFreak, *Pirate Bay Trial Day 9: BitTorrent Is Not Evil*, http://torrentfreak.com/pirate-bay-trial-day-9-bittorrent-is-not-evil-090226/ (Feb. 26, 2009) (describing media professor Roger Wallis's testimony in the Pirate Bay litigation in Sweden).

208 *But see* Jeff Howe, *Why the Music Industry Hates Guitar Hero*, WIRED, Mar. 2009, at 19, 20, *available at* http://www.wired.com/culture/culturereviews/magazine/17-03/st_essay (reporting that some labels had conflicts with these game producers over size of the license fees); Michelle Quinn & Alex Pham, *Music Exec Wants Bigger Cut on Video Games*, CHI. TRIB., Aug. 25, 2008, at C3.

209 CONNOLLY & KRUEGER, *supra* note 22, at 678.

210 *See* Ku, *supra* note 12, at 308 ("[M]usicians can and do earn significant income by means other than selling copies of their works."); *see also* Posting of Patrick Klepek to MTV Multiplayer, *Activision: 'Guitar Hero' A Bigger Money-Maker for Aersomith than any Album*, http://multiplayerblog.mtv.com/2008/09/15/gh-money-for-aerosmith/ (Sept. 15, 2008, 17:42 EST) (explaining how Aerosmith has made more money from *Guitar Hero* than any of its albums).

211 As Music Industry Struggles, Artist Income Grows, http://www.hypebot.com/hypebot/2009/11/as-music-industry-struggles-artist-income-grows.html (Nov. 2009) (posting "the chart that the music industry didn't want you to see").

212 Musicians often hold different views than their labels regarding how sales are affected by the free consumption of music. *See, e.g.*, Janis Ian, *The Internet Debacle: An Alternative View*, JANISIAN.COM, http://www.janisian.com/article-internet_debacle.html (last visited Nov. 10, 2009) ("[E]very time we make a few songs available on my website, sales of all the CDs go up. A lot.").

Even before these long-term effects fully take place, the immediate result of allowing file-sharing may result in a shift to a less expensive distribution scheme that will increase, rather than decrease, the market of revenue. File-sharing offers the music industry an opportunity to allocate the resources now spent on distribution to other channels. The investment in other channels will allow for most of the distribution and promotion to be done more effectively than is even possible today.[213]

The current distribution scheme for music is a combination of central online and offline sales through licensees. In contrast to offline sales, distribution through file-sharing does not endure the large scale costs of CD and DVD burning, wrapping, stamping, shipping, storage and shelf space, wholesale transactions, and stock management.[214] File-sharing will also render redundant the need to estimate the demand in advance and the cost of waste if predictions were exaggerated. CDs may still have a place in the market even after allowing file-sharing to operate freely.[215] However, for most private uses file-sharing may likely replace the more expensive offline mechanism of distribution.[216]

File-sharing is efficient even in comparison to online sales, as all costs associated with maintaining a central server can be eliminated. Instead of a central server that hosts the content and must be robust enough to react to high, parallel demands, file-sharers utilize their own resources for distribution, including content, bandwidth, storage space, and computing power.[217] The network

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213 The music industry examined the use of the peer-to-peer technology only in a modified form that will allow it to maintain the control over the network, and thus did not encompass the entirety of the advantages free file-sharing can provide. *See* Pablo Rodriguez et al., *On the Feasibility of Commercial, Legal P2P Content Distribution*, ACM SIGCOMM COMPUTER COMM. REV. 75, Jan. 2006, *available at* http://www.rodriguezrodriguez.com/papers/CCR.pdf.

214 Elkin-Koren, *supra* note 110, at 21–22 (citation omitted):

> The superiority of peer-to-peer as an efficient distribution method is self evident when compared with the distribution of physical copies of copyrighted works (such as CDs). It involves no cost of storing, packing and distributing copies to vendors. Files are only downloaded by those interested and therefore there is no need to manage any stock and there is no waste.

215 *See* Oberholzer-Gee & Strumpf, *supra* note 174, at 2 (noting that digital files lack features such as physical liner notes or cover art); *see also* Craig Winneker, *Vinyl Gets Another Spin*, WALL. ST. J., Sept. 13, 2008, at W2, *available at* http://online.wsj.com/article/SB122126199207430275.html?mod=hpp_us_inside_today. *But see* Charles Mann, *The Heavenly Jukebox*, ATLANTIC, Sept. 2000, at 39, 40 (predicting an absolute absence of market for the sale of content embedded in physical objects and relocation of all existing content onto the Internet).

216 Taking Mann's proposition to the extreme. *See* Mann, *supra* note 215, at 39, 40.

217 *See* Elkin-Koren, *supra* note 110, at 21; *see also supra* note 143 and accompanying text.

effects of file-sharing render it particularly effective in dealing with a large volume of users. A central system incurs an inverse relationship between the number of users and the system's capabilities as more users share the server's fixed amount of resources. In contrast, in a peer-to-peer system growth in user volume implies a greater selection of files and system resources, as every peer adds its own resources to the pool.[218] Since a peer-to-peer system's capacity is in a direct relationship with demand, it has exponential abilities to grow and increase its speed. As a comparison, iTunes and other online music retailers store the purchased music in a locked format on the users' hard drives in order to avoid the need for users to access the server.[219] Yet, acquiring and downloading music from the iTunes store is done through iTunes' own central server and carries all the vulnerability associated with maintaining such a server.

A related benefit of file-sharing is its enhanced robustness and reliability. In a central system, a failure of a single server can disable the whole network. Peer-to-peer networks, in contrast, replicate data over multiple peers and therefore have no single point of failure.[220] New peer-to-peer technologies such as BitTorrent creatively intensify this idea by simultaneously downloading file segments from multiple hosts, increasing both the robustness and swiftness of the downloading process.[221]

While file-sharing can be more economically efficient than central methods for acquiring music online, as explained above, contracting with a small number of online stores makes perfect sense if the goal is not to make the most profitable deal in terms of revenues, but rather to strengthen the control over access to copyrighted works. The current model, in which online access to music is conducted mainly through a number of main music stores, not only perpetuates the already centralized market, but also engages new, powerful partners in the interest of keeping the market highly centralized. It should come as no surprise that these companies are occasionally accused of using their derived con-

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218 *See* Elkin-Koren, *supra* note 110, at 22 ("A user who wishes to distribute a file on BitTorrent no longer needs a powerful server that can respond to users' requests in a timely manner. Instead, the network takes advantage of the distributed resources of all users who participate in uploading and downloading."); *see also*, Lemley & Reese, *supra* note 75, at 1381–82.

219 *See, e.g.*, Apple Support, http://support.apple.com/kb/HT1660 (last visited Nov. 10, 2009).

220 *See* Elkin-Koren, *supra* note 110, at 21; *see also* Jordan S. Hatcher, *Mesh Networks: A Look at the Legal Future*, J. INTERNET L., Nov. 2007, at 1, 15–16 (exemplifying such a system).

221 Elkin-Koren, *supra* note 110, at 21; *see also* Lemley & Reese, *supra* note 75, at 1382 (explaining how peer-to-peer "networks harness volunteers providing essentially free computing resources.").

trol for their own benefit, as a means to increase their power and to drive competitors out of the market.[222]

It is true that the online stores' model is a notable development compared to an exclusively offline sales model, and that online stores further opened up the market for subsequent, less centralized services as well.[223] However, besides the fact that file-sharing was probably the driving force behind the opening of online stores,[224] the centralized manner in which the music industry entered the online market was not intended to maximize revenues, but rather to strengthen the music industry's hold on the digital distribution market.

Even assuming an honest pessimism among record companies that leaves them unconvinced that merely permitting file-sharing would provide adequate revenues, the record companies could consider a modified version of file-sharing which would allow a direct revenue stream. Various such schemes have already been suggested in academia and by market players that are calculated to achieve an amount of revenue which is at least equal to the alleged losses of the industry.[225]

One set of models, which has been offered by several commentators in different variations, is the imposition of a levy that facilitates digital copying on

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222 Apple has been repetedly accused of defeating RealNetworks' attempts to penetrate the market with its own DRM music by preventing RealNetworks' DRM from working on the Apple iPod®. *How FairPlay Works: Apple's iTunes DRM Dilemma*, ROUGHLYDRAFTED.COM, Feb. 26, 2007, http://www.roughlydrafted.com/RD/RDM.Tech.Q1.07/2A351C60-A4E5-4764-A083-FF8610E66A46.html; Posting of Andy Dornan to InformationWeek's Digital Life Weblog, *Apple's Demand for a State-Sponsored Monopoly Shows that DRM Aims to Stop Competition, Not Piracy*, Mar. 23, 2006, http://www.informationweek.com/blog/main/archives/2006/03/apples_demand_f.html. Currently, Apple blocks the access of other devices to iTunes® in order to achieve advantages over competitors in the cellular market. *See, e.g.*, Jenna Wortham, *Rivalry Between Apple and Palm Intensifies Over Phone's Access to iTunes*, N.Y. TIMES, Aug. 3, 2009, at B6, *available at* http://www.nytimes.com/2009/08/04/technology/companies/04palm.html?_r=1.

223 *See* Michael Arrington, *Confirmed: MySpace to Launch New Music Joint Venture with Big Labels*, TECHCRUNCH, Apr. 2, 2008, http://www.techcrunch.com/2008/04/02/myspace-to-launch-new-music-joint-venture-with-big-labels/ (confirming that settlement between MySpace and Universal Music resulted in a joint venture, MySpace Music, where "[u]sers will be able to stream music on demand, create playlists, and add widget music players to their profiles"); MySpace Music, http://music.myspace.com/ (last visited Oct. 22, 2009).

224 *See* Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1030 (2008).

225 *See also* LAWRENCE LESSIG, *Preface to* REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY xix (2008) ("The last decade is filled with extraordinarily good work by some of the very best scholars in America, mapping and sketching alternatives to the existing system.").

devices and services. Neil Netanel advances a model allowing unrestricted non-commercial file-sharing in return for a levy of approximately four percent of sales on related services and products.[226] Similarly, Raymond Ku supports a levy on internet service and equipment, but only if revenue from analog sources proves insufficient as an incentive for creation and distribution.[227]

An additional proposed scheme includes raising the royalty surcharge under the Audio Home Recording Act (AHRA),[228] and broadening the definition of "digital audio recording device[s]"[229] to include computers and all digital devices that contain hard drives.[230] A modified levy scheme is offered by the Electronic Frontier Foundation (EFF), which basically consists of a voluntary license offered by the copyright owners to allow file-sharing for a low periodical fee.[231]

An additional model, discussed by William W. Fisher, includes slightly increasing the federal income tax.[232] Apparently, in order to collect the amount necessary to run the entertainment industry through taxes, each household would only pay an additional twenty-seven dollars per year.[233] As either an alternative or as a precursor to the tax system, Fisher suggests that copyright holders form an "Entertainment Coop," a nonprofit organization responsible for the licensing of works for unrestricted use by individuals that are coop members and pay a monthly rate.[234] Lawrence Lessig supports such a solution as well, arguing for application of a tax in the meantime until permanent licensed music streaming replaces the current distribution scheme.[235] In keeping with Lessig's

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226 Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 4 (2003).

227 Ku, *supra* note 12, at 313 (indicating a two percent levy could yield approximately $1.3 billion annually).

228 The Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237, 4240–42 (1992) (codified at 17 U.S.C. §§ 1001–1010 (2006)) imposes a three percent levy on the sales of blank digital audiotapes and a two percent levy on the sale of digital audiotape equipment. 17 U.S.C. § 1004.

229 *See* 17 U.S.C. § 1001(3) (defining digital audio recording devices).

230 Mary Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution Is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 304–05 (2006).

231 ELECTRONIC FRONTIER FOUNDATION, A BETTER WAY FORWARD: VOLUNTARY COLLECTIVE LICENSING OF MUSIC FILE SHARING 1 (2004), http://www.eff.org/share/collective_lic_wp.pdf.

232 FISHER III, *supra* note 169, at 199–258.

233 *Id.* at 216.

234 *Id.* at 245–46.

235 LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 301 (2004).

approach, Daniel Gervais suggests, based on a 2004 Canadian court decision,[236] applying existing collective licensing to the peer-to-peer context.[237]

Yet another model, which was offered to allow file-sharing, includes providing a free or low fee service that shares advertisement revenues. Such cooperative models have begun to emerge in the marketplace as well. Typically, these models are based on license agreements between copyright owners and technology providers that include profit-sharing scheme networks that share proceeds from the sale of advertising space with the copyright owners;[238] or through collection of low fees for downloads and compensation of both copyright holders and users who upload music.[239]

Beyond valid criticism of each of these models,[240] their novelty is the abandoning of the pay-per-use scheme in favor of a more feasible collection system. In addition to providing the required revenue stream, these models include additional potential benefits. First, they all allow for direct access to consumer preference information, reflected in their real-time consumption, as opposed to the current model that is based on deducing future preferences from past preferences.[241] Such information can direct the industry more precisely.

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236 BMG Canada Inc. v. Doe, [2004] F.C. 488 (Can.).

237 Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 55–70 (2004).

238 *See* Robert Levine, *New Model for Sharing: Free Music with Ads*, N.Y. TIMES, Apr. 23, 2007, at C5, *available at* http://www.nytimes.com/2007/04/23/technology/23qtrax.html:

> Several start-up companies are pursuing the idea of advertising-supported music, including SpiralFrog and Ruckus, which caters to college students. . . .
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> . . . .
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> Advertising revenue would be used to compensate the music labels that make their songs available, just as television commercials fund the production of shows. And though labels have been reluctant to legitimize the idea of free music, they are also extremely eager to find new business models.

239 *See* Grooveshark Help, http://www.grooveshark.com/help ("Groovershark's goal is to compensate everyone in the value chain—from users to rights' [sic] holders.") (last visited Nov. 10, 2009); About Altnet, http://www.altnet.com/about/about.aspx (last visited Nov. 10, 2009) ("For just $19.98/mo, you can download unlimited music files, and play those files on up to 3 PCs that you own. . . . The files will remain playable while your subscription is active—once your subscription ends, you will no longer be able to play those files.").

240 *See, e.g.*, Christian L. Castle & Amy E. Mitchell, *What's Wrong With ISP Music Licensing?*, ENT. & SPORTS LAW., Fall 2008, at 4, 4; McDaniel, *supra* note 2, at 310–11; Salil K. Mehra, *The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan*, 79 U. COLO. L. REV. 421, 425 (2008) (illustrating the difficulty of implementing a levy system in the real world given the possibility of regulatory failure).

241 Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345, 389 ("Predicting whether a given work will succeed or fail has proven nearly im-

Second, the models provide a platform for creating and distributing more music thus increasing revenue potential. Instead, in today's model, limited distribution resources prevent record companies from investing in all types of diverse music.[242] Such new models enable a market of revenue and also allow unrestricted access to existing works, perhaps solving the incentive-access paradigm at last.

Nevertheless, the common denominator of the above-discussed models is abandoning the idea that every song is a tollbooth.[243] They therefore shift the control over the works from the copyright holder to the general public at the moment it arrives in the public sphere.

This explains the RIAA's unwelcoming response to all of these proposals. The RIAA insists on not only receiving revenue for dissemination but also on maintaining control over the methods of distribution. The RIAA explains that *any* voluntary license creates a problem of free riding and thus is unfair, and that *any* compulsory license would involve the government in setting the price for music, thus being unacceptable.[244]

Other copyright owners have reacted differently. Many private artists and marginal distributors—who did not hold a dominant position in the market in the first place—often contentedly accepted the leeway opened by the file-sharing options, claiming that it opened broad opportunities for recognition, penetration into the market, and making profits.[245]

The agency problem prevents the expression of an efficient state of affairs and prevents bilateral profitable bargaining in the file-sharing context. The industry, which purportedly fights for the interests of the artists, in fact holds them as hostages in its own battle for control. Indeed, the artists have long ago given up all control over their works and transferred it to the record companies, retaining only limited rights for revenues alone.

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possible for most industries. Despite the efforts of talent scouts (such as artist and repertoire, or 'A&R,' specialists), record labels have not been able accurately to predict what music will prove popular.").

242 See in this context CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006).

243 *See* Benkler, *supra* note 120, at 422.

244 Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 35 (2004).

245 *See Josh Kelly Biography*, LETSSINGIT, July 7, 2006, http://artists.letssingit.com/josh-kelley-42nf1/biography ("[Napster] helped me on this first album because nobody knew about it. It made it easier for people to know about the music."); Courtney Love, Remarks at the Digital Hollywood Online Entertainment Conference (May 16, 2000) [hereinafter Love Remarks], http://www.salon.com/technology/feature/2000/06/14/love/print.html. Note, however, that some artists reacted differently. Metallica, for example, successfully sued Napster independently for injunctive relief. *See* Metallica v. Napster, Inc., Nos. C 00-4068 MHP, MDL C 00-1369 MHP, C 00-3997 MHP, 2001 WL 777005, at *1 (N.D. Cal. Mar 05, 2001).

The industry's claims that revenues depend on control topple like a house of cards in the face of the wealth of options available to economically exploit the file-sharing uncontrolled market. The question that remains, therefore, is whether it is justified to provide the industry with the keys to the market of control.

V. FILE-SHARING AND THE MARKET OF CONTROL

Opposed to the potential positive effect of file-sharing on the market of revenue, its effect on the market of control is indeed patently destructive,[246] an effect which is likely to increase if file-sharing becomes completely embraced and legitimate.

The essence of file-sharing is spreading out dissemination to a point where no central moderator is needed.[247] This concept is radical from the record companies' point of view, because control of dissemination mechanisms is a key to controlling additional primary functions. For example, control of dissemination effectuates decision-making power regarding content. In the current reality, which is already substantially eroded de facto by file-sharing, the power to determine what, and whose, music will be recorded, released, distributed, and promoted resides solely with the labels.[248] The artist is contractually obliged to accept the labels' decision-making power,[249] and the public is a passive recipient of the material resulting from that power. The more decentralized the dissemination power becomes, the more decentralized that decision-making power will derivatively become as well. This will result in materials being released regardless of the labels' decisions, distributed independently, and motivated by the audience's alternative decision-making power.[250]

Similarly, the selection of the time and manner of releasing new music is undoubtedly impacted as well. Recently, an RIAA investigation led to a lawsuit by the government against a person who uploaded songs from a Guns N' Roses album to the Internet before the album was officially released.[251] The

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246 *See generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–86 (5th ed. 1976).

247 *See, e.g.*, Elkin-Koren, *supra* note 110, at 23 (emphasizing the "decentralized architecture, lacking central control mechanisms" of peer-to-peer networks).

248 *See* 17 U.S.C. §§ 114, 115 (2006); *see also supra* text accompanying note 29.

249 *See* Hall Jr., *supra* note 15, at 190; *supra* text accompanying note 15.

250 *See, e.g.*, Morgan, *supra* note 35.

251 *See* Gov't's Position re Presentence Report and Sentencing for Def. at 1, 3, U.S. v. Cogill, CR No. 08-1222-PLA (C.D. Cal. Mar. 10, 2009), *available at* http://www.wired.com/images_blogs/threatlevel/files/cogill.pdf; Letter from L. Carlos Li-

RIAA, which took seventeen years to complete the album, claimed a $2.2 million loss based on arguably 350,000 downloads of the songs, multiplied by the $6.39 "wholesale legitimate price."[252] In fact, the album reached third place in the charts anyway,[253] thus showing that apparently the early release did not result in a severe harm in the market of revenue. Nevertheless, the RIAA firmly opposes penetration into its control territory by an unauthorized entity.

In addition, the recording industry currently holds, at least theoretically, the control over the supply of musical works in the market. This control is destined to dissolve as well as supply becomes a direct function of demand in a file-sharing system.[254]

Prices of musical works will also be affected, since the labels will, indeed, need to compete in a free market of distribution. The recording industry will need to offer incentives to customers, such as additional features in their products, to motivate them to purchase, as opposed to freely consume, the music. Currently, instead of adjusting its prices or features to this reality, the RIAA is endorsing CD purchases by attempting to convince consumers that CD prices are in fact reasonable.[255]

Hence, the suppression of competing dissemination technologies serves the interests of the record companies well in the market of control and fortifies their grip on it. In their controlled file-sharing-free market, no one can independently participate in the determination of the availability of music, and it is far harder to distribute even one's own self-created music without going through the industry's selection and contracting mechanism. File-sharing, even in its current unaccepted form, effectually changes this state of affairs and, as aforesaid, threatens to shake the market of control.

The consequences of the collapse of the market of control appear to primarily affect two levels: the artist-label relationship and the public-music

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nares Jr., Attorney for RIAA, to Craig H. Missakian, Assistant United States Attorney (Mar. 10, 2009), *in* Decl. of Craig H. Missakian at 4–6, U.S. v. Cogill, CR No. 08-1222-PLA (C.D. Cal. Mar. 10, 2009), http://www.wired.com/images_blogs/threatlevel/files/linares.pdf [hereinafter Linares Letter].

252 The federal prosecution of Los Angeles argues in this case for a compensation of $371,622, in addition to a six months imprisonment. Linares Letter, *supra* note 251.

253 Posting of David Kravets to Threat Level, *Feds Demand Prison for Guns N' Roses Uploader*, http://blog.wired.com/27bstroke6/2009/03/feds-demand-6-m.html (Mar. 13, 2009, 16:37).

254 *See* Elkin-Koren, *supra* note 110, at 21; *supra* text accompanying note 214.

255 COMMC'NS & STRATEGIC ANALYSIS DEP'T OF THE RIAA, THE CD: A BETTER VALUE THAN EVER 2–3 (2007), http://76.74.24.142/F3A24BF9-9711-7F8A-F1D3-1100C49D8418.pdf (last visited Nov. 10, 2009) ("[W]hen adjusted for inflation, CDs are less expensive today than ever before.").

relationship. On both levels, file-sharing will probably move the labels down in the power scale to a stance in which they will resemble a service-providing company rather than the ultimate representative of the music industry and leader of the copyright agenda as a whole.

On the artist-label level, the opening of alternatives to the traditional distribution scheme can drastically transform the power balance in the industry. The labels' controlling status towards artists mainly stems from the inability of the latter to directly connect with their audience and to turn their music into a means for sustaining their living.[256] File-sharing is part of a line of already emerging technologies that open a direct communication lane and therefore potentially diminish the control of the labels.[257]

The most straightforward effect of the opening of alternatives would be utilizing them. Thus, artists would be able to produce and distribute their music on their own,[258] perhaps outsourcing some functions for either flat rates or revenue-sharing.[259] Artists would then have the ability to choose whether they prefer the larger service pack offered by the record labels[260] or a more limited one offered by service companies, and they may well choose the latter to achieve a larger piece of the royalty pie.

An indirect potential effect of opening alternative distribution schemes would be compelling the labels to offer competitive contracts to artists, in terms of both revenue-sharing and control over their works. Apparently, artist-label standard contracts can benefit from rebalancing. For years artists have tried to

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256 *See, e.g.*, Love Remarks, *supra* note 245.

257 Other examples include sites and technologies that allow artists to create their own distribution means and maintain their royalties. *See* YouLicense, http://www.youlicense.com/ (last visited Nov. 10, 2009); TuneCore, http://www.tunecore.com/ (last visited Nov. 10, 2009) [hereinafter TuneCore]; *see also* Nate Anderson, *Bands Pressing Major Labels for Control over Copyright, More*, ARS TECHNICA, Oct. 6, 2008, http://arstechnica.com/old/content/2008/10/bands-pressing-major-labels-for-control-over-copyright-more.ars.

258 *See* Van Houweling, *supra* note 50, at 103.

259 *See* Stephen Manes, Columnist, P.C. World & Forbes, Surfing and Stealing: An Author's Perspective, Lecture at the Columbia University School of Law 1999 Horace S. Manges Lecture (Mar. 2, 1999), *in* 23 COLUM.-VLA J.L. & ARTS 127, 132 (1999) (hypothesizing such a shift regarding book authors); *see also* TuneCore, *supra* note 257 (showing a startup company which provides such service).

260 The recent shift to 360 deals will supposedly further widens the service pack offered by the labels. *See supra* note 27 and accompanying text.

change their contracts to no avail,[261] due to the imbalance in bargaining power between record companies and artists.[262] The current shift to 360 deals[263] has also not changed the basic patterns of these contracts, namely that the label owns the copyright in the work in return for services and the artist remains with a modest share of revenues.[264] This shift merely expanded the services provided by the labels and the sources of revenues that the label is entitled to from the artist's music.[265]

Traditionally, and to this very day, recording contracts simultaneously enable the labels to make a considerable profit off an album, yet leave the artist indebted to the label for the same album for quite awhile.[266] The artists' share of the revenue pie is normally eight to twenty-five percent of the suggested retail list price of an album in the United States.[267] Regarding sales abroad, some recording contracts provide that such sales do not entitle artists to royalties at all.[268] The label regularly pays artists recoupable advances, and invests returna-

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261 *See Sound Recordings Hearing*, *supra* note 16 ("Although the recording industry has changed considerably since the 1960s, the contracts signed between record companies and performers appear to have changed very little.").

262 William Henslee, *Marybeth Peters Is Almost Right: An Alternative to Her Proposals to Reform the Compulsory License Scheme for Music*, 48 WASHBURN L.J. 107, 118 (2008).

263 *See supra* note 27 and accompanying text.

264 *See* discussion *supra* Part II.

265 *Id.*

266 *See* Ku, *supra* note 12, at 307; Marshall Brain, *How Recording Contracts Work*, HOWSTUFFWORKS, http://entertainment.howstuffworks.com/recording-contract2.htm (last visited Nov. 10, 2009).

267 Buche & Associates, P.C., http://www.westerniplaw.com/music.html (last visited Nov. 10, 2009).

268 *See* Scamman, *supra* note 17, at 278 ("Some of these clauses may include no royalties for foreign sales, no punitive damages, costs, or termination of contract, auditing, and copyright ownership of recorded material."); *see also* Hall Jr., *supra* note 15, at 207 (citations omitted):

> The use of the label's superior bargaining power to force outrageously unfair terms upon the artist is quite possibly no more evident than in the clause dealing with royalties for foreign sales. According to the industry standard contract, the label will not pay the artist royalties on albums sold outside the United States (U.S.), if the label receives payment for those sales in non-U.S. currency. Under this clause, the label will pay royalties for those foreign sales (in the foreign currency) only if the artist requests that the label do so in writing, and the artist provides the label with a foreign bank account to deposit the royalties in at the artist's expense. The label will of course calculate the currency difference so the payments will reflect the royalties that would have been paid if those sales had been made in U.S currency.

ble or recoupable sums in promotion, distribution, and other services.[269] Artists begin earning royalties only after these sums are fully returned to the label.[270] The striking data is that, as of 2002, an "estimated 99.6[%] of artists [remained] indebted to their labels."[271]

Even if an artist pays off her debts,[272] her modest share in the revenue pie is still vulnerable to manipulations. For example, at least twenty-five percent of royalties are regularly retained in a "reserve account"; royalties are discounted by up to fifteen percent to cover the risk of breakage during shipping, by up to twenty-five percent to cover the cost of packaging, and by approximately fifteen percent for records freely distributed at the label's discretion. Absurdly, technological developments had the effect of increasing these fees although the price of conducting the service was reduced in pure economical terms.[273]

Transforming the power balance can also increase the transparency in distribution of royalties to artists. The accounting system utilized by the labels is unconventional, to put it mildly.[274] The key according to which royalties are distributed among artists is often in the exclusive possession of the labels, and

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269 *See* Scamman, *supra* note 17, at 274–75 (explaining that the sums are recoupable and not returnable if they only need to be paid out of the records' proceeds and do not need to be returned in the absence of such proceeds).

270 Record contracts usually include stipulations stating that the label does "'not have to pay the artist any royalties . . . until the label has recovered, through a recoupment from the artist's royalties, its out-of-pocket production costs and advances.'" *Id*. at 274 (quoting DAVID BASKERVILLE, MUSIC BUSINESS HANDBOOK 4 (Sherwood Publishing Partners 2001)).

271 Hall Jr., *supra* note 15, at 190; *see also* David Segal, *Aspiring Rock Stars Find Major-Label Deals—and Debts*, WASH. POST, May 13, 1995, at A1 (same); Love Remarks, *supra* note 245 (discussing how musicians end up in debt to major record labels).

272 As of 2002, "an estimated 75[%] of releases from the major labels [were] not even in print, leaving artists with a debt they have no means of paying back." Hall Jr., *supra* note 15, at 190–91.

273 "Even in today's digital world, in which the cost of digital distribution is nonexistent, some record labels have demanded that artists surrender even larger portions of their royalties for the cost of encoding the song to digital format, encryption, and digital delivery." Ku, *supra* note 12, at 307.

274 "[I]n 99.99[%] of the audits [of a record label's accounting for an album], the labels are found to have underpaid the artist . . . ." Neil Strauss, *Behind the Grammys, Revolt in the Industry*, N.Y. TIMES, Feb. 24, 2002, § 4, at 3 (quoting Dixie Chicks' manager, Simon Renshaw); *see also* Too Much Joy's Absurd WMG Royalty Statement, http://www.hypebot.com/hypebot/2009/12/too-much-joys-sad-royalty-statement-from-wmg.html (last viewed Dec. 29, 2009).

the artists' power to object to the figures is often impractical.[275] Transparency in this field can further empower artists and provide them with a larger share of the market of revenue as a result of decentralizing the market of control.

The current contracts have been uneven to the extent that multi-platinum selling bands have chosen to disband rather than ever record again under their contracts;[276] and successful artists were filing for bankruptcy in order to release themselves from their recording contracts.[277] This represents a social loss, and an irony: adverse contractual terms actually hindered the incentive to create what copyright sought to enhance, and with it harmed the progress of science and useful arts.

Nonetheless, the one thing that seems to trouble artists the most is the loss of the creative control in their work[278] and the need to surrender their artistic expression to their labels.[279] Yet, until recently, the imbalanced bargaining power and the absence of alternatives rendered any change unrealistic. If file-sharing technology can bring upon such change, it may increase the welfare and creativity of artists to the benefit of all.

The "take it or leave it" nature of recording contracts and the essentially identical conditions provided by each of the big companies enhance the unfairness of the contracts. Moreover, courts have not had an opportunity to hear challenges to these contracts. Artists are unlikely to sue, risking both financial resources and the future of their career, and when they threaten to sue, the labels either settle the suits or renegotiate the contracts.[280]

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275 The contracts allow the artists a one- or two-year period to object to the accounting figures, after which they become final; and although the contracts allow for artists to audit the label's books, the costs involved in this process renders it impractical for many artists. Scamman, *supra* note 17, at 277–78.

276 Hall Jr., *supra* note 15, at 191.

277 Jennifer A. Brewer, Note, *Bankruptcy & Entertainment Law: The Controversial Rejection of Recording Contracts*, 11 AM. BANKR. INST. L. REV. 581, 582 (2003). In the past, the RIAA lobbied aggressively to amend the bankruptcy law in order to bring to a halt the bankruptcy escape route. At their behest, a bill that excluded "recording artists" from the ability to void burdensome contracts when in bankruptcy, at the courts' discretion, was tucked into a 177-page bill by Florida Republican Rep. Bill McCollum. Katharine Q. Seelye, *Bankruptcies by Musicians Inspire a Bill*, N.Y. TIMES, May 15, 1998, at A18.

278 *See* Scamman, *supra* note 17, at 274–75 and accompanying text.

279 RadioHead's explanation of the circumstances leading to leaving their record company was based exactly on this point: "what [sic] we WANTED WAS [sic] some control over OUR WOrK [sic] and how it was used in the future . . . ." Posting of Thom to Dead Air Space, *FYI: If you Care*, http://www.radiohead.com/deadairspace/index.php?a=324 (Dec. 29, 2007).

280 Hall Jr., *supra* note 15, at 191.

The justification for providing copyright owners with control is, in essence, to provide them with an incentive to create.[281] The justification critically erodes as control wanders away from artists and moves to the label as explained above.[282] As stated by Jessica Litman, the recording industry provides perhaps the best demonstration that artists create even when money is not forthcoming.[283] If the ideas of providing incentives to create and adequately compensating artists are to be taken seriously, empowering artists and changing the power balance between them and their record companies appears to be an appealing scenario.

Nor is the industry's control a desired state of affairs in the public-music relationship. Opposed to the controlled nature of music, file-sharing creates both alternative markets for music and a market for alternative music. Our culture is built upon the delicate tension between sharing the same cultural components on the one hand and diversifying the content on the other. A decentralized structure enhances them both.

With respect to the first aspect, file-sharing has the power to significantly increase the access to music for the benefit of society,[284] because access stands in a reverse relationship with prices. For a long period of time, not only was this point demonstrably missing from the debate, but was also explicitly denied by some judges and scholars. Justice Blackmun, for example, noted in the *Sony* case, "[w]hen the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser."[285] This view is also reflected in the *Napster* and *Aimster* decisions.[286] Such a view attributes no societal value to the exploitation of copyrighted works, and accordingly, tends to entitle copyright owners to high levels of control over their works. Similarly, the industry does not at all internalize the social costs of limited access to music, nor the positive externalities that are created by such access. On the contrary, every free consumption is, in its view, a loss.[287]

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281 *See* Wagner, *supra* note 165, at 1018 ("As a general matter, greater control should yield greater incentives, and thus greater production of works.").

282 *See supra* notes 15–21 and accompanying text.

283 *See* Litman, *supra* note 244, at 31.

284 Jonathan J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?*, 6 NW. J. TECH. & INTELL. PROP. 1, 42 (2007).

285 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting).

286 *See In re* Aimster Copyright Litig., 334 F.3d 643, 653 (7th Cir. 2003); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).

287 *See* U.S. CONGRESS REPORT, *supra* note 194, at 9.

In fact, access to music carries tremendous importance from a societal point of view, as it implies access to language as well as to a variety of educational, cultural, and societal content.[288] The dependency of consumption on central and often costly resources stemming from the industry's control entails social costs resulting from the exclusion of certain groups, typically those who cannot afford to purchase the music, from this collective. An affordable distribution service enables the free exchange of culture and ideas regardless of economic status,[289] and thus increases the ability to take part in the cultural discourse, which is in the interest of society and of the individuals who are part of it.[290]

With respect to the second aspect, removing centralized control can promote the creation of alternative and diverse music, stemming from the fact that control over dissemination effectuates control over content.[291] A centralized dissemination model subjugates the availability of music to the business interests of the record industry, which favors mainstream music because it will most likely return the investment.[292] The mainstream preference may be detrimental to most artists and the public at large; and due to the unavoidable effect of influencing audiences' preferences, it creates a cycle that sustains itself and further strengthens the grasp of the industry's control. In contrast, in a decentralized model availability will reflect preferences of consumers and not the commercial interests of the industry.

Along the same lines, while new or marginal artists represent a source of risk for the record companies, they represent creativity and wider selection opportunities for society.[293] Reducing the industry's control can therefore bring marginal work, including works that were marginalized as a result of inferior treatment and works which are already out of the market, to the front of the stage.

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288 PLATO, 1 THE REPUBLIC OF PLATO 401 (Benjamin Jowett trans., Clarendon Press 3d ed. 1908) (discussing the importance of music to the individual).

289 Symposium, *Creating Culture: Protection of Traditional Cultural Expressions and Folklore and the Impact on Creation and Innovation in the Marketplace of Ideas*, 35 SYRACUSE J. INT'L L. & COM. 369, 398 (2008).

290 Symposium, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 558 (2000) ("[F]ree information flows are central to freedom—both in the sense of personal autonomy, and in the sense of political or democratic self-governance.").

291 *See supra* text accompanying notes 248–250.

292 *See* Elkin-Koren, *supra* note 110, at 23.

293 *Id.*

A related and extremely interesting effect of a decentralized model is the reshaping of the classic dichotomy between producers and consumers of music. The shift to a decentralized model enhances the ability to create authentic music and bring it to recognition without contracting with industry players who pressure artists towards the mainstream taste. Turning individuals from passive consumers into active participants in shaping the new generations of music through selection, creation, or distribution[294] engages individuals in the public sphere, thus enhancing the democratic nature of society.[295] Paradoxically, it is the phenomenon of mass user-created content through file-sharing and other technologies that is under attack by the RIAA as threatening creativity.

The existence of an agency problem prevents an efficient state of affairs from which all relevant parties could benefit. The record labels' control is not only unjustified on a constitutional basis,[296] but it is also to the detriment of both artists and society who are trapped in an agency problem that forces the recording industry upon them as representatives and as mediators.

Interestingly, the industry is resisting a process it created with its own hands for artists half a century ago. It compelled them to surrender control over their works and be satisfied with the market of revenue alone. Today, reality and technology have led record companies down the path they delineated for artists—release control and let revenues suffice. Their resistance is apparent, but the structure they created for the music industry provides the best demonstration that the Gordian knot between the market of control and the market of revenue was, in fact, already untied.

VI. CONCLUSION

With an eye towards the future, the interesting question that arises from the above analysis is where will this process head from here? One prediction for the near future is a collapse of the RIAA, mainly due to the challenges posed

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294 Today's inexpensive technology has created a wave of altruism, individuals who upload materials for no expectation of profit, to contribute their share to the system's functioning. *See* Idit Keidar et al., *EquiCast: Scalable Multicast with Selfish Users, Address at the ACM Symposium on Principles of Distributed Computing (July 23–26, 2006), in* PROCEEDINGS OF THE 25TH ANNUAL ACM SYMPOSIUM ON PRINCIPALS OF DISTRIBUTED COMPUTING 63, 63 (ACM 2006).

295 *See* Benkler, *supra* note 173, at 358; *see also* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 339 (1996).

296 Oberholzer-Gee & Strumpf, *supra* note 9, at 3 ("Weaker copyright is unambiguously desirable if it does not lessen the incentives of artists and entertainment companies to produce new works.").

by digital technology. The future may perhaps lead to the RIAA's merging into the global IFPI organization. The mass lay-offs in the RIAA in February 2009 may support such a forecast.[297]

An additional possibility is a gradual understanding by the RIAA that the age of control has passed, resulting in a gradual surrendering of control. The contracts with powerful companies that operate online stores indicate a willingness to divide the control pie, which can support this view. The abandonment of DRM in a number of frameworks may signal an additional step further in this direction. Rumors about a covert scheme to apply a levy system on file-sharing have been around for a while,[298] and may contribute to the strength of such a theory.

Yet, not all are optimistic regarding the readiness of the recording industry to surrender the keys to the market of control. "Pessimists" point to the new agenda topic of contracting with ISPs, all-inclusive recording contracts with artists and widening campaigns, as well as to the additional measures discussed above which are still employed by the industry. The prediction stemming from these measures is an even stronger attempt to apply censorship and tracking of file-sharing services and users.

Only the future will tell what path the industry will follow. As it currently appears, beyond its advantages file-sharing is clearly here to stay, at least until a newer technology emerges to take its place. The industry must ultimately choose between remaining a relevant—though probably weaker—player in the swiftly changing market, or standing its ground in the fight over control, a fight in which history has shown that useful technology tends to emerge as the victor.

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297 *See, e.g.*, Posting of David Kravets to Threat Level, *Report: RIAA Undergoing Massive Layoffs*, http://blog.wired.com/27bstroke6/2009/02/riaa-undergoing.html (Feb. 27, 2009, 16:49).

298 *See, e.g.*, Frank Rose, *Music Industry Proposes a Piracy Surcharge on ISPs*, WIRED, Mar. 13, 2008, http://www.wired.com/entertainment/music/news/2008/03/music_levy.