Science and Technology Law Review

Volume 13

2010

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I. INTRODUCTION

The law and business of media distribution in the United States developed in a world in which media was distributed using technologies controlled by a value chain of rights holders and distributors. Advances in digital distribution technologies and widespread use of the Internet have moved media distribution technology directly into the hands of consumers or creative members of the general public. This sea of change calls for an examination of how U.S. copyright law applies to new business models that take advantage of these technologies. One proposal, which has garnered a significant amount of attention in the United States, is collective rights licensing at the Internet Service Provider (ISP) level.[1] In short, the proposal is that a fee for the use and sharing of media accessed on the Internet should be applied at the point of access: the ISP.[2]

Since the early days of media distribution on the Internet, a wide variety of individuals and industry groups have suggested collective compensation schemes to compensate rights holders for content accessed on the Internet. The Electronic Frontier Foundation (EFF) has been a proponent of this concepts since as early as 2003.[3] Groups such as Choruss are currently attempt-

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

2. *Id.*

3. Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUNDATION, Apr. 30, 2008, *available at* http://www.eff.org/files/eff-a-better-way-forward.pdf.

ing to get the idea off the ground by working with U.S. universities to build a small music-royalty fee into tuition payments in order to legalize music swapping through file sharing.[4] The idea is beginning to gain traction in the recording industry with Warner Music Group leading the way and EMI Music and Universal Music Group also expressing interest.

While there have been many proposals for collective-rights licensing schemes, most proposals fall into two camps: a new legislatively introduced public right,[5] or a privately implemented opt-in arrangement.[6] Under the former, the government-mandated public right is collected as a payment on a user's ISP or mobile-phone bill and distributed through a third party organization to rights holders.[7] Under the latter, rights holders would sign a covenant not to sue any user who opts-in to pay licensing fees for content accessed by that user.[8]

II. CURRENT U.S. LAW AND PRACTICE

Article I, Section 8, Clause 8 of the U.S. Constitution, also known as the Intellectual Property Clause, is the basis for U.S. copyright law.[9] This provision gives Congress the power to grant creators of original works exclusive rights in relation to their works over a limited period of time.[10] In the *Federalist Papers*, James Madison wrote of the Congress's copyright authority that "the utility of this power will scarcely be questioned."[11] U.S. copyright law seeks to incentivize artists, authors, musicians, artisans, and other creators through this limited monopoly.[12] The Copyright Act of 1976, Title 17 of the U.S. Code, is the current federal statute governing U.S. copyright law.[13] This provision of the Code protects original works of authorship fixed in tangible mediums of expression. It affords copyright owners a distinctive bundle of rights to control, and the copyright owners may financially benefit from the

4. Eliot Van Buskirk, *Three Major Record Labels Join the 'Choruss,'* WIRED, Dec. 8, 2008, *available at* http://www.wired.com/epicenter/2008/12/warner-music-gr/.

5. Rose, *supra* note 1.

6. von Lohmann, *supra* note 3.

7. Rose, *supra* note 1.

8. von Lohmann, *supra* note 3.

9. U.S. CONST. art. I, § 8, cl. 8 (empowering 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*") (emphasis added).

10. Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1569 (1963).

11. THE FEDERALIST NO. 43 (James Madison).

12. Gorman, *supra* note 10, at 1569.

13. Copyright Act, 17 U.S.C. § 102 (2009).

exploitation of their works.[14] In particular, Section 106 of the Code imparts on all copyright proprietors the exclusive right to reproduce and adapt their works. In the case of literary, musical, dramatic and choreographic works, pantomimes and motion pictures, and other audiovisual works, the owners have the right to perform and display their works. And in the case of sound recordings, they retain the right to perform their works publicly by means of a digital audio transmission.[15] When Internet users stream, download, upload, and otherwise share copyrighted content over the Internet without permission from the rights holders, they are reproducing, displaying, and publicly performing others' works.[16] Under Section 501 of the Copyright Act, this constitutes copyright infringement.[17]

Millions of users have seized the opportunities that digital technology provides to obtain and share creative works without permission. On the Internet, sharing copyrighted material that has not been paid for has become a mainstream pursuit. The vast majority—90% or more—of peer-to-peer (P2P) file transfers are in violation of copyright laws and threaten the viability of U.S. businesses that depend on copyright protection.[18] The collateral damage from digital piracy includes: (1) a dramatic reduction in sales for record and motion picture companies that many believe is the direct result of file sharing,[19] (2) the suppression of overall economic growth,[20] (3) the thwarting of innovation,[21] and (4) an onslaught of litigation.[22] For example, the movie *The Dark Knight* was reportedly illegally downloaded more than seven million times within a couple of months of its release, despite Warner

14. *See, e.g., id.* at §§ 102, 106.

15. *Id.* at § 106.

16. *See* 17 U.S.C. § 501 (2009).

17. *Id.*

18. RICHARD COTTON & MARGARET L. TOBEY, NBC UNIVERSAL, COMMENTS OF NBC UNIVERSAL INC., IN THE MATTER OF BROADBAND INDUSTRY PRACTICES 2 (FCC June 15, 2007), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=6519528962.

19. Stephen E. Siwek, *The True Cost of Motion Picture Piracy to the U.S. Economy*, INSTITUTE FOR POLICY INNOVATION, IPI Policy Report 186, i (Sep. 9, 2006), *available at* http://www.ipi.org/IPI%5CIPIPublications.nsf/PublicationLookupFullTextPDF/293C69E7D5055FA4862571F800168459/$File/CostOfPiracy.pdf?OpenElement.

20. *Id.* at 4.

21. Tad Crawford, *Publishing in the Age of Digital Piracy*, AIGA, Mar. 23, 2010, *available at* http://www.aiga.org/content.cfm/publishing-in-the-age-of-digital-piracy.

22. *The RIAA Responds: "Our Efforts Have Made a Real Difference . . . ,"* DIGITAL MUSIC NEWS, Aug. 01, 2010, *available at* http://www.digitalmusicnews.com/stories/080110riaa.

Brothers' aggressive anti-piracy campaign.[23] While it is debatable that recent losses in the entertainment industry are the result of file sharing alone, there is no doubt that those losses have caused significant harm to the overall U.S. economy. American industries that rely heavily on copyright protection to generate revenue are among the most important growth-drivers of the U.S. economy, contributing nearly 40% of the growth achieved by all U.S. private industry and nearly 60% of the growth of the total U.S. exportable products.[24] It has been reported that roughly 40% of the U.S. gross domestic product is affected by the inadequate protection of intellectual property, and U.S. losses widely attributed to piracy are staggering.[25]

Documenting the scope and scale of the infringement taking place on the Internet and seeking legal recourse against culpable individuals have proven to be overwhelmingly costly and time consuming.[26] For example, the Recording Industry Association of America (RIAA) has sued more than 30,000 individuals in the past five years.[27] But most of these cases have resulted in settlements, and this strategy has done very little to stem the tide of uncompensated use of copyrighted works on the Internet.[28] Furthermore, efforts to pursue infringers have not only led to a backlash of consumer criticism, but the RIAA has yet to make a significant dent in the amount of piracy.[29] In the digital era, the ubiquity and worldwide scope of electronic distribution networks, the ease and speed of technologically assisted reproduction, and the overall financial stakes involved have increased both the complexity of and necessity for effective management of copyrights in sound recordings and other forms of intellectual property.

III. A Government-Mandated Public Right

As a possible solution to the problems associated with digital piracy, a wide range of proponents have begun espousing government-mandated col-

23. Brian Stelter & Brad Stone, *Digital Pirates Winning Battle with Major Hollywood Studios*, N.Y. Times, Feb. 4, 2009, *available at* http://www.nytimes.com/2009/02/05/business/media/05piracy.html.

24. Siwek, *supra* note 19, at 1.

25. Press Release, Recording Industry Association of America, RIAA Comments on U.S. Trade Rep's Special 301 Report Highlighting Piracy Issues in Key International Markets (Apr. 5, 2008), *available at* http://www.riaa.com/newsitem.php?news_month_filter=4&news_year_filter=2008&resultpage=&id=A00DE818-FFE8-0579-F4CA-9D5ACBBE143B.

26. *See, e.g.*, David Kravets, *RIAA Thomas Appeal Denied; Retrial Likely to Set New Copyright Infringement Course*, Wired (Dec. 28, 2008, 22:36 EST), *available at* http://www.wired.com/threatlevel/2008/12/judge-denies-ri/?intcid=postnav.

27. *Id.*

28. Rose, *supra* note 1.

29. *Id.*

lective rights licensing.[30] These supporters contend that recent experience has shown that the market cannot solve this problem on its own and that the government needs to step in.[31] Proponents of government-mandated collective-rights licensing also argue that Congress should amend the copyright laws to create a right to collect reasonable fees from all Internet users at their point of access in exchange for the ability to consume music and other copyrighted intellectual property on the Internet.[32] The most publicized model would require all U.S. ISPs and university networks to add a fee (figures around $5 are being proposed) to their usual charges and funnel the money collected to one or more collective rights organizations (CRO).[33] In order to collect their portion of the fee, artists and other rights holders would be required to join a CRO, and each CRO would be responsible for distributing the proceeds received from the ISPs among its members based upon a formula reflecting the value of the works or the number of times the works are exploited by Internet users.[34] The ISP's role in collecting fees would warrant retention of a small percentage of the fees collected to be used for investment in network capacity and to pay for up-to-date content identification and monitoring technologies.[35] According to some, the fees collected would create a pool as large as $20 billion annually to pay artists and copyright holders.[36]

IV. Previously Established Collective Rights Licensing Regimes

According to Warner Music Group executive Jim Griffin, "[c]ollective licensing is what people do when they lose control, or when control is no longer practical or efficient."[37] Music composition copyright holders and songwriters faced a similar loss of control over exploitation of their works in the early 1900s; therefore, U.S. precedent exists for collective rights licens-

30. *See id.*

31. *See* William W. Fisher III, *An Alternative Compensation System*, Promises to Keep: Technology, Law, and the Future of Entertainment 1, 3-4 (2004), *available at* http://cyber.law.harvard.edu/people/tfisher/PTKChapter6.pdf.

32. *Id.*

33. Sam Gustin, *Music Outlaws, There's a New Sheriff in Town*, Wired (Mar. 27, 2008), *available at* http://www.wired.com/entertainment/music/news/2008/03/portfolio_0327.

34. Fisher, *supra* note 31, at 3–4.

35. Christian L. Castle & Amy E. Mitchell, *What's Wrong With ISP Music Licensing?*, 26 Ent. & Sports Law. 4, 7 (2008).

36. *See* Gustin, *supra* note 33.

37. *Id.*

ing.[38] Implementation of a government-mandated public right would be similar to collective licensing of musical compositions and the administrative functions of the performance rights organizations (PROs) that currently handle the collection and distribution of performance royalties for musical compositions.[39] The 1897 revision of the U.S. Copyright Act established—for the first time—a songwriter's exclusive right of public performance.[40] Songwriters and composers needed a way to enforce their right of the public performance of their musical compositions and most, if not all, did not have the resources to police every theater, bar, restaurant, and hotel to make sure the proprietors of those establishments were paying for a license to play their music.[41] It was impractical, and likely impossible, for the owners of these establishments to obtain a license from each rights-holder of each musical composition being played on any given night.[42] PROs were needed for efficiency and practicality.[43] Under authorization of its member songwriters and publishers, the first PRO in the United States—the American Society of Composers, Authors and Publishers (ASCAP)—proceeded to grant blanket licenses to any establishment or service that was operated for a profit and played music.[44]

In 1923, the District Court of New Jersey handed down a landmark decision for performance rights. The court held that songs played during radio broadcasts were played for profit and required a license from the rights-holders of the song.[45] In 1926, the advent of coast-to-coast radio networks created an incredible source of revenue for songwriters and music publishers.[46] However, negotiations between radio broadcasters and the ASCAP regarding licensing rates became more and more difficult as the years passed. Due to the difficulties in negotiations with ASCAP, in 1940, a group of broadcast-

38. J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. TECH. L. REV. 407, 413 (2004).

39. Rose, *supra* note 1.

40. Keyes, *supra* note 38, at 413–14.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See, e.g., id.*

45. M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776, 780 (D.N.J. 1923), *noted in* Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations* 17-18 (UC BERKELEY PUB. LAW RESEARCH PAPER NO. 1266870, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266870 (follow "One-Click Download" hyperlink).

46. Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations* 17-18 (UC BERKELEY PUB. LAW RESEARCH PAPER NO. 1266870, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266870 (follow "One-Click Download" hyperlink).

ers—consisting of major radio networks and almost five hundred independent radio stations—formed a second PRO, known as Broadcast Music, Inc. (BMI).[47] Paul Heineke, a European music publisher, established the third PRO in the United States in 1931, known as the Society of European Stage Authors and Composers (SESAC).[48] Today, ASCAP and BMI represent the majority of songwriters and music publishers, with SESAC licensing about 1% of all performance rights in the United States.

By agreement, music publishers grant to the PRO the right to license all of the songs controlled by the music publisher. A PRO's repertoire is the PRO's entire collection of songs from the thousands of songwriters and music publishers who have entered into agreements with the PRO. As a result, in the United States, any user of publicly performed music—be it a theater, hotel, restaurant, club, bar or radio station—must pay to the PROs an annual fee for a blanket license to publicly perform any or all of the songs in each PRO's repertoire an unlimited number of times.[49] The PROs then collect the royalties from these licenses and pay out to publishers and songwriters their respective shares. The amount of royalties is determined according to complicated calculations, including the frequency with which each song was played. The PRO pays the publisher's share (50%) directly to the publisher and the songwriter's share (50%) directly to the songwriter.

Proponents of a new digital right argue that just as radio networks created an incredible source of revenue for songwriters and PROs allowed songwriters and music publishers to reap the financial rewards of widespread exploitation of their works, government-mandated collective rights licensing of media files distributed using the Internet represents a way for copyright holders to reap the financial rewards of this new means of widespread exploitation.[50] Proponents argue that a compulsory license fee should be charged because most files are shared on the Internet for free. Such a fee would avoid the difficulty of either elucidating or renegotiating contractual claims.[51] Supporters also propose that society would benefit from lower transaction costs and less litigation because the act of sharing content on the Internet would be legitimized and compensated. Finally, supporters of a new digital right advocate the concept that a marketplace of competing file shar-

47. *Tradition*, BMI.COM, http://www.bmi.com/about/entry/533105 (last visited Aug. 29, 2010).

48. *About SESAC*, SESAC.COM, http://www.sesac.com/About/History.aspx (last visited Aug. 29, 2010).

49. *About ASCAP*, ASCAP.COM, http://www.ascap.com/about/ (last visited Aug. 29, 2010).

50. Joseph Merante, *Role in the Remedy: Finding a Place for ISPs in the Digital Music World*, 29 LOY. L.A. ENT. L. REV. 387, 388 (2009).

51. *Id.*

ing and streaming applications and ancillary services could develop in a legal—instead of illegal—setting.[52]

V. Consumer Behavior in an Age of Free Access

Many supporters of collective licensing argue that free access to unlimited media on the Internet is a public good. Conversely, an increasing number of other countries are introducing a "three-strikes-and-you're-out" type of legislation, in which a user repeatedly found downloading copyrighted material will lose access to the Internet at home.[53] Questions remain as to whether these measures will realistically serve to keep prosecuted file-sharers off of the Internet or if such a goal is even desirable. But given the possibility that the United States could adopt similar legislation, it is worth understanding how free access to a nearly unlimited repertoire of music, film, pictures, and text has affected U.S. society.

The numbers show that the desire of consumers to experience music, motion pictures and other forms of multimedia products—and to express themselves through music and video—continues to increase. For example, in 2006, websites featuring user-generated media content attracted sixty-nine million users in the United States alone, and they are projected to attract 101 million U.S. users by 2011.[54] The number of U.S. households with broadband access that watched full-length movies and television shows online doubled in the past year, according to research firm Parks Associates.[55] According to BigChampagne, an online media measurement company, the average simultaneous P2P population grew from over five million users in December 2002 to over seven million users by December 2004, and there continues to be an increase in P2P populations year after year.[56] The proliferation of music, video and photographic editing software, coupled with the distribution power offered by P2P networks has fueled a new generation of creative expression. Rather than being limited to a handful of authorized services like Apple's iTunes or RealNetworks's Rhapsody, access to unlim-

52. *Id.*

53. Mathew Ingram, *RIAA Drops Lawsuit Strategy for "Three Strikes" Plan*, GIGAOM (Dec. 19, 2008), http://gigaom.com/2008/12/19/riaa-drops-lawsuit-strategy-for-three-strikes-plan/.

54. Interactive Advertising Bureau, IAB Platform Status Report: User Generated Content, Social Media, and Advertising—An Overview, 1 (2008), http://www.iab.net/media/file/2008_ugc_platform.pdf.

55. *See* Greg Sandoval, *Hulu's Backers Bicker as Web Video Soars*, Media Maverick (Nov. 16, 2009, 10:45 AM), http://news.cnet.com/8301-31001_3-10398698-261.html.

56. Adam Toll, BigChampagne LLC, Peer-to-Peer Filesharing Technology: Consumer Protection and Competition Issues 3, Presentation at the FTC Workshop: Peer-to-Peer File Sharing (Dec. 15, 2004), *available at* http://www.ftc.gov/bcp/workshops/filesharing/presentations/toll.pdf.

ited media from any source has increased the number of cultural reference points from which artists draw to create new works. As a result, it is easy to argue that free access to media on the Internet has contributed to a better educated public, and that both the volume and quality of artistic output have increased as a result of it. It is clear that sections of the population who could not previously afford access to certain artistic works, cultural reference points or research materials can now get them free with a three-hundred dollar netbook computer and an Internet connection. This may serve to decrease the "digital divide." For instance, "getting information online saves the cost of printing textbooks, and this is a case where what is cheaper is also better . . . the computer can serve as a library, a laboratory and an art studio, saving the cost of these or making those that exist far more effective."[57]

Furthermore, we have already seen with services like Flickr, Twitter and YouTube, that disseminate news, picture and video collections to millions of Internet users has increased the number of data points from which our news is collected, improving, theoretically, how much we learn about what is happening in the world. Similarly, millions of consumers with unlimited access to the world's media collection will preserve and foster its growth. Fans sharing media may be the best distributors, decision makers, and preservers of media—all of which were previously costly roles for media companies to fulfil. For example, MusicBrainz, a user-maintained community music metadatabase, has already compiled information covering 9,605,951 tracks and 813,659 album releases.[58] Additionally, Gracenote, a wholly owned subsidiary of the Sony Corporation of America that provides technology for digital media, points out that media management is critical to a user's experience and it begins with the user.[59] If these activities were made legal, it could aid in the claiming of "orphan works." Automated submission process services might evolve for copyright owners to register their works with the appropriate databases in order to collect payment of rights licenses.[60] For all of these reasons, it is important not to dismiss the possibility that free access to media on the Internet could be desirable. Evolved business models may be the missing piece needed to fund such projects.

57. Seymour Papert, Professor, Mass. Inst. Tech., *quoted in* Clint Witchalls, *Bridging the Digital Divide*, THE GUARDIAN (London), Feb. 17, 2005, at Technology Guardian section 23, *available at* http://www.guardian.co.uk/technology/2005/feb/17/olpc.onlinesupplement.

58. *Database Statistics*, MUSICBRAINZ, http://musicbrainz.org/show/stats/ (last visited May 26, 2010).

59. *About Us*, GRACENOTE, http://www.gracenote.com/company_info/ (last visited May 26, 2010).

60. Merante, *supra* note 50, at 388.

VI. Issues With Implementation

In order to implement a mandatory collective rights licensing system, the copyright provisions in Section 17 of the U.S. Code would need to be revised. For this to occur, a bill setting forth the revisions would need to be introduced and lobbied through Congress. If experience with the DMCA is any guide, this would involve months of negotiations in congressional committees, and it might be years before the resulting language is brought to a vote.

Specific revisions that would be required include a licensing scheme that authorizes ISP customers to copy, display, and publicly perform works downloaded from and uploaded to computers connected to the Internet. Such rights were previously reserved exclusively for owners of the copyrighted material in question, so we can presume that those copyright owners will want to have a say in deciding how the licensing scheme would work. The legislation would also need to describe in some detail the entity responsible for accounting to the rights holders and possibly provide guidelines for measuring how much to pay particular rights holders.[61] We must presume that rights holders would retain their rights to sue Internet users for direct infringement if they fail to pay the fees or otherwise circumvent the system. Similarly, we would guess that ISPs would remain secondarily liable for copyright infringement if they failed to properly account to the CROs for all of the fees collected from their customers.

Proponents of government-mandated collective rights licensing have yet to address whether copyright holders would retain the exclusive right to create, authorize derivatives of, and otherwise retain control over their works. Furthermore, debate continues as to which activities constitute fair use of a copyrighted work. According to the Copyright Act, fair use permits the reproduction of copyrighted works without the authorization of the copyright holder "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research."[62] Before bringing a claim of copyright infringement, copyright holders must first recognize and assess the merits of a fair-use affirmative defense. Given the lack of consistency shown by courts in recent cases on the topic, this assessment has become increasingly complex.[63]

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61. In the past, for example, with the performance right collection societies, and in regard to collection of mechanical rights by Harry Fox, an actual existing organization was not designated. Rather, the attributes required for such an organization, or the requirements for proper payment of compulsory licensing fees or collection of blanket licensing fees, were described in the statute in question.

62. 17 U.S.C. § 107 (2000).

63. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569. 592 (1994) (reasoning that court must distinguish between criticism that lowers demand and infringement that destroys it); *see also* Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1078–79 (2d Cir. 1992) (explaining that use is fair when only marginal amounts of material are taken, and this taking would not affect the marketability of the copy-

Perhaps the legislative implementation process will help clarify what constitutes fair use, since some of the downloaded material arguably falls under the current definition. Regardless of the outcome, users who claim that exploitation of intellectual property on the Internet constitutes fair use will undoubtedly contest the imposition of any mandatory fees for access to these copyrighted works. Given the consent decree under which both ASCAP and BMI currently operate, Congress will need to remain alert to any antitrust concerns presented by the CROs assigned the task of collecting fees.[64]

Opponents of compulsory collective licensing argue that it amounts to a tax for consumption of intellectual property on the Internet, with the cost equally allocated to all users regardless of their individual consumption level. Opponents point to the inequity inherent in forcing some users to subsidize the activities of others. Consumers with strong moral and ethical positions would be financially supporting content to which they may be morally or ethically opposed.[65] Finally, data collection and use practices would need to conform to the requirements of the Electronic Communications Privacy Act (ECPA) so that private information, including personal media consumption data, is not sold without consent.

The logistics of data collection and measurement give rise to a variety of potential problems. New standards must be created for an entire market of Internet media tracking, security, usage measurement, cyber investigation, and royalty collection firms. For instance, one technology-driven media-measurement company, BigChampagne, uses its software to create a real-time map of music downloading.[66] This map is created by matching partial IP addresses to zip codes.[67] However, without empirical proof showing which company's technology is best for measuring media consumption, opponents insist that ISPs and CROs would merely be providing "good guesses" as to how the collected fees should be distributed.[68] The burden of making these calculations—along with the cost of inherent negotiation and litigation that would arise—would fall upon music and media royalty accounting firms. The result would be a staggering workload that many of these firms may find themselves ill-equipped to handle. Furthermore, ISPs might be subject to additional accounting duties and would, therefore, find

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righted work); *see also* Penelope v. Brown, 792 F. Supp. 132, 136 (D. Mass. 1992) (explaining that factors listed in § 107 are not the only factors a court should consider, nor are they determinative).

64. *See* von Lohmann, *supra* note 3.

65. Neil Desai, *Copyright and Culture (Voluntary Collective Licensing—Innovation or Extortion?) Annotated Bibliography*, http://tags.library.upenn.edu/project/40857 (last visited Aug. 20, 2010).

66. Jeff Howe, *BigChampagne is Watching You*, WIRED (Oct. 2003), *available at* http://www.wired.com/wired/archive/11.10/fileshare.html.

67. *Id.*

68. Desai, *supra* note 65.

themselves more vulnerable to secondary liability for unwitting participation as middle-men in fraudulent or otherwise unauthorized transactions.[69] It is unlikely that ISPs would freely sacrifice any of their existing immunity under Section 512 of the Code by participating in data collection or enforcement at the direction of third parties.[70] The addition of explicit statutory immunities would serve to reduce transaction costs and ensure participation by ISPs.

In short, questions remain concerning the determination of the basis and frequency of collecting fees. Current rates for "bits" uses vary considerably along with the procedures for their determination. Uniformity of units, rates, and methods for measuring usage would be necessary to implement any collective rights licensing scheme. Whichever mechanism is chosen to determine an aggregate online use fee would need to take into account the rights of reproduction, distribution, and public performance.

Lastly, there are market disruption concerns. Introduction of a new mandatory collective rights licensing system could accelerate the decline in physical media sales which, despite the trend, still represent a substantial percentage of the world's media sales market.[71] Industry experts argue for a more gradual transition away from physical distribution technology in order to allow media companies to successfully cross the chasm and develop a more robust and diversified digital distribution market.[72] Some new media services such as Hulu, iTunes, and Netflix are posting positive results and experiencing successful growth in new markets.[73] These new markets are centered around convenient distribution of high quality digital content, and many experts believe they will grow into billion-dollar industries.[74] A new mandatory collective rights system might cut off this growth at the knees, superseding or otherwise disrupting the business of legal downloading services.

At best, a compulsory collective licensing scheme would be difficult to implement and would require a departure from market-based economics in a society defined by its strict adherence to capitalism. Even if a compulsory system is implemented, it would be difficult for such a system to simultaneously address the concerns of both rights holders and new businesses.

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69. *Id.*

70. *See* 17 U.S.C. § 512 (2000).

71. *See* Fisher III, *supra* note 31, at 62 n.51.

72. Peter DiCola, *The Economics of Recorded Music: From Free Market to Just Plain Free*, FUTURE OF MUSIC COAL., July 16, 2000, *available at* http://future-ofmusic.org/article/economics-recorded-music.

73. Desai, *supra* note 65.

74. *Id.*

VII. OPT-IN IN EXCHANGE FOR COVENANT NOT TO SUE: THE VOLUNTARY ALTERNATIVE

The most commonly proposed alternative to a government-mandated collective licensing scheme is a voluntary collective-rights licensing scheme. A voluntary scheme would consist of a private agreement between rights holders and users. Rights holders would sign a covenant not to sue any users who opt in to pay licensing fees for media they consume. In exchange, any user opting into the agreement would obtain an unlimited right to download copyrighted content. As part of the agreement, the user would agree not to share copyrighted content with anyone who had not opted in, or face monetary penalties. Those users opting out of paying the fees would remain liable for copyright infringement and thus subject to prosecution. Creators and rights holders would also have the ability to opt out of this licensing scheme. ISPs would receive only an administrative fee in connection with the opt-in arrangement while newly created CROs would be responsible for tracking media consumption and distributing royalties to rights holders.

Supporters of voluntary collective rights licensing contend that any solution to digital piracy "should minimize government intervention in favor of market forces because "[m]arket-driven solutions are likely to work faster, and more efficiently, than top-down government regimes."[75] For example, proponents believe that file sharing networks will rapidly improve once the cloud of copyright litigation is eliminated.[76] An additional benefit is that an opt-in system would be more respectful of individual subscriber preferences and rights; only those who are interested in downloading or otherwise sharing entertainment on the Internet would pay for such activities. As with the government-mandated system, opt-in users would have completely legal access to the virtually unlimited selection of media available on file-sharing networks. However, unlike the mandatory public-right option, users would not be forced to pay for media content if they do not choose to access it. This freedom of choice—to pay or not to pay—could also help repair the general bad perception many consumers now have regarding copyright owners. In addition, it might clarify for the general public the degree to which artists and creative industries rely on clearly defined rights and responsibilities for copyright owners, intermediaries, and users.

The most striking benefit of a voluntary collective licensing system is that copyright law need not be amended to implement it. Also, instead of relying on a government or collective industry board to set rates as with mechanical licenses or ringtone rates, CROs would set their own prices, and the market would dictate price fluctuations. Rights holders could potentially make more money through volume with a lower price and a larger base of subscribers than with the current system of high prices and expensive—and

75. von Lohmann, *supra* note 3, at 1.

76. *Id.* at 2.

ultimately ineffective—enforcement efforts.[77] In addition, there could be a rise in the development of commercial services that would include the user opt-in agreement into the terms and conditions of the service, and then provide free, basic, and premium services at different price points, including free advertising-supported services.

Moreover, "[p]roponents of opt-in licensing schemes argue that so long as the fee is reasonable, effectively invisible to fans, and does not restrict their freedom, the vast majority of file sharers will opt to pay rather than engage in complex evasion efforts."[78] These proponents also "contend that the vast majority of file sharers would be willing to pay a reasonable fee for the freedom and peace of mind to download whatever they like using whatever software suits them."[79] They further argue that a compulsory license is not necessary, as artists will be incentivized to join a CRO by the prospect of receiving some compensation for their works.[80] Those choosing to remain outside the system will be without a practical means of receiving compensation for the file sharing.[81] These proponents continue to argue that it is very possible that if a large contingent of "major music copyright owners joins a collecting society, the vast majority of smaller copyright owners will have a strong incentive to join, just as virtually all professional songwriters and music publishers opt to join ASCAP, BMI, or SESAC."[82]

Further arguments in favor of a voluntary licensing system stress that "the distribution bottleneck that has limited the opportunities of independent artists will be eliminated."[83] Artists will have the benefit of being "able to choose any road to online popularity—including, but no longer limited to, a major label contract."[84] This will assist artists as compensated "digital distribution will be equally available to all artists."[85] Also, with regard to promotion, "artists will be able to use any mechanism they like, rather than having to rely on major labels to push radio play."[86] Thus, it could be argued that with an increased number of "options from which artists may choose, recording contracts will be more balanced than the one-sided deals" which artists have complained of in the past.[87] Another criticism of the way the industry

77. *Id.* at 3.

78. *Id.* at 5.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 3.

84. *Id.*

85. *Id.* at 4.

86. *Id.*

87. *Id.*

has operated is the complexity of individual music-industry contracts. The propensity of successful artists to sign several different contracts over time "make[s] it very difficult for record labels and music publishers to be sure what rights they control."[88] So the proponents' argument stands to reason that by joining a CRO, copyright owners would not be asked to itemize their rights, but would "instead simply covenant not to sue those who pay the blanket license fee."[89] This would create a win-win situation in which "music fans and innovators [would not be] held back by the internal contractual squabbles that plague the music industry."[90]

However, many of the same concerns that were identified above in reference to a government-mandated collective rights licensing scheme will also plague a voluntary one.[91] These concerns include privacy issues, data-collection difficulties, derivative rights, trouble maintaining ISP immunity, file-quality issues, and complexities in making sure that artists and other rights holders are actually paid their fair share.[92] Also, like a compulsory license, the opt-in license tends to flatten the market for sales of music and other media, a consequence which could stifle innovation because there would not be an incentive to produce new media products.[93] In addition, there is the problem of "free riding," whereby those who opt out of paying the fee can still get free content from those who opt in. This can be done by either re-routing their Internet connections or by simply having someone who opts in burn the content onto CD or DVD and then share the content with someone who opts out.[94]

Uncertainty also exists as to how far these covenants not to sue will go. Will copyright holders retain the right to sue an ISP for secondary liability if it allows, even unwittingly, a user to re-route his connection? "Consumers may also be at serious risk in a world where authorized and unauthorized works are at their fingertips with no clear ability to distinguish between the two."[95] Would a green "OK" tag pop up on media you could use? Would you only be able to use "opt-in approved" services that bear the equivalent of a *Good Housekeeping* seal of approval, making the choices of opt-in users no

88. *Id.* at 5.

89. *Id.*

90. *Id.*

91. Brandon Evenson, *IP Osgoode Speaks: Chris Castle on Voluntary Collective Licensing*, IP OSGOODE, Oct. 27, 2009, *available at* www.iposgoode.ca/2009/10/ip-osgoode-speaks-chris-castle-on-voluntary-collective-licensing.

92. 92 *Id.*

93. DiCola, *supra* note 72.

94. von Lohmann, *supra* note 3, at 5.

95. Desai, *supra* note 65.

different than the choices they have today with the legal services?[96] Furthermore, what incentive is there for ISPs to cooperate and take on the additional burdens of tracking and recording who is accessing content and allocating a reasonable fee?[97] What is to keep them from demanding a larger and larger portion of the fees being collected from users?[98] Already in the mobile content arena, retailers and promoters of mobile content must operate their business using 50% or less of their product prices, because the mobile service providers collect 50% for delivering the mobile data services. Given that a substantial segment of the population is currently accessing content free of charge, how can content holders be sure that enough people opt in that it will make the system worthwhile?[99]

Opponents of voluntary opt-in services cite a wide variety of reasons why they believe proponents to be, for the most part, myopic about the incentives present in human nature and capitalist societies.[100] For instance, "proponents of the generic proposal and its offshoots seem to have given insufficient consideration to the many, many details involved in ISP licensing. The devil is, of course, in the details, and even considering a music-only licensing method creates a devilish predicament indeed."[101] Hence, the main problem that an opt-in collective-rights licensing system faces is the same problem faced by any new product introduced into a new market: getting users to try something new. For the new users, the benefits are unclear, and they may have a concern that they are putting their names on a list that may someday be submitted for prosecution of copyright infringement, whether the infringement was witting or unwitting.

VIII. CONCLUSION

In the United States, we inherited the current copyright regime from Europe, and it was developed over hundreds of years of trial and error. And the current system works for our culture.[102] It can adapt to new technologies and changing business models. Past collective licensing systems, including schemes with compulsory licensing, have been successfully applied to public performances, radio, and mechanical licenses for affixing copyrighted works

96. *See* http://www.goodhousekeeping.com/product-testing/history/about-good-housekeeping-seal (last visited Aug. 20, 2010).

97. Evenson, *supra* note 91.

98. Reihan Salam, *The Music Industry's Extortion Scheme*, SLATE, Apr. 25, 2008, http://www.slate.com/id/2189888/.

99. Evenson, *supra* note 91.

100. *Id.*

101. Castle & Mitchell, *supra* note 35, at 7.

102. *See* Copyright Timeline: A History of Copyright, http://www.arl.org/pp/ppcopyright/copyresources/copytimeline.shtml (last visited August 18, 2010).

to a tangible medium.[103] In these instances, the market was seen as "broken" and in need of a fix. However, the Internet is not a problem to be fixed; it is a set of opportunities. The Internet is a far more exciting technology than recordings or radio because it is worldwide and allows for interaction, and it is a means for commerce. A panoply of new businesses can develop, which take advantage of these attributes. In fact, they are developing rapidly, whether we choose to accept it or not. The key is to focus not on developing a panacea to "fix" a single problem in time. Our concentration should be to provide the basic ingredients upon which a new market, which fosters innovation, can be built. Then we should get out of the way so that additional centuries of trial and error can take place in which to create innovations that benefit consumers as well as rights holders and business people. We believe in a system of copyright protections for the benefit of all people, "[t]o promote the Progress of Science and useful Arts", as stated in our most important legal document, the United States Constitution.[104]

103. Brian R. Day, *Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse*, 18 TEX. INTELL. PROP. L.J. 195, 211 (2010).

104. U.S. CONST. art. I, § 8, cl. 8.