

UCLA Journal of Law & Technology

FREE IS HARD TO BEAT: A CLOSER LOOK AT THE DIGITAL MUSIC DOWNLOAD DILEMMA

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On June 27, 2005, many believed that the beginning of the end of all P2P technology¹ and illegal downloading of copyrighted materials had finally arrived. Nevertheless, over six years has passed since the Supreme Court's decision in *MGM v. Grokster* and online services reminiscent of those exploited by the defendants in the *Grokster* case continue to thrive.² Innovations in technology have introduced a host of new problems for the record industry, including serial online copyright infringement. However, the current strategies employed by the Recording Industry Association of America (RIAA) and its members have failed to improve the situation. If the recording industry were to focus on why this problem continues to exist, the industry might find a realistic solution to its escalating nation-wide dilemma.

¹ P2P means "peer to peer" technology. In a P2P network, files may be shared directly between other computers connected to the program, also known as "peers", without the need for a central server. *P2P (Peer to Peer) Definition*, TECHTERMS, <http://www.techterms.com/definition/p2p> (last visited Sep. 19, 2011, 3:51 PM). Thus, in a P2P network a user acts as both a file server by allowing others to download from his computer and also as a program client by downloading from other computers.

² Morpheus, one of the file sharing programs at issue in *MGM v. Grokster*, relied on a form of P2P technology called Gnutella. 545 U.S. 913, 921 (2005). In a recent study conducted by Sandvine, a Canadian broadband management company, researchers found that on an average day, 11.18% of upstream traffic in North America can be attributed to Gnutella applications. SANDVINE, INC., FALL 2010 GLOBAL INTERNET PHENOMENA REPORT 15 (2010), <http://www.sandvine.com/downloads/documents/2010%20Global%20Internet%20Phenomena%20Report.pdf> (Sandvine). Additionally, the study found that 53.3% of all upstream traffic in North America can be attributed to P2P applications in general. *Id.* at 10. It is important to note that in most parts of the world Gnutella technology is no longer used. *Id.* at 14.

I. The Record Industry's Attempts To Diminish Illegal Downloading Have Been Fruitless And Will Continue To Achieve Little Results

The defendants in *Grokster* were owners and distributors of P2P programs that enabled online users of their programs to anonymously trade data, including vast amounts of copyrighted material, with other like users.³ Various content owners and large media studios joined together to bring action against the P2P program owners, Grokster and StreamCast, for secondary liability of copyright infringement. In reaching its decision, the Supreme Court focused on the defendants' encouragement of their users' infringing activity and the great profit generated as a result.⁴ The Court concluded that, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."⁵ The decision came as a huge blow to the numerous other owners of file-sharing programs at the time. Fearing litigation, a few owners contemplated shutting down their P2P and file-sharing programs.⁶ Mark Gorton, Chief Executive Officer of the Lime Group, a firm that operates a file-sharing program named LimeWire, said, "Some people are saying that as long as I don't actively induce infringement, I'm O.K. I don't think it will work out that way."⁷ In effect, Mr. Gorton said that the Court "has handed a tool to judges that they can

³ *Grokster*, 545 U.S. at 919-20.

⁴ *Id.* at 936-40.

⁵ *Id.* at 919.

⁶ *See, e.g.*, LIMEWIRE, <http://www.limewire.com/> (last visited Oct. 25, 2011).

⁷ Tom Zeller, Jr., *Sharing Culture Likely to Pause But Not Wither*, N.Y. TIMES, June 28, 2005, <http://www.nytimes.com/2005/06/28/technology/28peer.html>.

declare inducement whenever they want to.”⁸ Unfortunately for Mr. Gorton, he was correct. In October of 2010, a federal court issued a permanent injunction against LimeWire, finding that the website intentionally caused a “massive scale of infringement,” and ordered the website to be closed.⁹

Nevertheless, as much as the decision in *Grokster* was a loss for the owners and users of file-sharing programs, it was not a complete victory for the content industry. The Court focused on a theory of inducement in which a third-party is liable only if a content owner can show that the third-party encouraged and promoted copyright infringing activity.¹⁰ It was relatively easy for the content owners in *Grokster* to show intent on the part of the file-sharing program owners. The record was full of promotional materials and e-mail exchanges that expressly spoke of the defendants’ motives and intent to capitalize on the file-sharing market despite the fact that they were enabling and promoting illegal activity in so doing.¹¹ As one of the first cases of its kind, the file-sharing program owners in *Grokster* may not have considered that their email records could be used against them in court. In the wake of the *Grokster* decision, however, it is hard to imagine that a file-sharing program owner, or any other party that may be vulnerable to secondary liability for copyright infringement, would be so careless as to continue to generate such incriminating evidence. As a result, it will be difficult for the content industry and other copyright holders to show intent in the case of every file-sharing program or

⁸ *Id.*

⁹ Josh Halliday, *LimeWire Shut Down by Federal Court*, GUARDIAN (Oct. 27, 2010), <http://www.guardian.co.uk/technology/2010/oct/27/limewire-shut-down>.

¹⁰ *Grokster*, 545 U.S. at 919.

¹¹ *See id.* at 923-26.

website owner. Meanwhile, illegal downloading continues to be a significant problem for the content industry.

The Recording Industry Association of America (“RIAA”)¹² took a further step in September 2003 to combat illegal downloading by targeting individual P2P file sharers.¹³ Of the thousands of lawsuits that were initiated by RIAA, only two cases proceeded to trial. In one, Capitol Records and other RIAA member companies brought suit against Jammie Thomas-Rasset in 2006 for the unauthorized download and distribution of copyrighted songs through the file-sharing program known as Kazaa.¹⁴ The jury found in favor of the record labels and ordered Thomas-Rasset to pay \$9,250 for each illegal download, totaling \$222,000.¹⁵ After a second trial and an amendment of the second judgment,¹⁶ RIAA sought to settle the case for \$25,000 but Thomas-Rasset refused to settle.¹⁷ The district court judge denied Thomas-Rasset’s motion to consider the constitutionality of the damages and consequently, a third trial was set.¹⁸ However, after the jury found in favor of the record labels yet

¹² RIAA is the trade organization that represents the interests of record labels and other recording industry distributors in the United States. *Who We Are*, RECORDING INDUS. ASS’N OF AM., <http://www.riaa.com/aboutus.php> (last visited at Sept. 14, 2011). According to RIAA, the organization’s member companies account for the creation and distribution of approximately 85% of all legitimate sound recordings produced and sold in the United States. *Id.*

¹³ *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, RECORDING INDUS. ASS’N OF AM. (Sept. 8, 2003), <http://www.riaa.com/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1>.

¹⁴ *See* Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1049 (D. Minn. 2010).

¹⁵ *Id.*

¹⁶ Based on a jury instruction error, the court affirmed a motion for a new trial, and in the second trial, the jury found Thomas-Rasset guilty for the second time. *Id.* at 1049-50. This time Thomas-Rasset was ordered to pay \$80,000 per song, totaling \$1.92 million. *Id.* However, in January of 2010, the district court judge amended the judgment and remitted the damages to \$2,250 per song for a final total of \$54,000. *Id.* at 1061.

¹⁷ Jaikumar Vijayan, *Third Trial to Begin in \$1.92m Music Piracy Case*, COMPUTERWORLD (Oct. 26, 2010), http://www.computerworld.com/s/article/9192999/Third_trial_to_begin_in_1.92M_music_piracy_case?taxonomyId=70.

¹⁸ *Id.*

again and ordered Thomas-Rasset to pay \$1.5 million, the judge reduced the damages to \$54,000 on constitutional grounds.¹⁹

The next case that went to trial involved Joel Tenenbaum, a college student who had used various P2P file-sharing programs, including Morpheus, Kazaa and LimeWire.²⁰ In 2007, Sony BMG and four other major music companies brought suit against Tenenbaum for the illegal download and distribution of 30 digital copies of songs.²¹ Again, the jury found in favor of the plaintiff record labels and awarded the plaintiffs \$22,500 per song for a total of \$657,000 in statutory damages.²² Then in late 2008, RIAA officially announced that it would no longer pursue legal action against individual file-sharers and would only continue to litigate outstanding lawsuits.²³

Although damages were awarded in both suits, it is doubtful that the litigation was in fact worth the effort. Over a three-year period from 2006 to 2008, RIAA spent over \$64 million in their lawsuit campaign and in return they received \$1.4 million in settlements.²⁴ Moreover, the litigation turned into a public relations disaster. In a survey conducted by FindLaw.com, 56% of American adults opposed the RIAA lawsuits.²⁵ RIAA was constantly criticized for initiating crippling lawsuits

¹⁹ Nate Anderson, *Judge Calls \$1.5M File-Sharing Judgment "Appalling," Slashes to \$54,000*, ARS TECHNICA (July 2011), <http://arstechnica.com/tech-policy/news/2011/07/judge-calls-15m-file-sharing-judgment-appalling-slashes-to-54000.ars>.

²⁰ Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 90 (D. Mass. 2010).

²¹ *Id.* at 91.

²² *Id.*

²³ 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>.

²⁴ Mike Masnick, *RIAA Spent \$17.6 Million in Lawsuits...to Get \$391,000 in Settlements?*, TECHDIRT (July 14, 2010, 9:44 AM), <http://www.techdirt.com/articles/20100713/17400810200.shtml>.

²⁵ Press Release, FINDLAW, *FindLaw Survey Reveals RIAA Lawsuits Unpopular with Americans* (June 29, 2004), available at <http://company.findlaw.com/pr/2004/062904.musicpiracy.html>.

against single mothers, college students, pre-teens and even the deceased.²⁶ Furthermore, RIAA was condemned for initiating suits against “innocent” people. This was a result of the inconsistent and flawed tracking technology that they employed to determine individual IP addresses and identify illegal downloading users.²⁷ Nonetheless, RIAA claims that the litigation was successful because it increased awareness about the consequences of illegal downloading.²⁸ As support for its success, RIAA relied on a statistic that states that between 2006 and 2009, the percent of Internet users downloading music illegally declined from 19% to 14 %.²⁹ However, the NPD Group, which supplies RIAA with its statistics, also reported that the amount of music shared through P2P applications rose by 23% during the last quarter in 2008 and the IFPI reported that by the end of 2008, 95% of all downloaded music tracks were unauthorized.³⁰ Moreover, RIAA’s own member companies were not pleased with the results of the litigation. One record label, EMI, even threatened to terminate its membership if RIAA and IFPI³¹ did not cease their

²⁶ See Cassi Hunt, Editorial, *Run Over by the RIAA Don...t Tap the Glass* [sic], THE TECH (Apr. 4, 2006), <http://tech.mit.edu/V126/N15/RIAA1506.html>; Nate Mook, *RIAA Sues Deceased Grandmother*, BETANEWS (Feb. 4, 2005), <http://betanews.com/2005/02/04/riaa-sues-deceased-grandmother/>; McBride & Smith, *supra* note 23.

²⁷ See *RIAA v. The People: Five Years Later*, ELEC. FRONTIER FOUND. (Sept. 2008), <http://www EFF.org/wp/riaa-v-people-years-later>.

²⁸ See Recording Indus. Ass’n of Am., *supra* note 12 (describing RIAA’s education campaign in relation to increasing awareness about illegal downloading); *For Students Doing Reports*, RECORDING INDUS. ASS’N OF AM., <http://www.riaa.org/faq.php> (last visited at Nov. 17, 2010) (claiming a 35% increase in awareness as a direct result of the allegedly successful litigation campaign).

²⁹ *For Students Doing Reports*, *supra* note 28.

³⁰ Press Release, NPD GROUP, *Decline in U.S. CD Sales Drives Down Overall Music Demand by 2 Percent in Third Quarter of 2008* (Dec. 18, 2008), available at http://www.npd.com/press/releases/press_081218.html; *IFPI Publishes Digital Music Report 2009*, INT’L FED’N OF THE PHONOGRAPHIC INDUS., http://www.ifpi.org/content/section_resources/dmr2009.html (last visited Oct. 20, 2011).

³¹ The International Federation of the Phonographic Industry (IFPI) is an international trade organization that represents around 1400 members that are comprised of record labels and affiliated industry associations worldwide. *IFPI’s Mission*, INT’L FED’N OF THE PHONOGRAPHIC INDUS.,

aggressive litigation strategy.³² And during the first day of the original trial in the Thomas-Rasset case, a Sony BMG executive admitted that the record industry was losing millions of dollars on the RIAA lawsuits.³³ In the end, neither type of litigation strategy, either against the file-sharing program owner or the individual downloader, seems to be a viable option for the content industry's goal to eviscerate, or even merely reduce, illegal downloading.

Despite programs such as Morpheus³⁴ and LimeWire³⁵, having been effectively shut down by lawsuits, illegal downloading continues to prosper.³⁶ Presently, most file sharing is accomplished by using BitTorrent technology, yet another form of P2P technology. BitTorrent is slightly different than its ancestors because it breaks each file up into numerous pieces instead of downloading a full file at one time.³⁷ When a user initiates a download, the system will locate multiple computers with the file and will simultaneously download different chunks of the

http://www.ifpi.org/content/section_about/index.html (last visited Nov. 17, 2010). Among IFPI's global members, RIAA is the affiliated industry association representative for the United States. *Local Record Industry Associations*, INT'L FED'N OF THE PHONOGRAPHIC INDUS., http://www.ifpi.org/content/section_links/local_associations.html#U (last visited Nov. 17, 2010).

³² See Mike Masnick, *EMI Threatens to Leave IFPI*, TECHDIRT (Jan. 11, 2008, 5:45 PM), <http://www.techdirt.com/articles/20080111/173730.shtml>.

³³ Eric Bangerman, *RIAA anti-P2P Campaign a Real Money Pit, According to Testimony*, ARS TECHNICA (Oct. 3, 2007), <http://arstechnica.com/tech-policy/news/2007/10/music-industry-exec-p2p-litigation-is-a-money-pit.ars>.

³⁴ See Janko Roettgers, *R.I.P., Morpheus: File Sharing Client Shuts Down, World Fails to Notice*, P2P BLOG (Oct. 29, 2008, 1:28 PM), <http://www.p2p-blog.com/item-884.html>.

³⁵ See Marius Olaga, *No More LimeWire Downloads, The File-Sharing Network Shut Down by Court Order*, SOFTPEDIA (Oct. 27, 2010, 10:20 AM), <http://news.softpedia.com/news/No-More-LimeWire-Downloads-the-File-Sharing-Network-Shut-Down-by-Court-Order-163125.shtml>.

³⁶ In the last quarter of 2005, following the decision in *Grokster* and the subsequent closure of the Grokster P2P program, most torrent sites experienced a high increase in user traffic. Ernesto, *BitTorrent's Popularity is Growing*, TORRENTFREAK (Dec. 24, 2005), <http://torrentfreak.com/bittorrents-popularity-is-growing>. The reported trend is consistent with the idea that once a P2P program is shut down file-sharing users will seek alternatives. The file-sharing users continue to download infringing works. Thus, litigation does educate or deter current users.

³⁷ *BitTorrent Definition*, TECHTERMS.COM, <http://www.techterms.com/definition/bittorrent> (last visited Nov. 17, 2010).

file from different computers.³⁸ By partitioning the download of a file across multiple computers, the transfer rate for a file is increased because most Internet Service Providers (ISPs) provide faster download speeds than upload speeds.³⁹ This further increases the efficiency of file sharing and thus, proliferates the speed and volume at which illegal downloading can occur. BitTorrent currently accounts for 34.31% of upstream traffic in North America.⁴⁰

Initially, BitTorrent was a popular mechanism for file-sharers because of its noted efficiency, increased download speed, and supposed user anonymity.⁴¹ In the past year, however, the United States Copyright Group (USCG), with the help of the courts, has diminished that appealing anonymity by forcing many ISPs to reveal their clients' IP addresses. After gaining identifying information regarding BitTorrent users, the content industry began a new phase in the individual lawsuit campaign.⁴² At present, the USCG has initiated over 15,000 lawsuits against BitTorrent users.⁴³ It is easy to imagine the recording industry and RIAA taking similar steps to sue BitTorrent users. However, in response to the litigation, the file-sharing community distributed numerous programs that were created to effectively hide a user's IP address and thus, his identity from ISPs.⁴⁴ Furthermore, more and

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Sandvine, *supra* note 2 at 15.

⁴¹ See Thomas Mennecke, *LimeWire - The Beginning, The Middle, The End*, SLYCK (Oct. 27, 2010), http://www.slyck.com/story2108_LimeWire_The_Beginning_The_Middle_The_End (explaining that users were drawn away from LimeWire and instead towards BitTorrent due to the latter's advanced technology and efficient transmission of large files).

⁴² See Ernesto, *Thousands More BitTorrent Users to be Sued in the U.S.*, TORRENTFREAK (Jul. 18, 2010), <http://torrentfreak.com/thousands-more-bittorrent-users-to-be-sued-in-the-u-s-100718/>.

⁴³ *Id.*

⁴⁴ See Ernesto, *More BitTorrent Users Go Anonymous*, TORRENTFREAK (June 22, 2009), <http://torrentfreak.com/more-bittorrent-users-go-anonymous-090622/>.

more users are turning from BitTorrent to file-hosting websites.⁴⁵ Hosting refers to the process by which one computer is configured as an Internet server and other computers, or clients, connect to the server through the Internet and gain access to the content stored on the server.⁴⁶ After a user uploads his content, he receives a link that can be used remotely to access the content stored on the server.⁴⁷ This link is then shared with the online community by publication on a file-sharing website that organizes the links according to the type of content.⁴⁸ In this way, an average Internet user can access free content with a few clicks of the mouse. Even greater anonymity is achieved with the use of these sites because users are not required to register or identify themselves in any way prior to upload or download.⁴⁹ Furthermore, the sites themselves are more akin to a storage locker than P2P networks and thus, site owners have a stronger argument for immunity from liability under the Digital Millennium Copyright Act's (DMCA) safe harbor guidelines.⁵⁰ Many sites, such as RapidShare, adhere to these requirements by

⁴⁵ Eric Lai, *Torrent Sites Losing Popularity to Web File Hosts*, COMPUTERWORLD UK (Oct. 13, 2009, 16:00), <http://www.computerworlduk.com/in-depth/applications/2623/torrent-sites-losing-popularity-to-web-file-hosts/>.

⁴⁶ *Module for Hosting*, MODULEHOSTING.COM, <http://www.modulehosting.com/hosting.html> (last visited Dec. 5, 2010).

⁴⁷ Janko Roettgers, *Piracy Beyond P2P: One-Click Hosters*, GIGAOM (June 17, 2007, 12:00 AM), <http://gigaom.com/video/one-click-hosters/>.

⁴⁸ *See id.*

⁴⁹ *Id.*

⁵⁰ The DMCA amended Title 17 of the United States Code by adding § 512, referred to as the "Safe Harbor Provision." The provision applies to online service providers that merely store material at the direction of their users. *See* 17 U.S.C. § 512. If the online service provider follows certain guidelines, then the provision limits them from copyright infringement liability due to their users' activity of uploading infringing material. *Id.* Two such requirements are that the online service provider not be aware of the presence of infringing material or of any circumstances that would make the presence of infringing material apparent and that upon receiving notice from the copyright holders, the online service provider must act expeditiously to remove the allegedly infringing material. *Id.*

quickly deleting any unauthorized files in response to a takedown notice.⁵¹

Nonetheless, because of the number of users that enjoy this technology, it does not take long for a new copy of the material to be posted immediately after one is taken down by the website. It is clear that the file-sharing community has no intention of ceasing its activity and instead, it is working to combat any steps taken by the content industry to curb illegal downloading.

Legal attacks are unsuccessful because of the rapid proliferation of new sites and copies of files after the pre-existing sites and links are taken down. Litigation simply cannot move fast enough to keep up with the speed of the Internet. However, there may be other legal tactics that the content industry could use to end copyright infringement. For example, content owners could lobby for a change in the DMCA to require an additional element for safe harbor protection eligibility. The DMCA would be modified to require that before a party can claim safe harbor protection from copyright infringement liability, the party must provide evidence of a filtering system that blocks the upload of an infringing file on their site or service. Another tactic could be enlisting ISPs to monitor individual activity and report any indication of illegal file sharing. The French government has recently adopted a similar strategy in which ISPs are required to completely suspend a user from Internet service upon a third finding of illegal activity associated with a user's particular IP address.⁵² These strategies show that litigation may not be a complete

⁵¹ A takedown notice is sent by the copyright owner of a particular work to notify the storage provider that there is an unauthorized copy of his work on the host's website. *Id.*

⁵² See Eric Pfanner, *France's Three-Strikes Law for Internet Piracy Hasn't Brought Any Penalties*, N.Y. TIMES, July 18, 2010, <http://www.nytimes.com/2010/07/19/technology/internet/19iht-CACHE.html>.

failure for the content industry in the future if some significant legal changes are made.

With each step that the content industry takes to sue individual users and programs, the file-sharing industry finds a new way to get what consumers want: free digital material. Unfortunately, the cumulative force of this illegal activity is devastating to the record industry. The International Federation of the Phonographic Industry (IFPI) reported a 30% decline in global music sales from 2004 to 2009.⁵³ In addition, IFPI claims that 95% of all music downloaded from the Internet is pirated and that this percentage remained steady throughout 2009.⁵⁴ Amidst the lawsuits and the takedowns, the file-sharing community persists with the full force of new technology and the support of a throng of devoted users.⁵⁵ The current litigation attacks and the supposed education strategies employed by RIAA have failed to improve the situation and therefore, are not the solution to the continuing piracy problem.

II. The Core Of The Problem

Author's Guild Board member James Gleick said, "It is significant that one says book lover and music lover and art lover but not record lover or CD lover or, conversely, text lover."⁵⁶ Gleick's statement perfectly encapsulates the core of the

⁵³ Eric Pfanner, *Music Industry Counts the Cost of Piracy*, N.Y. TIMES, Jan. 21, 2010, <http://www.nytimes.com/2010/01/22/business/global/22music.html>.

⁵⁴ *Id.*

⁵⁵ See Ernesto, *LimeWire Alternatives See Huge Increase in Downloads*, TORRENTFREAK (Oct. 31, 2010), <http://torrentfreak.com/limewire-alternatives-see-huge-increase-in-downloads-101031/> (revealing that despite the legal takedown notice on LimeWire users continued to download by seeking alternatives and that growth in the alternatives boomed after the shut down of LimeWire).

⁵⁶ James Gleick, Op-Ed., *How to Publish Without Perishing*, N.Y. TIMES, Nov. 30, 2008, at WK10, available at <http://www.nytimes.com/2008/11/30/opinion/30gleick.html>.

problem: even though the content industry creates items that are treasured and desired by many, people do not want to pay for content that they can get for free. Most individuals who illegally download would not steal a CD from a store and yet they have no qualms about downloading numerous albums. There are three main factors that contribute to this contradicting activity: first, the intangible form of a digital copy of a work; second, the lack of a uniform social conviction about morality as it relates to illegal downloading; and third, the idea that music is a communal resource that should be shared by all.

a. Intangible Form of a Digital Copy of a Work

First, the obvious difference between taking a CD from a record store and downloading a digital copy of the album is the physical form of the material in question. Intellectual property has been widely referred to as a non-rivalrous good, meaning that one person's use of the good does not deprive another from also using the good.⁵⁷ In this way, downloading a digital copy of a song from another user is more akin to sharing and not stealing because the downloading user does not deprive the uploading user of the song and thus, nothing is actually taken from the latter user.⁵⁸ Therefore, the individual user does not *feel* like he is stealing, in the traditional sense of the word⁵⁹, when he downloads a digital copy of a song from

⁵⁷ See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

⁵⁸ See, e.g., Joe Brockmeier, *Infringement is Not Stealing*, DISSOCIATED PRESS (July 3, 2010), <http://dissociatedpress.net/2010/07/03/infringement-is-not-stealing/>.

⁵⁹ The definition of "steal" is "to take the property of another wrongfully." *Steal Definition*, MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/steal> (last visited Nov. 17, 2010). The definition of "take" is "to get into one's hands or one's possession, power or control." *Take Definition*, MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/take> (last visited Nov. 17, 2010). Due to the intangible form of the digital copy, a user does not experience

another user. Another difference is that the user who downloads from a faceless program in the privacy of his own home does not appreciate the downstream effect of his act and does not engage in direct interaction with the alleged victims. In contrast, the person that steals from a store perceives the empty slot on the shelf as an immediate and physical indication of the resulting harm to the store.⁶⁰

Therefore, the user does not weigh the resulting harm to the record industry and the artists when deciding whether to download illegally. On the contrary, it may seem to the user that there is no harm in the act whatsoever. A common justification for illegal downloading is that the music artists are wealthy and are not harmed by free downloads.⁶¹ The spatial and temporal separation between the bad act and the market harm coupled with the notion that there is no actual harm to the artists leads users to believe that they are neither stealing nor committing any bad act.

b. Lack of a Uniform Conviction Regarding Morality

Second, it is not clear whether unauthorized downloading is truly “bad” because there is no uniform idea regarding the morality of such activity. This is the result of mixed signals from society about whether illegal downloading is in fact wrong.⁶² From the outset, the media portrayed P2P program creators as public

an actual taking of anything from another’s possession and thus, an illegal downloading user does not feel like he is stealing.

⁶⁰ Note that in both scenarios, the user does not contemplate the harm caused to the artists; either the user perceives no real harm when illegally downloading or he perceives harm to the record store instead of the artists or the recording industry as a whole.

⁶¹ See, e.g., Gene J. Koprowski, *The Web: The Effect of Illegal Downloading*, UNITED PRESS INT’L (Feb. 18, 2004, 10:30 AM), http://www.upi.com/Science_News/2004/02/18/The-Web-The-effect-of-illegal-downloading/UPI-58631077118251/.

⁶² See Marc Perlman, Op-Ed., *Why File-Sharing Doesn’t Feel Like Stealing*, BROWN UNIV. NEWS SERV. (Aug. 18, 2003), http://brown.edu/Administration/News_Bureau/2003-04/03-008.html.

heroes and referred to content up-loaders as “modern-day Robin Hood(s).”⁶³ Shawn Fanning, the creator of Napster, was featured on the cover of magazines such as Time and BusinessWeek.⁶⁴ A considerable amount of this media coverage analogized the lawsuit against Napster to a tale of a valiant dwarf battling a mammoth giant. MTV warmly invited Fanning to present an award at the 2000 MTV Video Music Awards, a presumably hostile environment for a file-sharing advocate.⁶⁵ On the other hand, some news outlets⁶⁶ and government officials⁶⁷ spoke out vehemently against illegal downloading and wholly supported RIAA’s aggressive litigation campaign.

In addition, the artists themselves held wildly varying notions about unauthorized file sharing. A group of notable musicians, including rapper Chuck D, Heart, Jason Mraz, and Steve Winwood, filed papers in support of the defendants in *Grokster* and urged the Supreme Court to consider how P2P technology can benefit artists because it allows them to reach a wider audience.⁶⁸ Conversely, artists such

⁶³ See, e.g., *Scene Stealer: The aXXo Files*, THE INDEPENDENT (Dec. 29, 2008), <http://www.independent.co.uk/arts-entertainment/films/features/scene-stealer-the-axxo-files-1214699.html> (referring to aXXo, the Internet’s most popular uploading pirate, as a “modern-day Robin Hood”).

⁶⁴ See *Archive 1932 - Present*, TIME, <http://www.time.com/time/covers/0,16641,20001002,00.html>; BLOOMBERG BUSINESSWEEK, http://www.businessweek.com/2000/00_33/b3694002.htm.

⁶⁵ *MTV Video Music Awards 2000*, MTV NETWORKS, <http://www.mtv.com/ontv/vma/2000/> (last visited Nov. 17, 2010).

⁶⁶ See, e.g., Marci A. Hamilton, *Why Suing College Students for Illegal Music Downloading is Right*, CNN.COM (Aug. 7, 2003), <http://www.cnn.com/2003/LAW/08/07/findlaw.analysis.hamilton.music/index.html>.

⁶⁷ See, e.g., *Radical Illegal Download Remedy*, CBSNEWS.COM (Feb. 11, 2009, 8:43 PM), <http://www.cbsnews.com/stories/2003/05/02/tech/main551969.shtml> (describing Utah Senator Orrin Hatch’s plan to develop technology to remotely destroy computers on the third time that a computer is reported to have been used for illegal downloads).

⁶⁸ Jonathan Krim, *Artists Break with Industry on File-Sharing*, WASH. POST, Mar. 1, 2005, at E5, available at <http://www.washingtonpost.com/wp-dyn/articles/A61254-2005Feb28.html>.

as Madonna and Sting opposed P2P programs in Music United's⁶⁹ anti-piracy ad campaign.⁷⁰ In one such televised advertisement, Britney Spears poses the question, "Would you go into a CD store and steal a CD?"⁷¹ Another advertisement involves rapper Sean "P. Diddy" Combs telling fans to, "Put yourself in our shoes!"⁷² It is hard to imagine that the majority of the public felt any sympathy for these multi-millionaire artists complaining about their loss of revenue. As society continued to debate on the topic, the activity continued to expeditiously grow. As a result, no uniform social conviction was ever adopted and present day Internet users have become accustomed to obtaining free digital content.

c. Music as a Communal Resource

Third, at the heart of the whole problem is the idea that music is a communal resource that should be shared for the public good. Many ethnomusicologists and historians believe that music is a human need and in this respect, it is unique among other forms of art. Based on the study of anthropology, sociology, psychology and neurology, one theory describes music as the result of an original rhythmical impulse in the human body.⁷³ Music serves the purpose of reestablishing the

⁶⁹ Music United is a coalition of musicians, recording artists, record companies and the Recording Industry Association of America that oppose illegal downloading and strive to educate others about their ideals. See *Who Really Cares?*, MUSIC UNITED, http://www.musicunited.org/1_whocares.aspx (last visited Nov. 17, 2010).

⁷⁰ Lisa M. Bowman, *Superstars Blast File Swapping*, CNET NEWS (Sept. 25, 2002, 9:00 PM), http://news.cnet.com/Superstars-blast-file-swapping/2100-1027_3-959537.html.

⁷¹ Gary Susman, *On the Download*, EW.COM (Sept. 26, 2002), <http://www.ew.com/ew/article/0,,354931,00.html>.

⁷² *Id.*

⁷³ RICHARD WALLASCHEK, *PRIMITIVE MUSIC* 230-35 (Longmans, Green, & Co. 1893); see also WILLIAM H. MCNEILL, *KEEPING TOGETHER IN TIME: DANCE AND DRILL IN HUMAN HISTORY* 2-3 (Harvard Univ. Press 1995) (describing the theory of "muscular bonding", communal feeling and social cohesion that results from engaging in prolonged and rhythmic muscular movements with others, as one explanation for why people need music).

rhythmical motion in a human's nervous system that was "disturbed by the evolutionary increase of mental action that was not rhythmically employed."⁷⁴ Due to this physical need, music has been deeply intertwined with the human experience and evidence of musical practices can be traced to prehistoric times.⁷⁵ A similar theory explains how music was essential to human survival. The formation and preservation of social groups was a key factor for the continued existence of civilization because group action enabled humans to prevail against predators and efficiently hunt for food. Music was a tool through which collective identities were formed. Accordingly, the collaborative performance in musical rituals created the social cohesion necessary for the preservation of civilization.⁷⁶

Today, music is still used as an important form of social communication. A glance at any Facebook, MySpace or other social networking site proves that we primarily list our aesthetic preferences to define and represent ourselves to others. Psychological studies have provided compelling evidence that music plays an incredibly important role in social interactions.⁷⁷ According to one such study, music was the most discussed topic over a six-week period in conversations

⁷⁴ ALMA WEBSTER POWELL, *MUSIC AS A HUMAN NEED* 20 (Nabu Press 2010) (1914).

⁷⁵ See generally, WALDO SELDEN PRATT, *THE HISTORY OF MUSIC* (G. Schirmer 1907) (describing the discovery of some form of music in every part of the uncivilized world as shown by the numerous artifacts of primitive music, such as basic drums, harps, flutes and zithers).

⁷⁶ THOMAS TURINO, *MUSIC AS SOCIAL LIFE: THE POLITICS OF PARTICIPATION* 2-3 (Univ. of Chicago Press 2008).

⁷⁷ See Peter J. Rentfrow & Samuel D. Gosling, *The Do Re Mi's of Everyday Life: The Structure and Personality Correlates of Music Preferences*, 84 J. PERSONALITY & SOC. PSYCHOL. 1236, 1250 (2003) (describing how the psychological study suggests that individuals believe that music preferences accurately reveal information about themselves); see also Adrian C. North & David J. Hargreaves, *Music and Adolescent Identity*, 1 MUSIC EDUC. RES. 75, 76-92 (1999) (explaining that the results of the psychological study indicate that individuals deliberately use music preferences to communicate information about themselves to others).

between college students.⁷⁸ Furthermore, there was a significant difference between the percentages of the conversations devoted to music versus the next most commonly discussed topics, which were movies and football.⁷⁹ These results suggest that music preferences, more so than preferences for movies or books, play a prominent role in becoming acquainted with an unfamiliar person.⁸⁰

Furthermore, other psychological studies suggest that music is a dominant tool used in shaping and defining personal identities.⁸¹ Music, more so than other forms of art, is a highly personal matter and it plays a unique and important function in our social lives.

In light of the history and social function of music, the idea of paying for an intangible form of something that we regard as a fundamental social resource and moreover, a deep part of ourselves, is unsound. The public sale of music initially occurred during the era of classical composers, such as Mozart and Beethoven, who would sell handwritten scores of their compositions to the upper class.⁸² However, the invention of the phonograph generated the first literal sales of musical sounds and spawned the contemporary idea of music as a product.⁸³ It was not illogical to

⁷⁸ See Peter J. Rentfrow & Samuel D. Gosling, *Message in a Ballad: The Role of Music Preferences in Interpersonal Perception*, 17 PSYCHOL. SCI. 236, 237 (2006) (describing the six-week experiment where each pair of strangers was given instructions to become acquainted with one another but no specific instructions on the content of their conversations were given).

⁷⁹ *Id.*

⁸⁰ *Id.* at 237-38.

⁸¹ See Matthew Johnson, *Music and Youth Identity*, MEDIA AWARENESS NETWORK (Mar. 30, 2010), <http://www.media-awareness.ca/blog/index.cfm?commentID=158>; see also Dominic Abrams, *Social Identity on a National Scale: Optimal Distinctiveness and Young People's Self-Expression Through Musical Preference*, 12 Group Processes & Intergroup Rel. 303, 304-17 (2009).

⁸² See, e.g., GLENN STANLEY, THE CAMBRIDGE COMPANION TO BEETHOVEN 23 (Cambridge Univ. Press 2000).

⁸³ See WALTER WELCH & LEAH BRODBECK STENZEL BURT, FROM TIN FOIL TO STEREO 16 (Univ. Press of Fla. 1994) (describing how the phonograph was the first machine that enabled both the recording and more importantly, the reproduction of sound).

pay for music because one was receiving a physical product in return. Payment for the manufactured product was perceived as compensation to the creator of the object for the cost of producing it and not as compensation to the artist for creating it. The idea of music as a product remained viable through the invention of eight-tracks, cassettes and compact discs.

However, the Digital Revolution changed the landscape of the record industry. The intangible quality of today's music distribution evokes the inner sense that music is a communal resource. A community where members can exchange and share music is reminiscent of the prehistoric musical ceremonies that promoted social cohesion. Furthermore, the public has grown accustomed to accessing free content because of the lack of a uniform social convention. Therefore, once the Internet created an environment for music to be shared and enjoyed by all, the illegal activity was sustained by an underlying feeling of music as a communal resource. Overall, people's primal feeling towards music helps explain why users generally refuse to pay for intangible digital copies of music.

Moreover, the general public does not want to pay for almost any sort of digital content. The growth of movie, TV show and video game downloads is a clear indication of that. The aforementioned three factors help explain why illegal music downloading remains an active problem. Moreover, two additional factors exist that explain why illegal downloading of content affects the music industry most dramatically. First, a music file is easier and faster to download than a typical movie, TV show or video game file because the former encodes less data than the latter. Secondly, an average person is less likely to notice the particular sound

quality of a music file whereas they would be quick to note the poor resolution of a video file. In order to increase download speed, many video files are compressed to a smaller file size. As a result, downloaded copies are often not the best quality, and many users find it more convenient to find a legal source for their video downloads than to bother with the inferior quality of many illegal video files. In contrast, compressed digital music files do not suffer as much in their quality and thus, people are more likely to download music over videos. However, as Internet speeds are increased the differences in download rates and the resulting effect on file quality will no longer be vital.⁸⁴ Accordingly, the intangible nature of digital music, the lack of a social norm, and the deep human need for communal music continue to explain the reason behind illegal music downloads.

The President of RIAA, Cary Sherman, however, claims that a source of the downloading dilemma is that people steal because they believe that they will not get caught.⁸⁵ Although this is a factor to be considered, it is not dispositive. If that were true, then individuals would steal and commit crimes in many other scenarios than they do. What stops individuals from committing most crimes is a balance of a myriad of factors, which includes the fear of punishment but also involves the feeling of morality. However, as mentioned above, there is no uniform thought

⁸⁴ See, e.g., Ely Portillo, *Time Warner Upgrades Internet Speeds*, CHARLOTTE OBSERVER, Nov. 8, 2010, <http://www.charlotteobserver.com/2010/11/08/1823236/time-warner-upgrades-internet.html> (explaining that Time Warner's new upgrade will now allow users to download a movie in about 10.5 minutes versus 15 minutes in past).

⁸⁵ Benny Evangelista, *RIAA to Sue Individual File-Sharers / Recording Industry Gets Personal With Online Music Fight*, SFGATE.COM (June 26, 2003), http://articles.sfgate.com/2003-06-26/business/17495275_1_file-sharing-riaa-president-cary-sherman-napster (responding to the idea about online user anonymity, Cary Sherman said, "People don't shoplift not because they're worried about morality, but they are worried they're going to get caught").

about what is right and wrong with regard to digital file sharing. Because of its narrow focus on the lack of punishment as the only factor explaining digital music theft, RIAA decided to embark on an aggressive litigation campaign against file-sharers and file-sharing program creators. Yet even after successful lawsuits that punished individuals and dismantled file-sharing programs, users continue to find new ways to steal music.⁸⁶ Indeed, users have only increased their illegal downloading.⁸⁷ RIAA's strategy has been and will continue to be unsuccessful because it does not address the core of the problem. In plain terms, users simply do not want to pay for individual digital copies of their music.

III. Solution: Collective Licensing System

The recording industry must seek another solution to music piracy because the current strategies are failing to make any difference. At the most, the industry is worsening the situation by isolating its own consumers and driving a wedge between the industry and the public. Furthermore, the current situation is not addressing the primary goal of copyright law, which is to promote the arts by giving artists incentives to create.⁸⁸ Presently, recording artists are generally not

⁸⁶ See Enigmax, *File-Sharing Sites Unfazed By Takedowns, Bounce Right Back*, TORRENTFREAK (Jul. 5, 2010), <http://torrentfreak.com/file-sharing-sites-unfazed-by-takedowns-bounce-right-back-100705/> (describing the trend among numerous file-sharing sites that resurface with new URLs after a takedown); see also Ernesto, *supra* note 36 (reporting the noted increase of users on various file-sharing sites the day after the official takedown of LimeWire).

⁸⁷ For the first few months of 2010, P2P file sharing accounted for 19.2% of the normalized aggregate of all traffic, including both upstream and downstream, during peak hours in North America. Sandvine, *supra* note 2 at 13. In contrast, P2P file sharing only accounted for 15.1% in 2009 in the same category. *Id.*

⁸⁸ The United States Constitution provides that Congress is authorized "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. ART. I, § 8, cl. 8; see also *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (1984) (ruling that the Constitution authorizes Congress "to motivate the creative activity of authors and inventors by the provision of a special reward, and to

adequately compensated for the record sales. As Courtney Love famously pointed out in her speech at the 2000 Digital Hollywood Online Entertainment Conference in New York in 2000, “What is piracy? Piracy is the act of stealing an artist’s work without any intention of paying for it. I’m not talking about Napster-type software. I’m talking about major label recording contracts.”⁸⁹ Love, the famous lead singer of the alternative rock band Hole, described how the record companies collect large revenues from record sales but the artists do not receive any profit from the success of their records.⁹⁰ In a recent report published by the daily online magazine, The Root, it was revealed that for every \$1,000 in music album sales, the average musician in a four-piece band makes \$23.40.⁹¹ The recording companies, instead of the artists, collect the profit from record sales, and thus the recording companies are the ones losing money due to illegal downloading. A new approach to the digital download dilemma should compensate artists directly and encourage recording companies to develop new business models.

The best solution to the current problems involving illegal downloading is the application of a collective licensing regime. The royalties generated in a collective licensing regime would be paid directly to the artists. Furthermore, under such a regime, artists would not be required to enlist the services of record

allow the public access to the products of their genius after the limited period of exclusive control has expired”).

⁸⁹ Courtney Love, Speech at the Digital Hollywood Online Entertainment Conference (May 16, 2000) (transcript available at <http://www.salon.com/technology/feature/2000/06/14/love/print.html>).

⁹⁰ Love said, “Two million dollars in royalties minus two million dollars in recoupable expenses equals zero. . . . So their [the record company’s] profit is \$6.6 million; the band may as well be working in a 7-Eleven.” *Id.* Record companies generate large profits from album sales, yet a 20% royalty paid to the band does not result in any profit for the band after the record label recoups the marketing and promotional expenses that they prepaid. *Id.*

⁹¹ Cord Jefferson, *The Music Industry’s Funny Money*, ROOT (Jul. 6, 2010), <http://www.theroot.com/views/how-much-do-you-musicians-really-make?GT1=38002>.

companies in order to be paid. Moreover, a collective licensing regime would generate more incentives for artists to create because any amount of royalties would be greater than the zero amount of profit that most artists receive now. Thus, a collective licensing regime would work to fulfill the goals of copyright law more effectively than the current recording industry system. However, such a system would not necessarily eliminate all record companies from existence because there would still be a need for companies to promote and market artists. The more popular an artist becomes, the more royalties they will receive. Therefore, an artist would have a choice to work with and compensate a record company for promoting the artist and increasing its popularity.

d. Electronic Frontier Foundation's Voluntary Collective Licensing Regime

A few solutions to the digital download problem have been championed by various organizations. Since 2004, the non-profit organization, Electronic Frontier Foundation (EFF), has advocated for the adaptation of a voluntary collective licensing regime.⁹² The regime involves the creation of collecting societies that would collect regular payment from users in exchange for unlimited music downloads.⁹³ The fee could be collected in different ways in order to enable users to choose the method most tailored to their needs.⁹⁴ The collecting societies

⁹² Fred von Lohmann, *Monetizing File-Sharing: Collective Licensing Good, ISP Tax Bad*, ELEC. FRONTIER FOUND. (Mar. 20, 2008), <http://www.eff.org/deeplinks/2008/03/monetizing-file-sharing-collective-licensing-good-isp-tax-bad>.

⁹³ See Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELEC. FRONTIER FOUND., Apr. 30, 2008 at 1, available at <http://www.eff.org/files/eff-a-better-way-forward.pdf>.

⁹⁴ *Id.* at 2.

themselves could set up a fee collection directly on their websites.⁹⁵ ISPs could offer an unlimited music bundle to their broadband packages.⁹⁶ Additionally, P2P programs could charge a low monthly subscription for use of their software and access to the network.⁹⁷ Eventually, advertisements can subsidize the user fees or a user could opt to pay the monthly fee in exchange for an advertisement-free experience.⁹⁸

The EFF claims that a voluntary licensing regime includes many advantages. First, the regime does not call for a large amount of government involvement.⁹⁹ The public would not need to wait for copyright law to be amended before the regime may be implemented, a process that would necessarily take a long time. Furthermore, the market, and not the government, would set the price of the licenses.¹⁰⁰ If ISPs valued the unlimited download package at a high rate, then no one would opt in, and the system would not work. A second advantage is that there would be an increase in investment in digital music technologies and services.¹⁰¹ Instead of wasting resources to combat illegal downloading, businesses could invest in and focus on new technologies. Third, artists would have greater opportunities to distribute their music because they would no longer need to rely on a major label to market their music.¹⁰²

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 3.

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

However, a few other programs similar to the EFF's voluntary collective licensing regime have been implemented to no avail. The problem with the EFF's voluntary collective licensing regime is the simple fact that it is voluntary. Rhapsody, an online digital music service, has been offering users unlimited access to major label music in exchange for a monthly payment since 2002.¹⁰³ Nevertheless, Rhapsody has experienced a steady decline in the number of paid subscriptions.¹⁰⁴ Overall, only 3% of Internet users pay for a monthly subscription service, such as Rhapsody.¹⁰⁵ This is compared to the 19% of Internet users who download from iTunes and the 40% who use YouTube and other video streaming services.¹⁰⁶ Supporters of a subscription-based or voluntary collective licensing regime may point to the success of Spotify, one of the newest additions to the subscription-based music services. Just recently made available outside of Europe, Spotify is a unique digital music service because it offers both a free and paid subscription option.¹⁰⁷ Subscribers may opt to pay the monthly subscription price in exchange for commercial free music. Otherwise, users may enjoy the service free of charge but must thereby tolerate advertisements every twenty minutes, much

¹⁰³ See *About Us*, RHAPSODY INT'L, INC., <http://www.rhapsody.com/about-us#about> (last visited Nov. 17, 2010).

¹⁰⁴ Paid subscriptions to Rhapsody dropped from around 800,000 in early 2009 to 750,000 paid subscriptions in the second quarter, and finally to 700,000 paid subscriptions towards the end of the same year. Ed Oswald, *Rhapsody User Base Drops, Despite iPhone App Success*, PCWORLD (Oct. 30, 2009), http://www.pcworld.com/article/181101/rhapsody_user_base_drops_despite_iphone_app_success.html.

¹⁰⁵ Mike Pearson, *Rhapsody Begins New Life as \$80 Million, 600,000 Customer Startup*, E-COM. TIMES (Apr. 7, 2010), <http://www.ecommercetimes.com/story/69714.html?wlc=1289795406>.

¹⁰⁶ *Id.*

¹⁰⁷ Rob Fitzpatrick, *Why Spotify May Spell the End of Ownership*, SUNDAY TIMES (Mar. 15, 2009), <http://www.timesonline.co.uk/tol/news/uk/article5908344.ece>.

like other online radio programs.¹⁰⁸ However, out of the 10 million users across Europe, barely over 15% of them are paid subscribers.¹⁰⁹ As it has been noted time and again, most individuals will select a free option over one that charges any sort of fee. As such, a voluntary system would be unsuccessful because it would be difficult to encourage users to opt-in given that most users currently do not register with similar programs.¹¹⁰

Furthermore, as history has shown, there is little reason to believe that a voluntary system would not eventually become vulnerable to the continuous advances in technology. New technologies have enabled online users to evade barriers in the past. When Digital Rights Management (DRM)¹¹¹ technology was first introduced, the record industry believed it to be the absolute solution to piracy. In a short amount of time, however, advances in technology were employed to create circumvention methods that would virtually unlock DRM-protected digital

¹⁰⁸ *Id.*

¹⁰⁹ Paul Resnikoff, *Hey Bronfman: Spotify Approaching 650,000 Paid Subscribers*, DIGITAL MUSIC NEWS (Oct. 21, 2010), <http://www.digitalmusicnews.com/stories/102110spotifynumbers> (disclosing that there are currently 650,000 paid Spotify subscribers, 90% of whom are paying the full monthly payment and 10% of whom are paying the half-price monthly fee).

¹¹⁰ Many other disadvantages to a monthly subscription-based service have been noted. First, most services cannot offer complete music catalogues and thus, not every user will be able to find everything for which he searches. Paul Bonanos, *5 Reasons I'm Still Not Paying for a Music Subscription Service*, GIGAOM (Mar. 18, 2010), <http://gigaom.com/2010/03/18/5-reasons-i%E2%80%99m-still-not-paying-for-a-music-subscription-service/>. Second, with a subscription based model a user cannot listen to music that they own along with the music that they stream from the subscription. *Id.* Finally, a user's playlists and music may only be shared with other subscribers to the same service. *Id.*

¹¹¹ Digital Rights Management (DRM) technology refers to the various systems used to protect electronic copyrighted works, namely music and movies. *Tech Terms Computer Dictionary*, TECHTERMS.COM, <http://www.techterms.com/definition/drm> (last visited Sept. 12, 2011). Distributors of digital media use DRM technologies to control the trading, protection, monitoring and tracking of the copyrighted works. *Id.* For example, a distributor could use DRM technology to limit the number of copies that can be created from a digital file of a song. *Id.* The recording industry hoped to combat piracy by virtually controlling digital files well after the consumer has purchased them.

works.¹¹² Furthermore, companies were publicly criticized for the consumer issues that accompanied the application of many DRM technologies.¹¹³ Presently, the major record companies have ceased using DRM technologies to protect their digital works, and most music services tout DRM-free music.¹¹⁴ Therefore, it is easy to imagine how new technology could develop in the near future that would bypass digital barriers to avoid payment of a fee in a voluntary collective license regime. As such, users would stop paying for the monthly subscription because as always, free is hard to beat. In this scenario, the recording industry would be in a similar situation to the one it is in now: continually losing profit due to the illegal activities of online users. Thus, a slightly tweaked version of the EFF's voluntary collective licensing regime would be the best solution.

¹¹² See Dale Dietrich, *IMEDIA L. BLOG*, <http://daledietrich.com/imedia/category/drm-tpms/drm-circumvention/> (last visited Sept. 12, 2011) (reporting the ongoing discovery of new DRM circumvention technologies).

¹¹³ See, e.g., Gwendolyn Mariano, *Apple: Play Music at Your Own Risk*, *CNET NEWS* (May 13, 2002), http://news.cnet.com/2100-1023-912695.html?tag=fd_top (describing technological problems that some copy-protected CDs were causing consumers, including turning computer screens gray and losing the ability to eject the copy-protected CDs from a computer); Jack Shofield, *Ask Jack*, *GUARDIAN* (London) (Aug. 8, 2002), <http://www.guardian.co.uk/technology/2002/aug/08/columnists.shopping> (explaining the unwarranted consequences of DRM where legitimate owners could lose their entire music collection by reformatting their hard drive because the DRM technology will recognize the reformatted hard drive as a different computer and thus, the music files will no longer play).

¹¹⁴ See Catherine Holahan, *Sony BMG Plans to Drop DRM*, *BUS.WK.* (Jan. 4, 2008), http://www.businessweek.com/technology/content/jan2008/tc2008013_398775.htm (reporting that Sony BMG was the last of the four major record companies to cease using DRM technology); *iTunes Store and DRM-Free Music: What You Need to Know*, *MACWORLD* (Jan. 7, 2009), http://www.macworld.com/article/138000/2009/01/drm_faq.html (explaining Apple's decision to provide only DRM-free music on iTunes); Ginny Mies, *10 Best (and DRM-Free) Online Music Stores*, *PCWORLD* (Dec. 15, 2008), http://www.pcworld.com/article/155512/10_best_and_drmfree_online_music_stores.html (listing a number of online music stores that only sell DRM-free music).

e. Involuntary Collective Licensing Regime

An involuntary collective licensing regime is a more realistic approach to the online downloading problem and it also involves many of the same benefits as a voluntary collective licensing system. An involuntary version involves collecting a low monthly fee from users by bundling the cost into the user's internet-service in exchange for unlimited access to music.¹¹⁵ This would allow all Internet users to freely download, upload, copy and share music online. Griffin explained, "Collective licensing is what people do when they lose control, or when control is no longer practical or efficient. A pool of money and a fair way to split it up replaces control."¹¹⁶

One possible way to split the pool of collected money fairly is to employ the Ultimate Chart method created by BigChampagne Media Measurement. In order to accurately divide the money between artists, traditional charts, such as that compiled by Billboard, cannot be relied on because they are based on the sale of albums. If album sales are no longer an accurate means by which to track the popularity of an artist, then a new tracking method must be used. BigChampagne is a California-based company that tracks online media distribution using a variety of sources in lieu of the mere record sale.¹¹⁷ BigChampagne's Ultimate Chart rates

¹¹⁵ Some industry insiders have begun to research possible ways to implement an involuntary collective licensing system. In 2008, Warner Music Group appointed Jim Griffin, a respected music industry critic, to forefront such a plan. See Sam Gustin, *Fee for All*, PORTFOLIO.COM (Mar. 27, 2008), <http://www.portfolio.com/news-markets/top-5/2008/03/27/Warners-New-Web-Guru/index.html>.

¹¹⁶ *Id.*

¹¹⁷ Andrew Dansby, *Rice Grad Keeps Track of What We're Downloading*, HOUS. CHRON. (Apr. 25, 2008), <http://www.chron.com/disp/story.mpl/ent/5730393.html> (explaining the reasoning behind his company, BigChampagne creator Eric Garland said, "All this time, there's always been a single indicator of success: the sale of an album. It used to be you were selling CDs or you weren't. But we transitioned quickly from one business indicator of health to many. You're no longer judged by one

artists based on a combination of scores in four categories: sales; broadcast; watching and listening; and, fans, friends and followers.¹¹⁸ The scores are based on data compiled from a myriad of sites such as Amazon, YouTube, iTunes, Facebook, Rhapsody Radio, Pandora, Twitter, VEVO, Clear Channel and many more.¹¹⁹ As championed by the company's creator, Eric Garland, the Chart results create a "more multidimensional picture of an artist."¹²⁰ Therefore, a tracking method such as BigChampagne's Ultimate Chart would be an appropriate way in which to determine an artist's popularity in today's digital landscape. The collecting societies would then determine how to divide the royalties based on the information about an artist's popularity and thus, establish a specific method by which to do so. To help in this endeavor, the collecting societies can mirror the distribution systems already in place by relevant organizations such as ASCAP¹²¹, SoundExchange¹²², BMI¹²³ and AARC¹²⁴.

number."); *see also* Jeff Howe, *BigChampagne is Watching You*, WIRED (Oct. 2003), http://www.wired.com/wired/archive/11.10/fileshare.html?pg=1&topic=&topic_set= (noting that BigChampagne's earliest tracking services monitored the popularity of songs on P2P programs, such as Napster).

¹¹⁸ *See generally* Ultimate Chart, BIGCHAMPAGNE MEDIA MEASUREMENT, <http://www.ultimatechart.com/> (last visited Sept. 12, 2011).

¹¹⁹ *Id.*

¹²⁰ Dansby, *supra* note 117.

¹²¹ The American Society of Composers, Authors, and Publishers (ASCAP) is a membership association composed of over 420,000 American composers, lyricists, songwriters and music publishers. *See About ASCAP*, AM. SOC'Y OF COMPOSERS, AUTHORS & PUBLISHERS, <http://www.ascap.com/about/> (last visited Oct. 17, 2011). ASCAP licenses and distributes royalties based on non-dramatic public performances of its members' copyrighted works. *Id.*

¹²² SoundExchange is a non-profit performance rights organization that collects and distributes specific statutory royalties collected in relation to satellite radio, Internet radio, cable TV music stations and other similar platforms for streaming music. *See* SOUNDEXCHANGE, <http://www.soundexchange.com/> (last visited Nov. 17, 2010).

¹²³ Broadcast Music, Inc. (BMI) is a performance rights organization that collects and distributes royalties to songwriters and music publishers not represented by other performing rights organizations. *See* BROAD. MUSIC, INC., <http://www.bmi.com/> (last visited Oct. 17, 2011).

¹²⁴ Alliance of Artists and Recording Companies (AARC) is a non-profit organization charged with the task of distributing statutory royalties collected based on the Audio Home Recording Act of 1992. *See*

Furthermore, an opt-out version of the system should be employed so that no individual is compelled to pay the fee against his or her will. In order for an opt-out system to be effective, the user must agree that they are opting out of paying a fee and acknowledge that they are thereby vulnerable to legal action if they are found to be illegally downloading. Although present litigation efforts have proven to be practically unsuccessful and unpopular, litigation under an opt-out collective licensing system would be productive. Firstly, one can assume that less people would be open to legal prosecution than under the current system. A user would have to actively opt-out of the collective licensing regime and agree to accept the risk of litigation versus passively consenting to the fee. As many psychologists have pointed out, an opt-out system generally results in more participants than an opt-in system.¹²⁵ Also, many users would not opt-out simply because they would recognize the value of a service that provides both unlimited music downloads and the accompanying legal protection. Secondly, there would be a decreased public relations issue because litigation under an opt-out system would seem more reasonable. If a user actively opts-out and exposes themselves to legal liability, then prosecution would more likely be seen as fair because violating users would have disobeyed the rules. The present litigation efforts seem unreasonable to the public because random users are prosecuted when it is clear that many are liable. Also,

What is AARC?, ALLIANCE OF ARTISTS & RECORDING CO.'S,
<http://www.aarcroyalties.com/2008/home.php?nav=whatis> (last visited Sept. 14, 2011).

¹²⁵ The large difference in organ donation rates in various European countries spawned a study into the effects of an opt-in versus an opt-out system. Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338, 1338-39 (2003). The study found that donation rates were twice as high when opting-out than as when opting-in. *Id.* This is due to the idea that the way a decision is presented to someone influences one's decision-making facilities. *Id.*

under an opt-out system there will be a decrease in mistaken identification of unlawful users because ISPs will be able to provide the information of every registered user who opts-out of the system. Thus, litigation under a collective licensing regime would be more equitable, practical, and accurate than the present litigation efforts of the content industry.

Nevertheless, there are many criticisms of the involuntary collective licensing system. David Barrett, an engineering manager for peer-to-peer networks, claims that, "Jim's proposal does nothing but direct money to the very people that tried to prevent this future from coming to be, while further legitimizing the terror being waged in the courtrooms against their members."¹²⁶ However, those critics that believe that this type of system is a conduit through which the record companies can profit freely are mistaken. The royalties collected from ISPs would be distributed by the collecting societies directly to the artists, giving artists the power to decide whether or not to work with a record company. If they prefer to, artists could pay a record company for valuable services, such as marketing, managing, branding, etc. Thus, this system does not have to be one in which record companies continue to control the industry nor a system where record companies are obliterated from existence. Instead, the system would encourage record companies to change their business model and no longer rely on music as a product as the source of their income. Another criticism claims that such a system would

¹²⁶ Gustin, *supra* note 115.

eviscerate competition in the market and also kill innovation and creativity.¹²⁷

However, artists would be driven to compete because the royalty incentive would be in proportion to one's popularity. An artist must generate enough popularity to receive any profit. This would be no different than what has always been known about the music industry; a majority of artists do not become famous, and only those that reach some level of popularity are able to generate profit. The involuntary licensing regime would not remove incentives or competition from the system and thus, it would successfully achieve the goals of copyright law.

f. Royalty Imposed on Manufactured Products

Another possible alternative solution would be to enforce a statutory royalty on manufactured products that are capable of recording and playing digital sound recordings or are involved with the copying and transferring of digital recordings. This regime would essentially act as an extension of an already working royalty system based on the Audio Home Recording Act of 1992. Congress implemented the Audio Home Recording Act to further protect the rights of copyright holders in response to the growing digital audio recording technology environment. As part of the solution, the act imposes a royalty on manufacturers, distributors and importers of devices that enable the reproduction of digital copies of copyrighted works.¹²⁸ Nevertheless, many of today's devices that are utilized for digital copying are not addressed in the act and thus, are not vulnerable to the royalty.¹²⁹ Therefore,

¹²⁷ Michael Arrington, *The Music Industry's New Extortion Scheme*, TECHCRUNCH (Mar. 27, 2008), <http://techcrunch.com/2008/03/27/the-music-industrys-new-extortion-scheme/>.

¹²⁸ See 17 U.S.C. §§ 1001-10 (2006).

¹²⁹ See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1078 (9th Cir. 1999) (holding that "Under the plain meaning of the Act's definition of digital audio recording

extension of this act to include products that are not currently vulnerable to the royalty, such as computers, laptops, smart phones and MP3 players, may be a solution to the online downloading problem. A great amount of royalties could be collected from this sort of regime given the incredible number of these types of devices sold on a daily basis. However, this type of solution does call for government action and thus, it may take an especially long time to implement. Additionally, with the advent of smart phones and iPads, more and more companies are developing “all-in-one” devices. This suggests that consumers will only require the purchase of one device for all of their digital needs in the near future. A royalty on these devices may bring substantial revenue now, but will most likely cease to be fruitful. Therefore, a solution that involves a statutory amendment to collect royalties from manufacturers of products used for the enjoyment of digital music would not be a better option than a collective licensing system.

A collective licensing regime is not an unwarranted or unrealistic solution to the current music distribution dilemma. Less than a century ago, copyright holders faced similar predicament due to the advent of broadcast radio.¹³⁰ Eventually, the solution was a voluntary collective licensing regime. Collective societies, such as ASCAP and BMI, were formed in order to grant collective licenses to radio stations.¹³¹ As such, radio stations pay a fee to the collecting societies who in turn distribute the payments to their respective members. This system far out weighed the alternative, which was an attempt to shut down each radio station one by one by

devices, computers (and their hard drives) are not digital audio recording devices because their ‘primary purpose’ is not to copy digital audio recordings).

¹³⁰ von Lohmann, *supra* note 90, at 2.

¹³¹ *Id.*

initiating legal action against them.¹³² In the long run, the collective licensing system proved successful for radio and thus, is a reasonable solution to today's digital download problem.

IV. Conclusion

The digital download dilemma cannot be ignored and yet, there are no signs that it will be solved by the current strategies employed by RIAA and the rest of the entertainment industry. A radically different approach is needed to solve today's problem, which stems from the radically different world in which we live. The content industry should advocate for an opt-out involuntary collective licensing system, despite the fact that the system's success would be limited to the music industry.¹³³ The application of a collective licensing regime would not signify the end of copyright law nor would it be a way to fully compensate artists for their work. Artists can generate further profit by touring, endorsing products and licensing their music for films and advertising. If recording companies acquiesce and let go of the archaic idea of music as a product, they too can profit from new business models and reclaim their position in the industry. A solution to the download dilemma is feasible provided that all sectors of the market realize that a radical change is required in order to adjust to the radically different world that the

¹³² *Id.*

¹³³ This system would not be successful for the film and television industry. The difference is that a great deal of initial investment and organization between many players are required for that industry to create its art. Thus, a clear incentive system is required to promote the creation of those types of art. Conversely, a direct incentive is not necessarily required for music to be created. As previously mentioned, music is unique to other forms of art. It is something that would be created even if no incentives were given because it is a human need. Musicians create art because it is within them and it is something that can be created wonderfully by one person acting alone. The same cannot be said of films and television. Thus, a collective licensing regime is limited as a solution for the music industry only.

Digital Revolution has brought. Free may be hard to beat but it is far from impossible.