

NEW BUSINESS MODELS FOR MUSIC

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I. INTRODUCTION

The popular music industry is in the middle of a technology-driven revolution. It is clear that the old order has been swept away, but it is not yet clear what form the “new order” will take. The major labels are on life support and will not survive in anything like their previous form. Compact Discs are dead as a distribution medium. Copyright is unenforceable and hence essentially irrelevant except at the margins of the “new order.” Barriers to entry have been reduced dramatically as the costs of producing top-quality recordings have declined by a couple of orders of magnitude. Portable music players such as the iPod permit consumers to listen to music all the time and this enormously increases the potential demand for music.

The amount of new music generated by indie musicians will increase as the demand for music increases because of its portability for consumers. Copyright protection, in the form of digital rights management (“DRM”), will become even less effective for recorded music and technological protections and will be abandoned altogether. The result will be continued downward pressure on prices for recorded music and soft demand for paid record sales.

Increased supply and demand mean increased search costs—how are musicians and their potential fans to find each other? As in the past, intermediaries must match consumers with the music they like, but this will happen in new ways. As music MySpace pages and independent websites proliferate, the burden of finding new music only increases. Someone has to perform the matchmaking function formerly performed by the major labels and the radio-station chains. Who will do it? Innovation and experimentation will increase as new kinds of intermediaries try to find the best way to connect musicians with their potential fans. A handful of these will become the dominant gatekeepers.

The increased competition and the demise of traditional gatekeepers signal a sharp reduction in prices—approaching zero—for recorded music. This means a reduced revenue stream to support anyone in the industry unless demand increases so heroically as to outpace the downward pressure on prices. This is unlikely. What business model will support the post-revolutionary space? In this climate of increasing competition, musicians and their sponsors will try to fill the revenue gap for established musicians and to support new entrants by shifting their focus to live performances, ring tones, new forms of fan-performer interactions, movie scores, and advertising.

All the evidence supports the proposition that most musicians will make music; even without a business model. They say that they want to “get to the next level”—that they want to make a living from their music. But their behavior makes it clear that they will perform for pennies or for free to get their music in front of any crowd—live or virtual—even if limited to their friends and to the friends of other bands appearing on the same bill. It may become easier for a few new musicians to break through and to achieve a significant following among consumers, but most will continue to labor in obscurity. Many of them will make good music, but it will be listened to only within a modest circle of associated musicians, their families and friends.

It is unlikely, however, that potential intermediaries, necessary to perform the matchmaking function, will work for free. Even if a business model is unnecessary for the musicians themselves, it is necessary for the intermediaries.¹ Unless such a business model can be framed, embraced, and sold to investors, the “new order” in the music industry will be one in which hundreds of thousands of

1. The point is not that musicians do not *deserve* to make money; the point is that they will make music whether or not they make money.

artists making very good music go essentially unnoticed by those who would enjoy their music.

The demise of the major labels will not be the end of the “music business.” The major labels were never the true innovators.² Nevertheless they channeled capital to anonymous musicians and enabled a handful to become famous, as the labels poured money into attempts to build a following for those they adopted. The big questions about the future of popular music are who will aggregate and allocate capital? Who will perform the gate keeping, advertising and promotion functions historically performed by the major labels?

Metaphorically, this is a struggle between dinosaurs and beavers, with herds of amiable and talented sloths on the fringes, providing background music. The dinosaurs—the major record labels, their defensive myths, and their lobbyists and lawyers—are trying to crush an environmental phenomenon that threatens to make them extinct. The beavers—the indie musicians and the entrepreneurs who are experimenting with new forms of intermediation—are largely oblivious to the thrashing of the dinosaurs, and are heroically working to construct structures that work in the new marketplace. Because most beavers focus on the individual trees rather than the forest, most will fail; but some will succeed in proving the viability of a new business model.³

This article is the fourth in a series by this author seeking to explore the impact of the technological revolution in the music industry. The first three built the case for three propositions concerning costs, copyright, and DRM, while this article explores the question of what economic incentives will suffice to facilitate an effective market in the absence of intellectual-property or copy protection.⁴ It bases its analysis, in part, on empirical evidence collected from interviews with musicians and music consumers.

2. See EVAN EISENBERG, *THE RECORDING ANGEL: MUSIC, RECORDS AND CULTURE FROM ARISTOTLE TO ZAPPA 18-19* (2d ed. 2005) [hereinafter *Eisenberg*] (exploring recorded music’s impact on society). Labels are happy to climb aboard a bandwagon once it is underway but are rarely in the driver’s seat. *Id.*

3. Less metaphorically, indie musicians and entrepreneurs are preoccupied with tactics and tend to neglect strategy.

4. See Henry H. Perritt, Jr., *New Architectures For Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT L.J. 259 (2007) [hereinafter *New Architecture*] (arguing digital media will only erode record companies’ profits on music, not decrease growth in industry); Henry H. Perritt, Jr., *Music Markets and Mythologies*, 9 J. MARSHALL REV. INTELL. PROP. L. 831 (2010) [hereinafter *Mythologies*] (proposing that contrary to big labels’ cries, new music technologies will increase demand for popular music and create new opportunities for musicians); Henry H. Perritt, Jr., *Flanking the DRM Maginot Line Against New Music Markets*, 16 MICH. ST. J. INT’L L.

Following this introduction, the article first defines the problem; explaining why the old business models have eroded in the face of new technologies and of the changing role of the law—especially copyright law. Then, it builds on the author’s work in his *New Architectures* article, explaining who makes music, who consumes it, and why. These sections explain that while money plays a role in the marketplace for music, it is secondary to “hedonic” factors both for musicians, who make music largely for self-expressive and self-affirmation reasons, and for consumers, who listen to music for reasons including idiosyncratic perceptions of its quality, a desire to be part of a particular crowd, and vicarious identification with or attraction to the performers.

This Article then explores the essential role that intermediaries play in the marketplace. This section acknowledges that the new kinds of intermediation needed in the new technology-driven market place will not occur unless intermediaries can make money. Building on this foundation, this Article develops the elements of a business model that can sustain new forms of intermediation. The result will be a robust market for popular music that will provide more opportunities for a wider variety of musicians and result in greater consumer satisfaction than past models. For viable business models to exist, entrepreneurs striving to stake out roles as new kinds of intermediaries must creatively monetize access to the celebrity that they build in their clients through new technologies including not only social networking and videogames, but also technologies for classifying music to reduce consumer search costs.

Whatever insights this article offers are the product of the author’s involvement in the grassroots music, theatre, and film communities in Chicago, often known as the “indie” (in the case of

113 (2007) [hereinafter *DRM Maginot Line*] (asserting digital rights management and other copyright protections limit growth of music market). The music trilogy builds on an earlier scholarly interest in the relationship between intellectual property protection and new digital technologies, especially Internet-linked personal computers. See generally Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261 (1996) (discussing evolution of intellectual property law to accommodate new challenges presented by technology); Henry H. Perritt Jr., *Book Review: Lawrence Lessig, Code and Other Laws of Cyberspace*, 32 CONN. L. REV. 1061 (2000) (reviewing Lawrence Lessig’s book, *Code and Other Laws of Cyberspace*, emphasizing book’s point on Internet’s effects on politics); Henry H. Perritt, Jr., *Unbundling Value in Electronic Information Products: Intellectual Property Protection for Machine Readable Interfaces*, 20 RUTGERS COMPUTER & TECH. L.J. 415 (1994) (arguing IP rights must not make data incompatible between machine interfaces if new technologies are to expand data availability); Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65 (1992) (explaining why common law should govern issues of tort liability in cases concerning electronic networks).

music and film) or “storefront” (in the case of theatre) communities.⁵ The author writes and records songs under the name *Modofac*, which has so far released two albums.⁶ Beginning in the summer of 2008, the author wrote a musical, and produced it in 2009 and again for an eight-week run in 2010.⁷ The musical played to sold-out audiences during its initial run in a storefront Chicago theatre. Now, the author is working with a group of indie filmmakers to make a feature-length film based on the story embodied in the musical.

In the course of that effort, he collaborated with and formed friendships with a growing group of indie musicians, theatre people, and filmmakers, mostly in their twenties and thirties, who write

5. “Indie,” a short form of independent, signifies several different things to musicians. See *Indie*, URBANDICTIONARY.COM, <http://www.urbandictionary.com/define.php?term=indie> (last visited Oct. 11, 2010) (indicating difficulty of defining “indie”). In its broadest sense, the word simply refers to musicians who do not have a contract with a major record label. In its narrowest sense, it refers to a music genre associated with such musicians. “Indie rock” is loosely associated with the punk sound; “indie pop” is associated with jangling guitars and superficial lyrics. This article uses the term in its broader sense.

6. See MODOFAC, <http://www.modofac.com> (last visited Oct. 11, 2010) [hereinafter Website] (giving information on band’s latest endeavors); MODOFAC, <http://www.myspace.com/mo-dofacprof> (last visited Oct. 11, 2010) [hereinafter MySpace] (displaying music bio on Hank Perritt, Jr.). The first album contains fourteen songs; the second contains twelve. The author wrote and arranged the songs in Sibelius, a full-featured composition software product. The recorded performances almost all involved acoustic instruments or electric guitars; only two of twenty-six use any significant amount of synthesized sound. Each took about 300 hours in the studio to record and mix. The studio created a master CD. Meanwhile the author solicited bids from Internet-based duplication/pressing houses. He chose one (HAVE, Inc.) based on a combination of price and service levels. After the CDs were pressed, the author sent several to reviewers, radio station music editors and several promotion houses identified on the Internet. He entered into a contractual arrangement with The Plantetary Group, which sent the first album to 300 college and community radio stations. More than 100 stations played some or all of the songs from the album. The author financed all of this from his personal capital. The albums are available for sale on CDBaby, through CDBaby on iTunes and Amazon, and on Snocap until Snocap ceased operations. CD and download sales have been very modest. This is a music-making effort completely carried out through digital technology and the Internet. The author may not be representative of indie musicians generally. Like them, however, he confronts the reality that consumers may or may not like his music, regardless of its objective merits or shortcomings, but he is sixty-five, while most indie musicians are closer to twenty-five. Their pictures are more likely to attract consumers than the author’s picture because it is easier for younger consumers to identify with them. He has no present capacity to perform publicly, and this deprives him both of an opportunity to build a fan base through live performances and to sell CDs in conjunction with live performances. The author has a relatively high discretionary income and so the availability of capital for production and promotion is not an issue; there is no need to attract outside capital.

7. See Website, *supra* note 6 (giving overview of band’s latest works); MySpace, *supra* note 6 (documenting author’s musical activities).

their own music (or plays or screenplays), perform it live publicly, and dream of making a living with their art. On the whole, they approach life in ways significantly different from the author's multiple generations of law students. Interested in their philosophies, their experiences, and their formative influences, the author interviewed several of them in depth and wrote a series of profiles for publication on the Web.⁸ The profile-writing effort expanded naturally to include several enthusiastic consumers of popular music, in the same general age group.

The author joined the advisory board of the Chicago Music Commission, a non-profit group devoted to improving Chicago's climate for musicians and its visibility as a music city. Simultaneously, as a vice-chair of the Chicago Council on Global Affairs' Global Chicago Project, he investigated the role of grassroots music creation and of independent theatre and film work as determinants of success in the global competition among cities. In the course of these activities, he organized and moderated several focus groups in which musicians and their professional facilitators discussed the environment for music activities and the hallmarks and pathways of success.

II. THE PROBLEM

Harvard economics Professor Richard Caves summarized the characteristics of the music industry as follows:

1. The goals of the creative process strain against the economic resources available for the task
2. Musicians face an "anguished" contact with the gatekeepers who select among the many available artists and their creative output
3. Ecological forces in the marketplace determine the organization of the gatekeepers
4. Gatekeepers may function in a sequence so that an artist may be admitted by one, but denied entry by another—necessary—one.
5. "The many would-be creative workers who suffer rejection either [give up], toil in dedicated poverty or settle for humdrum work, while those who experience creative suc-

8. See *Profiles*, INDIE MUSIC CHICAGO, <http://www.indiemusicchicago.com> (follow "Profiles" hyperlink) (last visited Oct. 11, 2010) (listing profiles written by author).

cess reap adulation and wealth in what tend to be take-all contests”

6. Uncertainties reign in a market structure in which costs at each level are sunk, before the gatekeeper who controls the next function decides whether to risk investing.⁹

Caves’s “ecological forces” change over time, causing upheavals in the organization of the industry. Printed scores, broadcast radio, recording technologies, and audio amplification all changed the way music was made, distributed and consumed. All of these technological innovations, like the more recent proliferation of small computers linked to the Internet, rendered existing forms of organization obsolete and provided opportunities for entrepreneurship in redefining how musicians would find and interact with their audiences.

The popular preoccupation with recorded music delivered to consumers in the form of CDs is a misleading way to think about popular music. Dominance of recorded music as the revenue engine of the music business is a phenomenon of the twentieth century—mostly the latter part of the twentieth century.¹⁰ Recorded music pushed publishing and live concerts into the background only toward the end of the century. Radio was a big driver of discovery and celebrity.

Technology has produced a new “ecology” in which all access to recorded music is essentially free (broadcast radio had always been free). This has upended a business model based on billions of dollars annually in sales of recorded music. The resulting crisis in the music industry really is a crisis only for enterprises that depend on recorded music for their profits.

This part of the article analyzes the development and erosion of the model on which those enterprises depended and contrasts it with the new model that is replacing it. This section concentrates most of its attention on recorded music, but also describes briefly how live concerts and publishing enter the picture.

9. RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* 363 (2002) (summarizing characteristics of markets for creative work, including music).

10. See ELIJAH WALD, *HOW THE BEATLES DESTROYED ROCK 'N' ROLL: AN ALTERNATIVE HISTORY OF AMERICAN POPULAR MUSIC* 84-85 (2009) (discussing change in music industry with rise of recorded music).

A. The Old Model

The business model for popular music at the end of the 20th century relied on three revenue streams: recorded music, live performances, and publishing.

1. *Recorded Music*

Recorded music was consumed through two channels: acquisition of records in CD or other formats, and by being heard on the radio. Radio play reinforced record distribution and vice versa.

Some music industry analyses treat the patterns of supply and demand and the business models that existed in the late 1990s as though they had been the long-term pattern. This was incorrect. The CD album, top forty radio play and the dominance of the major labels were upstarts, just as digital distribution, peer-to-peer (“P2P”) file sharing and Do It Yourself (“DIY”) musicians are today.¹¹

There surely is a technology-driven revolution going on, but it began 120 years ago. The invention of the phonograph and of easily reproducible records upended the role of music in people’s lives. Before these innovations, consuming music was necessarily a social activity: the performer had to be in the presence of the consumer for the exchange to take place.¹² Efficiency dictated that the consumers usually clustered in groups for each performance.

As recorded music became widely available, consumption of music could be a solitary activity. This may have loosened social bonds, but it significantly reduced the transaction cost for consumers.¹³ One no longer had to schedule an evening at the symphony or persuade a little sister to play the piano; one simply put a record on the turntable.¹⁴ By the late 1920s, it also was possible to listen to music on the radio, and that music was free (once one owned a radio receiver). Still, there is no such thing as a free lunch, and the zero price that came from radio consumption accompanied a loss of control over which songs played. In either event, one had to be

11. See STEVE KNOPPER, *APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* 23-39 (2009) (describing rise of CDs in sic industry and subsequent boom in sales).

12. See EISENBERG, *supra* note 2 (exploring recorded music’s impact on society).

13. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 216-17 (2000) (discussing how changes in technology changed music from social to solitary activity).

14. See Eisenberg, *supra* note 2, at 58 (describing people gathered around an early Victrola).

at home or at a music establishment to have access to a record player or a radio receiver.

The next step was for technology to make music portable. This happened in a mass way in the 1950s. At that time, automobile ownership exploded, and the automobile radio, introduced by Motorola in 1932, made music portable for the first time, expanding the potential demand by increasing the number of available hours for consumers to listen to music.¹⁵ Portability increased further when portable transistor radios were introduced in late 1950s by Texas Instruments and Sony.¹⁶

Two kinds of gatekeepers controlled access to this market: record labels and radio stations. Many of these existed, usually making decisions at the local or regional level. A musician could, of course, always give a live concert. That had been true since before the days of Bach. But for distribution of his music to audiences larger than could be persuaded to come to a concert—or accommodated by the physical spaces available—a musician needed the mass market distribution potential of radio and records.

It was expensive to make records, and difficult to set up a radio station. The development and commercialization of tape recording in the late 1940s and early 1950s made audio recording more broadly available than before, but recording equipment was still expensive, and only a few possessed the skills necessary to edit tape. Moreover, manufacturing the vinyl disks from the master recording was a big deal, and within the capability of only a handful of pressing plants. A musician had no prayer of making a record unless he hooked up with a recording studio. Elvis hung out for weeks before he made such a pest of himself that Sun Records' Sam Phillips finally agreed to talk to him.¹⁷

Portability depended on radio play. Radio play could not occur unless a record existed and even then it was controlled by rela-

15. See *Music in Motion: The First Motorola Brand Car Radio*, MOTOROLA.COM, <http://www.motorola.com/content.jsp?globalObjectId=8432-10811> (last visited Oct. 11, 2010) (documenting history of first car radio, attributed to Motorola founder).

16. See *Regency TR-1 Transistor Radio History*, REGENCY: WORLD'S FIRST POCKET RADIO, <http://www.regencytr1.com/> (last visited Oct. 11, 2010) (outlining history of fight to distribute first transistor radio and noting Texas Instruments as first company to distribute in the US); see *The Little-Known Transistor Radio Kit*, SONY.COM, <http://www.sony.net/SonyInfo/Corp-orateInfo/History/capsule/17/index.html> (last visited Oct. 11, 2010) (recounting history of first Japanese transistor radio, invented by Sony).

17. See PETER GURALNICK, *LAST TRAIN TO MEMPHIS: THE RISE OF ELVIS PRESLEY* 62-65 (1994) (describing Elvis Presley's persistence at Sun Records).

tively independent DJs, whom the record labels courted assiduously—and bribed.

Radio stations continued to proliferate in the period before television penetrated the home entertainment market, and local station management was entirely free to decide what music to play. Links between local promoters, local disc jockeys, and local recording studios fueled the breakthrough of Elvis Presley.¹⁸ The same kind of local and then regional entrepreneurship occurred with Buddy Holly and, twenty years later, with Punk.¹⁹ The discretion of local DJs to decide what was played on the radio declined with consolidation of radio-station ownership and the introduction of more “scientific” market research to decide what kind of music would attract radio audiences most desired by advertisers.²⁰ Radio consolidation accelerated after changes in FCC rules in 1992 and even more after enactment of the 1996 Telecommunications Act.²¹ Clear Channel, which owned forty-three radio stations in 1992, bought seventy more during the middle 1990s.²²

Twenty years later, music became even more portable with the introduction of cassette tapes containing recorded music. These devices made it easy for consumers to record music off the radio, to transfer recordings from vinyl to cassettes, and to play cassettes on Sony Walkman and boom boxes, which were introduced in the late 1970s. The Walkman was introduced in 1979 as a cassette player with two headphone jacks.²³ CD players took over in the mid to late 1990s.

Record labels were the initial gatekeepers, although radio stations were gatekeepers for building a fan base. An aspiring star would first get a record deal with a local label and, if things went

18. *See id.* at 111-14 (describing Sam Phillips’ travels to promote Elvis).

19. *See* SCOTT SCHINDER, *ICONS OF ROCK: AN ENCYCLOPEDIA OF THE LEGENDS WHO CHANGED MUSIC FOREVER* 80-82 (2008) (recounting Holly’s early music career and relationship with local radio); *see also* MARC SPITZ, *NOBODY LIKES YOU: INSIDE THE TURBULENT LIFE, TIMES AND MUSIC OF GREENDAY* 21-40 (2006) (describing early days of punk music).

20. *See* DANNY GOLDBERG, *BUMPING INTO GENIUSES: MY LIFE INSIDE THE ROCK AND ROLL BUSINESS* 119-23 (2008) (describing how top forty radio selected songs to play based on audience and advertiser preferences).

21. *See* MICHAEL C. KEITH, *THE RADIO STATION: BROADCAST, SATELLITE AND INTERNET* 31 (2009) (documenting changes in government regulation of radio over the years).

22. *See Company History*, CLEARCHANNEL.COM, <http://www.clearchannel.com/Corporate/Pr-essRelease.aspx?PressReleaseID=1166&p=hidden> (last visited Oct. 12, 2010) (listing significant moments in Clear Channel’s company history).

23. *See* PAUL DU GAY, *DOING CULTURAL STUDIES: THE STORY OF THE SONY WALKMAN* 8 (2003) (proposing that people have created a new cultural reality around the Sony Walkman).

well, eventually graduate to a major label with a national market presence.²⁴

Technological changes revolutionized the structure of the industry in the last half of the 1990s, although the effects were felt most dramatically after the turn of the century. The wide availability of inexpensive portable music players, the introduction of digital formats and compression software pre-installed on almost every personal computer, and the ubiquity of the Internet destroyed the control exercised by traditional gatekeepers and made intellectual property in recorded music essentially unenforceable. As distribution channels shifted dramatically to downloadable formats delivered through the Internet, new kinds of search engine technologies challenged broadcast radio's preeminence.

Now the industry structure is highly concentrated:

[I]n 2006, the four largest major record companies were Universal, Sony BMG Music Entertainment ("Sony BMG"), EMI Recorded Music ("EMI") and WMG, which accounted for approximately 73% of worldwide recorded music sales. There are many mid-sized and smaller players in the industry that accounted for the remaining 27%, including independent music companies. Universal was the market leader with a 26% global market share in 2006, followed by Sony BMG with a 21% share. WMG and EMI held a 14% and 13% share of global recorded music sales, respectively. While market shares change moderately year-to-year, none of these players have [sic] gained or lost more than 3 percentage points of share in the last 5 years through 2004 (taking into account combined shares of Sony and BMG for years prior to the formation of Sony BMG in 2006).²⁵

After 2000, alternative distribution channels crystallized and consumers began to prefer them instead of the traditional labels and retailers. P2P file sharing developed as an underground channel for unlicensed access to recorded music. Apple introduced iTunes, which swept the market. The established music industry opposed both; although, it could have created either itself.

24. See Guralnick, *supra* note 17, at 111-14 (detailing Sam's sale of Elvis to RCA).

25. Warner Music Grp. Corp., Annual Report (Form 10-K) 13 (Nov. 29, 2007) available at <http://www.sec.gov/Archives/edgar/data/1319161/000119312507255544/d10k.htm>.

Major record labels have fallen on hard times, as CD sales have declined and consumers have shifted purchases away from albums toward singles.²⁶ In 2008, download sales exceeded CD sales for the first time for a major label.²⁷

EMI and Warner Music Group specialize in the music business, so their financial results are a better indicator of the fortunes of the major labels than Universal Music Group (“UMG”) and Sony. EMI does business under the labels Angel, Astralwerks, Blue Note, Capitol, Capitol Nashville, EMI, EMI Classics, EMI CMG, EMI Televisa Music, Mute, Narada, Parlophone and Virgin.²⁸ EMI’s revenue was 1.75 billion pounds in 2007, compared with 2.08 billion in the previous year, the reduction due to the declining sales of recorded music.²⁹ EMI was purchased by private equity firm Terra Firma in 2007, which embarked on an aggressive cost-cutting program focused on publishing.³⁰

Warner Music Group spun off from Time Warner in 2004, and is the only stand-alone music content company with publicly traded common stock.³¹ Warner Music Group does business under many labels including Asylum, Atlantic, Cordless, East West, Elektra, Lava, Nonesuch, Rhino, Rykodisc, and Warner Bros.³² Its reported financial results may therefore be the best barometer of what is going on with major label subsidiaries of the larger diversified corpo-

26. See *id.* at 22 (“While CD sales still generate most of the recorded music revenues, CD sales continue to decline industry-wide . . .”).

27. See Tim Arango, *Digital Sales Surpass CDs at Atlantic*, N.Y. TIMES, Nov. 26, 2008, available at http://www.nytimes.com/2008/11/26/business/worldbusiness/26iht26music.1816318-6.html?_r=1&scp=3&sq=Digital%20Sales%20Surpass%20CDs%20at%20Atlantic&st=cse (reporting shift in Atlantic Records’ sale demographic).

28. EMI Grp., Annual Review for Period Ending March 31, 12-13 (2008), available at <http://www.emimusic.com/wp-content/uploads/migration/0,,12641~140527,00.pdf> (giving a survey of artists throughout history on the EMI label).

29. See *id.* at 13 (charting EMI’s profits and revenue between 2003 and 2008).

30. See Terra Firma, Annual Review 2008 at 79-80 (2008), available at <http://www.te-rrafirma.com/ar08/ar08.pdf> (setting out new business plan for EMI). “EMI has seen improved results at both its Recorded Music and Music Publishing businesses. In the year-to-date, earnings of Recorded Music have improved on the prior year due to the significant progress that has been made in cutting costs and introducing a new, more commercial culture to the business. Music Publishing delivered solid results as it pursues its long-term strategy of actively developing new markets and licence [sic] types for the commercial usage of music.” *Id.* at 12.

31. See Warner Music Grp. Corp., *supra* note 25, at 5 (recounting how an investor group acquired Warner Music Group in May 2005, establishing the group as the only stand-alone music content company with publicly traded common stock in United States).

32. See Warner Music Grp. Corp., List of Subsidiaries (Ex. 21.1), Nov. 29, 2007, available at <http://www.sec.gov/Archives/edgar/data/1319161/000119312507255544/dex211.htm> (listing sub-sidiaries of Warner Music Group Corp.).

rate parents. Warner's 2007 income was \$3.4 billion, down from \$3.5 billion in 2006, and it had a net loss of \$21 million in 2007, compared with a net profit of \$60 million in 2006.³³

Universal Music Group is 100% owned by Vivendi, a French limited liability company.³⁴ It does business under the labels Island Def Jam Music Group, Interscope Geffen A&M Records, Lost Highway Records, MCA Nashville, Mercury Nashville, Mercury Records, Polydor and Universal Motown Republic Group, Decca, Deutsche Grammophon and Philips, Verve and Impulse! Records.³⁵ Vivendi's revenues for 2007 were \$21.7 billion, which was up from \$20 billion in 2006.³⁶ Its adjusted net income was \$2.8 billion in 2007 compared with \$2.6 billion in 2006.³⁷

Universal Music Group's revenues were off 1.7%, however, comprising \$4.87 million in 2007, compared with \$4.96 billion in 2006.³⁸ Its earnings were down even more sharply, at 16%, from \$624 million in 2007, compared with \$744 million in 2006.³⁹ Recorded music revenues decreased by 7.2%, while music publishing revenues were up 45%.⁴⁰

Sony BMG was formed in 2004 as a fifty-fifty joint venture between Sony and Bertelsmann.⁴¹ Sony bought out Bertelsmann's stake in October 2008.⁴² The merger of Sony's and Bertelsmann's music activities into Sony BMG faced protracted challenges in Eu-

33. See Warner Music Grp. Corp., *supra* note 25, at 41 (charting Warner Music Group Corp. revenue).

34. See Vivendi, Annual Report at 15 (2007), available at http://www.vivendi.com/vive-ndi/IMG/pdf/20080422_annual_report_2007-4.pdf (noting that Universal Music Group is one of Vivendi's business groups).

35. See *id.* at 26 (describing Universal Music Group's businesses and listing its major recording labels).

36. See *id.* at 130 (showing Vivendi's consolidated financial data).

37. See *id.* (listing Vivendi's revenue in chart).

38. See *id.* at 143 (breaking down revenues from 2006 and 2007 of Vivendi's various businesses and showing percent change between two years).

39. See *id.* (comparing graphically earning distinction between 2006 and 2007).

40. See *id.* at 144 (showing revenue changes from 2006 to 2007 from recorded music and music publishing sectors).

41. See Press Release, Bertelsmann AG and Sony Corporation Agree on Music Merger (Dec. 12, 2003), available at <http://www.sony.com/SCA/press/031212.shtml> (explaining details of merger creating Sony BMG and how it will be managed and run).

42. See Press Release, Sony Completes Acquisition of Bertelsmann's 50% Stake in Sony BMG (Oct. 1, 2008), available at <http://www.sony.com/SCA/press/081001.shtml> (announcing Sony's full ownership of shares and creation of new company called Sony Music Entertainment Inc.).

rope.⁴³ While the merger was approved by the European Commission, it was rejected by the European Court of Justice Court of First Instance in 2006.⁴⁴ The decision was then overturned by the European Court of Justice in October 2008.⁴⁵ Sony does business under the labels Arista Records, Columbia Records, Epic Records, J Records, Jive Records, and RCA Records, among others.⁴⁶

Sony corporate revenues were \$8.9 million in 2008, compared with \$8.3 million in 2007, while earnings were \$466 million in 2008, compared with \$102 million in 2007.⁴⁷ Sony BMG was a joint venture which “contributed significantly to net income” for 2008.⁴⁸ Sony reported a net income of \$10 billion from its share of Sony BMG in 2007, an increase of \$5 billion from the previous fiscal year.⁴⁹ This increase was “primarily due to a reduction in restructuring costs compared to the previous fiscal year, lower marketing costs, a reduction in overhead costs from continued restructuring, a gain on the sale of an interest in a joint venture of SONY BMG, and the favorable impact of currency fluctuations.”⁵⁰

All four, in their discussion about their business environment in their annual report sections, note that they face uncertainty because of the continuing decline of CD sales and the rise of digital downloads as a replacement. They also emphasize the need to protect their intellectual property rights in recorded music.

In describing its business, EMI said, “EMI Music identifies potentially successful recording artists, signs them under recording contracts, collaborates with them to produce recordings of their work, markets the finished recordings to consumers and media,

43. See Case C-413/06 P, Bertelsmann and Sony, (Sept. 9, 2008) <http://courtsofjustice.blogspot.com/2008/09/c41306-p-bertelsmann-and-sony.html> (explaining litigation history of Sony and Bertelsman in the European courts).

44. See Case T-464/04, Impala v. Commission, 2006 E.C.R. 39, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:224:0039:0040:EN:PDF> (annulling Commission’s decision declaring concentration to be compatible with common market and functioning of EEA Agreement).

45. See Case C-413/06, Bertelsmann v. Impala, 2008 ECR 7, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:223:0007:0008:EN:PDF> (quashing judgment and remanding to Court of First Instance).

46. See Sony Music Entertainment, <http://www.sonymusic.com> (last visited Oct. 17, 2010) (listing record labels owned by Sony Music Entertainment).

47. Sony Corp., *Annual Report*, at 88 (June 26, 2008), available at <http://www.sony.n-et/SonyInfo/IR/financial/ar/2008/qfhh7c00000htn6x-att/SonyAR08-E.pdf> (reporting revenue for 2008 and comparing it to prior years).

48. *Id.* at 5 (noting value of Sony BMG in generating income in 2008 along with other ventures of company).

49. See *id.* at 54 (noting increase in income from 2007-2008).

50. *Id.*

and sells the releases into the retail trade in a variety of formats.”⁵¹ Historically, record labels performed eight major functions:

1. They recruited artists
2. They provided capital
3. They managed the recording process
4. They manufactured CDs
5. They advertised and promoted the CDs
6. They distributed them to stores
7. They performed revenue and royalty accounting functions
8. They enforced copyright⁵²

The demise of the CD renders the manufacturing and distribution functions obsolete.⁵³ New technologies call into question the artist-recruitment, recording-management and copyright-enforcement functions, leaving only the capital aggregation and allocation, advertising and promotion functions still to be performed by the major record labels.⁵⁴ It remains to be seen whether they can and will perform these functions separately from the obsolete functions, and whether they can do it better than newer firms specializing in those functions.⁵⁵

Although the major labels had the capital and the brand recognition to have dominated and shaped the technological revolution, they did not.⁵⁶ Their failure to do so reveals much about the reasons why they are unlikely to adapt successfully to the new marketplace.

51. EMI Group PLC, Annual Report, 10 (2007).

52. PATRICK BURKART & TOM MCCOURT, *DIGITAL MUSIC WARS: OWNERSHIP AND CONTROL OF THE CELESTIAL JUKEBOX* 18-19 (2006) (explaining basic role of record companies in music industry).

53. See *The Music Industry: From Major to Minor*, *ECONOMIST*, Jan. 12, 2008 (giving statistics of decline in CD sales and showing people no longer want CD's, even when given out for free).

54. See *New Architecture*, *supra* note 4, at 329-33 (describing new ways of distributing music outside of traditional record label arena).

55. See *id.* at 278 (“[T]he pressure of consumer demand, which could be satisfied in new ways through new technologies, has swept away the objections of the defenders of the status quo—and often the objectors themselves.”)

56. See Jessica Litman, *Sharing and Stealing*, 27 *HASTINGS COMM. & ENT L.J.* 1, 3 (2004) (explaining music industry did not embrace new technology and intentionally fought against it by “su[ing] the purveyors of peer-to-peer file sharing software, the Internet service providers who enable consumers to trade files, and more than 5000 individual consumers accused of making recorded music available to other consumers over the Internet.”).

Major labels are large firms with substantial overhead bound by inertia.⁵⁷ Their business processes and fixed costs were designed to succeed in the environment of the last quarter of the twentieth century, but have not been adjusted to fit current technology.⁵⁸ Their Artist and Repertoire (“A&R”) representatives, all highly paid professionals, spend much of their time going to clubs seeking to discover good, new musicians.⁵⁹ Their recording studios are well staffed with producers, recording engineers and technicians.⁶⁰ Their legal staffs review deviations from standard-form contracts and supervise litigation against the growing army of listeners who infringe label copyrights—or are perceived by the labels as infringing, based on the labels’ interpretation of the law.⁶¹ Accounting staffs keep track of the money coming in and divvy it up more or less according to contractual obligations.⁶²

Marketing and advertising professionals develop strategies for building loyalty to the label’s brand and for promoting long-time and new musicians on the label. They contract with advertising agencies for expensive mass-advertising campaigns. Other full time staff members work with radio-station chains to get the label’s music on nationwide playlists and some also work with major radio stations to get good positions on their playlists. Others mediate press and media publicity. Labels, as a subsidiaries or divisions of large conglomerates, must contribute to label and holding-company corporate overhead. They must generate sufficient gross margin to support human-relations, environmental, risk management, purchasing, auditing and legal compliance staffs.

The job approaches of all of these people have been refined over decades to produce past successes. The collection of their skills and approaches comprises the skill set of the firm. Experienced professionals among their ranks do what has worked well for them earlier in their careers. As the firms matured, internal rules circumscribing individual employee discretion crystallized and then hardened. All firms extol creativity and innovation but have a hard time making room for such values in the context of committee

57. See CAVES, *supra* note 9, at 315 (“a large enterprise must be bureaucratic and rule-based to coordinate its team members in pursuit of a common set of objectives”).

58. See *id.* at 149 (discussing system of fixed costs of promotion and distribution).

59. See *id.* at 67-70.

60. See *id.* at 158-59.

61. See *id.* (stating legal staff job).

62. See *id.* (noting job of accounting staff).

meetings to coordinate among departments and hierarchical approvals to protect against imprudent investments.

Fundamental change is difficult for several reasons. Individual employees resist change—or any analysis of the business environment that suggests the need for basic change—because they fear their skills’ becoming obsolete. A few, nearing retirement age and seeing their alternative employment opportunities drying up, do not care about the long-term future of the enterprise; they just want to keep their jobs until they are eligible to retire. CFOs, CEOs, and boards of directors are reluctant to launch new business ventures that are uncertain, capital intensive, and that threaten the cash flow of existing product lines or relationships. And innovation is costly in another sense: rules reduce transaction costs, internally and externally. If a firm does something the way it always has been done, it does not have to think or to negotiate. Doing something that has never been done before requires much more high-quality—and therefore expensive—attention.

All of these realities produce high fixed costs and difficulty in coping with dramatic changes in consumer preferences and behavior. If technology, including new ways of organizing economic activity in the industry, reduces possible cost structures significantly, a once-successful firm is likely to find that it no longer is an effective competitor. If consumers shift their attention to new marketing channels, a once-successful firm is likely to find that it is spending lots of money on things that do not matter anymore.

Major labels still budget between \$300,000 and \$400,000 to record an album.⁶³ The labels provide big advances to bands when they signed; however, the amount is declining from the high hundreds of thousands of dollars to tens of thousands of dollars.⁶⁴ The label’s executives and signed bands travel in limousines and expect lavish parties at major performances and music festivals. Labels continue to spend on what is essentially “payola,” albeit much of it directed so as to be legal.⁶⁵

63. One music blog reports that major labels spend about \$500,000 to support radio play and \$250,000 to record a major album. See Posting of Michael Einhorn to <http://72.52.81.253:8081/site1/Newpr/blog/categories/Labels> (Sept. 28, 2004, 11:16 EST) (discussing the costs of radio play and recording albums).

64. See *id.* (describing signing advances).

65. See Douglas Wolk, *The Other Foot*, THE VILLAGE VOICE, <http://www.villagevoice.com/2005-08-16/music/the-other-foot/> (last visited Oct. 16, 2010) (describing ways in which record labels have illegally paid money or given products to boost song play on radio stations). See 47 U.S.C. § 317 (2009) (prohibiting music industry’s practice of paying broadcasters to play recordings during regular airplay unless there is disclosure during airtime that song is paid endorsement).

As fortune turns against them, the labels are more and more focused on musicians who already are celebrities, and consequently, they are less inclined to invest in new, unproven, talent. For example, the cover of the November 13, 2008 edition of Rolling Stone magazine featured AC/DC.⁶⁶ Major stories inside the issue focused on The Dead, James Hetfield, Metallica's front man, Eminem, Taylor Swift, the Clash, Queen, Van Morrison, Rise Against, and the Who.⁶⁷ There was one column on new music and feature stories on three newer bands, TV on the Radio, Fleet Foxes, and Franz Ferdinand.⁶⁸

Two possible motivations exist for such a retrospective emphasis. One is that the magazine and its advertisers want to target the baby boomers, a large demographic cohort that has more disposable income than younger fans.⁶⁹ More likely is that the popular establishment has shifted its focus to what is safe—bands and performers of whatever vintage that proved their audience appeal in the past.⁷⁰ Giving much attention to new groups is simply too risky.⁷¹ Warner Music Group notes:

The sale of catalog material is typically more profitable than that of new releases, given lower development costs and more limited marketing costs. In the first three quarters of calendar 2007, according to SoundScan, 40% of all U.S. album unit sales were from recordings more than 18-months old, and 28% were from recordings more than three-years old.⁷²

66. ROLLING STONE, Nov. 13, 2008 (showing picture of AC/DC on cover of magazine).

67. *See id.* at 21-49 (showing who most of the articles are written on in magazine, most being already successful artists).

68. *See id.* at 32-42 (showing small number of articles devoted to newer artists in magazine).

69. *See* Kristin Davis, *Marketers, Take Note: Baby Boomers Have a Lot of Money to Spend*, U.S. NEWS & WORLD REP., Mar. 6, 2005, available at <http://www.usnews.com/usnews/b-iztech/articles/050314/14boomer.htm> (describing why baby boomers are most sought-after demographic for companies).

70. *See* Warner Music Group, 2007 *Annual Report*, at 15 (2008) available at <http://library.corporate-ir.net/library/18/182/182480/items/276802/WMG2007AR.pdf> (explaining catalog material generates more profit than new music because of lower costs).

71. *See id.* at 2 (stressing flexibility and discretion available to Warner Music Group in contracting with new artists).

72. *Id.* at 15.

They concentrate on trying to build market share rather than increasing the size of the market.⁷³ But for those already celebrities, a push by a major label has smaller marginal return than the same effort would have for a new musician. And the celebrities need it less; they are already well known.⁷⁴

The labels are pushing all their artists for “360 deals” - contractual arrangements in which the label gets, not only a share of revenue from record sales, but also a share of revenue from live performances, merchandise sales and endorsements.⁷⁵ The labels have no expertise in concert promotion or marketing of merchandise, but they are seeking a share anyway.⁷⁶

One of the reasons the major labels confront irrelevancy is that they no longer function as effective gatekeepers.⁷⁷ Reduced barriers to entry because of technology have led to a proliferation of musicians who make their music available to the general public, without the need to get permission from a major label.⁷⁸ Some 10,000 Chicago-based MySpace music pages exist, for example.⁷⁹ The vast majority of these artists write their own music, retain their copyrights to it, and acquire support services on an unbundled basis contracting with recording studios, hiring session musicians to perform arrangements (if necessary), and contracting separately

73. See Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, NOV. 11, 2007, available at <http://www.nytimes.com/2007/11/11/arts/music/11leed.html> (describing idea of smaller roster and higher stakes for albums).

74. See Geoff Taylor, *Record Industry's Survival in the Digital Age*, TELEGRAPH, Oct. 22, 2007, available at <http://www.telegraph.co.uk/finance/markets/2818082/Record-industrys-survival-in-the-digital-age.html>. (theorizing that labels can provide new acts with “multiplicity of online channels” to bolster their careers).

75. See Leeds, *supra* note 73 (explaining 360 deals and reasons behind their popularity).

76. See *You Spin Me Right Round: Like a 360 Record Deal*, LAWYER 4 MUSICIANS, Mar. 22, 2009, <http://lawyer4musicians.com/2009/03/22/you-spin-me-right-round-like-a-360-record-deal/> (noting that old model of label recouping advance from album sales does not match changes technology has had on music industry).

77. See Jeannie Hart, *MySpace Artists Draw Publicity*, ASSOCIATED CONTENT, Nov. 23, 2005, available at http://www.associatedcontent.com/article/14009/myspace_artists_draw_publicity.html?cat=33 (explaining how MySpace functions as place to hear unsigned, new artists).

78. See Jason Luntz, *Independent Artists are Using Social Networking to Get Their Music Heard*, CREATIVE DRIVE STUDIO, Feb. 4, 2010, <http://www.creativedrivestudio.com/blog/article/Independent-artist-are-using-Social-Networking-to-get-their-music-heard.htm> (discussing benefits of MySpace and social networks for aspiring artists and methods to increasing musical popularity independent of a record deal).

79. See Cultural Policy Center at the University of Chicago, *A REPORT ON THE MUSIC INDUSTRY IN CHICAGO* 39 (ed. Lawrence Rothfield 2006), <http://culturalpolicy.uchicago.edu/publications/CMCFullReport.pdf>. (citing city statistics of performers posting their music on MySpace Music).

with CD pressing plants and with radio promotion services.⁸⁰ They sell their music through separate services, which have non-exclusive licenses to distribute the music.⁸¹

There is less investment in new musician entrants to the industry because the major labels, under financial distress, have less capital and because the new intermediaries are not accumulating capital through profitability.

2. *Live Performances*

Musicians and their agents can put their music in the marketplace in two ways: they can record it and distribute the recording, or they can perform live.⁸² Live performances generate some three to four billion dollars per year in revenue, compared with about ten billion dollars for recorded music.⁸³ Control of large-venue performances in arenas and stadiums has become more concentrated in the hands of a few enterprises, such as Live Nation.⁸⁴

The only significant innovation has been the proliferation of major music festivals, such as Bonnaroo, Lollapalooza, South By Southwest, and the CMC festival in New York.⁸⁵ Festivals offer some advantages for consumers who are too busy with work or family to

80. See *id.* at 12 (noting how MySpace Music page holders interact with “core components of the music industry”).

81. See *id.* (referencing self-employed musicians selling their music through various channels including gigs, street fairs, music festivals, online downloads, etc.).

82. See Glen Peoples, *4 Categories to Kickstart the Music Biz*, BILLBOARD, Sept. 1, 2010, http://www.billboard.biz/bbbiz/content_display/industry/e3id2408305f8fc71558827499ceb571451 (explaining how record labels increase business through concert ticket sales and recorded CDs).

83. See *Stones Smash Own Concert Record*, QUEEN NEWS, Dec. 30, 2005, <http://www.brianmay.com/queen/queennews/queennewsdec05.html> (citing music industry statistics). Pollstar estimates that ticket sales for music concerts fell from 2004 to 2005, while revenue rose from \$2.8 billion to \$3.1 billion. *Id.* But North American concert revenues in 2007 were \$2.6 billion and concert attendance was down 19.2% to 51 million. *The Police Score Top-Crossing Tour of '07*, BILLBOARD, http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003685265 (last visited Oct. 12, 2010). But a Forbes article disagreed with this report, concluding that total “primary market” concert ticket sales for 2007 were \$3.9 billion, up 8% from 3.6 billion in 2006. See Louis Hau, *Another Record Year for the Concert Industry*, FORBES, (Jan. 4, 2008), http://www.forbes.com/2008/01/04/concert-revenues-2007-biz-media-cx_lh_0104bizconcert.html. Earlier Pollstar reported figures were limited to the top 20 artists. *Id.*; RIAA, 2007 Year-End Shipment Statistics, (2008), available at <http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf>.

84. See Steve Kandell, *The Crowd Pleasers*, SPIN, May, 2008, at 72, available at <http://spin-cdnsrc.texterity.com/spin/200805/> (noting changes in leisure time use favor festivals over fixed venues).

85. See *id.* (recognizing existence of major music festivals).

go to smaller venues several times a week.⁸⁶ They can wait and see a dozen or more bands by going to one festival.⁸⁷ Although originally hyped as providing exposure for indie musicians, in fact these festivals concentrate most of their capital and promotional activity on well-established bands, take advantage of hungry local groups, and do everything they can to limit competition by the musicians themselves and by alternative intermediaries. Lollapalooza, for example, pays local groups as little as \$200 to perform, while insisting on non-compete agreements that prohibit the groups from performing sixty days before and after the festival. Lollapalooza prohibits independent photography, recording or video capture.⁸⁸

Live performances, unlike recorded music, are not threatened by digital technology's erosion of copyright protection, but they are threatened by other forces.⁸⁹ Promoters have had a harder time filling stadiums, and have shifted to multi-band festivals, which are better suited to midlevel indie bands with a buzz.⁹⁰ But some prominent promoters disdain indie music.⁹¹ "If today's indie bands remain at their current level of popularity, who will headline the festivals of the future? You give it five years and it's going to be scary."⁹²

86. *See id.* (suggesting busy lives of consumers as reason for increased popularity of major music festivals).

87. *See id.* (recognizing that fans trade in comfort of small venue for increased numbers of performances).

88. *See* Lollapalooza FAQ, LOLLAPALOOZA, <http://www.lollapalooza.com/info/faq/in-dex.php#items> (last visited Oct 16, 2010) (listing non-professional recording equipment as permitted items and professional recording equipment as not permitted for attendance at Lollapalooza).

89. *See* Steve Knopper, *Summer Tour Meltdown: Canceled Tours, Slow Sales: Inside the Worst Season in a Decade*, ROLLING STONE, June 24, 2010, at 15 (arguing increased ticket prices caused declining demand for concerts); *See also* David Browne, *Outside Chances*, SPIN, (May 2008) at 67, 68 (expressing concern about lack of headlining acts to draw crowds to concerts).

90. *See* Knopper, *supra* note 89 (regarding changes in live music performance models).

91. *See id.* at 70 (quoting Perry Farrell, promoter of Lollapalooza). Lollapalooza also engages in anti-competitive behavior aimed at smaller local venues. *See id.* (discussing 70-mile radius prohibiting performance in other venues from date of festival announcement until 90 days afterwards).

92. *Id.*

Live performances have advantages over distribution of recorded music.⁹³ They are really a different product from recorded music.⁹⁴

[N]one of their recordings captured what they sounded like in front of dancers. They were driving and free and exultant. They were showing off for the dancers, and the dancers, in return, showed off for them. It was a fervent, ritualistic relationship that made the music as close to visual as music can be.⁹⁵

The author of this observation could have been talking about a 9 December 2008 concert by the young pop group Vampire Weekend performing in Boston's Orpheum Theater. A couple thousand, mostly college-age fans, were belting out the words to every song along with the band, cheering the onset of each song from the band's first album. The whole theater was rippling with shoulders and hands moving to the rhythm. "Musicians find that concerts concentrate their minds wonderfully. And blood lust is only one of the needs that concerts satisfy; there is also the need for public ritual and for a public architecture of time."⁹⁶

3. *Publishing*

As a musician becomes more popular, it becomes more likely that other musicians will want to perform ("cover") the first musician's songs or to adapt them.⁹⁷ Such a demand opens up a new revenue stream. The law's bifurcation of copyright between sound recordings and musical works (there is no performance right attached to sound recordings, but there is for musical works) results in a bifurcated market structure, with the players in the market for licenses for musical works different from the players in the market

93. See Victor Keegan, *The Demise of Music is Visible Everywhere But In the Facts*, THE GUARDIAN, Mar. 12, 2010, <http://www.guardian.co.uk/technology/blog/2010/mar/12/demise-music-industry-facts> (explaining how industry works to prevail in economic crisis). "A key fact is that last year income from live music overtook that from recorded music for the first time. Don't think tracks, think music." *Id.*

94. See *id.* (noting people who do not pay for music legally still willing to pay for tickets to concerts).

95. EISENBERG, *supra* note 2, at 78 (noting that recorded performance cannot be compared to seeing and hearing it in-person).

96. *Id.* at 83.

97. See *Ten of the Most Covered Songs Ever*, THE FIRE WIRE, Feb. 6 2009, <http://larryfire.wordpress.com/2009/02/06/10-of-the-most-covered-songs-ever/>. (providing list of most covered songs in history and noting popular musicians who made them popular).

for recorded music.⁹⁸ Copyright collectives and sheet music agents, dominated by Hal Leonard, control the former. While most cognoscenti refer to “publishing” income, it is not primarily related to publishing sheet music, but instead to royalties from performance and derivative work licenses. According to the Warner Music Group 2007 Annual Report:

The top four music publishers collectively account for over 65% of the market. Based on Music & Copyright’s most recent estimates in 2005, EMI Music Publishing and WMG (Warner/Chappell) were the market leaders in music publishing, holding 17% and 16% shares, respectively. They were followed by BMG at 13%, Universal at 12% and Sony/ATV Music Publishing LLC (“Sony/ATV”) at 7%. Independent music publishers represent the balance of the market, as well as many individual songwriters who published their own works.⁹⁹

B. Effects of Technology’s Latest Revolution

Technology has increased the productivity of most inputs, reduced barriers to entry, shifted consumption patterns and changed the ways in which new musicians and consumers find each other.¹⁰⁰ The result is both intensified competition, and a shift in the locus of the market, away from traditional channels to new spaces, many of them on the Internet.¹⁰¹

The new technologies for making, distributing and listening to music have four major effects. They increase the number of musicians who make music and can reach potential consumers.¹⁰² They increase the demand for music, by reducing its price and making it more portable. They reduce the costs of making and consuming it. They reduce the effectiveness of the “gates” managed by the traditional gatekeepers. The combination of these effects reduces reve-

98. See 17 U.S.C. § 106(4) (conferring performance right for musical works but not for sound recordings); 17 U.S.C. § 114 (delineating limitations on sound recording rights). Compare 17 U.S.C. § 102(2) (musical works) with 17 U.S.C. § 102(7) (sound recordings).

99. Warner Music Group, *supra* note 70, at 14.

100. See Luntz, *supra* note 78 (discussing “trifecta of social networking” and effects Internet has on musicians through utilization of social network sites).

101. See Warner Music Group, *supra* note 70 (recognizing piracy as notable reason for increase in competition with illegal channels provided by advancing technologies).

102. See Luntz, *supra* note 78 (noting that artists with pages on social networking sites often search for other page-creators as friends or fans).

nue streams available for the traditional gatekeepers—but also for each musician.

The increased productivity resulting from sharply lower costs is available to major labels as well as to indie musicians and new intermediaries, but, as explained above, the major labels will have difficulty taking advantage of these reduced costs.¹⁰³ Accordingly, the major labels will continue to have high costs and find themselves less and less competitive. Concentration will not necessarily decrease over the long run because economies of scale will continue to exist in promotion and advertising. But the beneficiaries of these economies will be different firms—just as Microsoft and Google replaced IBM, Wang, and DEC at the top of the Fortune 500.¹⁰⁴

How the major labels evolve and who emerges to replace them depends on the effects of the demise of the CD, on the potential of downloadable digital files to plug the resulting revenue gap, and on law's diminished role in determining the architecture of the marketplace for music.

1. *Effects of the Demise of the CD*

A market based primarily on distribution of music embedded on physical CDs, which were not easily obtainable unless they were paid for, resulted in limited price competition, inventory-management, and retail levels. This supported high margins and the tying of highly desired songs with less desired songs in the album format. The tying enabled push marketing of music that might grow in popularity once consumers were exposed to it.¹⁰⁵

High margins generated a fund to support marketing and promotion bureaucracies that largely determined demand patterns. They also provided a pool of investment capital that could be directed to the development of unknown musicians. Getting a major record label deal was the main—perceived as the only—way a band could break through to real commercial success and celebrity status. Getting signed to a major label meant tens or hundreds of thousands of dollars in advances, some of which was received in cash and much of which was enjoyed in-kind in the form of produc-

103. See *CAVES*, *supra* note 9, at 257.

104. See *Fortune 500: Our Annual Ranking of American's Largest Corporations*, CNN, May 3, 2010, http://money.cnn.com/magazines/fortune/fortune500/2010/full_list/index.html (listing Fortune 500 companies).

105. See Tom Hess, *The Pursuit of the Record Deal*, MUSIC CAREERS, (2008), <http://www.musiccareers.net/career-articles/pursuit-of-the-record-deal/> (explaining perks of signing record deal).

tion and recording support, food, travel and lodging.¹⁰⁶ Label A&R representatives enjoyed considerable discretion in allocating significant amounts of capital to musicians that they, in their relatively independent judgment, believed had something to offer to music consumers.¹⁰⁷ They prowled music venues seeking to discover new bands to sign.

The demise of the CD and its replacement by online distribution has increased competition at all levels, reduced concentration, and reduced margins.¹⁰⁸ The traditional pools of investment capital have evaporated, hundreds of A&R representatives have been laid off, and those that remain have had their discretion curtailed by rules on where investment may be directed and tougher requirements for higher level corporate approval before a new band may be signed.¹⁰⁹ The demise of the CD diminishes the capacity of the traditional intermediaries to control the marketplace.

2. *Limited Potential of Downloadable Digital Files*

Music consumers prefer downloadable digital files to CDs, but the revenue potential of digital sales is insufficient to support the same business model that was built on CDs. Sales of CDs have declined every year over the last six years; by 8% from 2004-2005, 12% from 2005-2006, 17% from 2006-2007, 25% from 2007-2008 and 20.5% from 2008 to 2009.¹¹⁰ Sales for 2008 were down 55%, com-

106. See Dan Bricklin, *The Recording Industry is Trying to Kill the Goose That Lays the Golden Egg*, DAN BRICKLIN'S WEBSITE, Sept. 9, 2002, <http://www.bricklin.com/recordsales.htm> (describing positives and negatives of CDs and downloading music).

107. See *What Does a Record Label A&R Do*, ALL MUSIC INDUSTRY CONTACTS, (2010), <http://www.allmusicindustrycontacts.com/a&r.htm>. (noting that while A&R representatives have discretion in signing acts, their job is dependent on acquiring successful acts and head A&R makes ultimate decision). "A&R" stands for Artist and Repertoire. *Id.* An A&R acts as a scout for a record label and signs acts. *Id.*

108. See Greg Sandoval, *Music Tech Guru Says Web is Not the Enemy*, CNET News, Aug. 26, 2010, available at http://news.cnet.com/8301-31001_3-20014752-261.html?tag=topTechContentWrap;editorPicks (describing positive affects of downloading music for music industry).

109. See *What Does a Record Label A&R Do*, ALL MUSIC INDUSTRY CONTACTS, (2010), <http://www.allmusicindustrycontacts.com/a&r.htm> (explaining why signing with record label is hard).

110. See RIAA, 2009 Year-End Shipment Statistics, 2010, available at <http://76.74.24.142/A200B8A7-6BBF-EF15-3038-582014919F78.pdf> [hereinafter RIAA 2009] (reporting physical CD sales for 2009); RIAA, 2008 Year-End Shipment Statistics, 2009, available at <http://76.74.24.142/D5664E44-B9F7-69E0-5ABD-B605F2EB6EF2.pdf> (reporting physical CD sales for 2008); RIAA 2007 Year-End Shipment Statistics, <http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf> (reporting physical CD sales for 2007).

pared with 1998.¹¹¹ Revenue from CD sales was down by a similar amount.¹¹² Over the same six years unit, sales of digital singles increased by 163% for 2004-2005, 60% for 2005-2006, 38% from 2006-2007, 28% from 2007-2008, and 9.2% from 2008-2009, and revenue from sales of digital singles increased by the similar percentages.¹¹³ Unit sales of digital albums increased 195% from 2004-2005, 103% from 2005-2006, 54% from 2006-2007, 34% from 2007-2008, and 20.2% from 2008-2009, with revenue from sales of digital albums up by similar amounts.¹¹⁴

Moreover—and this is the important part—the total number of digital sales was 1.2 billion in 2008, exceeding 292 million total shipments of CDs. Digital album sales were much less—seventy six million.¹¹⁵ This shows, not a decline in the willingness of consumers to buy music, but a shift in consumer preferences from physical to digital formats, and to singles as opposed to albums.¹¹⁶ The hemorrhaging of major-label revenue may threaten the interests of the labels, but it does not prove that the music world is being savaged by thieves. It shows that consumers *are* willing to buy music. But it also shows that they prefer more convenient formats, that they resist having the songs they want being tied to songs they do not want, and that they want the prices they are charged to reflect the much lower costs of production and distribution which new technologies make possible.¹¹⁷

Despite the explosion in demand for downloadable digital formats, the revenue flows are much less than for CDs. Total revenues from digital sales were \$2 billion in 2009, compared to \$4.2 billion for CDs shipped in the same year.¹¹⁸ This reflects a generally lower price for digital formats (averaging just under \$1 for digital singles) compared with CDs (averaging just over \$14 for albums—almost all

111. See RIAA 2009, *supra* note 110 (comparing 2008 and 1998 sales).

112. See *id.* (listing and discussing revenue from CD sales).

113. See *id.* (same).

114. See *id.* (same).

115. See *id.* (same).

116. See Rafat Ali, *Music Labels Rethinking iTunes, Again; Same Old Gripe of Album vs Singles*, PAIDCONTENT.ORG, Aug. 27, 2008, <http://paidcontent.org/article/419-music-labels-rethink-itunes-again-same-old-gripe-of-album-vs-singles/> (explaining why downloading single songs is more popular than buying CDs).

117. See RIAA 2009, *supra* note 110 (discussing statistics of types of music sold). In 2009, 94 % of the digital sales (by unit) were singles and 6 % were albums. See *id.* (reporting digital sales). By contrast, in the same year, 99.7 % of the physical CD sales were albums and 0.3 % were singles. See *id.* (reporting physical CD sales).

118. See *id.* (reporting digital sales and CD sales for same year).

CD sales are album sales), and the consumer preference for singles.¹¹⁹

Other realities limit the revenue potential of downloadable digital formats. They are available from multiple sites on the Internet, some licensed, some not, directly from musicians on their websites or on their MySpace and YouTube pages, as well as from music services such as iTunes.¹²⁰ This results in a much more competitive market structure at the retail level, which puts continuing pressure on prices. It also makes it likely that musicians, their fans, and their promoters will make some of their music available for downloading for free.

3. *Potential of Live Performances*

Technology has changed the market for live performances much less than it has changed the market for recorded music. The technologies for live performances have changed only modestly over the last twenty years. Relevant developments are limited to more powerful sound systems and more widely available video screens, which permit larger crowds to see close-ups of performers, regardless of their actual distance from the stage.

Nothing much has changed about the costs of starting and operating a live-music venue, regardless of size. Indeed, more aggressive enforcement and tougher health, safety and environmental regulations likely increase costs, as do increasing competition for land use in high-density areas. The supply of musicians willing to perform in these venues has increased, however, because of technology's effects, and this is certain to reduce the prices at which musicians are willing to perform. But musician compensation has always been a small part of the total costs of the operation of smaller and medium-size venues. While technology has increased the popular demand for recorded music, the determinants of attendance at live performances has not changed. Potential audience members still must decide how much of their leisure time to devote to attendance, and how much of their discretionary income to allocate to pay for tickets or cover charges. The price of admission to

119. *See id.* (comparing CD and digital singles).

120. *See* MySpace, <http://www.myspace.com/> (last visited Oct. 14, 2010) (allowing artists to post music on personal web pages); YouTube, <http://www.youtube.com/> (last visited Oct. 14, 2010) (allowing artists to post music videos for free viewing); iTunes, <http://www.apple.com/itunes/> (last visited Oct. 14, 2010) (offering music in digital format for sale).

very large venues has increased sharply, and the price for admission to smaller venues has not decreased.¹²¹

All of this suggests constant demand and increasing supply for performances at music venues, with reduced revenue opportunities for musicians performing at such venues. Even though the supply of musicians willing to perform is increasing, the number of possible performances is constrained by the number of venues. Any venue still can present only three—or at most five—bands on a Friday or Saturday night.

If anything, technology provides alternative ways for potential concert attendees to fuel their “altruism” motivation. Web pages maintained by musicians or intermediaries allow fans to see photographs and full-motion videos of musicians, to obtain information about their backgrounds, to read their blog, to join their social networks as MySpace or Facebook “friends,” to subscribe to their newsletters and to post comments about them.¹²² This may reduce public-performance attendance, at least for those artists with sex appeal or other coherent, attractive images.¹²³ Access to music videos and videos of interviews via the Internet is a new way of indulging this motivation for consumption.

Nevertheless, virtual access is only a partial substitute for attending live performances. The web-based opportunities satisfy some of the hedonic needs of music consumers but do not provide all of the value that attendance at live performances provides. Consumers of popular music report a special kind of satisfaction associated with their attendance at live performances, differing somewhat depending on whether the performance occurs at a small venue, with a capacity of one hundred or less or as part of a much larger audience as an outdoor music festival such as Bonnaroo, Pitchfork Music Festival or Lollapalooza. In the large venues, visual observation of the performers is limited because of distance and obscured sight lines for most members of a large crowd. Many attendees ac-

121. See Mike Masnick, *Reminder: Big Concerts Are Not All of the Live Music Business*, TECHDIRT.COM, July 27, 2010, <http://www.techdirt.com/articles/20100727/01401510369.shtml> (discussing prices for live concerts).

122. See, e.g., *Fall Out Boy*, MYSPACE.COM, <http://www.myspace.com/falloutboy> (last visited Oct. 12, 2010) (displaying band’s photos and information about concerts and upcoming music).

123. See Bruce Warila, *Do Most Fans Really Want Anything from You Other than Your Music?*, MUSIC THINK TANK, Nov. 3, 2008, <http://www.musicthinktank.com/blog/do-most-fans-really-want-anything-from-you-other-than-your-m.html> (discussing interest by fans in things besides music). Altruism may stem not from physical attraction in the conventional sense, but from a desire to obtain “a genuine look at the person behind the music.” *Id.*

tually watch most of the performance on large video screens adjacent to the stage.

Why is this better than watching the same group at home on a video display? Solitary observation does not provide the same sense of connection with the musicians as physical participation with hundreds of others in real-time interaction with the performers through singing along, cheering and applauding their performance, or shouting out requests for particular songs. Listening to the music on a home audio system is qualitatively different from listening to it at high volume in the open air.

C. Law's Role

MySpace and YouTube, now owned by Google and News Corporation respectively, iTunes, and major labels and film studios depend on intellectual property ("IP") rights.¹²⁴ Licensing of IP rights is part of almost every major shareholder and loan agreement.

But pervasive enforcement of copyright in connection with most exchanges of recorded music at the consumer level is impracticable. It cannot be done without imposing significant new burdens on Internet intermediaries, and this cannot be done without destroying the core features of the Internet. The decentralized and immediate accessibility of MySpace for direct distribution of music by musicians would be impossible if MySpace were obligated to pre-screen every upload for possible IP infringement. The same is true of the web hosting sites musicians use to create their own web pages and make them available to the world.

Law's role—particularly the role of copyright law—in the music industry has declined. It will continue to decline. Music copyright has suffered two body blows: because of the proliferation of digital copies, it has become less enforceable and, as the value of recorded music declines, it is less worthwhile to try to enforce.

Copyright protection for recorded music at the consumer level has become essentially unenforceable. Digital recording technologies make it possible to produce perfect copies of recorded music cheaply and quickly. Compression algorithms embedded in software known as "codecs" produce relatively small files that can be

124. See *MySpace Launches Take Down Stay Down Copyright Protection*, EIN PRESSWIRE, (last visited Oct. 12, 2010), <http://www.einpresswire.com/article/9041—myspace-launches-take-down-stay-down-copyright-protection> (explaining importance of protecting intellectual property on MySpace).

distributed in a few seconds via the Internet.¹²⁵ The economic viability of licensed channels for recorded music is more a function of lower consumer transaction costs for iTunes—but not for many major-label sources—than of respect for intellectual property rights.

Historically, copyright was most effectively enforced through bottlenecks in the distribution chain, printing houses in the case of books, and disc duplicators in the case of recorded music.¹²⁶ The obsolescence of physical media for distributing music has removed these bottlenecks, and the proliferation of peer-to-peer file sharing networks has eliminated the last vestiges of centralization. Even where bottlenecks still exist, Section 230 of the Communications Decency Act and the safe-harbor provisions of the Digital Millennium Copyright Act immunize those intermediaries that refrain from controlling content of what is distributed through their facilities.¹²⁷

The music labels have won some prominent lawsuits, such as *Metro-Goldwyn-Mayer, Inc. (“M.G.M.”) v. Grokster, Ltd.*, in which the Supreme Court held that a distributor of P2P file sharing software could be secondarily liable for copyright infringement by software users.¹²⁸ The impracticability of chasing all the infringers and

125. See *What Do You Need to Know About Codecs*, CODECS.COM, Feb. 19, 2006, http://www.free-codecs.com/guides/What_you_need_to_know_about_codecs.htm (“The purpose of codecs is to reduce the size of digital audio samples and video frames in order to speed up transmission and save storage space.”)

126. See ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 23 (1983) (discussing history of copyright enforcement).

127. See 47 U.S.C. § 230(c)(2) (2010) (immunizing interactive computer services that act in good faith to restrict certain material). Section 230 does not cover copyright infringement. 47 U.S.C. § 230(e)(2). The Digital Millennium Copyright Act, however, provides a limited immunity from copyright-infringement liability for digital network service providers. 17 U.S.C. § 512(a). The immunity is conditioned on the provider removing material as to which it receives notification of claimed infringement, under procedures established by the Act. 17 U.S.C. § 512(c)(1)(C).

128. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914-16 (2005) (holding that P2P file-sharing software distributors can be liable for user downloads); *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1015-18 (9th Cir. 2001) (noting that defendants would likely fail on defense that sampling of music constitutes fair-use). *But see Zomba Enter., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 583-84 (6th Cir. 2007) (noting that defendant’s conduct was not privileged under fair use defense because entire songs were copied, which adversely affected market value of copyrights). See also *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008) (denying defendant’s motion to dismiss action for damages based on Digital Millennium Copyright Act which requires rights holders claiming infringement to notify intermediaries in evaluation of fair use); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 326-28 (S.D.N.Y. 2008) (denying preliminary injunction based on insufficient probability of success on merits given evaluation of fair-use factors in connection with fifteen seconds of copyrighted song played during film).

facilitators of infringement with copyright infringement actions means that copyright enforcement is pushed to the margins of any business model. Copyright remains useful in controlling the activities of large-volume pirates, but it is essentially irrelevant when end-users engage in small-scale reproduction and distribution of recorded music to their friends. The statute probably should be amended to encompass such technically infringing activities within fair use, but few stakeholders are likely to risk the uncertainty of opening up the copyright act to amendment.

As prices for recorded music decline, following marginal costs toward zero, the result is that no one is willing to pay (much) for recorded music.¹²⁹ The costs of copyright enforcement exceed the benefits. Technology makes it impossible to enforce copyright, but it does not matter, because no one would pay for music from either the originator or a pirate. A pirate cannot construct a viable business model.

The sword of victory for consumers may also be the dagger of defeat for indie musicians. The same technologies that have made it possible for hundreds of thousands of musicians to reach their fans directly have also eroded their ability to protect their art through copyright law. This has a deleterious effect on constructing viable business models.

Copyright has not become entirely irrelevant. As the preceding paragraphs point out, it will still be enforceable and useful against large-scale commercial pirates. The creative commons idea is an outgrowth of the open-source movement in computer software programming. It provides a standard way for musicians to license their music for non-commercial sharing and adaptation without surrendering the copyright. In *Jacobsen v. Katzer*, the United States Court of Appeals for the Federal Circuit held that violating the terms of such licenses constitutes copyright infringement, for which statutory damages and injunctions are available.¹³⁰

129. Of course people will always be willing to pay for some music. Radi-ohed made its new music available for free, and fifty percent of downloaders paid something for it. The creation of celebrity status, even if achieved by giving music away for free, generates some demand for celebrity music at a non-zero price. My colleague, Ed Harris, challenged me on the assertion that consumers seek celebrity by asking me how I became enthusiastic about Vampire Weekend. To be sure, it was because I heard about their music on an NPR radio show, sought it out, and loved the music. I did not care at the time whether they were stars. I just liked their music.

130. See *Jacobsen v. Katzer*, 535 F.3d 1373, 1380-82 (Fed. Cir. 2008) (holding that violation of music licenses is copyright infringement).

Furthermore, the Internet reduces detection costs for enforcement of performance rights.¹³¹ It only takes a few seconds to perform a Google search or to search on YouTube or MySpace for the name of a band or of a song. If unlicensed performance is occurring, it is fairly easy to find the notice for the live performance or for recording for sale.

Even the end of copyright would not mean the end of property or market exchange. One commentator explains how the American market for British novels worked in the 19th century, before such works enjoyed copyright protection in the United States.¹³² The practice emerged of paying British authors for early proofs of their works to permit American publishers to get a headstart on their competitors who had to wait to pirate the published version of the work.¹³³

The lesson for rights holders in the new music marketplace is that they must identify something to which they can control access and charge for access. Access to recording tracks or to the privilege of recording live concert performances might be examples.

Technology threatens copyright more than it threatens other forms of protection for musician identities. Demand for music results in part from a desire to be associated with the artists. Fan clubs have been a staple of such association for decades. Now, internet based social networks increase both breadth and depth of the fan club idea. As a musician builds a persona and an image in the marketplace, trademark protects the visual symbols associated with that image. Persona can be protected through trademark. While it is expensive and ultimately futile to track down and sue successfully everyone with an unauthorized copy of a recorded song, it is entirely feasible to track down and get injunctive relief or a money judgment against someone pretending to be Vampire Weekend or Modofac.

III. WHO MAKES MUSIC NOW? WHY AND HOW?

Musicians make music for multiple reasons: to make money, to create art, for further camaraderie with bandmates, to obtain affirmation from a peer- or other reference group, or to achieve fame

131. See Caves, *supra* note 9, at 302 (summarizing characteristics of markets for creative work, including music).

132. See *id.* at 311-13 (discussing pre-copyright protected works in America).

133. See *id.* at 312 (discussing tactics used by American publishers to get British novels before they were officially published).

and notoriety more generally.¹³⁴ Few musicians say that they make music only to make money. They make music because it is fulfilling and only secondarily do most of them say their dream is to make a living at it. The relative weight of the motivations varies from musician to musician, and over a particular musician's career. The author's *New Architectures for Music* article specified production and consumption functions for popular music. It explained how digital technologies and the Internet are shifting these functions. It did not, however, consider how non-economic factors enter into the supply equation.¹³⁵ This article extends that analysis; by probing more deeply the *qualitative* aspects of music creating, distribution, and consumption, and draws on *quantitative* data to evaluate various business models. Both supply and demand functions include variables for "hedonic" values—those related to personal fulfillment or pleasure and not easily quantified.¹³⁶ The following analysis explores the role of these hedonic values, compared with pecuniary values.

A. Hedonic Values

Musicians often are asked a fundamental question "why are you doing this—why do you make music?" Non-economic motiva-

134. Formal data on musicians is nearly non-existent. Because most musicians are independent contractors rather than employees, they do not show up in data collected by the U.S. Bureau of Labor Statistics, which relies on surveys of employers. Because most of them are free-lancers, they do not show up on data collected by the U.S. Bureau of Census, which relies on surveys of "business establishments." As a result, this section develops estimates of the identity of musicians and their motivations, economic and otherwise, from the theoretical economics literature and from bottom-up estimates described in subsequent footnotes.

135. See *New Architecture*, *supra* note 302-304 n.167-73 (constructing supply function only in terms of revenue and costs); see also Jared S. Welsh, *Pay What You Like—No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses*, 58 EMORY L. J. 1495, 1497 (2009) (citing *New Architectures* article and arguing that its proposed privilege for noncommercial use does not go far enough); Horace E. Anderson, Jr., "Criminal Minded?": *Mixtape DJs, The Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111, 146 (2008) (citing *New Architectures* article on drivers of demand for music).

136. The word "hedonic" signifies a pursuit of pleasure in all aspects of life. THE NEW WEBSTER'S INTERNATIONAL DICTIONARY 1155 (3d ed. 1946). See Sherwin Rosen, *Hedonic Prices in Implicit Markets: Product Differentiation in Pure Competition*, 82 J. POL. ECON. 34 (1974), available at <http://www.jstor.org/stable/1830899> (defining hedonic value as factor accounting for different prices of similar goods based on implicit valuation of good's utility-bearing attributes).

tions drive most musicians.¹³⁷ Music expresses one's personality.¹³⁸ Captivating an audience validates one's self and beliefs.¹³⁹

While one can compose a song or perform someone else's song more or less mechanically, according to a formula, most musicians do it more expressively. To discover a melodic line or a chord progression that is both pleasing and different from someone else's expresses something from inside that is difficult to articulate verbally. To take a theme and develop lyrics that bring it to life provides more scope for linking your soul to reality than having a conversation or writing an essay.

Billie Holiday, for example, insisted on recording the song "Strange Fruit," despite the refusal of Columbia Records to put it on an album. As one commentator writes:

Holiday clearly reveled in the song's effect, and she sang it almost every night during the year and a half that she performed regularly at Café Society. It was always the last song of her set, and she performed it with her usual flair. All activity inside the nightclub came to a halt. Waiters and busboys stood in their tracks. The room grew silent and the lights went black except for a thin pale ray focused on Holiday's face. She sang the wrenching lyrics accompanied only by a light piano. After she was finished, she walked out of the hushed room without a word.¹⁴⁰

A song does not have to be about murder to evoke strong emotions in a performer. "A song like that is so vulnerable . . ." said Billie Joe Armstrong (referring to a Green Day song). "Instead of throwing your insecurities into a closet somewhere and keeping your guard up all the time, it's like celebrating [them]."¹⁴¹ "Jesus

137. In this respect musicians are similar to law professors. "Why do you write law review articles? You don't make any money off of them," asked one indie musician, when the author was asking him about his motivations for making music.

138. See Roger Alsop, *Exploring the Self Through Algorithmic Composition*, 9 LEONARDO MUSIC J. 89 (1999) ("The first act of music composition occurs when the composer acts musically in a way that draws a reaction within his or her self. . . . Why did I compose this piece? Why did that work? Does this piece fit with my image of myself as a composer? Does this represent me in the universal context? Will it communicate effectively to my audience?").

139. See Jamie Arndt & Jeff Schimel, *Will the Real Self-Esteem Please Stand Up?* 14 PSYCHOL. INQUIRY, 27 (2003) ("Mere expression of one's true self may not lead to secure self-esteem unless one can be sure such authentic expressions will be socially validated by others.").

140. DUSTAN PRIAL, *THE PRODUCER: JOHN HAMMOND AND THE SOUL OF AMERICAN MUSIC* 129 (2006).

141. Spitz, *supra* note 19, at 131 (quoting Billie Armstrong).

of Suburbia . . . is Armstrong's most personal song and, to his mind, the high point of his career as a songwriter. 'I think it's the one I'm proudest of . . . I never get tired of playing it live. It always makes me emotional.'¹⁴²

Self-esteem can result from technical proficiency as well as from candid expression:

I heard the Beatles very early on . . . I just had to know how they made those sounds. I was just wonderstruck. I began to figure out how they played all those songs on guitar, bass, drums, piano. I had this quest to figure out how they did all that.¹⁴³

Touching consumers with one's music is an important motivation: "[Billie Joe] Armstrong is a giver. He writes to reach others as well as to express himself. . . . 'Good lyrics have always been important to me. . . . Once somebody gets it, it's like 'Oh, that's cool.'¹⁴⁴ Ian Narcisi puts it this way:

I'd like to just have a name—some way of people around the world knowing who I am. As far as the monetary status, I'm doing quite well in my [non-music] career right now. So that's not as important to me, to be a musician that's making a great buck—though I certainly wouldn't turn it down if the opportunity came.

But right now it's very difficult to get my name out there. Very difficult. I have my stuff all over MySpace, I have it all over my own web page, I have it all over. I can't even tell you how many places I have it and yet the response is very small.

A lot of people like it when they hear it, but it doesn't sell. Yeah, I love it. Can you send it to me for free? But I just love doing it and I will do it till the day I die.¹⁴⁵

"We wanted to leave a mark, to mean something to someone else," says Jason Holly, explaining why he, Aaron Priest, Jonathan Iseman, and Ben Brown organized Algren. "I want to be in a rental car in California and hear my music on the radio," says Ben. "I want

142. *Id.* at 2.

143. *Id.* at 82.

144. *Id.* at 65.

145. Comments at Focus Group on Chicago's Indie Music, (Feb. 17 2010), <http://www.indiemusicchicago.com/focusgroup17feb2008.html>.

to be able to look back and know that I was creative and to be proud of my music. Music is an identifier for me,” says Aaron.¹⁴⁶

Jamie Gallagher says this:

I have two dreams. First I want to take my performance career to the next level; I want to turn more people on to my creative self. Ultimately, I would like to tour the world to do that.

Second, I want to continue to teach. I have a lot to say about where drumming is headed, how to find your own voice as a drummer—or playing any instrument or singing. I want to start a blog, to write a book, reflecting that philosophy and also offering tips on technique and critiques of alternative directions for music’s development.

There’s absolutely no possibility of defeat. I’ve been through band breakups; they’re difficult, but you don’t give up. I don’t have to prove myself anymore. I know what I can do, and anyone can see what I can do. Whatever else happens, I am part of a community of musicians. It makes me feel good when my friends succeed and break through. Such a community is unusual and I value that. It’s an opportunity to learn—and to learn, not just how to play the drums better, not just to collaborate on creating better music, but also to learn about others things such as film scoring and synching a sound track to a video track.¹⁴⁷

But music is a hedonic good for both consumers and musicians. Consumers want music they enjoy listening to; they do not just buy the cheapest music. This reality sometimes poses a dilemma for musicians. The strength of hedonic factors may not be symmetrical. Musicians want to make music they enjoy creating, even if it earns them less revenue than music they would not want to be associated with. While consumers probably will not listen to music they do not enjoy, musicians do make music they do not enjoy creating either because their existing fans demand it, or because they believe they have to make that kind of music to build mass market appeal.

146. Interview with members of the band Algren in Chi., Ill (Nov. 23, 2008).

147. *Jamie Gallagher: I’m Going to Be a Musician*, INDIEMUSICCHICAGO, www.indiemusicchicago.com (follow “Profiles” hyperlink; then select “Profile: Jamie Gallagher.”) (last visited Oct. 13, 2010).

Personal expression involves expressing changes and personal growth, both technically and psychologically. Jeff Tweedy of Wilco is famous for his anger over the conflict between what his audiences wanted and the kind of music he wanted to make: “They [the fans] were . . . our enemies; they were the ones who were not going to allow change. . . . [T]he only songs we felt like playing were the new songs, and the songs that were going to be harder for them to accept.”¹⁴⁸

Frank Zappa expressed his frustration as similar conflict: “I got tired of playing for people who clap for all the wrong reasons. . . . Those kids wouldn’t know music if it came up and bit ‘em on the ass. . . . Kids go to *see* their favorite acts, not to hear them. . . . The best responses we get from an audience are when we do our worst material.”¹⁴⁹

The Beatles, at the height of their popularity, yearned to venture in more creative directions. “Like John, Paul needed something new. There was no challenge anymore to churning out fare-thee-well lyrics—the ‘moon and June stuff,’ as Paul disdained it [W]e wanted to do something bluesy, a bit darker, more grown-up. Rather than just straight pop.”¹⁵⁰ “You can’t be singing 15-year old songs at 20 because you don’t think 15-year old thoughts at 20 . . . We were expanding in all areas of our lives . . . [w]e were suddenly hearing sounds that we weren’t able to hear before.”¹⁵¹ “We’re fed up with making soft music for soft people, and we’re fed up with playing for them, too. But it’s given us a fresh start . . . [now] we can create something that’s never been heard before: a new kind of record with new kinds of sounds.”¹⁵²

“Rock ‘n roll is, you’ve gotta follow your own beliefs; it’s all about freedom,” says Chris Martin of Coldplay.¹⁵³ Tim Sandusky put it this way:

There’s more to playing music than making money off of it. If I want to make money from music, I should write popular songs and recruit a really attractive young singer to sing them and an investor to finance marketing and promotion. That’s not what I want to do. I would be

148. GREG KOT, *WILCO: LEARNING HOW TO DIE* 123 (2004).

149. BARRY MILE, *ZAPPA: A BIOGRAPHY* 185 (2004).

150. BOB SPITZ, *THE BEATLES* 538-39 (2005).

151. *Id.* at 584.

152. GEOFF EMERICK & HOWARD MASSEY, *HERE, THERE AND EVERYWHERE: MY LIFE RECORDING THE MUSIC OF THE BEATLES* 132 (2006).

153. Michael Joseph Gross, *Shine On*, SPIN, July 2008, at 62.

happy to *spend* money to make Oucho Sparks what it should be . . . For Oucho Sparks, the objectives are to write and play good music, to become well known and respected, and to make a living . . . When you go to sleep at night, it's nice to be able to say, 'Wow! I did a lot of things I wanted to do, today.' I say that almost every night.¹⁵⁴

David Safran says,

I got started because I wanted to make music that I wanted to hear. At some point in high school I realized, 'I can do this!' I always wanted to make something that I enjoyed. What my friends did didn't really matter. The highlight of my college experience was when one of my professors—he had become a kind of mentor—played my songs on the last day of class and then pulled me aside. 'You are not great at all, but you could be,' he said. I want to write good material, perform good material, and have an audience that embraces it.¹⁵⁵

That music is a hedonic good for the highest and lowest in the musical order does not mean that money is unimportant; it is hugely important at both ends of the spectrum.¹⁵⁶ The hedonic quality of music, however, makes financial success and failure extremely hard to predict; it is difficult to measure or predict hedonic value of a particular song or performance, beyond the rough instincts that any good songwriter, performer, producer, promoter or A&R rep gains with experience.¹⁵⁷

154. Henry H. Perritt, *Tim Sandusky: Indie Lynchpin*, INDIE MUSIC CHICAGO (May 2007), <http://www.indiemusicchicago.com/profiles/profiletimsandusky.html>.

155. Interview with David Safran, Evanston, Ill., (Feb. 2008).

156. See Kathleen T. Lacher & Richard Mizerski, *An Exploratory Study of the Responses and Relationships Involved in the Evaluation of, and in the Intention to Purchase New Rock Music*, 21 J. CONS. RES. 366, 367-68 (1994), available at <http://www.jstor.org/stable/pdfp-lus/2489827.pdf?acceptTC=true>, (finding musical consumption affected by emotion and music "may be purchased more for the experience it creates than for any utilitarian or objective attributes . . .").

157. See *id.* at 366 (discussing lack of consumer research regarding why people purchase music).

B. Making Money

Despite the importance of hedonic factors in making music, money matters to artists.¹⁵⁸ Money is a means of survival in a market economy.¹⁵⁹ Everyone, including musicians, need food, shelter, clothing, transportation, and healthcare.¹⁶⁰ Musicians also need money to pay for the input factors of making music including: instruments, studio recording time, and rehearsal space.¹⁶¹

1. *Why Money Matters*

Depending on a musician's preference function, the relative utility of money for different purposes varies.¹⁶² A rational individual, confronted with different income situations, chooses among consumption possibilities to maximize pleasure.¹⁶³ In 1943, economist Abraham Maslow observed that consumer preferences are guided by a hierarchy.¹⁶⁴ "In Maslow's hierarchy, human needs for survival are primary; the need for safety is secondary Following in sequence are needs related to love and belonging, the need for esteem, and the need for self-actualization."¹⁶⁵ Persons with limited income may spend it all on basic needs. As wealth increases, they are able to afford goods and services higher on Maslow's pyramid: vacations, better housing, nicer cars, and more elaborate entertainment. While money is essential for satisfying Maslow's lower-order

158. See Paul Resnikoff, *Got Good Music? Ten Tips From Industry Pros*, DIGITALMUSICNEWS.COM, Dec. 29, 2009, <http://www.digitalmusicnews.com/stories/111608ten> (listing methods for marketing new music as described by industry executives).

159. See Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89, 98 (noting that "as individuals we need money to survive and we each strive to earn at least enough to provide for ourselves and our loved ones").

160. See *id.* (explaining need for money to be able to obtain essentials to survival).

161. See Rhonda Abrams, *Six Steps to a Successful Small Business*, USA TODAY, Sept. 29, 2009, available at <http://www.usatoday.com/money/smallbusiness/startup/week3.htm> (explaining need for money to start and maintain any kind of business).

162. See PAUL A. SAMUELSON, UTILITY, PREFERENCE AND PROBABILITY (1953), reprinted in COLLECTED SCIENTIFIC PAPERS OF PAUL A. SAMUELSON 127, 127 (Joseph E. Stiglitz ed., MIT Press 1966). "[W]e buy goods, services, and junk because these things give us pleasure, or utility. The more pleasure we seek, the more we will buy." BRADLEY R. SCHILLER, THE ECONOMY 371 (1975).

163. See A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 370-86 (1943), available at <http://psychclassics.yorku.ca/Maslow/motivation.htm> (delineating a hierarchy of motivations that drive human behavior).

164. See *id.* (noting consumer preference guided by hierarchy).

165. MARY ELIZABETH MILLIKEN, UNDERSTANDING HUMAN BEHAVIOR 63 (Cengage Learning 6th ed. 1997).

needs, it is not the only way to satisfy higher-order needs; indeed, it often is not possible to buy esteem.

In modern society, moreover, money has intrinsic value—beyond what it will buy. Generally, in American society, wealth is a proxy for success. In most fields, modest income relative to others in the field signals modest professional success. Similarly, making more money than others in the same field indicates greater success. It permits one to be a big shot in the eyes of friends and family.

Money from music is a validation of self-esteem for musicians because it indicates that others like the music well enough to pay for it; and it builds credibility with reference groups—making money is the difference between “making something of yourself” and “fooling around.”¹⁶⁶ “Yes, it matters if I can make a living at music; otherwise I am not a professional,” says David Safran.¹⁶⁷ Money from music, has a special cachet, compared with money from other sources: it validates one’s music endeavors.

No one enjoys economic privation—not being able to afford a car, not being able to treat friends to a dinner or a drink, or having to defer purchase of a new guitar or computer. Even without being truly wealthy, a musician enjoys what a comfortable income buys. To satisfy needs and wants, musicians, like everyone else, can derive income from one or more of several sources. They may receive subsidies from parents, friends, the government, or sponsors.¹⁶⁸ They can earn income from day jobs. They can earn income from their music. All other things being equal, musicians would prefer to make money from music rather than in other ways. The greater the income available from their music, the less need they have for income from subsidies or day jobs. But the money they can make from music is certain to be less than what they can earn from day jobs. “Some percentage of everyone’s day must be devoted to surviving,” says Tim Sandusky.¹⁶⁹ “Only a few lucky ones get to spend a large percentage of their days doing exactly what they want.”¹⁷⁰

166. Not only parents emphasize the difference. Brian Kennedy, one of the young actors in the author’s musical was rebuked by his agent for accepting a role in the musical—“following your passion”—as opposed to building a career by accepting modeling jobs. The difference was money. Mr. Kennedy wants to be an actor, not a model. Interview with Brian Kennedy in Chicago, (Feb. 2009).

167. Interview with David Safran, Evanston, Ill. (Feb. 2008).

168. “Subsidies,” as the term is used in this article, refers to payments made by third parties—persons other than a musician or a consumer of that musician’s music outside a direct exchange for the music.

169. Sandusky, *supra* note 155.

170. *Id.*

The reality is that most musicians will never make a comfortable income from their music.¹⁷¹ For some, the lure of becoming rock stars keeps them in the game, but the facts show that they are less likely to become rock stars than to be murdered or killed in an automobile accident.¹⁷² For most, the question is whether—and when—the opportunity cost of devoting substantial time to their music becomes too great, causing them to exit the music market.¹⁷³ The interesting question is not whether musicians want to make money: the vast majority of them do. The question is whether they can make money from their music and how they will react if they cannot.¹⁷⁴

Despite the reality that prospects for earning a living from music are modest, few musicians are able to put the rock-star fantasy out of their heads. Some entertainers, including pop musicians, are known to make fortunes. Rock stars are rich. It is difficult for a rock musician to escape the status of being a rock star as the defining goal. But the reality is that a typical musician, serious enough about his music to have a MySpace music page, has a .024 percent probability of becoming a superstar.¹⁷⁵ By way of comparison, a

171. See Omar Anorga, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739, 758 (2003) (“Ninety percent of all new musicians fail to generate any money whatsoever for their record labels.”).

172. See Katherine L. McDaniel, *Accounting for Taste: An Analysis of Tax-and-Reward Alternative Compensation Schemes*, 9 TUL. J. TECH. & INTELL. PROP. 235, 281 (2007) (“[V]ery few artists get signed (and of those who make it, very few make it big), there seems to be no lack of young, ambitious, would-be musicians. . . . The lure of being famous is often enough, without promise of money, to keep a young artist going.”).

173. See *id.* at 243 (noting that lack of revenue for musicians may cause them to leave music market by stating). “[F]ile-sharing critics are concerned that legalized file sharing without compensation not only destroys the ability of existent artists to sustain their trade, but also discourages future artists from entering the trade.” *Id.*

174. See *id.* at 242 (discussing possibility of less available music by stating that “Unauthorized digital distribution undermines the revenue stream and ends up hurting both superstars and less popular musicians by lowering sales . . . The industry players argue that unauthorized distribution will, in the long run, result in less music being available to the public”).

175. See Recording Industry Association of America Top Selling Artists, <http://www.riaa.com/goldandplatinumdata.php?resultpage=2&table=tblTopArt&action> (last visited Oct. 11, 2010) (listing “top selling artists” by millions of units sold). According to the RIAA, a total 240 performers have sold ten million units (albums) or more. See *id.* Assume each musician earns one dollar per nineteen-dollar album. Each of these musicians thus earned ten million dollars over a lifetime. If the average career is twenty years, that would be \$500,000 per year. There are 10,000 MySpace pages in Chicago, which has a population of 2.8 million or about three million. Extrapolating to 300 million people in the U.S., one arrives at the estimate of about one million musicians in the U.S. Dividing 240 by 1,000,000 yields a probability of 0.000240 probability of making \$500,000 per year.

person has a 0.0004 percent probability of being struck by lightning, a 2.2 percent probability of being murdered, and a .02 percent probability of being killed in an automobile accident.¹⁷⁶ In other words, a musician has as much chance of being killed a murder, or an automobile accident as becoming a rock star. Their odds are better, however, than being killed by a lightning strike. Not only that: rock stars do not remain stars forever. Most peak in popularity and then largely disappear from public consciousness. As Tim Sandusky puts it, "Rock stardom is rare, but life-long rock stardom is crazy rare."¹⁷⁷ Roughly speaking the expected, undiscounted, value of superstardom for the average serious musician is \$2400.¹⁷⁸

A small subset of musicians who qualify as celebrities earn enough from their music to satisfy all their wants. Non-celebrity musicians are unable earn enough from music to put bread on the table; in effect, they have to use leisure time to make music. They may engage the fantasy that they make some money off music, but more careful scrutiny of the actual profits, once expenditures are considered, often reinforces the idea that they are essentially using leisure time. Positive revenues may be badges of professionalism, regardless of the actual profitability. Those who are unemployed have nothing but leisure time. They still have to eat, however, so they must have some means of support, which can only come from subsidies or savings from past employment. Others can ensure adequate leisure time through some combination of subsidies and day jobs that provide adequate income for basic needs, and whatever

176. See Kendra Dahlstrom, *Airplane Safety: Overcome Your Fear of Flying*, http://www.as-sociatedcontent.com/article/146247/airplane_safety_overcome_your_fear.htmlD?cat=16 (last visited Oct. 11, 2010) (addressing probability of being involved in an airplane or car accident). The probability of being involved in an airplane accident is only one in eleven million (9×10^{-8}); however, the chances of dying in a car crash are actually one in 5000 (2×10^{-3}). See *id.* (discussing different probabilities of travel accidents); see also National Criminal Justice Reference Service, *Juvenile Justice Bulletin: The Chance of Being Murdered Varies With Age, Gender, and Race*, DEPARTMENT OF JUSTICE, http://www.ncjrs.gov/html/ojjdp/jjb-ul2000_12_3/page5.html (last visited Oct. 11, 2010) (calculating odds of murder based on age, gender, and race). The odds of being murdered: 22/100,000 (22×10^{-3}). See *id.* See also National Lightning Safety Institute, *Lightning Strike Probabilities*, http://www.lightni-ngsafety.com/nlsi_pls/probability.html (last visited Oct. 11, 2010) (calculating odds of being struck by lightning). The odds of being struck by lightning are 1: 280,000 (3.57×10^{-6}). See *id.*

177. Interview with Tim Sandusky at Chi., Ill (Feb. 2008).

178. Ten million dollars times .00024. The ten million dollar figure is lifetime earnings from an album. If one applied a discount factor, to allow for the fact that money received in the future is worth less than money received now, the figure would be even lower.

else they demand from Maslow's hierarchy without squeezing out time for music.

2. *Day Jobs and Opportunity Cost*

For the vast majority of musicians, income from day jobs exceeds income derived from music production. These musicians must decide how much of their time they will devote to day jobs and how much they will devote to music. Richard Caves divides the universe of musical artists into two basic categories: starving and well-fed.¹⁷⁹ He observes that the elastic supply of artists depresses their wages compared with what they could earn at what he calls "humdrum labor," alternative occupations suited to their general levels of education, skills and experience.¹⁸⁰ Artists seeking to achieve popular success, he observes, are willing to accept near-zero music-related wages as an investment in potential success.¹⁸¹ But since they have to finance their basic needs for food, shelter, and clothing, they usually accept humdrum employment—"day jobs."¹⁸² In selecting day jobs, they rationally prefer those paying the highest wages and requiring the fewest hours, in order to leave time for music activities; the purpose, after all, is not to build a career around the day job, but only to finance their creative music effort.¹⁸³

Passing up other career opportunities in favor of music, as Cave describes, imposes a cost.¹⁸⁴ Whether a musician decides to do this involves an economic decision that depends on the relationship between music income and other income possibilities.¹⁸⁵ This gap between music income and day-job income represents the op-

179. See generally CAVES, *supra* note 9 at 78 (addressing separation of artists into two categories through economic activity).

180. See *id.* (finding artists may make higher wages in non-musical occupations suited to their skill set). The adjective "humdrum" is pejorative—"lacking variety; dull; monotonous; boring." WEBSTER'S NEW WORLD DICTIONARY (2d coll. ed. 1972). As such, this article uses the term most musicians use: "day job."

181. See *id.* (noting musicians desire to become famous).

182. See *id.* at 79-80 (reporting empirical studies concluding that approximately seventy-five percent of artists of all kinds have humdrum jobs; income from art produced at most forty-six percent of total income and for many, was negative).

183. See *id.* at 78 (noting lack of drive to achieve best employment for future as a result of desire to become famous musician).

184. See *id.* at 79 (explaining that musicians are giving up opportunities and forfeiture of this opportunity is cost that must be considered).

185. See *id.* (demonstrating that most musicians value minimal prospect of becoming famous by playing music over employment opportunity forfeited).

portunity cost of making music at the expense of other employment.¹⁸⁶

In any market, there is a price below which some potential suppliers will not sell.¹⁸⁷ This can be characterized as their “reservation price.” In the music supply context, the relevant reservation price is the price for a musician’s labor.¹⁸⁸ Two such prices are relevant: the price obtainable in the music market, and the price obtainable in the day-job market. A rational musician who derives no hedonic value from making music will devote labor to making music only if the price for his music activities exceeds the price for his labor in the day-job market.¹⁸⁹ For most musicians, who do derive hedonic value from making music, the choice is more complex. They must balance the total personal value of making music and eking out a basic existence from the goods and services characteristic of a small income, against the value of enjoying the goods and services that a higher income will provide.¹⁹⁰ The reservation price, and thus the economic incentive to make music, derives from opportunity cost what the musician could earn in other employment that excludes music.¹⁹¹

An example is useful. Imagine a typical indie musician. The subsequent analysis in section VII.A.1 suggests that he can make about \$7500 per year from music.¹⁹² If the musician spends all his time making music, he earns about \$3.50 per hour. Minimum wage effective in 2008 is \$6.55 per hour.¹⁹³ The opportunity cost of mak-

186. *See id.* at 80 (describing inherent costs associated with forfeiting other employment opportunities).

187. *See* KALYAN T. TALLURI & GARRETT VAN RYZIN, *THE THEORY AND PRACTICE OF REVENUE MANAGEMENT* 303 (Springer 2004) (noting that rational suppliers will not sell below a certain price).

188. *See* JEROME ROTHENBERG ET AL., *THE MAZE OF URBAN HOUSING MARKETS: THEORY, EVIDENCE, AND POLICY* 131-33 (University of Chicago Press 1991) (explaining reservation prices and what is included in reservation prices).

189. *See* TALLURI, *supra* note 187, at 131 (explaining that rational people should not pursue opportunities that would cause them to fall below their reservation price).

190. *See* Tyler Cowen & Alexander Tabarrok, *An Economic Theory of Avant-Garde and Popular Art, or High and Low Culture*, 67 S. ECON. J. 232, 233 (2000), available at <http://mason.gmu.edu/~atabarro/AvantGarde.pdf> (modeling artist’s utility function as additively separable function of consumption of goods other than art and art production: non-pecuniary satisfaction).

191. *See id.* at 234 (noting need to include hedonic value musicians attach to earning living playing music).

192. *See infra* notes 580-88 and accompanying text.

193. *See* Labor Law Center Inc., *Federal Minimum Wage Increases for 2007, 2008 & 2009*, <http://www.laborlawcenter.com/t-federal-minimum-wage.aspx> (last visited Oct. 11, 2010) (listing federal minimum wage history and recent federal minimum wage increases).

ing music is the difference: \$3.05 per hour. A perfectly rational, non-hedonic, musician will make music only if he can earn \$6.55 or more per hour from music. A hedonic musician must derive satisfaction from music making equal to or greater than \$3.05 per hour.¹⁹⁴

On the other hand, the \$3.05 hourly opportunity cost may represent an investment in future income possibilities.¹⁹⁵ The musician may expect that the relative price for his labor in the music market may change relative to the price for his labor in the day-job market over time. If he expects to become a rock star, that surely will be the case.

Evaluating the rationality of such an investment depends on the expected value of lifetime day-job earnings, compared with the expected value of lifetime music earnings.¹⁹⁶ It was established that the expected present value of becoming a rock star is \$2400.¹⁹⁷ The U.S. Bureau of Labor Statistics has collected data on average earnings as a function of years out of school and years of school completed.¹⁹⁸ The most commonly accepted summary of the data observes that the wages of high school graduates:

- Grow 35% in the first ten years, for an average hourly wage of \$7.69 during that ten-year period.¹⁹⁹
- Grow 25% in the next fifteen years, for an average hourly wage of \$8.66 during that 15-year period; and
- Decline 16% in the next fifteen years, for an average hourly wage of \$7.97 during that 15-year period.²⁰⁰

During the first ten years following high school, a musician can expect to earn \$15,380 annually from a day job, resulting in an op-

194. See TALLURI, *supra* note 187, at 131 (noting irrationality of pursuing opportunities that would cause person to fall below reservation price).

195. See JACK R. KAPOOR, *PERSONAL FINANCE* 29 (1996) (acknowledging potential for higher future earnings when analyzing opportunity costs of career choices). Thus, if the future earnings discounted to the present value are greater than the opportunity costs associated with choosing a certain career then the decision is economically justifiable. See *id.* (explaining that future earnings can justify continuing venture where opportunity cost exceeds current earnings from venture).

196. See ERIC HANUSHEK & FINIS WELCH, *HANDBOOK OF THE ECONOMICS OF EDUCATION* 343-48 (describing how to value prospective lifetime earnings).

197. See *supra* note 178 and accompanying text.

198. See Kevin M. Murphy & Finis Welch, *Empirical Age-Earnings Profiles*, 8 J. LAB. ECON. 202, 204 (1990) (summarizing results of quadratic formulation of data).

199. See *id.* (describing growth of income over time).

200. See *id.* (explaining the rise and subsequent fall of earnings over time).

portunity cost of \$5480 per year of concentrating on music.²⁰¹ In the next fifteen years, the day-job annual compensation grows to \$17,320, resulting in a gap of \$7420.²⁰² In the subsequent fifteen years, the day-job annual compensation shrinks to \$15,940, narrowing the gap to \$6040.²⁰³ Starting wages and early growth rates are much higher for those with more education.²⁰⁴

In other words, it is not likely rational for a musician with a high-school education to choose music as an income-producing career over a series of day jobs.²⁰⁵ For those with more education or opportunities for more education, the choice of music is even less rational.²⁰⁶

This explains why popular music is mainly a young person's game.²⁰⁷ Most of the performers and most of the consumers are in their late teens, twenties and early thirties. With the exception of retirees, this demographic group has the most leisure time and the least attractive day-job employment opportunities. They also have the greatest prospect for family-based subsidies.²⁰⁸

Of course the real choices are not so stark, involving an all-or-nothing choice between a music career and a law career. The opportunity cost for the artists that Cave discusses represents at least two different influences. One influence represents the income obtainable for an alternative career that leaves little room for music at

201. *See id.* The \$15,380 is compared with \$9900 (\$7500, plus \$2400) available from music. \$7500 represents monthly amount earned, and \$2400 represents net present value of future earnings of playing music.

202. *See id.* (comparing current and future earnings of musicians and those earning minimum wage and future earnings calculated by using a widely accepted growth rate).

203. Compared with the \$9,900 (\$7,500, plus \$2,400) available from music.

204. *See* Murphy, *supra* note 198, at 207 (noting future income for people with advanced education).

205. *See* TALLURI, *supra* note 187, at 131 (describing irrationality of pursuing opportunities that would cause person to fall below reservation price).

206. *See id.* (noting irrationality of pursuing opportunities that would cause person to fall below reservation price); *see also* Murphy, *supra* note 198 at 207 (mentioning future income for people with advanced education).

207. *See* Kee H. Chung & Raymond A. K. Cox, *A Stochastic Model of Superstardom: An Application of the Yule Distribution*, *The Review of Economics and Statistics*, 76 REV. OF ECON. & STAT. 771, 771 (1994) (characterizing earlier studies as showing "only the young enter the occupation and earn low incomes playing to small crowds, and only the successful stay on").

208. *See* Cowen, *supra* note 190, at 238 (postulating positive correlation between family wealth and choice of artistic profession). Parents with adequate means do not generally say to a 24-year-old son who is a member of a rock band, "We like that song; we'll buy it from you." They say, "until you are on your feet, we will continue your allowance," or, "we will pay your apartment rent," or "we will pay for your car and the insurance on it." In other words, they subsidize the son's music.

the professional level. Lawyers or young executives who give up their conventional careers to make music choose to pay this cost, as do young people who pursue music instead of going to law school, getting an MBA or even getting a university education altogether. This is the opportunity cost that their parents often worry about. Others make the opposing choice. The scores of the author's present and former law students who once were musicians are examples.²⁰⁹ They decided that the opportunity cost of pursuing music throughout their lives was too high.

In reality the choices are more frequent and pragmatic. A musician has to choose on a week-to-week basis whether he works a few more hours at his day job to generate income or works a few hours less so he can devote more time to developing, recording or performing a new song.²¹⁰ These choices, driven by opportunity costs, determine the career paths of musicians and their bands, considered in the next section.

C. Career Paths

Career paths for musicians vary widely. Some scratch their way into stardom, with entrepreneurial energy that meshes with the popular culture of the moment. Others reach certain plateaus of popularity, ranging from regional celebrity to hobbyist. Some exit and stop making music seriously. All confront a fairly typical life cycle.

1. *Life Cycle of a Band*

Musicians—and this includes Elvis Presley, Buddy Holly, the Beatles, Bright Eyes, Fall Out Boy, and Vampire Weekend, as well as those yet undiscovered—go through a series of phases.

First, musicians experience the formative phase, when they crystallize their interest in music and start their first band.²¹¹ This usually occurs in junior high school or in high school.²¹² Second, is

209. Actually, they always will be musicians, and try to fit music around their obligations. But, to keep things simple, it is easier to accept their characterization that they gave up music to become lawyers.

210. See Cowen, *supra* note 190, at 235 (artist increases art production until “the loss in utility from the income decline is just balanced by the increase in utility from working on more preferred art”).

211. See Clancy Magnuson, *Starting a Band Made Easy*, GONZAGA PREP (Nov. 2007), available at <http://www.spokesmanreview.com/blogs/vox/media/nov-VOXpage4.pdf> (stating that starting band is “in every teenagers basic psychology”).

212. See Taniya Singh & Prakriti Kumar, *Teens Use Music to Express Individuality*, CONN. POST ONLINE, Sept. 29, 2009, available at <http://www.allbusiness.com/humanities-social-science/visual-performing-arts-music/13067857-1.html> (asserting

the college phase. Some pass up college, usually to concentrate on music.²¹³ Those who go to college either give up music as a career ambition and embark on another track or reinforce their commitment to music by continuing to create and perform music while they are in college, often majoring in music.

The third phrase, which overlaps the first two, is the “playing out” phase where musicians begin performing music live. Initially, they do this for each other—“let’s pretend we are on stage.” Then, friends drop by to listen to them. Next, they play some gigs in clubs close to home. After that, many extend their live performance efforts into an expanding market, larger clubs in the area, or may tour other towns and cities. Then, once they have a repertoire of songs, tempered by performing them, they make their first record as soon as they can raise the money.

After that, the pathways diverge dramatically. Some—a tiny handful—realize their fantasies and become rock stars. A few—the entrepreneurs, more numerous than the rock star successes, but still a minority, aggressively and imaginatively promote themselves and their music and achieve a significant following but never quite break through. Most other pursue music essentially as a hobby, although they label themselves “professional musicians,” and spend much of their time lamenting the need to hold day jobs to support themselves. All of them eventually exit the community of musicians, most by the time they are thirty, many of the entrepreneurs soon thereafter, and the handful of rock stars only when they die or their popularity fades.

The phases intersect opportunity cost in important ways. The opportunity costs of devoting oneself to music increase over time through the twenties and thirties, which was explored more deeply in Section III.B.2. The gravitational pull of alternative career tracks thus increases through about age forty.

2. *Two Case Studies of Successful Entrepreneurship: Vampire Weekend and Fall-Out Boy*

This section compares the rise of Vampire Weekend, a New York based band, with the earlier rise of Fall Out Boy, a Chicago-

that many teens form bands and number of teens bands is increasing); *see also* Caves, *supra* note 9, at 34 (“High school students in large numbers ‘fool around’ in garage bands, most of them quitting short of any serious run at a career.”).

213. *See 100 Famously Successful People Who Skipped College*, Online Colleges, June 7, 2010, <http://www.onlinecolleges.net/2010/06/07/100-famously-successful-people-who-skipped-college/> (noting that Tom Petty left school at age seven-teen to play in band full-time).

based band.²¹⁴ Both bands enjoyed meteoric ascendancy in the trade press and in the affections of music consumers. Both bands worked hard on their music and on their image. Their success stories illustrate their life cycles and the roles of entrepreneurial energy and luck.

a) Vampire Weekend

In February 2006, Vampire Weekend played its first show at a student-run battle of the bands competition.²¹⁵ Out of the four bands competing, Vampire Weekend received a lowly third place. This loss, however, was short-lived. Rolling Stone magazine selected the band's song *Cape Cod Kwassa Kwassa* as one of the 100 best songs of 2007.²¹⁶ The following January, the band was shot for the cover of Spin magazine.²¹⁷ Such a quick rise to fame is not unprecedented, but Vampire Weekend achieved this level of hype before releasing their debut album.²¹⁸

Vampire Weekend's poor performance at their first competition was predictable. The band booked the show before its members had ever practiced together. Instead of rehearsing, the band spent this time discussing its name and approach. The name Vampire Weekend comes from the title of a movie the band's singer, Ezra Koenig, had made years earlier.²¹⁹ In the movie, Mr. Koenig played a character named Walcott, who had to travel to Cape Cod in order to save the country from vampires. Some of the band's first songs were based on Walcott and Cape Cod as well.²²⁰ The allusions to this upscale vacation spot are not merely incidental.

214. This section was written by Joe Panza, Chicago-Kent College of Law, Class of 2010, research assistant to the author.

215. See Andy Greenwald, *Vampire Weekend: The Graduates*, SPIN MAGAZINE, Feb. 25, 2008, available at <http://www.spin.com/articles/vampire-weekend-graduates?page=0%2C2> (stating date of Vampire Weekend's first competition and show).

216. See *Rolling Stone Magazine The 100 Best Songs of 2007*, ROLLING STONE MAGAZINE, available at http://www.rollingstone.com/news/story/17601363/the_100_best_songs_of_2007 (noting success of Vampire Weekend's single).

217. See *Vampire Weekend, On the Cover*, SPIN MAGAZINE, Jan. 7, 2008, available at <http://www.spin.com/videos/vampire-weekend-cover> (establishing band's photo shoot cover).

218. See Amazon.com Music, <http://www.amazon.com/Vampire-Weekend/dp/B0010V4TZU> (last visited Oct. 12, 2010) (stating album release date).

219. See *Vampire Weekend Vents to Rock Your Face*, THE FADER, Jun. 2, 2007, available at <http://www.thefader.com/articles/2007/6/7/vampire-weekend-vants-to-rock-your-face> (describing origin of band's name).

220. See Vampireweekend.com, <http://www.vampireweekend.com/lyrics.php> (last visited Oct. 13, 2010) (stating Vampire Weekend's lyrics).

Vampire Weekend's entire image revolves around such upper class subjects.²²¹

The band's four members, Ezra Koenig, Rostam Batmanglij, Chris Tomson, and Chris Baio, met while attending Columbia University.²²² Their Ivy League education has been mentioned in nearly every review of their music: from a review of a CD-R they passed to the blog Stereogum in April 2007 to Rolling Stone's review of their full length album in February of 2008.²²³ Ezra Koenig's status as a fourth generation Ivy Leaguer has also been reiterated in various magazines and blogs.²²⁴ The reason that the press has dwelled on Vampire Weekend's privileged background is that the band uses it as a hook.²²⁵ Ezra Koenig publicized his family's Ivy League history on his blog long before Spin printed it in its cover story about Vampire Weekend.²²⁶

Vampire Weekend created this theme in a "band manifesto" before they played its first show.²²⁷ Many of the rules in the manifesto laid out the band's sound: no trip-hop beats, no distorted guitars, influences ranging from the Smiths to the late South African Singer, Brenda Fassie. In addition, the manifesto defined the band's image, including a rule banning members from wearing t-shirts during their performances. Following the band's upper-class theme, Ezra Koenig prefers to wear cable knit sweaters and boat shoes on stage. Spin described the manifesto as a sign that the band is "highly conscious of its mythmaking." If its music is

221. See FluxCapacitor, *The Only Living College Boys In New York*, MOG BLOG, Jan. 1, 2008, <http://mog.com/FluxCapacitor/blog/140918> (last visited Nov. 4, 2010) (explaining band's image). "They wear their Ivy League educations like a badge (or rather, a Ralph Lauren logo). VW will have their clothing preppy, their lyrics laced with literary (and architectural and nautical) references, and their music rinsed through that stuff most people only listen to as students – what's it called again? Oh yeah, world music." *Id.*

222. See Greenwald, *supra* note 215 (discussing how member's met).

223. See Stereogum, *Band To Watch: Vampire Weekend*, STEREOGUM.COM, Apr. 13, 2007, http://stereogum.com/archives/band-to-watch/band-to-watch-vampire-weekend_005100.html (last visited Nov. 5, 2010) (mentioning band's Columbia University education).

224. See Greenwald, *supra* note 215 (describing Koenig's family education).

225. See Bob Ham, *Vampire Weekend: Ivy League Bloodsuckers*, AMPLIFIED.COM, http://www.amplifiermagazine.com/amplified/vampire_weekend.php (last visited Oct. 13, 2010) (discussing origin of media's focus).

226. See Dan DeLuca, *Before CD Debuted, It Was Already A Success*, PHILA. INQ., Feb. 7, 2008, available at http://www.philly.com/philly/entertainment/music/20080207_Before_CD_debuted_it_was_already_a_success.html (noting Koenig's announcement that his ancestors were also Ivy League graduates).

227. See Greenwald, *supra* note 215 (explaining when theme was created).

thought of as a product, this conscious decision to create an image was its branding.

Vampire Weekend's consciously crafted image extends beyond what the band wears on stage. The band played its early shows at the houses of Columbia University literary societies.²²⁸ Band member Rostam Batmanglij stated, "I feel like those shows were the best because they were— it was kind of our vision for our band."²²⁹ These literary society shows fit Vampire Weekend's image so well that they used a photo of a chandelier hanging above one of these performances for the cover of their album.²³⁰ The upper class imagery continues on to one of the band's videos, in which Vampire Weekend plays the song Mansard Roof in the cockpit of their sailboat.²³¹ Most of Vampire Weekend's lyrics fit into the band's preppy theme as well. The band's debut album contains references to nautical history, the Oxford comma, Cape Cod, Benetton, Hyannisport, and different types of teas.²³² The linking of their upbringing and experiences and the subject matter of their songs brings an authenticity appealing to audiences.²³³

Some of the band's lyrics, however, do not fit precisely into this stereotypical preppy mold. Lyrics regarding kefir, which is a kefiriyah, Dharamsala, Darjeeling tea, Old San Juan, and the Falklands War carry connotations of cultural appropriation and colonialism.

228. See *Vampire Weekend Vents To Rock Your Face*, *supra* note 219 (naming where first shows were played).

229. Rostam Batmanglij, *Vampire Weekend*, PITCHFORK.COM, Jan. 31, 2008, <http://www.p-itchforkmedia.com/article/feature/47957-guest-list-vampire-weekend> (last visited Oct. 13, 2010).

230. See Greenwald, *supra* note 215 (noting appeal and image demonstrated at concerts by Vampire Weekend).

231. See Vampire Week Videos, <http://vampireweekend.com/video.php> (last visited Oct. 13, 2010) (detailing music video for Mansard Roof).

232. See *Vampireweekend.com*, *supra* note 220 (discussing some themes from band's album).

233. See Mike Powell, *Please Ignore the Embroidered Dog Sweater*, THE VILLAGE VOICE, Jan. 22, 2008, available at <http://www.villagevoice.com/2008-01-22/music/please-ignore-the-embroidered-dog-sweater/> (describing band's attraction to fans).

Vampire Weekend is a world drawn with the details of an insider, but that doesn't mean the portrait isn't critical. The last line of "One"—"Oh, your collegiate grief has left you dowdy in sweatshirts/Absolute horror!"—is as bitterly mocking as Evelyn Waugh or Whit Stillman (who also took their snipes at the upper class from a close range). What makes VW not the Decemberists is simple: The Decemberists were not sea captains in the 1900s, whereas Vampire Weekend did go to an Ivy League college in the Northeast, and at least one of them was a literature student. Their style is restlessly cultivated, but it's rooted in their experience. And under all the wit and posture, they bury real sentiment.

Id.

In a Spin interview, Koenig stated: “Every once in a while, we’ve seen some things where people try to bring colonialism or appropriation into [talking about our band] in a negative way—but that debate has already happened. We’re in a context that’s coming *after* instances of people actually stealing from each other.”²³⁴

The band has described its sound as “Upper West Side Soweto,” an amalgamation of one of the richest sections of Manhattan and one of the poorest sections of Johannesburg.²³⁵ Vampire Weekend’s musical style is a form of cultural appropriation as well, although Ezra Koenig insists that it is irrelevant whether their afro-pop sound is authentic.²³⁶ Both music blogs and the mainstream press often compare Vampire Weekend’s music to Paul Simon’s *Graceland* album, because of its similar uses of clean guitars and an upbeat afro-pop sound.²³⁷ Vampire Weekend’s songs *A-Punk* and *Boston*, however, sound closer to ska punk than anything off of *Graceland*. Vampire Weekend’s sound also differs from *Graceland*’s because of its heavy use of strings and a synthetic Mellotron, as opposed to Paul Simon’s chants and slap bass. The Mellotron in particular, an instrument best known from the Beatle’s song *Strawberry Fields*, makes it feel like Vampire Weekend’s music would be more appropriately played in a Wes Anderson movie than at a concert in Zimbabwe. The band’s new sound has also been well received critically, with Pitchfork rating the album an 8.8 out of ten and Rolling Stone giving it 3.5 stars.²³⁸ The band resists over analysis of its music. “We’re musicians, not nerd-experts on every genre of African music. We don’t have to be musicologists to make the link to African music. Anyway, we focus on concise pop structures, drawing elements from other genres.”²³⁹

234. Greenwald, *supra* note 215.

235. Alison Stewart, *Vampire Weekend’s African Transfusion*, WASH. POST, Jan. 29, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/28/AR2008012802-634.html>.

236. See Greenwald, *supra* note 215 (expressing Vampire Weekend’s musical style).

237. See Marathonpacks, *Vampire Weekend Cape Cod Kwassa*, MARATHONPACKS.COM, Nov. 27, 2007, <http://earfarm.blogspot.com/search?q=vampire+weekend&updated-max=2007-11-29T-10%3A55%3A00-05%3A00&max-results=20>; see also Vulture, *What to Expect From the Upcoming Vampire Weekend Backlash*, NYMAG.COM, Jan. 29, 2010, available at <http://nymag.com/daily/entertainment/2008/01/vampire-weekend-backlash.html> (comparing different types of media’s coverage of Vampire Weekend).

238. See Nitshu Abebe, *Vampire Weekend*, PITCHFORK, Jan. 8, 2008, http://www.pitchforkmedia.com/article/record_review/48053-vampire-weekend.

239. Video Interview: Re Origins of Music Vampire Weekend (PSL 2009) (located on Youtube at <http://www.youtube.com/watch?v=IUdHjgJARGI>) (explaining Vampire Weekend’s songs process and construction).

Vampire Weekend's music alone, however, does not explain why they were photographed for the cover of *Spin* before releasing its debut album.²⁴⁰ The band's music and the intriguing image they created are only parts of what led to their rise in popularity. Another factor was the band's approach to self-promotion. Like many bands, Vampire Weekend created a Myspace page and recorded a demo CD-R early in its career.²⁴¹ Its approach to distributing the demo and mp3s differed from most other artists. Singer Ezra Koenig asserted that the band did not send its demo to record labels because "these people don't want listen to some random thing they don't have context for."²⁴² Instead, Vampire Weekend aggressively distributed its demo and mp3s to blogs.²⁴³

The band was mentioned first in the African music blog *Benn Loxo Du Taccu* on August 18th, 2006, after Koenig sent the site an mp3 of *Cape Cod Kwassa Kwassa*.²⁴⁴ The site posted the song to share with its readers but did not review it or discuss Vampire Weekend at length. On January 10th, 2007, the blog *Ear Farm* did a full post on the band and made both *Cape Cod Kwassa Kwassa* and *Oxford Comma* available.²⁴⁵ The site's review of the band was positive, calling Vampire Weekend the "group of African music making white boys in all of New York." More importantly, *Ear Farm* has an Alexa traffic rank of 240,545, whereas earlier blogs that mentioned the band were not popular enough to be ranked.²⁴⁶ Vampire Weekend's popularity achieved critical mass after it was mentioned on April 13th, 2007, in the blog *Stereogum*, a popular blog that has become an indie music tastemaker.²⁴⁷ The band had sent its demo to the blog's writer Amrit Singh, and it paid off with a review that

240. See Greenwald, *supra* note 215 (describing Vampire Weekend's various reasons for rising success).

241. See *id.*; see also MySpace: Vampire Weekend, <http://www.myspace.com/vampireweekend> (displaying music and Vampire Weekend's fan posts).

242. Greenwald, *supra* note 215.

243. See *id.* at 65. (describing Vampire Weekend's aggressive approach to releasing online music).

244. See *Benn Loxo Remixed*, Oct. 18, 2006, <http://bennloxo.com/archives/2006/10/18/benn-loxo-remixed/> (noting Vampire Weekend's initial online music debut).

245. See *The Earfarm*, Nov. 29, 2007, <http://www.marathonpacks.com/2007/11/vampire-weekend-cape-cod-kwassa-kwassa/> (last visited Nov. 6, 2010) (describing Vampire Weekend's growing popularity among Internet blog sites).

246. See *Alexa*, http://www.alexa.com/data/details/traffic_details/earfarm.blogspot.com (last visited Oct. 13, 2010).

247. See *Stereogum: Band to Watch*, Apr. 13, 2007, http://stereogum.com/archives/band-to-watch/band-to-watch-vampire-weekend_005100.html (last visited Nov. 5 2010) (describing Vampire Weekend's biggest fan following after indie music's top blog, *Stereogum*, posting that gave Vampire Weekend rave reviews).

described its songs as “indie-pop gems of a different cut.” This post also made the songs *Cape Cod Kwassa Kwassa* and *Oxford Comma* available to download. This was likely the largest audience the band had received thus far, considering Stereogum’s impressive Alexa traffic rank of 10,326.²⁴⁸ Chris Thomson, Vampire Weekend’s drummer, acknowledged that “there was kind of a tipping point in April of 2007. Suddenly at our shows there’d be more non-friends than friends.”²⁴⁹

By June of 2007, Vampire Weekend was touring fulltime, and at each stop on the tour the shows were packed by fans who heard the band’s songs on various blogs. By the time Vampire Weekend’s tour ended in July, they were signed to the record label XL. Even getting signed to XL was the result of a blogger. The blogger behind Good Weather for Airstrikes saw Vampire Weekend perform at Columbia, and he wrote a positive review of its music. Later, the blogger was approached by XL A&R representative Imran Ahmed, and the two discussed the band. Imran Ahmed called them the best new band he had heard all year and signed them to the label. The success of the band’s promotional approach was solidified. Blogs generated more than enough hype for the band, and as Spin noted “so-called ‘old media’—labels, MTV, The New York Times, even national magazines—were quickly forced to respond to the buzz.”²⁵⁰

By mid-2009, when the band took some time off to record its second album, it was one of the most popular bands in the United States.

b) Fall Out Boy

The pop-punk group Fall Out Boy followed an unorthodox path to popularity. Like Vampire Weekend, Fall Out Boy’s success is partially due to the band’s image.²⁵¹ Vampire Weekend, however, publicly feigns disregard for its image, whereas Fall Out Boy

248. See Alexa, http://www.alex.com/search?q=stereogum.com&r=site_site_info&p=bigtop, (Oct.13, 2010) (describing Alexa’s blog ranking other music blogs popularity and Vampire Weekend’s continually increasing popularity).

249. Greenwald, *supra* note 215 (describing Vampire Weekend’s shock and realization of their rising success and popularity).

250. *Id.*

251. See Neda Ulaby, *Fall Out Boy Rewrites the Gender Roles of Rock*, NPR MUSIC INTERVIEWS, Nov. 30, 2007, <http://www.npr.org/templates/story/story.php?storyId=16699161> (last visited Nov. 5 2010) (discussing band’s image and its importance to successful marketing strategy).

flaunts its bad-boy image as a key part of its marketing strategy.²⁵² To some extent, Fall Out Boy considers its image more important than its music because of the scene that fans have created around it.²⁵³

Fall Out Boy formed in 2001 in the Chicago suburb of Wilmette, Illinois.²⁵⁴ The members of the band knew each other from previously playing in various local straight-edge metalcore bands, including the relatively popular band Arma Angelus.²⁵⁵ Drummer Andy Hurley and Bassist Pete Wentz played together in the band Racetractor, a metalcore group known for its extreme political views and an album entitled *Burn the Idol of the White Messiah*.²⁵⁶ The members of Fall Out Boy had grown disillusioned with the metalcore scene and thus decided to give their nascent band a pop-punk sound.²⁵⁷ The band released a three song demo, the lyrics of which were a notable shift from Racetractor's. Instead of overdramatic political statements, the lyrics on Fall Out Boy's demo contained overdramatic references to lost love and teen angst. Examples of lyrics from the demo include: "your smile reminds me of switchblades and infidelity," "last night I saw my world explode," and "I dried my eyes, now I crust them with sleep/I'll crust them over/She begged me: don't hate me."²⁵⁸

Fall Out Boy released its first LP in May 2002 under Uprising Records's label.²⁵⁹ Fall Out Boy released a second LP on the Upris-

252. *See id.* (discussing Fall Out Boy's calculated gender-bending style); *see also* FluxCapacitor, *supra* note 221 and accompanying text (describing Vampire Weekend's nonchalant public image and how band uses image as powerful marketing tool).

253. *See* Maureen Callahan, *Teenage Tasteland: Inside N.Y.C.'s Angst-Rock Empire*, NYPOST.COM, June 6, 2007, available at http://www.nypost.com/p/entertainment/musi-c/item_S3a2H6ki5vguEzXvgGhxXKj;jsessionid=2B928DF9E3CE59FDCAD50D046147A619 (looking closely at New York City's Angst-Rock Empire and Fall Out Boy's large role as break out artists). The most outspoken member of Fall Out Boy, bassist Pete Wentz, stated that the "most important thing is the brand, and the shift in pop culture we're making." *Id.* at 4.

254. *See* Fall Out Boy—Biography, GODESKTOP.COM, http://www.godesktop.com/mu-sic/fall_out_boy/biography.html (last visited Sept. 15, 2010) (surveying Fall Out Boy's formation and biography).

255. *See id.* (noting band member origins).

256. *See* Gary Sharpe-Young, *New Wave of American Heavy Metal* 247 (2005) (summarizing Racetractor band history).

257. *See* Fall Out Boy—Biography, *supra* note 254 ("Dissatisfied with the metal direction, [the band founders] decided to continue in the direction of pop/punk music.").

258. FALL OUT BOY, *Switchblades and Infidelity*, on *EVENING OUT WITH YOUR GIRLFRIEND* (Uprising Records 2003); FALL OUT BOY, *Growing Up*, on *BELIEVERS NEVER DIE* (Island Records 2009).

259. *See* Johnny Loftus & Corey Apar, *Fall Out Boy—Full Biography*, MTV.COM, http://www.mtv.com/music/artist/fall_out_boy/artist.jhtml#bio (last visited Oct.

ing label in January 2003, named *Evening Out with Your Girlfriend*.²⁶⁰ A month later, the band performed at South by Southwest, which attracted further attention.²⁶¹ By the end of April, Fall Out Boy became the first band to sell one million downloads on PureVolume.com, and larger labels started a bidding war to sign the band.²⁶² Fall Out Boy signed on with the label Fueled by Ramen to release the album *Take this to Your Grave* in May of 2003.²⁶³ The band produced a video for the song “Grand Theft Autumn/Where is Your Boy,” which helped the band gain popularity when the video received minor airplay on MTVU.²⁶⁴ The album and video were funded in part by an advance the band received from Island Records that gave the label a right of first refusal on the next Fall Out Boy album.²⁶⁵ By the end of 2003, the band officially signed with Island Records.²⁶⁶

Although Fall Out Boy was already signed to Island Records, in May of 2004, the band released an acoustic EP under Fueled by Ramen entitled *My Heart Will Always Be the B-Side to My Tongue*. The EP marked Fall Out Boy’s growing popularity, as it managed to rise to number 153 on the Billboard 200.²⁶⁷ The band also landed a spot on the Vans Warped Tour that August.²⁶⁸ Nonetheless, even with its successes Fall Out Boy remained largely unnoticed by the mainstream music press. In 2005, however, Fall Out Boy became a recognized pop phenomenon when it released its first major label

13, 2010) (noting Fall Out Boy’s initial LP date and that LP was split with band Project Rocket).

260. *See id.* (summarizing Fall Out Boy’s career).

261. *See id.* (noting Fall Out Boy’s early tour appearances).

262. *See* Bram Teitelman, *Unexpected Fall Out, Boy*, ALLBUSINESS.COM, May 28, 2005, <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4559242-1.html> (describing Fall Out Boy’s record-breaking Internet music sales promoting its popularity among large music labels).

263. *See* Fall Out Boy—Biography, FALLOUTBOYFORUM.COM, <http://www.falloutboy-forum.com/profile.htm> (last visited Oct. 13, 2010) (noting band’s signing and creating album in 2003).

264. *See* Fall Out Boy—Biography, *supra* note 254 (noting success of particular Fall Out Boy songs in punk rock community).

265. *See id.* (detailing Fall Out Boy’s financial links that allowed it to produce album).

266. *See id.* (giving history of Fall Out Boy’s record labels).

267. *See* Fall Out Boy—Biography, LYRICSFREAK.COM, <http://www.lyricsfreak.com/f/fall+out+boy/biography.html> (last visited Oct. 13, 2010) (noting Fall Out Boy’s rise on Billboard top 200 chart).

268. *See* *Vans Warped Tour 2004: Full-line up, Tour Dates, and Tickets*, IGN MUSIC, Feb. 9, 2004, <http://music.ign.com/articles/491/491121p1.html> [hereinafter *Van Warped Tour*] (listing Fall Out Boy on Van’s Warped Tour 2004 line-up).

debut, *From Under the Cork Tree*.²⁶⁹ Due to its much-anticipated release, the album became the number-one Tower online pre-sale title of all time as of 2005.²⁷⁰ It immediately shot up to number nine on the Billboard 200.²⁷¹ Rolling Stone gave the album a positive review, finally introducing Fall Out Boy in the mainstream press.²⁷² A repeated showing on MTV's TRL and an MTV2 award at the 2005 MTV Video Music Awards reinforced the band's popularity.²⁷³

Fall Out Boy's popular success continued through 2006. The band won more awards, including Favorite International Group at the MuchMusic Video Awards, and Best Rock Group and Best Single at the Teen Choice Awards.²⁷⁴ Fall Out Boy was also nominated for a Grammy in 2006 for Best New Artist.²⁷⁵ The album *From Under the Cork Tree* remained on the Billboard 200 until October 2006, a total of seventy-two weeks on the chart.²⁷⁶

The band released its second major label album, *Infinity on High*, in February 2007.²⁷⁷ The album opened at number one on the Billboard 200, but it dropped off the chart after fifty-two

269. See Tony Pascarella, *Music Review: Fall Out Boy "From Under the Cork Tree,"* THE TRADES.COM, May 8, 2005, <http://www.the-trades.com/article.php?id=3173> (reviewing Fall Out Boy's 2005 album).

270. See *Fall Out Boy Releases Highly Anticipated New Album on Island Records*, BMI.COM (Apr. 29, 2005), <http://www.bmi.com/musicworld/entry/4006> [hereinafter *Fall Out Boy Releases*] (describing Fall Out Boy's highly popular new album and top-of-the-chart sales).

271. See *From Under the Cork Tree: Fall Out Boy*, BILLBOARD.COM, <http://www.billboard.com/#/album/fall-out-boy/from-under-the-cork-tree/679777> (last visited Oct. 13, 2010) [hereinafter *From Under the Cork Tree*] (listing global chart rating history for "From Under the Cork Tree").

272. See Christian Hoard, *Fall Out Boy: From Under the Cork Tree Review*, ROLLING STONE, May 5, 2005, at 76 (giving Fall Out Boy a three star rating for its second album and commenting on band's clever song titles).

273. See Fall Out Boy—Biography, *supra* note 254 (noting band's multiple performances on popular television award shows).

274. See *Winners*, MUCHMUSIC.COM, <http://www.muchmusic.com/events/mmva06/winners/> (last visited Oct. 13, 2010) (listing 2006 award winners in all categories); see also *Teen Choice Awards*, METROLYRICS.COM, <http://www.metrolyrics.com/2006-teen-choice-awards.html>, (last visited Oct 13, 2010) (listing 2006 award nominees in music).

275. See *Grammy Award Nominations 2006*, ABOUT.COM, <http://top40.about.com/o-d/awards/a/grammynoms2006.htm> (last visited Oct. 13, 2010) (giving overview of awards ceremony and nominations).

276. See Rob Patterson, *Fall Out Boy Flies Up the Charts*, BMI.COM, July 9, 2007, <http://www.bmi.com/news/entry/535202> ("From Under The Cork Tree then yielded two Top Ten Singles . . . and spent 72 weeks on the *Billboard* 200 album chart.").

277. See Loftus & Apar, *supra* note 259 (outlining band history and giving information on band members).

weeks.²⁷⁸ It received three and a half stars in *Rolling Stone*, higher than the magazine awarded *From Under the Cork Tree*.²⁷⁹ Nevertheless, one review noted how divisive Fall Out Boy had become, particularly the band's bassist, Pete Wentz.²⁸⁰ One month later, *Rolling Stone* put Fall Out Boy on its cover, with Pete Wentz in the center and shirtless.²⁸¹

As Fall Out Boy's music became more popular, Pete Wentz became the driving force behind building the band's image. Wentz saw Fall Out Boy's popularity as an opportunity to impact pop culture by creating a brand that encompassed the band's music, appearance, and merchandise.²⁸² Wentz's attempt at branding was inspired by hip-hop, particularly Jay-Z and old Def Jam.²⁸³ "They created this entire counterculture," said Wentz. "You buy the record, then this comes along with it. You fell so in love with this idea that you ate, slept and breathed it."²⁸⁴

In 2004, Wentz founded Clandestine Industries in order to design and sell his own merchandise.²⁸⁵ Working from his parents' basement, Wentz's merchandise reinforced Fall Out Boy's pop version of teen angst.²⁸⁶ The first product was a self-published forty-three page illustrated book based on his nightmares.²⁸⁷ Wentz sold 10,000 copies of the book at Fall Out Boy shows.²⁸⁸ Wentz believed

278. See *Infinity On High*, BILLBOARD.COM, <http://www.billboard.com/#/album/fall-out-boy/infinity-on-high/824630>, (last visited Oct. 13, 2010) (listing album's chart history).

279. See Erica Futterman, *Fall Out Boy*, ROLLINGSTONE.COM <http://www.rollingstone.com/music/artists/fall-out-boy/news/artists/8828/56444/56463> (last visited Oct. 13, 2010) (giving overview of Fall Out Boy's music career).

280. See *id.* (noting Wentz's independent economic ventures and more publicized personal life).

281. Peter Yang, *Cover*, ROLLING STONE, Mar. 8, 2007.

282. See Ulaby, *supra* note 251 (discussing Fall Out Boy's social precociousness toward gender standards and its effect on band marketing).

283. See Caryn Rousseau, *Fall Out Boy Bassist Brands Emo*, May 12, 2006, <http://hampt-onroads.com/node/100631> (discussing Pete Wentz's knack for brand marketing).

284. *Id.* "It's inspired originally by Jay-Z and then like old Def-Jam. They created this entire counterculture." *Id.*

285. See Amanda Schupak, *Fall Back Boy*, FORBES.COM, July 2, 2007, available at <http://www.forbes.com/forbes/2007/0702/104.htmlAmanda%20Schupak,%20Fall%20Back%20Boy> (analyzing Wentz's business savvy).

286. See *id.* (noting Wentz began his business prior to moving out of his parent's house in 2005).

287. See *id.* (listing Wentz's early products).

288. See *id.* (giving specifics on book sales).

the book's popularity could be attributed to fans looking for more ways to decipher Wentz's world.²⁸⁹

Wentz's consistent entries on his personal blog and a series of videos he and the band created gave fans even more inside information. The band released its first video footage with the album *My Heart Will Always Be the B-Side to My Tongue*, which consisted of benign footage of the band back stage and in the studio.²⁹⁰ In 2005, Pete Wentz released another DVD through Clandestine named *Release the Bats*.²⁹¹ *Release the Bats* reveals Pete Wentz's appetite for attracting attention. This video consisted mostly of lighter Jackass-style antics, such as drinking urine, shooting paintball guns, and blowing up fireworks.²⁹² During his Fall Out Boy career, Wentz attempted suicide, had a nude photo scandal, and married pop star Ashley Simpson.²⁹³ Because of Wentz's history of constant promotion and attention-seeking, critics questioned whether these events were natural occurrences or planned publicity.²⁹⁴

In late 2004, Wentz began selling t-shirts through Clandestine's website.²⁹⁵ The clothing he sold became immensely popular amongst his fans, bringing in \$500,000 dollars in its first year.²⁹⁶ Wentz purposefully marketed the clothing in small runs, allowing demand for the clothes to outweigh supply.²⁹⁷ The small batches of each design caused the clothing to carry an air of exclusivity. This

289. See *Fall Out Boy*, POLLSTAR.COM, May 30, 2005, http://www.pollstar.com/blog-s/hotstar/archive_/2005/05/30/hotstar57240.aspx (featuring Wentz's theory that Fall Out Boy came off largely as mystery to fans and thus fans' desire to purchase band information).

290. FALL OUT BOY, *MY HEART WILL ALWAYS BE THE B-SIDE TO MY TONGUE* (Fueled By Ramen 2004). Although the album had only five tracks, each came packaged with a bonus DVD.

291. FALL OUT BOY, *RELEASE THE BATS* (Clandestine Industries 2005).

292. See *id.* (including personal footage of band); see also Fueled by Ramen Store, *Release the Bats*, <http://store.fueledbyramen.com/store/show/26616> (last visited Oct. 12, 2010) (describing content of DVD and specifically promising fans insider band footage).

293. See Pete Wentz on Celebrity Central, PEOPLE.COM, http://www.people.com/people/pete_wentz (last visited Oct. 12, 2010) (noting Pete Wentz's publicity dealings).

294. See Wade Tatangelo, *Pete Wentz, Headline Boy*, CREATIVE LOAFING MUSIC, Mar. 12, 2008, http://tampa.creativeloafing.com/gyrobase/pete_wentz_headline_boy/Content?oid=410569 (commenting on Pete Wentz's then-new penchant for politics and equating to earlier Wentz so-called publicity stunts).

295. See Schupak, *supra* note 285 (noting Wentz's early business ventures).

296. See *id.* ("He booked \$500,000 the first year—and now brings in \$100,000 a month, keeping a one-third cut).

297. See Rebecca Little, *Clandestine Destination*, CHICAGOMAG.COM, Nov. 6, 2007, available at <http://www.chicagomag.com/Radar/Sales-Check/November-2007/Clandestine-Destination/> (presenting Clandestine's sales practices).

exclusivity caused fans to feel closer to the band, like members of an insiders' club. Also, on the advice of Jay-Z, Wentz only sold his clothing in select stores as opposed to embracing every retailer that approached him.²⁹⁸ This move kept the brand from being diluted, allowing Wentz to market Clandestine as a designer label. In 2006, Wentz added to his brand's buzz by showing a new line of clothing during New York's Fashion Week.²⁹⁹ In 2007, Clandestine became a strong enough brand to partner with DKNY, marking Wentz's move into the world of mainstream fashion.³⁰⁰

Wentz put his entrepreneurial talents to work outside of Clandestine as well. In the fall of 2004 he started his own label, Decaydance Records. The first band he signed to the label was the group Gym Class Heroes.³⁰¹ The group's single, "Cupid's Chokehold," reached number four on Billboard's Pop 100 in March, 2007.³⁰² Wentz has signed ten other groups to the label, including the highly successful band Panic at the Disco.³⁰³ The band consisted of recent high school graduates whose songs Wentz heard online. After signing Panic at the Disco, Wentz convinced the band to mirror parts of the image he had used for Fall Out Boy, including mild gender bending by wearing excessive makeup and kissing on stage.³⁰⁴ Panic at the Disco's sophomore album peaked at number two on the Billboard 200, and the band received an award for Video of the Year at the 2006 MTV Video Music

298. See Schupak, *supra* note 285 (Jay-Z told Wentz that "[t]aking a lot of money up front is like betting against yourself, taking a little is betting on yourself.").

299. See James Montgomery, *Fall Out Boy Takes On Fashion Week: Pete Wentz Debuts Clothing Line*, MTV.COM, Sept. 11, 2006, http://www.mtv.com/news/articles/1540619/2006-0911/fall_out_boy.jhtml (reporting on Clandestine's Fashion Week debut).

300. See *Pete Wentz and DKNY Jeans Launch Clandestine Industries for DKNY Jeans*, Aug. 31 2007, <http://www.prnewswire.com/news-releases/pete-wentz-and-dkny-jeans-launch-clandestine-industries-for-dkny-jeans-58646852.html> (announcing DKNY and Clandestine's joint fashion collection).

301. See Schupak, *supra* note 268 ("Decaydance's first client was Gym Class Heroes, a New York hip-hop act whose single, 'Cupid's Chokehold,' dominated radio for five weeks.").

302. See *Gym Class Heroes—Chart History*, BILLBOARD.COM, <http://www.forbes.com/for-bes/2007/0702/104.html> Amanda%20Schupak,%20Fall%20Back%20Boy (last visited Oct. 7, 2010).

303. See *Panic at the Disco—Artists*, DECAYDANCE.COM, <http://decaydance.com/artists/panic-at-the-disco/> (last visited Oct. 7, 2010) (linking to Panic at the Disco's artist page on Decaydance.com and listing all other artists under label under "artists" on page).

304. See Ulaby, *supra* note 251.

Awards.³⁰⁵ Panic at the Disco became so successful, it became somewhat of a rival of Fall Out Boy since the two bands share most of their fans. Nevertheless, this puts Pete Wentz in the comfortable position of making money from both his own band and his band's immediate competition.

c) Common patterns

Whether a band is seeking pop stardom like Fall Out Boy or indie recognition like Vampire Weekend, lessons can be learned from both bands. The first lesson is that a clear and interesting identification for the band is essential. Branding and promotion defines a band's artistic concept – much like an artist's statement hanging in a gallery. Pete Wentz branded Fall Out Boy by combining upper-middle income suburban origins with sexual ambiguous bad boy.³⁰⁶ Vampire Weekend combined upper-income Columbia University with African pop.³⁰⁷ Both of these combinations were enough to turn heads. The bad-boy, African pop, suburbia or Columbia University elements by themselves would not have been interesting. Whatever promotional strategy a band follows, it can increase the likelihood of being noticed by creating an intriguing image; celebrity status presupposes an identifiable persona. Similar to Vampire Weekend and Fall Out Boy, a band's managed image should be an exaggerated version of its members' genuine identities. If a band's image is too contrived, consumers will not perceive it as authentic. This image should be part of the band's brand, a conscious theme that also encompasses the band's, music, lyrics, artwork, and merchandise. By retaining control over promotion and branding, a band can maintain artistic integrity.

The second lesson is that it takes focus for a band to become successful. Both bands were incredibly committed and put in the hours and hard work necessary to achieve their goals. Fall Out Boy toured extensively to create a fan base, impressively playing 270

305. See *Panic at the Disco Music News & Info*, BILLBOARD, <http://www.billboard.com/bbcom/bio/index.jsp?pid=696097> (last visited Oct. 12, 2010) (summarizing Panic at the Disco's history, namely their successful hit "I Write Sins Not Tragedies"). "I Write Sins Not Tragedies" won "Video of the Year" at the 2006 VMAs. *Id.*

306. See Futterman, *supra* note 279 (describing Fall Out Boy's suburban roots and "snarky humor and big, deep-feeling choruses").

307. See Alf Garcia, *For Vampire Weekend, the stakes get higher*, NORTHJERSEY.COM, Sept. 13, 2010, http://www.northjersey.com/arts_entertainment/102753529_For_Vampire_Weekend_the_s-takes_get_higher.html (identifying Vampire Weekend's roots and musical style).

shows in 2003 and 550 shows in a two-year period.³⁰⁸ Vampire Weekend tour schedule was disciplined as well; the band pooled its money to buy a minivan and went on three tours around the country without a tour manager.³⁰⁹ The band also recorded ten songs itself soon after it formed so it would have enough material to put on demos.

Relatively cheap recording software combined with the Internet allows such a band to take a do-it-yourself approach to recording and distribution. Competitors have access to the new technology as well, however. As the cost of entry into recording music decreases, the amount of music being recorded increases. Accordingly, consumers need to search through this larger quantity of music, making it more difficult for any particular band to be noticed. A band can gain an advantage in this filtering process by giving people a reason to listen. As Ezra Koenig of Vampire Weekend stated, “[People at labels] don’t want to listen to some random thing they don’t have any context for.”³¹⁰ Essential for success in the do-it-yourself approach is creating this context. The right context spawns celebrity status.

The quickest way for a band to build context around its music is by focusing its promotional efforts towards developing Internet-based music community. Spin describes this virtual community as “the newly developed middle – an incestuous network of fans, bloggers, and music-biz outsiders.”³¹¹ This strategy involves aggressively targeting popular music blogs, like Vampire Weekend targeted Stereogum.³¹² Another member of this “middle” is KEXP, an independent public radio station that cosponsored and promoted multiple Vampire Weekend shows.³¹³ Although KEXP has a real station in Seattle, a large percentage of its listeners stream the station online to different cities throughout the world.³¹⁴ KEXP is often the

308. See *Red Line Distribution - Fall Out Boy*, RED LINE DISTRIBUTION, Mar. 2004, <http://www.adita.org/redlinedistribution/interviews/FallOutBoy.shtml> (recounting Fall Out Boy’s concert history for 2003); See *Fall Out Boy Releases Highly Anticipated New Album on Island Records*, BMI.COM, Apr. 29, 2005, <http://www.bmi.com/news/entry/4006> (providing statistics on touring schedule).

309. See Greenwald, *supra* note 215 (highlighting Vampire Weekend’s rise to fame).

310. *Id.*

311. *Id.*

312. See *id.* (noting blogs targeted by Vampire Weekend).

313. See Posting of Andrew to <http://blog.kexp.org/blog/2007/07/05/song-of-the-day-vampire-weekend-a-punk/> (July 5, 2007) (posting information about Vampire Weekend performances).

314. See *KEXP History*, KEXP 90.3 FM, <http://kexp.org/about/about.asp> (last visited Oct. 10, 2010) (describing station history and format).

first station to play up-and-coming indie bands and has become known as an indie tastemaker.³¹⁵ The station's website even includes advice for bands looking to get radio airplay.³¹⁶

Celebrity status is strengthened by touring relentlessly to build up a loyal grass-roots fan base. Anyone on stage in front of an audience enjoys celebrity status in the mains of the audience for at least an hour or two. A valuable lesson can be learned from Fall Out Boy in regards to this strategy: have patience. As Fall Out Boy manager Bob McLynn stated, "The best way to do it is to move slower, not skip steps and build from smaller clubs to bigger venues."³¹⁷ Following this advice, Fall Out Boy played venues small enough to sell out at each show, repeatedly playing at VFW halls, bowling alleys, and bars that were closed for all-ages shows.³¹⁸ The band took a small step up in venue size with each tour, starting with 300-seaters, then on to 500-seaters, 1,000-seaters, 3,000-seaters, and finally arenas.³¹⁹ Even though it could have filled larger venues, the band created buzz by continuously selling out the smaller shows.³²⁰ Since the band was touring regularly, it could use this buzz to fill a larger venue the next time it returned to a city, building up its popularity with each successive tour.³²¹ This strategy is similar to the one Pete Wentz used with his Clandestine clothing line: keep supply lower than demand.³²²

Pete Wentz observes, "Why do I need to have some corporation that I don't believe in get behind me just because they could line

315. See *Get Your Music on the Airways*, APPLES AND CATS MEDIA'S COLLEGE RADIO PROMOTION FAQ, <http://www.applesandcats.com/radio.html> (last visited Oct. 12, 2010) (identifying difficulty of getting music played on KEXP).

316. See *Getting Airplay*, KEXP 90.3 FM, <http://kexp.org/programming/airplay.asp> (last visited Oct. 12, 2010) (providing station suggestions and tips for getting airplay).

317. Ray Waddell, *Fast Breaks – The Killers aren't alone in their rapid rise as a touring power*, BILLBOARD, Sept. 23, 2006, at 32, available at http://books.google.com/books?i-d=xg0EAAAAMBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

318. See Jim DeRogatis, *Fall Out Boy speaks out: Pete Wentz on the promoter's ordinance*, CHICAGO SUN-TIMES, May 13, 2008, available at http://blogs.suntimes.com/music/2008/0-5/fall_out_boy_speaks_out_pete_w.html (mentioning Fall Out Boy's initial "under the radar" performances).

319. See Waddell, *supra* note 317 (describing Fall Out Boy's gradual climb to arena performances).

320. See *id.* (identifying Fall Out Boy's deliberate marketing strategy).

321. See *id.* (determining Fall Out Boy's increasing popularity; by selling out, their shows became "a hotter ticket next time the band came to town.")

322. See Rebecca Little, *Clandestine Destination*, SALES CHECK, Nov. 6, 2007, <http://www.chicagomag.com/Radar/Sales-Check/November-2007/Clandestine-Destination/> (describing Wentz's production tactic). "Wentz's designs are made in runs of 250. . . 'once they're gone, they're gone.'" *Id.*

our pockets, when we could be that corporation and we could have the ideals that we want?”³²³

3. *Plateaus of Popularity*

Most musicians do not achieve the level of success reached by Vampire Weekend and Fall Out Boy. The members of these bands are established celebrities—rock stars. Most of the others come to rest in one of three categories: those who have achieved a regional reputation; those who have not but are actively striving to achieve it; and those who make talk about aspirations to “reach the next level,” but who are content, judged by their actions, to play live performances once every couple of months before small audiences comprising mostly members of other bands they know and their friends. The first and second groups need a business model. The third group does not; it is comfortable being part of a small community of musicians and music lovers. Musicians in the third group, however, will always need sources of income not derived from their music.

a) Established celebrities

Vampire Weekend and Fall Out Boy are established celebrities. Musicians who are already celebrities can easily satisfy their goals—both economic and hedonic. “Making it” in popular music, referred to for convenience as achieving rock star status, depends on passing one or more of several thresholds. A musician can achieve this level of success because music reviewers regularly write about him in favorable terms. He can succeed because his recorded music sells more than a million units, or he can succeed because he performs live in stadium or arena-size venues that are filled with fans.³²⁴ Record sales drive position on charts of music popularity. “Making the charts” is a common proxy for stardom.

Once a musician achieves celebrity status, his income usually explodes, although net profits may be eaten up by expenses advanced by record labels or promoters and further diminished by creating accounting. Celebrities also have increased opportunities to earn revenue from endorsing commercial products in advertisements and from merchandise sales to fans. Both advertisers and

323. Caryn Rousseau, *Fall Out Boy Bassist Brands Emo*, HAMPTONROADS.COM, May 12, 2006, <http://hamptonroads.com/node/100631>.

324. As technology changes the manner in which recorded music is acquired by consumers and the levels of album or song sales necessary to “make the charts” and to qualify for stardom shifts. Now, the number of sales is less than it was in the 1990s.

fans want to ride the coattails of celebrities. As Gene Simmons, the bassist of Kiss, put it to Danny Goldberg:

It's the Elvis syndrome. When you become a rock star, you become bigger than your songs. Wang Chung had number-one songs, Huey Lewis and the News had lots of hits, but they weren't rock stars. The fans didn't care about the people. Rock stardom is charisma with melody. The Beatles themselves were bigger than any of their songs. The Dylan photo with his Jewfro and black shades made him a rock star—bigger than his songs. The music matters—but the messenger is more important.³²⁵

Once a musician is a celebrity, his name draws consumers, and he has the flexibility to make new kinds of music, confident that fans will buy it. To be sure, if the fans really do not like the new music, the celebrity's popularity may decline. Nevertheless, celebrity status gives a musician a platform from which to educate consumers to new directions in music. The Beatles did that with *Yellow Submarine*. Bob Dylan did it when he took up the electric guitar. Leonard Cohen shifted away from his traditional sparsely instrumented folk sound to synthesizers in his 1987 album *I'm Your Man*.

Linkin Park migrated from rap to more melodic hard rock. Most musicians evolve in their styles, but an established base of fans provides more freedom to let artistic taste dictate the direction of creative effort rather than guesses about what will resonate in the marketplace, which drives lesser known musicians motivated by economic reward.³²⁶

b) Striving Entrepreneurs

A subset of indie musicians have not achieved celebrity status but are not content with the hobbyist category. They want to follow in the entrepreneurial (if not the musical) footsteps of Vampire Weekend and Fall Out Boy. Tom Schraeder is an indie musician in Chicago, who commented in a February 2008 focus group, "you have to do everything you can do to build relationships – with everyone."³²⁷ He schmoozes local music critics and succeeds in getting write-ups in the major Chicago newspapers and the free "shopper" papers that concentrate on Chicago's nightlife. He makes sure that

325. DANNY GOLDBERG, *BUMPING INTO GENIUSES: MY LIFE INSIDE THE ROCK AND ROLL BUSINESS* 109 (2008).

326. *See id.* at 119-23.

327. Comments at Focus Group on Indie Music in Chicago (Feb. 17, 2010).

a member of his street team works the crowds standing in line at venues, giving out demo CDs. He befriends bartenders and makes sure he waits in the lobby and the stairwell after performances to greet fans.

Darren Garvey is another indie musician in Chicago. He is the product of a formal university education in music and has phenomenal technique on a variety of instruments. He tours relentlessly as a member of four different bands. Known mostly for his innovating drum and percussion performances as a member of these bands headlined by others, he undertook in mid-2008 to attract outside investment to fund a new solo album and to support innovating marketing through the blogosphere, emphasizing a coherent and attractive image.

Algren was a Chicago indie band comprising four fraternity brothers from Valparaiso. They had achieved favorable press notice despite only about eighteen months of performing together in Chicago. They were toying with various ideas to define themselves more uniquely in the marketplace, including billing themselves as the “world’s smartest rock band,” because they had six university degrees among them. Their other professional opportunities caused them to break up in late 2009, however.

The drummer, Ben Brown, got married. Jonathan Iseman, the guitarist and backup vocalist started law school at Ohio Northern. Aaron Priest, the lead vocalist moved back home to Indiana because he did not find suitable legal employment in Chicago. The loss of Iseman was particularly problematic because he came up with the initial musical ideas for about seventy-five percent of the band’s songs.

“We were all exhausted after making the album,” says Jason Holly, the bassist and backup vocalist.

It wasn’t fun anymore; we were kind of relieved when Jonathan pulled the trigger. Afterwards I paired up with drummer and singer songwriter. We’ve played a few gigs. It has a totally different feel: no flyers that must be distributed; no Facebook messages to be broadcast; we’re just doing it for fun. As for the future, in five years, I’ll be too old to be a credible rock band member (I’m 29 now). If there’s opportunity maybe it will be in alt-country, which is what the three of us have been doing. But I would be more focused on doing it for fun, rather than scrambling

to break through. Trying to break through was more stressful than I thought.³²⁸

What these groups share is a commitment to self-promotion, energy, entrepreneurial creativity, and receptiveness to new marketing techniques, and an appreciation of the role of luck. They are willing to explore new channels of distribution, new ways to brand themselves and to build celebrity status. From efforts of groups such as these will emerge new forms of intermediation and new business models.

c) Hobbyists

A significant subset of the indie community makes music only for its friends. The musicians in this subset consider themselves to be professionals and express the desire to make enough money from their music to support themselves. But they are not entrepreneurial. They work with their bandmates to create new songs in protracted and ill-focused jam sessions. They talk about getting into the studio to record their next album as soon as they can amass the money. Mainly, they “play out”—perform live, rotating through a series of small venues, opening for better-known bands they know and once in a while being the featured act. The audiences at these performances, numbering thirty to fifty, are friends of the band. “What brought you here?” is occasionally asked by, or of, one of the few who is a stranger to the others. “I know Darren, in the main act,” is the response, or “I know Eddie, in the opening act” or “I have never heard the others, but I am looking forward to hearing their sound.”

During the performance, it is obvious from each band’s behavior and the audience’s reaction that they are old friends. Often, the music is pretty good. The performers take it seriously, and the audience genuinely enjoys it. Some friends of the opening or middle acts drift out as subsequent bands take the stage, but some stay. Thus, there is discovery taking place. There are many permutations of opening, middle, and featured bands. The friends of each featured band discover new music and new bands in the form of the other two bands.

The permutations are limited. Identifiable networks of bands repeatedly share the stage with each other. Few members of one network have ever heard of the members of another network. Given the opportunity, they lament the “fragmentation” of the in-

328. Interview with Jason Holly in Chi., Ill. (Sept. 21, 2010).

die music community, while doing little to reach across the divides. It is simply too comfortable to remain within one's own community. One's established fans—really an extended network of friends and collaborators—celebrate one's music. Why risk exposure to an audience that may not?

Even more significant, it is not all that much trouble to play out within one's own network. To get a gig within another network, on the other hand, would be a lot of trouble: phone calls, sales pitches to strangers, rejection, and the expense of posters. Who has the time? Not much time is left after hours of beery jam sessions to discover new music, occasional serious rehearsals or recording sessions, the day job, and an active social life.

Playing regularly before friends is immensely satisfying. The music is good; the audience loves it, and being on stage is exciting. If it ain't broke, don't fix it. And this phenomenon ain't broke—except for the money part. The money part works okay for the venue owners. The bands attract their friends and the friends of the other bands on the bill, and they spend money on drinks and food. A few hundred dollars comes in from cover charges, and sometimes there is some money left over for the band.

The band does not really care. They can claim to be professional musicians because they are getting paid something. Their art comes before money, and performing in the venue proves their professional status and reinforces the quality of their music.

There is nothing wrong with this; the phenomenon does not impose any societal costs. Indeed, it confers societal benefits for the band members and their friends. But it is not a business model. It is a social phenomenon, what outsiders to the indie music industry sometimes characterize as a "hobby" until they are brought up short by those more knowledgeable about how professional musicians define themselves.

d) Balancing the motivations

According to Tim Sandusky, a young musician,

Some percentage of everyone's day must be devoted to surviving. Only a few lucky ones get to spend a large percentage of their days doing exactly what they want. I am one of the lucky ones. Some people don't know what they want. I do. If music is in your soul it will come out. If it's not coming out, then it either was not in your soul in the

first place, or something is terribly wrong with the structure of your life.³²⁹

For Oucho Sparks, Sandusky's band, the objectives are to write and play good music, to become well known and respected, and to make a living. Different band members would rank these objectives differently, and Sandusky is determined to maintain a mode of operating that helps each band member fulfill his or her own goals according to his or her own priorities. That means flexibility in scheduling practice sessions, minimizing "democratic" discussions of business policy and artistic direction, and reliance on Sandusky to be the manager and the linchpin who keeps each member involved through frequent one-to-one communication. It is not a significant setback when bandmate Laura Grey is unavailable for a period because she is on tour with Second City or drummer Jamie Gallaher is on a three-month tour with Andreas Kapsalis Trio. Despite other involvements, each band member finds the Oucho Sparks philosophy credible and believes that the group can help each performer fulfill his or her goals for music. They always make time available for their Oucho Sparks obligations.

"For a modern musician to make a living, you have to be diverse: you perform live; you record; you give lessons; you produce; you work as a webmaster; you promote MySpace exposure; you do interviews; you may have a job in a completely different field," Sandusky says.³³⁰ This defines the Oucho Sparks philosophy for its performers.

Bound Stems started when a few kids from the Chicago suburb of Naperville placed an ad in Craigslist for a drummer. Having recruited Evan Sult, the former drummer for Harvey Danger, they practiced intensively, focusing on the complexities of the songwriting process rather than playing in clubs. When they thought they were ready, they played clubs all over Chicago, and then decided it was time to record an album, even though they did not know how they would pay for it. "We'll get a label to pay for it when we're done," Sult reports.³³¹

They spent half a year recording an album they called "Appreciation Night," then sent it out to all the independent record labels they admired. One, Flameshovel Records, also located in Chicago,

329. Henry H. Perritt, Jr., *Tim Sandusky: Indie Linchpin*, INDIE MUSIC CHICAGO, (May 2007), <http://www.indiemusicchicago.com/profiletimsandusky.html>.

330. *Id.*

331. Henry H. Perritt, Jr. *Evan Sult: Take Off Your Glasses*, INDIE MUSIC CHICAGO, Aug. 18, 2007, <http://www.indiemusicchicago/profileevansult.html>.

suggested they go back in the studio to record an EP to promote until they could tour in the summer—a necessity given singer Bobby Gallivan’s job as a high school history teacher. “The Logic of Building the Body Plan” came out in November of 2005, and the band started their first real touring. Response was fast and positive. For a band that had started from zero, a write-up in the *New York Times* was a coup. As they prepared to release “Appreciation Night,” Bound Stems decided to take the plunge: they all quit their jobs so they could continue touring to support their labor of love.³³²

Bound Stems did not leap straight onto the radio. They worked hard, touring both coasts and all over the country. It was rewarding, but difficult on everyone. After months of making less money from shows than they spent on gas and expensive van repairs, the band had to pull over and reconsider their decisions. A period of reflection brought them to the conclusion: they could keep making music, but not like this. It was time to go back to the day jobs.

Younger band members fretted about the need to get married and settle down before they got too old. A whisper breathed, “Are you already too old and neither married nor settled down?” But six months touring is not enough. According to Sult,

Music has to be at the center of a musician’s life, not a hobby or a lottery ticket casually bought at the 7-11. It has to be the center of life. Harvey Danger had won the fame lottery, but had not been willing to put music first, and that killed the band. Bound Stems had worked much harder, pushing full steam ahead—but they still had not reached the station.³³³

Interviewed in August 2007, Sult did not want Bound Stems to take cover—even when the financial side is difficult or even seems impossible. In the band, his is the voice that argues against letting lack of money define the band’s goals and commitments. Of his own life, he says,

Theoretically I could make \$50-60K a year easily as a full time graphic designer. But I don’t want to do that; I want to create music—new kinds of music. So I try to figure out

332. See *Bound Stems*, FLAMESHOVEL RECORDS, <http://www.flameshovel.com/boundstems.php> (last visited Oct. 12, 2010) (discussing band’s “leap of faith” of quitting jobs to pursue music career).

333. Perritt, *supra* note 331.

ways to get by on the \$16K a year I can make as a freelancer and go into debt with Bound Stems as we make and perform our music. People in the band love it, but it's not obvious yet how we can clear the \$150-200K per year it would take to support five of us, even at the meager level of \$20K year for each of us.³³⁴

While they worked on their next record for Flameshovel, each member of the band had to balance his attention to music with the ongoing details of the rest of their lives. No matter the commitment level of the band, each member of Bound Stems had other interests and relationships in their lives.³³⁵ The band broke up in late 2008.³³⁶

e) Artist exit

Most musicians do not remain musicians for long. Most of them start playing music and writing songs when they are in junior high school, get more serious about it when they are in high school, and many continue into or beyond college. By the time they are thirty, however, most have dropped out and established themselves on another professional course. For the ones who pursued music because they dreamed of fame and riches, evidence has accumulated that by then they are not going to become rock stars. Sometimes the evidence suggests that the music they are capable of creating is not competitive; sometimes the evidence is that they need more money than they have to make a serious run at stardom.

Others have evidence, usually in the form of a growing body of enthusiastic fans and a handful of favorable reviews, that their music is good, and they have enough money from their music and their day jobs to eke out a modest living. Still, for the vast majority, music is essentially a leisure-time activity; it simply does not generate enough income to be otherwise. As most young people progress through their twenties, the competition for their leisure time intensifies. They engage in more serious dating and then get married or establish stable domestic partnerships with children usually following shortly thereafter. Their spouses/partners and children de-

334. *Id.*

335. See *Bound Stems*, *supra* note 332 (alluding to Bound Stems' lives outside their band).

336. See Andy Downing, *Like Pioneers gently pick up where Bound Stems left off*, CHICAGO TRIBUNE, Sept. 17, 2010, available at http://articles.chicagotribune.com/2010-09-17/entertainment/ct-ott-0917-like-pioneers-20100917_1_chiming-danfley-rich-sound (mentioning break up of Bound Stems in December 2008).

mand major chunks of their time—or the musicians feel guilty about denying it to them. As they mature and get more education, their professional prospects outside music expand, ratcheting up the opportunity costs in financial terms of sticking with music on the professional level.³³⁷

By the time they are in their early thirties, music is something they once did seriously, and it will remain part of their lives, but when someone asks, “What do you do?” they no longer answer, “I am a musician.” Instead, they say, “I am a lawyer,” or “I am a law student,” or “I’m getting my MBA,” or “I work for GE.” Musicians find that sufficient leisure time for music is squeezed out when the opportunity cost of other leisure activities, especially spending time with family, combined with the opportunity cost of career development, present a higher price than they are willing to pay by continuing to make music. So, who makes music and why?

Young people between the ages of sixteen and thirty, by the hundreds of thousands, some motivated by unrealistic fantasies of becoming rock stars, almost all motivated by the power that music has to express themselves. By the age of thirty, most of them will have confronted the reality that they cannot make a living from their music and will either continue to make music essentially as a hobby, or largely give it up because of the more attractive demands of other careers and family obligations.

IV. WHO CONSUMES MUSIC AND WHY?

The demand for any particular musical product depends on what kind of music consumers prefer, how they find it, and the format they prefer. The *New Architectures for Music: Law Should Get Out of the Way* article specified a demand function for music that expressed demand for a specific song or all the songs of a particular band as a function of price, perceived quality of the music, transaction costs of obtaining the song (including search costs), “altruism” toward the supplier—the possibility that a consumer may identify with the performer and therefore want to purchase music from a source that maximizes revenue flow to the creator, popularity of the song with others in social groups to which the consumer feels a

337. See *Time Spent in Leisure and Sports Activities for the Civilian Population by Selected Characteristics, 2009 Annual Averages*, BUREAU OF LABOR AND STATISTICS, <http://www.b-ls.gov/news.release/atus.t11.htm> (last visited Oct. 13, 2010) (providing data on time spent participating in leisure activities by age group). Men and women spend on average less time participating in leisure activities at ages twenty-five to thirty-four than they do at ages twenty to twenty-four. See *id.* (noting time spent on leisure activities).

connection, inconvenience of listening to the song, perceived probability of obtaining a corrupted file and perceived probability of legal liability.³³⁸

This part of the article elaborates on the structural elements of the demand function presented in the earlier article. It reports data on the demographics of popular music consumption. Then it synthesizes from social science research and from interviews to explain how music consumers determine what music they like, explains how they find it, and considers sources and format preferences.

A. Demographics

According to statistics compiled by the Recording Industry Association of America, in 2007 11.5% of recorded music was consumed by ten to fourteen-year-olds, up from 9.1% in 1998.³³⁹ This is 171% of their presence in the population.³⁴⁰ Fifteen to nineteen-year-olds consumed 12.3% of recorded music, down from 15.8% in 1998.³⁴¹ This is 173% of their presence in the population.³⁴² Twenty to twenty-four year olds account for 11.3% by, down slightly from 12.2% in 1998.³⁴³ This is 162% of their presence in the population. Twenty-five to twenty-nine-year-olds consumed 9.2%, down from 11.4% in 1998.³⁴⁴ Thirty to thirty-four-year-olds consumed 11.3%, about the same as 11.4% in 1998.³⁴⁵ This is 152% of the presence in the population for the twenty-five to thirty-five year old group.³⁴⁶ Thirty-five to thirty-nine year olds accounted for 12.6% in 1998, forty to forty-four year olds consumed 7.9% by, down slightly from the 8.3% in 1998.³⁴⁷ This is 143% of their presence in the population. Those over forty-five consumed 24.8%, up significantly

338. See *New Architectures*, *supra* note 4 at 315 (introducing factors influencing consumer demands for music).

339. See *2007 Consumer Profile*, RECORDING INDUSTRY ASSOCIATION OF AMERICA, <http://76.74.24.142/44510E63-7B5E-5F42-DA74-349B51EDCE0F.pdf> (last visited Sept. 8, 2010) (providing consumption statistics).

340. See *id.* (providing consumption statistics).

341. See *id.* (identifying decrease in consumption by fifteen to nineteen-year-old age bracket).

342. See *id.* (noting percent of presence in population).

343. See *id.* (representing how much twenty to twenty-four year olds make in recorded music market).

344. See *id.* (declining consumption with twenty-five to twenty-nine year olds).

345. See *id.* (identifying slight decline with thirty to thirty-four year olds).

346. See *id.* (looking at presence of 25-35 year old).

347. See *id.* (noting presence of 35-39 & 40-44 year old).

from the 18.1% in 1998.³⁴⁸ This is only 86% of their presence in the population.³⁴⁹

As in 1998, in 2007 demand was split just about evenly between males and females, in 2007 as in 1998.³⁵⁰ The data backs up the conventional wisdom that younger members of the population are the most important consumers of recorded music.

B. Musical Preference

Music is a hedonic good for consumers as well as for musicians. Consumers may choose among different ways of receiving music based on price, but almost no one says they pick songs based on price. Price surely matters, but its effect is dwarfed by the other determinants of demand, particularly as the price of recorded music falls to near zero under the pressure of the technological revolution.³⁵¹

Eisenberg identifies five reasons people acquire recordings. First, people need to make beauty and pleasure permanent.³⁵² Second, they need to comprehend beauty through repetition.³⁵³ Third, people need to distinguish themselves as consumers through conspicuous consumption.³⁵⁴ Fourth, people need to belong to a past era or a newly blooming era.³⁵⁵ Finally, people need to impress others or themselves by being collectors.³⁵⁶

Peer group popularity drives demand (Eisenberg's factors three through five). Consumers want to listen to what everyone else is listening to. This results in what economists call "network effects"—the more people who buy a particular good or service, the more that want to buy it.³⁵⁷ Indicia of popularity include chart positioning, public appearances, advertisements, and radio play.

348. *See id.* (stating increase in consumption).

349. *See id.* (noting total percentage presence in population).

350. *See id.* (describing demand demographics by gender).

351. *See Music Markets and Mythologies, supra* note 4, at 838 (noting that the marginal cost for a copy of an .mp3 file is effectively zero, meaning that prices for recorded music are trending toward zero). Understanding this trend, sellers of songs do not price their songs differently to compete based on price.

352. *See Eisenberg, supra* note 2 at 14-16 (discussing sociological rationale for acquiring recordings).

353. *See id.* (noting that beauty is better grasped by "keeping the object in striking distance of the mind").

354. *See id.* (identifying the paradox of consumption).

355. *See id.* (describing nostalgia's role in dignifying cultural objects).

356. *See id.* (analyzing collector's need to impress).

357. *See Arun Sundararajan, Network Effects, INDUSTRIAL ORGANIZATION OF INFORMATION TECHNOLOGY INDUSTRIES*, <http://oz.stern.nyu.edu/io/network.html> (last visited Oct. 12, 2010) (defining network effects).

Consumers favor music from musicians that attract them viscerally (Eisenberg's factors four and five). Industry executives give advice such as "be as personal as possible in trying to spread your music," "pay attention to the image that you want to present, make sure that what you put online or send to people to represent yourself is unique and shows as much of your character and creativity as possible."³⁵⁸ "[C]auses often have a bigger PR mechanism behind it [sic] that exposes your music. But it has to be really authentic, and something you really believe in."³⁵⁹ Fall Out Boy and Vampire Weekend took this advice to heart.

1. "Quality" of the Music

The demand for musical works is driven in part by the perceived quality of the music.³⁶⁰ Quality is in the ear of the listener. Some people prefer heavy metal, other prefer folk songs, punk, or traditional rock. Within such genres and hundreds of sub-genres, execution—quality of the performance—matters as well: a pleasant voice usually is preferable over a grating one; accurate and consistent execution of harmonies, melodies and rhythms is better than erratic execution; good mixing is better than mixing that has distracting anomalies.

New can be desirable; old can be desirable. For some sophisticated consumers or tastemakers, new approaches to music are indicia of low quality. This was the reaction to rock music until the mid-1960s.³⁶¹ For others, new is desirable, and many consumers are excited by the next new thing in music. Novelty enhances the possibility of becoming a member of an affinity group in which membership enhances self-esteem. Novelty also increases the possibility of feeling like one "owns" the music and the performers: by being a fan of the latest group with a new sound one sets oneself and a group of similarly minded fans apart from everyone else.

The popular quest for novelty in music is not a new phenomenon. Alex Ross reports on the enthusiasm with which the citizens of Graz greeted Strauss's *Salome*, to the surprise of Mahler, who considered the piece "one of the greatest masterworks of our time," but

358. Paul Resnikoff, *Got Good Music? Ten Tips from the Industry Pros*, DIGITALMUSICNEWS, Dec. 29, 2009, <http://www.digitalmusicnews.com/stories/111608ten/> (quoting Ali Par-tovi, CEO, iLike and Devin Arnold, CEO, IODA).

359. *Id.* (quoting Terry McBride, CEO, Nettwerk Music Group).

360. *But see* Eisenberg, *supra* note 2, at 11-19 (luck matters more than quality).

361. *See* Terence J. O'Grady, *A Rock Retrospective*, 66 MUSIC EDUCATORS' J. 34, 34 (1979) (describing general attitude toward rock music).

had considered genius and popularity to be incompatible.³⁶² More recently, metal followed classic rock. Punk was a reaction to commercialized rock. Folk enjoyed commercial success as a reaction to other, harder-edged styles.

Being perceived as novel is challenging. Some commentators believe that the gradual relaxation of compositional rules during the 20th century of rules inherited from the common period in music—Bach, Beethoven, and Mozart—has made it more difficult for musicians to make music that will be perceived as “new” and thus attract a following on those grounds.³⁶³ Terence O’Grady concludes:

[T]he problem of stylistic exhaustion has become increasingly obvious to rock critics. Rampant eclecticism has created an atmosphere so musically free-wheeling and stylistically inbred that the possibility of genuine individuality in contemporary rock has become moot. The result of all this leakage between styles is a diminishing excitement, if not necessarily quality, in rock music.³⁶⁴

Nevertheless, “new” usually is defined in popular culture by comparison with what is in vogue at the time; it is not an objective criterion based on the totality of history. Fashion is cyclical. Wide ties succeed narrow ties, which succeeded wide ones. Long hair follows crew cuts, and after a couple of generations, crew cuts come back in fashion. The same thing is true with popular music. Rebellious music is popular when it succeeds mellow music with an upbeat message. Then, after a while, mellow music with an upbeat message seems new and different in comparison with the rebellious music then in fashion. The despair about the capacity of musicians to attract a following by innovating is likely overblown.

Quality of music is a perception, not an objective characteristic. Here is how two male law students in their mid-twenties describe what they like and how they find it.

362. ALEX ROSS, *THE REST IS NOISE* 9-10 (2007) (noting Mahler’s bewilderment over success of what he considered “significant and audacious piece”).

363. See O’Grady, *supra* note 361, at 36 (noting how earlier rock followed relative constraining rules or patterns of harmony, but later subgenres were more flexible). “Surely the most remarkable characteristic of most American popular music since 1972 is its lack of any clearly dominant trends.” *Id.* at 44

364. *Id.* at 94.

As a child, Matt Vaughn wanted to be a musician.³⁶⁵ While his ambition to be a musician faded, his guitar lessons and basement band experience imbued him with a respect for good musicians and a basis for confident opinions about how good they were.

What he liked was greatly influenced by older siblings of his friends. “My friends influenced what I liked, but I had influences on them as well; my values were consensually defined.”³⁶⁶ Attending concerts at the World Music Center (Now First Midwest Bank Arena) just ten minutes from his Flossmoor, Illinois house was a regular pastime for Matt and his friends.³⁶⁷ After he and his circle of friends were old enough to drive, they spent a lot of their time listening to music while driving around.³⁶⁸

He favored new bands, such as the Dave Matthews band, which Matt discovered before it became popular.³⁶⁹ Matt tended to follow fashion regarding genres, and would gravitate to a new group when he got a tip from one of his friends, but once a band became highly popular, it usually would lose its luster for him.³⁷⁰

Matt has never approached new music casually; when he embraces it, it's like adopting a child or pledging a fraternity.³⁷¹ He remembers riding home from a ski trip when he was in elementary school and insisting that the driver and all the other passengers in the car listen to a Beatles tape over and over again until he was sure he could identify which Beatle was singing each part.³⁷² Later, Phish became his favorite.³⁷³ He became a huge Phish “phan,” and followed the group all over the country.³⁷⁴ He and other phans got together to listen to live shows and discuss concert experiences.³⁷⁵ Phish, and its jam rock, were huge obsessions for Matt.³⁷⁶ “My friends and I traded tapes of live shows, and traveled around to see shows- I must have been to 20+ shows. Their appearance and their

365. Interview with Matt Vaughn, law student, University of Chicago-Kent College of Law at Chi., Ill. (Nov. 14, 2007) (describing his approach to music from time of childhood).

366. *Id.*

367. *See id.* (discussing development of his interest in experiencing music).

368. *See id.* (explaining meaning of music in his young adult life).

369. *See id.* (describing how he chooses and discovers new music).

370. *See id.* (showing disparity between his philosophy on music and actual music preferences).

371. *See id.* (describing how much thought he gives each new band before deciding to become fan of its music).

372. *See id.* (showing how certain music has made lasting impressions).

373. *See generally id.* (stating how much Vaughn likes Phish).

374. *See id.* (detailing his commitment).

375. *See id.* (describing his passion and approach to listening to Phish).

376. *See id.* (conveying that certain music has left lasting impressions).

stage performance was nothing special; it was their improvisational talent; their 300+ song repertoire; the mystery; and the experience.”³⁷⁷

Once he had adopted a band, he nurtured the relationship, spending hours to organize his album collection.³⁷⁸ Even now he pauses before he leaps into a commitment to a new group.³⁷⁹ He almost never buys a single, instead checking out the musicians and, if they seem worthy, buying one or more of their albums.³⁸⁰ He studies liners and album art and is disappointed when they do not include lyrics to all the songs.³⁸¹ He wants a fulsome acknowledgement section.³⁸² “It’s a bonus when the album art or other commentary reveals something about the musicians’ outlook on the world. I wanted to identify with the groups I made part of my collection.”³⁸³

It’s hard for new musicians to break into Matt’s club.³⁸⁴ That’s not because he disdains pioneers or those who travel alone or in small bands of fans.³⁸⁵ Always he has prided himself of being a discoverer, and feels some sense of betrayal when one of his favorites made it to the big time.³⁸⁶

While he prefers newly discovered groups, his favorites are, for the most part, bands who have “made it”—who have major label deals.³⁸⁷ The Chicago indie scene is only dimly audible to him.³⁸⁸ His all time favorite is Phish, but also on his list of favorites is Wide-spread Panic (Southern rock, and blues), Moe, and Kanye West.³⁸⁹ He likes Wilco (alt. country, alt. folk and experimental) and Smashing Pumpkins (layered, heavy guitar alternative), but not Linken Park, which he finds to be too heavy.³⁹⁰ Also on his favorites list are

377. *Id.*

378. *See id.* (detailing his time commitment).

379. *See id.* (emphasizing his serious approach).

380. *See id.* (stating his approach to purchasing music).

381. *See id.* (describing his specific expectations of album art).

382. *See id.* (expressing his expectation of acknowledgement section).

383. *Id.*

384. *See id.* (recognizing requirements have to be met for him to consider new music).

385. *See id.* (stating his approach to choosing bands).

386. *See id.* (explaining sentiments about discovered musicians becoming famous).

387. *See id.* (showing disparity between his philosophy on music and actual music preferences).

388. *See id.* (giving example of generally unknown music that does not interest him).

389. *See id.* (listing some of his favorite artists).

390. *See id.* (sifting through various types of musical preferences).

The Shins (Indie Rock), Sam Roberts Band (traditional rock), My Morning Jacket (reverb-heavy mix of jam, country, and psychedelic rock), The Raconteurs (heavy indie rock), The Red Hot Chili Peppers (rap intermixed with melodic vocals; improvisational).³⁹¹ Recently he's gotten into hip hop, but his favorite genre is firmly rooted in rock n' roll, "brushing the edges of hard rock."³⁹² He was unfamiliar with The Academy Is and Bound Stems, and had heard of My Chemical Romance but not listened to their music.³⁹³ He likes Fall Out Boy, in part because Pete Wentz went to high school with his wife.³⁹⁴

Music has always been closely tied to Matt's memories.³⁹⁵ To this day he can still remember where he was when he listened to certain albums or songs for the first time.³⁹⁶ Before taking vacations, Matt typically bought a new album for the trip.³⁹⁷ Billy Breathe's by Phish reminds Matt of walking through the airport in Sydney Australia; Pearl Jam's Daughter reminds Matt of Thanksgiving at his aunt's house in Evansville, IN; Stone Temple Pilot's, Purple reminds Matt of a high school trip to New Mexico; Travis, The Man Who reminds Matt of his study abroad experience in London, specifically his daily jogs through Hyde Park; and Galactic, Late for the Future reminds Matt of a trip he took to L.A.³⁹⁸

He does not care what the musicians look like, but he likes the art and commentary that comes on album liners.³⁹⁹ He never has bought a CD at a concert; he usually buys them before seeing a group in concert.⁴⁰⁰ He disdains bands in which the lead singer does not also play an instrument; somehow if you don't play an instrument it seems like you are not a real musician.⁴⁰¹ He has never been after the story; lyrics take a back seat.⁴⁰² It's the music.⁴⁰³ It has never been the personalities or the appearance of mu-

391. *See id.* (describing some of his less mainstream favorites).

392. *See id.* (emphasizing rock n' roll as his favorite type of music).

393. *See id.* (listing bands he did not know).

394. *See id.* (explaining personal connection behind his admiration for Fall Out Boy).

395. *See id.* (noting music being intertwined with different memories).

396. *See id.* (recognizing impact music has had on his life).

397. *See id.* (detailing importance he placed on music for trips he took).

398. *See id.* (listing specific memories certain songs trigger).

399. *See id.* (stating his interest in album liners).

400. *See id.* (explaining his procedure for buying music).

401. *See id.* (expressing his opinion on band members playing instruments).

402. *See id.* (conveying his opinion on the role of lyrics in music).

403. *See id.* (describing what he looks for in music).

sicians that mattered; only their music and how they played it.⁴⁰⁴ He has high standards.⁴⁰⁵ More than once he has gone to a concert and the music did not measure up to the same musicians' recording.⁴⁰⁶ That says to Matt that the studio recording was overproduced, possibly to cover up a talent deficit.⁴⁰⁷ He listens to albums straight through, from the first song to the last, because the musicians put them in a particular order and thus the sequence reveals part of the art.⁴⁰⁸

Mike Mead no longer aspires to be a rock star, though he seems puzzled as to the moment when that dream was abandoned.⁴⁰⁹ He wants to be a good lawyer and he will be.⁴¹⁰ But music is part of who he wants to be.⁴¹¹

"I have a collection of CDs, including those from local bands. I particularly like Buddy Nuisance and Tractor Bay, the now-defunct group that befriended us in the early days."⁴¹² He is entirely uninterested in information or pictures about the musicians; it's the music he cares about, not the personalities of those making it.⁴¹³ He explained that "I don't experience the idol identification that some people do with the celebrities."⁴¹⁴ The personality or appearance of musicians has never been important to him.⁴¹⁵ He does not remember becoming particularly attached to any bands in a psychological sense.⁴¹⁶ Giving his quizzical look in response to the question, "did you ever follow a band around the country?" he responds, "well, I never had the chance. I guess that would have been fun, but I never did it."⁴¹⁷

Social science research provides some broader clues as to the determinants of consumer music preferences. The research results are consistent with what Vaughn and Mead say about their own tastes.

404. *See id.* (stating his opinion on role of musicians' appearances).

405. *See generally id.* (describing his standards for choosing music).

406. *See id.* (comparing live performances to recordings).

407. *See id.* (explaining correlation between bad live performances sounding different than artists' previous recordings).

408. *See id.* (describing method of listening to albums).

409. *See* Interview with Mike Mead, Law Student, University of Chicago-Kent Law at Chi., Ill. (Feb. 5, 2008) (stating his life goals).

410. *See id.*

411. *See id.* (expressing role he wants music to take in his life).

412. *Id.*

413. *See id.* (describing his stance on artists' reputations).

414. *Id.*

415. *See id.* (listing his criteria in choosing music).

416. *See id.* (describing his general level of interest in bands).

417. *Id.*

Well-known orchestras and well-known conductors and soloists increase attractiveness of a concert.⁴¹⁸ “Apart from the [content of] the program, the most important determinants of the attractiveness of a concert are price, quality of the orchestra performing, the strength of the orchestra, and the reputations of the conductor and the soloist.”⁴¹⁹ “More highly educated and younger individuals prefer more modern music, whereas to our surprise they dislike variation more than less educated and older music lovers. Females prefer slightly more diverse programs.”⁴²⁰

The research suggests that four general responses to music exist: sensorial (it inspires motions such as swaying or tapping of toes), imaginal (it inspires images, memories or situations), emotional (it inspires joy, rage, sadness, or love), and analytical (it arouses expectations about melodic progression and harmonic construction).⁴²¹ Features that influence aesthetic appeal for particular consumers include tempo, rhythm, dynamics, and phrasing.⁴²²

Sensorial and imaginal responses are the most important; the analytical response is far less important, although experimental subjects refer to “how the song developed,” and “whether it seemed right and made sense” in evaluating whether a song created an absorbing experience.⁴²³ The strongest influence on intentions to purchase was the need to re-experience the song.⁴²⁴

Other research explores the relationship between three dependent variables: pleasure, arousal, and surprise, and three basic musical properties: tempo, tonality, and texture (timbre and orchestration).⁴²⁵ Higher tempos increased pleasure for classical

418. See Hans van Ophem et al, *Multichoice Logit: Modeling Incomplete Preference Rankings of Classical Concerts*, 17 J. BUS. ECON. STAT. 117, 122-24 (Jan 1, 1999) (noting that in survey instrument, dependent variables were location, reputation of orchestra, size of orchestra, reputation of conductor, reputation of soloist, type of solo (instrumental or vocal), time of day of performance, day of performance, month of performance, availability of parking, content of program, and price, while independent variables were income, educational level, gender, age, employment status, and marital status).

419. *Id.* at 126 (noting that in research reputation was used as proxy for perceived quality).

420. *Id.* at 124.

421. See Kathleen T. Lacher & Richard Mizerski, *An Exploratory Study of the Responses and Relationships Involved in the Evaluation of and in the Intention to Purchase New Rock Music*, 21 J. CONSUMER RES. 366, 368 (1994).

422. *See id.* at 372 (noting features which appeal to consumers).

423. *Id.* at 376.

424. *See id.* (needing to re-experience the song).

425. See James J. Kellaris & Robert J. Kent, *An Exploratory Investigation of Responses Elicited by Music Varying in Tempo, Tonality, and Texture*, 2 J. CONSUMER PSYCH. 381, 382 (1994) (listing three variables found in research).

music but not for pop.⁴²⁶ Tonality also affected pleasure, with major keys being more pleasurable for classical music than minor keys, but the major/minor dimension having little effect for pop.⁴²⁷ But pleasure decreased significantly for atonal as opposed to tonal music for both classical and pop categories.⁴²⁸ Arousal increased with tempo for pop music but not for classical.⁴²⁹ Feelings of surprise were highest for less consonant music and lowest for major modes of tonal music.⁴³⁰ Melody (and other musical features) had more impact on emotions than lyrics.⁴³¹ Lyric content reinforced the emotional effect of “sad” and “angry” music; but the presence of lyrics diminished the effect of “happy” and “calm” music.⁴³²

Different people rate the same song similarly, in terms of a wide range of specific emotions evoked, such as tension, gaiety, triviality, exhalation, solemnity, softness, relaxation, depression, and fear.⁴³³ They rate other songs differently but similarly among themselves.⁴³⁴ Self-selected music induces stronger emotions.⁴³⁵ Familiarity is an important predictor of enjoyment and emotional arousal from music.⁴³⁶

Nostalgia plays an important role. Like Matt Vaughn, many consumers want to listen to music because it reminds them of past events and earlier phases of their lives. The available empirical research explores the role of nostalgia in determining movie preferences.⁴³⁷ Nostalgia is an important determinant of preference for movies.⁴³⁸ It also correlated with content, with those higher in nos-

426. *See id.* at 390 (referencing pleasure associated with tempos).

427. *See id.* (describing different pleasure effects of tones).

428. *See id.* at 391 (comparing atonal and tonal music).

429. *See id.* (noting arousal increase for pop music).

430. *See id.* (describing feeling of surprise).

431. *See id.* (stating impact of melody).

432. *See* S. Omar Ali & Zehra F. Peynircioglu, *Songs and Emotions: Are Lyrics and Melodies Equal Partners?*, 34 *PSYCHOL. OF MUSIC* 511 (2006) (describing different effect of lyric content from merely presence of lyrics).

433. *See generally* Kelleris, *supra* note 425 (rating emotions of song).

434. *See* Geoffrey L. Collier, *Beyond Valence and Activity in the Emotional Connotations of Music*, 25 *PSYCHOL. OF MUSIC* 110 (2007) (referencing difference among ratings).

435. *See* Gunter Kreutz et al, *Using Music to Induce Emotions: Influences of Musical Preference and Absorption*, 36 *PSYCHOL. OF MUSIC* 101, 120 (2007) (commenting that self-selected music invokes more emotion).

436. *See* Emery Schubert, *The Influence of Emotion, Locus of Emotion and Familiarity Upon Preference in Music*, 35 *PSYCHOL. OF MUSIC* 499, 510 (2007) (suggesting familiar music’s important role).

437. *See* Morris B. Holbrook, *Nostalgia and Consumption Preferences: Some Emerging Patterns of Consumer Tastes*, 20 *J. CONSUMER RES.* 245 (Sept. 1993) (noting empirical survey of movie preferences).

438. *See generally id.* (looking at impact of nostalgia).

talgic proneness preferring movies with more sentiment and less violence or more music and less warfare.⁴³⁹ Surprisingly, older respondents do not show greater nostalgic proneness.⁴⁴⁰ Older respondents prefer older movies; younger ones prefer newer movies.⁴⁴¹ This does not mean that younger viewers are more nostalgic; it means that the smaller number of years that their lives span includes only the subset of newer movies.

Once a consumer identifies music that he likes, he can choose among a number of alternatives—substitutes in the terminology of economics. Different recordings of the desired musician are available from multiple sources. Near substitutes, such as the same song performed by a cover band frequently are available for more popular songs.

In a survey conducted by the author of the twenty-one law students in his Entertainment Law Seminar in the Fall of 2009, melody and rhythm slightly outpaced harmony and lyrics as determinants of musical appeal.⁴⁴² Nostalgia also was important.⁴⁴³

2. *Vicarious Association with Celebrity*

As the *Music Architectures* article explains, a significant portion of demand is driven by consumer desire to associate with musicians.⁴⁴⁴ This associational affinity may exist because the musicians represent role models, and consuming their music satisfies a psychological need to be like them.⁴⁴⁵ It may exist because consuming—and paying for—their music supports activities that the consumer wants to support, as when bands promote popular causes such as the presidential candidacy of Barack Obama, amelioration of starvation, or fair trade. It may exist because becoming a fan satisfies latent—and sometimes patent—sexual desires.

439. *See generally id.* (analyzing proneness to nostalgia).

440. *See id.* at 251 (looking at impact of age for nostalgia analysis).

441. *See id.* at 252-53 (noting preference of older movies for older individuals and new movies for younger individuals).

442. *See* Interview with twenty-one law students in Entertainment Law Seminar in Chi., Ill. (Fall 2009) (noting that these survey results are not statistically meaningful, both in terms of the skewed demographics of the survey respondents and because of the small sample size).

443. *See id.* (describing importance of nostalgia).

444. *See New Architecture, supra* note 4, at 259 (explaining that one aspect of the drive to buy musicians music is the desire to associate with the band).

445. *See Eisenberg, supra* note 2, at 84 (exploring impact on society of recorded music; labels are happy to climb aboard a bandwagon once it is underway but are rarely in the driver's seat) ("The impersonality of the electronic media is what makes the public crave 'personalities': 'distancing' is what makes closeness, however bogus, a crying need.").

This makes it likely that consumers will prefer musicians similar in age to themselves and prefer musicians whose image expresses goals and behavior with which a consumer identifies or aspires to. A preppie is likely to prefer music from preppies, and a rebel is likely to prefer music from rebels.

Regardless of the underlying determinants of the phenomenon, it is clear that celebrity sells. It would not be far off the mark to assert that traditional music intermediaries—labels and concert promoters—sell celebrity rather than music. But that begs the question: how does celebrity status get created—a question explored more fully later.

3. *Music is Modeling*

Tim Sandusky says, “Pop/rock is half modeling.”⁴⁴⁶ Attractive musicians are more in demand than unattractive ones. The desire for vicarious association is driven in significant part by two fantasies: that a consumer might go to bed with the celebrity to whom he or she is devoted, or that, by becoming like the celebrity, the consumer will increase his or her attractiveness to others. The two fantasies can be encapsulated by two phrases: “I want to go to bed with him,” or “I want to be him.”⁴⁴⁷ For male bands, the former idea operates for straight women and gay men, and the latter idea operates for straight men. For female bands and singers, the former operates for straight men and lesbians; the latter for straight women.

Empirical research on popular culture reinforces common experience that physical attractiveness of performers enhances demand for their art. All other things being equal, a pretty face makes success in the mass marketplace more likely.⁴⁴⁸ This is consistent with broader social-science research demonstrating that more attractive people do better in the workplace than less attractive people.⁴⁴⁹ It almost certainly operates more strongly in the en-

446. Tim Sandusky, *indiemusicchicago*, 2007, <http://www.indiemusicchicago.com/profiletimsa-ndusky.html>.

447. Mike Hale, *The One Women Wanted and Men Wanted To Be*, N.Y. TIMES, July 31, 2009 at C1, C11 (quoting Pauline Kael).

448. See STEVEN HELLER, *SEX APPEAL: THE ART OF ALLURE IN GRAPHIC AND ADVERTISING DESIGN* 108-109 (Allworth Press) (2000) (citing PAMELA A. IVINSKI, I SEE LONDON, I SEE FRANCE, I SEE CALVIN'S UNDERPANTS (2000)) (characterizing 1980 Calvin Klein ad featuring 15-year old Brooke Shields reporting that “nothing” comes between me and my jeans as having same appeal as kiddie porn).

449. See Markus M. Mobius & Tanya S. Rosenblat, *Why Beauty Matters*, 96 AMER. SOC. REV. 222 (2006) (reporting on empirical study that reinforces hypothesis that workers of above-average beauty earn about ten to fifteen percent more than workers of below-average beauty); see also *Beauty and Success*, THE ECONOMIST, Dec. 19, 2007, available at http://www.economist.com/displaystory.cfm?story_id=

tainment fields where personality as well as creative output is the product being sold.

Beauty, of course, lies in the eyes of the beholder. Some gentlemen prefer blonds; others prefer brunettes. Some consumers prefer androgynous males like recent American Idol winners Kris Allen and David Cook, or the members of Vampire Weekend; some like gay males like Ricky Martin, or Adam Lambert; some prefer manly handsomeness as in Brad Pitt or Paul Newman; others prefer rougher images like Kiss or Pete Wentz.

Such sex appeal of musicians has long been a mainstay of music promotion, from the Beatles and Elvis to Justin Timberlake.⁴⁵⁰ How else to explain the swooning of teenage girls over the Beatles and Elvis, and the propensity of male performers to take off their shirts at live performances? It is a subset of a more general realization that “sex sells.”⁴⁵¹

Looking like a model is not important for all musicians. Some fans, like Mike Mead and Matt Vaughn, disclaim physical attractiveness as an element of what draws them to a new band. Others are

10311266 (reporting that more attractive people succeed better than less attractive people).

450. See *Local Musicians Balance Talent with Sex Appeal*, INDY.COM, Nov. 28, 2007, <http://www.indy.com/posts/local-musicians-balance-talent-with-sex-appeal> (reporting on how local musicians utilize sex appeal to appeal to audiences; describing how one aspiring talent was asked for her photograph before being asked for a sample of her music by New York promoter); *Josh Groban Praises John Mayer's Sex Appeal*, POPMUSICSCENE, MAY 19, 2008, <http://www.popmusicscene.com/josh-groban-praises-john-mayers-sex-appeal-say-awwww/> (“Groban things that Mayer has a swagger that works with women”); Morris B. Holbrook, *Popular Appeal Versus Expert Judgments of Motion Pictures*, 26 J. CONSUMER RES. 144 (1999) (reporting on empirical research findings showing divergence between critical acceptance and popularity of motion pictures); Susan Bordo, *Gay Men's Revenge*, 57 J. AESTHETICS & ART CRITICISMS 21, 22 (1999) (analyzing shift in male images that appeal to popular audiences; noting shift toward “beautiful, undressed, male bodies doing what real men are ‘supposed to do’” in advertising aimed at women and gay males); Georganne Scheiner, *Look at Me, I'm Sandra Dee: Beyond a White Teen Icon*, 22 J. WOMEN STUDIES 87, 89 (2001) (analyzing conflict between conscious exploitation of sex appeal of women celebrities and appropriate conceptions of women and their roles in society); Ian Codd, 135 MUSICAL TIMES 73, 73 (1994) (lamenting emphasis in popular music promotion, now apparent in promotion of “serious” music to emphasize sex appeal of performers); see also Jeremy McCarter, *The Original Culture Warrior*, NEWSWEEK, Oct. 27, 2008, <http://www.newsweek.com/2008/10/17/the-original-culture-warrior.html> (“With his youthful energy, good looks and lion’s charisma, Bernstein exploited the new medium in ways that still captivate”); O’Grady, *supra* note 361, at 42 (describing Beatles’ and Rolling Stones’ sex appeal as determinant of success and promotional themes, in article evaluating musical characteristics of icons of evolution of American and British rock as a genre).

451. See generally Heller, *supra* note 448, at 108-109 (2000) (describing the effect of sex appeal).

drawn more by the behavior of a musician than by what he looks like—anti-social behavior is appealing to many.⁴⁵² Also, nostalgia may operate to sustain a fan base for a band after it has aged.

Modeling is infiltrating country music, which traditionally favored older musicians because they were more credible in singing the usual themes of life's hardships.⁴⁵³ The headline and the pictures make clear that the attractiveness of the female singers is a crucial part of the marketing campaign.

A conundrum exists, however, with respect to the proposition that music is modeling. Why do attractive male performers (and most rock groups that are predominantly male) appeal to the half—or more—of the fan base that is male? Even by the highest estimates, no more than ten percent of the fan base is gay. Some—largely speculative—analysis exists supporting the idea that same-sex physical attraction (“homoeroticism”) is far more pervasive in society, especially in professional sports, than homosexuality or even tolerance of homosexuality.⁴⁵⁴ Another simpler explanation is that most people identify with celebrities who have characteristics that they imagine themselves having—good looks, intelligence, wealth, and power.

Countering the thesis that “beauty” sells music, beauty and personality counted little in a survey conducted by the author of the twenty-one law students in his Entertainment Law Seminar in the fall of 2009 and “Music” was most important.⁴⁵⁵ Melody and rhythm slightly outpaced harmony and lyrics as determinants of musical appeal.

452. See Richard B. Felson, *Mass Media Effects on Violent Behavior*, 22 ANN. REV. OF SOC. 103, 103 (1996) (“watching violence is a popular form of entertainment,” including street fights, wrestling, boxing, cock-fights, bull-fights, and dog-fights).

453. See Jon Caramanica, *Country's New Face: It's Young And Blond*, N.Y. TIMES Aug. 2, 2009 at AR-1, AR-19 (“... youth has often been a liability in Nashville. More than any other genre, country music leans heavily on storytelling, an area where life experience, or perceived life experience, makes a difference”).

454. See King Kaufman, *Football: America's Favorite Homoerotic Sport*, SALON, Jan. 8, 2003, <http://www.salon.com/news/sports/col/kaufman/2003/01/08/homoerotic/> (pointing out contrast between behavior of fans and athletes on the field and their professed homophobia); Dana M. Britton, *Homophobia and Homosociality: An Analysis of Boundary Maintenance*, 31 THE SOC. Q. 423, 425 (1990) (determining that homophobia is especially strong in social groups in which male interaction predominates; it may be necessary to repress affections for same sex and thus, to preserve traditional gender roles in society).

455. The author understands that these survey results are not statistically meaningful, both in terms of the skewed demographics of the survey respondents and because of the small sample size.

4. *Popularity of the Music*

Network externalities exert strong influence on consumers of popular music. Consumers want to share a common culture. Once a song or a performer becomes popular, an important bandwagon effect occurs.⁴⁵⁶ The more popular a performer becomes, the faster his popularity accelerates. A Columbia University music laboratory experiment demonstrated that consumers with little information to guide their choices of songs are strongly influenced by other consumers' behavior.⁴⁵⁷ The result becomes a kind of "cascade effect" in favor of the songs chosen first.⁴⁵⁸

This empirically verified proposition is consistent with Matt Vaughn's preference for bands that have made it, and with van Ophen's finding that more popular orchestras, conductors, and soloists are more desirable.⁴⁵⁹ This bandwagon effect operates positively for some consumers: they want to be enjoying the music that everyone else is enjoying. It operates negatively for others: they disdain what is popular and embrace music precisely because it is not popular. Popularity is both a mass phenomenon and a cult phenomenon; a consumer may embrace the latest hit because it makes him cool and marks him as part of the mainstream, or he may embrace music because it identifies him as a member of a select group of friends—a secret and selective club.

C. Finding What You Like

Matt Vaughn listens to music for two or more hours per day, when he is commuting, when he is at the gym, when he is performing household chores on the weekends, and when he is in the

456. See generally Michael Abramowicz, *An Indus-Trial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 86-87 n.153, 155 (2004) (noting that demand for music experiences network externalities—"I invest in music to be in the cool crowd"—but each investment may "harm others by diluting their relative coolness quotient."). According to Metcalfe's law, the usefulness, or utility, of a network equals the square of the number of users. John T. Nakahata, *Regulating Information Platforms: The Challenge of Rewriting Communication Regulations from the Bottom Up*, 1 J. TELECOMM. & HIGH TECH. L. 95, 135 (2002) (analyzing network effects in terms of tendency toward monopoly in communications networks).

457. Matthew J. Salganik et al., *Experimental Study of Inequality and Unpredictability in an Artificial Cultural Market*, 311 Science 854 (Feb. 10, 2006) [hereinafter Columbia Music Study]; See also Benedict Carey, *In Music, Others' Tastes May Help Shape Your Own*, N.Y. TIMES Feb. 14, 2006 at D7 (describing Columbia Music Study).

458. See Columbia Music Study, *supra* note 458 (noting cascade effect).

459. See Hans van Ophen et al., *Multichoice Logit: Modeling Incomplete Preference Rankings of Classical Concerts*, 17 J. Bus. Econ. Statis. 117, 124 (Jan. 1, 1999) (stating correlation between popularity and attractiveness of events).

car.⁴⁶⁰ He listens while he is at work and when he is studying - usually to familiar songs; new ones break his concentration.⁴⁶¹ When he is in his car he primarily listens to the radio as the radio seems to tie him down less.⁴⁶² The radio also keeps Matt current with what is new in the music world and is his primary source when mining for new artists.⁴⁶³ He has never used MySpace or any of the other social networking sites.⁴⁶⁴ He relies mostly on the radio and tips from a handful of friends at work who are into music.⁴⁶⁵

Mike Mead uses most of his scarce spare time to discover new music made by others.⁴⁶⁶ He is always listening to music except when he is studying. The week of the interview, he was listening to Radiohead, Dispatch, Red Hot Chili Peppers and Incubus.⁴⁶⁷ While he listens to music on the radio some two or so hours per day and admits that music played on the radio influences his discovery of new musicians, he also is disdainful of the corporate control of what appears on the radio.⁴⁶⁸ He goes to local indie venues as often as he can, not more than two or three times during the semester, but then four or five times during Chicago-Kent's winter break.⁴⁶⁹ He uses word of mouth to discover new bands or the serendipity of who appears on the bill for someone he has gone to see.⁴⁷⁰ That is the way he discovered Buddy Nuisance, the only current local indie band he mentioned by name.⁴⁷¹ He spends little time browsing for new music on the Internet, although he uses MySpace and other websites to check out music from bands that he knows.⁴⁷² If an unknown group wanted to attract his attention, it could give out flyers in a club or demo CDs.⁴⁷³ "If I got a demo with

460. See Interview with Matt Vaughn, University of Chicago-Kent Law in Chi., Ill (Nov. 14, 2007) (describing Vaughn's music use).

461. See *id.* (providing Vaughn's preferred times to listen to music).

462. See *id.* (stating Vaughn prefers listening to radio while in car).

463. See *id.* (describing what Vaughn considers to be benefits of listening to radio).

464. See *id.* (stating Vaughn does not rely upon social networking sites for listening to music).

465. See *id.* (describing Vaughn's music use).

466. See Interview with Mike Mead, University of Chicago-Kent Law (Feb. 5, 2008)

467. See *id.* (noting Mead's music choice).

468. See *id.* (revealing Mead's thoughts regarding radio).

469. See *id.* (referencing attendance at indie venue).

470. See *id.* (discovering new bands through word of mouth).

471. See *id.* (stating Mead heard about Buddy Nuisance from bill from another musical group's performance).

472. See *id.* (stating Mead uses Internet and social networking sites to obtain music from groups with whom he is already familiar).

473. See *id.* (providing ways groups could attract attention of potential fans).

one song, I would listen to it, and if I liked it, I would search out more of that group's music," Mead says.⁴⁷⁴ Others find music in other ways. They hear a song on the radio, see a group on television, or read an article in a print publication. They Google the group, check out MySpace pages and YouTube videos. Depending on whether they like the music, the looks of the performers, and the performers' message, they buy an album or a song on iTunes.

D. Formats

Once a consumer has picked a band or a song based on the factors discussed earlier, that consumer almost always has a choice of formats and distribution channels. Ease of access matters greatly, particularly when instant gratification is possible. One can hear a favorable recommendation about a song or a band and get a copy of an album and pictures and videos of the band as soon as one has access to a computer—including a Web-enabled cell phone. Ease of access is a combination of transaction costs of obtaining the song (including search costs), inconvenience of listening to the song, perceived probability of obtaining a corrupted file, and perceived probability of legal liability. Distribution has shifted from physical formats to digital distribution through the Internet and, increasingly, through wireless downloads to portable players.⁴⁷⁵ Pandora reported two million downloads to iPhones in December, 2008, with thirty-something males being the heaviest users, and average users spending ninety minutes daily listening to music via Pandora.⁴⁷⁶

Convenience extends beyond initial acquisition. A consumer choosing between downloading a file from iTunes versus downloading a file of the same songs from an unlicensed P2P service trades off the ninety-nine cent price and the need for a credit-card-based account against the zero price but with the higher probability of getting a corrupted file or malicious software from the free P2P site.⁴⁷⁷ Inherent features of DRM systems justify paying a higher

474. *Id.*

475. See Wireless Music Distribution Part One, COMPUTER AUDIOPHILE, <http://www.comput-eraudiophile.com/content/Wireless-Music-Distribution-Part-One> (last visited Oct. 10, 2010) (describing how music distribution can be accomplished today).

476. See Paul Resnikoff, *Pandora: The Most Popular iPhone Application?* DIGITAL MUSIC NEWS, Dec. 4, 2008, <http://www.digitalmusicnews.com/stories/120408-pandora/> (describing average statistics of Pandora users).

477. See A Little Positive Apple Analysis, OSNEWS, Sept. 16, 2010, http://www.osnews.com/story/23816/A_Little_Positive_Apple_Analysis (stating iTunes music price).

price for DRM-free versions of the same song.⁴⁷⁸ For example, both Wal-Mart and Yahoo abandoned their customers who brought DRM-protected music.⁴⁷⁹ In mid-2008, both firms announced that they were shutting down their DRM servers that their purchasers depended on to authenticate DRM-protected music they had bought.⁴⁸⁰ Then, after a customer outcry, both firms backed up and reinitiated their DRM servers.⁴⁸¹ The threat to consumers who buy DRM-protected music is obvious: you may buy it, but you will not be able to play it after the seller reneges on its deal with you. The possibility of legal liability may drive some consumers to licensed sites and away from unlicensed P2P sources.⁴⁸²

V. MUSIC MARKET INTERMEDIARIES

The market for popular music includes not only musicians (suppliers) and fans (consumers), but also intermediaries that match the musicians and potential fans. The amount of new music generated each year is too great for even the most dedicated consumer to sample and find what he likes. Since the late 1940s, a variety of intermediary institutions have filtered the available music to reduce consumer search costs. In the period now ending, the most prominent intermediaries were record labels, concert promoters, radio stations, and print reviewers, with CD retailers playing a supporting role. As the preceding parts of this article explain, the technology revolutions now undercut their ability to continue to perform some or all of these intermediary functions. New kinds of intermediaries are emerging in the new marketplace, including music bloggers, iTunes, Pandora, and last.fm. Vampire Weekend relied on newer types of intermediation to achieve celebrity status in a relatively short period of time.⁴⁸³ The new technologies for making, distributing, and listening to music have three major effects: (1) they reduce the costs of making music and distributing it, thereby increasing the number of musicians; (2) they increase the demand for music, by making it more portable; and (3) they reduce

478. See *DRM Maginot Line*, *supra* note 4, at 141 (describing features of DRM systems).

479. See, e.g., Cyril Kowalski, *Walmart Postpones DRM Server Shutdown Indefinitely*, THE TECH REPORT, Oct 10, 2008, <http://www.techreport.com/discussions.x/15676> (describing Wal-Mart's original plan to shutdown DRM).

480. See *id.* (discussing impact of DRM).

481. See *id.* (describing motivations for both companies' backpedaling).

482. See *DRM Maginot Line*, *supra* note 4, at 140 (discussing possibility of liability).

483. For a further discussion on Vampire Weekend, see *supra* notes 215-50 and accompanying text.

the costs of consuming it. The combination of these three effects reduces revenue streams available for each musician and intermediary. The greatest uncertainty with respect to the shape of the new market of music is who will perform the necessary intermediation, how they will perform it, and what business model will induce them to perform it.

This part begins by explaining why intermediaries will continue to be necessary—why a marketplace in which suppliers of music and consumers simply find each other directly is not feasible. Then it enumerates the specific intermediary functions that are needed. Sections VII.A.1 to VII.A.2 identify the revenue streams potentially available for intermediaries.

A. Need for Intermediaries

A market with tens of millions of consumers making individual decisions about what to consume and hundreds of thousands of producers able to deliver their products to consumers requires filters—some form of intermediation—to match consumer tastes with musician capabilities. Without intermediaries, searching for new music is too costly for consumers. In 2006, the major labels alone released 30,000 new albums in CD form.⁴⁸⁴ With an average of ten songs per CD, that amounts to 300,000 new songs. If a consumer listens to thirty seconds of a new song to decide if he or she likes it and wants to listen to the whole song, that is 150,000 minutes or 2,500 hours or 104 sleepless days per year of trial-and-error searching for new music. No one is going to do that. Reduced barriers to entry for musicians and increased portability of music for consumers mean that the market is more crowded. Reduced costs mean that it is more competitive. The problem with the more competitive marketplace is that the noise-to-signal ratio is high.

Indeed most consumers do not seek new music by trial-and-error searching; they understand the low signal-to-noise ratio. Instead they listen to their old favorites, and focus attention on new releases from the bands they already like. Occasionally they hear a song on the radio—including Internet radio—that they check out. Those—usually the younger ones—that frequent smaller music venues get exposed to unfamiliar bands that share an evening's stage with the band they went to see. Otherwise the discovery process is

484. See Sudip Battacharjee et al., *The Effect of Digital Sharing Technologies on Music Markets: A Survival Analysis of Albums on Ranking Charts*, 53 *MANAGEMENT SCIENCE*, 1359, 1362 (2007) (stating number of released albums for big four record companies).

dependent on word-of-mouth, networks for which exist for almost everyone known by his friends to enjoy music. Such informal processes for matching consumers to new music are not hospitable for bands trying to break through to celebrity status.

More systematic matching processes with much wider scope are necessary. In the past this intermediation has been accomplished by a chain of gatekeepers who funnel the available supply down into a manageable set of choices for consumers. For most of the last two decades record labels and radio stations solved most of the intermediation problems. They facilitated matching new musicians and potential fans by performing a gate-keeping function. Experienced professionals with the capacity to understand and predict consumer tastes would give a chance in the marketplace to a small subset of new musicians and their music, based on their assessment of what might resonate with consumers. They rejected everything else, and that was it; the channels were closed.

Labels “discovered” musicians and targeted them for investment. Then they got their music into relevant channels—mostly radio play and physical supply chains.

They mounted large-budget advertising campaigns to get consumers to listen to and to buy the new music products. Major label A&R representatives selected only a small subset of musicians to receive label capital investment. Radio stations selected a subset of the major label output to expose to consumers. Only certain albums were stocked in record stores—although the choice was large by the time the CD became obsolete as a physical distribution medium. Room existed in this environment, of course, for entrepreneurship and innovation. The blockbusters of the latter half of the twentieth century were the achievements of a new class of entrepreneurs who performed the gate-keeping function while opening the gates to accommodate new kinds of music. They acted on the (shoestring) scale of Sam Phillips and his Sun Studios who thought Elvis Presley had something to offer.⁴⁸⁵ George Martin at EMI Music was part of one of the biggest music enterprises in the world, but he broke with tradition and crossed bureaucratic lines at EMI with the Beatles.⁴⁸⁶ Norman Petty was struggling with *his* marginally

485. See *The Mistake of Rock N’ Roll*, SUN STUDIO, <http://www.sunstudio.com/> (last visited Oct. 10, 2010) (providing background regarding beginning of Sun Studio and Sam Phillips).

486. See *1960-1969*, EMI, <http://www.emimusic.com/about/history/1960-1969/> (last visited Oct. 10, 2010) (“When Brian Epstein met with Parlophone head George Martin in 1962 to play him a tape of a new band, he didn’t mention that every other record company had heard the band and rejected them. Fortunately

profitable small label when he bet his future on Buddy Holly.⁴⁸⁷ Likewise Murry Wilson saw something the Beach Boys.⁴⁸⁸ The stories of these three discoverers are quite different, but they were all innovators and they all exerted entrepreneurial energy. Sam Phillips was a new label owner on the make who was trying to discover a new sound.⁴⁸⁹ EMI was a behemoth and Martin just happened to work for them while acting on unconventional tastes.⁴⁹⁰ Wilson was the father of the original Beach Boys who had a handful of low-level industry connections.⁴⁹¹

While the institutions and methods of intermediation are changing, the functions still have to be performed; otherwise the numbers make search costs for consumers and targeting by producers unmanageable. The shape of this market will be determined by the characteristics of new kinds of filters (intermediaries). The search methods will shift increasingly to the Internet as the Internet continues to increase its penetration into everyday life as the routine means of being tethered to the world at large. But the image of a casual popular music fan spending hours upon hours surfing MySpace in search of new music is a mirage. The useful question is the character and identity of the new Internet-based methods that will succeed in integrating music discovery with other day-to-day activities, much as broadcast radio is integrated today.

Who is today's Sam Phillips? What is he doing? Is he running an indie label? Is he doing something innovating with social networking on the Internet? How does he reach out to find new musicians? What kind of influence does he have with consumers and why? The central economic question is what business models exist for him.

for the band, their fans, EMI, and indeed anyone who has ever had anything to do with music, Martin was intrigued and agreed to sign the band.”).

487. See NORMAN PETTY STUDIOS, <http://www.superoldies.com/pettystudios/pettytour.html> (last visited Oct. 10, 2010) (providing background regarding Norman Petty's interest in Buddy Holly).

488. See *History*, THE BEACH BOYS: THE COMPLETE GUIDE, <http://www.beachboys.com/history.html> (last visited Oct. 10, 2010) (“The domineering father of the brothers, Murry Wilson, immediately seized on their potential and appointed himself as manager, publicist and producer).

489. See *The Mistake of Rock N' Roll!*, SUN STUDIO, <http://www.sunstudio.com/> (last visited Oct. 10, 2010) (stating Sam Phillips did not know rules of industry and was self-taught but nevertheless built Sun Studio into successful enterprise).

490. See *1960-1969*, *supra* note 486 (stating George Martin worked for EMI at time he signed The Beatles).

491. See *History*, *supra* note 488 (stating Wilson was Beach Boys' father).

B. New Intermediaries

Who and what will mediate the process through which a handful of musicians break through the barrier separating the bottom tier from the top tier? It likely will not be major-label A&R reps dropping in on live venues or surfing the Web. It may be mass-marketed television programs such as *American Idol* and its imitators, which erect their own audition and screening processes.⁴⁹² It may be, as with Harvey Danger several years ago, and *Fallout Boy* more recently, a combination of viral word of mouth, fed by college and conventional radio, and by the specialized press outlets such as *Rolling Stone* and *Spin*.⁴⁹³ It is not enough to say that musicians will break through as they always have by touring widely and getting good reviews unless we also can describe who will be attending the tour-performances and reading the reviews that have the power to catapult a musician or group of musicians into the top tier. The major labels and A&R reps used to do this, but they will not exist in the future.

1. *New Distribution Channels*

Almost everyone has a MySpace music page, which permits a limited number of tracks to be made available for fans to listen to, and linking to other sites where CDs or downloads can be purchased.⁴⁹⁴ Most also have their own web pages where CDs and downloads can be purchased directly or through third-party sites linked to the musician page. Both MySpace and musician web pages offer nearly unlimited flexibility for the musicians to provide

492. See, e.g., *AMERICAN IDOL*, <http://www.americanidol.com/auditions/> (last visited Oct. 10, 2010) (providing information about *American Idol* auditions).

493. Stardom struck Harvey Danger in 1998, fueled by their song "Flagpole Sitta." Played at the end of a local Seattle DJ's program, then picked up by the sister station in Portland, OR, then by KROQ in LA, the song swept suddenly over the country's radio waves. All at once they found themselves fielding phone calls from Universal, A&M, DGC and other major labels. Harvey Danger's second record, *King James Version*, encountered a different kind of luck. A major promotion campaign had been built around MTV's promise to play the video for the album's first single, "Sad Sweetheart of the Rodeo." But an MTV production assistant foiled the entire marketing plan by playing an old Harvey Danger video instead. Now MTV mindlessly reported that there had been a poor response to the "Sad Sweetheart" video. Harvey Danger's fall came soon thereafter. Their label was acquired in the music-industry merger mania, and was missing in action for months. The band couldn't pull itself together well enough to write a new album. A year of no music followed. While the band still performs, its real fame is behind it.

494. See *Fact Sheet*, MySPACE.COM, <http://www.myspace.com/pressroom?url=/fact+sheet/> (last visited Oct. 10, 2010) (providing statistics regarding MySpace's music services).

data about themselves and their music, to make still photographs and videos available and to link fans through online networks.⁴⁹⁵ Snocap provided a service through which musicians can sell downloads, and CDBaby makes it easy for them to sell CDs, also providing automatic uploads to other sites specializing in download sales.⁴⁹⁶ These represent relatively thin levels of intermediation; they are little more than distribution channels, not matchmakers, and they do little to reduce search costs.

2. *New Matching Services*

A variety of new technologies and business structures for matching musicians to potential fans also are in the marketplace. Amazon's "others who bought this book also bought . . .," iTunes' "you might also enjoy this," Pandora's individualized "radio channels" are reasonably familiar. A group of '08 graduates from Northwestern University started The Next Big Sound, a website which lets unsigned artists submit their music and then allows consumers to select up to ten bands for their personal "labels."⁴⁹⁷ Because each consumer is limited to ten bands, the result is an indicator of how popular new music is with consumers.

Pandora permits indie musicians to make their music visible, in association with other music that the Pandora staff or computerized music analysis believes have similar characteristics.⁴⁹⁸ Pandora permits consumers to set up their own listening channels, organized behind a sounds-like filter, which also facilitates matching. Pandora is available free to users and is supported by advertising.⁴⁹⁹ All that a user must do is register to use the website/program.⁵⁰⁰ It has

495. *See id.* ("MySpace Music is one of the largest and most popular music platforms on the web offering users the most robust song and album catalog available. MySpace Music allows artists and fans to truly connect and unite around all genres of music both online and off.")

496. *See* www.snocap.com, KILLERSTARTUPS, <http://www.killerstartups.com/Site-Review-s/www-snocap-com-powering-your-digital-music-world> (last visited Oct. 10, 2010) ("Through the SNOCAP proprietary Digital Registry, artists and labels are empowered to easily promote and sell their music through digital retailers or through their own unique artist store."); *How It Works*, CDBABY, <https://members.cdbaby.com/AboutCDBaby.aspx> (last visited Oct. 10, 2010) (providing information about how CDBaby's music service operates).

497. *See* The Next Big Sound, www.thenextbigsound.com, (last visited Oct. 10, 2010).

498. *See Id.* (providing background information about The Next Big Sound).

499. *See Advertising Inquiries*, PANDORA, <http://www.pandora.com/static/ads/media-kit/advertising.html> (last visited Oct. 10, 2010) (providing information about advertising on Pandora).

500. *See* Pandora, <http://www.pandora.com> (last visited Oct. 10, 2010) (enabling users to create their own profile under "Your Profile" link).

also become available for mobile devices such as Blackberries and iPhones in addition to the traditional computer interface. There is an advertisement-free version available to users who opt to pay a minimal subscription fee and is a remnant of Pandora's initial and failed attempt to offer the service exclusively as a paid subscription service.⁵⁰¹ Pandora also receives royalties from Amazon or iTunes if a user purchases a song he or she hears using one of the links on Pandora.com.

Pandora's music license limits the number of songs that a user may skip through, essentially preventing users from targeting specific songs or sampling unlimited songs. As such, there remains room to improve the system. Perhaps users would be more willing to pay the subscription fee or Pandora could generate larger advertisement support if this limitation were removed. Rather than offer a link to purchase songs, Pandora may allow users to tag songs they enjoy, which Pandora had suggested, and then be able to listen to them at any time. In such a case, users would pay for Pandora's ability as an intermediary that can introduce the user to new music, rather than pay only for the songs themselves in which the Pandora system is a means to an end.

Many other lesser-known sites provide similar services. They further reduce search costs because they allow consumers to be exposed to new music passively; they do not have to exert any effort to browse or search. Substantial room exists for improvement in classifying new music so that its linkages to existing music are more robust. Substantial room also exists in improving the interface, so that a listener easily can backtrack through an archive of what was played on his channel over the several past hours or days. A consumer should not have to act affirmatively to know or record the name of a new song he is exposed to while he is occupied with another activity such as driving.

Gatekeeping, however it is performed in the future, is just half of the matching process; it merely limits the supply of new music that consumers have to consider. Equally important—probably more important as new channels open up and the gatekeepers become more diverse and more numerous—is intermediation that helps consumers focus their discovery efforts on a subset of the supply where search energy is most likely to be productive for them. The problem is not that consumers cannot find new music if they

501. See *Pandora Terms of Use*, PANDORA.COM, <http://www.pandora.com/legal/> (last visited Oct. 10, 2010) (stating fee is charged to subscribers of Pandora Services).

look for it; the problem is that musicians and their intermediaries have to be able to make them want it. The reconfiguration of this market function is even more amorphous than the reconfiguration of the gate-keeping function, although the experimentation is more visible to consumers. iTunes and Amazon tempt music purchasers and browsers with “more like this” and “you might also enjoy” and “people who bought this also bought . . .” prompts on their web pages. Pandora was organized around the idea that consumers could search for new music by starting with the names of artists or songs they already like.⁵⁰² MySpace, CDBaby and Snocap all encourage those putting new music into their systems to include tags that relate the new music to songs likely already to be familiar to consumers.

Much experimentation is underway to find out what kinds of intermediation are most attractive to consumers. Two researchers at New York University’s business school evaluated the relative effect of consumer ratings on Internet sites, blog chatter, size of social networks, the evaluation of mainstream music reviews, and major-label association on popular music sales.⁵⁰³ Blog chatter and increases in the number of MySpace Friends was correlated more strongly with early CD sales than any other measured variable.⁵⁰⁴ Blog chatter was more strongly predictive, probably because of the greater commitment a blog poster must have than a MySpace friend.⁵⁰⁵ The effect of average consumer ratings was weak but positive and statistically significant.⁵⁰⁶ Mainstream reviews, however, tended to influence sales negatively, possibly because critical ac-

502. See *About The Music Genome Project*, PANDORA, <http://www.pandora.com/corporate/mgp> (last visited Oct. 10, 2010) (“We believe that each individual has a unique relationship with music - no one else has tastes exactly like yours. So delivering a great radio experience to each and every listener requires an incredibly broad and deep understanding of music. That’s why Pandora is based on the Music Genome Project, the most sophisticated taxonomy of musical information ever collected.”).

503. See Vasant Dhar & Elain Chang, *Does Chatter Matter? The Impact of User-Generated Content on Music Sales* 6-7 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?a-bstract_id=1113536 (evaluating consumer ratings). Blog chatter was measured by counting the number of postings mentioning a song on popular music blogs. See *id.* at 14 (measuring chatter). Ratings were measured by collecting quantitative postings of quality and desirability from Amazon and other sites that rate music. See *id.* at 12 (calculating ratings).

504. See *id.* at 16 (“[A]n additional 1% increase in blog post corresponds to a greater increase in sales than an additional 1% increase in Myspace friends.”).

505. See *id.* (stating MySpace is not best source of “user-generated content” because of ease of friending artist on MySpace, meaning some friends of artists could be users who came across profile once with little interest in that artist).

506. See *id.* (“[A]lbum sales rise with higher consumer ratings and more mainstream reviews.”).

claim is decoupled from popular appeal.⁵⁰⁷ A release by a major label had six to twelve times the sales of a release by an independent label.⁵⁰⁸

These findings suggest the potential power of a decentralized set of Internet-based intermediaries, including music consumers themselves and volunteers who set up blogs. They undercut the conventional wisdom about the essentiality of validation of establishment critics. They reinforce the perceived power of traditional intermediaries to shape consumer tastes, although they do nothing to weaken the evidence indicating that the major labels, as an archetypal traditional intermediary are disappearing for economic reasons.

3. *New intermediation technologies*

Technology can match consumer tastes and musician product, thereby reducing the costs of intermediation and increasing the range of plausible business models. Any such technology must confront major challenges. Consumers are inarticulate about what they like, except by naming bands they already like. Musicians are inarticulate about what they offer, even by naming “sounds like” bands as on Snocap or MySpace entries. The heart of this problem is the absence of any consensual taxonomy of music characteristics—even among academics and commercial researchers. It is unlikely that a comprehensive and rigorous taxonomy can be developed because of the holistic and visceral determinants of music enjoyment. It is too early to predict the extent to which automated analysis can play a major role in music intermediation, but some promising approaches can be identified, one based on statistical classification of music, the other based on open-source software.

a) Statistical Classification

(1) Factor analysis

Factor analysis is a statistical technique developed in the field of psychology that identifies those features of members of a class that distinguish them from other members of the same class and from members of other classes.⁵⁰⁹ For example, the tone of C three

507. *See id.* at 21 (noting negative effect of mainstream reviews).

508. *See id.* (“Other sources have estimated that major label releases sell about six times more than independent label releases”).

509. *See* D.N. Lawley & A.E. Maxwell, *Factor Analysis as a Statistical Method*, 12 J. OF THE ROYAL STATISTICAL SOC’Y: SERIES D (THE STATISTICIAN) 209, 209 (1962) (stating factor analysis is type of multivariate analysis that began in field of psychology).

octaves below middle C may be present in a subset of songs and absent in others. Factor analysis becomes useful in identifying that subset and isolating the low C as a discriminator. It also permits identification of other discriminators. For example, the tone E, a major third higher than the low C, might have independent power in distinguishing songs containing it. If, however, songs containing the tone C *always* also have the tone E, the presence of the E has no independent distinguishing power. In such a case, C and E are said to be perfectly correlated. Factor analysis evaluates the correlation among all the identifiable attributes of members of a class to evaluate the independent distinguishing power of each. The same approach can evaluate the discriminatory power of the chord progression I-IV-vii-iii-vi-II-V-I, or of particular rhythms. Once a set of attributes are identified that distinguish pieces of music comprising one subclass from those comprising another subclass, a new piece of music can be classified as belonging to a particular subclass, which might be thought of as a genre.

(2) Identification

A sufficiently large number of distinguishing attributes can define a song uniquely, but that is not the point. The utility for music discovery is to identify a song sharing attributes with other songs—the attributes that collectively define a class or genre, and preferably a narrow subclass or subgenre that represents the set of music that an individual consumer is likely to enjoy. At a relatively high level of abstraction, this goes on already without the aid of information technology: a song is readily classified as “country,” “metal,” “rap,” “folk.” “classical,” or “classic rock.” Most consumers describe their tastes in music with reference to such categories. But few consumers would claim to enjoy all metal music equally or all country music equally; they have their preferences within the larger categories based on artist and features of the music that distinguish it but nevertheless leave it securely within the genre.

Some of these characteristics that cause a consumer to prefer one song over another can readily be described by most consumers: crashing distorted guitar accompaniment, for example. Ordinary consumers, however, would be inarticulate with respect to other features of the music, specification of chord progressions, resolved or unresolved phrase endings, diatonic or chromatic melodic tendencies. Someone with greater musical knowledge could readily identify such features and classify songs accordingly. Indeed that is

what intermediation services such as Pandora rely on—a large staff of skilled musicians to classify incoming music so it can be recommended to subscribers based on their description of their tastes and their selection of other music.⁵¹⁰ All the current Internet matching services—iTunes’ Genius, Amazon’s “you also might like this,” Pandora, last.fm—use some classification system to match demonstrated or specified consumer tastes with music the consumer does not yet have. Many of their methods are labor intensive and, since the quality of the labor required is high, expensive.⁵¹¹ If computer techniques could be developed that performed all the classification costs would be reduced significantly.

There would be several steps in such an automatic classification scheme. The first step would involve the extraction of certain parts of the music into independent streams, so each part could be analyzed separately. Thus, the tempo, the harmony, the melody, and the rhythm would be isolated. In essence, computer-executable algorithms would perform an automated transcription—processing the complex audio signal representing recorded music and transforming it into the same variables that make up a score for the music. Then, other algorithms would be applied to the separate streams to determine the values of the variables. For example, tempo-analysis algorithms would determine that the song is performed at 120 beats per minute. One rhythm algorithm might determine that the piece is in $\frac{3}{4}$ time, while another determines that most measures have a syncopated rhythm of a particular pattern. Harmony algorithms would determine that—as would be likely with a country song—the song is in a major key with a one-four-five-one chord progression. A melody algorithm might determine that the melody has a narrow range, emphasizing diatonic notes with frequent use of passing tones.

Such features for a large sample of songs could then be subjected to factor analysis to determine which of the variables and values has the most distinguishing power. But as noted earlier in this section, analysis that ends by specifying a method that can describe a song uniquely is not very useful for popular-music interme-

510. See *About Pandora*, PANDORA, <http://www.pandora.com/corporate/> (last visited Oct. 11, 2010) (“Together our team of fifty musician-analysts has been listening to music, one song at a time, studying and collecting literally hundreds of musical details on every song. It takes 20-30 minutes per song to capture all of the little details that give each recording its magical sound - melody, harmony, instrumentation, rhythm, vocals, lyrics . . . and more - close to 400 attributes!”).

511. See, e.g., *About The Music Genome Project*, *supra* note 510 (stating music analysts have four-year degree in music theory, composition, or performance).

diation. Everyone can already do that without the aid of computers. It only takes a few seconds to know that Vampire Weekend's "Cape Cod Kwassa Kwassa" is defined by its repeating patterns of two-guitar-note intervals in the pattern D-G-A-D, punctuated by a chorus with the triad chords Emin-A-D-Emin-A, and to know that it differs dramatically from the lush pipe organ fullness of Arcade Fire's "Intervention," even though the latter song uses equally simple chord progressions. In a useful classification system, Cape Cod Kwassa Kwassa or Intervention needs to be associated with other songs that might please the same consumers because they share characteristics important to those consumers. Those characteristics may be ones the consumers are aware of and could verbalize, but they may not as well. There may be some characteristic its audio footprint that would link Cape Cod Kwassa Kwassa with the audio footprint of other songs without anyone having noticed it before. That would make the computerized analysis very useful for consumer search, at least if the consumer agrees that there was some subjective similarity that made both pleasing.

This is how all analogical reasoning works: pre-identified features of different members of the same set are compared. Those members with many common features are similar; those with few common features are dissimilar. This analytical approach is what law students learn how to do in law school. Law professors call it "learning how to think like a lawyer." In law school, the desired skill is not only the ability to compare based on pre-defined features, usually selecting elements of legal doctrine, but also based on their own original characterizations of the facts of the disputes giving rise to the judicial precedents, enabling them to "distinguish" otherwise apparently similar cases. The same automated classification techniques could be useful for recommending music based on the music collections of others who like the same song. In the most basic implementation of this approach no musical attributes of songs in the collection need be identified; the name or a unique arbitrary identifying number is all that is necessary. The only real analysis simply counts song titles to determine that eighty-nine percent of the people who bought Vampire Weekend's "Walcott" also bought Decemberist's "A Soldiering Life," while only two percent bought Bob Dylan's "Blowing in the Wind." An intermediary using such techniques would be likely to recommend "A Soldiering Life" but not "Blowing in the Wind." Application of the more sophisticated feature analysis, however, could begin to explain why "Oxford Comma" and "A Soldiering Life" are similar and why "Blowing in

the Wind” is less similar, even though it shares one major characteristic.

The automated classification of music would be even richer if vocal lyrics could be extracted automatically and then subjected to natural language processing. Many commercial products are already quite good at searching for and identifying textual documents sharing certain phrases and expressions: that is the basis on which Google’s search engine works. Some of the lyrics are obtainable from analyzing a separate text file of the lyrics associated with a particular song and then linking the result of the text analysis—perhaps only an inverted file, to the record containing the results of the music-attribute analysis.

Such classification technologies are not fanciful. Two patents describe such methods for matching music tastes to music. The first, number 7,003,515, which was granted on February 21, 2006, is owned by Pandora.⁵¹² The overarching claim in this patent is:

A method for predicting a preference of a user for a media selection, the method comprising analyzing a catalog of media selections according to a plurality of characteristics; rating at least one media selection by the user, matching said rating with said plurality of characteristics to predict the preference of the user for at least one of the media selections of the catalog; and recommending at least one predicted media selection to the user.⁵¹³

The patent describes a means to have a computer use vector pair analysis to predict a user’s preferences to an item before the user has actually been exposed to that item.⁵¹⁴ Other systems such as Amazon.com and FM.last.com appear to predict user preferences, but actually only draw parallels between multiple users.⁵¹⁵

512. The analysis of the Pandora patent was drafted by Brian Adams, research assistant to the author.

513. U.S. Patent No. 7,003,515 (filed May 16, 2002) (issued Feb. 21, 2006).

514. *See id.* (stating patented method is able to provide tailored music by means of vector analysis).

515. *See, e.g., Sum of the Parts: An Interview with Steven Johnson*, AMAZON.DE, http://ww-w.amazon.de/exec/obidos/tg/feature/-/217324/ref%3Ded_cp_le_1_4/302-1180530-0945615 (last visited Oct. 11, 2010)

(“Same goes for Amazon’s recommendation system. The software doesn’t know what it’s like to read a book, or what you feel like when you read a particular book. All it knows is that people who bought this book also bought these other ones; or that people who rated these books highly also rated these books highly, etc. Out of that elemental data something more nuanced can emerge—if you set up the system correctly, and give it enough data.”).

Under these systems, predictions are not based upon what that user will enjoy, but are based on what other independent users enjoy. Consequently, the system is unable to expand the pool of recommendable items without a user initiating it. The Pandora method allows new items to enter the pool *de novo* and still accurately satisfy a user's preference. This expands the user's tastes beyond that of other users and allows the system as a whole to grow unrestricted.⁵¹⁶

While the system is not limited by user suggestions, it is still finite. This pool of items is generated by experts who are concerned with increasing the total volume and diversity of the pool while not catering to any specific tastes.⁵¹⁷ Pandora employs experts to expand the pool further, diversifying the realm of "known" music. They reach out to both popular and obscure music in an effort to maximize the size and diversity of the database. Experts analyze each song within the pool by hundreds of characteristics ("genes").⁵¹⁸ They assign a numerical value to each song between 1 and 5 for each gene depending on the intensity of the quality.⁵¹⁹ Such qualities include, for example, the level of distortion on the guitar or the gender of the lead vocalist. As such, some of the qualities allow for a continuous variable, e.g., levels, while other qualities are discrete, e.g., gender. To compensate for this difference and to address the fact that the values between one and five are not necessarily linear, the experts also add a weighting vector to each gene.⁵²⁰ An expert may feel that certain qualities are more defining than others or that small increases within certain qualities drastically alter the preference for the song. Consequently, the "value" of that quality is magnified or diminished by the weighting vector.

The method utilizes basic distance-squared geometry to match songs. The distance between two songs is the square root of the sum of the square of all of the distances between all of the gene

516. See U.S. Patent No. 7,003,515 (filed May 16, 2002) (issued Feb. 21, 2006) (providing match songs are determined based upon vector analysis of source item or song, meaning independent users' preferences are not factor in selection of music).

517. See *About The Music Genome Project*, *supra* note 503 (describing how music analysts work to get songs in database).

518. See *id.* ("Each song in the Music Genome Project is analyzed using up to 400 distinct musical characteristics by a trained music analyst).

519. See U.S. Patent No. 7,003,515 (filed May 16, 2002) (issued Feb. 21, 2006) (stating characteristics of each song are assigned numerical value corresponding to that characteristic).

520. See *id.* (stating weighting factor is added to numerical value of characteristics in calculating vector).

values, each multiplied by its respective weighting vector.⁵²¹ For two songs, X and Y, their distance is

$$= \sqrt{\sum_n w(t_x^1 - t_y^1)^2 + w(t_x^2 - t_y^2)^2 + \dots}$$

where n is the number of genes, w is the respective weighting vector, and t is the value of a gene. In doing this, the system will be able to identify songs that are similar based upon how far or close their overall distance is.⁵²² Similar to the weighting vector, however, experts also assign “focus traits” to songs to intensify the effects of certain traits.⁵²³ These focus traits may be individual traits or groups of traits which can outright define a taste in music on their own. Therefore, the system matches songs using these genes, rather than all of the genes as a whole and would limit n to several genes.⁵²⁴

With the expert analysis done, the pool formed, and the system ready, an end user may initiate the matching. With a single song entered, the system moves from song to proximate song and presents the next “close” match to the user.⁵²⁵ If the user entered the original song and had no other interaction with the system, it would likely produce poor results because, once song matching begins to deviate from a user’s preference, it can quickly pursue the wrong similarities ending up with results drastically different than the original song. To prevent this, users may approve or disapprove of suggested songs. The system can then understand which similar traits were significant to the user and those which were merely fortuitous using statistical patterns.⁵²⁶ This creates better matches in the future.⁵²⁷ These preferences also allow the system to alter the weighting vector and focus traits itself based on patterns of preference by the user further improving the predictions by the system.

The second, U.S. Patent number 7,532,943, is owned by Microsoft.⁵²⁸ It combines automated sonic analysis through digital

521. *See id.* (providing equation for calculating song vector).

522. *See id.* (stating distance calculation is used to find musical matches).

523. *See id.* (“Focus traits may be used to re-weight the song matching system and refine searches for matching songs to include or exclude the selected focus traits.”).

524. *See id.* (stating focus traits are used to match songs).

525. *See About Pandora, supra* note 510 (stating once user enters song, Pandora’s Music Genome Project scans database to find similar songs).

526. *See id.* (stating users can disprove songs if they do not like match).

527. *See id.* (stating disproving songs enables Pandora to select better songs for that user).

528. U.S. Patent No. 7,532,943 (filed Aug. 21, 2001) (issued May 12, 2009).

signal processing with classification of musical properties by human experts.⁵²⁹ The result is a set of “neighborhood[s] of songs . . . within which each song has similar sonic properties.”⁵³⁰ The process is best summarized by the following claim:

A method for classifying audio data according to its spectral properties, comprising: classifying by human experts each entry of a representative set of sounds according to their spectral perceptual qualities; assigning each entry in the representative set at least one value based on digital signal processing; reducing the results to a set of numbers called the characteristic vector of each sound; storing the characteristic vector in a classification chain; receiving a digital audio information; dividing the digital audio information into frames; determining a sonic characterization vector as a function of the energy, entropy and rate of change of frequencies in at least one frame; and presenting the characteristic vector to the classification chain, which returns an estimate of the spectral properties; and classifying the digital audio information by a human when the confidence in the at least one classification is low and adding a representation of the spectral perceptual qualities to the classification chain.⁵³¹

The process includes multiple steps. First a digital-signal-processing subsystem analyzes the sonic properties of a collection of songs in terms of features such as spectral balance, spectral weight, and spectral density.⁵³² It also computes the rate of change of the frequencies, and identifies “peaks” to isolate important musical features.⁵³³ Then, human experts classify a representative set of sounds according to their perceived musical qualities:

For example, if songs with heavy activity in the frequency spectrum at 3 kHz, as determined by the DSP processing, are also characterized as ‘jazzy’ by humans, a rule can be created to this effect. The rule would be, for example: songs with heavy activity at 3 kHz are jazzy. Thus, when enough data yields a rule, machine learning classification

529. *See id.* (stating patent is for method for “automatically classifying spectral properties of audio data.”).

530. *Id.*

531. *Id.*

532. *See id.* (describing process).

533. *See id.* (describing specifics of subsystem).

module 350 outputs a rule to rule set 360. While this example alone may be an oversimplification, since music patterns are considerably more complex, it can be appreciated that certain DSP analyses correlate well to human analyses.⁵³⁴

These “groovers” function at two levels.⁵³⁵ The most experienced classify a group of training songs.⁵³⁶ A second set of less expert groovers, trained by the first group, classify a larger cross-section of music iteratively until a certain level of accuracy and consistency is achieved.⁵³⁷ The results are represented by a “sonic vector” for each sound.⁵³⁸ After this training process is completed, nearest neighbor and other matching algorithms can be used to locate songs that are similar to a designated song or that match a user-generated profile:

[T]he fundamental properties of media entities, such as songs, are grouped into three main areas: rhythm, zing and mood. Rhythm may include tempo, time signature, rhythm description, rhythm type and rhythmic activity. In the case of mood, the sub-categories may include emotional intensity, mood and mood description. In the case of zing, the sub-categories may include consonance, density, melodic movement and weight. Once a trainee learns the nature of and how to recognize distinctions for these terms, a trainee becomes a groover and may classify new songs or song segments.⁵³⁹

. . . .

In . . . the classification of new songs or song segments, a groover enters values for attributes for the song or song segment including song-level attributes and voice-level attributes. Some of these attributes are similar to the fundamental properties described above. Song-level attributes may include tempo, weight, harmony, intensity, density, consonance, chordal movement, mood, range, flow, dy-

534. *Id.*

535. *See id.* (introducing “groovers”).

536. *See* ‘943 Patent col.9 l.10 (filed Aug. 21, 2001) (identifying multiple groups of groovers).

537. *See* ‘943 Patent col.9 l.15 (filed Aug. 21, 2001) (describing second set of groovers).

538. *See* ‘943 Patent col.9 l.37 (filed Aug. 21, 2009) (summarizing vectors representing sound attributes).

539. ‘943 Patent col.10 l.22 (filed Aug. 21, 2009).

namics, rhythm description, rhythm type, rhythmic activity, rhythm flexibility, rhythm time signature and description. Voice-level attributes include prominence, melodic movement, intensity, ornamentation, cleanliness, rhythm activity and whether the song has a solo. Values may be entered via discrete adjective descriptors, via continuous or discrete range(s) of numbers, via more subjective terms like, low, medium and high, jagged or smooth, and the like, as long as the classification values used are consistent from segment to segment or from song to song.⁵⁴⁰

b) Open Source Technologies

Under the Creative Commons non-commercial attribution license, a licensee is “free to share (to copy, distribute, and transmit) [and] to remix (to adapt) the work,” so long as the licensee attributes the work to the author and does not use it for commercial purposes.⁵⁴¹ In March 2008, Nine Inch Nails released “Ghosts I-IV,” comprising thirty-six new instrumental tracks under a Creative Commons license.⁵⁴² The terms of the license allow copying, displaying, distribution and performance, conditioned on attribution and making any derivative works available under the same license terms.⁵⁴³

David Byrne, former front man for Talking Heads, has made parts of his 2004 album “Grown Backwards” available under a Creative Commons license.⁵⁴⁴ In 2004, Wired Magazine released a CD under a Creative Commons license, containing music from Beastie Boys, David Byrne and fourteen others. There was no technical difference between the CD and CDs released under more restrictive copyright licenses, but the Creative Commons license permitted

540. '943 Patent col.10 l.33 (filed Aug. 21, 2009).

541. Creative Commons License Deed, <http://creativecommons.org/licenses/by-nc/3.0/> (last visited October 11, 2010).

542. See Eric Steuer, *Nine Inch Nails Releases Ghosts I-IV under a Creative Commons License*, Mar. 2, 2008, <http://creativecommons.org/weblog/entry/8095> (discussing Nine Inch Nails choice to release under Creative Commons license).

543. See Creative Commons, *Attribution -NonCommercial- ShareAlike 3.0 United States*, <http://creativecommons.org/licenses/by-nc-sa/3.0/us/> (last visited October 11, 2010) (describing terms of license).

544. See Ethan Smith, *This Compilation CD is Meant to Be Copied and Shared*, WALL ST. J., Sept. 20, 2004, at B1, available at http://www.davidbyrne.com/music/cds/grown_backwards/gro-wn_press/WallStreetJournal.php (discussing fact that David Byrne’s CD was meant to be freely copied).

free copying and trading.⁵⁴⁵ Beastie Boys makes available a cappella tracks “for your own personal use to make your own remixes,” although that part of the band’s website does not explicitly refer to the Creative Commons license.⁵⁴⁶

The concept does not exactly seem to be taking the world by storm. Several points of tangency, however, can be envisioned between the Open Source software concept and indie music. One is to use the Creative Commons non-commercial attribution license to allow indie music to be freely distributed, copied and adapted. Another is to develop open-source software applications that would automate the porting of indie music to other media, for example, to permit a consumer to extract a certain portion of a song and automatically download it into a cellphone as a ringtone. Such an application could insert the name of the band, automatically accomplishing the required attribution. Or tools could be developed to facilitate the incorporation of a song into a video production.

The most profound impact of open-source technologies is likely to be the facilitation of new classification technologies, and lower-cost videogames that provide virtual access to musician personalities, as discussed subsequently in this Article.⁵⁴⁷

4. *New Intermediary Entrepreneurship*

New intermediaries can perform a variety of activities in the marketplace, ranging from simply providing convenient distribution channels for digital formats, to deployment of new technologies for matching consumer tastes to the characteristics of new music, to more proactive “push” techniques for building celebrity status.⁵⁴⁸ To be successful economically, they also must implement methods for earning revenue from the value they provide.⁵⁴⁹ Creativity is required with respect to each of these activities.

545. *See id.* (“There are no technical differences between the Wired compilation and the CDs that carry standard copyright language.”).

546. *Beastie Boys A Cappella Download Page*, BEASTIEBOYS.COM, <http://www.beast-ieboys.com/remixer/> (last visited Oct. 10, 2010).

547. For a further discussion of potential new revenue streams, see *infra* notes 599-679 and accompanying text.

548. *See Booz-Allen Report Anticipates Major Changes And Opportunities for the Music Industry*, BUS. WIRE, June 20, 2001, <http://www.allbusiness.com/media-telecommunications/movies-sound-recording-record/6146300-1.html> (outlining opportunities available to music industry during digitalization).

549. *See id.* (explaining ways that new intermediaries can profit from digital music market).

VI. STRUCTURE OF THE NEW MARKETPLACE

The new marketplace for music will be one in which the gatekeeping functions traditionally performed by major labels, concert promoters and broadcast radio are relatively unimportant. It will be one in which copyright is essentially irrelevant, because recorded music is free or close to free. It will be one in which the demand for popular music increases dramatically because recorded music is portable and can be obtained not only through the Internet but also wirelessly. It will also be one in which the number of musicians and the amount of their music increases as least as much because of the demise of the traditional gatekeepers.

A. Matchmaking

In such a competitive and crowded market, new forms of intermediation will be necessary to replace the functions formerly performed by the traditional gatekeepers. It is unlikely that complete disintermediation will work, producing a market in which every music consumer considers with equal interest the new music available through MySpace or CDBaby written and performed by every musician.⁵⁵⁰

Automated matching of consumers and musicians holds considerable promise, although it is unlikely that technology deployed by new entrepreneurs can do the whole job.

Peer-group and friend influence suggests that social networking sites can be effective music-finding intermediaries.⁵⁵¹ Those in which the network are constructed based on personal relationships, like Facebook, are likely to have more power in this regard than those in which “friendship” is a marketing tool, like MySpace music pages.⁵⁵²

The power of word of mouth as a finding tool suggests that live performances may be effective sources of intermediation as well as important revenue sources. Someone who has just attended a live performance and enjoyed it is more likely to talk about it to his

550. See CDBABY.COM, <http://www.cdbaby.com> (last visited October 11, 2010) (displaying CDBaby.com homepage).

551. See *Social Networks and Digital Music Downloads: A Match Made in Heaven*, THE BIVINGS REP., Aug. 3, 2007, <http://www.bivingsreport.com/2007/social-networks-and-digital-music-downloads-a-match-made-in-heaven/> (theorizing that social networking sites will revolutionize music industry).

552. See Facebook, <http://www.facebook.com/> (last visited October 11, 2010) (leading to Facebook homepage); see also MySpace, <http://www.myspace.com/> (last visited October 11, 2010) (showing homepage of MySpace).

friends than if he merely heard a song on the radio or downloaded a song and listened to it.

Much of demand for popular culture is driven by network effects, the desire to be “cool” by associating oneself with the same products and celebrities that one’s peer group is consuming—or, to some extent affiliating with the same products that admired celebrities endorse.⁵⁵³ Therefore, musicians and intermediaries must have some way to make the velocity of adoption visible to consumers. That is the current function of Billboard and of other “charts” that musicians want to “make.”⁵⁵⁴

B. Role of the Bottom Tier

A two-tiered market for popular music could emerge, in which the top tier provides music made by a handful of stars for a mass audience, and the bottom tier provides music made by thousands of musicians operating on the borderline between amateur and professional for the enjoyment of mostly friends and family of the musicians.

If this occurs, what are the prospects for the bottom tier to satisfy some of the demand otherwise concentrated in the top tier? If this occurs at all, will it occur mostly by consumers discovering unknown musicians residing in the bottom tier through the Internet? Will it occur mainly through informal file sharing? Will it occur mainly through serendipitous exposure at live performances?

C. Breaking Through

Who and what will mediate the process through which a handful of musicians break through the barrier separating the bottom tier from the top tier? It likely will not be major-label A&R reps dropping in on live venues or surfing the Web. It may be mass-marketed television programs such as *American Idol* and its imitators, which erect their own audition and screening processes. It may be, as with Harvey Danger several years ago, and *Fallout Boy* more recently, a combination of viral word of mouth, fed by college and conventional radio, and by the specialized press outlets such as *Rolling Stone* and *Spin*.

553. For a further discussion on network effects, see *supra* notes 445-46 and accompanying text.

554. See *About Us*, BILLBOARD.COM, <http://www.billboard.com/#/footer/about-us> (last visited Oct. 10, 2010) (explaining Billboard’s purpose).

It is not enough to say that people will break through as they always have by touring widely and getting good reviews unless we also can describe who will be attending the tour-performances and reading the reviews that have the power to catapult a musician or group of musicians into the top tier. The major labels and A&R reps used to do this, but they will not exist in the future.⁵⁵⁵

There may be a new class of entrepreneurs who perform this function, acting on the (shoestring) scale of Sam Phillips and his Sun Studios with Elvis Presley, George Martin and EMI with the Beatles, Norman Petty and Buddy Holly, and Murry Wilson with the Beach Boys. The stories of these three discoverers are quite different. Sam Phillips is the most interesting because he was a new label owner on the make who was trying to discover a new sound.⁵⁵⁶ EMI was a behemoth and Martin just happened to work for them and had unconventional tastes.⁵⁵⁷ Wilson was the father of the original Beach Boys who had a handful of low-level industry connections.⁵⁵⁸

Who is today's Sam Phillips? What is he doing? Is he running an indie label? Is he doing something innovating with social networking on the Internet? How does he reach out to find new musicians? What kind of influence does he have with consumers and why?

What role will intellectual property play in the new marketplace? Surely some realms in which celebrity flourishes, it plays a relatively small role. Professional sports come to mind. On the other hand, the power of someone who needs capital to transfer some kind of durable property interest to those who provide capital seems efficacious.

Even if most musicians continue to make music for free — or for something considerably less than a living wage, intermediaries will not work for free. Some business models must exist that provide incentives for effective intermediation and for investment in intermediation.

555. See Jason Feinberg, *What Will Record Labels Look Like in the Future*, MEDIASHIFT, Aug. 18, 2009, <http://www.pbs.org/mediashift/2009/08/what-will-record-labels-look-like-in-the-future-230.html> (illustrating major labels' decline).

556. See *Sam Phillips' Sun Records*, THE HIST. OF ROCK 'N' ROLL, http://www.history-of-rock.com/sam_phillips_sun_records.htm (last visited Oct. 10, 2010) (explaining Sam Phillips's history).

557. See *George Martin Biography*, THE BEATLES' BIBLE, <http://www.beatlesbible.com/people/george-martin/> (last visited Oct. 10, 2010) (recounting George Martin's relationship with The Beatles).

558. See Steve Eidem, *Murry Wilson Biography*, ALBUM LINER NOTES, http://www.alb-umlinernotes.com/Murry_Wilson.html (last visited Oct. 10, 2010) (analyzing Wilson's relationship to The Beach Boys).

D. Investment Capital

“Capital” is generally understood to refer to the stock of resources that can be used to produce income.⁵⁵⁹ Capital can be enhanced by various sources, including investors, who expect a share of the firm’s profits, the excess of revenue over expenditures, or gifts.⁵⁶⁰ Invested capital is thus distinguished from revenue, which refers to a stream of money attributable to purchases or goods or services.⁵⁶¹

1. *Capital Sources*

For most indie musicians, revenue does not exceed expenses, at least not by a significant amount, and so they are dependent on other sources of capital, which are properly called “subsidies” or “savings.” Capital may come from their own personal savings, in which case they are investors in their music enterprise. It may come from parents, in which case the contribution to capital may be—but is not always—a subsidy in the form of a gift.

From the 1950s to the end of the twentieth century, the usual investor for an indie musician was a record label. Now, the reduced probability of a major label deal, and the diminishing amounts labels are willing to invest even when they made deals, have heightened interest in the identity of other potential investors. The universe of potential investors has been increased because the lumpiness or granularity of investment in a band has declined significantly. A band can make a high-quality album for about \$5,000.⁵⁶² Such an album can be financed by third-party investors who expect a return because they are betting that the musician will succeed in generating a significant profit. Many people have that much money to invest in a promising through risky enterprise. The

559. See *Capital Definition*, INVESTORWORDS.COM, <http://www.investorwords.com/694/c-apital.html> (last visited Oct. 10, 2010) (defining capital).

560. See Robert T. Kleiman, *Economic Profit*, REFERENCE FOR BUS.: ENCYCLOPEDIA OF BUS. 2ND ED., <http://www.referenceforbusiness.com/encyclopedia/Eco-Ent/Economic-Profit.html> (last visited Oct. 10, 2010) (explaining how capital is enhanced through economic profit).

561. See *Revenue Definition*, INVESTORWORDS.COM, <http://www.investorwords.com/42-54/revenue.html> (last visited Oct. 10, 2010) (discussing invested capital).

562. See Laurence Trifon, *The Myth of “Almost Zero” Recording Costs*, MUSIC THINK TANK, Apr. 30, 2008, <http://www.musicthinktank.com/blog/the-myth-of-almost-zero-recording-costs.html> (explaining that investment of “\$5000 to \$20,000” can be sufficient).

rapid expansion of investment in films by private individuals illustrates the phenomenon.⁵⁶³

There is, however, a significant barrier to investment in indie music that does not exist in the film industry. One can put together a business plan for a film project that shows huge upside for a film that captures public affection. It is much more difficult to put together a business plan for a music project that shows the same upside. The result is that there has been no major infusion of private capital into indie music and may not be.

2. *Sources of Subsidy*

a) Cross subsidy From Day Jobs

Caves reports that most artists support themselves with day jobs.⁵⁶⁴ Most musicians do likewise.⁵⁶⁵ Any assessment of the economic viability of indie musicians must consider the kinds of day jobs available and their impact on music activities.⁵⁶⁶ The interaction between day jobs and making music has already been considered in the section on opportunity cost.⁵⁶⁷ This section focuses on the kinds of day jobs available and the extent to which a day job may fulfill some of the artistic impulse because it is related to music.

Musicians can supplement their income by employment in ancillary functions in the music industry itself.⁵⁶⁸ They can work as recording engineers, organize and promote live, make websites, design and place advertising and do press outreach for other musi-

563. See INDIEVEST: CONNECTING FILM AND CAPITAL, http://www.indievest.com/abo-ut_us/index. (last visited Oct., 2010) (“independent film studio and financier with a member community of high-net-worth individuals who work together to produce top-tier feature films with guaranteed theatrical distribution”); KICKSTARTER, <http://www.kickstarter.com/> (last visited Oct. 10, 2010) (providing musicians and other artists with forum to post projects to attract donations).

564. See Caves, *supra* note 9, at 78 (describing many artists’ efforts to find highest-paying day job with fewest required hours in order to devote minimum possible time to meeting living costs while having rest of time for creative activities).

565. See Casey Phillips, *Local Musicians Work Day Jobs to Help Support Their Passions to Perform*, CHATTANOOGA TIMES FREE PRESS (Apr. 2, 2008), <http://www.times-freepress.com/news/2008/apr/02/local-musicians-work-day-jobs-help-support-their-p/> (explaining that most musicians must supplement earnings with part-time employment).

566. See *id.* (describing the relationship between part-time musicians and other employers).

567. For a further discussion on opportunity cost, see *supra* notes 179-210 and accompanying text.

568. See *Occupational Outlook Handbook, 2010-11 Edition*, U.S. DEPARTMENT OF LAB.: BUREAU OF LAB. STAT., Dec. 17, 2009, <http://www.bls.gov/oco/ocos095.htm> (explaining that most musicians have other jobs).

cians. But such broadened employment does not increase the aggregate income stream for the musician community overall unless one of two things happens: the ancillary activities are successful enough that the aggregate revenue increases more than enough to compensate both the performing musicians and the new intermediaries for their activities, or the specialization capitalizes on the greater productivity of comparative advantage.

To illustrate the first point, suppose two musicians earn \$200 per night each for live performances and another \$100 for CD sales at the performances. Now, one of the two stops performing and concentrates on enhancing the potential of the other. Unless the new activities produce more than \$600 per night for the musician still performing, the average income for both of them has declined.

The second point related to comparative advantage. The musician still performing may be a better musician than the one who concentrates on advancement. The one who stops performing may be better at advance than the one who continues to perform.⁵⁶⁹ In this case the total revenue for the two of them is likely to increase because each is able to spend more time on what he does best.⁵⁷⁰ On the other hand, if both are equally good at both functions, the specialization produces no net benefit. Each would be just as well off if he split his time between performance and advancement.

The size of the revenue stream that can be tapped by this form of specialization depends ultimately on whether the opportunities are limited to increasing share of a fixed market demand, or whether specialization can produce increased aggregate demand. It is plausible that increased demand could result—or at least a shift of market share from established artists promoted by the industry heavyweights to indie musicians. Anecdotal evidence suggests that even those enthusiastic about indie music and interested in encountering new groups spend little time searching for them by browsing MySpace or websites or by going to small venues.⁵⁷¹ Their interests in new music could be tapped by more effective outreach on behalf of indie musicians. That is what specialization in the promotion and advertising functions could produce.

569. He may not stop performing altogether; he may just perform less to make time for his new intermediation activities. But the point is most easily illustrated by imagining, that the new activities substitute, hour for hour, for performing time.

570. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 10-13 (C.J. Bullock ed., P.F. Collier & Son, 1909) (using pin-making as example of efficiencies gained from division of labor).

571. See, e.g., *Profiles*, *supra* note 8 (listing consumer profiles).

Many musicians supplement their income within the music industry by teaching, usually giving individual lessons.⁵⁷² This can be a fairly lucrative source of income because the going rate for private lessons is \$30-\$50 per hour—substantially greater than what a musician can earn in a basic day job, in which the wage level is likely to approximate minimum wage: \$7.25 per hour.⁵⁷³ This source of employment has an advantage over other types of employment within the music industry: it taps a new revenue stream. The source of revenue for music teaching is (mostly) people who are not already musicians but who seek to acquire a skill to make music. Most of these students will not become sufficiently proficient or otherwise be motivated to become serious musicians, and so there is a churning effect that magnifies the available revenue over what might be estimated if one considered only the supply of new musicians necessary to replace those exiting the industry or needed to meet growing demand.⁵⁷⁴

Many indie musicians use established recording studios when they accumulate sufficient capital to record an album. Technology has reduced the economic barriers to entry for the recording function without requiring sacrifice in quality of the result.⁵⁷⁵ This enables those who presently spend their time making music as performers but who possess the requisite artistic and technological skills to shift some of their music-making or day-job time to offering recording studio services. Their income potential from making such a shift depends on whether the aggregate demand for recording studio services is fixed, or whether it could be increased by reduced prices associated with new market entry and greater competition.

Abundant evidence suggests that musicians want to make more recordings that they are able to do because of the barrier represented by the cost of making an album—whether intended for commercial release or for demonstration purposes.⁵⁷⁶ So this direction for specialization has the potential to produce an increase in overall

572. MAKE MONEY WITH MUSIC, <http://www.moneyinmusic.com/> (last visited Oct. 10, 2010) (explaining that many independent musicians choose to teach).

573. See *Minimum Wage*, U.S. DEPARTMENT OF LAB., <http://www.dol.gov/dol/topic/w-ages/minimumwage.htm> (last visited Oct. 21, 2010) (“The federal minimum wage for covered nonexempt employees is \$7.25 per hour effective July 24, 2009.”).

574. See Occupational Outlook handbook, *supra* note 568 (describing that most aspiring musicians take lessons).

575. See *id.* (“[T]he Internet and other new forms of media may provide independent musicians and singers alternative methods for distributing music.”).

576. See Trifon, *supra* note 562 (noting how high album costs can be).

recording revenue, albeit still limited by the total assets available to musicians already engaged in the industry.

b) Direct Subsidies

“Subsidies,” as the term is used in this article refers to payments made by third parties—persons other than a musician or a consumer of that musician’s music outside a direct exchange for the music. Parents don’t generally say to a twenty-four year-old son who is a member of a rock band, “We like that song; we’ll buy it from you.” They say, “until you are on your feet, we will continue your allowance,” or, “we will pay your apartment rent,” or “we will pay for your car and the insurance on it.” In other words, they subsidize the son’s music.

Governmental subsidies for music are not widespread in the United States, unlike in Europe. But one type of music making that is generally subsidized at least in part is the music made by high school bands, and other music groups. Public funds support the young musicians in their music making activities because those activities are perceived as being part of the educational process that serves a public benefit.

Even if public subsidies were efficient ways to address market failure, they are unlikely. Moreover, the politics of subsidy would be likely to result in subsidies, not for new forms of music creation, discovery and distribution, but to perpetuate established and now essentially obsolete business practices. The dinosaurs are well organized in Washington and the state capitals. The beavers are not. But there is a type of public subsidy that exists, is politically viable, and has less risk of capture. Federal, state and local governments support culture, education and tourism. All three types of subsidy receive broad public support because they are perceived as productive in creating jobs and human capital. These policies should reflect greater consciousness of the contribution that indie musicians make, to the reality that most musicians first identify themselves as such in their junior-high and high-school experiences, and to the allure than indie music venues can have for tourists.

When state agencies and municipalities publish tourism guides and design advertisements, they should feature the communities of indie musicians found almost everywhere, and tell tourists how to find them, on line and in the flesh. This is not a zero-sum game, benefitting the indies at the expense of the celebrities. Many tourists will not go to a major concert in an arena or a stadium. But they will go to a smaller venue where they can combine an informal

opportunity to eat and drink while they explore new music. Given the DIY tradition of indie musicians, the potential match between musical entrepreneurship and relatively modest public expenditures is pregnant with opportunity

When school boards budget for music activities in the public schools, they should recognize the potential of programs that embrace genres of music and the types of music creation that are most accessible to the students they educate—rock and hip hop, as well as Sousa marches for the band and Rossini for the orchestra.

VII. BUSINESS MODELS: THE MONEY PART

Markets evolve under the stimulus of entrepreneurship; their future shape is not the result of some grand policy vision. Nevertheless, it is appropriate to identify likely instances of market failure, where policy intervention or some burst of entrepreneurial spark is most needed.

Popular entertainment is big business—historically it has generated billions of dollars. As the technological revolution threatens traditional business models and established intermediaries, the search for new business models must start with the question: what is money needed for? It is clear that money is needed to support intermediaries and to draw new ones into the market. The prospect of profit is what induces entrepreneurs to take the risk of experimentation.

It is less clear that money is needed to support musicians. Most musicians do not make any real money under existing business models; they make music for other reasons. To be sure, some of them are drawn by the fantasy of becoming celebrities, but the prospect of that happening is vanishingly small. Money may be necessary to forestall exit by the best musicians, however money is not everything. Most musicians would continue making music even if they cannot make money at it, so long as they can find the time, given their other obligations, including obligations to work at other jobs to support themselves.

To discover new business models for either group is daunting. As earlier parts of this article explain, technological innovation is pushing the cost—and therefore the price—of recorded music to zero. Increased competition because of reduced barrier to entry means a smaller share of revenue streams for each market participant. Much further entrepreneurial experimentation is necessary to discover how functions essential to the effective working of the new marketplace will be performed.

Flip Filipowski, a Chicago-area high-tech entrepreneur, remarked in 2002 that venture capital must finance 100 or 1000 startups to get one successful innovation.⁵⁷⁷ Most startups fail, he pointed out, but that is not a bad thing; it is the inevitable process through which innovation in markets occurs. This means that a large venture capital stock is needed, a significant portion of which funds the set of “experiments.”

Paul Resnikoff, reporting in 2008 on the failure of prominent digital intermediaries to make money even as the traditional record-label model collapses refers to the quest for economic viability in the music industry as a “the lure of figuring out this seemingly hopeless riddle, coupled with a passion for the sexiness of music, is enough to keep the experimentation alive.”⁵⁷⁸ Resnikof says, “the reason is that demand for music is so immense, and so is the entrepreneurial appetite for translating that energy into cash.”⁵⁷⁹

The good news is that the size of the chunk of capital needed for each experiment does not remain fixed. New technologies, including new ways of organizing things, reduce the size of the chunks. It takes less capital to finance an innovative Web-based channel between musicians and music bloggers than to finance a new CD warehouse for a music distributor. A new statistical matching algorithm could be implemented through open-source software or a video game could be written to offer virtual access to musician personalities for tens of thousands of dollars rather than millions of dollars. That means that even a diminishing stream of investment capital can fuel more innovation.

No investor will invest, however, unless the enterprise seeking capital can present a business plan demonstrating the potential for sustainability and an adequate rate of return.

A. Elements of a Business Plan

Two types of business models must be considered: a business model for musicians and a business model for intermediaries. It makes sense to start with the business model for musicians because the most straightforward business model for intermediaries is to take a share of the musician’s earnings. If those earnings are suffi-

577. Address by Flip Filipowski at Chicago-Kent College of Law, Chi., Ill. (June 19, 2000).

578. Resnikoff, *Resnikoff’s Parting Shot: Still Broke After All These Years*. . ., DIGITAL MUSIC NEWS, Dec. 29, 2009, <http://www.digitalmusicnews.com/stories/111808/parting/>.

579. *Id.*

cient to support a share acceptable to the intermediary then the problem is solved: viable business models exist for both musicians and intermediaries.

1. *For Musicians*

The following evaluation of business models for musicians assumes that musicians have made their own judgment that they want to create music and make it available to audiences, trading off desires for financial rewards against the opportunity cost of devoting a significant part of their time to musical endeavors. Some will stay in the market only if they expect to reap substantial economic rewards from their music; others will stay in if the combination of their music—profitable or unprofitable—and the incomes from their day jobs and from subsidies makes it possible for them to cover their costs and support themselves at a modest level.

The analysis focuses on situations in which music must be financed by funds available from day-job employment, from savings, and from subsidies. In other words outside financing is unavailable. To obtain such financing, the musicians must explain to a potential investor what the money is needed for. Profit-seeking investors need to understand how much return on their investment is contemplated and the circumstances under which it will be realized. As the following analysis shows, a positive rate of return could not be offered and thus no investment could be attracted. Section VII.A.2 shows how investors could be attracted to finance a band in conjunction with a new intermediary.

a) Costs

(1) Recorded Music

The starting point for developing any business plan is to identify the costs of the proposed business, focusing particularly on cash outflows. The costs of creating recorded music include the costs of composition—inventing a new song; the costs of recording it; duplicating the recording; marketing it; and distributing it to consumers.⁵⁸⁰

The costs of composition, for most musicians, are opportunity costs. Few musicians earn salaries for composing music, a handful of songwriters in Hollywood or Nashville being the exception. Well known musicians benefit from advances under their record-label contracts, intended to support them and their costs as they record a

580. See Trifon, *supra* note 562 (describing process of recording).

new album.⁵⁸¹ Lesser-known musicians use leisure time for composition, for which opportunity cost is what matters. The time required to come up with a new song varies enormously. Typically, bands take a year off from touring to create a new album of twelve to fifteen songs, but a month or two of intense effort can suffice.⁵⁸² Rock bands usually compose in the studio on their instruments, working from outlines of musical concepts developed by one or more of their members.⁵⁸³ The process is recursive: the creator tries out an idea with his colleagues; they make suggestions or perform adaptations, and the creator goes back to rework and integrate the collective ideas. Based on the author's experience, a total of twenty-five hours by the principal composer is realistic for one song. So, if opportunity cost is measured by minimum wage, the cost of composing a song is \$164.⁵⁸⁴ This ranges upwards for musicians with better day-job prospects.⁵⁸⁵ It is \$3,125 per song if the opportunity cost is \$1000 per day, a reasonable figure for a successful entertainer or someone with a professional job as a lawyer or physician.⁵⁸⁶

Musicians without access to paid intermediation, as this part of the business-model analysis assumes, must record during their leisure time. The opportunity cost for such time is zero. Expenses must be incurred for recording, duplicating and distributing. Studio time costs \$50-100 per hour in major markets.⁵⁸⁷ Most indie musicians consider that they can record an album of songs reasona-

581. See Goldberg, *supra* note 20, at 47-48 (describing typical mid-1980s record deal). The author notes that deals typically consisted of a \$50,000 signing bonus, a \$275,000 advance for recording, a \$900,000 gross royalty, and after recoupment of advances and paying agents and managers, the musician was left with a net income of \$75,000. *Id.*

582. See Spitz, *supra* note 150, at 584-592 (describing new album recording process, "Rubber Soul") The process began on October 12, 1965 and was completed by Christmas of same year. *Id.* The album characterized The Beatles as serious musicians. *Id.*

583. See *id.* (describing creative process).

584. See *Minimum Wage*, *supra* note 573 (listing statutory minimum wage in U.S. as \$7.25 per hour beginning July, 2009). Finding \$164 by multiplying minimum wage at \$7.25 per hour by the twenty-five hours required to make a song.

585. For instance, if an artist makes twenty-five dollars per hour, the opportunity cost of creating a song would be \$625.00.

586. \$3,125 is arrived at by multiplying twenty-five hours (3.125 days at an eight hour per day work day) by \$100 per day.

587. See *Lofish Recording Studio: Rates*, LOFISH RECORDING STUDIO, <http://www.lofi-sh.com/6w28/pages/rates.html> (last visited Oct. 10, 2010) (showing prices for New York City studio ranging from forty-five to one-hundred dollars per hour); see also *Los Angeles Recording Studio: Rates*, RECORDING STUDIO LA, <http://www.recordingstudiola.com/rates> (last visited Oct. 10, 2010) (providing hourly studio time in a Los Angeles studio for \$50 per hour).

bly well worked out in advance—usually by playing it at live performances preceding the recording process—for \$5,000 to \$7,500. The model assumes the higher figure: \$7,500. When all the musicians are part of the same band, there is no cost for studio musicians. A generalized business model, however, needs to accommodate the situation in which the band needs to be filled out with session musicians, who may charge \$200 per recording session. Once the songs on an album are recorded and mixed, duplicating one thousand copies costs on the order of \$2,000, and mailing it to reviewers and radio stations costs another \$3,000.

Based on these estimates, the total cost of an album is \$12,500.⁵⁸⁸ Few musicians have enough capital or the expertise and intermediation technologies to finance expenditures for paid advertising or paid publicists.

(2) Live Performances

The costs of creating live music include the costs of composition; the costs of promotion; the costs of touring; and the costs of the actual performance.⁵⁸⁹ When musicians perform close to home, the costs are minimal, after they have incurred the costs of composition. If the band wants to expand their public-performance opportunities, they must tour, because local markets eventually become saturated—only a certain number of public performances in a specific time period can draw audiences.

Touring is not cheap.⁵⁹⁰ The musicians must have a vehicle. They need a route that does not leave them traveling long distances and backtracking unnecessarily, allowing them to play venues that form a logical geographic sequence. They have to pay for fuel, meals, and lodging, unless they can persuade fans to let them sleep on the fan's couch.⁵⁹¹ Most tours produce psychological gratification but the expenses eat up the revenue.

588. \$7500, plus \$2000, plus \$3000, produces a total of \$12,500.

589. See Mike Pro, *Why Bands NEED to Play Live and How To Set Up Your Own Indie Tour, Pt. #1*, GETSIGNED.COM, Sept. 29, 2003, <http://www.getsigned.com/index.php/Performing-Live-Touring-Tips/repo32.html> (describing efforts associated with playing live concerts).

590. See Jeri Goldstein, *How to Get Tour Support for Your Musical Act*, THE NEW MUSIC TIMES, INC. (2006), <http://www.performingbiz.com/?content=article040> (noting some touring expenses) (“There are so many costs associated with launching a tour and many of those costs are incurred before playing the first date. As an independent artist managing your own career and possibly running your own record label, you are responsible for fronting all the money for marketing, recording and eventually touring.”).

591. See *id.* (listing touring costs).

If a band is aggressive in touring, while holding day jobs, it might tour fifty-six days per year, playing four two-week tours with performances twice per week. A band on tour drives an average of 250 miles per day in a vehicle that gets twenty miles/gallon. If fuel costs \$3 per gallon, it must spend \$37.50 per day on fuel.⁵⁹² The cost of lodging can be estimated at \$50 per night, if all the band members stay in one room when they stay in a hotel or motel, and sometimes sleep on a fan's couch. Food expenses can be ignored because the band members would have to spend money on food even if they were not touring, so food is not a marginal cost attributable to touring.

The total outlays for one year are thus \$4,900.⁵⁹³

b) Revenue

In a viable business model, revenue must be sufficient to cover costs and to produce a return on investment ("ROI") acceptable to investors.⁵⁹⁴

The thesis of this article is that substantial revenues from CD sales are not part of the business model for musicians. Nevertheless some CDs can be sold at performances, when audiences are enthusiastic about what they have just heard and want a tangible souvenir of the experience. While CD sales are declining industry wide, audiences remain likely to buy a CD at a concert by a band that they like because it is a tangible impulse purchase, rewarding the performers and being able to take some of the music home. Sales of ten per show would be optimistic. The model assumes that 5% of the attendees at venues with an average capacity of seventy-five purchase CDs at a price of \$10, yielding revenue of \$600 per year from CD sales at shows.

Indie musicians and some celebrity musicians often argue that they will make up for lost revenue from the sales of recorded music by shifting their energies to live performances, where consumers can be charged for access. It is certainly true, as Section II.A.2 explains, that the technologies that facilitate free riding on recorded

592. 250 miles per day, divided by twenty miles per gallon equals 12.5 gallons of gas per day. At three dollars per gallon, a band would pay \$37.50 on gas per touring day.

593. \$4,900 is arrived at by multiplying \$37.50 per day on fuel by fifty-six days, plus fifty dollars per night for hotel accommodations times fifty-six days.

594. See Hakan Erdogmus et al., Return on Investment, IEEE Software, June 2004, at 18, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.2.5.190&rep=rep1&type=p-df> (noting ROI is "ratio of net benefits to costs" or "(benefits - costs)/costs").

music do not threaten the integrity of business models based on live performances. The size of the market for live performances, however, is not as elastic as the size of the market for recorded music, because the effect of new technologies of consumption is more dramatic for recorded music than for live performance.

Most indie musicians perform in small venues, usually bars, with capacities of twenty-five to 500 people. They receive, at most, a few hundred dollars for each performance, and are expected to do much of the promotion to bring out crowds of their friends and local fans developed by their own Internet promotion and street teams. The venue owners are more interested in sales revenue from alcohol and food, supplemented sometimes by cover charges, than they are in the nature of music. As long as a good-sized crowd is willing to come and drink and eat while they listen to it, the venue owners are happy.

There are advantages to both the venue owners and to the musicians in this arrangement. The venue owners get more revenue than they would with no live entertainment, because they can count on the musicians to beat the bushes to get their friends to come out. The musicians get an opportunity to perform live in front of a crowd. Bigger cities have hundreds of small venues, with three-to-five slots on the bill for Friday, Saturday, and Sunday, and some weekdays. Nearly every hamlet in the country big enough for a Wal-Mart has at least one bar that may be interested in having live music performers.

Live performances help sell recorded music, and recorded music helps bring crowds to live performances. Most bands have a table in the back of the venue at which CDs and merchandise are for sale, and they make sure their audiences know, by saying so during their performance. Audience enthusiasm right after the performance makes it likely that at least a dozen or so fans will pick up a CD for \$10 as a souvenir of a good time, whether they ever listen or it or not. It takes a certain amount of effort to go to a live show, and if potential have heard a band's music on a CD, an iTunes download, or through a free C copy or a free file exchange, and like it, they are more likely to attend a live show.

Section VII.A.1.a.(2) assumes that a band would tour for fifty-six days per year, playing two performances per week.⁵⁹⁵ The

⁵⁹⁵. For a further discussion of the fifty-six day touring schedule, see *supra* notes 591-92 and accompanying text.

band's share of revenue for each live performance is twenty percent, producing annual revenue from touring of \$3,600.⁵⁹⁶

Merchandise—tee shirts and coffee cups and beer mugs or liners—might net another \$50 per show, for an annual total of \$800.

Total revenues for the band may include:

Touring:	\$3,600
CD sales:	\$600
Merchandise:	\$800
Total:	\$8,563

If the members of the band split the earnings evenly, the result is \$2,141 per musician. Minimum wage is \$14,500 per year.⁵⁹⁷

Costs, as estimated in Section VII.A.1.a, are \$22,400, considerably in excess of revenues. Few indie musicians could finance such an investment, and operating on their own, most lack the expertise to translate their music and their efforts into celebrity. The ROI for such an investment would be -73.4%.⁵⁹⁸ Most bands would tour much less because of the constraints of their day jobs, thereby producing less live-performance revenue. Most would not be able to afford a publicist or paid advertising, as the calculations assume. Artists would scrimp to finance studio time and the band's recorded music would go mainly unnoticed except for what the band sells at performances.

In other words, there is no sustainable business model for indie musicians unless new sources of revenue can be tapped.

2. *For Intermediaries*

Despite the variety of the intermediation resources available to any indie musician on a shoestring budget, identified in section V.B., none of these third-party services (except for iTunes) shows signs of dominating the market. It does not appear that any is particularly successful financially.

The result is that everyone is scrambling to find a way to make money. The major labels are infatuated with "360 degree deals," in which they take a portion of the revenue obtained from all the activities of signed bands, in contrast to their traditional practices of

596. This number is arrived at by calculating twenty percent of a total revenue of \$18,000.

597. Assuming minimum wage is \$7.25 per hour, if a person works for forty hours per week, fifty weeks per year, the total earnings would be \$14,500 per year.

598. ROI for investment would be $(\$22,400 - \$32,200) / \$32,200$; this equals a ROI of -30.4%.

looking only to revenue from sales of recorded music, leaving the revenue streams from live performances, merchandise, and video-entertainment deals or advertising alone.⁵⁹⁹

If a viable business model for musicians exists, the business model for intermediaries is simple: intermediaries simply take a share of musician profits adequate to cover the intermediaries' costs and to provide an adequate rate of return.⁶⁰⁰ That is what labels, concert promoters, publicists, and lawyers historically have done.⁶⁰¹ But that business model for intermediaries works only if the musician's business model generates sufficient income to share it with the intermediaries.⁶⁰² For most indie musicians that condition will not be satisfied.

But as the preceding discussing concludes, a sustainable business model for musicians does not exist for musicians that draw only on existing sources of revenue. Accordingly, for the new market to function well, an independent business model for intermediaries must exist. This exists only for intermediaries who do more than perform match-making functions. Economically successful intermediaries will perform a combination of match-making and promotional functions, drawing more consumers into the orbit of client bands.⁶⁰³ These intermediaries will have to push as well as pull.

Much good music has always been made—and will continue to be made—by musicians who essentially pursue music as a hobby, even if they would be insulted by the term. These musicians will continue to make music in the interstices of their day-job and family responsibilities, and some will do it all their lives. In these in-

599. See *Why 360-Degree Deals Won't Turn the Music Industry Around*, PODCOMPLEX, <http://www.podcomplex.com/blog/why-360-degree-deals-wont-turn-the-music-industry-around/> (last visited Oct. 12, 2010) (explaining appeal of 360 degree deals).

600. See Helienne Lindvall, *Deal or No Deal? Artists Need to Think Twice Before Signing a 360-Degree-Deal—it Could Leave Them in a Spin*, GUARDIAN: MUSIC BLOG, Jul. 25, 2008, <http://www.guardian.co.uk/music/musicblog/2008/jul/25/dealorno> (detailing advantages and disadvantages for artists signing 360-degree-deals). Artists can expect 360-degree-deals to help support touring and start-up costs. *Id.*

601. See *360 Degree Deals*, ILS: INDEPENDENT LABEL SCHEME, <http://independentlabelsch-eme.com/faq/360-degree-deals> (last visited Oct. 10, 2010) (noting 360 degree deals cover traditionally separate areas, such as recordings, live performances, merchandizing and sponsorship).

602. See *Why 360-Degree Deals Won't Turn the Music Industry Around*, *supra* note 599 (explaining for new bands to make money, bands are “better off producing (and distributing) their own music and hiring a dedicated promotional agency to handle the marketing and business side of things”).

603. See Lindvall, *supra* note 600 (saying 360-degree-deal providers are responsible for profitability).

stances, it is not a problem that their artistic activities lack a specific business model. Many of the artists talk about getting a major record deal, but this never has been a realistic possibility for most of them; it is simply too hard to get discovered, and they are not willing to pay the price of trying.

Another group of musicians, however, possess the emotional energy and modest opportunity cost, to try to break through the barriers and to earn sufficient income from their music to support themselves. To realize their aspirations, the musicians need capital—as much for advertising and promotion as for creating and distributing their music—and they need new kinds of intermediaries who can promote them successfully using new technological channels.

These intermediaries badly need a viable business model. For them, the combination of advertising, new revenue streams from things like ringtones, and paid packages that combine access to recorded music with narrowly targeted discovery tools, represent the best possibilities.

Intermediaries will be available to them if a business model exists adequate to draw intermediaries into the market and keep them there even though most of the musicians for whom they provide services cannot pay them enough. The answer is already, “yes,” for a subset of new intermediaries. For example, Myspace, YouTube, AT&T and Comcast perform important intermediation functions in the new marketplace helpful to hundreds of thousands of musicians; yet their business model does not depend on a share of their musicians’ earnings.⁶⁰⁴ They get their revenue from someone else: ISP subscribers in the case of Comcast and AT&T, and advertisers in the case of MySpace and YouTube.⁶⁰⁵ All these control distribution channels for music that consumers already want. They make money off established celebrities by charging for access to the distribution channels.

604. See Mitra Barun Sarkar et al., *Intermediaries and Cybermediaries: A Continuing Role for Mediating Players in the Electronic Marketplace*, available at <http://jcmc.indiana.edu/vol1/iss-ue3/sarkar.html> (last visited Oct. 12, 2010) (explaining the relationship between social networks and intermediation).

605. See Paul Thomasch, *Comcast Revenue Up; Profits Slip on NBC Costs*, REUTERS, July 28, 2010, available at <http://www.reuters.com/article/idUSTRE66R27G20100728> (showing revenue from online subscribers); JP Mangalindan, *MySpace: A Place for . . . What, Again?*, FORTUNE, Aug. 26, 2010, available at http://tech.fortune.cnn.com/2010/08/26/myspace-the-place-for-what-again/?section=magazines_fortune (saying advertisements are MySpace’s only form of revenue).

It is worthwhile to explore, therefore, the possibilities that new music intermediaries can construct a business model that relies on revenues from music consumers or from those who want to reach those consumers.⁶⁰⁶

To be successful, these new intermediaries—one might refer to them as “agents,” because they would be closely tied to musicians—would need skill sets that match the architecture of the new marketplace:

- Clear understanding of the potential for behaviorally targeted micro-advertising
- Entrepreneurial creativity on how to develop and sell access to celebrity
- Capacity to promote live performances

A sustainable business model exists for such people or entities, consistent with the pessimistic model suggested for the musicians themselves in Sections VII.A.1 (business model for musicians) and VII.A.3 (capital requirements).

a) Revenues: Tapping New Revenue Streams

Capturing a revenue stream requires four steps: one must identify the revenue stream and develop a strategy for tapping it; one must make it easy for sources of that revenue to acquire the music or other product or service associated with the musician supplier; and potential consumers (sources of revenue) must be persuaded to allocate some of their discretionary income to that particular product or service. In this regard developing a “brand” is essential. Pete Wentz recognizes that, when recorded music is free, bands have to have a multi-dimensional brand, including not only the music, but also clothing, videos, all linked through communities and clubs.⁶⁰⁷

Multidimensionality, however, has its costs. It is hard for one person to know enough about the logistics of live concerts and touring, making productive use of studio time, distribution of merchan-

606. One should distinguish consumers as sources of revenue in the Comcast sense from consumers as sources of revenue in the music label sense. In the latter case, the consumer considers that she has entered into a commercial contract with Comcast, and that the music subsequently flowing through the Internet connection is the product of a separate deal. In the former case, the consumer considers that she has entered into a contract with the musician, even though the legal relationship may be with the label and its distribution channels because the musician has transferred all the rights in the music.

607. For a further discussion on Pete Wentz creating a multi-dimensional band, see *supra* note 251-305 and accompanying text.

dise, designing and propagating a resonant image, in addition to being talented in creating appealing music. This means that, if indie musicians are to be effective in the new marketplace, they need two things. They need education and training in the activities which they are not already skilled at.⁶⁰⁸ They also need intermediaries, because the finer granularity of the activities inflate transaction costs relative to the substantive costs and benefits.⁶⁰⁹

Section IV.B.2, explains that network effects influence the demand for music: consumers prefer songs that are already popular. Musicians and their agents must be ready to capitalize on this by making the “velocity of adoption” visible to potential fans.⁶¹⁰ That is the function of Billboard and other charts referred to in the colloquialism “making the charts.”

(1) Live Performances

Considering the costs, including the opportunity costs, of extensive touring, most musicians will not be able to tour more than a few weeks a year unless they can attract outside investors. Even if musicians shift their strategies to live performances and publishing and away from sales of recorded music, there is no room in those submarkets for all the wannabe suppliers; the demand for both live performances and publisher assets is essentially fixed, while the demand for recorded music has been growing dramatically for decades and will continue to do so. If more musicians focus more of their productive effect on performing live, they will be fighting for market share in a market the size of which is relatively fixed—or at least growing slowly based on immutable demographic factors. The amount of concert revenue available to each will decline as they compete with each other for the same audience.

Musicians will not be able to overcome this reality and get the full benefit from touring unless they enlist the services of new kinds

608. See *Chicago Music Commission, Achieve of Musician at Work Forums*, CMC: CHICAGO MUSIC COMMISSION, available at <http://www.chicago-music.org/category/musicians-at-work-forums/> (last visited Oct. 12, 2010) (providing links to seminar audio and PowerPoint).

609. See CAVES, *supra* note 9, at 9 (deterring need for intermediaries).

610. See Jonah Berger & Gael Le Mens, *How Adoption Speed Affects the Abandonment of Cultural Tastes*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, May 19, 2009, at 8146, 8148, available at http://marketing.wharton.upenn.edu/documents/research/Adoption_Velocity.pdf (explaining velocity of adoption in relation to the music industry). Musicians “who shoot to the top of the charts right away, rather than growing slowly, realize overall lower sales.” *Id.* According to the authors, this “suggests that faster adoption is not only linked to faster death, but may also hurt overall success.” *Id.*

of intermediaries whom they will have to pay, increasing the investment requirements proportionally. With support from investors and the right kind of intermediary, they can increase their market share, getting the days on tour up to the 180 days projected in *supra* Section VII.A.2 and the performances per week up to as many as five or six, with efficiently scheduling and routing. The resulting word of mouth, if exploited adroitly could help fill larger venues as well.

(2) Publishing

Conventional wisdom says that musicians often enjoy better financial prospects from the sale of sheet music and public performance rights in their musical works than they do from sales of recorded music.⁶¹¹ “Publishers always get paid, and always share fifty-fifty with the artist,” repeated one musician at a February, 2008 focus group in Chicago.⁶¹²

Even as new technologies threaten established business models for recorded music by facilitating unlicensed copying, distribution and performance, they strengthen business models for publishing.⁶¹³ As performance gravitates to the Internet, it is easier for rights owners to detect unlicensed performances.⁶¹⁴ It is almost as though there is now only one jukebox and only one venue with multiple spaces.⁶¹⁵ All a rights holder or its licensing cooperative need do is to stake out this new venue/jukebox and watch and listen to what is being performed.

611. See JAMES BESSEN & ERIC MASKIN, *INTELLECTUAL PROPERTY ON THE INTERNET: WHAT’S WRONG WITH CONVENTIONAL WISDOM?* 1-2 (2004), available at <http://www.researchoninnovation.org/iippap2.pdf> (explaining traditional intellectual property model, which holds creativity is discouraged when works are copied because original author may lose potential sales and profits).

612. See Bob Donnelly, *Buyer Beware: Why Artists Should Do A 180 On “360” Deals*, *Billboard.biz*, March 22, 2010, http://www.billboard.biz/bbbiz/content_display/industry/e3ib6547f261e43d0f65fd4e46289bf169e (discussing current trends in artist contracts).

613. See Brooke Garrett, *Digital Music Technology and the Right of Public Performance: The Technology, the Legislation, and the Reaction*, 2 *WAKE FOREST INTELL. PROP. L. J.* 203, 206 (2002) (describing systems maintained by performance rights societies to monitor public performances of members’ works).

614. See *id.* (explaining how Internet has improved ability to detect unlicensed performances). Google filed a patent application in August, 2010 to protect forthcoming software aimed specifically at detecting music infringement. See U.S. Patent No. 20,100,218,111 (filed Aug. 26, 2010) (creating methods and apparatus for challenging an online user).

615. See U.S. Patent No. 20,100,218,111 (filed Aug. 26, 2010) (requiring user information to access materials, would streamline access).

Changes in lifestyles, however, undercut the growth of revenue from this source. Singing around the piano at home—once the mainstay of sheet music sales—has declined precipitously since a century ago, because of the ubiquity of recordings and broadcast music.⁶¹⁶ Dance bands have declined in popularity, and they once were important revenue sources for sheet music sales.⁶¹⁷ Most indie musicians, unlike Elvis Presley, write their own music, rather than relying on independent songwriters (the country music sub-industry remains an exception).⁶¹⁸ The wide availability of sheet music for paid downloading on the Internet represents a potential channel for expanding musical-work revenue, but most indie musicians do not represent their songs in conventional scores, and for the most part do not exploit this channel.

(3) “Merch”

Sales of merchandise (“merch”) such as tee-shirts, posters, coffee-cups, and mousepads are a mainstay of the revenue stream for both indie and celebrity musicians.⁶¹⁹ At small venues, the same table often sell both CDs and merch. Some musicians—Fall Out Boy, and its marketing genius Pete Wentz—aggressively exploited the potential of merch early in the days of the band’s emergence from obscurity on Chicago’s North Shore by establishing a line of clothing associated with the band, and by producing medium-length video features which it sold.⁶²⁰

The limitations on this revenue stream, however, result from the certain correlation between sales potential for merch associated with a band and the band’s celebrity. No one is going to buy a tee

616. See Joanne Ostrow, *Wavering on Radio: The Venerable Medium Faces an Army of Competitors: iPods, Downloads, Music Phones. Signals for its Future are Anything but Clear*, DENVER POST, June 17, 2009 at A-01 (noting “radio eclipsed sheet music some 80 years ago . . .”).

617. See *Big Bands & Big Names*, <http://www.bigbandsandbignames.com/Rise-andFall.html> (last visited Oct. 11, 2010) (detailing rise and fall of swing bands during the 20th century).

618. See *Elvis Presley Songs*, HOWSTUFFWORKS, <http://entertainment.howstuffworks.com/elvis-presley-songs.htm/printable> (last visited Oct. 11, 2010) (showing Presley songs and songwriters).

619. See *Merch*, MERCH.COM: BAND APPAREL AND MERCHANDISE, <http://www.merch.com/> (last visited Oct. 11, 2010) (displaying various band related items available for purchase).

620. See Charlotte Cripps, *Fallout Boy: This is Hardcore*, THE INDEPENDENT, Apr. 28, 2006, available at <http://www.independent.co.uk/arts-entertainment/music/features/fall-out-boy-this-is-hardcore-475858.html> (detailing Fall Out Boy’s “Clandestine Clothing” clothing line and Barts skull production company, which, according to Pete Wentz, is used by the band to “write [its] own video treatments and partially direct them.”).

shirt identifying the buyer with a band or a performer that no one has ever heard of—unless the purchaser was so moved by the music or the appearance of the performer that he must have a souvenir.

(4) Ring Tones

As cell phone use exploded, and it became easier to download person ring tones to cell phones, the revenue stream from cell phone owners to music rights holders from this source grew rapidly.⁶²¹ The U.S. ringtones market grew to \$873 million in 2006 and continued to grow thereafter until the first quarter of 2008, when it fell for some major labels.⁶²² Still, indie musicians, by creating catchy musical hooks and by making it easy for consumers to download ten to thirty seconds slices of their music, can tap the ringtones market as an entirely new revenue stream for them.⁶²³

(5) Music Tracks for Movies

Musicians can exploit their musical talent and leverage growing popularity by creating and performing scores for video works, such as feature or documentary films or television productions.⁶²⁴ Most commercial video works have some music in their soundtracks, and the demand for the video works stimulates demand for musicians to create the soundtracks. Andreas Kapsalis, for example, the principle in the Andreas Kapsalis Trio, a Chicago indie group that makes unusual Jazz/Rock instrumental music, defined by Kapsalis's virtuoso guitar technique and the creative percussion of Jamie Gallagher and Darren Garvey, has extended their popularity and earnings by writing and performing the soundtracks for sev-

621. See *BMI Predicts Growth in Ringtone Sales*, THE MOBILE TECH. WEBLOG, Apr. 4, 2006, http://www.mobile-weblog.com/50226711/bmi_predicts_growth_in_ringtone_sales.php (predicting U.S. ringtone market would exceed \$600 million in 2006, up more than \$100 million from 2005).

622. See Joshua Chaffin, *Warner Echoes Industry Woes as Ringtone Sales Fall Flat*, FINANCIAL TIMES, Feb. 7, 2008, at 18 (noting \$16 million first-quarter loss in ringtone sales).

623. See *Rock Alt-Indie Ringtones*, THUMBPLAY, <http://ringtones.thumbplay.com/Rock-genre-Alt-Indie-subgenre-ringtones> (last visited Oct. 11, 2010) (showing Indie bands that have taken advantage of growing ringtone market).

624. See Jan Peterson, *Songwriters and Musicians: Take the Deal or Not?*, ASSOCIATED CONTENT, Feb. 16, 2010, available at http://www.associatedcontent.com/article/26805-29/production_music_library_songwriting.html (explaining selling songs for use in movies can be profitable for musicians).

eral movies that are scratching their way up to mainstream distribution through the festival circuit.⁶²⁵

(6) Advertising

Consumers are not the only potential sources of revenue. Advertisers and bar owners also will pay, if they think the music or the musicians will draw people to spend money on their products. Conventional advertising is not the only possibility. Merchants also may be willing to sponsor musicians, much as they sponsor little-league teams and NASCAR race cars and drivers.

Advertising is another form of subsidy, as it was defined above.⁶²⁶ Many aspects of popular entertainment are “free” to consumers, yet are well-funded. Over-the-air radio and television are the two most obvious examples. Early hopes that broadcasting could be developed on a subscription basis, with consumers allowed access only if they had wired connections, radio and television broadcasting has been supported from their earliest years by advertising.⁶²⁷ Other branches of the entertainment industry, including stock car racing, newspapers and magazines, benefit from substantial advertising revenue, even though consumers pay a fraction of the total advertising costs. Little League baseball and similar sports activities are examples where consumers pay nothing but advertisers (“sponsors”) cover some of the costs.

Historically, advertising played only a minor role in financing popular music. Manufacturers of musical instruments, especially guitars and drum sets, would supply their hardware for free to musicians who prominently displayed the logo of the supplier on the instruments. Once musicians reached celebrity status, they could earn income by endorsing products.

Celebrity endorsement is a mainstay of modern mass advertising.⁶²⁸ Once musicians attain celebrity status, this revenue stream is

625. See *Andreas Kapsalis Film Scoring Reel*, ANDREAS KAPSALIS TRIO, <http://www.a-ndreaskapsalis.com/filmreel.php> (last visited Oct. 11, 2010) (listing songs included in 2006 and 2007 films with links available to hear the scores online).

626. For a further discussion on subsidies, see *infra* 564-80 and accompanying text.

627. See *American Advertising: A Brief History*, HISTORY MATTERS: THE U.S. SURVEY COURSE ON THE WEB, <http://historymatters.gmu.edu/mse/ads/amadv.html> (last visited Oct. 11, 2010) (explaining American advertising has grown tremendously beginning in the 1920's, due to the use of “new media” including radio, television and Internet).

628. See, e.g., Paul Keegan, *The Future is Now: Adventures in Advertising*, FORTUNE, Aug. 4, 2010, available at <http://tech.fortune.cnn.com/2010/08/04/the-future-is-now-adventures-in-adver-tising/> (noting only seventy-five top athletes earn more than two-thirds of \$1.1 billion paid for athlete endorsements).

easily available and celebrities can command a high price.⁶²⁹ Even unknown performers, however, often can make more money modeling than performing.⁶³⁰ An entrepreneurial musician can diversify by constructing an image or persona that is interesting not only to consumers of his music but also to advertising agencies and advertisers. A unique persona has power to move consumers of a variety of products. Physical appearance plays a major role in this, but other factors do, as well.⁶³¹ Fall Out Boy and Vampire Weekend recognized this. The former cultivated a bad-boy image; the latter cultivated a cultivated, educated, preppie image.⁶³²

The rapid growth of behaviorally targeted advertising, which permits advertising intermediaries to place ads based on detailed data about the purchasing and shopping behavior of individual consumers opens new possibilities for musicians, both as advertisers and as hosts for others' advertisements. One commentator expresses fear that, as licensees associated with advertising replace record label A&R executives, the tendency will be to back away from music for its own sake and to replace it with music that is not too distracting as background for an advertisement.⁶³³ On the other hand, licensees can "be good talent scouts," offering an alternative channel to radio play to build an audience.⁶³⁴ Indeed, advertisers may turn out to be more embracing of offbeat and creative music as they seek to give their ads impact, compared with radio chain executives who seek only mainstream music to satisfy the established tastes of demographic segments of radio audiences they want to hold or build.⁶³⁵

Many other possibilities exist, mostly unexploited so far. Bands could receive advertising dollars by offering "naming rights."

629. *See id.* (explaining differences between top tier and "second tier" celebrities).

630. *See* Interview with Brian Kennedy, 19-year-old Chicago actor, in *Chi.*, III (Nov. 7, 2008) (reporting ready availability of modeling opportunities paying \$500 per appearance, in contrast with struggle to find paying roles in theater or film performances).

631. For a discussion of physical appearance in image construction, see *supra* 446-580 and accompanying text.

632. For a discussion comparing the promotional strategies for Fall Out Boy and Vampire Weekend, see *supra* 215-305 and accompanying text.

633. *See* Brian Stelter, *Those Funny YouTube Videos Are Pulling In Serious Money*, N.Y. TIMES, Dec. 11, 2008, at 1, 19 (reporting sponsors of YouTube videos who are earning six-figure incomes from share of advertising revenue through YouTube partner program, which places advertising on YouTube pages).

634. *See id.* (discussing potential benefits on licensees).

635. *See id.* (explaining big name productions companies place ads and run videos, but individuals may participate and be seen as well).

Oucho Sparks, Curtis Evans, or the Andreas Kapsalis Trio, Chicago based indie groups, could become the “Coca-Cola Sparks,” “Curtis Evans for Nike,” or the “Facionable Trio,” in exchange for substantial capital infusions.⁶³⁶ Or, groups could retain their names as bands, and offer naming rights to albums, or songs. Modofac’s “They Have to be Watching You” could be called the “Tide Watch” album, or David Safran’s song, “Starving Time” could be called the “Gatorade Ballad.”⁶³⁷

This, no doubt, is a startling—and instinctively unwelcome—idea for all these groups, but it is a way to finance bands, albums and songs.

Also interesting is the development of targeted advertising, based on increasingly rich databases of individual consumer behavior, such as “click tracks,” showing what websites a consumer has visited, collected by search engines such as Google.⁶³⁸ Known as “micro advertising,” the technology permits advertisers to buy access to very narrow groups of persons potentially interested in the advertisers product at low prices.⁶³⁹ It also permits musicians with a small fan base to sell advertising “space” at low prices.

(7) Access to Celebrity

Revenue can be generated by selling direct access to the celebrity, much as political contributors making larger contributions get to see the candidate in a more intimate group setting, and even larger contributors get a “photo-op” with the candidate, a brief one-on-one meeting or even—it is rumored—a night in the Lincoln Bedroom of the White House. Adapting this idea to the popular music setting, a musician could give away CDs at a concert and sell the autograph session for \$25. Alternatively, he could offer a post-performance backstage “hangout” session for \$100 or more. Vir-

636. The noted names are examples of potential naming rights; the names do not reflect actual changes to band or individual names.

637. See generally Jon Pareles, *Songs From the Heart Of a Marketing Plan*, N.Y. TIMES, Dec. 28, 2008, at AR 1 (reporting growing tendency for pop musicians to license music for advertisements). Pareles notes that as many consumers “see no reason to pay for [recorded music], . . . [t]he emerging practical solution is to let music sell something else. . . .” *Id.*

638. See *Lyris HQ Web Analytics Software Solutions*, LYRIS INC., <http://www.lyris.com/solutions/lyris-hq/web-analytics/> (last visited Oct. 11, 2010) (detailing methods to track Internet marketing campaigns).

639. See *Micro Advertising*, www.webadvantage.net/webadbl-og/micro-advertising-145 (last visited Oct. 11, 2010) (providing definition of “mirco advertising”).

tual hangout sessions also could be offered, which would have more value if they include live audio, and perhaps video.

According to a survey conducted by the author of the twenty-one law students in his Entertainment Law Seminar in the Fall of 2009, the value of an actual meeting with performers (mean=\$150) dwarfed other possibilities, such as autographed CDs (mean=\$25) or music videos and Internet videos (none more than \$1, except \$5 for merch).⁶⁴⁰

Technology can be employed more aggressively capitalize on fan desire for access, as celebrity status builds. Bands can offer video games that permit individual fans to enter a virtual space and interact with realistic representations of the personalities of the band members.⁶⁴¹ As one might expect, Pete Wentz and Fall Out Boy are early adopters of this strategy.⁶⁴² Fans can log on to a special Web site that permits them to take part with Fall Out Boy in a concert tour in which the fans participate in making decisions that determine the success or failure of the tour.⁶⁴³ In an interview, Pete Wentz said that the game is part of the band's dedication to finding "ways for people to engage" with the band beyond albums.⁶⁴⁴ The technology used for the FOB game is primitive; much better software exists now. For example, the promoters of the Transformer series of movies offer a game.⁶⁴⁵ Video games are proliferating in which players control the personalities of the characters in the game.⁶⁴⁶ Electronic Arts' "The Sims 3," is a popular video game that focuses on social behavior, allowing players to de-

640. Henry H. Perritt, Jr., *Questionnaire results*, <http://www.kentlaw.edu/perritt/courses/semi-nar/questinnaire%20results%202.htm> (last visited Oct. 11, 2010). The author understands that these survey results are not statistically meaningful, both in terms of the skewed demographics of the survey respondents and because of the small sample size.

641. See Caryn Ganz, *Pete Wentz Explains the Birth of Online Video Game Fall Out Boy Trail*, "ROLLING STONE ROCK&ROLLDAILY, Mar. 9, 2009, <http://www.rollingstone.com/ro-ckdaily/index.php/2009/03/09/pete-wentz-explains-the-birth-of-online-video-game-fall-out-boy-trail/> (detailing interactive nature of band based online games).

642. See *id.* (discussing Fall Out Boy online games). Fans can access the game on the Internet. See Fall Out Boy Trail, FRIENDS OR ENEMIES.COM, <http://www.friendsorenemies.com/page/falloutboytrail-1> (last visited Oct. 11, 2010) (providing access for players to Fall Out Boy Trail online game).

643. See Ganz, *supra* note 641 (providing fans with opportunity for virtual concert tour).

644. See *id.* (saying game helps fans "engage" with band).

645. See *Transformers: The Game*, Amazon.com, www.amazon.com/transfoers-Game-Nintendo-Wii/dp/B000NjLVZO (last visited Oct. 11, 2010) (outlining features of Transformers: The Game).

646. See, e.g., *The Act: An Interactive Comedy*, THE ACT GAME, <http://www.theact-game.com/> (last visited Oct. 11, 2010) (explaining The Act is "a unique interactive

fine detailed characters according to user-selected personality traits.⁶⁴⁷ Players can create a new kind of a person that has unique desires in life that shapes their destinies in the game.⁶⁴⁸ These features are combined with high quality animation and moviemaking tools.⁶⁴⁹

Such techniques permit a band to design and deploy games that permit fans to create and interact in movies with the band members. The band members' personalities would be pre-defined by the band according to its selected persona.

Open-source software tools, discussed in Section V.B.3.b, reinforced by the explosion of experience in developing small applications for Apple's iPhone, will permit collaborative development of videogame technology that can reduce the historically high costs of videogame development.

(8) Revenue Results

The main differences between the business models for musicians operating without a new intermediary and the intermediary model are:

- Larger venues
- 180 days touring, compared with 54 days touring
- Larger fan base
- More revenue from advertising
- Revenue for music videos, and backstage hangout

An intermediary could expect a revenue stream of \$244,200 per year for each band, sufficient to produce a twenty-seven percent rate of return on invested capital, after a development period of three years.⁶⁵⁰ This revenue stream comprises about \$128,500 from public performances, about \$15,000 from Web-based advertising, about \$30,000 from sales of music videos, and about \$50,000 in payments for direct access to the musicians. It assumes only \$24,000 in revenue from sales of CDs and \$21,500 from sales of merch at performances.

film experience. . . . [in which] players control the personality, emotions, and actions of . . . the story's main character").

647. See *The Sims 3*, THE SIMS 3, <http://www.thesims3.com/> (last visited Oct. 11, 2010) (showing new Sims game coming out in Fall, 2010).

648. See *id.* (advertising Sims 3 game)

649. See *Create a Movie*, The Sims 3, <http://www.thesims3.com/moviesandmore/createmovie> (last visited Oct. 11, 2010) (detailing instructions for creating and publishing movies).

650. Based on the following assumptions:

b) Costs

(1) Total Costs, Including Costs of Tapping New Revenue Sources

The main differences between the business models for musicians operating without a new intermediary and the intermediary model are:

- Intermediary compensation
- Paid advertising
- Payment to musicians to cover opportunity costs
- Production of music video
- Production of video game

Marketing costs are the hardest to estimate, depending on the availability and efficacy of volunteer labor, such as street teams, and the scale and type of paid advertising used. A reasonable marketing plan for a new indie album would include mailing copies of the album in CD form to 500-1000 radio stations and music reviewers, at a cost of \$3,000.⁶⁵¹ Advertising costs range from five figures for advertising in major newspapers to single digits for behaviorally

Fan base	50,000
Opportunity cost payments to each band member	\$15,000 (based on minimum wage of \$7.25 per hour)
Compensation for agent	\$1,500 per month
Average venue size	250 seats (As celebrity status grows, the size of the venue can increase, thus improving financial performance)
Average ticket price	\$20
Touring days per year	180 (The same results could be achieved with fewer touring days per year if better scheduling results in more than five performances per week)
Gigs per week	5
Percentage of fans that attend public performances	64%
Music video price	\$30
Percentage of fans buying music videos	Two percent
Price of personal chat with musicians	\$25
Percentage of fans paying for personal chat	Two percent
Percent of fans clicking on ads	Ten percent

Advertising rates based on Google AdWords, described in *supra* 582-590 and accompanying text.

651. Actual cost of the CD approximating two dollars; postage for regular first-class mail of about \$1.60.

targeted advertising on search engines.⁶⁵² The weekly rate for a “home page cube” ad on www.chicagotribune.com is \$50,000, and \$10,000 for a “home page header.”⁶⁵³ Ads on Google’s AdWords service cost \$5 for an activation fee, and a minimum of one-cent per click, and 25 cents per thousand impressions.⁶⁵⁴ Advertisers can set a daily budget and a maximum cost—Google offers an example of a daily budget of \$5 and a maximum cost of ten cents per click. Advertisers are charged only if someone clicks on the ad, not when the ad is displayed.⁶⁵⁵ Contracting with a publicist costs on the order of \$1500 per month in the Chicago market. A serious six-month advertising campaign in which all services are paid for instead of being volunteered would cost \$15,000-\$100,000, depending on the amount of paid advertising used. The business model assumes paid advertising expenditures of \$15,000 per year.

(2) Bribes (“payola”)

In the past, a business model would have included expenditures for bribes to radio stations. Now, such “payola” is illegal, and it is therefore omitted as a cost item.⁶⁵⁶

One of the characteristics about economic and legal transactions in the music marketplace is the proliferation of various kinds of deals among different players. Musicians enter into contracts—usually separate contracts—with recording studios, public relations specialists, concert promoters and labels. Labels contract with distributors, retailers and advertising agencies. Music publishing companies and rights-enforcement collectives enter into contracts with musicians and with each other.

652. For a discussion of the range of advertising costs, see *infra* notes 629-43 (detailing advertising costs in music industry).

653. See *Ad Rates*, CHI. TRIB. INTERACTIVE, <http://www.tribuneinteractive.com/chicago/me-diakit/rates.htm> (last visited Oct. 12, 2010) (listing ad rates for Chicago Tribune).

654. See *Account Fees and Payment Options*, GOOGLE ADWORDS, <https://adwords.google.com/select/AfpoFinder?countryCode=US> (last visited Oct. 11, 2010) (listing Google Adwords advertising fees).

655. See *WHAT IS GOOGLE ADWORDS?*, <https://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6084> (last visited Oct. 12, 2010) (explaining Google Adwords policy).

656. See Communications Act of 1934, 47 U.S.C. § 317 (2006) (requiring broadcasters to disclose to their listeners or viewers if matter has aired in exchange for money or other consideration); see also 47 C.F.R. § 73.1212 (West 2010) (explaining sponsorship identification requirements promulgated by Federal Communications Commission for broadcasters’ responsibilities).

Some kinds of economic exchange, however, are disfavored, including payola.⁶⁵⁷ Caves explains why payola is common in the music industry and how it can be efficient.⁶⁵⁸ The prevalence of fixed costs encourages suppliers to reduce the effective price of their goods by offering a discount in the form of bribes.⁶⁵⁹ The infinite variety of available music and large volumes of new music provides incentives to persuade influencers to differentiate a supplier's product by offering bribes.⁶⁶⁰ Payola can be efficient because it increases revenue to music suppliers through enhanced CD and download sales to those who have heard a song featured on the radio.⁶⁶¹ Likewise, the radio station stands to gain because a pop record may attract listeners, who increase the station's popularity and its advertising revenue.⁶⁶² The enhanced sales and the increased size of the station audience swamps the cost of the bribes to the supplier and offsets any decrease in the station's ratings or profits for not playing songs that are "objectively" more popular.⁶⁶³ Because potential popularity is so difficult to determine "objectively," it is hard to say that selecting songs for radio play based on payola produces a worse result from a consumer's perspective than any other method of selection, including purely random selection. What may matter more than the quality of the selections is the repetition of particular songs.

Caves details all the techniques, including contests, sophisticated inter-corporate "pay for play" deals, and exchange-of-advertising placement for new coverage and favorable review, that permit music suppliers to evade statutory prohibitions on payola.⁶⁶⁴ Musi-

657. See Caves, *supra* note 9, at 286 (defining "payola" as "[A] bribe paid in order to influence a gatekeeper's choice among competing creative products").

658. See *id.* at 286-87 (describing logic of "payola").

659. See *id.* (explaining that prevalence of fixed, sunk costs in creative industries and potential for spillover effects from sales creates an incentive for seller to offer bribes or rebates to select buyers).

660. See *id.* at 287 (noting that infinite variety of creative goods and uncertainty of consumer preferences encourages record companies to offer price cuts or bribes to radio DJs and reluctant customers who might not otherwise broadcast or purchase product).

661. See *id.* ("Airplay causes some of these listeners to buy their own copies; the record label profits from those purchases").

662. See *id.* (asserting that pop records attract listeners, which leads to increased profits from advertising revenues).

663. See *id.* (explaining that any deviation from *best* playlist will lower the station's profits, but these can be "easily offset by a modest bribe.") (emphasis added).

664. See *id.* at 292-93 (describing how record industry responded after restrictions were placed on payola via Federal Bribery Act of 1960, and various loopholes in statute that record labels used to promote their products).

cians who have not achieved celebrity status are not well-positioned to engage in these forms of indirect payment.

3. *Capital Requirements and Return-on-Investment*

If a musician or an intermediary cannot construct a sustainable and credible business model, it makes no sense to talk about “capital requirements.” Any “investor” is providing a subsidy, not “capital” to an enterprise that has no realistic prospect of producing a return on investment. A realistic business model must cover the opportunity costs of human capital and produce sufficient revenue to provide a return above and beyond costs. Such a business model cannot be constructed if only traditional revenue sources are tapped. Viable business models depend on accessing new sources of revenue.

The business model offered here is one under which a new kind of intermediary—one might call him or her an “agent” or “manager”—coordinates the band’s efforts at music-making, image-creation, and promotion. A band spends three years writing enough music for one album, recording the album, distributing it publicly, and touring constantly when it is not in the studio. The intermediary gets the word out about their music and their performances. The musicians give up their day jobs during this three-year period, at the end of which they project sufficient revenue from both traditional and new sources to generate a 38.7% Return on Investment for the total amount invested. Such a plan must include sufficient capital to cover the following sources of cash outflows during the three-year development period:

Compensation for musicians to cover opportunity cost:	\$174,000 ⁶⁶⁵
Studio time:	\$7500
Duplication and distribution of albums:	\$5,000
Publicists:	\$54,000 ⁶⁶⁶
Touring costs:	\$47,250 ⁶⁶⁷

That results in a total capital requirement of \$287,750, and implies a revenue stream of at least \$244,232 annually and expenditures of

665. Assuming a minimum wage of \$7.25, times 2,000 hours per year, times four musicians, times three years.

666. Assuming publicist compensation of \$1500/month.

667. Assuming 180 days of touring per year, \$32.50 per day for gas, and fifty dollars per day for lodging.

\$119,250 annually thereafter to provide a 43.4% return-on-investment after the end of the 3-year development period.⁶⁶⁸

4. *Uncertainty*

The credibility of any business plan—for a musician or an intermediary—is undermined by uncertainty. A musician's work product—a song, an album, or a concert—may be a huge success in the marketplace, or it may be a failure or only a modest success.⁶⁶⁹ The failures vastly outnumber the modest successes, and these vastly outnumber the huge successes. Statistical methods permit analysis of these possibilities by decision-makers, including both musicians and potential investors, through probability functions, expected values, and variance. Some of the literature suggests, however, that luck matters more than definable characteristics of the music.⁶⁷⁰

A probability function is a mathematical equation, which can—and usually is—expressed in graphical form. Such a function represents the probability that a song will achieve a particular level of success. Probability is reflected as a number less than one, usually expressed in percentage terms. A graphical representation shows all of the possible levels of success and the height of the graphical line shows the probability. The familiar bell curve is a normal frequency distribution, in which a maximum probability, indicating the most likely outcome, is surrounded by two “tails” of similar shape, indicating that the probability of a very good outcome is exactly the same as the probability of a very poor outcome. Poor outcomes usually are represented to the left and better outcomes usually are represented to the right, on the horizontal or “X” axis.

668. This estimate is plausible, considering the amounts of capital benchmarked for indie music groups by innovators in off-label financing. See Brad Stone, *Musician, Market Yourself*, N.Y. TIMES, July 22, 2009, at B2 (reporting on new venture, “Polyphonic,” by manager of Radiohead, which has \$20 million in seed financing that Polyphonic plans to invest in chunks of \$300,000 in individual bands, emphasizing personal contact between musicians and fans as part of business model).

669. The following discussion, in the interest of simplicity, uses the term “song” to refer to any type of musical work, sound recording, or live performance, generated by a musician. See EISENBERG, *supra* note 2, at 18-19 (noting that labels cannot determine which records will be hits—“the millions of dollars spent on market research and promotion cannot psych out the buyer,” citing example of 1979 Kiss album which was “with much fanfare,” shipped to stores in quantities totaling “more than a million units . . . [that] came back almost untouched”).

670. See Kee H. Chung & Raymond A. K. Cox, *A Stochastic Model of Superstardom: An Application of the Yule Distribution*, 76 REV. OF ECON. & STAT. 771, 771-772 (1994) (noting that superstardom does not depend on being especially talented; it is a phenomenon of “luck”).

The probability function for the success of a song is not a normal distribution. The most probable outcome is that a song will earn nothing. As the level of possible success becomes greater, the probability of achieving it becomes smaller. Some songs become so popular that they earn tens of millions of dollars. The probability of any song achieving this level of success when it is first written is very small, but it is not zero. Any level of success, no matter how great, is theoretically possible. The right hand side of the probability function for music gradually approaches zero but never actually reaches it. This is what mathematics calls “asymptotically approaching” zero.

The poorer outcomes, on the left hand side, are more probable, but a song ordinarily will not earn less than zero, absent the unusual circumstance where a musician pays a fan to take the song or to come to the concert. That kind of outlay is better reflected as a cost than as negative revenue. There is no reason to expect that any particular outcome better than zero is more likely than any other, except that all better outcomes are less likely than all worse outcomes. It is plausible that the probability function will be at its maximum at the zero point on the outcome axis, and steadily decline as one moves further to the right. The most appropriate equation to express this is likely to be a decaying exponential function, which produces a declining curve that is concave and asymptotically approaches zero.⁶⁷¹

The “expected value” of any probability function can be calculated. It is simply the sum of the value of each outcome multiplied by its probability: the same thing as a weighted average or *mean*. The expected value of the revenue earned for any song is thus non-zero because there always is some small probability that the song will be a great success. For example if the community of indie musicians in Chicago creates 50,000 new songs a year, suppose only one is a hit, but the one hit earns \$10,000,000 in revenue.⁶⁷² The others are failures and earn zero. Considered after the fact, the probability

671.

$$f(x;\lambda) = \begin{cases} \lambda e^{-\lambda x}, & x \geq 0, \\ 0, & x \leq 0. \end{cases}$$

672. This is not an implausible figure. According to the Chicago Music Study, there were 10,778 MySpace music pages showing Chicago as the hometown in 2006. See Univ. of Chi., Cultural Policy Inst., *Chicago Music City: A Report on the Music Industry in Chicago*, (2006) available at http://www.chicago-music.org/wp-content/uploads/2008/12/chicagomusiccity_full-report.pdf at 39 (stating that Chicago came in fourth with 10,778 performers naming Chicago as hometown). If each of these musicians creates five new songs per year, the total would be 50,000 songs. If

of success was one out of 50,000, or .0002 percent—not very good odds.⁶⁷³ But the expected revenue was \$200 because of the large earnings of the one success.

While \$200 is not much money, it would be quite misleading for a musician or an investor to consider nothing more than the average revenue in seeking or planning an investment. Instead, a more realistic assessment of prospects for a return requires consideration of the *variance* as well as the mean. The variance represents the spread of outcomes around the mean or the dispersion of the distribution. Professor Cave's research, based on data collected in the 1990s, showed that income from creative endeavors has greater variance than day-job income and is more evenly distributed among artists who can support themselves solely from their art than among artists who depend on day-job income.⁶⁷⁴ This suggests that the lower one travels down on the status hierarchy, the greater the variance in revenues and income.

The job of the new intermediaries is to shift the probability function to increase the likelihood of celebrity status, while not eliminating uncertainty altogether.

In the business model calculations, certain of the assumptions are particularly prone to uncertainty. The projected sales of recorded music, music videos and videogames and advertising revenues are conservative. If a band's celebrity status mushrooms, they could be much larger. The assumed average venue size is reasonable, but if a band really catches on, the average venue size could be at least an order of magnitude larger and ticket prices could be higher as well. On the expenditure side, the paid advertising assumption is on the low side, and the production costs for the music video and the videogame similarly are on the low side.

It is entirely possible that the band may fall flat in the marketplace, despite all the intermediary's efforts and creativity. In that case, the revenues would be more like what the musicians could earn on their own, while the expenses are considerably higher. In that eventuality the investors would lose their investment and the intermediary would have difficulty attracting investors for other clients.

one wants to assume that only a fraction of these 10,000 sponsors of pages creates any new music, one can do the arithmetic to determine the number of new songs.

673. Economists call this "ex post."

674. See Caves, *supra* note 9, at 82 (noting that artists' incomes vary more among artists who depend solely on income from their art, and distribution curve elongates among artists who achieve superstardom, as compared with artists forced to derive income from so-called "humdrum occupations" or "day jobs").

B. Effect of Declining Efficacy of IP Protection: Making Money from Free Music

Given the concerns raised by the major labels that technology threatens the future of music because it undermines copyright protection, it is appropriate to comment on the relationship between policy balances constitutionalized by the Patents and Copyrights Clause and the probable evolution of the music market.

Copyright becomes mostly irrelevant in a market in which technology has reduced the cost of producing and distributing recorded music to near zero and competition has forced prices to these near-zero costs. It acknowledges that copyright still has a role to play in mitigating large-scale commercial piracy, and argues that trademark can play a major role in protecting the identities and personas of musicians.

Popular music will not disappear in such a legal environment; musicians will continue to make music even if their potential revenue from sales of recorded music diminishes or disappears. Still, money has to be generated for intermediaries, if not for musicians. Musicians might make music for the artistic gratification, but fewer intermediaries will facilitate access to it unless they can make money.

Any viable strategy in such an environment must begin with an understanding of what consumers *will* pay for. Three possibilities come to mind:

1. They will pay for access to celebrity, either actual, physical, access, or vicarious access.
2. They will pay for sons, daughters, nephews, nieces, and grandchildren to pursue their dreams.
3. They will pay for—and contribute to—civic advancement.

Each of these possibilities is considered in greater detail in the sections that follow.

Law has no role to play in providing incentives for the second and third, but it does have a role to play with respect to the first: it can protect the value of promoting celebrity.

Consider Pete Wentz, the most visible member of Fall Out Boy. Pete Wentz faces a potentially free-riding threat, not because people copy his music and try to sell it—there would be no demand for such pirated products; it is available all over the place for free. Consumers can get the real thing for free; they don't want the

counterfeit. A free ride in this reality is pretending to be Pete Wentz. And that is what trademark law protects against—passing off an imitation as the real thing.

In this environment, the goal for an indie musician, and those who invest in him, is to build celebrity status. The question, of course, for both musician and investor, is how to do that.

Defenders of the IP status quo in the music industry often ask rhetorically, “How can we compete with free?” The question implies that no business model exists for either musicians or intermediaries unless the flow of unlicensed music to consumers who do not pay anything for it is shut off. The implication is invalid. First off, challenge of “free” only applies to recorded music; concerts are not free because it is relatively easy to exclude those who have not paid.

Second, many very successful firms do compete with free. Cable television competes with over-the-air television which is free. Sellers of bottled water compete with free tap water. People buy music through iTunes even though they could get much or all the same music for free through peer-to-peer file sharing services.

The reason consumers are willing to pay and to pass up free in these circumstances is either avoidance of transaction cost if they pay or the availability of some improved service if they pay—more channels in the case of cable television; purer water in the case of bottled water.

The author always is willing to spend ninety-nine cents for a song or \$9.95 for an album through iTunes because it is so easy, compared with searching out the same music through a peer-to-peer service and then taking the risk of viruses or cumbersome performance or compatibility issues. Once musician/fan matching services have proven themselves, it is plausible that consumers will be willing to pay something, especially on a subscription basis, for the service, even though they theoretically could spend 200 days per year finding the music themselves. And of course, much of what is free to consumers is financed by advertisers.

The central argument of this article is that advances in technology and the resulting reductions in cost make recorded music essentially free. Old business models based on selling recorded music are deeply embedded in the thinking of persons interested in the future of the marketplace for music. They have difficulty understanding how any business model can exist when the most important product is free. Chris Anderson, author of *The Long Tail*, explains a diverse array of business models, in his subsequent book,

*Free: The Future of a Radical Price.*⁶⁷⁵ He describes the many historical examples of markets based on free—or heavily subsidized—goods such as free lunches in drinking establishments, safety razors, free product samples, and free long-distance-calling plans.⁶⁷⁶ He offers a prescription for making such a market successful, in the context of open-source software and hardware:

1. Build a community around free information and advice on a particular topic.
2. With that community's help, design some products that people want, and return the favor by making the products free in raw form.
3. Let those with more money than time/skill/risk-tolerance buy the more polished version of those products. (That may turn out to be almost everyone.)
4. Do it again and again, building a 40 percent profit margin into the products to pay the bills.⁶⁷⁷

While this plan has obvious conceptual links to the practices of the open source software movement, it can be adapted easily to popular music, at least conceptually.⁶⁷⁸ Expressed in its most basic form, it would look like this:

1. Build a community around the persona and music of a musician.
2. Involve the community in shaping the musical and other performance activities of the musician. Offer new songs free to this community and to others who might be motivated to join it.
3. Design and make available other products and activities that fans are willing to pay for. These might include more elaborate forms or mixes of the free songs, paid concerts, videos highlighting the personalities and social activities of the musicians, and special “backstage” opportunities for fans to interact with the musicians

675. Chris Anderson, *The Long Tail*, Dec. 11, 2009, <http://www.longtail.com>. See generally, CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* (Harper Collins 2009) (detailing theory that lower input costs and online niche markets have subverted traditional models of economic scarcity in pricing, allowing businesses to generate a profit by giving products away for free).

676. See *id.* at 40-54 (describing historical examples of free markets).

677. *Id.* at 69 (offering solutions to eliminate unfair consumer advantage in open source software movement).

678. See *id.* at 68-69 (briefly describing open-source software and hardware movements).

4. As celebrity status develops, sell targeted advertising opportunities to advertisers interested in the demographics of the fan group.⁶⁷⁹

This formula takes somewhat different forms from the perspectives of the musicians and of new kinds of music intermediaries.

VIII. CONCLUSION

In the end, the market will evolve successfully, lubricated by new technologies and entrepreneurial energy.

The music of the future may be performed and consumed at two levels, a celebrity level and an amateur level.⁶⁸⁰ The lower tier may take music back to a context resembling that of the turn of the 20th century. Most people enjoyed music in small communities of family and friends. Individuals would be able to play the piano or another instrument such as the fiddle, banjo, or harmonica. At almost every social event, people would gather around the piano and sing together. No one expected to make a living from their music.

The twenty-first century equivalent would not be family centered. Instead, it would be centered on informal communities of rock musicians in bands, who rehearse and record together. These musicians perform in jam sessions, rehearsals and small venues. Other members of their own music communities and friends are the main attendees of their events. Many of them may hope to make a living off of their music, but most will not. In the meantime, they enjoy performing and making new music, and their friends enjoy listening to it.

Celebrity will not vanish. Established celebrities—Bob Dylan, Paul McCartney, Green Day—will continue to draw admirers who seek a nostalgic connection with their younger years. In turn, younger generations will discover the artistic creativity of the “old guys.” Meteors, once unknown musicians who shoot into the forefront of public consciousness, such as Arcade Fire, Fall Out Boy, Vampire Weekend, will continue to emerge.

Outside the realm of celebrity, more people will get to make music, more musicians will get to share it, and more consumers will be able to enjoy a wider range of creative effort from more sources.

679. See *id.* at 69 (listing do-it-yourself plan for building successful markets).

680. For a further discussion on the two-tiered market, see *supra* notes 554-55 and accompanying text (explaining possibility that two-tiered market will emerge in pop music industry consisting of celebrity and amateur music groups, where latter group can only break through to mass consumer appeal and stardom through talent-search television programs, such as American Idol).

New intermediaries, spawned by the revolution, will help them find each other.

The new intermediaries will have the skills and creative imagination that enable them to tap new sources of revenue, to make money, and to attract investors who will make money, too. Through these new intermediaries, a handful of musicians will achieve celebrity status based on their development and presentation of their public personas. Consumers will be enthralled by their celebrity and identify with them. Investors will cash out through public offerings and corporate acquisitions in which the relevant intellectual property is trademark rather than copyright.

The major labels and their corporate bureaucrats will fade from the scene, much like Hollywood's studio system, the mass of newspaper linotype machines and stereotype plates in daily newspaper plants, typewriters, and analog tape drives were rendered obsolete by the entrance of new technologies. Some will be nostalgic for the old order, spinning urban legends about how it was better. Notwithstanding the legends, the new music will be better, created by a wider range of artists, and enjoyed by more consumers.