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## MUSIC MARKETS AND MYTHOLOGIES

HENRY H. PERRITT, JR.

### ABSTRACT

New technologies have started a revolution in the music marketplace. As new business models emerge, major firms in the popular music industry have mounted a campaign on the premise that the world of popular music faces a grave threat from illicit file sharing. This article makes the case against that campaign. It discusses how new technologies are currently reshaping the marketplace to allow a wider range of new artists, as well as more direct access between musicians and their fans. It also predicts how future demand for popular music will increase due to portability, and ultimately recommends directions for marketplace reform and the application of copyright law.

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## MUSIC MARKETS AND MYTHOLOGIES

HENRY H. PERRITT, JR.\*

### INTRODUCTION

The revolution in the marketplace for music is in its early stages. New technologies make available new ways to perform creation, intermediation, and consumption activities.<sup>1</sup> Some emerging enterprises are experimenting with new business models for connecting musicians with their fans.<sup>2</sup> As in the early days of e-commerce, circa 1998, it is too soon to know who will become hugely successful and who will fade from the scene. It is possible, however, to estimate the basic features of the new marketplace. It will not look at all like the old one.

Confronted with change, the major firms in the popular music industry<sup>3</sup> have mounted a major public-relations and litigation campaign premised on the idea that the world of popular music is under a grave threat.<sup>4</sup> This article debunks the myth propagated by dominant players in the current music industry that the problem is illicit file sharing. It explains how new technologies based on more powerful personal computers (“PCs”), portable music players, and the Internet are reshaping the marketplace for popular music so as to facilitate more direct access between

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\* Professor of Law, Chicago-Kent College of Law. The author is a songwriter who uses new technologies to record his music and then to make the music available through Internet-based intermediaries. See MODOFAC, <http://www.modofac.com> (last visited May 24, 2010); *Modofac on MySpace Music*, MYSPACE, <http://www.myspace.com/modofacprof> (last visited May 24, 2010); *Modofac, Wind Will Fill the Sails*, CD BABY, <http://www.cdbaby.com/cd/modofac>; <http://www.cdbaby.com/found?artist=&soundlike=&album=fire+for+colors&style=> (last visited May 24, 2010) (search for “Fire for the Colors” or “Tim Sandusky”); ITUNES, <http://www.apple.com/itunes> (last visited May 24, 2010) (search for “Modofac” in iTunes Store). He appreciates stimulating discussions about the future of music with his music collaborators Tim Sandusky, Jamie Gallagher, Aaron Allietta, and Darren Garvey, with indie musicians Dick Prall and Evan Sult, with his colleagues Graeme Dinwoodie, Tim Holbrook, Ron Staudt, Mickie Piatt, Ed Harris, and Richard Warner, with music attorney Albert Gieseman, and with his present and former students Ben Shanbaum, Matt Topic, and Kurt Iselt. The author’s involvement with business models and the role of IP in the entertainment industry proceeds from his having written and produced a rock opera, *You Took Away My Flag: A Musical About Kosovo*, which played to four sold-out houses and favorable audience reaction at Strawdog Theatre in Chicago in June, 2009, and was reopened for an eight-week run at Theatre Building Chicago in 2010. See *YOU TOOK AWAY MY FLAG – A MUSICAL ABOUT KOSOVO*, [www.youtookawaymyflag.com](http://www.youtookawaymyflag.com) (last visited June 20, 2010).

<sup>1</sup> See Jon Pareles, *A World of Megabeats and Megabytes*, N.Y. TIMES, Jan. 3, 2010, at AR1.

<sup>2</sup> See *id.*

<sup>3</sup> 1 ROBERT LIND ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 1.142 (2008) (noting that the Recording Industry Association of America represents the interests of the recording industry); Frank Ahrens, *Music Industry Sues Online Song Swappers; Trade Group Says First Batch of Lawsuits Targets 261 Major Offenders*, WASH. POST, Sept. 9, 2003, at A01 (noting that the Recording Industry Association of America represents the music industry’s five largest music companies of Universal Music, Sony Music Entertainment, Warner Music Group, BMG Entertainment and EMI).

<sup>4</sup> RIAA to Stop Mass Lawsuits, ROLLING STONE, Feb. 5, 2009, at 18 (“After suing 35,000 people since September 2003 for illegally sharing music files online, the Recording Industry Association of America announced in December that it has halted its controversial lawsuit campaign.”).

musicians and their fans. It predicts that the overall demand for popular music will continue to increase because music is becoming more portable, that opportunities will increase for “indie” musicians,<sup>5</sup> even as the fortunes of the major record labels are eclipsed. It concludes by recommending some general directions for reform and application of copyright law in the new marketplace, and by describing new business models and labor markets for musicians.

### I. THE MYTH VERSUS THE FACTS

If one were to believe the drumbeat of the major music labels, the world of music is facing a catastrophe. A future without music looms unless intellectual property laws are strengthened to expand the labels’ control over how music is distributed and consumed. Their message comprises four propositions:

*CDs (“Compact Discs”) are music.* The major labels publicize declines in CD sales as though those declines represent a decline in the willingness of consumers to pay for music.<sup>6</sup>

*The major labels promote art.* They characterize their own interests as equivalent to the interests of musicians.<sup>7</sup>

*Thieves are ruining everything.* Consumers are less willing to pay for music and thus reward artists for their artistic efforts, the labels say, because of the misconduct of “thieves”—pirates who sell music of others below the cost of creating it and depraved high-school and college students who proliferate free copies.<sup>8</sup>

*Protecting copyright should be at the center of American foreign policy.* They are distorting American foreign policy, inducing public officials to move intellectual

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<sup>5</sup> “Indie” musicians are independent musicians without major record label deals. Stephen Lee, *Re-Examining the Concept of the ‘Independent’ Record Company: The Case of Wax Trax! Records*, 14 *POPULAR MUSIC* 13, 13 (1995).

<sup>6</sup> See *Piracy: Online and on the Street*, RECORDING INDUSTRY ASS’N AM., <http://www.riaa.com/physicalpiracy.php> (last visited May 24, 2010) (“It’s commonly known as piracy, but it’s a too benign term that doesn’t even begin to adequately describe the toll that music theft takes on the many artists, songwriters, musicians, record label employees and others whose hard work and great talent make music possible.”).

<sup>7</sup> See *Who We Are*, RECORDING INDUSTRY ASS’N AM., <http://riaa.com/aboutus.php> (last visited May 24, 2010).

The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA® members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States.

*In support of this mission, the RIAA works to protect the intellectual property and First Amendment rights of artists . . .*

*Id.* (emphasis added).

<sup>8</sup> Michael Carney, *File Sharers Sued; Music Industry Cracks Down on Internet ‘Piracy’*, WASH. TIMES, July 16, 2003, at A2; see Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 *VILL. L. REV.* 13, 58–59 (2003).

property protection to near the top of the list of priorities for negotiations with major powers such as China, Russia and India, and with scores of developing nations.<sup>9</sup>

The facts are out of synch with the drumbeat.

*The real goal is to stifle competition enabled by new technologies.* The major labels' trade association, the Recording Industry Association of America ("RIAA"), has filed some 20,000 lawsuits, most against individuals engaged in file sharing.<sup>10</sup> Most of the suits do not go to trial because the RIAA employs contract collection agencies that threaten the defendants with ruin unless they "settle" for \$8,000 to \$10,000, depending on the apparent wealth and income of the defendant.<sup>11</sup> The courts have been sluggish in punishing such abusive practices.<sup>12</sup> It's as though the law had empowered typewriter manufacturers to launch a blizzard of lawsuits to discourage the early use of word-processing software and hardware.

The avalanche of litigation is only the latest in a long tradition of major interests in the music industry trying to stifle competition resulting from new technology. Music rights holders fought phonographs<sup>13</sup> and music radio in its early days.<sup>14</sup> The major labels were found by the Federal Trade Commission to have violated the anti-trust laws in the late 1990s by prohibiting retailers from selling music CDs at discounted prices.<sup>15</sup> The industry's campaign against use of the new technologies began before it was possible to buy music in digital formats. The industry had made sure of that by refusing to offer its catalog in any of the new formats until relatively recently.<sup>16</sup>

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<sup>9</sup> See David Lague, *U.S. Official Presses China to Punish Piracy*, N.Y. TIMES (Nov. 15, 2006), [http://www.nytimes.com/2006/11/15/business/worldbusiness/15yuan.html?\\_r=1&adxnml=1&adxnmlx=1267293993-zEThyTWvQA+06mRJqIqN+Q](http://www.nytimes.com/2006/11/15/business/worldbusiness/15yuan.html?_r=1&adxnml=1&adxnmlx=1267293993-zEThyTWvQA+06mRJqIqN+Q) (reporting on U.S. Commerce Secretary's call to China to reduce infringement of U.S. intellectual property).

<sup>10</sup> *File Sharing*, ELECTRONIC FRONTIER FOUND., <http://www EFF.org/issues/file-sharing> (last visited May 24, 2010) (describing the abusive nature of music-label litigation); see ELEC. FRONTIER FOUND., *RIAA v. THE PEOPLE: FIVE YEARS LATER* 4–5 (2008), <http://www EFF.org/files/eff-riaa-whitepaper.pdf> (describing litigation and collection practices).

<sup>11</sup> See David Canton, *Peer-to-Peer Filing Sharing Now a Fact of Internet Life*, LONDON FREE PRESS (Ontario), Nov. 3, 2008, at BM5 (explaining that the RIAA threatens "individuals with expensive litigation . . . that leaves a lay person with no alternative but to settle for amounts ranging from \$3,000 to \$11,000").

<sup>12</sup> See *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 928–39 (9th Cir. 2006) (rejecting Racketeer Influenced and Corrupt Organizations Act claims against satellite television service that sent more than 10,000 demand letters to consumers asserting legal claims that were "weak").

<sup>13</sup> See *Stern v. Rosey*, 17 App. D.C. 562, 564–66 (D.C. Cir. 1901) (affirming dismissal of suit by music rights holder against seller of phonograph wax cylinders).

<sup>14</sup> See, e.g., *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 195–202 (1931) (holding that, in suit for injunction against a hotel, radio broadcasts of copyrighted songs made available to hotel guests, constituted a "public performance" of the works).

<sup>15</sup> See *Market for Prerecorded Music, Statement of Chairman Robert Pitofsky & Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, & Thomas B. Leary*, FED. TRADE COMMISSION, <http://www.ftc.gov/os/2000/09/musicstatement.htm> (last visited May 24, 2010); Press Release, Fed. Trade Comm'n, Record Companies Settle FTC Charges of Restraining Competition in CD Music Mkt.: All Five Major Music Distributors Agree to Abandon Advertising Pricing Policies (May 10, 2000), <http://www.ftc.gov/opa/2000/05/cdpres.shtm>.

<sup>16</sup> See, e.g., Patrick Foster, *Record Companies Have a Trick Up Their Sleeve for Downloads: Big Four Challenge Apple with Online Album Format*, THE TIMES (London), Aug. 8, 2009, at 28, available at [http://business.timesonline.co.uk/tol/business/industry\\_sectors/media/article6788159.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/media/article6788159.ece).

The major record labels would not, of course, have attained their present size if they did not perform a useful function in the market. The problem they face, however, is not that they suddenly are under attack by teenage pirates; the problem is that the intermediation activities they have organized their bureaucracies to perform have become obsolete because of new technologies. In a music marketplace characterized by live performances in huge venues, recording of music on analog tape, sales of recorded music on physical artifacts such as vinyl records, cassette tapes and CDs, and over-the-air radio broadcasts, the major labels aggregated capital for capital-intensive recording sessions and concert promotion and production.<sup>17</sup> They selected what they thought were the best among hundreds of thousands of aspiring musicians and signed “record deals” with them, managed the manufacturing process for the physical recordings, advertised their rock stars and other talent through their network of paid contacts with radio stations, music reviewers, and brick-and-mortar retailers, and warehoused and distributed the physical recordings.<sup>18</sup>

But the institutional context in which the major labels have a comparative advantage is melting away like an iceberg under them.<sup>19</sup> The threat they face is not one of attack on their property, but irrelevance. Analysis of the relative cost and efficiency of old versus new methods for selecting, recording, performing, distributing, and promoting music shows that a new architecture for the music marketplace is emerging quickly, an architecture which has little need for what the major labels do well.<sup>20</sup>

*Music revenue is increasing even as sales of physical units decline.* To be sure, revenue from CD sales has declined dramatically, and the decline continues, often accelerating, with each recent reporting period.<sup>21</sup> 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.<sup>22</sup> Sales of CDs have declined every year from 2004 to 2008, by 8% from 2004–2005, 12% from 2005–2006, 17% from 2006–2007, 25% from 2007–2008, and 20.5% from 2008–2009.<sup>23</sup>

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<sup>17</sup> See PATRICK BURKART & TOM MCCOURT, *DIGITAL MUSIC WARS: OWNERSHIP AND CONTROL OF THE CELESTIAL JUKEBOX* 18 (2006).

<sup>18</sup> See *id.*

<sup>19</sup> See *The Music Industry: From Major to Minor*, *ECONOMIST*, Jan. 12, 2008, at 80.

<sup>20</sup> See Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 *HASTINGS COMM. & ENT. L.J.* 259, 320 (2007) (exploring changing economics of music production, distribution and consumption, and relationship between these changes and copyright law).

<sup>21</sup> See RECORDING INDUS. ASS'N OF AM., 2008 YEAR-END SHIPMENT STATISTICS, MANUFACTURER'S UNIT SHIPMENTS AND RETAIL DOLLAR VALUE (2008), <http://76.74.24.142/D5664E44-B9F7-69E0-5ABD-B605F2EB6EF2.pdf> [hereinafter RIAA 2008] (showing a 26.6% decline in CD sales from 2007 to 2008); RECORDING INDUS. ASS'N OF AM., 2006 RIAA MID-YEAR STATISTICS, MANUFACTURER'S UNIT SHIPMENTS AND DOLLAR VALUE (2006), <http://76.74.24.142/0E3C72C6-4D76-AA00-E4E0-C62025A87126.pdf> [hereinafter RIAA 2006] (showing a 13.9% decline in CD unit sales for the first-six months of 2006, compared with a similar period of 2005).

<sup>22</sup> See Glenn Peoples, *Analysis: The Digital Revenue Slowdown*, *BILLBOARD.BIZ* (Sept. 8, 2009), [http://www.billboard.biz/bbbiz/content\\_display/industry/e3ia3f2289d03ed2216c96c78087debf9f1](http://www.billboard.biz/bbbiz/content_display/industry/e3ia3f2289d03ed2216c96c78087debf9f1).

<sup>23</sup> RECORDING INDUS. ASS'N OF AM., 2007 YEAR-END SHIPMENT STATISTICS, MANUFACTURERS' UNIT SHIPMENTS AND RETAIL DOLLAR VALUE (2007), <http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf> [hereinafter RIAA 2007]; see RIAA 2008, *supra* note 21; RECORDING INDUS. ASS'N OF AM., 2009 YEAR-END SHIPMENT STATISTICS, MANUFACTURERS' UNIT SHIPMENTS

Sales for 2008 were down 55%, compared with 1998.<sup>24</sup> Revenue from CD sales was down by a similar amount.<sup>25</sup> Over the same five 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.<sup>26</sup> Unit sales of digital albums increased 198% 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.<sup>27</sup>

Moreover—and this is the important part—the total number of digital sales was over 1 billion in 2009, exceeding 385 million total shipments of CDs.<sup>28</sup> Digital album sales were much less—76 million.<sup>29</sup>

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.<sup>30</sup> 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.

Despite the explosion in demand for downloadable digital formats, the revenue flows are much less than for CDs.<sup>31</sup> Total revenues from digital sales were \$2 billion in 2009, compared to \$4.2 billion for CDs shipped in the same year.<sup>32</sup> 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 CD sales are album sales), and the consumer preference for singles.<sup>33</sup>

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<sup>34</sup> or on their MySpace<sup>35</sup> and YouTube

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AND RETAIL DOLLAR VALUE (2009), <http://76.74.24.142/A200B8A7-6BBF-EF15-3038-582014919F78.pdf> [hereinafter RIAA 2009].

<sup>24</sup> See Edna Gundersen, *Moving in All Directions: Sales Slides, Pirates Aplenty, Microtrends in Pop – All Altered by the Internet*, USA TODAY, Dec. 29, 2009, § Life, at 1D.

<sup>25</sup> RIAA 2009, *supra* note 23 (reporting revenue down 21.9% from 2008); RIAA 2008, *supra* note 21 (reporting physical CD shipments down 26.6% and Total Retail Revenue for physical shipments down 27%); see also RIAA 2007, *supra* note 23 (showing ten-year numbers that illustrate the gradual decline of physical sales).

<sup>26</sup> RIAA 2009, *supra* note 23; RIAA 2008, *supra* note 21; RIAA 2007, *supra* note 23.

<sup>27</sup> RIAA 2009, *supra* note 23; RIAA 2008, *supra* note 21; RIAA 2007, *supra* note 23.

<sup>28</sup> RIAA 2009, *supra* note 23; RIAA 2008, *supra* note 21.

<sup>29</sup> RIAA 2009, *supra* note 23.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> *Id.*

<sup>33</sup> RIAA 2008, *supra* note 21 (taking the “Dollar Value” of both digital singles and physical CDs for 2008 and dividing it by “Units Shipped” for 2008 yielded an average price of \$0.99 per digital download and \$14.22 per CD).

<sup>34</sup> *E.g.*, COLDPLAY, <http://www.coldplay.com/recordings.php> (last visited May 25, 2010).

<sup>35</sup> MYSPACE, <http://www.myspace.com/> (last visited May 25, 2010).

pages,<sup>36</sup> as well as from music services such as iTunes.<sup>37</sup> 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.

*Manufacturing and distribution costs are approaching zero.* Apple iTunes is able to sell digital music at \$0.99 per song and artists are able to sell songs for less than that and still make money because the combination of digital formats, the Internet, and pervasive e-commerce utilities, have reduced the cost of reproducing and distributing music almost to zero, jerking the rug out from under a business model in which manufacturing and distribution costs dwarf other cost elements.<sup>38</sup> In addition, the same and related technologies have dramatically reduced the costs of producing music, rendering obsolete other aspects of the business model in which access to capital-intensive recording and mastering has to be rationed to allow access only to those with the highest probability of producing blockbuster songs.<sup>39</sup>

*Advertising and promotion must be performed through new channels.* Outreach to potential fans through the Internet and blog reaction to new music has become more important than traditional advertising channels, rendering mostly obsolete expertise, relationships and embedded capital tied to old channels. As reduced barriers to entry increase the supply of music available to consumers, and as portability of music increases demand, tools to help consumers find new music have become even more important than before, but the relevant tools are new and have different economics from the old approaches of promotion and payola.

*Tied sales of songs are unpopular.* In 2009, 94% of the digital sales (by unit) were singles and 6% were albums. By contrast, in the same year, 99.7% of the physical CD sales were albums and 0.3% were singles.<sup>40</sup> Consumers now can purchase only the songs they want rather than having to purchase a collection of songs bundled by the dozen on CDs.<sup>41</sup> The CD format ties less popular songs (or those the sellers believe would be less popular) to more popular songs. Now that consumers are free to purchase only what they want, they buy fewer copies of the less popular songs. Suppliers no longer can “push” songs by tying them to the coattails of other songs. This is not a bad thing for consumers, but it reduces revenue for suppliers of less popular songs.

Based on RIAA figures, consumers bought 37 million fewer CD albums in the first half of 2006 than in the first half of 2005.<sup>42</sup> They bought 119 million more digital singles and 6.5 million more digital albums.<sup>43</sup> That is about 30 million fewer

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<sup>36</sup> YOUTUBE, <http://www.youtube.com> (last visited May 25, 2010).

<sup>37</sup> See ITUNES, <http://www.apple.com/itunes/> (last visited May 25, 2010).

<sup>38</sup> Christopher Sprigman, *The 99¢ Question*, 5 J. TELECOMM. & HIGH TECH. L. 87, 87–89 (2006).

<sup>39</sup> See Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 689–90 (2009).

<sup>40</sup> RIAA 2009, *supra* note 23 (reporting total digital single sales of 1138.3 million; total digital album sales of 76.4 million; total physical CD single sales of 0.9 million; total physical album sales of 292.0 million).

<sup>41</sup> See Jeff Leeds, *With CD Sales Falling, Labels Seek New Deals with Apple*, N.Y. TIMES, Mar. 26, 2007, at C1 [hereinafter Leeds, *CD Sales Falling*].

<sup>42</sup> RIAA 2006, *supra* note 21.

<sup>43</sup> *Id.*

album sales.<sup>44</sup> If one assumes twelve songs per album, that represents a decline of 360 million in sales of individual songs. The increase in digital single sales was 119 million or almost exactly a third of the loss in individual songs on album formats.<sup>45</sup> That consumers who are free to buy only what they want would choose to buy only about a third of what is available on albums is plausible.

*As the portability of music increases, so does demand.* Meanwhile, consumers are enjoying more music, not less. They are not at the mercy of major-label A&R personnel and executives to define their tastes. They get cheaper music. They can buy only the songs they want. The possibility of carrying hundreds of songs in their shirt pockets and listening to them whenever they want is not only more attractive than standing in line at the checkout counter to buy CDs selected from a limited inventory, it likely increases the overall demand for music because it opens up more hours per day during which it can be enjoyed.

The established industry was slow to satisfy this new demand.<sup>46</sup> The attractiveness of the new technologies was strong enough that new enterprises sprang up to supply the exploding demand for music in .mp3 formats.<sup>47</sup> It was not as though someone went to a 7-Eleven store where magazines were offered for sale and elected to steal one instead. It is more like a situation in which 7-Eleven refused to sell magazines and had made commercial deals with potential importers to prevent them from importing, and people wanting to read magazines smuggled them in. Smuggling, like copyright infringement, is illegal.<sup>48</sup> But copyright infringement in the form of unlicensed conversion of music to .mp3 formats and trading in those formats exploded only when the established industry tried to block the use of new technologies with significant consumer benefits.<sup>49</sup>

Since the mid 1990s, of course, it has been possible to buy .mp3 files over the Internet and sales have mushroomed.<sup>50</sup> People are perfectly willing to buy digital music, and only now is the industry beginning to cooperate fully in making music available in those formats, while pressuring Steve Jobs to raise prices for iTunes, and trying to throw a litigation monkey wrench into the works of the phenomenally successful MySpace.<sup>51</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See John Tehranian, *All Rights Reversed? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 77–78 (2003).

<sup>47</sup> See Nicola F. Sharpe & Olufunmilayo B. Arewa, *Is Apple Playing Fair? Navigating the iPod Fairplay DRM Controversy*, 5 NW. J. TECH. & INTELL. PROP. 332, 337–38 (2007), <http://www.law.northwestern.edu/journals/njtip/v5/n2/5/>.

<sup>48</sup> 17 U.S.C. §§ 501, 506(a) (2006) (copyright infringement); 18 U.S.C. § 545 (2006) (smuggling).

<sup>49</sup> See *generally* STEVE KNOPPER, APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE (2009) (describing specific instances in which established music industry tried to block, rather than adapting to, new ways of making and distributing popular music).

<sup>50</sup> See Sharpe & Arewa, *supra* note 47, at 337–38.

<sup>51</sup> See *UMG Recordings, Inc. v. MySpace, Inc.*, 526 F. Supp. 2d 1046, 1053–54 (C.D. Cal. 2007). The complaint alleges widespread infringement by MySpace subscribers. Complaint for Direct, Contributory, and Vicarious Copyright Infringement, for Inducement of Copyright Infringement, and for Violations of California Business and Professions Code § 17200 ¶¶ 19–20, *UMG Recordings, Inc. v. MySpace, Inc.*, 526 F. Supp. 2d 1046 (C.D. Cal. 2007) (No. CV 06-07361 AHM (AJWx)).



It surely is not immoral for the major labels to try to protect a past technology that produces higher margins, nor for the Tower Records of the world to try to protect a business that arose to manage transaction costs that are no longer present. But the problem for the labels is a backward looking business philosophy, not an erosion of morals in those who want to listen to music in the most convenient way possible.

*The increased competition and the demise of traditional gatekeepers means a sharp reduction in prices—approaching zero—for recorded music.* In a competitive market, prices approach marginal costs.<sup>52</sup> The marginal cost of a copy of an .mp3 file is effectively zero.<sup>53</sup> That means that prices for recorded music are trending inexorably toward zero.

*Copyright is unenforceable and hence essentially irrelevant except at the margins of the new order.* Pervasive enforcement of copyright in connection with most exchanges of recorded music at the consumer level is impracticable.<sup>54</sup> It cannot be done without imposing significant new burdens on Internet intermediaries,<sup>55</sup> 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 intellectual property (“IP”) infringement.

The same is true of the web hosting sites on which musicians 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 it.<sup>56</sup>

Copyright protection for recorded music at the consumer level has become essentially unenforceable.<sup>57</sup> Digital recording technologies make it possible to produce perfect copies of recorded music cheaply and quickly.<sup>58</sup> Compression algorithms embedded in software known as “codecs” produce relatively small files that can be distributed in a few seconds via the Internet.<sup>59</sup>

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.

*New institutions for managing consumer search costs and musician promotion are emerging.*

“Time is money.” Time also is not unlimited. 350,000 new songs were released on CD format in 2006. If each one takes three minutes to play, and the average consumer listens to only one minute before deciding whether he

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<sup>52</sup> See DONALD STEVENSON WATSON & MALCOLM GETZ, PRICE THEORY AND ITS USES 219–29 (5th ed. 1981) (1963) (deriving short-term equilibrium price).

<sup>53</sup> Sprigman, *supra* note 38, at 88–89.

<sup>54</sup> See Robert J. Delchin, *Musical Copyright Law: Past, Present and Future of Online Music Distribution*, 22 CARDOZO ARTS & ENT. L.J. 343, 395 (2004).

<sup>55</sup> See 17 U.S.C. § 512(d) (2006).

<sup>56</sup> See Schultz, *supra* note 39, at 689.

<sup>57</sup> See Delchin, *supra* note 54, at 350.

<sup>58</sup> *Id.* at 350–51.

<sup>59</sup> See *id.* at 350–52.

likes it, it would require 350,000 minutes, or about 6,000 hours to sample all of them. That is 250 days per year, without allowing any time for sleep. No one is that compulsive about music[—let alone] the physiological problems of sleep deprivation. [Furthermore,] that does not allow for the other new songs created each year that never get released on CDs by major record labels[, which] surely number in the tens of millions. So consumers need some way to reduce search costs.<sup>60</sup>

Under the old model, the labels reduced search costs by selecting only a small fraction of available music to produce, promote, distribute, and sell, leaving musicians without a major record label deal mostly out of the marketplace. Radio stations exposed potential consumers to new music, almost all of it sold by the major labels.<sup>61</sup> Press and media coverage was focused primarily on artists with major record label deals.<sup>62</sup>

The most interesting question about the evolution of the new marketplace, considered in the next section, is the shape new kinds of intermediaries will take as they meet the needs of consumers to manage search costs, and the needs of musicians to make consumers aware of their music.<sup>63</sup>

## II. WHAT TO EXPECT IN THE FUTURE

The future of popular music will be determined by the same motivations and patterns of behavior that have defined the music marketplace of the past. Artists and consumers will continue to behave pretty much as they have in the past.<sup>64</sup> What will be dramatically different is that they will have different tools.

Most consumers, though interested in discovering new music, will remain relatively passive. Few will aggressively browse the Web to discover new musicians. Musicians will still have to push their message and their songs to consumers; just putting a new song or album on the Web will not be enough to attract fans.<sup>65</sup> New intermediaries must help consumers manage search costs and help artists push their music to consumers. “Push,” of course, reduces search costs; a consumer need not go out seeking music; he gets it put in his earbuds.

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<sup>60</sup> Perritt, Jr., *supra* note 20, at 313–14.

<sup>61</sup> See Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 *TOURO L. REV.* 375, 395–97, 399 (2006).

<sup>62</sup> See *id.* at 394–95.

<sup>63</sup> See Jon Pareles, 2006, *Brought To You By You*, *N.Y. TIMES*, Dec. 10, 2006, § 2, at 1 (reporting that the Internet has become an “incessant public audition,” diluting the winnowing down once performed by record label A & R departments, but multiplying choices “promise ever more diversity, ever more possibility for innovation and unexpected delight”).

<sup>64</sup> See RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* 2–10 (Harvard Univ. Press 2000) (summarizing characteristics of creators and consumers). The Caves book presents a probing analysis by a distinguished Harvard economist of the peculiar characteristics of markets for music, theater, film, and visual art. *Id.*

<sup>65</sup> Some surfing occurs, however, for example, indie musician Dick Prall got a Volkswagen car-show deal for several of his songs because the advertising agency surfed MySpace and liked the music he posted there for downloading. See *Dick Prall Biography*, ARTISTDIRECT MUSIC, <http://www.artistdirect.com/artist/bio/dick-prall/1111496> (last visited May 26, 2010).

Mere awareness by consumers often is not enough.<sup>66</sup> What musicians also need is some way to build attachment by fans—a sense of affiliation between a performer and fans. Fan clubs have been a feature of the entertainment industry for a long time. New applications by intermediaries such as MySpace “friends” make it easier to build attachment—though being displayed as a “friend” of Oucho Sparks<sup>67</sup> is not like Dick Prall<sup>68</sup> putting his arm around you after a concert and autographing his CD while smiling and looking you in the eye.

*iTunes and imitators will dominate and their availability will increase demand.* Industry statistics cited earlier in this paper show that sales of digital formats over the Internet are accelerating as CD sales decline.<sup>69</sup> Consumers are shifting their purchases from CDs to downloadable and portable formats, while overall demand is increasing.<sup>70</sup>

The portability of music in digital formats contained on shirt-pocket-sized players increases the number of hours in each consumer’s day when he or she can listen to music. The ease of purchase and downloading formats directly into portable players from retail sites like iTunes and from artists’ websites reduces the inconvenience of buying new music. The result will be a significant increase in the demand for music.

While firm data is not yet available to substantiate this prediction, the explosive upsurge in purchases of music from iTunes reinforces the prediction. Even as prices fall because of lower costs for promotion and distribution, the increased demand will enlarge the total revenue stream available for musicians.

*Major labels will decline.* The market share for major labels will continue to decline. Music intermediaries historically have (a) assembled capital for investment in new music production, provided (b) production, (c) publication, and (d) distribution functions, (e) promoted new music to make consumers aware of it, and (f) “filtered” new music to reduce consumer search costs.<sup>71</sup>

Major labels represent an institutional structure designed for the past—a past in which the most important forms of intermediation were artist-selection to reduce consumer search costs, advertising, promotion and distribution of physical formats. Their enterprises are structured to reflect the economies of scale of CD manufacture, promotion of radio play by staffs of agents, and advertising in major publications.

Few enterprises are able to resist the desire to protect short-term revenue streams to support existing infrastructure and bureaucracy. The major labels will

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<sup>66</sup> See Jenny Eliscu et al., *Indie Rock Around the Clock*, ROLLING STONE, Nov. 30, 2006, at 34 (“It’s kind of absurd how many bands are [at the October 2006 CMJ Music Marathon].” (quoting Ryan Frederiksen, guitarist, These Arms Are Snakes)).

<sup>67</sup> Oucho Sparks is an indie rock group in Chicago. See *Oucho Sparks on MySpace Music – Free Streaming MP3s, Pictures & Music Downloads*, MYSPACE.COM, [www.myspace.com/ouchosparks](http://www.myspace.com/ouchosparks) (last visited May 26, 2010).

<sup>68</sup> Dick Prall is an indie singer-songwriter in Chicago. See *Dick Prall on MySpace Music – Free Streaming MP3s, Pictures & Music Downloads*, MYSPACE.COM, [www.myspace.com/dickprall](http://www.myspace.com/dickprall) (last visited May 26, 2010).

<sup>69</sup> RIAA 2008, *supra* note 21; RIAA 2007, *supra* note 23.

<sup>70</sup> See RIAA 2008, *supra* note 21; RIAA 2007, *supra* note 23.

<sup>71</sup> See Thomas F. Cotter, *Some Observations on the Law and Economics of Intermediaries*, 2006 MICH. ST. L. REV. 67, 69–70, 75–77 (2006) (identifying historic functions; music intermediaries still needed to perform filtering function, even if other functions have been overtaken by technology which permits them to be performed in other, cheaper ways).

continue to divert resources into suing users of the new technologies; they will seek price increases for digital formats, and only grudgingly make their catalogs available to new distribution channels, encumbering them with digital rights management (“DRM”).<sup>72</sup>

Meanwhile, more artists will bypass the major labels, choosing to reach consumers directly or through new firms that have grown up around the new technologies.

*CDs are dead and radio may be next.* Few reasons exist to motivate a rational consumer of music to buy a CD from a brick-and-mortar retailer instead of downloading music from iTunes or from artist websites. CDs are inconvenient to buy; they require additional steps to transform the music contained on them into formats that can be played on portable music players. Additionally, the graphics, lyrics, and other text until recently available only on CD liners now are available for downloading and presentation on music players with video capability.<sup>73</sup>

As will any market transition driven by technology change, the transition in music formats will be incremental and the demand for CDs will never disappear altogether. Some consumers still prefer vinyl records and a few specialty shops still carry them. Nevertheless, within three to five years, CDs will be as much an artifact of the past as vinyl records and cassette tapes.

Music radio (including music played on general-programming stations) was a step toward portability of music consumption, now largely eclipsed by the greater ease and control of playing music on portable players. Music radio also helps to reduce search costs, helping consumers to discover new music. Radio will continue to have some role; it requires no intervention by consumers except to turn the radio receiver on and select the station. Some consumers some of the time will prefer the nearly complete passivity of listening that radio permits; even an iPod requires some greater effort to select particular songs, artists, or playlists. Also, some new music will continue to be discovered by consumers listening to the radio.<sup>74</sup>

A significant shift already is occurring, not only from listening to music on portable players instead of on the radio, but also from discovering new music through Web browsing instead of by listening to the radio. The existence of the shift is manifested by reduced interest by investors in owning music-oriented radio stations and the trend toward divestiture of radio stations by those already owning them.<sup>75</sup>

*As labels retreat and contract they will provide even fewer opportunities for musicians.* As the conglomerates that own major record labels retrench in the face of declining demand for the music formats in which they specialize and the means of intermediation they represent, less capital will be available to finance their approach

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<sup>72</sup> Cf. Pareles, *supra* note 63 (stating that the music industry will have to “remake itself with lower and more sustainable expectations along the lines of how independent labels already work”).

<sup>73</sup> Brian Garrity, *Pay Now, Download Later*, BILLBOARD (Aug. 7, 2005), <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4556368-1.html>.

<sup>74</sup> See Jesse Fox Mayshark, *One Way to Get RadioPlay: Do It Yourself*, N.Y. TIMES, Dec. 3, 2006, § 2, at 30 (noting that satellite radio’s programming of slots for well-known musicians broaden opportunities for radio play; offering a middle ground between the Internet, “where it is hard to get attention, and narrowly programmed terrestrial radio, where it is hard to get airplay,” and marketing-survey driven radio stations are playing fewer and fewer songs).

<sup>75</sup> See Andrew Ross Sorkin, *U.S. Radio Company May Sell For \$18 Billion*, INT’L HERALD TRIB., Nov. 14, 2006, at 12.

to new music ventures. The labels will become more selective, concentrating their capital and attention on those musicians most likely to produce blockbuster songs and albums in the short run. Emphasis will shift away from new musicians toward those who already have a substantial following—established singers and bands and new faces who have become stars through television programs such as *American Idol*, or who have made a name for themselves as actors or athletes.

*This will reduce opportunities for breaking through.* As the major labels direct their attention away from new musicians, the opportunities for breaking through into the big leagues by signing a record deal will diminish. Independent musicians will recognize this and shift their energies in other directions to make a living off of their music. In other words, Chris Anderson’s “long tail” may predominate.

The Long Tail equation is simple: 1) The lower the cost of distribution, the more you can economically offer without having to predict demand. 2) The more you can offer, the greater the chance that you will be able to tap latent demand for minority tastes that was unreachable through traditional retail. 3) [A]ggregate enough minority taste, and you’ll often find get a big new market.<sup>76</sup>

Anderson points to an experiment by Universal Music to offer out-of-print songs through download only as validating his hypothesis.<sup>77</sup>

That will squeeze out those who get rich by becoming rock stars, while opening up opportunities for many more indie musicians to make a living off of their music.<sup>78</sup>

*More opportunities exist for independent artists and amateurs.* The unbundling of songs from the album format, while reducing revenue for major labels, also opens up some new possibilities for musicians: no longer must they wait until they have ten to fifteen songs ready to release in an album format; now they can release songs individually as they are completed.<sup>79</sup> For musicians, this represents, among other things, a reduction in the “lumpiness” of capital: they no longer need to have enough money to carry on until they complete a dozen songs; now they can recover capital costs on a song-by-song basis. They also can keep their names more consistently in the public mind, without having to mobilize larger scale promotional campaigns for albums once every couple of years. E-commerce makes it possible for indie musicians, as well as for large firms to tap revenue streams resulting from “merch” sales.<sup>80</sup> Part V explores new business models for musicians.

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<sup>76</sup> Posting of Chris Anderson to *The Long Tail*, WIRED BLOG NETWORK (Oct. 19, 2006, 08:34 AM), [http://www.longtail.com/the\\_long\\_tail/2006/10/universals\\_long.html](http://www.longtail.com/the_long_tail/2006/10/universals_long.html).

<sup>77</sup> *Online Music Fans Respond Strongly to Universal Music’s Deep Catalogue Initiative*, UNIVERSAL MUSIC GROUP (Oct. 17, 2006), <http://new.umusic.com/News.aspx?NewsId=432> (reporting on sales of 250,000 tracks of otherwise unavailable European recordings in first six months of 2006); see WILLIAM DAVIES & KAY WITHERS, PUBLIC INNOVATION: INTELLECTUAL PROPERTY IN A DIGITAL AGE 28–29 (2006) (predicting that music industry will shift toward long-tail phenomenon).

<sup>78</sup> See Eliscu et al., *supra* note 66, at 34 (asserting that major labels lost market share in 2005, while indie musicians’ collective market share increased).

<sup>79</sup> See Jeff Leeds, *Squeezing Money From the Music*, N.Y. TIMES, Dec. 11, 2006, at C1 (“[S]ales of downloaded individual songs are eroding the underpinnings of the CD and remixing the industry’s economics.”).

<sup>80</sup> See *id.* (reporting that “new definition” of a hit is a song or album that racks up less than 500,000 in sales but with several revenue streams, including record sales, music publishing, concert

*New intermediaries will reduce market failure better than old ones.* As major record labels intensify their efforts to protect the past, space will open up for new enterprises to use the new Internet-based technologies to perform search and sales functions in a reconfigured market.<sup>81</sup> Apple's iTunes is the most dramatic example of rapid success in this regard. The music labels did not embrace the opportunity to sell music at reasonable prices over the Internet, so computer-company Apple stepped into the breach. But this will not be the only example. CD Baby<sup>82</sup> makes it easy for musicians to sell CDs and downloadable formats to consumers with low transaction and monetary costs for both.<sup>83</sup> CD Baby facilitates musician access to larger-scale Internet intermediaries such as amazon.com and iTunes.<sup>84</sup> Not all succeed, of course, even if they offer apparently attractive services. Snocap,<sup>85</sup> for example, sought to establish relationships with musicians and with sellers, building a large catalog of music from throughout the spectrum of creators, ranging from unknown indie musicians to major-label stars and to deploying a technology to make it easy for artists to specify and sellers to apply terms of sale that reflect artist preferences on price and license terms—whether consumers are allowed to share purchased music, for example.<sup>86</sup>

MySpace, which has blossomed as a marketplace where indie musicians can show off their music and build networks of collaborators and fans, now makes it possible for musicians to sell their music as well on their MySpace sites.<sup>87</sup> The acquisition of YouTube by Google portends the same with respect to music videos.<sup>88</sup>

New technologies allow consumers to find music they have not encountered but may like, through “you-might-like-this” features on amazon.com and iTunes, and through new services such as Pandora,<sup>89</sup> which allow consumers to specify a song they like and receive recommendations of other songs that have similar melodic, harmonic, and rhythmic structures.<sup>90</sup>

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ticket sales, and “merch” sales). “Merch” refers to collateral goods such as tee-shirts and posters containing musician images or logos. *Id.*

<sup>81</sup> See Leeds, *CD Sales Falling*, *supra* note 41 (providing an example of “protecting the past” through Apple's efforts in conjunction with labels, to encourage users through the use of “credits” to purchase entire albums through iTunes rather than just individual songs).

<sup>82</sup> *About CD Baby*, CD BABY, <http://www.cdbaby.com/About> (last visited May 28, 2010).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Snocap was acquired by imeem in April 2008, which was in turn acquired by MySpace in December 2009, at which time the Snocap service was discontinued. *Imeem Acquires Snocap*, BILLBOARD.BIZ, [http://www.billboard.biz/bbbiz/content\\_display/industry/e3i5c05b6a8dfbf0a334d1c82127be312a5](http://www.billboard.biz/bbbiz/content_display/industry/e3i5c05b6a8dfbf0a334d1c82127be312a5); see Brian Stelter, *MySpace to Showcase Music and Sell Performance Videos*, N.Y. TIMES, Dec. 4, 2007, at C5 (explaining that Snocap was part of MySpace and permitted bands to sell their music on personal profile pages).

<sup>86</sup> See Stelter, *supra* note 85.

<sup>87</sup> See Jeff Leeds & Brad Stone, *Three Record Companies Team Up With MySpace for Music Web Site*, N.Y. TIMES, Apr. 4, 2008, at C1 (introducing a subscription based plan for music distribution on MySpace which was initially a site for playlist sharing and streaming music free of charge).

<sup>88</sup> Press Release, Google Press Center, Google to Acquire YouTube for \$1.65 Billion in Stock: Combination Will Create New Opportunities for Users and Content Owners Everywhere (Oct. 9, 2006), [http://www.google.com/press/pressrel/google\\_youtube.html](http://www.google.com/press/pressrel/google_youtube.html).

<sup>89</sup> *About Pandora*, PANDORA, <http://www.pandora.com/corporate> (last visited May 28, 2010).

<sup>90</sup> See Anastasia Ustinova, *Music to Go: Pandora Works with Apple to Provide Tunes on the iPhone at No Charge*, SAN FRANCISCO CHRON., July 11, 2008, at C1.

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, however. 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.

All of this represents new intermediation channels between musicians and music consumers and new ways to reduce search costs for consumers.

*New business models will arise to replace models premised on revenue from recorded music.* It is possible to make money while giving away recorded music.<sup>91</sup> Consumers are willing to pay for convenience and for services that help them find new music that they like. As new intermediaries arise to match musicians with potential fans, they will crystallize business models based on fees for premium services (Pandora is a current example) and advertising.<sup>92</sup> They will share a portion of this revenue stream with musicians.

*Piracy will continue but diminish in importance because pirates can't compete with free either, and their music is not free.* Consumers are shifting their acquisition of music from CDs to a combination of licensed purchases of downloadable and portable formats and illicit sources—commercial pirates and peers.<sup>93</sup> No doubt the market share of illicit sources is higher than it was before downloadable formats were available.

Nevertheless, piracy is becoming less, not more, of a problem because some “pirates” are volunteer promoters, and real pirates “cannot compete with free.” The major labels are concerned about three kinds of piracy—although they routinely lump them together: (1) free file sharing among friends through informal networks, (2) sales of unauthorized copies of music, and (3) large scale free file sharing through organized networks such as Grokster.<sup>94</sup>

All three cases, the major labels say, represent a threat because, as many people put it, “you can’t compete with free.” (Tell that to sellers of bottled water and cable television.) The attractiveness of unauthorized copies of music is driven in part by the price of the copies, compared with the price of authorized copies. But it also is driven by the relative convenience of each, by loyalty to the performers, by fear of

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<sup>91</sup> See CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* 13–14 (2009) (offering examples of industries that have operating profitable business models based on giving away products and services).

<sup>92</sup> See, e.g., *Pandora FAQ, How do I Pay for Unlimited Monthly Listening Hours?*, PANDORA, <http://blog.pandora.com/faq/contents/1494.html> (last visited May 28, 2010).

<sup>93</sup> See Ram D. Gopal et al., *Do Artists Benefit from Online Music Sharing?*, 79 J. BUS. 1503, 1510 (“After downloading a song, a consumer faces three subsequent choices: buy a legitimate version of the song, keep the illegal copy (this constitutes piracy), or discard the downloaded song.”).

<sup>94</sup> See *Piracy: Online and on the Street*, *supra* note 6.

getting corrupted files and other harmful computer code, and by the fear of legal liability.

“Theft” in the first form of file sharing has never been a threat to music creation because it helps artists neglected by the major labels make consumers aware of their music. In the case of informal file sharing, preference for the unauthorized copy is usually driven by mere convenience. One’s friend hands him a CD or sends an .mp3 file, saying, “Hey, I think you’ll like this,” and one tries the music.

“Theft” in the second form provides the least social benefit; the pirate is simply seeking to make money off investment by the rightsholders. “Theft” in the third form has debatable effects: it provides greater exposure to otherwise unknown musicians, but it also undoubtedly undercuts sales by the rightsholders.

The wide availability of music for sale on services like iTunes and the increasing availability of full-length songs and albums on musician websites and on networks like MySpace is shifting demand away from large-scale illicit channels, even those that appear to offer music for free.<sup>95</sup> Choosing among substitutes responds to what economists call “cross elasticity of demand.”<sup>96</sup> What matters in cross elasticity of demand is *relative* price, not absolute price.<sup>97</sup> So as the price for music from legitimate sources falls, economic theory says that less of the total demand will be satisfied by unauthorized sources.<sup>98</sup>

Moreover, music through large-scale file-sharing networks is not really “free.” Any Internet network of strangers will be beset with spam, viruses, and phishing. Everyone’s e-mail box tells him that. Music consumers can reduce their exposure to such annoyances by dealing primarily with people they know or with legitimate commercial channels, whether they be iTunes, a specific musician’s website, MySpace, or YouTube.

*File sharing reduces search costs and increases exposure of musicians to potential fans.* Certain forms of file sharing increase the exposure of heretofore unknown musicians and increase the likelihood that consumers will buy their music. Several breakthrough bands such as Coldplay, Arctic Monkeys<sup>99</sup> and My Chemical Romance gained attention by giving away CDs for free and posting free downloads on their websites. Most music consumers have had the experience of being exposed for the first time to a band or a singer because one of their friends gave them a CD or emailed them an .mp3 file. Most of them responded to music they like by going to iTunes or a musician’s website to download more of that performer’s music.

*DRM gets in the way of robust evolution of the new market.* Many sellers of music naturally want to build walls around their music to prevent free-riding and other forms of competition. New technologies make it possible to build new kinds of

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<sup>95</sup> See Deborah Tussey, *Music at the Edge of Chaos: A Complex Systems Perspective on File Sharing*, 37 LOY. U. CHI. L.J. 147, 204 (2005).

<sup>96</sup> THE MIT DICTIONARY OF MODERN ECONOMICS 91, 414 (David W. Pearce & Robert Shaw eds., 4th ed.).

<sup>97</sup> *Id.* at 91.

<sup>98</sup> *See id.*

<sup>99</sup> See DAVIES & WITHERS, *supra* note 77, at 43–44 (reporting on Arctic Monkeys’ rapid rise to the top of the charts as a result of their making their music available for free through MySpace).



walls.<sup>100</sup> Apple makes it difficult for iTunes purchases to be played on anything other than an Apple iPod. Rhapsody and other music subscription services encode their music to prevent playing when subscriptions lapse.<sup>101</sup> Many proposals for reform of the music marketplace emphasize new digital rights management schemes through code embedded in digital music recordings.<sup>102</sup>

All of these schemes increase transaction costs for both musicians and consumers. Few DRM systems work perfectly and almost all leave consumers vulnerable to the experience of having bought something but not being able to enjoy what they have bought. For example, songs paid for and downloaded from iTunes mysteriously disappear from music libraries on consumer computers. Creators of music are confronted with annoying and burdensome queries about registration when they try to upload their own music into music libraries in iTunes and Microsoft Media Player. New DRM schemes interfere with management of music files by their own creators and rights owners.<sup>103</sup>

Creators and other suppliers of music should be steadfast in their efforts to *reduce* transaction costs confronted by consumers who want to purchase music from legitimate sources rather than to acquire it from unlicensed file sharing sources. DRM is inconsistent with this objective and will drive a greater proportion of consumers back to illicit file sharing networks.<sup>104</sup>

### III. THE LAW SHOULD NOT BE A COUNTER-REVOLUTIONARY FORCE

The law can make three contributions to accommodate the development of this new marketplace: first, it can make it clear that certain types of file sharing are privileged; second, it can avoid embrace of DRM; third, it can strengthen the copyright registration system so as to facilitate obtaining copyright permissions.

*Legislatures and judges should resist entreaties to broaden the scope of IP protection.* Major labels manage portfolios of intellectual property in music. Security of the IP is an important feature giving the portfolio value. The portfolio plays a role in financing new ventures because the IP can be pledged as security for loans.<sup>105</sup> This interrelationship between IP and finance is essential for capital-intensive projects, such as the launch of a new album under traditional conditions.<sup>106</sup> As upfront costs go down, however, the portfolio of IP becomes less important

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<sup>100</sup> See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 122 (Basic Books 1999) (arguing that use restrictions implemented by computer programs and copy protection inhibit consumers more than traditional law).

<sup>101</sup> See *Rhapsody Free Trial - Pricing and Plans*, RHAPSODY, <http://www.rhapsody.com/discover/plans> (last visited May 28, 2010).

<sup>102</sup> See, e.g., Randal C. Picker, *Mistrust-Based Digital Rights Management*, 5 J. TELECOMM. & HIGH TECH. L. 47, 69 (2006).

<sup>103</sup> David Pogue, *Trying Out the Zune: iPod It's Not*, N.Y. TIMES, Nov. 9, 2006, at C1 ("What's really nuts is that the restrictions even stomp on your own musical creations," reporting on DRM in Microsoft's Zune music player).

<sup>104</sup> See Henry H. Perritt, Jr., *Flanking the DRM Maginot Line Against New Music Markets*, 16 MICH. ST. J. INT'L L. 113, 144 (2007).

<sup>105</sup> See Sidney S. Goldstein, *Non-Traditional Sources—Intellectual Property as Collateral*, in 1 ADVISING SMALL BUS. § 12:6.20 (Steven C. Alberty ed., 2009).

<sup>106</sup> DAVIES & WITHERS, *supra* note 77, at 37.

because less capital needs to be raised.<sup>107</sup> Accordingly, industry proposals for expanded IP protection for popular music should be viewed with skepticism as a matter of policy, and scrutinized for consistency with the power granted by the Copyright Clause of the United States Constitution.<sup>108</sup>

*Copyright law should privilege file sharing.* File sharing can help sell music or it can undercut sales depending on the nature of file sharing. Small-scale gratuitous file sharing reinforces word of mouth and increases demand for previously unknown music.<sup>109</sup> Large-scale, fee-based, file sharing competes with authorized sellers for consumers.

This distinction should be accommodated by copyright law. A straightforward way to do this is to amend the Copyright Act by adding the following paragraph after ¶ (11) of 17 U.S.C. § 110:

(12) making and transferring a copy of a nondramatic musical work or sound recording, otherwise than sale to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the copy, if-

(A) there is no direct or indirect charge for the copy; and

(B) the transferor and transferee have a previous family, personal or social relationship.

One asserting this privilege shall have the burden of proving the existence of the prior relationship.

This would make it clear, statutorily, that informal music file sharing among friends cannot give rise to liability for infringement.

Existing law also could privilege the same type of behavior the proposed amendment to section 110 covers, under the fair-use privilege recognized in section 107. The problem is that the recent case law applying section 107 in the file-sharing context is adverse.<sup>110</sup> In *A&M Records, Inc. v. Napster, Inc.*, for example, the United States Court of Appeals for the Ninth Circuit rejected arguments that file sharing was privileged fair use because it was used to sample music for possible purchase and because it was not commercial in character.<sup>111</sup>

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<sup>107</sup> *See id.* (stating that the need for intellectual property protection is proportional to need for upfront capital).

<sup>108</sup> *Compare* United States v. Martignon, 346 F. Supp. 2d 413, 429–30 (S.D.N.Y. 2004) (dismissing indictment; “anti-bootlegging statute,” 18 U.S.C. § 2319A, is unconstitutional because it provides perpetual protection for non-fixed performances, thus violating both the “limited times” and the “writings” limitations of Copyright Clause) *with* Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc., 405 F. Supp. 2d 1169, 1171, 1173 n.9, 1177 (C.D. Cal. 2005) (granting motion for reconsideration on petition by United States; 18 U.S.C. § 1101(a)(3) is constitutional under Commerce Clause; no need to consider limitations of Copyright Clause).

<sup>109</sup> Gopal et al., *supra* note 93, at 1507.

<sup>110</sup> *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001).

<sup>111</sup> *Id.* at 1014–15 (stating that commercial use under fair-use framework exists when repeated and exploitative unauthorized copies are made to save expense of purchasing authorized copies); *see also* Wall Data Inc. v. L.A. County Sheriff’s Dept., 447 F.3d 769, 779 (9th Cir. 2006) (citing *Napster*

*Avoid embrace of DRM.* Probably the greatest danger to the new market architecture is that a “compromise” such as that proposed by several commentators, including Fisher,<sup>112</sup> and Litman,<sup>113</sup> would be enacted. This compromise would define a technological framework for digital music sales and use through sophisticated DRM technologies, in exchange for a tax on blank media and, perhaps, a tax on portable music players.<sup>114</sup> This would be a pernicious approach. The tax is not the problem, unless it were so great to increase the price of blank media or portable players, by more than, say, ten percent. The problem is the DRM. As noted *supra*, DRM gets in the way of desirable developments because it negates some of the advantages of the new formats and channels for distribution. There is nothing wrong with allowing suppliers, intermediaries and consumers who want to use DRM to use it. The problem is the likelihood that legislatively sanctioned use of DRM would tend to exclude entry-level musicians who do not have deals with major labels or other large intermediaries. The marketplace of the future should be one which accommodates and encourages the kind of competitive landscape now beginning to be visible with MySpace and the flourishing of artist websites offering music for sale—usually in the form of simple .mp3 files. DRM is not part of this landscape and it should not be imposed upon it.<sup>115</sup>

*A new Internet-accessible music-rights registration system is needed.* The Coase Theorem postulates that individuals will negotiate socially optimal bargains in the absence of law, but only if transaction costs are zero.<sup>116</sup> The assumption that copyrighted music will be licensed on market-appropriate terms assumes zero transaction costs.<sup>117</sup> Transaction costs are far from zero; no central database of copyrighted musical works exists, because there is no registration requirement;<sup>118</sup> and penetrating the opaque bureaucracies of rights holders requires the patience of Job.

The present copyright system impedes obtaining permission when a music creator wants to base his creation on material that is subject to copyright. The Copyright Office is slow to update the Internet-available system for searching copyright registration.<sup>119</sup> Music copyright holders are not required to register their copyrights or to deposit their works as a condition of copyright, and international law

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Ninth Circuit opinion for proposition that repeated copying of copyrighted works is not fair use even if copies are not offered for sale).

<sup>112</sup> WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 313 (2004).

<sup>113</sup> Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 31, 33 (2004).

<sup>114</sup> *Id.*; FISHER III, *supra* note 112, at 313.

<sup>115</sup> See Perritt, Jr., *supra* note 20, at 316.

<sup>116</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 7 (1960).

<sup>117</sup> *See id.*

<sup>118</sup> UNITED STATES COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS, CIRC. 56.0509, at 1 (2009) (stating that no requirement exists for publication or registration to gain copyright protection, but rather that the protection is automatic under current copyright laws).

<sup>119</sup> See *Fiscal Year 2010 Budget Request: Hearing Before the Comm. on Appropriations*, 111th Cong., U.S. COPYRIGHT OFFICE (Apr. 19, 2009), <http://www.copyright.gov/docs/regstat042909.html> (statement of Marybeth Peters, Register of Copyrights).

prohibits the United States from imposing such formalities as a requisite for a copyright coming into existence.<sup>120</sup>

As long as copyright law exposes creators of music to liability if they use material copyrighted by another in their own creations, the law also should facilitate their obtaining permission from the copyright holder, in exchange for whatever fee the copyright holder wants to charge—possibly subject to arbitration if the negotiations reach an impasse.

Incentives can be created for registration and deposit, by privileging development of derivative works unless the underlying material has been deposited and registered and unless the copyright holder agrees to submit to interest arbitration in the absence of agreement over the price of a license.

*The law should let the new market evolve.* The problem with this, if any, straightforward proposal for reform is that it is unlikely to be considered seriously by Congress,<sup>121</sup> and if Congress were to take it up, the resulting legislation probably would extend the scope of existing copyright without doing anything to privilege file sharing or otherwise promote the transition to the new marketplace.

The degree of capture of Congress by the established players in the industry makes it hazardous to attempt to move copyright reform through the Congress.<sup>122</sup>

It likely is better simply to leave the statute alone. Technology eventually will prevail against the efforts by the major labels to use the law to thwart the new competition. Aggressive litigation by the labels will provide a desirable disincentive for large-scale commercial piracy, but it can never reach all of the smaller scale file sharing that will continue, promoting exposure for new musicians.<sup>123</sup>

#### IV. NEW BUSINESS MODELS WILL EMERGE

“But if we cannot broaden the scope of IP protection and use DRM to limit what consumers may do with the music,” the industry advocates ask, “how are we to make money?” The more relevant question is not how Sony or Time Warner make money, but how can society assure that musicians keep making music and making it available to consumers? Both questions implicate business models for popular music.

The viability of any business model depends on the structure of the relevant market. As this article explains, the market structure for popular music will be one in which demand is increasing because of greater portability and the number of suppliers is increasing because of lower barriers to entry. If new levels of demand

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<sup>120</sup> See Lawrence Lessig, *Creative Economies*, 2006 MICH. ST. L. REV. 33, 38–39 (2006) (explaining why it is prohibitively expensive to obtain permissions).

<sup>121</sup> *Id.* at 40 (stating that the likelihood of appropriate Congressional response is “zero”; “a kind of IP McCarthyism reigns” over Washington debate).

<sup>122</sup> See *Performance Rights Act: Hearing Before the Comm. on the Judiciary*, 111th Cong. 26 (2009) (“[T]o be successful in any amendment to intellectual property law, you had to get all of the players at the table and at least all of the players not being opposed to the product of negotiation . . .”).

<sup>123</sup> See Amy Harmon & John Schwartz, *Despite Suits, Music File Sharers Shrug Off Guilt and Keep Sharing*, N.Y. TIMES, Sept. 19, 2003, at A1 (“[M]any file swappers said they were more wary of copying music since the wave of [record industry] lawsuits . . . . But there was a strong current of defiance, even among those who said they had stopped.”).

exceed new levels of supply, there will be more revenue to go around, if prices remain constant.<sup>124</sup> But prices will not remain constant; they are falling and will continue to fall, as competition increases and new technological channels beyond the control of suppliers proliferate.<sup>125</sup> The combined effect of demand, supply, and price trends is almost certain to reduce the total revenue available to each musician.

Unknown musicians will struggle in two ways in their efforts to achieve economic sustainability. They will struggle to get someone to notice them—to begin to build a fan base—and they will compete for their own share of revenue available for sales of recorded songs and for live performances. Major labels will take on fewer new artists and will be less generous in funding new-artist development. New intermediaries will continue to develop to facilitate artists making contact with potential fans and to struggle to capture a tolerable level of revenue.

New sources of capital likely will emerge to replace diminishing capital available from the shrinking major labels. Some investors may be motivated by the excitement of being close to the entertainers they fund. But at least some investors will not invest unless they have some plausible expectation of an adequate rate of return. One possible approach is to channel modest levels of investment through new intermediaries specializing in new music ventures. With plausible assumptions about frequency of performances, download, and merch sales, and advertising revenue a four-year investment of \$50,000 could produce an annual return on investment (“ROI”) of twenty percent.<sup>126</sup>

The new intermediaries will have 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 presentation of interest personal and band 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.

It is unlikely that musicians themselves can deploy the new business models. It’s hard for one person to know enough about the logistics of live concerts and touring, making productive use of studio time, merchandising of merch, 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

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<sup>124</sup> JULIE HOLLAND MORTIMER & ALAN SORENSEN, SUPPLY RESPONSES TO DIGITAL DISTRIBUTION: RECORDED MUSIC AND LIVE PERFORMANCES 10–12 (2005).

<sup>125</sup> *But see id.* at 11 (“[A]lbum prices were remarkably unresponsive to the diffusion of file-sharing technologies starting in 1999. Prices changed only slightly between 1999-2003 (and in fact they increased) and only in 2004 did prices begin to decline.”).

<sup>126</sup> Suppose a private investment fund invests \$50,000 in each band, with the revenue to be shared 50-50 between the fund and the band. The fund would control twenty-five percent of the total investment and use it for promoting the band, and it would be allowed twenty-five percent to cover its overhead. The band would use the remainder to cover its costs of recording, mixing, mastering, CD duplication, travel and street teams. The term of the deal would be four years. Assuming the band performs twice per week, gets an average of \$200 per performance, sells ten CDs at eight dollars and five tee shirts at ten dollars at each gig, sells another 500 CDs per year at the same price, and 200 downloads at one dollar each, total revenue generated over the term would be just under \$160,000. This would produce an annual rate of return of nearly twenty percent for the fund, and just under \$80,000 income for the band. Some hedge-fund bands would do much better, and some would fail altogether.

marketplace, they need two things. They need education and training in the activities they are not already skilled at.<sup>127</sup> They also need intermediaries,<sup>128</sup> because the finer granularity of the activities inflate transaction costs relative to the substantive costs and benefits.

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. The new intermediaries will channel investment to them.

Celebrity endorsement is a mainstay of modern mass advertising.<sup>129</sup> Once musicians attain celebrity status, this revenue stream is easily available and celebrities can command a high price.<sup>130</sup> Even unknown performers, however, often can make more money modeling than performing.<sup>131</sup> 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 attractiveness plays a major role in this, but other factors do, as well. Fall Out Boy and Vampire Weekend recognized this. The former cultivated a bad-boy image;<sup>132</sup> the latter cultivated an educated, preppie image.<sup>133</sup>

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.<sup>134</sup> On the other hand, licensees can "be [good] talent scouts," offering an alternative channel to radio play to build an audience.<sup>135</sup> 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

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<sup>127</sup> Musicians at Work Forum: Stand Out in a Digital World, CHICAGO MUSIC COMMISSION, at 14:30 (Nov. 16, 2009), <http://www.chicago-music.org/stand-out-in-a-digital-world/>.

<sup>128</sup> See CAVES, *supra* note 64, at 297.

<sup>129</sup> Jagdish Agrawal & Wagner A. Kamakura, *The Economic Worth of Celebrity Endorsers: An Event Study Analysis*, 59 J. MARKETING 56, 56 (1995).

<sup>130</sup> See *id.* (noting that Celebrity endorsements can cost millions of dollars if contracted over several years, and may also include profit sharing).

<sup>131</sup> Interview with Brian Kennedy, Actor, Chicago, Ill. (Nov. 7, 2008) (reporting ready availability of modeling opportunities paying \$500 per appearance, contrasted with struggle to find paying roles in theater or film performances).

<sup>132</sup> See Nina Garin, *They Love Me, They Love Me Not . . . Fall Out Boy Sells Out Shows and has Hit Records – and also Garners Votes as 'Worst Band,'* SAN DIEGO UNION-TRIB., Mar. 30, 2006, § Entertainment, at 17 ("[Fall Out Boy] was once a punk band that blew away Vans Warped Tour fans a few years ago . . .").

<sup>133</sup> Chris Richards, *No, Really, The Privilege Is Ours, Vampire Weekend*, WASH. POST, Jan. 10, 2010, at E2 ("[Vampire Weekend's] Ivy League pedigree rubbed many the wrong way, but instead of trying to live it down, Vampire Weekend wisely chose to live it up.").

<sup>134</sup> See Jon Pareles, *Songs From the Heart of a Marketing Plan*, N.Y. TIMES, Dec. 28, 2008, at AR1 [hereinafter Pareles, *Songs From the Heart*].

<sup>135</sup> *Id.*

to satisfy the established tastes of demographic segments of radio audiences they want to hold or build.<sup>136</sup>

Many other possibilities exist, mostly unexploited so far. Bands could receive advertising dollars by offering “naming rights.”<sup>137</sup> 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. 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.”<sup>138</sup>

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.<sup>139</sup> Most usefully termed, “micro advertising,” the technology permits an advertiser to buy access to very narrow groups of persons potentially interested in the advertiser’s product, at low prices.<sup>140</sup> It also permits musicians with a small fan base to sell advertising “space” at low prices.

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.<sup>141</sup> Adapting this idea to the popular music setting, a musician could give away CDs at a concert and sell the autograph session, for twenty-five dollars. Or, he could offer a post-performance backstage “hangout” session for \$100 or more. Virtual hangout sessions also could be offered, which would have more value if they include live audio, and perhaps video.

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

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<sup>136</sup> See Kate Fitzgerald, *By the Demo: Music for the Ages*, ADVERTISING AGE, July 28, 2003, at S3 (highlighting how advertisers use mainstream music to appeal to specific demographics in advertisements and commercials).

<sup>137</sup> The phrase “naming rights” usually refers to municipalities who offer major facilities to sponsors who get to name the facility in exchange for investments in the general fund of the municipality or in specific activities linked to the named facility. See *Stadium Naming Rights*, ESPN (Sept. 29, 2007), <http://espn.go.com/sportsbusiness/s/stadiumnames.html>. “U.S. Cellular Field” in Chicago—the stadium for the Chicago White Sox—is an example of the result. *Id.*

<sup>138</sup> See Pareles, *Songs From the Heart*, *supra* note 134 (reporting on the growing tendency for pop musicians to license music for advertisements and as “many [consumers] see no need to pay for [recorded music]. The emerging practical solution is to let music sell something else”).

<sup>139</sup> See *Corporate Information – Company Overview*, GOOGLE, <http://www.google.com/corporate/> (last visited May 28, 2010); see also *Profiting from Friendship*, ECONOMIST, Jan. 30, 2010, § Special Report (“Click-through rates on display ads at sites such as Facebook are a small fraction of those that Google commands for its highly targeted search ads.”).

<sup>140</sup> See *Profiting from Friendship*, *supra* note 139.

<sup>141</sup> Don Van Natta, Jr., *Campaign Finance: Raising the Money; Party Officials Orchestrated White House Sleepovers*, N.Y. TIMES, Oct. 4, 1997, at A8.

personalities of the band members. As one might expect, Pete Wentz and Fall Out Boy is an early adopter of this strategy.<sup>142</sup> 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.<sup>143</sup> In an interview, Pete Wentz said, the game “is part of the band’s dedication to finding ‘ways for people to engage’ with the band beyond albums.”<sup>144</sup> The technology used for the Fall Out Boy game is primitive; much better software exists now. For example the promoters of the *Transformers* series of movies offer a game.<sup>145</sup> Video games are proliferating in which players control the personalities of the characters in the game.<sup>146</sup> Electronic Arts’ “The Sims 3,”<sup>147</sup> is a popular video game that focuses on social behavior, allowing players to define detailed characters according to user-selected personality traits.<sup>148</sup> Players can create a new kind of a person that has unique desires in life that shapes their destinies in the game.<sup>149</sup> These features are combined with high quality animation and moviemaking tools.<sup>150</sup>

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.

All of that means more opportunity for artists to compete for investments based on the peculiarities of their own art. But it is unlikely to make it possible for every artist to attract it. Only a subset of them will fulfill business plan expectations, and a still smaller subset will be able to make a living as full-time musicians.

What will all the others do? Some of them will be forced to give up, as the financial pressures of family obligations compel them to take up other, more remunerative, lines of work. They will participate actively in the marketplace for five to ten years, and many of them will continue to make music sporadically thereafter. Others will use subsidies available from family or friends and continue recording and performing for longer periods—some for their entire lives. Others will remain outside society’s mainstream in informal communities of musicians who minimize housing, food and transportation costs by living together. Such arrangements can prolong the period of full-time involvement for another ten to fifteen years.

The income opportunities for most musicians will remain modest—and perhaps decline. The increased demand resulting from the portability of music will be spread

<sup>142</sup> See *Fall Out Boy Trail – Friends or Enemies*, FRIENDS OR ENEMIES, <http://www.friendsorenemies.com/page/falloutboytrail-1> (last visited May 28, 2010).

<sup>143</sup> *Id.*

<sup>144</sup> Caryn Ganz, *Pete Wentz Explains the Birth of Online Video Game “Fall Out Boy Trail,”* ROLLING STONE (Mar. 9, 2009, 4:56 PM EDT), <http://www.rollingstone.com/music/news/15765/94408> (quoting Pete Wentz, bassist, Fall Out Boy).

<sup>145</sup> TRANSFORMERS: WAR FOR CYBERTRON, <http://www.transformersgame.com/> (last visited May 28, 2010).

<sup>146</sup> See, e.g., CECROPIA PRESENTS THE ACT, <http://www.theactgame.com/> (last visited May 28, 2010).

<sup>147</sup> *Home – Community – The Sims 3*, THE SIMS 3, <http://www.thesims3.com/> (last visited May 5, 2010).

<sup>148</sup> Seth Schiesel, *Finding Escapism in the Minutiae of Daily Life*, N.Y. TIMES, June 2, 2009, at C1.

<sup>149</sup> *Id.*

<sup>150</sup> See *id.*



over many more musicians who have access to the marketplace because of the new technologies. The maximum annual income, even for the most successful, will rarely exceed \$50,000, and most will be lucky to earn \$10,000 to \$15,000. The resulting labor market likely will be one in which tens of thousands of new artists enter the market<sup>151</sup> each year, mostly in their late teens and early twenties. Some will drop out each year, as the demands of touring, the cost of recording, or slow sales, discourage them and other career or educational opportunities beckon. Few will still be creating music in a serious way when they are in their mid-thirties. In this scenario, the economic lifetime of a musician will be about ten years—not too different from that for professional and semi-professional athletes in football.<sup>152</sup>

This is not necessarily an unhappy scenario. Much music will be produced and consumed—some of it quite good. Many more young people than at present will have the gratification of having “succeeded” with their art.<sup>153</sup> Then they will “retire” early and go on to other careers.

The major labels and their corporate bureaucrats will fade from the scene, like Hollywood’s studio system, newspaper linotype machines and stereotype plates, typewriters, and analog tape drives. 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.

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<sup>151</sup> “Entering the market” is defined as completing an album and offering it for sale and/or performing in public for pay.

<sup>152</sup> See Joseph N. Geier & Brian J. Woods, *Disability Insurance the Only Sure Bet for Pros, Can’t-Miss Prospects*, BALTIMORE BUS. J. (Apr. 1, 2005), <http://www.bizjournals.com/baltimore/stories/2005/04/04/focus3.html> (noting that average career of professional athlete is four years). The careers of athletes are frequently ended by injury, unlike that of musicians. See *id.*

<sup>153</sup> See Eliscu et al., *supra* note 66, at 34. (“[E]ach band can make a living off of what they do. A few years ago, that was just unheard of.” (quoting Ryan Frederiksen, guitarist, These Arms Are Snakes)).