

Fair Trade Copyright

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ABSTRACT

Digital media has challenged copyright law in the past decades. The ease with which digital files can be copied and disseminated has amplified copyright infringement and jeopardized the profitability of copyright-based industries around the globe.

In this article I propose a solution: to complement the copyright system with a Fair Trade Copyright system. The Fair Trade Copyright system, which would apply optimally in the realm of the music industry, would encourage users to donate to recording artists on digital platforms and distribute the donations to artists.

The implementation of my proposal will yield several improvements over the current system. First, it would enlarge the pie of revenues that flow into the music industry. Second, it would compensate recording artists, who are under-protected in the current regime, and augment their incentives to create. Third, this model would monetize illegal music consumption, and would achieve this at a relatively low cost and without harming law-enforcement efforts. Fourth, and finally, the model would potentially change the power balance within the music industry in favor of artists instead of intermediaries.

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INTRODUCTION

The last two decades in copyright history will probably be remembered as a period of constant struggles with new media. Digital media has enabled users to copy and distribute digital content easily and inexpensively.¹ As a result, unauthorized use of copyrighted works has amplified,² leading to a sharp decline in music sales and jeopardizing the profitability of copyright-based industries around the world.³

Copyright law comprises the natural avenue to address this challenge. Copyright law protects creators from various types of unauthorized use of their works.⁴ Lawmakers have thus sought solutions for the copyright predicament under the lamplight of copyright law. Legislators have attempted to enhance enforcement of copyright law;⁵ and courts have imposed sanctions on direct and indirect copyright infringers.⁶

In this Article, I advance an idea for a radically different solution, which can apply optimally in the realm of the music industry: a Fair Trade Copyright system. This system would *complement* the extant copyright regime with a voluntary payment scheme from users to artists. Practically, I propose that whenever users access music online, they would be provided with the option to make a donation to the artists who have performed the music. I name this model “Fair Trade Copyright,” to connote a thematic association with the global fair trade movement. This movement encourages individuals to pay extra sums for goods they consume,

1. See, e.g., Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 273 (2002) (“Not only has technology made it easier to copy music, but it has also dramatically reduced the costs of copying.”).

2. See *infra* Part IV.

3. See, e.g., INT’L FED’N OF THE PHONOGRAPHIC INDUS., RECORDING INDUSTRY IN NUMBERS 2010 3 (2010); see also *infra* note 234 and accompanying text.

4. 17 U.S.C. § 106 (2012) (detailing the exclusive rights copyright law provides).

5. For example, see the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. 110-403 (more commonly known as the PRO-IP Act), which hardened penalties for copyright infringement and appointed an IP Czar to oversee enforcement of the new measures. Recently, two bills that were introduced for this purpose generated an unprecedented public outcry and were eventually withdrawn: the Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) (authorizing the government and intellectual property rights holders to compel Internet service providers to block access and payments to allegedly infringing websites), and the Protect IP Act, or The Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011), which in section 3(b)(1) provides the government with the right to pursue actions particularly against offshore websites that are “dedicated to infringing activities.” Thousands of Internet entities and bloggers blacked out their sites for twenty-four hours in protest of these bills, and as a result supporters of the legislation have withdrawn the legislation. See Tamlin H. Bason, *Reid Postpones Debate on Protect IP Act; Smith Follows Suit and Shelves SOPA*, DAILY REP. FOR EXEC., Jan. 23, 2012, at A-4; Eric Engleman, *SOPA Petition Gets Millions of Signatures as Internet Piracy Legislation Protests Continue*, WASH. POST, http://www.washingtonpost.com/business/economy/sopa-petition-gets-millions-of-signatures-as-internet-piracy-legislation-protests-continue/2012/01/19/gIQAHaAyBQ_story.html (last updated Jan. 20, 2012); see also *infra* Part IV.

6. See *infra* Part IV.

in order to provide equitable income for the producers of these goods.⁷

Complementing the copyright system with the proposed Fair Trade Copyright model would provide a significant improvement over the extant regime. Currently, the lion's share of sound recording copyrights vests with record labels, rather than with artists.⁸ Because revenues from creative works stem from copyright ownership, artists are in an economically inferior position.⁹ What is more, even if the copyright system were utterly successful, it would be unable to assure that artists derive any benefit from their works. This legal reality may adversely affect creativity and reduce the incentive of music artists to create.¹⁰

The Fair Trade Copyright model would address artists' economic inferiority in the extant system, by generating a substantial new source of revenues and directing donations to artists themselves, regardless of the formal owner of the copyright in the recording, which is typically a record label.¹¹

An additional anticipated benefit of the Fair Trade Copyright model is that it would monetize not only legal, but also illegal music platforms. The property nature of copyright means that illegal use of copyrighted works generally remains uncompensated (except via litigation).¹² In contrast, I suggest that both legal and illegal services would participate in the Fair Trade Copyright scheme, and comprise a venue for users to donate to artists. At the same time, because the Fair Trade Copyright model would not supplant the current system, copyright owners would still be able to take action against infringing activities of users and against illegal services.

Overall, the Fair Trade Copyright model offers what other models previously put forth in this context have not: a system that can both enlarge the pie of resources that flow into the music industry and distribute this pie more equitably among relevant stakeholders, without destroying the existing system.

But how likely are users to pay music artists voluntarily? It is undisputed that some social contexts induce voluntary payments, while others do not. Based on the literature in this area, I attempt to design the Fair Trade Copyright model in a way that is most likely to yield significant contributions. The model relies on the immense quantity of online music consumption, and would intensify existing norms and motivations that are known to promote voluntarism in equivalent situations.¹³

7. See ALEX NICHOLLS & CHARLOTTE OPAL, FAIR TRADE: MARKET-DRIVEN ETHICAL CONSUMPTION 6 (2005); *The Fairtrade Foundation*, FAIRTRADE FOUND., http://www.fairtrade.org.uk/what_is_fairtrade/fairtrade_foundation.aspx (last visited Aug. 4, 2011).

8. See *infra* Part I.A. Note that a sound recording encompasses two copyrights. The first is the sound recording copyright, which protects the recorded performance as embodied in the sound recording. The second is the musical work copyright, which protects the underlying musical work from which the sound recording was created. The discussion in this Article is focused exclusively on the sound recording copyright.

9. See *infra* Part I.

10. See *infra* Part I.C.

11. See *infra* Part I.A.

12. See *infra* notes 125, 131 and accompanying text.

13. See *infra* Part IV.A.

The Article proceeds in four Parts. Part I analyzes artists' inferiority in the music industry as it transitions into the digital age, and demonstrates the need for the Fair Trade Copyright model. Part II delineates the mode of operation of the Fair Trade Copyright model and its potential effectiveness. Part III considers and tackles potential challenges and objections to this model. Part IV compares this scheme with three proffered alternative models for resolving the predicament in the music industry. A short conclusion ensues.

I. THE CURRENT COPYRIGHT REGIME

In this Part, I demonstrate the need for Fair Trade Copyright. I begin by showing that artists receive little protection under copyright law, because they normally transfer away the copyrights in their works to record labels. I then turn to show that digital music services cannot even potentially compensate artists in a significant manner. Finally, I discuss the costs to society from under-compensation of artists.

A. UNDER-PROTECTION OF ARTISTS IN COPYRIGHT LAW

Legal protection of creative works in the United States is bestowed almost exclusively upon copyright owners. Copyright is a strong right. It provides rights holders with a monopoly over a variety of activities, including, *inter alia*, copying of their works, distribution and public performance.¹⁴

In contrast to the strong rights copyright law affords to copyright owners, the law provides hardly any protection for creators who transfer or otherwise disengage from their copyrights. Specifically, copyright law contains few mandatory remuneration provisions for creators,¹⁵ and nothing in the law ensures that creators benefit in any way from works they have created if they do not hold the copyrights in those works.¹⁶

While the law grants the initial copyright in a work to the creator of the work, it provides an easy mechanism to transfer rights to third parties.¹⁷ U.S. law further contains the unique "work made for hire" doctrine, which allows employers or commissioners of a work to own the copyright in works in the first place, in lieu of the work's creator.¹⁸ Indeed, after a number of decades, authors may reclaim the

14. 17 U.S.C. § 106 (2012). The rights are subject to exceptions, such as the fair use doctrine. *Id.* § 107.

15. Such provisions include the Audio Home Recording Act (AHRA), Pub. L. No. 102-563, 106 Stat. 4237 (1994) (codified at 17 U.S.C. §§ 1001–1010), as well as the Digital Performance Right in Sound Recordings Act (DPRA), Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. §§ 101, 106, 111, 114, 115, 119, 801–803 (allocating a percentage of the royalty payments directly to performers). *See also infra* note 59 and accompanying text.

16. *See* Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 383–84 (2009).

17. 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work."); *id.* § 204(a) (providing that transfer of exclusive rights must be in writing and signed by the grantor).

18. *Id.* § 201(b) ("In the case of a work made for hire, the employer or other person for whom the

copyrights they have transferred.¹⁹ But the reclaim-mechanism is difficult to utilize,²⁰ and does not apply at all to works made for hire.²¹

Owing to this permissive framework, copyrights in sound recordings normally vest with record labels, rather than with artists.²² Recording contracts between artists and record labels typically define the sound recording as a work made for hire,²³ in which case ownership of the work is conferred upon the record label from the very beginning.²⁴ As a safeguard, the contracts usually include provisions that retroactively assign the works to the record label if a court finds post facto that the work made for hire doctrine is inapplicable.²⁵ As a matter of fact, over eighty percent of the copyrights in sound recordings rest with one of three major record labels rather than with artists.²⁶

The alienability of copyrights was justified in light of particular historical circumstances: until not long ago, artists were ill-positioned to perform the functions necessary to carry music to the public.²⁷ Recording equipment was

work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

19. See *id.* § 203(a)(3) (providing that authors can reclaim copyrights thirty-five or forty years after they transferred them); *id.* § 304(c)(3) (stating that authors can terminate a copyright-grant during a period of five years beginning at the end of fifty-six years from the date the copyright was originally secured); *id.* § 304(d)(2) (permitting authors to terminate a copyright grant seventy-five years after the copyright was first secured if the 17 U.S.C. § 304(c) termination opportunity was foregone).

20. See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 36–37 (2010) (arguing that recapturing copyrights is “sufficiently difficult to be largely illusory for most creators,” because, among other things, court decisions have narrowed the scope of the rights subject to recapture, and upheld assignee strategies to renegotiate the underlying contract before the termination date in order to avoid termination).

21. 17 U.S.C. § 203(a)(3) (setting the case of works made for hire as an exception for the termination rights).

22. EMI, Sony BMG Music Entertainment (“Sony BMG”), Universal Music Group Recordings, Inc. (“UMG”) and Warner Music Group Corp. (“WMG”), “control over 80% of Digital Music sold to end purchasers in the United States.” *Starr v. Sony BMG Music Entm’t*, No. 08-5637-cv, 2010 U.S. App. LEXIS 768 (2d Cir. Jan. 13, 2010). As of September 21, 2011, EMI was split in two and sold to UMG and to Sony. The controversial merger was approved by Federal Trade Commission in September 2012. See FED. TRADE COMM’N, STATEMENT OF BUREAU OF COMPETITION DIRECTOR RICHARD A. FEINSTEIN: *IN THE MATTER OF VIVENDI, S.A. AND EMI RECORDED MUSIC* (2012), available at <http://www.ftc.gov/os/closings/comm/120921emifeinsteinstatement.pdf>.

23. See generally *Sound Recordings as Works Made for Hire: Hearing Before Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat52500.html> (“Most contracts contain clauses specifying that the works . . . are works made for hire. Such contracts generally contain an additional clause providing that if the work created is found by courts to fall within neither prong of the definition of works made for hire, that the performer assigns all his rights to the record company.”).

24. See *supra* note 19.

25. See *supra* note 24. Courts have yet to resolve whether the work made for hire provisions in recording contracts are enforceable. A negative answer to this question may lead to a wave of terminations of transfers by artists, starting in the year 2013, when recording artists’ termination rights begin to vest. See *supra* note 22 and accompanying text; see also Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002).

26. See *supra* note 22.

27. There are at least three more reasons for the alienability of copyright. One is the property

beyond the reach of individual artists,²⁸ traditional media (like radio or TV) was required in order to connect artists to potential audiences,²⁹ and dissemination of recorded music depended on tangible media.³⁰ Free alienability of copyrights allowed the transfer of copyrights to the entities that were best positioned to exploit them and to fulfill the utilitarian goal of music copyright: that music become available to the public.³¹ Artists, on their side, had few viable alternatives to record labels, and accordingly, signing a recording contract appeared to be a rational move for them.

As a matter of fact, however, artists were entering unremunerative bargains with record labels. Until this day, recording contracts are heavily skewed towards record labels' interests. In essence, besides granting record labels the copyrights in the artist's work (or works),³² these contracts provide for disproportionate sharing of all *revenues* the works yield, while placing the full *cost* of production on the artists' shoulders.³³

Specifically, recording contracts typically stipulate that in exchange for the copyrights, record labels pay artists a recoupable advance and invest other returnable or recoupable sums in the production of the album.³⁴ The artist is entitled to fairly low royalties: ten to twelve percent (for beginning artists) to seventeen to twenty-five percent (for top artists).³⁵ The artist is not entitled to any

nature of copyright, which is believed to inherently include alienation. See Ginsburg, *supra* note 16, at 384 (explaining that our legal system "frowns on 'restraints on alienation.'). Second, the alienability of copyright increases the economic value of the copyright, thus augmenting the author's incentive to create. The third reason is grounded in public choice theory and provides that record labels and other corporations have formed an interest group and managed to influence lawmakers to promote their interests at the expense of artists. See, e.g., Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989). See generally Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890 (1987) (arguing that lawmaking can be depicted as resulting from interest-group activity); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 880 (1975) (perceiving political settings as a "market" where legislation is effectively "sold" to the highest bidder by legislators, and "purchased" by interest groups.). But see H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2127 (1990) (stating that social choice theory does not fully describe "general legitimacy and meaningfulness of democratic decision making").

28. Ku, *supra* note 1, at 306. Today, various technologies make high quality audio production costs within the reach of everyone. See, e.g., ABLETON, <http://www.ableton.com> (last visited Nov. 16, 2012).

29. See, e.g., Courtney Love, Remarks at the Digital Hollywood Online Entertainment Conference (June 14, 2000), available at http://www.salon.com/2000/06/14/love_7/.

30. Ku, *supra* note 1, at 306.

31. See *infra* note 93 and accompanying text.

32. See *supra* notes 24–25 and accompanying text.

33. See Ku, *supra* note 1, at 306 ("In fact, not only do musicians rarely earn royalties from the sale of CDs, they are often in debt to the recording industry for the costs of manufacturing, marketing, and distributing their music."). If the album fails to yield revenues, some debt is excused. See *infra* notes 34–37 and accompanying text.

34. Sums are "recoupable" if they need to be paid out of the records' proceeds and are forgiven in the absence of such proceeds, and are "returnable" if they need to be paid in any event.

35. JEFFREY BRABEC & TODD BRABEC, *MUSIC MONEY AND SUCCESS* 114–15 (6th ed. 2008); see

royalties until she finished repaying in full the sums the record label invested in relation to the work, including any advances.³⁶ As a matter of fact, most artists do not ever earn any royalties at all.³⁷

Worse yet, artists' revenues are subject to various deductions (some of which are quite questionable),³⁸ and to manipulations.³⁹ The contracts further set limits on artists' ability to supervise the accounting figures record labels present.⁴⁰

Recently, major record labels have embraced a new model of contracts, usually termed "360 degree contracts," which entitle the label to a share of the artists' revenues from sources beyond record sales (such as live performances and merchandise), in return for a larger advance.⁴¹ Notably, recording contracts bind

also Music Law, BUCHE & ASSOCIATES, <http://www.buchelaw.com/MUSIC.HTML> (last visited Dec. 27, 2012). Note that significantly more artists are located in the lower half of the royalty range than in the upper. *Id.* For licensing of music, such as for movies or TV shows, artists are often entitled to a fifty percent share of royalties not subject to deduction. This has led to manipulation of licensing deals by record labels, which classified licensing deals with third parties as sales, in order to avoid paying high royalties. *See infra* note 64 and accompanying text.

36. DAVID BASKERVILLE, *MUSIC BUSINESS HANDBOOK* 157 (7th ed. 2000) (noting that recording contracts stipulate that the label does "not have to pay the artist any royalties . . . until the label has recovered, through a recoupment from the artist's royalties, its out-of-pocket production costs and advances"). Record labels conduct the accounting under these contracts. *See infra* note 40.

37. *See* Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music* 23 (Nat'l Bureau of Econ. Research, Working Paper No. 11282, 2005) ("Indeed, only the very top bands are likely to receive any income other than the advance they receive from the company, because expenses – and there are many – are charged against the band's advance before royalties are paid out."); *see also* Phillip W. Hall Jr., Note, *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189, 190 (2002) (noting that 99.6% of artists were believed to be indebted to the labels in 2002); David Segal, *Aspiring Rock Stars Find Major-Label Deals—and Debts*, WASH. POST, May 13, 1995, at A1, A7 (noting that many artists owe the label for advances before they will see any royalties). Artists have complained about mistreatment by record labels. *See, e.g.*, Patrik Wikström, *THE MUSIC INDUSTRY: MUSIC IN THE CLOUD* 30 (2009) (noting that "Prince performed several times with the word 'slave' written on his forehead as a way of describing his relationship with his employer"); Love, *supra* note 29 (discussing how musicians end up in debt to major record labels).

38. Twenty-five percent of royalties are regularly retained in a "reserve account"; the record company discounts up to 15% to cover the risk of breakage, up to 25% to cover the cost of packaging, and approximately 15% for records distributed for free, to cover the cost of encoding the song to digital format, encryption and digital delivery. *See* BRABEC & BRABEC, *supra* note 35, at 119–22; *see also* Ku, *supra* note 1, at 307.

39. *See* Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 28 (2004) (discussing record labels' "bookkeeping tricks"); *see also* Neil Strauss, *Behind the Grammys, Revolt in the Industry*, N.Y. TIMES, Feb. 24, 2002, at D3 ("In 99.99 percent of the audits [of a record label's accounting for an album], the labels are found to have underpaid the artist . . .") (quoting Simon Renshaw, the manager of the band the Dixie Chicks).

40. *See* BRABEC & BRABEC, *supra* note 35, at 122–23 (noting that recording contracts usually provide limits on the time an artist may object to the accounting figures, the time an audit can last, the scope of the audit, the identity of the auditor, and the physical location of the audit); *see also* Mike Masnik, *Warner Music's Royalty Statements: Works of Fiction*, TECHDIRT (Dec. 2, 2009, 9:09 AM), <http://www.techdirt.com/articles/20091201/1957497156.shtml>.

41. *See* Sara Karubian, *360 Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. CAL. INTERDISC. L.J. 395, 399 (2009); Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007, at A1; Paul Resnikoff, *0 to 360 Degree—Different Types of Deals Emerge*, MUSIC ROW L. (Jan., 23, 2009), http://musicrowlawyer.typepad.com/music_row_lawyer/2009/01/0-to-360-degrees-different-types-of-deals-emerge.html. Interestingly, embracing the 360 model by record labels had a

artists to long-term exclusivity provisions, practically rendering the signing of a record deal a decision for a lifetime career.⁴²

Ultimately, the extant system de facto grants strong rights almost exclusively to record labels, and provides little protection for artists. As Jane Ginsburg observes, “all too often in fact, authors neither control nor derive substantial benefits from their work.”⁴³

B. THE UNREDEEMED PROMISE OF DIGITAL MEDIA

While the extant system provides little protection for artists, digital media brought a promise of change.⁴⁴ Digital media has made several of the functions that were essential in order to disseminate music either unnecessary or more economically attainable.⁴⁵ Digital media thus holds the potential to reduce the transaction costs associated with trade between artists and audiences, and can perhaps reduce the role of record labels as intermediates that are immune from competition.⁴⁶

In fact, however, while digital media opened new venues for artists to *create and disseminate* music independently, it failed to form equivalent ways for artists to *monetize* their music independently.⁴⁷ In this Section, I demonstrate how both

twofold effect. On the one hand, it increased the hold of record labels over artists. On the other hand, it allowed producers of live shows, such as LiveNation, to compete with record labels by offering a 360 model as well.

42. “[T]he record company will always have a number of options to extend the recording agreement for additional periods and additional albums.” BRABEC & BRABEC, *supra* note 35, at 113; *see also* Katherine L. McDaniel, *Accounting for Taste: An Analysis of Tax-and-Reward Alternative Compensation Schemes*, 9 TUL. J. TECH. & INTELL. PROP. 235, 280 (2007) (noting that typical recording contracts grant the labels an option to extend the contract to six more albums at their sole discretion).

43. Ginsburg, *supra* note 16, at 382. This observation pertains to authors in general, not only in the recording industry.

44. *See supra* Part I.A.

45. For example, burning the transporting cassettes or CDs has become unnecessary, and copying and distribution are achieved at lower costs. *See* Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1646 (2001) (“Traditionally, publishers have performed or overseen the following functions: selection; editing; reproducing the work in copies for distribution; distributing; marketing, including advertising and promotion; and accounting to the author for royalties. Today, some of these functions are no longer required, and others can be disaggregated . . .”).

46. It is possible to view record labels as a multisided platform. One market side is artists, and the other market side is composed of audiences. The status of record labels as a multisided platform might also erode as a result of reducing the transaction costs associated with connecting creators and consumers of music. *See* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 332–33 (2003) (arguing that platforms are needed when “[i]nformation and transaction costs as well as free-riding make it difficult in practice for members of distinct customer groups to internalize the externalities on their own”); David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL’Y INT’L 151, 154 & n.7 (2007) (noting that multisided platforms often “aris[e] in situations in which there are externalities and in which transactions costs . . . prevent the two sides from solving this externality directly”).

47. *See* Ginsburg, *supra* note 16, at 388 (“[A]vailing oneself of the means of distribution is one thing, making a living from the works one distributes is another”); Brian Stelter, *For Web TV, a Handful of Hits but No Formula for Success*, N.Y. TIMES, Aug. 31, 2008, at C1 (“[P]roducing Web content may be easy but profiting from it is hard.”). *See generally* Peter S. Menell, *Envisioning Copyright Law’s*

types of digital music services, i.e., streaming services and downloading services, are still geared towards enriching record labels rather than improving the economic state of artists. This effect stems from the fact that these services rely on economies of scale: every individual song, album or artist generates a negligible income, yet the aggregation of this income by record labels who own numerous copyrights can be substantial. As a result, despite promising technologies, artists have remained largely bound to the compensation schemes they knew prior to the Internet revolution.

1. Streaming Services

Streaming music services transmit music to users for listening in real time but not for downloading.⁴⁸ In the terminology of copyright law, streaming services *publicly perform* the music,⁴⁹ and do not *distribute* it.⁵⁰

Congress attached the performance right to sound recordings in the 1990s, and set forth particular rules for its implementation.⁵¹ Although the resulting framework is, as David Nimmer describes it, “frightfully complex,” we must delve into it in some detail, in order to understand the revenue potential streaming services offer artists.⁵²

Under the new regime, set forth in section 114 of the Copyright Act, two

Digital Future, 46 N.Y.L. SCH. L. REV. 63, 98–199 (2002–03).

48. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 442 (S.D.N.Y. 2007) (“Streaming . . . allows the real-time (or near real-time) playing of the song and does not result in the creation of a permanent audio file on the client computer.”).

49. 17 U.S.C. § 101 (2012) (“To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process . . .”). A performance may be “to the public . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” *Id.*; see also *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 134 (2d Cir. 2008) (“[I]n determining whether a transmission is ‘to the public,’ it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times.”); 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.14[C][3], at 8-142 (2006) (“[I]f the same copy . . . of a given work is repeatedly played (i.e., ‘performed’) by different members of the public, albeit at different times, this constitutes a ‘public’ performance.”).

50. See *Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d at 443–44 (holding that streaming digital delivery is a public performance under § 106(3)). However, it is not considered distribution under § 106(4).

51. See *Digital Performance Right in Sound Recordings Act (DPRA)*, Pub. L. No. 104-39, § 2, 109 Stat. 336, 336 (1995) (codified as amended at 17 U.S.C. §§ 101, 106, 111, 114, 115, 119, 801–803) (granting rights holders of sound recordings the right “to perform the copyrighted work publicly by means of a digital audio transmission”); *Digital Millennium Copyright Act of 1998*, Pub. L. No. 105-304, § 405 112 Stat. 2860, 2890–2902 (codified as amended at 17 U.S.C. §§ 112, 114(j)(13)). The public performance right for sound recording is limited to the digital realm. Proposals to expand the public performance right beyond this realm, particularly to traditional radio stations, are frequently on Congress’ agenda. See, e.g., *Performance Rights Act*, S. 379, H.R. 848, 111th Cong. (2009). Note that while until the 1990s users did not need to ask permission or compensate rights holders for public performance of their records, a public performance license was still needed for the underlying musical piece, i.e., the lyrics and composition. 17 U.S.C. § 102(a)(2).

52. David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 191 (2000).

different licenses pertain to two types of streaming services.⁵³ Interactive services—which stream to listeners a particular sound recording upon request—are subject to the regular copyright rule, under which they must obtain a license from copyright owners in order to use their works.⁵⁴ The revenues these licenses yield are distributed to the artist pursuant to her share under the recording contract she has signed.⁵⁵

Noninteractive services, on the other hand, are eligible for a compulsory license for public performance of sound recordings.⁵⁶ Section 114 further mandates a specific distribution scheme of the revenues the compulsory license yields, under which artists are entitled to forty-five percent of these revenues.⁵⁷ Fifty percent of revenues are granted to the copyright owner of the sound recording (most likely, a record label), and five percent are shared between escrows of feature and non-feature artists.⁵⁸

Rate-setting for the section 114 compulsory license is an intricate, never-ending saga.⁵⁹ Concisely, the annual rates de facto serve as a ceiling, because digital services collectively negotiate a lower rate from copyright owners after the statutory rates are set. The 2011 ceiling, for example, was set on 0.17 cent per performance,⁶⁰ yet the negotiations set the maximum rent at 0.097 cents.⁶¹ As a result of these low figures, artists—who are entitled to forty-five percent of these sums—can only generate meager revenues from noninteractive streaming

53. 17 U.S.C. § 114(d)(1). On the distinction between interactive and noninteractive services see, for example, *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 151–52 (2d Cir. 2009).

54. BRIAN T. YEH, STATUTORY ROYALTY RATES FOR DIGITAL PERFORMANCE OF SOUND RECORDINGS: DECISION OF THE COPYRIGHT ROYALTY BOARD 2 (2008), available at http://www.ipmall.info/hosted_resources/crs/RL34020_081023.pdf.

55. 17 U.S.C. § 114(g)(1).

56. To be eligible, services must restrict the number of songs that could be played per hour by a single artist or on a single album and avoid publishing an advance playlist of specific songs. *Id.* § 114(d)(2).

57. *Id.* § 114(g)(2)(A).

58. *Id.* The Copyright Royalty Board has entrusted SoundExchange, a newly created Performing Rights Organization (PRO), to collect and distribute the statutory royalties under section 114. See *id.* § 801(b)(1) (2006) (listing four specific objectives in the calculation of royalty rates); *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1222 (D.C. Cir. 2009).

59. Congress has delegated authority to set rates for the compulsory licenses under several statutory schemes. The most recent, passed in 2005, directed the Librarian of Congress to appoint three Copyright Royalty Judges to set “reasonable rates and terms” for royalty payments from digital performances. See 17 U.S.C. §§ 114(f)(2)(B), 801, 803; 37 C.F.R. § 351 (2012); see also *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 753–54 (D.C. Cir. 2009); NIMMER, *supra* note 49, § 8.14[C][3]; YEH, *supra* note 54, at 4.

60. A \$500 minimum applies. 37 C.F.R. § 380.3. This payment includes fees for making an ephemeral recording under 17 U.S.C. § 112.

61. The market agreement sets differential rates for different types of services. Under the new agreement, large services pay the greater of the per-song fee or 25% of their revenue. Smaller services, defined as services which have \$1.25 million or less in total revenue, would pay between 10% and 14% of their sales or 7% of their expenses, whichever is greater. See Michael Schmitt, *RAIN 7/7 News Flash: SoundExchange and “Pureplay” Webcasters Announce 2006–2015 Royalty Agreement*, RAIN (July 7, 2009), <http://textpattern.kurthanson.com/articles/719/rain-77-soundexchange-and-pure-play-webcasters-reach-royalty-agreement>; see also Jim Puzanghera, *Company Town: Music Websites Get a Break on Royalties*, L.A. TIMES, July 8, 2009, at B1.

services.⁶²

As to interactive services, although they operate under individual licenses, and thus yield overall higher sums than compulsory licenses, artists are not likely to enjoy this premium.⁶³ First, record labels structure the agreements with digital services in a way that allows them to pay minimal royalties, such as by manipulating the definitions of “sale” or “license” to fit to the lower royalty provision under artists’ recording contracts.⁶⁴ Second, record labels often demand services to pay part of the proceeds in the form of advances or equity stake in the service, and thus avoid sharing them with artists.⁶⁵ Third, artists’ royalties are likely to fall prey to deductions and to be swallowed by the artists’ debt to the record label.⁶⁶ Even artists who are not signed with record labels receive low sums via interactive services. Specifically, interactive services yield for them merely between 0.0005 cents to one cent per stream.⁶⁷

Although these sums are fairly low, the above analysis should not be read as a general critique of the streaming business model. These services may have a range of advantages.⁶⁸ A comprehensive analysis of these services is beyond the confines of this Article. Yet, this analysis shows that the streaming business model can benefit primarily record labels, which directly negotiate licensing deals, and

62. A service that operates under the section 114 compulsory license would generate at most less than 0.05 cents (\$0.0005) per stream for performers (45% of 0.097¢). This means that a record has to be streamed more than two thousand times in order to result in *one dollar* in revenues for the artist. The same number of streams will result in approximately two dollars for unsigned, independent artists who are also the copyright owners of their music. Even independent artists must receive their digital royalties from SoundExchange, the representative body nominated by the Copyright Office to collect performance royalties for sound recordings, and are subject to its administrative fee and procedures. See SOUNDEXCHANGE, <http://www.soundexchange.com/>.

63. See *supra* note 54.

64. Such manipulations affect licensing deals with both streaming services and downloading services. See, e.g., *FBT Prods., LLC v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010); *Ridenhour v. UMG Recordings*, No. 4:11-cv-05321-DMR (N.D. Cal. Nov. 2, 2011); *James v. UMG Recordings*, No. 3:11-cv-01613-SI (N.D. Cal. Apr. 1, 2011); “The Youngbloods” v. BMG Music, No. 07 Civ. 2394 (GBD) (KNF), 2011 U.S. Dist. LEXIS 1585 (S.D.N.Y. Jan. 6, 2011); see also Ben Sisario, *Eminem Lawsuit May Raise Pay for Older Artists*, N.Y. TIMES, Mar. 27, 2011, at B1; Neil Strauss, *Record Labels’ Answer to Napster Still Has Artists Feeling Bypassed*, N.Y. TIMES, Feb. 18, 2002, at A1.

65. Andrew Ross Sorkin & Jeff Leeds, *Music Companies Grab a Share of the YouTube Sale*, N.Y. TIMES, Oct. 19, 2006, at C1 (reporting that record labels negotiated \$50 million in equity stakes in YouTube as part of the licensing agreement); Mark Cuban, *Some Intimate Details on the Google YouTube Deal*, BLOG MAVERICK (Oct. 30, 2006, 5:35 AM), <http://blogmaverick.com/2006/10/30/some-intimate-details-on-the-google-youtube-deal>; see also Jessica Litman, *Antibiotic Resistance*, 30 CARD. ARTS & ENT. L.J. 53, 64 (2012) (“As some cynical observers noted at the time, structuring the licensing deal as an equity stake enabled the labels to shelter the proceeds from obligations to pay royalties to artists and composers.”).

66. See *supra* note 38.

67. Some streaming services appear to generate for artists just under one cent per stream, while others generate 0.015 cents or 0.077601 cents per stream. Faza, *The Paradise That Should Have Been*, CYNICAL MUSICIAN (Jan. 21, 2010), <http://thecynicalmusician.com/2010/01/the-paradise-that-should-have-been/>; Benji Rogers, *Thank You for My \$0.00077601. No Really Thank You*, PLEDGEMUSIC (May 24, 2010, 4:01 PM), <http://www.pledgemusic.com/articles/25-thank-you-for-my-0-00077601-no-really-thank-you?locale=es>.

68. For example, these services can be effective as promotion tools and enhance users’ access to music.

aggregate the small payments accumulated from the musical creations of many artists.⁶⁹

2. Downloading Services

Downloading services, typically online music stores, allow users to download music on a one-track basis.⁷⁰ In copyright law terminology, downloading services *reproduce and distribute* music but do not evoke the public performance right.⁷¹ Because section 114 is limited to the public performance right, downloading services operate under a regular, individual license from copyright owners, and are not subject to any regulatory distribution scheme.⁷²

Downloading services offer a somewhat better deal to artists than do streaming services. This is not utterly surprising. Streaming services typically provide users with a wide selection of music in return for either advertisements or a low monthly fee.⁷³ Downloading services, on the other hand, charge a per-track or per-album price, and simply have a larger pot to share for each track.

In terms of revenues, artists who are signed with record labels earn nine cents on

69. Theoretically this system might also benefit top artists whose music is streamed millions of times. However, the data does not always support this conclusion. The singer Lady Gaga claimed to have received merely \$167 for a million streams from the streaming service Spotify. Spotify denied the claim. *See Report: Spotify Paid Lady Gaga \$167 For 1M Plays*, HYPEBOT.COM (Nov. 23, 2009), <http://www.hypebot.com/hypebot/2009/11/report-spotify-paid-lady-gaga-167-for-1m-plays.html>.

70. Record labels have historically been centered on sales of bundled albums, despite sometimes releasing “singles,” i.e., discs typically containing the most commercially viable song of a new album. In contrast, digital stores now enable customers to choose from the full range of songs on most albums. *See Abraham Bell & Gideon Parchomovsky, Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1030 (2008); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 657 (2006) (“No longer can the music industry rely on one-hit-wonders to sell relatively high-priced pieces of plastic or vinyl containing one or two hits bundled with less desirable songs.”); *see also infra* note 224 and accompanying text.

71. *See United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 443–44 (S.D.N.Y. 2007) (citations omitted) (“Although we acknowledge that the term “perform” should be broadly construed . . . we can conceive of no construction that extends it to the copying of a digital file from one computer to another in the absence of any perceptible rendition. Rather, the downloading of a music file is more accurately characterized as a method of reproducing that file.”); *see also Maverick Recording Co. v. Goldshteyn*, No. CV-05-4523, 2006 U.S. Dist. LEXIS 52422, at *8 (E.D.N.Y. July 31, 2006) (“Downloading and uploading copyrighted files from a peer-to-peer network constitutes, respectively, reproducing and distributing copyrighted material in violation of 17 U.S.C. § 106.”).

72. *See supra* note 51.

73. The distinction between ad-based and fee-based services is somewhat blurred, because ad-based services typically utilize the free service to lure users to upgrade to an ad-free, fee-based model. *See, e.g., Kim-Mai Kutler, Spotify CEO Daniel Ek Vague on U.S. Launch, Company Has 320,000 Paid Subscribers*, VENTUREBEAT (Mar. 16, 2010), <http://venturebeat.com/2010/03/16/spotify-daniel-ek/> (quoting Spotify’s CEO: “We want to make sure there’s a conversion rate [from free to paid subscription] . . . because that’s the only way we’ll be self-sustainable.”). Some free services began to collect subscription fees for some services or geographic areas, or limited the free option. *See Important Update on Royalties*, PANDORA (July 7, 2009), http://blog.pandora.com/pandora/archives/2009/07/important_updat_1.html; *Last.fm to Charge for Streaming*, BBC NEWS (Mar. 25, 2009), <http://news.bbc.co.uk/2/hi/technology/7963812.stm>.

average from the sale of each track on iTunes or Amazon (the label's share is fifty three cents).⁷⁴ Unsigned artists are required to use an intermediary service to access online stores. After the fee such intermediaries charge, artists can retain 63.7 cents per track.⁷⁵

These sums exclusively are nevertheless too low to sustain a living. A solo artist who is signed with a record label would need to have her music downloaded more than twelve thousand times per month in order to obtain even the minimum wage.⁷⁶ If the artist is not signed with a label, she can approach the minimum wage if her music was downloaded more than fifteen hundred times.⁷⁷ For band members to reach these sums, this figure would need to be multiplied by the number of band members.

Clearly, my calculations did not take into account diversification of revenue sources. Combined platforms of revenues can certainly increase the overall sums artists earn. Yet, these calculations do indeed demonstrate the low capability of existing business models to improve the economic prospect of artists.

C. THE RESULT: ARTISTS' ECONOMIC INFERIORITY AND ITS COSTS

Given the reality depicted above, artists today face a choice between two unremunerative career alternatives. The first is to sign a contract with a record label. This option provides temporary economic security in the form of large advances and investments, which allow artists to devote their time to creating music. The tradeoff is that artists must sign an unfavorable record deal and often remain economically and professionally dependent on the record label for the rest of their careers.⁷⁸ The second option is to forgo a recording contract and create and disseminate music independently with the help of digital media. Here, the tradeoff is not only that artists must bear the cost of production of the records, but also that they cannot realistically expect reasonable compensation for their work, because of the payment structure of digital music services, as described in Part I.B.⁷⁹ Neither way allows most artists to earn a living from creating art.

The implausibility that music creativity can provide sufficient living for artists generates at least four types of costs. First and foremost, the low returns artists can expect ex post may have a negative impact on their incentives to create ex ante. This is a critical point. American copyright law is designed to encourage creativity

74. *How Much Do Music Artists Earn Online?*, INFO. IS BEAUTIFUL (Apr. 13, 2010), http://www.informationisbeautiful.net/2010/how-much-do-music-artists-earn-online/?utm_source=log.bybjorn.com&utm_medium=twitter.

75. For example, services such as TuneCore (<http://www.tunecore.com/>) and CD Baby (<http://www.cdbaby.com/>) intermediate between artists and digital storefronts like iTunes in return for a fee. See Faza, *supra* note 67; Rogers, *supra* note 67.

76. See *How Much Do Music Artists Earn Online?*, *supra* note 74.

77. Note, however, that unsigned artists incur the costs of payment for services such as distribution, promotion, etc.

78. See *supra* note 42 and accompanying text.

79. Artists who are signed with labels indirectly bear the cost of production as well, because the sums record labels invest in the production are returnable or recoupable. See *supra* note 34 and accompanying text. Yet, they do not need to devote the time and effort to this activity.

for the benefit of society.⁸⁰ As Shyamkrishna Balganesh explains: “By providing a creator with limited exclusionary control over creative expression at time T2, the system is thought to encourage the production of such expression at time T1.”⁸¹ Yet, as the preceding discussion shows, the extant framework misses the mark: while the system provides economic incentives for record labels to execute their part of the creative process, it generates little incentives for individual artists to create. Relatedly, undercompensation may raise moral concerns, because artists are unable to reap what they have sowed.⁸²

One may argue that generating economic incentives for record labels rather than for artists in the context of music creation might be efficient for two reasons. First, artists might derive indirect pecuniary benefit from record sales, such as from performances, and this benefit can generate a sufficient incentive to create.⁸³ As William Landes and Richard Posner note, “[m]any authors derive substantial benefits from publication that are over and beyond any royalties.”⁸⁴ However, the shift to “360 degree contracts” considerably blunts the force of this argument by biting into artists’ revenues from performances and other sources.⁸⁵ Moreover, as I discuss below, relying on indirect pecuniary benefit may create an incentive for artists to only perform music that they have created in the past, and not to create new music.⁸⁶

80. U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); see also *Eldred v. Ashcroft*, 537 U.S. 186, 223 (2003) (“The grant of exclusive rights is intended to encourage the creativity of ‘Authors and Inventors.’”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that it is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1047 (2008) (“Because the initial production of intellectual goods often necessitates considerable investment and once produced they can be copied at a very low cost, there is a serious risk that not enough intellectual goods would be created without legal protection.”); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 471 (1998) (“By guaranteeing authors certain exclusive rights in their creative products, copyright seeks to furnish authors and publishers, respectively, with incentives to invest the effort necessary to create works and distribute them to the public.”); Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996) (“To encourage authors to create and disseminate original expression, copyright law accords them a bundle of proprietary rights in their works.”).

81. Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577 (2009).

82. Admittedly, it is unclear that American copyright law leaves room for moral considerations if they do not affect actors’ incentives. See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005) (“Intellectual property rights are an exception . . . and they are granted only when—and only to the extent that—they are necessary to encourage invention.”). It is worth noting, however, that even if copyright is reduced to a pure utilitarian system, unjust systems may eventually have an effect on incentives, because people naturally avoid situations where they feel they are treated unfairly.

83. See *infra* Part IV.C.

84. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 331 (1989).

85. See *supra* note 41 and accompanying text.

86. See *infra* notes 278–79 and accompanying text.

Second, one may also argue that while economic incentives are necessary to motivate record labels' investments,⁸⁷ they are not needed in order to spur artists' creativity, because individual artists are mainly driven by intrinsic motivations.⁸⁸ Yet, this rationale can only go so far: if artists cannot earn a living from their music, they will need to maintain a day job in order to put bread on their tables, and devote less time to music creativity.⁸⁹

The second cost of the current structure lies in the considerable barriers to entry it creates for new artists. The overwhelming holdings of copyrights by record labels (horizontal integration),⁹⁰ together with the integration of the entire process of music production and distribution into the record labels (vertical integration),⁹¹ have placed record labels in a controlling position over the majority of the means and resources necessary to create music professionally. This status created barriers to entry, because artists who were unable to secure a recording contract could not effectively create and disseminate music.⁹² Indeed, the status of record labels as gatekeepers has eroded in the digital age. There are now alternative ways to produce and disseminate music. Yet, without ways for artists to monetize their music independently, the status quo holds, because record labels still provide the main road for artists who seek funding to support music creativity.

Another, corollary cost concerns the negative impact the gatekeeping function of record labels has on the variety and diversity of music. The extant system, where artists have few opportunities to earn money without the involvement of record labels, may subjugate the availability of music to the labels' business interests. As analyzed above, record labels' profits stem from economies of scale. They thus have an incentive to produce music that fits the mainstream taste and yields maximum profits. Record labels' dominance risks compelling artists to follow

87. See, e.g., Landes & Posner, *supra* note 84, at 326–27 (arguing that copyright is designed to assure adequate incentives for both artists and intermediaries); Ku, *supra* note 1, at 266–67 (“Who would invest the money necessary to press thousands of albums of a new recording artist . . . unless there was the potential to recoup that initial investment and then some?”).

88. See, e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517–18 (2009) (expressing skepticism that monetary incentives lead authors to create); Diane L. Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (drawing on social science studies to explore internal motivations to create).

89. See, e.g., Diane L. Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1137 (2003) (“Having made the point that artistic production is not only, and perhaps not even primarily, about money, it is nevertheless unlikely that writers will devote themselves as fully to authorship as a profession if they cannot profit from the value that others place on their work.”).

90. See *supra* note 22.

91. David Blackburn, *On-Line Piracy and Recorded Music Sales 6* (Dec. 2004) (unpublished Ph.D. dissertation, Harvard University), available at <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.117.2922> (“Albums are typically produced in the following manner. First, an artist . . . is signed to multi-year contract An album is then produced in one of the label’s recording studios, printed onto a compact disc by the production arm of the owner recorded company, and distributed by the distribution arm of the company. Thus . . . the path from artist to consumer is essentially completely vertically integrated.”).

92. See *supra* notes 28–30 and accompanying text. The bundled service offerings of record labels can also create barriers to entry for potential rivals who could compete with the existing record labels.

record labels' instructions and harm their own creative instinct and society's interest in diverse music, for the sake of pursuing economies of scale.

An additional concern is "misallocation costs," namely, misallocation of market resources in favor of record labels, which offer little benefit to society. In free markets, the law should not concern itself with market bargaining and the way in which gains from trade are divided.⁹³ However, as the above analysis shows, there are few reasons to assume free market in the recording industry. The industry is loaded with inefficiencies and market failures, such as market concentration, unequal bargaining power between artists and labels and the absence of markets for artists to sell their works.⁹⁴

As the preceding discussion implies, the value of record labels to society has probably decreased: many of the traditional functions of record labels can now be relinquished, disaggregated or undertaken by other entities.⁹⁵ Moreover, digital media can perform many of the functions record labels perform at a lower cost.⁹⁶ Yet, the extant system still allocates the lion's share of music revenues to record labels. Given that these resources could have been channeled to support artists' creativity, this misallocation of resources considerably diminishes societal welfare.⁹⁷

Misallocation of resources leads to only more misallocation of resources because the lucriveness of the misallocation results in excessive involvement of record labels in the creative process. This negative dynamic effect maintains the economic gap between artists and record labels. It thus preserves the economic dependency of artists on record labels and exacerbates all of the costs that I discussed in this Section.

II. THE FAIR TRADE COPYRIGHT MODEL

In this Part, I present and advance the Fair Trade Copyright model. I begin by exploring practical aspects of the model. My aim is to demonstrate how the Fair Trade Copyright model might actually operate, and to delineate the most efficient

93. See, e.g., James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 451 (1995). However, in the recording industry there are few reasons to assume efficient free market for this purpose. Structural unequal bargaining power between artists and record labels, market concentration, and the lack of meaningful alternatives for artists, together with public choice problems may dictate the distribution of revenues. See *supra* note 27.

94. All these are combined with serious public choice problems. See *supra* note 27.

95. This process characterizes content industries across the board. See Ginsburg, *supra* note 45, at 1646; see also Ku, *supra* note 1, at 294 ("[U]ntil now the bundling of interests was acceptable because the cost of producing the vessels—CDs, books and DVDs—for content, and distributing those vessels, was an essential component of making content available to the public.").

96. I do not want to suggest that the role of record labels has become redundant. In fact, this Article is completely agnostic as to the contemporary role of record labels. But, as I explain, incentivizing record label to orchestrate the venture of music creation cannot be deemed sufficient to sustain musical creativity.

97. In the hands of record labels, these resources may sometimes even be used for socially inefficient uses, such as litigation and lobbying that have the effect of increasing misallocation costs. See also *infra* Part IV.A.

way for the model to achieve its goals. Then, I address the benefits of the model, showing that the Fair Trade Copyright model would be welfare enhancing on two levels. First, it would create an independent revenue stream for artists, thus augmenting artists' incentives to create and addressing the problems discussed in Part I. Second, Fair Trade Copyright can promote long-term efficiency by shifting the power balance within the music industry in favor of artists.

A. THE FAIR TRADE COPYRIGHT MECHANISM

In the reality which I envision, users would be presented with an option to make a donation to performing artists any time they listen to music or download it. Practically, I suggest that a designated button would appear on users' screens whenever they play or download music to their computers or digital devices. Pressing that button would allow users to select the amount they wish to donate and a payment method, and transfer their contribution to the artist.⁹⁸

In the following discussion, I explore the steps necessary for implementation of the Fair Trade Copyright proposal and how best to perform each step. Two principles guide this analysis: simplicity and low cost. The Fair Trade Copyright system must be easy and inexpensive for services to implement, for users to utilize and for musicians to collect from. Otherwise, it would involve considerable opportunity costs for all parties involved and would be underused.⁹⁹

1. Creating an Opt-Out System for Artists

The first step to implementing the model is to enroll artists in the Fair Trade Copyright system. One option to accomplish this is to create an opt-in system, where musicians would need to elect to participate in the system in order to collect donations. However, an opt-in system would face the risk of suboptimal artist participation. The reason for this is twofold. First, people generally lean towards "inertia," and tend to follow the path of least resistance.¹⁰⁰ Second, each individual artist would not internalize the full social value of the system, because this value includes long term implications on prospective artists and the public at large.¹⁰¹

The better option is to create an opt-out system, where donations will be

98. Payment methods are abundant these days, and include Internet payment services (e.g., PayPal, moneybookers), credit cards or, in case of mobile-phones, cellular carriers.

99. See Fred D. Davis, *Perceived Usefulness, Perceived Ease of Use, and User Acceptance of Information Technology*, 13 MIS Q. 319, 320 (1989) (noting that perceived ease of use of a technology determines to a large extent the probability that it will actually be used); see also Richard P. Bagozzi, *The Legacy of the Technology Acceptance Model and a Proposal for a Paradigm Shift*, 8 J. ASS'N FOR INFO. SYS. 244 (2007); Mohammad Chuttur, *Overview of the Technology Acceptance Model: Origins, Developments and Future Directions* (2009) (unpublished review paper), available at <http://sprouts.aisnet.org/9-37>.

100. Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 203 (2009) (noting that "inertia" is a central reason behind traditionally low opt-out rates from class actions (as well as low opt-in rates) because people "usually do nothing").

101. See *infra* Part II.B. This risk is inherent to collective actions, where part of the social value from the collective action is located in the impact of the action beyond each member.

collected for all artists, unless the artist actively elects to eschew the system. An opt-out system would yield a higher membership rate not only because of the power of “inertia,” but also because a rational artist will not opt-out of a system from which she can only gain. A higher membership rate would, in turn, augment the system’s effectiveness: First, users and services would be more inclined to cooperate with it, and more artists will have an incentive to promulgate the model and encourage users to participate in it. Second, wide participation of artists will increase the likelihood that the industry-altering potential of the system will be fulfilled.¹⁰²

Obviously, as far as procedure is concerned, artists would still need to actively provide information to the system in order to receive the funds donated to them. This, however, does not upset the opt-out status of the system. Donations will be collected even for artists who have not provided information, and would be retained in reserve until the artist registers, unless the artist opts-out of the system.¹⁰³

2. Creating a PRO and Setting up a Collection System

The next challenge pertaining to the model is to set up a safe and efficient way to transfer users’ donations to the designated artists. At first blush, the simplest way to accomplish this is to assign each music service the task of transferring to artists the donations users make to them via the platform of that service.

While this process appears simple and instantaneous at first sight, it should be rejected. First, it would be unrealistic to expect artists to provide data to all the different services, and websites have no incentive (and perhaps no way) to collect the data themselves. As a result, while services can know when an artist should be paid, they would have no way to actually transfer the donation to that artist.¹⁰⁴ But even if services could obtain this information, it would be inefficient and cost-intensive if each music service would need to manage and transfer numerous micropayments to different artists. Nor should music services bear the administrative cost and risk associated with the payment process. This would impose unnecessary costs on services and discourage the cooperation of services with the system.

What is more, management of the donations by services would raise reliability

102. See *infra* Part II.B.

103. In a similar manner, SoundExchange retains the money for artists until they claim it. See *supra* note 62. Another possibility is that the Fair Trade Copyright system would send money of artists who neither register nor opted out to their account in SoundExchange or to their record label. I believe this path would be less preferable because these organizations take a cut of the revenues, but this would still be better than the alternative—i.e., that these artists will not be part of the system at all.

104. Music services are already obligated to collect and provide data that links music tracks to their performers to copyright owners and other entities, such as SoundExchange. See 17 U.S.C. § 114(g)(2), (d)(2)(A)(iii) (2012) (requiring digital broadcasts to include, “if technically feasible,” the information encoded in the sound recording that identifies the title of the recording and the featured recording artist).

The problem of transferring the donation to the artist would be ameliorated in the context of services where both artists and users need to be signed-in, such as eBay, Amazon and other platforms. Most services, however, do not require registration by performing artists themselves.

and data-security issues, because services would need to be trusted to transfer the entire amounts to the correct artists and securely maintain users' information.¹⁰⁵ This problem may discourage users from using the model. The problem may be prohibitive in the context of illegal music sites, which may be open source-based and generally less reliable for this purpose.¹⁰⁶

To overcome these problems, I suggest establishing a collective organization for performing artists. I model this organization after Performing Rights Organizations (PROs), which administer digital performance royalties to songwriters, composers and publishers.¹⁰⁷ Services would route users' donations to the PRO rather than directly to artists, and the PRO would distribute the donations to artists periodically. This mechanism closely resembles the current operation of PROs around the world.

A PRO would provide the most efficient solution to the challenges discussed in this Section. First, the PRO is better positioned to obtain necessary information from artists. Artists will only need to provide their information once and to a reliable body. Furthermore, the PRO will be able to hold the money for artists in reserve until the artist claims it, a capacity that most services are not likely to have.

Second, the PRO would spare services the costs associated with obtaining information and managing the payment process, thus enhancing services' incentives to participate in the system. Indeed, the services would need to inform the PRO regarding the target artist for each donation. But services prepare similar reports for other purposes in any case, and the marginal cost of providing the reports to the PRO is negligible.¹⁰⁸ The experience with member-run PROs shows that this framework enables relatively low operating costs and a high distribution rate.¹⁰⁹

A PRO would also substantially alleviate reliability concerns. First, the fact that donations will always be sent to the same address and not dispersed among various

105. Clearly payments would be processed by external payment services, which have strong incentives and established practices to provide secure payment services. Yet, the platform has to be trusted not to interfere with the payment service's operation and not to access or store users' data. Moreover, some services, such as iTunes and Amazon, do have their own payment system.

106. See Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 150–51 (2010) (noting that illegal file sharing sites are often short-lived and sometimes reside overseas). Open-source services exacerbate the problem because programmers can change the service-code to divert donations elsewhere.

107. The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC (originally, the Society of European Stage Authors & Composers) are the three PROs operating in the United States. SoundExchange operates as a PRO for the sake of collection of section 114 revenues. See *supra* note 62.

108. See *supra* note 104. Illegal services are unlikely to provide such reports, because, inter alia, it might increase their risk of being prosecuted. The solution for the lack of data may be to distribute the proceeds from illegal services pro rata, according to the consumption patterns on legal sites. A similar solution is employed by other PROs, such as ASCAP, when they collect proceeds from bars and restaurants, because verifying the playlist of each individual establishment is costly.

109. For a comparison, ASCAP, a member-run PRO, has about 12% as a distribution rate, meaning that 88% of the money it collects is distributed to its members. See *The ASCAP Advantage*, ASCAP, <http://www.ascap.com/about/ascapadvantage.aspx> (last visited Feb. 28, 2011).

artists would enable the PRO to compare between different services and locate irregularities. Thus, if a report by one service is substantially different from the others, the PRO may conduct a closer inspection of that service. The PRO could also serve as a focal point for complaints by users or artists who suspect the reliability of a particular service. A central mechanism to address the problem of reliability and trust will be discussed in the next Subsection.

3. Creating a Fair Trade Copyright Trademark

A major challenge for the Fair Trade Copyright application is to create an incentive for services to implement the system and—once implemented—to participate in it in a trustworthy manner.

To address these challenges, I suggest what is perhaps the “hardest” mechanism in the otherwise “soft law” nature of the Fair Trade Copyright proposal. I propose that the Fair Trade Copyright button to be installed on services’ platforms embed a trademark that the PRO will register with the Patent and Trademark Office. The mark would be the exclusive property of the Fair Trade Copyright PRO and will be used for a threefold function. First, the mark would be used for ethical branding of services that use the service appropriately. Second, the mark would augment the system’s reliability by allowing the PRO to supervise and create standards for services that use the system. Third, the mark would signal to users which services are reliable for donations.¹¹⁰

To begin with the branding function of the mark, ethical branding would produce an economic incentive for services to join the system.¹¹¹ It is well established in the literature on corporate charity that “[s]ome customers prefer, all things being equal, to trade with an organization that has a social mission rather than with a more conventional profit-maximizing corporation.”¹¹² Similarly, the ethical-branding certificate would be a draw for users and thereby allow participating services to gain a competitive advantage over nonparticipating services, at no cost.¹¹³

110. A similar practice is employed by the Fairtrade Foundation. The Foundation owns the Fairtrade mark and licenses the right to use the mark only to entities that meet international Fairtrade standards. *Use of the Fairtrade Mark*, FAIRTRADE FOUND., http://www.fairtrade.org.uk/business_services/use_of_the_fairtrade_mark.aspx (last visited July 20, 2011).

111. Competitive advantage in the form of ethical branding would pertain to legal and illegal services alike. As for illegal services, while the Fair Trade Copyright cannot immunize them from copyright infringement claims, it may make them appear more morally sound (perhaps “the Robin Hood of the music industry”) and increase their appeal with users. Legal services, for their part, would need to compete with illegal services on the ethical front as well, and would not wish to appear as if they are siding with record labels against both users (by asking money for what illegal services offer for free) and artists (by shirking from installing the Fair Trade Copyright option).

112. Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1374 (2011); see also STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 437 (2002) (suggesting that “charitable giving is simply another form of advertising”); Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945, 982 (2011) (“After all, doing good for others can be a strategic public relations ploy, designed to improve consumer perception of the firm’s brand and increase future revenues.”).

113. Recall that these services are relying on economies of scale, and their revenues depend on the

Digital music services today compete in a non-price-based competition in order to draw traffic to their sites. Price competition in digital music is most likely exhausted at this point.¹¹⁴ The Fair Trade Copyright branding would provide much needed competitive edge. Rational services are thus likely to install the Fair Trade Copyright feature because of individual cost-effectiveness assessments: the system provides a competitive advantage at virtually zero cost.¹¹⁵

If the incentives analyzed above prove insufficient to induce services to install the Fair Trade Copyright, the PRO might consider, as a second best solution, allowing services to keep a share of the overall donations.¹¹⁶ Indeed, this result would reduce artists' share in the Fair Trade Copyright revenues. But the alternative—under-participation in the model—would result in greater under-compensation of artists and would thus come at a much greater cost to society.¹¹⁷ The advantage of this second best solution would be to create incentives for services not only to install but also to promulgate the Fair Trade Copyright concept, and it would still be a significant improvement over the current system.

Consider now how the fair trade trademark would enhance the reliability of the system. In order for a service to claim a fair trade copyright status, the service will need to license the mark from the PRO. The license would set guidelines for the eligibility of services to utilize it and for the actual use of the mark. These guidelines would be designed to ensure that the full amount of contributions is being transferred and that users' information is securely stored. The guidelines would likely include, *inter alia*, using secure payment services,¹¹⁸ providing accurate information regarding users' payments, and allowing the PRO to supervise the payments.¹¹⁹ The PRO will further retain the right to supervise the use of the

size of their user-base. *See supra* Part I.B.

114. Streaming services are typically free-of-charge or are very low-priced. *See supra* note 73. In addition, illegal services, which offer music for free, pushed all prices down towards zero. *See infra* note 128 and accompanying text.

115. An exception to this cost-benefit analysis might be services that enjoy market dominance and beneficial license agreements with record labels under the current scheme, such as Apple's iTunes. Such services may be less susceptible to competitive challenges. Yet, if the Fair Trade Copyright becomes standard across all other services, objection to it from any service would likely be reduced.

116. Some music services may have altruistic motivations as well, especially in light of the fact that quite a few music services were created by musicians or music enthusiasts to whom artists' interests are close to heart. *Cf.* Peter Navarro, *Why Do Corporations Give to Charity?*, 61 J. BUS. 65, 67, 89–90 (1988) (suggesting that corporate executives have mixed motives, including altruistic ones, when making corporate donations); *see also* Bill Shaw & Frederick R. Post, *A Moral Basis for Corporate Philanthropy*, 12 J. BUS. ETHICS 745, 747–48 (1993) (arguing, based on empirical research, that the “overwhelmingly dominant” explanation for why executives engage in corporate philanthropy was “corporate citizenship”).

117. *See supra* Part I.C.

118. Services that secure sites and online payment processes are abundant, and some of which are even free. *See* Brian Krebs, *Free Tools to Secure Your Web Site*, WASH. POST (June 26, 2008, 1:54 PM), http://voices.washingtonpost.com/securityfix/2008/06/free_tools_to_secure_your_web_1.html.

119. There are various ways that services can be asked to prove their reliability. For example, they can publicize each donation in real-time so that users can verify the amount, and the Fair Trade Copyright would be able to compare the sum that was published with the sums they have actually received. An honor system might be sufficient in some cases as well and is utilized by other PROs, such as ASCAP, when the cost of verifying the playlist is prohibitive.

trademark or revoke it if the service does not adhere to the PRO's guidelines. Moreover, this mechanism would enable the PRO to take action under trademark law against services that use the mark without authorization.

Finally, because the PRO would supervise the reliability of the services, the mark would be able to fulfill the third function mentioned above: signaling to users which services are reliable for contributions.

B. THE BENEFITS OF THE FAIR TRADE COPYRIGHT MODEL

The Fair Trade Copyright model would create a new source of revenues for digital music: users' donations. These new revenues will be directed in full to recording artists, and would thus dramatically improve the prospect of revenues artists can expect from digital music. In the long run, the Fair Trade Copyright model has potential to function as an equalizing tool within the music industry and tilt its internal power balance in favor of artists.

The Fair Trade Copyright model purports to enlarge the pie of revenues that flow into the industry, rather than to merely redistribute income from existing sources and affect how the pie is divided. Specifically, the system would provide artists with income from both the illegal market for recorded music—which thus far has not been monetized at all—and the legal market, which did generate profits—but not so much for artists.¹²⁰

Consider, first, the illegal market for recorded music. Copyright law grants copyright owners a limited property right in their works,¹²¹ which connotes a right to exclude others from using them.¹²² The exclusionary nature of copyright forces a dichotomist choice on users: whether to pay the full price copyright owners demand for their work, or to pay zero and obtain the music illegally.¹²³ Users who are able and willing to pay more than zero but less than the demanded price end up consuming the works without paying *any* compensation to copyright owners or

120. See discussion *supra* Part I.B.

121. For a discussion on the property nature of copyright see, for example, Balganes, *supra* note 81; Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 U. PA. L. REV. 1649, 1679–80 (2009) (discussing how the property-like characteristics of copyright “exist alongside considerable nonproperty features”); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007); Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, 12 THEORETICAL INQUIRIES L. 59 (2011); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 143 (2004) (noting that consumption of information is “nonrivalrous”); Lawrence Lessig, *Re-Crafting a Public Domain*, 18 YALE J.L. & HUMAN. 56, 80–81 (2006) (“[T]he understanding that copyright is property tends to support a simplistic view about the nature of that property.”); Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2667 (1994) (“All familiar with the IPR field recognize the strong presumption in favor of injunctions.”).

122. See, e.g., Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 783 (2007) (“‘[T]he right to exclude’ is the essence of a true property right.”). Exceptions to the “right to exclude” of rights holders include, *inter alia*, area-specific compulsory licenses in 17 U.S.C. §§ 114, 115. See Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99, 158–60 (2000) (considering fair use as a “zero price” compulsory-licensing scheme).

123. Some legal services may offer the music for free as well.

creators. Because copyright involves supracompetitive pricing,¹²⁴ there certainly are users who would be willing to pay more than zero for accessing music online, but have no way to do so.¹²⁵

What is more, copyright litigation strategy focuses on injunction, rather than monetization of copyright infringement.¹²⁶ Record labels have consistently refused to license their content to file sharing services at any price, and have proved unwilling to monetize the illegal market.¹²⁷ The Fair Trade Copyright model would enable artists to monetize the illegal market by allowing users to donate a sum of their choice to artists, while permitting copyright owners to use their copyrights, license them or take legal actions against illegal users or networks.

Legal services for music also encompass an unrealized market that the Fair Trade Copyright can capture. The need of music services to “compete with free” has driven services to offer music for free or at a very low price.¹²⁸ In the absence of perfect price discrimination, however, many users might be willing to pay more than the sums they are currently required to pay to access music.¹²⁹ The Fair Trade Copyright model would be able to capture these users and enlarge the revenue pie, as well as to allocate these revenues to recording artists.

In combination, these two new income sources—donations from both legal and illegal markets—can lead to a dramatic improvement in the economic outlook of

124. In a competitive market, the price of a copyrighted work would reflect the marginal cost of supplying that copy. Proprietary copyright results in supracompetitive pricing, because the prices reflect the cost of creating the work in the first place. See NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 124–28 (2008); see also Glynn S. Lunney, Jr., *Copyright, Private Copying, and Discrete Public Goods*, 12 TUL. J. TECH. & INTELL. PROP. 1, 26 (2009) (“In today’s copyright-based economy, pricing systems attempt to extract from consumers a much higher payment for wildly popular works, even where no additional costs are involved. This represents an attempt to extract the work’s value from consumers, and is a pricing approach fundamentally inconsistent with competitive markets.”). The monopoly of record labels in the industry exacerbates the problem. See *Starr v. Sony BMG Music Entm’t*, No. 08-5637-cv, 2010 U.S. App. LEXIS 768 (discussing the pricing methods of the major labels on online platforms).

125. See, e.g., Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1727–28 nn.1–2 (2000); S.J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, 8 RES. L. & ECON. 181, 184 (1986); see also Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-To-Peer File-sharing*, 17 HARV. J.L. & TECH. 1, 25 (2003); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004) (arguing for a model of “monopolistic competition” for copyrights).

126. Copyright law affords rights holders a wide array of remedies, including injunctions, actual and statutory damages, disgorgement of an infringer’s profits, and impoundment and destruction of infringing articles. See 17 U.S.C. §§ 502-505, 509.

127. See *Merges*, *supra* note 121, at 2667.

128. See, e.g., Peter S. Menell, *Silicon Valley Builds Legal Celestial Jukeboxes, Will Music Fans Return to the Market?*, OP-EDS (July 26, 2011) <http://www.law.berkeley.edu/11587.htm> (“Those intrepid entrepreneurs who tried to do things ‘by the book’ found it difficult if not impossible to ‘compete’ with free (and obtain viable license terms with the many copyright owners).”).

129. See, e.g., Douglas C. Sicker, Paul Ohm & Shannon Gunaji, *The Analog Hole and the Price of Music: An Empirical Study*, 5 J. ON TELECOMM. & HIGH TECH. L. 573, 586 (2007) (finding that even among self-avowed “pirates,” 80% would be willing to pay twenty to forty cents per piece).

artists.¹³⁰ The Fair Trade Copyright revenues from both legal and illegal platforms would be routed to artists in their entirety. They would not be subject to the rather substantial cut which intermediaries—record labels and digital services—capture from other sources of revenues these platforms generate.¹³¹ The fact that the PRO would be the first stop for revenues would also assure that the proceeds would actually make their way to artists.¹³² The positive economic forecast for artists, in turn, would reinvigorate incentives to invest in developing musical talent and building careers, as well as alleviate the problems that were discussed in Part I.¹³³

The Fair Trade Copyright model should have an additional salutary effect. The improved economic state of artists would improve artists' bargaining position with record labels. As a result, the Fair Trade Copyright model would improve the economic state of prospective artists as well, whether they elect to enter a contract with a record label or to create music independently.

Artists who wish to enter a record deal would still have the direct, nonintermediated, and unconditioned Fair Trade Copyright revenue stream, which would flow from the use of their music on digital media. As a result, artists' positioning in negotiations with record labels would be enhanced, and may allow them to avoid unfavorable contracts.¹³⁴ The Fair Trade Copyright should also improve the situation for artists who elect not to sign a record deal. The Fair Trade Copyright system would redeem the promise hidden in digital media, and turn the possibility to create music professionally and independently into a realistic option. Under this framework, independent artists would have a clear revenue stream that would serve as an incentive to invest more in producing creative works, and less in other activities.

If the model proves successful, the new reality it would create may also "bring back" potential artists who were discouraged from working in art because of the practical hardships and low benefits it currently provides.

III. POSSIBLE CRITICISMS

In this Part, I raise and address three possible concerns regarding the Fair Trade Copyright model. The first concern is that users may simply not pay. The second is that record labels may hamper Fair Trade Copyright through their contracts with artists and through exploitation of their market-dominance. The third is that the model may de facto legitimize and encourage copyright infringement.

130. See *infra* Part III.A for a discussion of the willingness of users on legal and illegal platforms to make donations.

131. See *supra* Part I.B; see also Katie Marsal, *iTunes Store a Greater Cash Crop than Apple Implies?*, APPLE INSIDER (Apr. 23, 2007, 4:00 PM), http://appleinsider.com/articles/07/04/23/itunes_store_a_greater_cash_crop_than_apple_implies.html.

132. See *supra* note 38 and accompanying text.

133. See *supra* Part I.C.

134. See William Henslee, *Marybeth Peters Is Almost Right: An Alternative to Her Proposals to Reform the Compulsory License Scheme for Music*, 48 WASHBURN L.J. 107, 118 (2008) (arguing that artists have not managed to change their contracts due to lack of bargaining power).

A. LACK OF INCENTIVES FOR USERS TO DONATE

An obvious challenge for the Fair Trade Copyright model is that users may simply refrain from making donations. Indeed, voluntary payment is fairly counterintuitive.¹³⁵ Why would rational individuals pay to advance the welfare of another person at their own expense?¹³⁶ The challenge remains powerful even under the assumption that the Fair Trade Copyright would benefit the donor herself as well, by supporting a prosperous creative environment she can enjoy. A creative environment has characteristics of a “public good,” meaning that potential donors can enjoy it even without paying.¹³⁷ Put differently, the Fair Trade Copyright provides a fertile ground for collective action and free rider problems: it is rational for every individual to enjoy the benefits that stem from the system (i.e., a creative environment) without participating in the system’s costs (i.e., by making donations).

Yet, in many contexts, voluntary payments, however puzzling on a theoretical level, are fairly common in reality. An abundance of evidence points to vast and routine engagement of individuals in voluntary payments of various types, even in cases where the rational choice theory would predict free-riding.¹³⁸

The tension between theory and reality has provoked abundant empirical and theoretical scholarship. The scholarship has identified two complementary sets of explanations for the apparently irrational behavior of voluntarism. These explanations shed light on the situations when voluntarism is to be expected. I believe that under both explanations, Fair Trade Copyright fits in with the types of

135. See, e.g., Ofer H. Azar, *The Implications of Tipping for Economics and Management*, 30 INT’L J. SOC. ECON. 1084, 1087 (2003); Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989, 1991 (2000); Michael Lynn, *Tipping in Restaurants and Around the Globe: An Interdisciplinary Review*, in HANDBOOK OF CONTEMPORARY BEHAVIORAL ECONOMICS 626, 627 (Morris Altman ed., 2006) (“[M]any economists regard tipping as ‘mysterious’ or ‘seemingly irrational’ behavior”); David E. Sisk & Edward C. Gallick, *Tips and Commissions: A Study in Economic Contracting 2* (Fed. Trade Comm’n Bureau of Econ., Working Paper No. 125, 1985), available at www.ftc.gov/be/workpapers/wp125.pdf (“A gift in exchange for service may be a contradiction in terms for economists . . .”).

136. See GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 3–14 (1976); see also Steven L. Green, *Rational Choice Theory: An Overview* 4–5 (May 2002) (unpublished paper) (“[T]he rational choice approach to this problem is based on the fundamental premise that *the choices made by [actors] are the choices that best help them achieve their objectives, given all relevant factors that are beyond their control.*”).

137. RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 79–80 (1996) (noting that a public good is nonrivalrous and nonexcludable). See generally Landes & Posner, *supra* note 84, at 344–61 (discussing the nonrivalrous and nonexcludable nature of intellectual property).

138. Lynn, *supra* note 135, at 626 (“In the U.S., consumers also tip barbers, bartenders, beauticians, bellhops, casino croupiers, chambermaids, concierges, delivery persons, doormen, golf caddies, limousine drivers, maitre-d’s, masseuses, parking attendants, pool attendants, porters, restaurant musicians, washroom attendants, shoeshine boys, taxicab drivers, and tour guides among others . . .”); see also Martin Dufwenberg & Georg Kirchsteiger, *A Theory of Sequential Reciprocity*, 47 GAMES & ECON. BEHAV. 268, 269 (2004); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 863 (2001) (concluding that contributions “can reach the level necessary to ensure efficient production of a public good”).

situations where individuals are likely to make voluntary payments.

The first explanation concerns social norms.¹³⁹ It provides that norms—such as fairness, honesty and reciprocity—weaken the incentive of potential payers to free ride and induce voluntarism.¹⁴⁰ Some scholars, such as Robert Cooter, argue that individuals often internalize these norms, so that *they themselves* believe that avoiding payments in certain circumstances would be wrong.¹⁴¹

The social norms explanation renders the success of the Fair Trade Copyright model quite feasible. Indeed, the wide practice of donating to musicians who pass the hat after a show would not automatically shift to the online realm. In the physical world, both the internal and peer pressure to comply with social norms are enhanced, while Internet use is private and anonymous by default. Yet, this difference is mitigated as the Internet becomes a central platform to manage increasing parts of one's social life. Moreover, despite the anonymous nature of the Internet, users vastly contribute online for various purposes, ranging from Wikis¹⁴² to fundraising services¹⁴³ to donation campaigns.¹⁴⁴ Several Internet platforms, including in the music realm, have successfully based their entire business models on voluntary tendencies of Internet users.¹⁴⁵ If indeed an audience is necessary for donation, the Fair Trade Copyright system can use tools to minimize anonymity, such as links to social networking profiles and other visible-to-all web applications.¹⁴⁶

Online voluntarism thrives thanks to a number of factors that would increase the

139. Social norms are defined as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.” Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996); see also Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1127 (2000).

140. See, e.g., Leo P. Crespi, *The Implications of Tipping in America*, 11 PUB. OPINION Q. 424, 429 (1947); Jon Elster, *Social Norms and Economic Theory*, 3 J. ECON. PERSP. 99 (1989) (discussing the rationality of tipping); Yoram Margalioth, *The Case Against Tipping*, 9 U. PA. J. LAB. & EMP. L. 117 (2006); Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369 (1999) (describing incentives in tipping).

141. Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); see also GARY BECKER, ACCOUNTING FOR TASTES (1996); Korobkin & Ulen, *supra* note 139, at 1128.

142. Jacqui Cheng, *Wikipedia Passes \$6 Million Donation Goal*, ARS TECHNICA (Jan. 2, 2009), <http://arstechnica.com/web/news/2009/01/wikipedia-passes-6-million-donation-goal.ars> (noting that the last fundraising campaign of Wikipedia reached its goal within mere days).

143. Kickstarter and Kiva provide a fundraising platform for entrepreneurial projects. See FAQ, KICKSTARTER, <http://www.kickstarter.com/help/faq/kickstarter%20basics?ref=nav> (last visited Dec. 28, 2012); *About Us*, KIVA, <http://www.kiva.org/about> (last visited Dec. 28, 2012). PledgeMusic provides a fundraising platform for recording albums. *Who We Are*, PLEDGEMUSIC, <http://www.pledgemusic.com/site/about/> (last visited Dec. 28, 2012).

144. See, e.g., James Morgan, *Twitter and Facebook Users Respond to Haiti Crisis*, BBC NEWS, (Jan. 15, 2010), <http://news.bbc.co.uk/2/hi/americas/8460791.stm> (“An appeal to help victims of the Haiti earthquake is breaking all records, fuelled by the power of social media.”).

145. See *supra* note 143.

146. A personal note from the artist thanking her donors might be possible as well. Kiva applies a system where recipients of donations can leave a note to their donors. See *Encouraging Those We Sponsor*, KIVA FRIENDS, <http://www.kivafriends.org/index.php?topic=1796.0> (last modified July 7, 2008).

probability that the Fair Trade Copyright model would prosper as well. First, Internet payment schemes have become common and widespread.¹⁴⁷ Hence, creating efficient digital payment systems that will be used securely and confidently is now attainable and well within reach.¹⁴⁸ Second, a generational change has occurred. While in the beginning of the millennium, technically savvy users were at most high school or college students, today they have greater financial means. Third, the online milieu has shifted from a passive to an active experience. Users are accustomed to commenting, reacting and contributing to online content.¹⁴⁹ This shift reduces the tendency of users to adopt the mental state of passive observers and encourages active involvement.¹⁵⁰

Indeed, I concede that I cannot estimate at this point in time how powerful norms would prove to be and how many donations they would actually motivate. Yet, it appears that embracing the Fair Trade Copyright model requires no large leap from the existing normative framework. Real world examples for online voluntary payment to artists support this view. The most celebrated example is the distribution scheme applied by the band Radiohead in 2007. The band distributed music for free and asked users to “pay what they can.”¹⁵¹ This scheme generated millions over a few days, and exceeded the revenues that previous albums yielded for the band.¹⁵² Other successful examples exist as well.¹⁵³

147. See Leena Rao, *The Online Payment Wars Continue: PayPal Officially Announces Flexible API*, TECHCRUNCH (July 23, 2009), <http://techcrunch.com/2009/07/23/the-online-payment-wars-continue-paypal-officially-announces-flexible-api/> (quoting PayPal’s President that \$2,000 flows through PayPal’s system every second). New online payment services have proliferated recently, partially thanks to PayPal, which opened its platform in late 2009, thus sparing services many technological and bureaucratic barriers. See *PayPal to Become First Truly Global Payment Platform Open to Third-Party Developers*, PAYPAL (July 23, 2009), <https://www.paypal-media.com/press-releases?year=2009#20090723006226>. Services that connected to PayPal’s infrastructure include, e.g., *TwitPay.me* and *QuickPay*.

148. See JAVELIN STRATEGY & RESEARCH, *ONLINE RETAIL PAYMENTS FORECAST 2010–2014* (2010) (noting that 63% of consumers are comfortable or very comfortable with shopping online; only 22% have not made an online purchase in the past year; and that 50% of online consumers chose payment services other than credit or debit cards). These percentages are expected to grow.

149. For example, content-based sites enable users to link to features outside of the site, share content, shop for products on other sites or subscribe to various services.

150. See *supra* note 146.

151. See MARY MADDEN & LEE RAINIE, PEW INTERNET PROJECT DATA MEMO RE: MUSIC AND VIDEO DOWNLOADING MOVES BEYOND P2P 9 (2005), available at http://www.pewinternet.org/~media/Files/Reports/2005/PIP_Filesharing_March05.pdf.pdf; see also Eliot Van Buskirk, *Estimates: Radiohead Made up to \$10 Million on Initial Album Sales*, WIRED (Oct. 19, 2007, 9:35 AM), <http://blog.wired.com/music/2007/10/estimates-radio.html>.

152. Van Buskirk, *supra* note 151 (noting that the program resulted in approximately six to ten million dollars).

153. See, e.g., MADDEN & RAINIE, *supra* note 151, at 13 (describing how Nine Inch Nails’ album *Ghosts I-IV* became the 2008 bestselling MP3 album on Amazon, although the band members distributed it for free via P2P networks). In another instance, the author Cory Doctorow published a novel online for free on the same day that it was released in print. Sales targets were reached months before the publisher had expected. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 284 (2004). Stephen King’s experiment—to publish chapters of his novel on his website, as long as three quarters of users pay one dollar per chapter—maintained above 70% paid downloads. See Stephen King, *How I*

The second explanation for voluntarism rebuts the assumption that voluntary payments comprise an irrational behavior. According to this view, donors do derive benefits—though nonmonetary ones—from making contributions.¹⁵⁴ Glynn Lunney has gathered five such possible benefits from the sociological and economic research.¹⁵⁵ The first is altruism, namely “satisfaction from the satisfaction others experience from the good’s creation.”¹⁵⁶ A second interest individuals may derive from using the system is “the warm glow effect,” namely, satisfaction derived directly from the act of contribution.¹⁵⁷ Third, some individuals recognize the long-term interest they themselves can derive from the public good.¹⁵⁸ Group theory provides a fourth explanation for voluntary payments, positing that individuals benefit from belonging to a group, and that groups have various informal ways to encourage voluntarism.¹⁵⁹ Fifth, some individuals seek to enhance their reputation by acting voluntarily.¹⁶⁰ Other scholars have emphasized individuals’ interest in flattering self-image in addition to reputation.¹⁶¹ Additionally, some scholars have contended that voluntary payments help create reciprocal relationships with others, the relationships in which most individuals feel comfortable.¹⁶²

Not only would these interests apply in the Fair Trade Copyright framework, but they can also be augmented for a number of reasons. First, from the point of view of music aficionados, their “social distance” from artists is smaller than from the waiters and bell-persons they are accustomed to tipping.¹⁶³ While the latter are

Got That Story, TIME EUR. (Jan. 8, 2000), <http://www.time.com/time/world/article/0,8599,2050164,00.html>; see also Mark G. Tratos, *The Impact of the Internet & Digital Media on the Entertainment Industry*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 133, 206–07 (Practicing Law Inst. 2007); M.J. Rose, *Stephen King’s ‘Plant’ Uprooted*, WIRED (Nov. 28, 2000), <http://www.wired.com/culture/lifestyle/news/2000/11/40356>. The project was abandoned, but not due to the declining donations. See King, *supra*. Clearly, King’s model differs from the Fair Trade Copyright; it is similar to the traditional quid pro quo of copyright economy, in which users (though as a group) pay the author’s determined price for access to the work. Yet it shows that most users do not fall prey to the free riding and collective action problems as economic theories predict.

154. Ofer Azar, *The Social Norm of Tipping: Does it Improve Social Welfare?*, 85 J. ECON. 141, 145 (2004) (arguing that when a norm is costly and does not benefit its followers except for avoiding social disapproval, the norm erodes over time.); Lunney, *supra* note 138, at 860–61 (discussing benefits individuals may derive from voluntary behavior).

155. Lunney, *supra* note 138, at 861 (“[Researchers] have identified at least five considerations that may lead individuals to contribute voluntarily to a public good . . .”).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* This explanation strikes the chord of social norms discussed above, although groups may have informal mechanisms other than social norms to encourage voluntarism.

160. *Id.*

161. Ofer H. Azar, *What Sustains Social Norms and How They Evolve? The Case of Tipping*, 54 J. OF ECON. BEHAV. & ORG. 49 (2004), (“Another reason for tipping is that people want to feel generous and do not want to feel ‘cheap.’ Tipping generously therefore improves the tipper’s self-esteem, encouraging him to tip even more than the norm.”). Azar, *supra* note 154.

162. See Dufwenberg & Kirchsteiger, *supra* note 138 (demonstrating through psychological game models that concerns for reciprocity induce voluntary payments even in situations where no social or other sanctions exist).

163. LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 101

short-term functionalities whose individual identities do not comprise a central consideration for consumers, many individuals identify with artists and view them as role models. Moreover, the contrast between artists' importance to users and their inferior status in the music industry renders artists a likely object for altruistic aspirations.¹⁶⁴

Second, using Fair Trade Copyright can offer users value that other small donations often do not: music is often tied to identity features such as culture, ethnicity, age group, geography and political views. Therefore, the Fair Trade Copyright would place users in a position to influence creative outputs and promote their culture and personal agenda through supporting certain types of music. The Fair Trade Copyright would also allow users to engage in more reciprocal relationships with artists. As Dianne Zimmerman puts it, "it might be appropriate (and in the listeners' own self-interest) to 'thank' their favorite musicians for what they produce with some money."¹⁶⁵

I do not want to suggest that all users will donate money to artists for each and every use.¹⁶⁶ Nor is it necessary for the success of this model to argue so. Fair Trade Copyright is not an "honor system" where every unpaid use is a failure.¹⁶⁷ My argument, rather, is that even modest outcomes would comprise a significant improvement over the current state of affairs. Artists' standard revenues from the extant business models would be increased *hundredfold* by *each person* who contributes merely a few cents at one *single* time.¹⁶⁸ Considering the immense consumption of music online and users' motivations to make contributions, as discussed above, the Fair Trade Copyright could easily exceed these sums.

If indeed this model becomes more widespread, network effects can raise awareness of the Fair Trade Copyright model and encourage the participation of even more users in the system.¹⁶⁹ The Fair Trade Copyright gesture may even become a social imperative so that *not paying* will appear wrong, similar to tipping in restaurants. In this sense, an evolving social norm may become a self-reinforcing power for the Fair Trade Copyright model.

While the above framework is relevant to users of all platforms, distinct challenges pertain to users of legal and illegal platforms. Users of legal platforms may well feel that they have already paid for the service.¹⁷⁰ However, it is

(2010) ("[S]mall social distance is known as a factor that promotes voluntary behavior . . .").

164. Cf. Margalioth, *supra* note 140, at 122 (noting that empathy for poorly paid workers motivates voluntary tips); see Michael Lynn & Andrea Grassman, *Restaurant Tipping: An Examination of Three "Rational" Explanations*, 11 J. ECON. PSYCHOL. 169, 180 (1990); see also *infra* note 171 and accompanying text.

165. See Zimmerman, *supra* note 89, at 1123.

166. See, e.g., Mimi Turner, *Radiohead Plays Price Tag: Band Won't Let Fans Pay What They Want Again*, HOLLYWOOD REP., Apr. 30, 2008, at 5 (speculating that many downloaded Radiohead's album without paying); see also Ginsburg, *supra* note 16, at 388–89.

167. For an "honor system" model, see Lunney, *supra* note 138.

168. Indeed, digital services may pay artists as low as 0.0005 cents per play. See *supra* Part I.B.

169. Network effects occur when the value of a good or service increases as the number of people who use it grows. See Stan J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133, 135 (1994).

170. Payment on legal services can be direct (via online stores or subscription-based streaming

becoming a well-known secret that the money collected on legal sites scarcely compensates recording artists, as descriptions of the travels of money in the record business have spread all over the web.¹⁷¹ Users who consume music legally out of considerations of fairness may be even more prone to use the Fair Trade Copyright system, for this very reason.

As an analogy, the system will function on authorized networks in a similar vein to the Fair Trade movement. Apparently, many people presented with the option to purchase Fair Trade-certified goods do not excuse themselves from guilt or considerations of fairness just because they can legally purchase equivalent products that exploit the end-producers of the product. As a result, the market-share of Fair Trade products is steadily growing.¹⁷²

A different challenge pertains to users of illegal networks. Indeed, if infringers are nothing but thieves, perhaps they are simply indifferent to the wellbeing of others in general and artists in particular.¹⁷³ In fact, however, while pirates will probably not convert to legal frameworks, the participation of many of them in the Fair Trade Copyright scheme is actually quite likely. To understand why, we need to first explore why users pirate music in the first place.

The main and most obvious motivation to pirate music is the gap between the cost of music on illegal services (which is zero) and on legal services. However, while the music industry places the full weight of this observation on the “free” side of the equation,¹⁷⁴ copyright also involves supracompetitive pricing, as discussed above.¹⁷⁵ In fact, from the point of view of users, legal music is often quite costly. A CD can cost near twenty dollars,¹⁷⁶ purchasing soundtracks can cost almost as much as purchasing the actual movie,¹⁷⁷ and filling an iPod legally

services) or indirect (via ad-based services).

171. See, e.g., *supra* note 69; see also Bruce Houghton, *Too Much Joy's Absurd WMG Royalty Statement*, HYPEBOT.COM (Dec. 2, 2009), <http://www.hypebot.com/hypebot/2009/12/too-much-joys-sad-royalty-statement-from-wmg.html>; Love, *supra* note 29; Helienne Lindvall, *Behind the Music: When Artists Are Held Hostage by Labels*, GUARDIAN MUSIC BLOG (Apr. 15, 2010), <http://www.guardian.co.uk/music/musicblog/2010/apr/15/artists-held-hostage-labels>; Thom, *FYI: If You Care* (Dec. 29, 2007), <http://www.radiohead.com/deadairspace/index.php?a=324>.

172. See *Facts and Figures*, FAIRTRADE FOUND., http://www.fairtrade.net/facts_and_figures.html?&L=0 (last visited Dec. 28, 2012) (stating that sales of Fair-Trade certified products grew 15% between 2008 and 2009, and in 2008 amounted to approximately €3.4 billion worldwide).

173. See Vice President Joseph Biden, *The White House Press Conference on Obama Administration's 2010 Joint Strategic Plan on Intellectual Property Enforcement* (June 22, 2010), available at <http://www.youtube.com/watch?v=5qS-s6dn7tM> (“[P]iracy is theft . . .”); see also *For Students Doing Reports*, RIAA, <http://riaa.com/faq.php> (“When you go online and download songs without permission, you are stealing. The illegal downloading of music is just as wrong as shoplifting from a local convenience store.”) (last visited Dec. 29, 2012).

174. See, e.g., INT’L FED’N OF THE PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 2010 18 (2010) (discussing “the lure of free”).

175. See *supra* note 124.

176. BRABEC & BRACEC, *supra* note 35, at 117. But see Ed Christman, *Universal Betting on Lower Prices to Boost CD Sales*, REUTERS (Mar. 19, 2010), <http://www.reuters.com/article/idUSTRE62J04Z20100320> (reporting that Universal has substantially cut CD prices in order to boost sales).

177. The soundtrack to the film *High Fidelity*, for instance, was \$18.98, while the entire movie was

can cost fifty times the price of the iPod itself.¹⁷⁸ Not only may the legal price simply be beyond the reach of some consumers, but the prices are also often perceived as unjust, further discouraging payments.¹⁷⁹

But mass infringement does not result solely from “the lure of free.”¹⁸⁰ A second well-recognized resistance to payment stems from eroding moral reasons to pay for music. As Paul Goldstein explains, “[p]ublic respect for the rights of entertainment companies cannot be separated from the public’s perception of the respect these companies pay to the rights of the authors and artists who are the source of their products.”¹⁸¹ Indeed, in many cases, infringement has become an act of protest against the corporations that seemingly cannibalize almost the entirety of artists’ revenues on the one hand,¹⁸² and use these resources to sue college students,¹⁸³ single mothers,¹⁸⁴ homeless men¹⁸⁵ and dead grandmothers on the other.¹⁸⁶ Rightly or wrongly, pirates are often not perceived as stealing from artists but as fighting “evil” corporations.¹⁸⁷

available on DVD for \$19.99. See Jane Black, *Big Music’s Broken Record*, BUS. WK. ONLINE (Feb. 13, 2003), <http://www.businessweek.com/stories/2003-02-12/big-musics-broken-record>.

178. Jonathan J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?*, 6 NW. J. TECH. & INTELL. PROP. 1, 11 (2007).

179. Lateef Mtima, *Whom The Gods Would Destroy: Why Congress Prioritized Copyright Protection over Internet Privacy in Passing the Digital Millennium Copyright Act*, 61 RUTGERS L. REV. 627, 628 (2009) (“These end-users believe that the major corporate copyright holders are engaged in a system of monopolistic price gouging of the public, and that widespread distribution of the copyrighted material that these entities control serves the spirit, if not the letter, of the copyright law.”).

180. *Supra* note 174. Indeed, file-sharers are not all ‘cheap’; at least one file-sharing site has managed to receive sufficient contributions from file-sharers to fight a copyright lawsuit. See Anthony Ciulli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1005 (2008) (noting that the owner of LokiTorrent managed to raise donations from users on his website in order to defend a lawsuit against the MPAA).

181. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 216 (rev. ed. 2003).

182. See, e.g., Matthew Green, Note, *Napster Opens Pandora’s Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet*, 63 OHIO ST. L.J. 799, 817–24 (2002); Joel Selvin & Neva Chonin, *Artists Blast Record Companies over Lawsuits Against Downloaders*, S.F. CHRON. (Sept. 11, 2003), <http://www.sfgate.com/default/article/Artists-blast-record-companies-over-lawsuits-2590112.php>.

183. Motion for New Trial, *BMG Music Ent. v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. July 9, 2010) (No. 07-CV-11446-NG).

184. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

185. *Warner Bros. Rec. v. Berry*, No. 07 Civ. 1092(HB)(KNF), 2008 WL 1320969, at *4 (S.D.N.Y. Apr. 9, 2008).

186. Nate Mook, *RIAA Sues Deceased Grandmother*, BETANEWS (Feb. 4, 2005), <http://www.betanews.com/article/RIAA-Sues-Deceased-Grandmother/1107532260>. The RIAA abandoned the mass lawsuits campaign in 2008. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008 at B1. But see Roy Beckerman, *RIAA Claim Not to Have Filed New Cases “For Months” Is False*, RECORDING INDUSTRY VS. THE PEOPLE, <http://recordingindustryvspeople.blogspot.com/2008/12/riaa-claim-not-to-have-filed-new-cases.html> (Dec. 19, 2008) (claiming that the lawsuit campaign was not in fact halted).

187. Ginsburg, *supra* note 16, 382 (“The overheated rhetoric that currently characterizes much of the academic and popular press tends to portray copyright as a battleground between evil industry exploiters and free-speaking users.”); see also Enigmax, *File-Sharers Safe Until Music Biz Change Laws*, TORRENT FREAK (Apr. 9, 2010), <http://torrentfreak.com/file-sharers-safe-until-music-biz-change->

Without passing judgment on these motivations on the one hand or justifying copyright infringement on the other, I argue that Fair Trade Copyright addresses precisely these barriers to payment. First, this model would allow users who are willing to pay more than zero but less than the monopoly price of music to simply do so.¹⁸⁸ Second, the flow of payments directly to artists addresses the insurgent nature of infringement. The rebellious ethos against record labels actually fits well with the notion of direct donations to artists. Third, the Fair Trade Copyright system would pull the rug under the most convincing justifications users use to avoid payment (i.e., the supracompetitive costs of legal music and the injustices of the industry). Without these justifications, users may find it difficult to ignore the pangs of guilt and continue not to pay anything.

B. RECORD LABELS POTENTIALLY OBSTRUCTING THE SYSTEM

The effectiveness of the Fair Trade Copyright may be hindered if record labels were to contract around the model so that artists were obligated to share with them in full or in part the donations they receive.¹⁸⁹ I concede that nothing in my proposal prevents contracts from obliging artists to transfer donations to their labels.¹⁹⁰ This, however, does not undermine my proposal in the least.

To begin with, current “360 degree contracts” probably do not cover the type of revenues the Fair Trade Copyright offers.¹⁹¹ Moreover, some artists have entered other types of record deals or do not sign record deals at all.¹⁹² In these cases, artists would be able to keep the entirety of the payments they receive.

Furthermore, the Fair Trade Copyright system will be helpful even if artists would be obligated to share the revenues with their record labels. First, the system would still create a new, additional revenue stream to distribute among industry players, and would improve the situation of artists even if not all of the donations end up in their pockets. Second, artists would become the first stop for revenues, and would be able to keep their share in full, unlike today, where their share of the revenue pie is subject to deductions and manipulations.¹⁹³ Relatedly, as direct receivers of the revenues, artists should end up in a stronger bargaining position. The contractual obligation to pay the labels would be balanced in terms of the

law-100409/ (describing the “David and Goliath-style copyright battles between large corporations and various file-sharing sites, services and individuals”).

188. See *supra* notes 123–25.

189. Indeed, not only are record labels likely to be interested in the additional revenue stream, but they may also stand to lose from a successful Fair Trade Copyright model. First, artists may demand more competitive recording contracts. Second, artists may be less inclined to sign a recording contract as the option of independent creativity materializes.

190. I suspect that enhanced competitive pressures on record labels would reduce the likelihood that labels would obstruct the system. In face of the emerging alternatives to record labels, the labels must maintain some balance in order to attract artists to sign contracts with them. However, the discussion in this Section would assume that record labels have elected to pursue this path.

191. See Leeds, *supra* note 41 (“[T]he label has an option to pay an addition \$200,000 in exchange for 30 percent of the net income from all touring, merchandise, endorsements and fan-club fees.”).

192. Schultz, *supra* note 70, at 692.

193. See *supra* notes 38–39 and accompanying text.

enhanced knowledge and enforcement ability that can offset claimed obligation for debt.

Additionally, the donations will provide artists with a clearer picture of their potential market value. Today, this knowledge often resides exclusively with the labels.¹⁹⁴ This information may result in better informed decisions on the part of the artists, in terms of entering future contracts and negotiating with labels and other entities.

A related concern is that record labels will exploit their market dominance in order to put pressure on services to refuse to install the Fair Trade Copyright feature. Such a pressure, if it occurs, would tilt the incentives of services against the Fair Trade Copyright system.¹⁹⁵

Yet, all services are not born equal. First, such a pressure is not expected to have any effect on illegal services. Furthermore, a more effective pressure may be inflicted on services that negotiate individually with record labels rather than those that acquire a compulsory license from them.¹⁹⁶ As a result, most services are unlikely to give in to the pressures of record labels.¹⁹⁷

Moreover, even services that are susceptible to pressure would need to consider the reaction of users as well as of the growing group of independent artists. In the competitive market for digital music these groups cannot be ignored.¹⁹⁸ Clearly, if the Fair Trade Copyright indeed becomes widespread and installed by a critical mass of services, it would be less likely that services would give in to the pressure of record labels (if such pressure indeed occurs). If this possibility of resistance would not suffice to motivate services, as discussed above, a second best solution might be to allow services to keep a share of the overall donations to counter the disincentive to use the system.¹⁹⁹

In the worst case scenario that services prove uneager to install the Fair Trade Copyright option, the Fair Trade Copyright could be voluntarily downloaded by users from a designated website. This option is substantially less desirable than a default Fair Trade Copyright model, although this would also be an improvement over the current state of affairs.

C. UNDERMINING COPYRIGHT LAW

Legal services monetize not only the risk-averse tendency of users and their fear of being caught but also the norms of fairness and honesty among users, which drive them to legal instead of illegal networks.²⁰⁰ While copyright law and

194. See Eliot Van Buskirk, *Inside BigChampagne's Music Panopticon*, WIRED (Aug. 5, 2009, 11:37 AM), <http://www.wired.com/business/2009/08/inside-bigchampagnes-music-panopticon/> (noting that labels receive and analyze quite specific data from media-analyzers, including the popularity of artists as measured by legal and illegal consumption of their music).

195. See *supra* Part II.A.3 (discussing the incentives of services).

196. See *supra* Part I.B.1 (discussing voluntary versus compulsory licenses).

197. See *supra* Part II.A.2.

198. See *supra* Part II.B (discussing the competition in the market).

199. See *supra* note 116 and accompanying text.

200. See generally Mark F. Schultz, *Reconciling Social Norms and Copyright Law: Strategies for*

enforcement remain unchanged under the Fair Trade Copyright model and the “fear factor” therefore remains the same, the Fair Trade Copyright may shift the normative point. Thus, the model can legitimize file-sharing and have the effect of driving users away from copyright-respecting sites to unauthorized sites. This may erode the importance of copyright law in protecting the interests of the creative community, and, despite the claim that the Fair Trade Copyright does not harm the existing copyright scheme, it could actually adversely affect it.

Notably, this critique pertains to a limited group of users: those who are concerned about being “morally right” towards artists but are not deterred or otherwise concerned about the law. Users who either obey the law or are indifferent to moral considerations are unlikely to shift their consumption habits due to the Fair Trade Copyright model; the former would probably remain on legal sites while the latter would continue the path they find preferable regardless of the alleged shift of the normative point.

Thus, it is still likely that some users will continue to use legal services even following the implementation of the Fair Trade Copyright. This would resemble the current phenomenon that many consumers use legal services, and even buy CDs,²⁰¹ despite the widespread availability of illegal services and the normative shift—which has already occurred—towards embracing illegal frameworks.²⁰²

From the point of view of services, legal services may need to make a special effort to “compete with free” in a nonprice competition.²⁰³ In fact, however, this need already exists today. Legal services already create additional added value in terms of ease of use, interactivity or the content they offer in order to compete with illegal services and with one another.²⁰⁴

Practically, the Fair Trade Copyright scheme in its very essence does not supersede any existing scheme to protect, use or enforce copyrights. Transactions through the current models can continue without disturbance and copyright can still be exploited in licensing markets or otherwise.

In fact, a deeper look at this critique reveals that what actually threatens to erode the importance of copyright is not the Fair Trade Copyright model but rather the development of the industry to a point where copyright has a limited effect on fostering artists’ welfare and creativity.²⁰⁵ The Fair Trade Copyright system lays bare—but does not create—the disturbing structure of copyright today, and will allow for the possibility of users to be “fair” towards artists while disobeying the

Persuading People to Pay for Recorded Music, 17 J. INTELL. PROP. L. 59, 63–70 (2009) (discussing norms of illegal copying of music). See also *supra* note 140.

201. See RECORDING INDUS. ASS’N OF AM., 2008 YEAR-END SHIPMENT STATISTICS: MANUFACTURERS’ UNIT SHIPMENTS AND RETAIL DOLLAR VALUE (2008), available at <http://76.74.24.142/D5664E44-B9F7-69E0-5ABD-B605F2EB6EF2.pdf>.

202. See *supra* notes 181–87 and accompanying text.

203. LESSIG, *supra* note 153, at 302 (citing examples of competition with free).

204. See, e.g., *Apple, Labels Stir up Deluxe, Digital Cocktail*, PC MAG. (Aug. 2, 2009, 5:23 PM), <http://www.pcmag.com/article2/0,2817,2351088,00.asp> (describing *Cocktail* as a mutual project between Apple and record labels which purports to add interactive features to the albums sold on iTunes).

205. See *supra* Part I.A.

copyright law, and others to be perfectly legal yet detrimental to artists' well-being. The Fair Trade Copyright cannot be considered the cause of this divide. In fact, if anything, as analyzed above, it could restore the moral incentive to pay for music.²⁰⁶

IV. COMPETITORS TO THE FAIR TRADE COPYRIGHT MODEL

In this Part, I consider three alternative proposals for reform in the music industry. These proposals stand on three distinct points on the continuum between strong copyright protection for records to no copyright protection for them. I term the first proposal "Copyright-Based Model." This model aims to strengthen copyright law and fight piracy, and it relies exclusively on proprietary business-models. The second, which I term "Digital Clearinghouse," gives up on the proprietary aspect of copyright in return for enhancing its monetary aspect. In recent years, several law professors nearly simultaneously came up with variants of this idea, proposing that copyright owners should allow users to freely download music in return for a licensing fee.²⁰⁷ The third model, "Relinquishing Copyright," stands at the other end of the continuum. This model calls to give up copyrights in digital platforms altogether, and limit artists to indirect revenues of recorded music, such as performances and merchandise.

A. COPYRIGHT-BASED MODEL

One attempt to address the crisis in the music industry has been to rely on the legal protection of copyright and fight the immense copyright infringement, which appears to be the core cause for the steep decline in revenues in the industry.²⁰⁸

The music industry—headed by the RIAA and cooperating ad hoc with parallel

206. See *supra* notes 181–87 (discussing incentives not to pay for music).

207. See *infra* Part IV.B; see also LESSIG, *supra* note 153, at 296–306 (advocating for free access in noncommercial contexts and a charge on other file-sharing activities); Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 618–19 (1998) (positing that greater access to copyrighted works will result if copyright owners and consumers use automated rights-management technologies to create an efficient fared-use system); Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 55–70 (2004) (suggesting licensing through Internet service providers, copyright collectives or technology companies); Ku, *supra* note 1, at 312–15 (calling to impose levies on internet services and digital equipment only if analog sales would prove to be insufficient to incentivize creation); Mary R. Wagman & Rachel E. Kopp, *The Digital Revolution Is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 304–05 (2006) (calling to raise the AHRA fees and to broaden the definition of "digital audio recording devices" to include computers and digital devices).

208. Besides fighting piracy, this view has called to establish alternative consumption routes via new business models which respect copyrights, such as online retailers and authorized streaming services which were discussed above. See *supra* Part I.B. A related measure has been the release of DRM devices, designed to control users' access or use of digital materials, for example, by limiting the possibility to print, copy, download, or modify the materials. See, e.g., Yuko Noguchi, *Freedom Override by Digital Rights Management Technologies: Causes in Market Mechanisms and Possible Legal Options to Keep a Better Balance*, 11 INTELL. PROP. L. BULL. 1, 5 (2006).

industries such as the film and software industries—has fought piracy on various fronts including litigation,²⁰⁹ legislation,²¹⁰ counter-technology²¹¹ and education.²¹² Napster, the first file-sharing service for music, was challenged until it was forced to close down.²¹³ A similar fate awaited successive file-sharing technologies, such as Aimster,²¹⁴ Grokster,²¹⁵ Streamcast,²¹⁶ eDonkey²¹⁷ and KaZaA.²¹⁸

The strict stance against copyright infringement is problematic on various levels. First, piracy might at least partially be the wrong enemy.²¹⁹ Various processes beyond piracy have contributed to the decline in sales revenues.²²⁰ Such processes include, for example, the shift to digital files which do not degrade over time; a decrease in new albums released;²²¹ an increase in average CD price;²²² the availability of competing home-entertainment activities beyond music;²²³ and the

209. See ELEC. FRONTIER FOUND., *RIAA v. THE PEOPLE: FIVE YEARS LATER I* (2008), available at <http://www.eff.org/files/eff-riaa-whitepaper.pdf> (enumerating direct infringement suits). For litigation of indirect infringement, see, for example, *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), cert. denied sub nom., *Deep v. RIAA*, 540 U.S. 1107 (2004); *A&M Records, Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 2001).

210. See Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 874 (2007); *Copyright Legislation*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/legislation/archive> (enumerating legislative initiatives in the copyright arena) (last visited Dec. 29, 2012).

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

212. INT'L FED'N OF THE PHONOGRAPHIC INDUS., *supra* note 174, at 30.

213. *Napster*, 239 F.3d 1004.

214. *Aimster Copyright Litig.*, 334 F.3d 643.

215. *Grokster*, 545 U.S. 913.

216. *Id.*

217. Michael A. Einhorn, *Digitization and Its Discontents: How Markets Are Transforming Copyright*, 54 J. COPYRIGHT SOC'Y U.S.A. 231, 231 (2007) (noting that “content industries have settled litigation with iMesh, Grokster, Sharman (distributor of KaZaa), and MetaMachine (distributor of eDonkey)”; see also Dale Dietrich, *eDonkey Settles for \$30M and Shuts Down After Adverse Ruling*, IMEDIA L. BLOG (Sept. 12, 2006, 2:34 PM), <http://daledietrich.com/imedia/edonkey-settles-for-30m-and-shuts-down-after-adverse-ruling/>).

218. See *Universal Music Austral. Pty Ltd. v Sharman License Holdings Ltd.* (2005) 220 ALR 1, 97–101 (Austl.), available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/1242.html.

219. See, e.g., Lydia P. Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 675 (2003) (arguing that digital technology is not the cause of the industry’s crisis, rather it “has laid bare the flaws of the current system that have been created by a process of accretion”).

220. See Seung-Hyun Hong, *The Effect of Napster on Recorded Music Sales: Evidence from the Consumer Expenditure Survey I* (SIEPR Discussion Paper No. 03-018, 2004), available at <http://siepr.stanford.edu/publicationsprofile/379> (identifying factors that have higher influence on sales reduction than file-sharing).

221. 38,900 albums were released in 1999, compared to 27,000 (or 31,734 according to the RIAA) in 2001, a decrease of 20–25%. See Black, *supra* note 177; see also WILLIAM FISHER, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 210 (2004) (noting that the year 1999 was an atypically good year for entertainment sales).

222. CD prices increased by 7.2% on average, from \$13.04 in 1999 to \$14.19 in 2001. FISHER, *supra* note 221, at 210.

223. *Id.*; see also Stephen J. Dubner, *What's the Future of the Music Industry? A Freakonomics Quorum*, FREAKONOMICS (Sept. 20, 2007, 2:07 PM), <http://freakonomics.blogs.nytimes.com/2007/09/20/whats-the-future-of-the-music-industry-a-freakonomics-quorum/>.

rise of online music stores, which turned the demand for albums into a demand for one-track songs.²²⁴

What is more, empirical evidence regarding the effect of piracy on sales is mixed,²²⁵ and while some research supports the attribution of the decline in sales to piracy,²²⁶ others argue that the effect of file-sharing on sales is positive, insignificant or differential.²²⁷

Other objections to the focus on piracy can be summarized as stating that this strategy is not justified under a cost-benefit analysis. On the cost side, prosecuting direct infringers has criminalized otherwise law-abiding citizens and has been criticized as unfair and disproportionate.²²⁸ In another article I argued that prosecuting services has also driven technology providers to the unproductive course of liability escapism and led to absence of responsible players from the field of file-sharing technologies.²²⁹

On the benefit side, there is no sign of improvement in coping with digital infringement.²³⁰ Despite some tactical victories,²³¹ the power of the masses

224. See *For Students Doing Reports*, *supra* note 173 (noting a reverse correlation between online and offline sales.); see also Anita Elberse, *Bye Bye Bundles: The Unbundling of Music in Digital Channels* (Nov. 1, 2009) (unpublished manuscript), available at http://www.people.hbs.edu/aelberse/papers/Elberse_2010.pdf (arguing that a third of the overall decline in music revenues is attributed to the shift to unbundled music sales).

225. Felix Oberholzer-Gee & Koleman Strumpf, *File-Sharing and Copyrights* 1 (Harvard Bus. Sch., Working Paper No. 09-132, 2009) (“[T]he empirical evidence of the effect of file sharing on sales is mixed . . .”).

226. See Stan J. Liebowitz, *A Comment on the Oberholzer-Gee and Strumpf Paper on File-Sharing* (Sept. 2007), available at <http://ssrn.com/abstract=1017418>; Norbert J. Michel, *The Impact of Digital File Sharing on the Music Industry: An Empirical Analysis*, 6 TOPICS ECON. ANALYSIS & POL’Y 1 (2006) (“Using household-level data from the Consumer Expenditure Survey we find support for the claim that file-sharing has decreased sales.”); Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1 (2006).

227. BIRGITTE ANDERSEN & MARION FRENZ, *THE IMPACT OF MUSIC DOWNLOADS AND P2P FILE-SHARING ON THE PURCHASE OF MUSIC: A STUDY FOR INDUSTRY CANADA 3* (2007), available at [http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/\\$FILE/IndustryCanadaPaperMay4_2007_en.pdf](http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/IndustryCanadaPaperMay4_2007_en.pdf) (“P2P file-sharing tends to increase rather than decrease music purchasing.”); Blackburn, *supra* note 91, at 45–46 (finding that three-quarters of music sales increased as a result of file-sharing, while the most popular quarter’s sales have declined); Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 1 (2007) (finding that file-sharing had “an effect on [music] sales that is statistically indistinguishable from zero”).

228. Geraldine S. Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 787–805 (2005) (“[T]he possibility that costs of criminalizing personal-use infringement may outweigh its benefits serves as a signal to lawmakers that treating infringement as a crime may not be an effective way to protect the long-term interests of copyright holders or the public.”); Kristina Groennings, Note, *Costs and Benefits of the Recording Industry’s Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 589–90 (2005) (arguing that these suits were unfair, singling out a random assortment of individuals for disproportionate sanctions while taking advantage of their financial inferiority); see also ELEC. FRONTIER FOUND., *supra* note 209, at 5.

229. See Helman, *supra* note 106.

230. Bryan H. Choi, *The Grokster Dead-End*, 19 HARV. J.L. & TECH. 393, 410 (2006) (“[I]llegal file-sharing has . . . continued at ever-increasing rates . . .”); Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 286 (2006) (“[U]nauthorized file-sharing continued unabated,

appears to have been decisive and the deterrent factor has not.²³² The year 2009 saw also a consistent growth in infringement via various channels other than peer-to-peer,²³³ and overall, it is estimated that twenty-four million fewer people bought music in 2009 compared with 2007.²³⁴

Yet, the most important criticism on the robust enforcement strategy for the purpose of this article is that the pseudo-crucial issues of piracy and lost sales do not appear to serve the interests of artists. From the standpoint of artists, the focus on sales overstates the interests of record labels and ignores other revenue streams from music, which have actually incurred a positive effect for artists.²³⁵ Similarly, the focus on copyright enforcement protects only formal copyright owner-record labels, and not necessarily artists themselves.

In this Article I do not argue against the enforcement of music copyright. Nor is it necessary to take a position on this question for the purpose of this Article. But the campaign to eradicate copyright infringement, coupled with the copyright-based business models which were discussed in Part I, appears to be at least insufficient in order to address the challenges of the music industry. Because artists rarely hold the copyrights in their works, even a perfect copyright enforcement would not be able to assure artists' wellbeing. For this reason, an exclusive focus on copyright and control is likely to exacerbate the misallocation costs that were discussed above, and widen the gap between artists and record labels to the detriment of artists.²³⁶ As a result, I contend that even if the copyright-strengthening approach continues to be pursued, the Fair Trade Copyright model should complement it in order to ensure that the economic interests of artists are advanced as well.

B. DIGITAL CLEARINGHOUSE

A model that has been offered by several commentators in different variations is to allow online distribution of music to operate freely in return for license fees from users.²³⁷ The fees will be collected from users in one of two ways. Most models suggest a compulsory license, in which the monies are collected through a tax or

and indeed grew.”).

231. See, e.g., *supra* notes 209–18.

232. See Schultz, *supra* note 70, at 655 (“The problem with a “fear strategy” is that it is very difficult to project threats of detection and legal action credible enough to alter behavior.”).

233. INT’L FED’N OF THE PHONOGRAPHIC INDUS., *supra* note 174, at 6 (citing as examples unlicensed download sites, news groups, specialized search engines, forums, blogs and cyberlockers).

234. Jacqui Cheng, *P2P Use Down, but 24M Fewer People Bought Music in '09 vs '07*, ARS TECHNICA (Feb. 25, 2010), <http://arstechnica.com/media/news/2010/02/p2p-use-down-but-24m-fewer-people-bought-music-in-09-vs-07.ars>.

235. Show tickets, for example, have increased artists' overall revenues. See *infra* notes 272–74 and accompanying text; see also BRABEC & BRACEC, *supra* note 35, at 142; Bruce Houghton, *As Music Industry Struggles, Artist Income Grows*, HYPEBOT.COM (Nov. 30, 2009) (posting “the graph the record industry doesn’t want you to see”); *Do Music Artists Fare Better in a World with Illegal File-sharing?*, TIMES ONLINE (Nov. 12, 2009), available at <http://www.nashvillemusicpros.com/forum/topics/do-artist-fare-better-in-the>.

236. See *supra* Part I.C.

237. See *supra* note 207.

levy on devices or digital services. The alternative is to enable users to acquire a voluntary license from copyright owners for a low monthly fee.

Compulsory license models have been applied in foreign jurisdictions with mixed success.²³⁸ In the United States, three partially successful systems exist as well: compulsory license for musical works (as distinct from recorded music),²³⁹ the levy system under the Audio Home Recording Act of 1992 (AHRA)²⁴⁰ and the compulsory license for sound recordings for noninteractive services under the Digital Performance Right in Sound Recordings Act (DPRA).²⁴¹

In the literature, commentators suggested to shift to a compulsory license model, in order to capture the lost revenues caused by illegal platforms and legalize (de jure or de facto) these illegal platforms. William Fisher has suggested applying a levy system on digital devices, in return for the elimination of most of the prohibitions on unauthorized use of audio and video recordings.²⁴² Neil Netanel has advanced a model that will allow unrestricted noncommercial file-sharing and creation of derivative works in return for a levy of approximately four percent of sales on related services and products.²⁴³ Jessica Litman has advocated a similar model with an important distinction, suggesting that the license's proceeds will be distributed directly to artists and not to copyright owners.²⁴⁴ For authors, the model will be voluntary, as they will be able to mark their files as unavailable for sharing.²⁴⁵ For users, obviously, the model will be compulsory, as they will all be subject to the levy on the devices they purchase. The Electronic Frontier Foundation (EFF) has been urging the music industry for years to offer licenses for file-sharing.²⁴⁶ According to this scheme, individuals who pay copyright owners a low monthly fee would be entitled to get music from any source they wish during that month.²⁴⁷

Despite being out there for almost a decade, across the diverse range of compulsory and voluntary license schemes, none has been adopted by the legislature or by the market. Complexity might have been the main barrier for implementation. Too many participants, interests and agendas need to be settled in order to make such systems feasible.²⁴⁸ Even if they eventually reach agreement,

238. Salil K. Mehra, *The Ipod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan*, 79 U. COLO. L. REV. 421 (2008).

239. 17 U.S.C. § 115 (2012).

240. See Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 1003, 106 Stat. 4237, 4240–41.

241. See discussion *supra* Part I.B.

242. FISHER, *supra* note 221, at 217.

243. *Id.* at 41; Netanel, *supra* note 125. Derivative works must identify the underlying work and indicate that it has been modified. A Copyright Office tribunal would determine the NUL rate, though interested parties could negotiate a rate prior to the tribunal's ruling.

244. Litman, *supra* note 39, at 41–49.

245. *Id.* at 44.

246. *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUND. (Apr. 1, 2008), <https://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>.

247. *Id.*

248. This concern may not apply to the EFF model which does not necessarily involve

by the time relevant negotiations would conclude (possibly in a less optimal form than the suggestions here), a shift to a different technological platform may render these compulsory models irrelevant.²⁴⁹ Compared to the compulsory levy systems, the Fair Trade Copyright proposal is practical and relatively simple to implement. It can be put into operation with no legislation, negotiations, raising of taxes or other complex processes.

An additional concern regarding these models touches on price setting. In the EFF voluntary license scheme, the license price has to be low enough for users to pay despite the wealth of legal and illegal ways to get the music otherwise, but high enough to serve as an engine for the entire creative process and to compensate all those involved in it.²⁵⁰ A similar issue arises regarding the various levy systems, where the balance needs to be struck between affordability of digital devices and adequate compensation of copyright owners and artists.

Worse yet, while at first glance these proposals offer wide access to existing works, the “tax” they would employ will necessarily increase the overall cost of digital media. The net effect will therefore be that the price of speech-enabling technologies will rise for all, while only a self-selected group (i.e., “heavy” users) would enjoy increased access to copyrighted works.²⁵¹ The difficulty of this reform is not merely the unjust cross-subsidies among users, a criticism recognized by some of the architects of these models.²⁵² The challenge also lies in the unnecessary increase in cost of important services, which will inevitably harm the notion of access.²⁵³

The problem of rate setting is intensified considering that beyond music, various kinds of works are subject to the same threat of piracy.²⁵⁴ Consider, for example, software, books, photographs, images and audiovisual works. If a levy system is to

negotiations, except for among content owners themselves.

249. This was the exact fate of the AHRA. Among other things, the AHRA instituted a 2% “tax” on DAT machines with revenues dispersed to copyright owners and artists. See Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 1004(a)(1), 106 Stat. 4237, 4241. By the time the AHRA was signed into law in 1992, however, the seven-year-old DAT technology had already given up its place to the CD format. See Lunney, *supra* note 138, at 828 (“[T]he AHRA was not entirely successful, given that, after the inclusion of the required technological controls, digital audiotape never achieved the commercial success originally expected.”). The AHRA, which did not conceive of computer-related media and transmissions in such formats as MP3, has little actual effect today. H.R. REP. NO. 102-873, pt. 2, at 2 (1992); see also JAY DRATLER, JR., *CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM* § 6.03 (2009); Tim Wu, *The Copyright Paradox*, 2005 SUP. CT. REV. 229, 231 n.7 (2006). Attempts by the music industry to expand the AHRA to the computer realm were rejected in *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1078 (9th Cir. 1999).

250. Ginsburg, *supra* note 45, at 1643 (“What sum will seem reasonable to the consumer, yet generate enough return to make a blanket license fee appeal to an increasingly broad class of copyright owners?”).

251. *Id.* at 1644 (“From the user’s point of view, ‘all you can eat’ is not necessarily the best formula, at least not for those whose diet of copyrighted works is modest.”).

252. Netanel, *supra* note 125, at 67–74.

253. See Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA L. REV. 119, 140 (noting that lack of Internet access is one of the factors that can limit the potential of the Internet for insurgent social movements and ultimate democratization).

254. Ginsburg, *supra* note 45, at 1643.

be put in place, there is no apparent justification to limit its proceeds to the music industry alone. Indeed, while Litman's model applies to music exclusively,²⁵⁵ Fisher's expands it to the film industry as well,²⁵⁶ and Netanel's scheme applies "only to most, but not all types of copyright-protected content."²⁵⁷ The rate that needs to be applied in order to compensate all these groups of copyright owners may well exceed the sum that is justified on the users and technology side of the equation.²⁵⁸ Clearly, because of the need to reach consensus among all the relevant parties in the various copyright and technology industries as to the devices to levy, its cost and distribution among the parties seems practically unfeasible.

The Fair Trade Copyright system, in comparison, does not involve unnecessary costs to users or services for the use of digital devices per se. This assures that applying this model will not come at a cost of limiting the wide—and important—access to online services.²⁵⁹

Most importantly, except for Litman's model, these models fail to address the economic state of artists but rather largely accept the industry's starting point for discussion: the need to recoup the lost revenues in the sales charts in the digital age. Indeed, despite the promise of digital technologies to do otherwise (except for Litman's proposal) these proposals actually leave the problems of the current distributive system very much intact.²⁶⁰

Thus, even if any of the "digital clearinghouse" paths will be pursued, they can be effectively complemented by the Fair Trade Copyright model, which can add to the equation the element of the incentives of individual artists to create.

C. RELINQUISHING COPYRIGHT

A proposal, standing at the opposite end of the spectrum from the copyright-based regime, advocates forgoing copyrights for recorded music on digital platforms altogether.

This proposal stems from a combination of descriptive and normative analyses. On the descriptive side, proponents have claimed that widespread free copying on digital platforms is inevitable, and that copyright law has, as a matter of fact, no role in determining the rules of the game of online music.²⁶¹ On the normative

255. Litman, *supra* note 39, at 3.

256. FISHER, *supra* note 221, at 218.

257. Netanel, *supra* note 125, at 41.

258. See Ginsburg, *supra* note 45, at 1643.

259. Litman's model mitigates this critique, as it cuts out record labels from the recipients' line of royalties.

260. See also Ginsburg, *supra* note 45, at 1646 ("The conclusion that a compulsory license regime is better for authors than exclusive rights presumes that authors are obliged in practice to give up their rights to a publisher; it disregards the potential of digital media to free authors from the corporate distributors on whom they depended to bring their work to the public.").

261. See, e.g., Diane L. Zimmerman, *Living Without Copyright in a Digital World*, 70 ALB. L. REV. 1375, 1376 (2007); Esther Dyson, *Intellectual Value*, WIRED, (July 1995) (predicting that content on the Internet will one day be free and content producers will be compensated by other means); John Perry Barlow, *The Economy of Ideas*, WIRED (March 1994) (arguing for the inevitability of widespread free copying); Jon Pareles, *David Bowie*, 21st-Century Entrepreneur, N.Y. TIMES, June 9, 2002, § 2, at

side, it has been argued that music *should* be disseminated for free on digital platforms. A classic argument supporting this view is that for the most part, copyright plays no role anymore in encouraging or supporting musical creativity. Artists earn most of their income elsewhere,²⁶² and digital media obviates the need to incentivize dissemination.²⁶³

The question of how to incentivize the creation of records when records are distributed for free has been answered in various ways within this doctrine.²⁶⁴ Raymond Ku has argued that the revenues from analog sales would probably suffice for that purpose, and that if not, a “Digital Clearinghouse,” as discussed in the previous section, is a second best alternative.²⁶⁵ Others have contended that “free content might increase the value of non-free content,”²⁶⁶ and concluded that even if records do not directly result in payment, they will be created in order to promote the purchasing of related products such as concerts and merchandise.²⁶⁷

A recent suggestion is to compensate artists exclusively through concerts, so that the record business would serve as a mere vehicle to promote concerts. In other words, under this view, the concert business will support not only itself, but also the production of studio recordings.²⁶⁸

To support this view, it has been claimed that live performances are “the last economic redoubt for musicians—the only unique, excludable, non-duplicable product left in the music business.”²⁶⁹ Moreover, it has been claimed that most artists already earn most of their money from concerts,²⁷⁰ and that this market is actually “the healthiest part of the music industry.”²⁷¹ As opposed to the declining

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262. See *infra* note 270 and accompanying text.

263. Ku, *supra* note 1, at 306–10. But see Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1378 n.127 (2004) (rebutting Ku’s argument).

264. For a discussion of non-copyright compensation that preceded the Internet revolution, see Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); JOHN KELSEY & BRUCE SCHNEIER, *THE STREET PERFORMER PROTOCOL* (1998), available at <http://www.schneier.com/paper-street-performer.pdf> (suggesting a “Street Performer Protocol” consisting of a voluntary payment scheme).

265. Ku, *supra* note 1, at 312–15.

266. LESSIG, *supra* note 153, at 284; see also Dyson, *supra* note 261, at 136 (suggesting that content owners would “distribute intellectual property free in order to sell services and relationships”).

267. See MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* 106 (2008) (arguing that earnings from live concerts would probably exceed the sums musicians earn from CD sales).

268. *Id.*; see also Chris Anderson, *Give Away the Music and Sell the Show*, THE LONG TAIL (Jan. 28, 2007, 8:06 PM), http://www.longtail.com/the_long_tail/2007/01/give_away_the_m.html.

269. Schultz, *supra* note 70, at 686.

270. MARIE CONNOLLY & ALAN B. KRUEGER, *ROCKONOMICS: THE ECONOMICS OF POPULAR MUSIC* 6 (Nat’l Bureau of Econ. Research, Working Paper No. 11282, 2005), available at <http://www.nber.org/papers/w11282.pdf> (“The top 10% of artists make money selling records, the rest go on tour.”); Peter Kafka, *Concert Tours Are Where the Real Money Is*, ABC NEWS (July 11, 2003), <http://abcnews.go.com/Business/story?id=86535&page=1>; Eliot Van Buskirk, *Rolling Stones Bank \$150.6 Million*, WIRED (Jan. 28, 2007, 2:37 PM) http://www.wired.com/listening_post/2007/01/rolling_stones/.

271. Scott Wapner, *Concert Ticket Prices Continue to Rise*, NBC NEWS (Mar. 28, 2004), <http://www.msnbc.msn.com/id/4601934/>.

sales of records, the average price for show tickets increased by sixteen percent in 2006,²⁷² and by eight percent in 2007.²⁷³ Revenues from touring in Britain have also increased substantially between 2004 and 2008.²⁷⁴

It is, however, doubtful that the business of performances can, economically and in principal, carry the entire business of recorded music upon its shoulders.²⁷⁵ The structure of the touring business makes it difficult for artists to reach a widely dispersed audience such as that available online, where a cumulative effect of users is created regardless of physical location.²⁷⁶ What is more, new artists are not likely to earn money from touring.²⁷⁷

The fact that concerts are being paid for also does not subsequently ensure that artists will still create new music and record music at all, a fact that hinders the societal values of preserving culture and widely disseminating it for wide and cross-generational use. In fact, concerts and rehearsals may compete with the creation of new music for the time and investment of the artists.²⁷⁸

Moreover, notably, artists who do not perform (the later career of the Beatles provides a good example), will have to either perform regardless, although this may not be the best way to exploit their talents, or else they may need to find an additional source of income.²⁷⁹ Clearly, this way does not allow artists to earn money from the mere creation of music.

There are dual obvious, yet important, differences between this model and the Fair Trade Copyright model. First, the Fair Trade Copyright model leaves the copyright framework intact and does not supplant it. Second, the Fair Trade Copyright enables artists to earn revenues from record sales and not merely from the additional activities in which recording artists may engage. These factors allow the Fair Trade Copyright to be implemented swiftly without radical changes to the current structure, while shifting revenues over time to those who deserve them from a practical, societal and legal point of view.

The perceived ineffectiveness of copyright law today has more to do with the distorted holdings of copyrights in the music industry and less with the nature of copyright itself. While the Fair Trade Copyright model recognizes the abuses in current employment of copyright, the proposals for abandoning copyright

272. Anderson, *supra* note 268.

273. *Id.*

274. *Do Music Artists Fare Better in a World with Illegal File-sharing?*, *supra* note 235.

275. I put aside the question of how the shift to a concert-based model can affect the compensation for artists who are not performers, such as song-writers and sound engineers, and focus the discussion on recording artists exclusively.

276. Schultz, *supra* note 70, at 686.

277. Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 905 (2011) (quoting music business lawyer Donald Passman that “[i]n the beginning . . . you will most likely lose money on touring”).

278. See Liu Jiarui, *The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China*, 27 CARDOZO ARTS & ENT. L.J. 621, 646 (2010) (“[I]t is not inconceivable that ‘day jobs’ in alternative markets (e.g., paid appearances, acting in television or film, and touring) would compete with music production for artists’ time and energy.”).

279. Schultz, *supra* note 70, at 753–54. Note that the Beatles were a hardcore performing band early in their career, and only later in the career did they stop performing.

altogether are in my view too radical, and may end up throwing the baby out with the bathwater.

In other words, besides the fact that it is probably unfeasible to simply relinquish copyright law, forgoing copyrights entirely is a step too far. One of the lessons to learn from the copyright struggle with the digital revolution is that it is often impossible to predict the future. Thus, it may be myopic to rely on the fact that concerts—or any other anchor—will remain forever lucrative, while recording will remain forever unprofitable.

The Fair Trade Copyright model acknowledges the hardships in enforcing copyrights in a digital age, yet allows artists to monetize the various dissemination channels that do exist, which in turn would allow enhanced autonomy and promote creativity.

V. CONCLUSION

In order to emerge from the copyright crisis successfully, content industries must look beyond the question of recouping the revenues that have been lost since the digital revolution. An effective reform must address a distributive question as well: how revenues should be allocated among the different stakeholders within the industry in order to meet the goals of the copyright system.

The proposal set forth in this Article addresses this key point in the context of the music industry. The Fair Trade Copyright model is a feasible solution that would direct the industry to better fulfill the objectives of copyright law: to encourage creativity, by benefiting those who engage in the actual creative process. While the discussion is topical for the music industry, which has been at the front line of the copyright battle, a wide spectrum of other entertainment and information industries already face similar challenges.

Two characteristics of the music industry render the Fair Trade Copyright model especially fitting for this realm. First, performing artists are recognized and often adored individuals. This feature is much more robust in the music industry than in other industries, such as software and even movies and books.²⁸⁰ This characteristic increases the chances of adoption of this model by music consumers. Second, the controlling position of record labels in the music industry, which extends even to business models that result from new methods of communication that do not require their intervention, urges the need for reform. At the same time, this monopolistic controlling position has a self-perpetuating effect, and limits the ability to accomplish a meaningful reform through the ordinary course of copyright policy design, requiring a complementary mechanism such as the Fair Trade Copyright model.²⁸¹

280. Unlike with music, where users develop affections to the artist herself, with regard to movies and books, consumers often identify with the movie or book *characters*, rather than with the author of the book or the movie creators or actors.

281. Beyond their ties in Congress, record labels have the resources to function as repeat players in the litigation arena. See, e.g., Marc Galanter, *When the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 100 (1974) (discussing the potential of repeat players

That said, the concept of collecting voluntary payments from end users to spur creativity by individual creators might apply in additional frameworks as well. Possible candidates could be bloggers, who could use an equivalent model in order to collect donations from their readers. A Fair Trade Copyright equivalent might add an economic incentive for current bloggers to invest more time in writing and spur the creation of new blogs. Other candidates might be photographers, designers or independent creators of various kinds, who might benefit from donations when their creations are offered online legally or illegally. Clearly, the costs of monitoring these materials and applying a collection scheme might prove prohibitive for many creators, at least at this stage.

An important lesson may be learnt from the implementation of the Fair Trade Copyright model in the music realm, even for industries that face completely different challenges. For example, if the Fair Trade Copyright model proves successful, it can inform copyright industries across the board of the potential of micropayments by end users to ultimately accumulate into considerable sums. On the other hand, if the success of the Fair Trade Copyright system proves more moderate, this might indicate the need to continue to rely on licensing materials to intermediaries in order to result in substantial revenues—even in a digital era. In both scenarios, we would attain valuable information that can serve in setting future policies by industry players and policymakers.

Overall, the implementation of Fair Trade Copyright in the music realm might prove to be a breakthrough in the way copyright and digital technology interact. If successful, the Fair Trade Copyright system may ultimately shift the power balance in the industry for the benefit of artists. The outcome of this experiment is likely to have an impact far beyond the realm of music alone.