

Online Music Distribution Compromise: Protecting the Artist's Copyright While Not Stifling Digital Development

by Itza Wilson

Generally, artists own the right to protect the integrity and value of their work, so it is only right that they also receive some financial benefit from others utilizing their works. Think about what goes into a song: the songwriter who has spent years developing her craft, the singer who pours her heart and soul into a message that connects with countless number of fans, and the marketing and promotional effort to encourage an audience to listen to her work.¹ By just taking the music, people are effectively saying that they do not place a value on what the artist puts into his creation.²

The emergence of online music has transformed the Internet into an active communication channel competing with radio and television.³ The advent of enhanced technologies and faster modems has provided Internet infringers with widespread opportunity to copy music information into an almost perfect album duplicate.⁴ It sounds like a music lover's dream, Internet sites where one can listen to an entire album without paying for it.⁵ Copyright infringement concerns are more serious because of its negative impact on an artist's profits.⁶ Infringement also interferes with a copyright owner's ability to have complete control over his works since perfect copies can be readily made within a short time.⁷

¹ *Copyright Issues Still Abound For Internet Music*, AUDIO WEEK, Aug. 16, 1999 available in 1999 WL 7563650.

² *Id.*

³ Heather D. Raftner and William S. Coats, *From Sampling Artistic Works to Music Distribution on the Internet: The Effect of New Digital Technology on Copyright Law*, 471 PLI/PAT 137 (1997).

⁴ *Id.*

⁵ *Free Internet Music Hits Copyright Discord*, ILLAWARRA MERCURY, Feb. 15, 1999, available in 1999 WL 12359210.

⁶ Heather D. Rafter, William Sloan Coats, Vickie L. Freeman and John Given, *Streaming Into the Future: Music and Video On the Internet*, 547 PLI/PAT 605 (1999).

⁷ *Id.*

The Copyright Act requires that most businesses, using radio or television broadcasts containing copyrighted music in a public place, obtain permission to use each piece of music from the owners of the copyright.⁸ Web site owners can contact either ASCAP (the American Society of Composers, Authors, and Publishers), or BMI (the Broadcast Music Incorporated) to conveniently obtain blanket performance licenses just as television and radio stations do.⁹ The Copyright Act revisions of 1909 focused on addressing the concerns of copyright violations by strengthening criminal penalties.¹⁰ Other legislation was passed to address the dilemma of promoting the enhancement of technology while allowing the holder more control over his work.¹¹ For example, the Digital Millennium Copyright Act of 1998 establishes protective measures of copyright protection against pirate activities affecting music being distributed over the Internet.¹²

There are advantages of music distribution over the Internet in comparison to the traditional methods of distribution under the control of the “Big Five.” Even with the challenges digital technology poses upon copyright holders and the music industry business, it is less of a threat to the traditional walls of record sale and distribution and more of a promotional technique that would only enhance the economics of such commercial services as well as the music community.

⁸ *ASCAP Legislative Matters* (visited Jan. 10, 2000) <http://www.ascap.com/legislative/legis_fourmajor.html>., *See also*, The Fairness in Music Licensing Act 17 U.S.C. §107-§110. Few businesses using radio or television music were exempted from music licensing fees. The “Fair Use” law expands the existing exemption for small restaurants, bars and retail stores for radio or television music only.

⁹ Rafter et. al, *supra* note 6.

¹⁰ Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705 (1999).

¹¹ *Id.*

¹² 17 U.S.C. §512, *See*, Mark Radcliffe, *Digital Millennium Copyright Act Forging the Copyright Framework For the Internet: First Steps*, 57 PLI/PAT 365 (1999).

Traditional Method of Music Distribution

Originally, the sale, manufacture, and distribution of music has been under the exclusive control of five large record labels - BMG Entertainment, EMI Recorded Music (\$6.5 billion in global music sales for fiscal 1997), Sony Music (\$5.3 billion), Universal Music Group, and Warner Music Group (\$3.7 billion).¹³ These companies have the money and the marketing capability to promote their artists and the power to bring them into the marketplace.¹⁴ Also, “independent” record labels have provided an alternate way for new artists to record and distribute albums.¹⁵ However, only the most successful of these labels are able to reach large audiences and make their label commercially viable due to the high costs associated with promotion and distribution through traditional retail channels.¹⁶ The traditional mode of distributing music to consumers relies on a cumbersome network of relationships between manufacturers, wholesalers, retailers, and in some situations additional layers of intermediaries.¹⁷ Each strand of the network typically comes attached with significant overhead costs, incurred by warehousing and transporting products before they move on to the next level of the distributing chain.¹⁸ “As far as the ultimate consumer is concerned, each group necessarily tacks on a fee for its part in passing the goods along.”¹⁹

“Even the most ambitious virtual record companies acknowledge that delivering music via cyberspace will complement, not replace brick-and-mortar retail outlets.”²⁰ “Some industry observers say digital distribution is a long way from posing any real competition to the big record

¹³ Rafter et. al, *supra* note 6.

¹⁴ *Id.*

¹⁵ *Id.* at 611.

¹⁶ *Id.*

¹⁷ David H. Morley and Michael W. Morley, *Stuck In the Middle Again*, CA MAGAZINE, Dec. 1, 1998, available in 1998 WL 28699745.

¹⁸ *Id.*

labels.”²¹ “Because these giants also own the biggest record distribution companies, they have enormous power to determine what kind of music is made and how much of it ends up in the record stores for consumers to buy.”²² Further, musicians turn over artistic control to these big labels in exchange for Top 40 returns.²³ “This hegemony creates a complicated relationship for artists, who often feel indebted to their labels for making them into stars.”²⁴ They could never have reached a mass audience without the help of the record company, but feel resentment over the issues of creative control and money.²⁵

For example, the Artist’s, formerly known as Prince, main frustration with his record label, Warner Brothers, was over output.²⁶ He created about 10 CDs worth of material per year and more than 1,000 songs are in his vault, but the Artist’s desire to express himself clashed with the label’s obligation.²⁷ “Manufacturing a CD, warehousing it, and distributing it in stores is tremendously expensive and it does not make sense for a label to release a new record while the current one is still selling well.”²⁸ “The Artist has repeatedly made it known he wants to obtain the rights to his own master recordings.”²⁹ However, it is unlikely that he would ever gain control of them since the original works were sold to the label under a valid contract.³⁰

¹⁹ *Id.*

²⁰ Paul Keegan, *Making Beautiful Music*, UPSIDE MAGAZINE, Sept. 1, 1998, available in 1998 WL 30500076.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Camillo Fracassini, *Back To Square One For “Surreal” Artist*, THE SCOTSMAN, April 17, 1999, available in 1999 WL 15109878.

³⁰ *Id.*

Just recently, the President approved the passage of the Satellite Home and Viewer Improvements Act, as part of the omnibus spending bill.³¹ This bill has changed the definition of “work made for hire” in the Copyright Act by adding “sound recordings” to the list of works that may be considered “works made for hire.”³² This change will permit record companies to obtain irreversible ownership and control of artists’ recordings.³³ Thus, it has eliminated the current legal protection that enabled artists to terminate the transfer of rights and regain ownership of their contributions to sound recordings at the end of the 85 year copyright term.³⁴

In 1996, the Artist parted with Warner Brothers to set up his own record company to re-record all his prior albums, as well as create new albums, and plans to sell them directly via the Internet in a challenge to his former label.³⁵ The Artist sold 250,000 copies of his most recent CD, “Crystal Ball,” directly through the Internet and retail stores, but it is “a far cry from the tens of millions he used to sell.”³⁶ As a result, “without the powerful marketing muscle of a big label, he is forced to cobble together free promotional events in order to stay in the public eye.”³⁷

David Bowie wrote the song “Telling Lies” while touring.³⁸ His label, Virgin Records America, did not release the song because there is little profit margin in releasing singles.³⁹ “Instead, Bowie posted the song for free on N2K’s www.davidbowie.com site and, accord-

³¹ Ann Chaitovitz, *Copyright Change Spells Trouble For Artists*, BILLBOARD, Jan. 29, 2000, available in 2000 WL 12299557.

³² *Id.*, A “work made for hire” is a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional test, as answer material for a test, or as an atlas...shall be considered a work made for hire. “Sound recordings” are works from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work regardless of the nature of the material objects such as disks, tapes or other phonorecords, in which they are embodied. 17 U.S.C. §101.

³³ *Id.*

³⁴ *Id.*

³⁵ Fracassini, *supra* note 29.

³⁶ Keegan, *supra* note 20.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

ing[ly] . . . 200,000 copies were downloaded within a short time.”⁴⁰ “Not only did that give Bowie great free publicity for his Web site, but the company came away with an invaluable asset; one that gives the Internet a huge advantage over retail stores--the names and email addresses of 200,000 Bowie fans.”⁴¹

A Possible Wave of the Future

New York’s Jupiter Communications estimates that online music sales will grow from a paltry \$37 million in 1997 to \$1.14 billion by 2002.⁴² The major record labels anticipate delivering music over the Internet within three to five years themselves.⁴³

Over the Internet, consumers are able to gain access to on-screen reviews and other detailed product information that an average store clerk is unable to offer.⁴⁴ “When [the] order is placed, the manufacturer is automatically informed by an online connection and immediately ships the goods to the consumer via a courier company.”⁴⁵ “Just a couple of mouse clicks have eliminated the need for retail space, store clerks and dedicated shipping fleets, [which results] in lower costs for the producer and presumably, lower prices for the consumer.”⁴⁶ The introduction of more sophisticated computer software has not only brought the ability to record and play back music to more people and at higher quality than other technologies are able to provide, in doing so, it has also eliminated the need for a physical product, the audio compact disc.⁴⁷ “For listeners, music has never been about its physical form, but about what is in the grooves or

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Morley and Morley, *supra* note 17.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

magnetic particles or digital pits; [it is] the music, not the plastic.”⁴⁸ “Digital distribution can turn that sentiment into a reality and that shift could alter the way music is made, released, sold, stored and valued.”⁴⁹

“Record companies, for all their historical ineptitude at spotting something new, do act as gatekeepers to filter out some of the rubbish.”⁵⁰ However, given the Internet’s egalitarian free-for-all of information, there will now be no limits on what and when something gets put out.⁵¹

The Digital Era

“Digitalization is the process of translating information, including sound, into mathematical bits.”⁵² “Music is stored in computer memory or on a compact disc or other digital software as 1s and 0s--the mathematical bits--and reconverted into music when played back on digital equipment such as a computer or a compact disc player.”⁵³ Through this process, “the original sound recording retains its high quality.”⁵⁴ “Music can be recorded onto a computer’s memory through the use of a Music Instrument Digital Interface (MIDI) file.”⁵⁵ “MIDI is the ‘industry standard for converting music into...digital data.’”⁵⁶ “Once the music has been converted into digital data and stored into a MIDI file, it can be recorded in a computer’s memory, [where] it can be saved onto a disc or any other form of recordable medium.”⁵⁷

⁴⁸ Jon Pareless, *Internet’s MP3 Frees Music, Scares Artists Easy Digital Copying Lets Listeners Bypass the Record Stores*, THE ARIZONA REPUBLIC, Nov. 22, 1998, available in 1998 WL 7812093.

⁴⁹ *Id.*

⁵⁰ Edward Helmore, *Music: Stop Thief a New System For Downloading Music From the Internet Has Got Record Companies Very Worried - About Copyright Piracy Sure But Mostly About Their Own Irrelevancies*, THE GUARDIAN, Nov. 20, 1998, available in 1998 WL 18678257.

⁵¹ *Id.*

⁵² June Chung, *The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music’s New Form of Distribution*, 39 ARIZ. L. REV. 1361 (1997).

⁵³ *Id.*

⁵⁴ *Id.* at 1367.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

“High-speed and high-capacity electronic information systems make it possible for individuals to deliver perfect copies of digitalized works to an infinite number of recipients throughout the world.”⁵⁸ “The illegal reproduction and dissemination of copyrighted material prevents the creators of those works from controlling the manner in which they are presented and used.”⁵⁹ This “denies them the economic benefits derived from those copied works.”⁶⁰

Ways to get Digital Music

There are about 80,000 music sites on the Net from streaming radio stations to fan sites to retailers such as N2K, CDnow Inc. of Jenkintown, Pa., and Tower Records of West Sacramento, Ca., that offer to send CDs through the mail.⁶¹ Consumers can get digital music from three major applications of digital audio technology in use, Internet jukeboxes, cable services, and digital radio.⁶² First, the “Celestial Jukebox” describes various Internet “jukebox” services where computer users can listen to and pay for each song or group of songs every time they download digital quality music off the Internet.⁶³ Nullsoft’s new playback software, which is available on the Internet, makes it possible for a user to turn his or her computer into a virtual jukebox.⁶⁴ Also, traditional cable boxes can be attached to a stereo system.⁶⁵ Subscribers pay an additional fee for all the music they wish to download.⁶⁶ “Finally, there is digital radio, also called Digital

⁵⁸ Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections For the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. 397 (1999).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Keegan, *supra* note 20.

⁶² Chung, *supra* note 52.

⁶³ *Id.* at 1372.

⁶⁴ Morley and Morley, *supra* note 17.

⁶⁵ Chung, *supra* note 52, at 1372.

⁶⁶ *Id.* See also, Pareless, *supra* note 48.

Audio Broadcasting.”⁶⁷ “This ... use is also a threat to copyrighted music because, like current radio broadcasts, entire albums may be broadcast without permission.”⁶⁸

Caselaw

The Recording Industry Association of America, RIAA, is “a trade association founded in 1952 whose 250 member companies create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.”⁶⁹ In *Recording Industry Association of America, Inc. v. Diamond Multimedia*, the music industry backed by RIAA opposed Diamond’s creation of Rio, a portable player, which downloads songs of MP3 format from the Internet or CD and transforms the file from the computer’s hard drive to the player through cables.⁷⁰ Instead of using a tape or CD, the ... Rio uses a microchip that can store up to 77 minutes of music.”⁷¹ The approximately \$200 device uses “flash” memory to store up to 16 songs from the computer and is approximately the size of a floppy disk.⁷² In the end, the court agreed with Diamond’s argument that the small device was not a type of bootleg recorder but only a playback device.⁷³ In fact, the Rio was not really threatening because “it cannot copy to another machine” nor upload it back to the computer.⁷⁴ But the squabble over the Rio is really about the new way of transmitting music over the Internet, or MP3.⁷⁵ Thus, the RIAA is still fighting to clamp down on illegal music piracy, not free expression on the Internet.⁷⁶

⁶⁷ Chung, *supra* note 52, at 1372.

⁶⁸ *Id.*

⁶⁹ Morley and Morley, *supra* note 17.

⁷⁰ Richard Raysman, Jill Westmoreland, *Fresh Battles Over Digital Music: The Sound and the Fury*, 5 No. 11 IPST 1 (1999); *See also*, Recording Industry Association of America, Inc. v. Diamond Multimedia, 180 F.3d 1072. (9th Cir., 1999).

⁷¹ Helmore, *supra* note 50.

⁷² Morley and Morley, *supra* note 17.

⁷³ Raysman and Westmoreland, *supra* note 70.

⁷⁴ Helmore, *supra* note 50.

⁷⁵ *Id.*

⁷⁶ *Id.*

The MP3 Revolution

Digital distribution, or the downloading of complete files, allows users to take advantage of free Internet music.⁷⁷ The famous MP3, which stands for, Motion Picture Experts Group-1 Audio Layer 3, is one form of digital distribution.⁷⁸ It allows users to freely download near CD quality sound copies of music onto their computer's hard drive.⁷⁹ MP3 has created many stirs because of the threat it poses for music piracy.⁸⁰ MP3 supporters argue that the issue is really about the record labels having the money, freedom, and control, but the artists and the public want the freedom and control.⁸¹

MP3 represents the recording industry's loss of control.⁸² The Internet promises as much as it threatens.⁸³ Such a democratic method of distribution, could also alter the whole process of signing, developing, recording, releasing and distributing music.⁸⁴ To independent labels, artists and progressively minded music fans, the format is a way to release high fidelity recordings unavailable in music stores, release music from the grip of its gatekeepers, and perhaps return music to its tangible essence.⁸⁵ The signs of this change is already here: MP3.com recorded over 1.5 million new visits to its website in September of 1998 alone and about two million promotional songs were delivered electronically.⁸⁶

⁷⁷ Raftner et. al, *supra* note 6, at 614.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 615.

⁸¹ *MP3 Music Plays Well With Artists and Fans*, U-WIRE, May 19, 1999, available in 1999 WL 18802616.

⁸² Helmore, *supra* note 50.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

The industry's fear of MP3 escalated when a dozen new and unreleased songs by rap star, Nas, were stolen and posted by a bootlegger available for free downloading on the Net.⁸⁷ The music tracks were among 30 tunes recently recorded for Nas' upcoming album, "I am..." which was initially conceived as a double CD.⁸⁸ As the World Wide Web becomes the pirates' preferred medium, the RIAA is keeping tabs on the issue.⁸⁹ In a 1997 release published on its web site, the Association noted a new trend, "Popular groups and individual artist, such as Pearl Jam, Van Halen, Madonna and Eric Clapton, found their songs circulating over the Internet months before the official release date of their album."⁹⁰

The Recording Industry Association of America

Smaller Internet-related companies and independent artists, that is musicians and bands who do not have recording contracts, have been the drivers behind the adoption of MP3.⁹¹ The quest to shut down illegal MP3 sites may prove to be an unattainable solution to the problem.⁹² For every site that the RIAA manages to shut down, another three sites will pop up.⁹³ Further, most of the pirates are college and university students with few assets available if compensation is sought.⁹⁴ In an attempt to address this issue, RIAA launched a campaign, "Soundbyting," which tries to educate students on the importance of respecting copyrighted sound recordings in cyberspace.⁹⁵ Even if the association manages to implement some form of electronic protection for all future releases, the current database of music and all CDs currently on sale and in

⁸⁷ Chuck Philips, *The Cutting Edge IBM Aims to Unplug Online Music Pirates Internet, System For Downloading Recordings to be Tested in San Diego, is Designed to Protect Copyrights*, THE LOS ANGELES TIMES, Feb. 8, 1999, available in 1999 WL 2127953.

⁸⁸ *Id.*

⁸⁹ Morley and Morley, *supra* note 17.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

listeners' collections, remain available for the pirates' picking.⁹⁶ If the RIAA and its members were to adopt the technology instead of crushing it, a possible scenario could result in which record companies open up their databases of music to consumers and charge them on a song-by-song basis.⁹⁷ Consumers would be willing to pay for such service given the massive archive of music available and the ability to control their selections, yet piracy would not be eliminated.⁹⁸

Secured Digital Music Initiative

Initially, online distribution was seen as a threat to record companies because proponents of music distribution in cyberspace were threatening to destroy the music industry by promoting music piracy and undercutting all the profits.⁹⁹ However, the fears that the Internet could fundamentally disrupt the relationship between artist and his label, impact the quantity of music readily available, affect costs from profits being shared and affect the copyright itself will not be seen for many years, if at all.¹⁰⁰ The industry is still dominated by the major record companies that have contracts with the overwhelming majority of popular artists.¹⁰¹ In 1993, the Internet Underground Music Archive (IUMA) web site supplied artists with a cheap and expedient channel to get their music heard.¹⁰² The tunes have changed as the music community works together with online providers as part of the Secured Digital Music Initiative, SDMI, to come up with an acceptable standard security specification engendering copyright protection via cyberspace.¹⁰³

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Raftner et. al, *supra* note 6, at 610.

¹⁰⁰ *Id.*

¹⁰¹ Keegan, *supra* note 20.

¹⁰² Raftner et. al, *supra* note 6, at 612.

¹⁰³ *Id.* at 625, 626.

Now, the music industry believes that the Net could allow them to expand their market over United State boundaries.¹⁰⁴ Online music sales according to Jupiter Report will reach \$1.4 billion, at least 8% of all US sales of music, even though in 1997 it stood at just .03% of total revenues or a mere \$88 million in sales of retail music.¹⁰⁵ America OnLine, as part of (SDMI), intends to work with record companies and associations to protect rights of artists through its online service.¹⁰⁶ Some sites offer users easy accessibility to hear music samples, to obtain information about the artists, and the ability to order the music of the user's choice.¹⁰⁷ So far, online distributors such as Artistdirect, Goodnoize, and Z Company are giving artists more of their profits and giving customers music in the format they want.¹⁰⁸ The main challenge will be to offer users the downloadable album while preventing subsequent illegal copying.¹⁰⁹ Ways to protect online music content includes the use of watermarking or encryption techniques and search software that enables copyright holders to track down pirated music on the Web.¹¹⁰

Software products such as Progressive Networks' Real Audio player, Macromedia's Shockwave, and Liquid Audio's Liquid Music Player, permit the streaming and downloading of audio from the Internet.¹¹¹ These same audio companies are also providing technological solutions to copyright issues arising from the Internet such as encrypting and watermarking the audio.¹¹²

¹⁰⁴ *Id.* at 610.

¹⁰⁵ *Id.* at 613.

¹⁰⁶ *AOL Internet Music Said to Promote Rights of Copyright Holders*, COMMUNICATIONS DAILY, June 3, 1999, available in 1999 WL 7579594.

¹⁰⁷ Raftner et. al, *supra* note 6, at 613.

¹⁰⁸ Nikki Goth Itoi, *The Music Industry Is Struggling to Adopt to the Internet*, THE RED HERRING, Jan. 1, 1999, available in 1999 WL 19627801.

¹⁰⁹ *E-Commerce*, GLOBE AND MAIL, available in WESTLAW, 03/30/1999 GLOBEMAIL C10.

¹¹⁰ Raftner et. al, *supra* note 6, at 625.

¹¹¹ Raftner and Coats, *supra* note 3, at 142, *See also* [FT 4] at 148, "Streaming" is the transmission in real time of audio over the Internet.

¹¹² *Id.*, *See also* [FT 5] at 148, "Watermarking" is essentially the process of encapsulating a recording's copyright data with the audio.

Internet companies are positioning themselves for leadership positions in the emerging digital music industry.¹¹³ Yahoo, through its acquisition of Broadcast.com is already making music available through its site.¹¹⁴ Lycos announced a distribution agreement with rap star DMX for all its Web properties.¹¹⁵ The record companies are trying to steer users toward digital formats like Liquid Audio and AT&T's A2B Music, which are preferred because they offer built-in copyright protection.¹¹⁶ Yet, MP3 is gaining greater acceptance among both technology companies and consumers than its proprietary counterparts.¹¹⁷ Microsoft now builds an MP3 player into its Windows 98 software.¹¹⁸ However, MP3 music is not by definition illegal.¹¹⁹ One enterprising company, MusicMatch, packed 152 songs from independent bands onto a CD-Rom, a perfectly legitimate action.¹²⁰ The problem for the companies and their artist is that while some MP3 songs are legal and endorsed by them, the software offers no copyright protection.¹²¹ For this reason, they want to replace the Internet's standard for digital download with their own, which would allow them to encrypt their product and thus protect their copyright.¹²²

Some artists and labels have agreed to allow MP3.com distribute their music.¹²³ For instance, deals have been struck between the leading MP3 Web site, MP3.com, and artists like Alanis Morissette, Tori Amos and other lesser-known musicians seeking the broad exposure available on cyberspace.¹²⁴ Further, MP3 will bring good news to consumers.¹²⁵ Cheaper digital

¹¹³ *supra* note 106.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Itoi, *supra* note 108.

¹¹⁷ *Id.*

¹¹⁸ Pareless, *supra* note 48.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *A New Song*, THE ECONOMIST, May 8, 1999, available in 1999 WL 7362976.

¹²³ *MP3 Music Plays Well With Artists and Fans*, *supra* note 81.

¹²⁴ *Id.*

¹²⁵ *Id.*

distribution, not only will mean lower prices and the ability to purchase single tracks instead of the entire album, the ease of making and posting an MP3 file will bring more music choices.¹²⁶ Record companies and music publishers are confronted with a consuming public that can literally manufacture its own albums based on material that is beamed into households from remote sources and who can then enjoy these albums.¹²⁷ Without the record labels deciding what music is good and deserves public release, listeners will be able to make up their own minds.¹²⁸ Today, the music industry forces you to buy music that you do not actually want because the only option is to buy it as a CD.¹²⁹

The “Big Five” record labels, BMG Entertainment, Sony Music, EMI Music, Warner Music Group and Universal Music Group, feeling the pressure of the user-friendly MP3 on the industry, recently unleashed the Madison Project.¹³⁰ This project is being tested in 1,000 homes, in conjunction with IBM, giving users access to an online music store with nearly 2,000 album titles.¹³¹ Accordingly, entire albums can be downloaded in three minutes.¹³² The major benefit of downloading music is flexibility.¹³³ The Madison Project, however, is designed to give consumers the same thing they can get in a record store, a CD, and not allow them to take individual tracks from albums.¹³⁴ Moreover, the project requires users to obtain specific software, a CD burner, which is already available in most computer or home electronic stores for as much as \$300 to \$400 dollars, a cable modem and a printer to print out liner notes in order to

¹²⁶ *Id.*

¹²⁷ Howard Seigal, *Digital Distribution of Music: How Current Trends Affect Industry*, 5 No. 1 MMEDIAST 1 (1998).

¹²⁸ *supra* note 81.

¹²⁹ Jennifer Pfafflin, *Easy as MP3: New Technology Shakes Up Music Industry*, THE DAILY CARDINAL, Feb. 19, 1999 available in 1999 WL 12726659.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

access the music made available.¹³⁵ The downloaded music can then be transferred to a recordable digital media device which complies with the trial program's copy-control policies.¹³⁶ One will be able to listen to them, to download them as many times as they please, to own them and make additional copies onto a CD, but it will all be controlled.¹³⁷ IBM will monitor each transaction and report the volume of sales and other data including demographic statistics and customer response to the industry technique.¹³⁸

Promotional Device

The Internet channel can be a good strategy for a new artist or upcoming band, who has yet to reach Mariah Carrie, Bruce Springfield or Puff Daddy status and can not reach an audience with little or no interference from the record companies. Yet, with retail stores there is the potential for an artist to sell millions of record copies, while an artist over the Net can only sell thousands because not everyone buys music over the Internet.¹³⁹ On the other hand, the Net provides the opportunity to identify fans or buyers and to get the music out to them.¹⁴⁰ Some free samples are provided for marketing purposes or for simple exposure, while others are teasers intended to entice listeners to purchase either mail order recordings or recordings available for direct download, along with album cover art, lyrics, and artist biographies.¹⁴¹ Subsidiary labels are more inclined to try new business technologies and are given licenses to experiment with direct delivery over the web.¹⁴² The smaller label company will save money by not manufacturing as much recorded copies, and targeting the specific audience more precisely than a

¹³⁵ *Id.*

¹³⁶ *E-Commerce, supra* note 109.

¹³⁷ *Id.*

¹³⁸ Philips, *supra* note 87.

¹³⁹ Keegan, *supra* note 20.

¹⁴⁰ *Id.*

¹⁴¹ Recording Industry Association of America, Inc., 180 F.3d 1072 at 1074.

record store could and still make money.¹⁴³ They will get rid of the costly business of dealing with returns of CDs that flop because no one will buy them in the first place.¹⁴⁴ According to the RIAA, 85 percent of records released do not recover their production costs.¹⁴⁵ The resurgence of making and distributing singles over the Net will allow new artists to get an idea of their audience responses and possibly lessen economic risks of companies putting out full CD's with only one or two hit makers.¹⁴⁶ With the range of possibilities, this could also mean that pricing of recorded music via cyberspace will have to change.¹⁴⁷ Current high costs of retail store CD's will sometimes discourage its listeners from buying the music they like and want to hear.¹⁴⁸ However, the advantage of traditional methods produces the unique packaging of a CD, a downloadable recording would not make the CD complete in its solid form.¹⁴⁹

Garage bands that cannot get a record label deal because big companies would not give them the time of day might turn to MP3.com to voice their music on the web.¹⁵⁰ There is still a success gap between on-line distribution and the traditional record contract.¹⁵¹ Garage bands may lose out on mass media opportunities for promotional exposure, but will have creative independence on the Net to directly interact with fans and listeners in the hopes that they will order their music.¹⁵² They know that the Internet may not get them a gig on MTV or a radio

¹⁴² Itoi, *supra* note 108.

¹⁴³ Keegan, *supra* note 20.

¹⁴⁴ *A New Song*, *supra* note 122.

¹⁴⁵ Keegan, *supra* note 20.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Pareless, *supra* note 48.

¹⁴⁹ *E-Commerce*, *supra* note 109.

¹⁵⁰ Thomas E. Weber, *Superstars On the Web, A Band Still Craves Hits In the Real World*, THE WALL STREET JOURNAL, Sept. 27, 1999, at B1.

¹⁵¹ Keegan, *supra* note 20.

¹⁵² *Id.*

interview but they fantasize that one day their fan base, through Internet channeling, will be significant enough that eventually record companies will have to give them a label deal.¹⁵³

Cost-Benefit Analysis

If a record company sells a million records by an artist, it has to spend those marketing dollars all over again the next year when there is another album.¹⁵⁴ But if you have the names of those million people, you can sell them the next record at a fraction of the marketing costs.¹⁵⁵ The Net's lower overhead means a label does not need to sell as many copies to make money and can target the right audience more precisely than a record store can.¹⁵⁶ For any artist concerned with his or her immortality, the Internet ensures that a record will never disappear.¹⁵⁷ The Net also allows record labels to dig into their vaults and sell old music that is not popular enough to justify the costs of issuing it on CD.¹⁵⁸ A great boon to the music fan who wants access to historically, alternate versions of classic pop songs.¹⁵⁹

For other musicians, it is also an issue of money.¹⁶⁰ With today's contract, artists might collect at most 15 percent of the gross revenues generated by their music.¹⁶¹ So musicians might turn to the Internet to sell directly to the fans while cutting out the middleman.¹⁶² For example, N2K Enclosed Music Label hopes to lure both famous and unknown artists with the promise of more creative freedom, a closer connection to fans and a greater share of profits.¹⁶³ Since N2K's costs are much lower distributing a record via the Internet, it can offer artists close to 50 percent

¹⁵³ Weber, *supra* note 150.

¹⁵⁴ Keegan, *supra* note 20.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

of the gross revenue rather than the standard 15 percent.¹⁶⁴ However, that is still not a great deal for artists because they can only sell thousands in cyberspace as opposed to millions in record stores.¹⁶⁵ Moreover, it has yet to be proven that significant consumer demand exists for music purchased over the Internet.¹⁶⁶ For example, N2K had a net loss of \$13.7 million in the first quarter in the year 1998, up from a loss of \$4.5 million in the first quarter of 1997.¹⁶⁷ A similar company, CDnow, racked up \$9.2 million in losses in the first quarter of 1998 and expects substantial operating losses for the future.¹⁶⁸

Inability of Prior Regulations to Address Advancements in Digital Music

With the passage of the U.S. Copyright Law 17 U.S.C. §101, regardless of whether a sound recording is streamed in real time through the use of compression technology like Real Audio, downloaded for future use, or arranged as a MIDI file, the web site owner who offers sound recordings must obtain one or more licenses from the copyright holder.¹⁶⁹ In most cases, there may be multiple copyright holders for a single recording: the composer, the publisher and the owner of the sound recording.¹⁷⁰ After the passage of the Copyright Act, great debate arose over the fact that the issue of a performance right in sound recordings was not addressed.¹⁷¹ Congress declined to address the issue, in part, because the record industry had increasingly profited since the passage of the Act.¹⁷²

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Raftner et. al, *supra* note 6, at 617, 17 U.S.C. §106-§115.

¹⁷⁰ *Id.*

¹⁷¹ Chung, *supra* note 52.

¹⁷² *Id.*

The Audio Home Recording Act (AHRA) of 1992 does not broadly prohibit digital serial copying of copyright protected audio recordings.¹⁷³ But rather, it places restrictions only upon a specific type of recording device able to reproduce a “digital music recording,” either directly or from a transmission.¹⁷⁴ The Senate report explains that the purpose of the Act is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for private, non-commercial use.¹⁷⁵

In November of 1995, Congress enacted the Digital Performance Right Act, in part, to grant artists and copyright owners the right to collect royalties for public performance of their sound recordings, including digitally transmitted sound recordings.¹⁷⁶ The forms of digital transmission afforded protection include direct cable, satellite broadcasts, the Internet and other online services.¹⁷⁷ First, the Act will work with the existing Copyright Act to provide added protection against copyright infringement of digital music, specifically sound recordings.¹⁷⁸ Second, it anticipates the possibility of a shift in distribution of sound recordings from physical to digital.¹⁷⁹ The Senate Report to the Act commented on the fact that online services that allow subscribers to download music on demand pose the greatest threat to traditional sales of records and compact discs.¹⁸⁰ Unfortunately, the Digital Performance Right Act fails to address transmissions that may be sent by an independent bulletin board service that uploads and downloads information on their own without charging a fee to people for access to the

¹⁷³ Raysman and Westmoreland, *supra* note 70, The Audio Home Recording Act, 17 U.S.C. §1001-§1010.

¹⁷⁴ *Id.*; A “digital music recording” is defined as “a material object (i) in which are fixed, in a digital recording format, only sounds, materials, statements, or instructions incidental to those fixed sounds, if any, and (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. §1001(5)(A).

¹⁷⁵ *Id.*

¹⁷⁶ Chung, *supra* note 52, at 1365, 17 U.S.C. §106.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

information.¹⁸¹ With the proper equipment, one can easily download digital music from the Internet onto a recordable compact disc through the use of a personal computer.¹⁸² The reverse, uploading music from a compact disc onto the Internet for others to download, is equally simple.¹⁸³ This is the process whereby music gets distributed virtually for free, in violation of copyright law.¹⁸⁴

Alternatives to Copyright Law

With the threat of strict liability, online services might have an incentive to develop solutions to prevent infringement.¹⁸⁵ Without such a threat, copyright holders might have no recourse for violations since the subscribers who are the direct infringers are often difficult to identify or have no financial resources to pay damages.¹⁸⁶ Some fear that such a threat will drive up the prices of such services, which goes against the purpose behind the National Information Infrastructure of widespread dissemination of information at an affordable cost.¹⁸⁷ If the services are held responsible for monitoring all the information that flows in and out of their system, a chilling effect might stunt the growth of what some consider a great public forum for free speech.¹⁸⁸

Frank Music Corp. v. CompuServe Inc., is the benchmark litigation dealing with the dissemination of copyrighted sound recordings over the Internet.¹⁸⁹ The case addressed online distribution of MIDI files and the plaintiffs sought to establish direct infringement of the online

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1366.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1364.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Siegal, *supra* note 127.

service hosting the files.¹⁹⁰ As a result, third-party content providers, like CompuServe, actively managing the downloadable service is required to be licensed.¹⁹¹

Since radio stations and local merchants must purchase blanket licenses before playing copyrighted music, it is reasonable to suggest the same for Internet service providers.¹⁹² Recently, there have been music-licensing agreements with the American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Incorporated (“BMI”) issuing blanket performance licenses to operators of individual World Wide Web sites for the transmission of music on the Internet.¹⁹³

Since 1996, the industry has experienced declining sales.¹⁹⁴ As a result, the record industry is more concerned than ever with the possibility of future profit loss attributable to unregulated copyrighted music on the Internet.¹⁹⁵ The Fairness in Music Licensing Act of 1998 expands the existing exemptions to small restaurants, bars and retail stores from the need to have public performance licenses in order to play radio or television receivers for their customers’ enjoyment.¹⁹⁶

In response to the immediate need for improved copyright protections, the Digital Millennium Copyright Act (DMCA) was enacted in October, 1998.¹⁹⁷ The DMCA seeks to accomplish three primary purposes.¹⁹⁸ First, the DMCA implements two important international treaties of the World Intellectual Property Organization (WIPO) both passed in Geneva,

¹⁹⁰ *Congress and the Music Industry Respond To Internet Opportunities*, 5 No. 8 MMEDIAST 7 (1999).

¹⁹¹ *Id.*

¹⁹² Chung, *supra* note 52, at 1387.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1363.

¹⁹⁵ *Id.*

¹⁹⁶ *Fairness In Music Licensing Act Exempts Many Stores, Restaurants and Bars From Need to Have Public Performance Licenses*, 20 No. 6 ENT. L. REP. 9 (1998), *See also*, Fairness in Music Licensing Act 17 U.S.C. §512.

¹⁹⁷ Andrepont, *supra* note 58.

¹⁹⁸ *Id.*

Switzerland in December, 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, collectively as “Treaties.”¹⁹⁹ Second, the DMCA updates the copyright laws concerning the Internet.²⁰⁰ It provides necessary protection for copyright holders who fear their works, now available on the Internet in a digital form, will be misappropriated.²⁰¹ Third, the DMCA outlaws the manufacture of devices or software designed to circumvent protective security measures created for the Internet and other electronic environments.²⁰²

The DMCA ensures that the United States will maintain its starring role in the competitive, evolving global market and serves as a compromise between the electronic advocacy groups and artists’ rights organizations.²⁰³ In the past, copyright holders have employed security devices, such as encryption, to protect their works.²⁰⁴ However, before the enactment of the DMCA, the law did not provide for the preservation of these security devices.²⁰⁵ The Act allows the use of encryption circumvention technology for fair use purposes by such groups as educational institutions, but will provide extreme penalties for those individuals who employ such tools to illegally use copyrighted material.²⁰⁶ Title II of the DMCA, titled the Online Copyright Infringement Liability Limitation, contains several “safe harbors” provisions for Internet service providers.²⁰⁷ Specifically, Title II amends the Federal Copyright Law, adding a new section 512 to the Copyright Act of 1976, and creating several new limitations on the potential liability of online service providers for copyright infringement.²⁰⁸ A service provider

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 399.

²⁰² *Id.*

²⁰³ *Id.* at 404, 409.

²⁰⁴ *Id.* at 409.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 412.

²⁰⁸ *Id.* at 413.

must meet two requirements in order to be eligible to benefit from the limitations on liability.²⁰⁹

First, the Internet Service Provider (ISP) must implement a policy for terminating the accounts of subscribers who repeatedly infringe copyrights.²¹⁰ Second, an ISP cannot interfere with, and in

fact must support technological measures used to protect copyrights.²¹¹ Thus, the provisions in Title II are vital to the growth and evolution of the Internet and the global information system.²¹²

Without a clear determination of their potential liability concerning online copyright infringement, the ISPs will be unwilling to put forth the time, effort and money which is necessary to the success of the Internet.²¹³

In the music industry, the DMCA has received support from several groups.²¹⁴ The Digital Media Association approves of the DMCA because the Act clarifies “recording companies’ ownership of, and Webcasters’ authority to use sound recordings, and will provide both industries with a simplified method of licensing.”²¹⁵ The government’s role concerning intellectual property rights and the protection of copyrighted material has been not only to encourage creativity and innovation, but also to create incentives to facilitate the sharing of information and the distribution of these materials to the public.²¹⁶ This Act successfully provides for both the fostering of creative genius within the artistic community and the fair use of works deriving from that genius.²¹⁷

It Certainly Works, But It Is Not a Threat

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 417.

²¹³ *Id.*

²¹⁴ *Id.* at 419.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

Technology is moving in the direction to strengthen the rights of owners to exercise greater control over their works. Artists can choose to sell their music through online distributors that will supply artists with a cheap and easy way to get their music heard and distributed worldwide.²¹⁸ Until systems can make this process faster for consumers, there should be little concern that distributing music over the Net threatens the record labels or retailers. Indeed, most of the big record labels realize they can no longer afford to ignore cyberspace.²¹⁹ Yet, technology is still in its experimental stages.²²⁰ Because of bandwidth constraints, legal entanglements and a lack of portable MP3 players, analysts insist that downloaded digital music will not be a substantial revenue category for another three years.²²¹ For example, it takes approximately two hours to download a 36 minute or full length CD using a 28.8 modem.²²²

If and when digital form does take over, record companies who have been in existence will still be needed for their marketing and promotional ideas due to their creative expertise in public tastes.²²³ Unfortunately, most of their time is taken up with manufacturing, inventory, distribution and retailing problems.²²⁴ Further, they understand and respect the system of rights and royalties that has evolved to meet their industry's needs.²²⁵

No matter how enticing or threatening new technology might appear towards record companies, change in the established system will happen only incrementally.²²⁶ The record companies can either fight to maintain control of the industry or reshape themselves for

²¹⁸ Raftner et. al, *supra* note 6.

²¹⁹ Keegan, *supra* note 20.

²²⁰ *Id.*

²²¹ Itoi, *supra* note 108.

²²² Keegan, *supra* note 20.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Itoi, *supra* note 108.

cyberspace.²²⁷ The Internet may have the effect of shifting power towards the creators of the content as opposed to those who distribute it.²²⁸ However, legal actions may delay the full impact, but it will not slow the pace of technological developments.²²⁹ As Internet businesses are trying to effectively build a community of loyal users, record companies must also learn to adapt to the potential of technology in the digital era if they are to flourish.²³⁰

²²⁷ *supra* note 81.

²²⁸ Fiachra O. Marcaigh, *Computers: Can Copyright Survive Online?*, IRISH TIMES, available in 1999 WL 24418981.

²²⁹ Itoi, *supra* note 108

²³⁰ *A New Song*, *supra* note 122.