A BRAVE NEW STEP: WHY THE MUSIC INDUSTRY SHOULD FOLLOW THE HULU MODEL

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ABSTRACT

The single greatest threat to the music industry today is the seemingly unstoppable rise of illegal music downloading. From legislative, liability, and institutional controls to an outdated and unresponsive business model, recording companies have demonstrated time and time again that they have been unable to adapt to music's digitalization. While numerous scholars have tackled the problem, few conceive of illegal downloading as a market problem, one that needs a market solution. To that end, this Article argues that the music industry should follow the Hulu model. Hulu is the television industry's answer to visual digitalization; by providing content for free streaming and paying for it through advertising revenues, the company is likely turning a profit and offers a promising model for the music industry. This Article argues that record companies should adopt a similar approach by partnering with multiple online intermediaries who will offer advertising-supported free music streaming and downloading.

However, this proposal differs from the Hulu model in significant ways. First, in contrast to visual media delivery, which is straightforward, online music delivery is rapidly evolving. This has several implications: record companies should choose licensing agreements instead of joint ventures, and partnerships need to be developed with multiple technologically adept intermediaries. Second, music is communal, which means an ultimate goal would be to form an online social music network. By following the Hulu model, the music industry can take a much-needed step toward online music delivery and embrace the future of music.

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INTRODUCTION

The single greatest problem facing the music industry today is its inability to find an effective response to illegal music downloading. Approximately ninety-five percent of music was downloaded illegally in 2008,[1] and one can only assume the problem will get worse. As a result, the four major record labels are facing shrinking profits, and overall music sales dropped from its peak of $14.6 billion in 1999 to only $11.5 billion in 2006.[2] Although numerous solutions have been suggested to combat this,[3] many fail to recognize that illegal piracy is ultimately a market problem, and a market problem requires a market solution. To that end, this Article proposes that the music industry should take a cue from the television industry and follow the Hulu model.

Hulu is the television industry's[4] answer to digitalization, an alternative approach that was developed after learning from the music industry's mistakes.[5] By offering consumers visual content for free streaming and paying for it through advertising,[6] the company is likely making a profit[7] and has won many online viewers.[8] Although Hulu only began in 2007,[9] which means its long-run

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1 INT'L FED'N OF THE PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 2009: NEW BUSINESS MODELS FOR A CHANGING ENVIRONMENT 22 (2009), *available at* http://www.ifpi.org/content/library/DMR2009.pdf [hereinafter IFPI 2009 REPORT].

2 *See* Joel C. Boehm, *Copyright Reform for the Digital Era: Protecting the Future of Recorded Music Through Compulsory Licensing and Proper Judicial Analysis*, 10 TEX. REV. ENT. & SPORTS L. 169, 172 (2009).

3 See *infra* Part II.A for a more detailed discussion of the various solutions.

4 Technically, Hulu involves three of the Big Four networks: ABC, NBC, and Fox, with only CBS without a stake in the joint venture. *See* Lisa Lapan, Comment, *Network Television and the Digital Threat*, 16 UCLA ENT. L. REV. 343, 369 (2009).

5 *See id.* at 366 ("The television industry witnessed the devastating effect digital technologies had on the music industry and is taking many important steps to protect itself from a similar fate.").

6 *See id.* at 368.

7 The company technically refuses to comment on its financial position, as Hulu's CEO asserted in an interview. *See* Stephen J. Dubner, *Your Hulu Questions, Answered*, FREAKONOMICS: THE HIDDEN SIDE OF EVERYTHING (May 13, 2009, 10:52 AM), http://freakonomics.blogs.nytimes.com/2009/05/13/your-hulu-questions-answered. However, numerous sources agree that the company is likely making a profit. *See* Lapan, *supra* note 4, at 368 (citing Liz Gannes, *Analyst Hulu to Bring in $120 Million in '09*, NEWTEEVEE (Mar. 31, 2009, 12:39 PM), http://newteevee.com/2009/03/31/analyst-hulu-to-bring-in-120-million-in-09/).

8 This is evidenced by the fact that it has become the second most visited online video site and the third fastest growing site on the web. Lapan, *supra* note 4, at 368.

potential is still unknown, its early success suggests that an equivalent approach in the music industry may work.

More specifically, this Article argues that the industry should partner with multiple established online intermediaries to offer most released music to consumers for free streaming and downloading. Online intermediaries would earn profits through online advertising, and then pay record companies a negotiated royalty fee, a percentage of their profits, or a greater of the two amounts. At the same time, the industry can continue to make profits by selling CDs and digital music through careful marketing using a windowing or subscription based service. However, there are a few notable differences from the Hulu model. First, the partnerships this proposal envisions are not joint ventures but hands-off licensing agreements with multiple technologically-adept parties, which stems from the fact that while visual content delivery is fairly well-established, music delivery is still very much in flux. Second, music is primarily a social experience,[10] which means the ultimate goal should be to create an online music social network. Music is communal, and by understanding the desires of its consumers, the industry has an opportunity to recapture the illegal downloading market while taking an important step towards the next frontier of music, which most likely is music streaming.

Part I provides a background of the music industry's failed attempts to combat illegal piracy, with Part I.A focusing on failed methods of control and Part I.B focusing on the industry's failure to provide an attractive alternative to illegal downloading given that its current CD album centric business model is outdated and non-responsive to changing consumer needs. Part II outlines this Article's proposal and argues that the industry should follow the Hulu model by partnering with multiple intermediaries to provide primarily free music to consumers. Part II.A explains why the proposal makes sense given its advantages over other proposals and the discussion in Part I, and Part II.B gives further details of how the recording industry can implement a model similar to Hulu.

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9 Hulu was formed in March 2007 as a joint venture between NBC Universal and News Corp (Fox). *Id.*

10 *See* Robert LaRose & Junghyun Kim, *Share, Steal, or Buy? A Social Cognitive Perspective of Music Downloading*, 10 CYBERPSYCHOL. & BEHAV. 267, 268 (2007) (noting that most illegal downloaders are in fact "more motivated by the social aspect of trading and sharing music with other music enthusiasts rather than the proposition of saving money on music purchases"). Indeed, traditionally music "is often enjoyed communally." PEW INTERNET, THE INTERNET AND CONSUMER CHOICE 14 (2008), http://www.pewinternet.org/Reports/2008/The-Internet-and-Consumer-Choice.aspx.

I. BACKGROUND: FAILED METHODS OF CONTROL FOR ILLEGAL DOWNLOADING AND AN OUTDATED AND UNRESPONSIVE BUSINESS MODEL

Recording companies have failed in their attempts to counteract illegal downloading for two primary reasons. First, the use of legislative, liability, and institutional controls[11] have been unsuccessful in the fight against illegal piracy. Second, from a business perspective, the current business model as an alternative to illegal downloading is both outdated and unresponsive to consumer desires in the digital era.

A. Failed Methods of Control

The music industry adopted legislative, liability, and institutional methods in an attempt to control illegal downloading. However, all of these controls have failed and will likely continue to fail. Before continuing though, a clearer definition of "failure" is necessary. For the purposes of this Article, failure is defined as a method that is unable to significantly and sustainably deter illegal downloading. This Article is not concerned with regaining the revenues the music industry enjoyed at its height, nor is it concerned with copyright law's policy rationale as a means of ensuring adequate compensation reaches creators so that they will continue to create publicly available musical works[12] except insofar as these concepts interact with the goal of a successful and sustainable alternative to illegal downloading.

1. Legislative Controls

Legislative controls are methods of control that rest with the legislature, as opposed to courts, for instance.[13] In the music industry context, legislative controls are any statutory reforms that the music industry passed that are aimed at combating illegal piracy.

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11 *See generally* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (discussing legislative, liability, institutional, and disciplinary controls in regulating lawyers). This article used the methods of control framework in the context of regulating lawyers, but this Article loosely applies the same framework in the music industry context. However, given that the music industry is very different, this Article will not discuss disciplinary controls, and will also be loose in its definitions and applications of these methods of control.

12 *See* Boehm, *supra* note 2, at 172.

13 *See* Wilkins, *supra* note 11, at 808.

a. *The Current Music Licensing Scheme*

At this juncture, it is helpful to understand current music licensing schemes as the schemes are fairly complicated, and understanding them will lead to a better appreciation for the legislative controls that the music industry pursued. Although a graph is best to understand the differing rights and parties involved,[14] briefly, any given song has two copyright identities: (1) a musical composition under § 115 of the Copyright Act, which is the physical composition of the music including any lyrics;[15] and (2) a sound recording under § 114 of the Copyright Act, which is the unique musical performance of a song.[16] Notably, the musical composition is something physical such as notated music or a phonorecord like a cassette tape or a CD; in contrast, the sound recording is intangible, the recording that can only be heard if transmitted through analog or digital files.[17] In addition, composers and songwriters typically own the musical composition rights, while record companies and performers typically own the sound recording rights.[18] Notice that under these definitions, one phonorecord, like a CD, can contain both a musical composition and sound recording component.[19]

However, music licensing is even more complex; both musical compositions and sound recordings have two separate rights associated with them: (1) public performance rights, which can be either live performances or repetitions of a sound recording transmitted through third channels such as the radio;[20] and (2) reproduction and distribution rights, sometimes referred to as "mechanical rights."[21] If the musical composition is being implicated under § 115 of the Copyright Act, publishers and songwriters have allowed different organizations to administer them: the public performance rights are administered by perfor-

14 *See, e.g.*, Skyla Mitchell, Note, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, app. at 1292–93 (2007).

15 *See id.* app. at 1292; Daliah Saper & Dominika Szreder, *Monetizing Music Over the Internet: An Examination of Online Money-Making Opportunities for Artists and Websites*, 21 DCBA BRIEF 18, 18 (2008).

16 *See* Mitchell, *supra* note 14, app. at 1293; Saper & Szreder, *supra* note 15, at 18.

17 *See* Saper & Szreder, *supra* note 15, at 18.

18 *See* Mitchell, *supra* note 14, app. at 1292–93; Saper & Szreder, *supra* note 15, at 18 ("Usually the record company owns the sound recording, and a publishing company owns the musical work.").

19 *See* Saper & Szreder, *supra* note 15, at 18.

20 *See id.*

21 *See id.*

mance rights organizations ("PROs"),[22] and the mechanical rights are administered by music publishing companies such as the Harry Fox Agency.[23] If the sound recording is implicated under § 114 of the Copyright Act, the public performance rights are either administered by SoundExchange[24] or involve direct negotiations with recording companies, while the mechanical rights must be negotiated directly with the recording companies.[25]

b. *The Transition to Digital Media: Legislative Controls to Deter Illegal Downloading*

In the past, the music industry successfully utilized legislative controls in response to the introduction of cassette tapes, which had also resulted in an illegal piracy problem where people were copying cassette tapes and selling them at a significantly reduced price.[26] At the time, under § 115 of the Copyright Act, copyright owners only had protection for the musical composition and the mechanical rights to their works.[27] This meant they had no legally identifiable right when the music was being replayed on a separate physical cassette. As a result, the recording industry convinced Congress to pass the Sound Recording Amendment ("SRA") in 1971, which gave provisional sound recording rights that were made permanent by amending the Copyright Act in 1976.[28]

Once digital music came onto the scene, the music industry prompted Congress to grant additional protections, which would deter illegal downloading as the industry was worried about a reduction in music sales.[29] Two major pieces of legislation were passed: the Digital Performance Right in Sound Record-

22 *See* Mitchell, *supra* note 14, at 1252–53 (discussing PROs in greater detail).

23 *See id.* at 1253.

24 *See id.* at 1255.

25 *See id.* app. at 1293.

26 *See* Brett J. Miller, Comment, *The War Against Free Music: How the RIAA Should Stop Worrying and Learn to Love the MP3*, 82 U. DET. MERCY L. REV. 303, 306 (2005). The respective legislative acts are the Sound Recording Amendment of 1971, Pub. L. No. 92-140, 85 Stat. 391; Copyright Act of 1976, Pub. L. No. 93-573, 88 Stat. 1873 (1974) (codified at 17 U.S.C. § 114).

27 *See* Mitchell, *supra* note 14, at 1242.

28 *See* Brian Flavin, Comment, *A Digital Cry for Help: Internet Radio's Struggle to Survive a Second Royalty Rate Determination Under the Willing Buyer/Willing Seller Standard*, 27 ST. LOUIS U. PUB. L. REV. 427, 433 (2008).

29 *See id.* at 433–34.

ings Act of 1995 ("DPRA")[30] and the Digital Millennium Copyright Act of 1998 ("DMCA").[31] Briefly, DPRA granted public performance rights to copyright owners in the digital realm through a new "digital performance right" embodied in § 106(6) and § 114 of the Copyright Act of 1976, though this new right had certain limitations as it had a scheme where copyright holders had to grant compulsory licenses.[32] DMCA significantly amended the Copyright Act by expanding and clarifying the scope of compulsory licenses for digital public performances.[33] This is only a brief summary of course; the nuances of what these two pieces of legislation did to copyright law in this area are beyond the scope of this Article.[34]

Concurrently, the music industry was working on imposing criminal sanctions. For instance, the DMCA had criminal penalties for individuals that either willfully circumvented or distributed circumvention technology.[35] In addition, the music industry successfully passed the No Electronic Theft Act ("NETA")[36] in 1997, which "provides that large-scale file trading, even if undertaken without any intent to profit monetarily, can constitute a crime."[37]

While these legislative methods of control may initially seem promising as a means of combating illegal piracy, the major problem is that granting copyright protections for digital media does not equate to effective deterring of illegal pirating. The law may very well say that the music is protected, but statutory changes do not work unless they have effective enforcement to reinforce the statute. Unlike prior battles against illegal piracy such as with cassette tapes, which are physical objects that would likely have a limited number of distributors or consumers that are easy to target, the sheer scope and ephemeral nature

30 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

31 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

32 *See* Flavin, *supra* note 28, at 434.

33 *See id.* at 436.

34 For a more detailed discussion of the legislation passed, see generally Mitchell, *supra* note 14, at 433–37.

35 *See* Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 17 (2003). DMCA's criminal provisions apply to anyone who violates "willfully and for purposes of commercial advantage or private financial gain." 17 U.S.C. § 1204(a) (2006).

36 No Electronic Theft (Net) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified at 17 U.S.C. § 101).

37 Netanel, *supra* note 35, at 17.

of digital illegal piracy makes enforcement very difficult.[38] Moreover, the legislation that is being added is generally to copyright statutes, which are not criminal in nature and therefore have low deterrent effects. The criminal statutes may have seemed promising initially, but their punishments are not enough to have a deterrent effect.[39] Further, enforcement has been lacking as the Department of Justice has not concentrated its limited resources on it,[40] though this may be increased in the future with the February 2010 creation of an intellectual property task force.[41] Legislative methods of control are important and have their place, but they ultimately only lay the groundwork for copyright protections; they are not practical as a vehicle through which record companies can deter illegal downloading, as amply demonstrated by the fact that these copyright reforms came early on in the 1990's, but illegal piracy has actually increased since then.[42]

2. Liability Controls

Liability controls are those that are instituted against offenders through legal actions.[43] In this context, liability controls include suits against three main parties: (1) providers of technology that could carry mp3s; (2) the peer-to-peer servers that provide illegal music; and (3) the users that download them. Although these suits are based off of the rights granted through the statutes passed to control illegal downloading through legislative means, ultimately the liability method of control similarly failed and will continue to fail.

The first type of lawsuit the music industry began was against providers of technology that could carry illegal mp3s. As early as 1999, the Recording Industry Association of America ("RIAA") sued companies such as Diamond's

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38 *See* Sean Silverthorne, *Delivering the Digital Goods: iTunes vs. Peer-to-Peer*, WORKING KNOWLEDGE, Apr. 16, 2007, at 3, *available at* http://hbswk.hbs.edu/pdf/item/5594.pdf.

39 *See* Netanel, *supra* note 35, at 18.

40 *See id.* at 17.

41 Press Release, Dep't of Justice, Justice Dep't Announces New Intellectual Prop. Task Force as Part of Broader IP Enforcement Initiative (Feb. 12, 2010), *available at* http://www.justice.gov/criminal/cybercrime/holderAnno.pdf.

42 *See* IFPI 2009 REPORT, *supra* note 1, at 22 (noting that ninety-five percent of all music was downloaded illegally in 2008).

43 *See* Wilkins, *supra* note 11, at 806 (discussing liability controls as client-initiated suits against lawyers in the context of regulating lawyers). This Article is again using the basic framework and applying it to the music context.

Rio, which had a portable mp3 player that was a precursor to the iPod.[44] However, similarly to how the movie industry had initially sued videotape recorders and lost when the Supreme Court declared the copying fair use and the creators of the technology not subject to contributory liability for any infringements, the RIAA ultimately lost their case and opened the door to further advances in mp3 players such as the now ubiquitous iPod.[45] Lawsuits against providers of technology that could carry the illegal mp3s proved to be beyond the reach of liability controls, and no doubt will continue to be a fruitless avenue of pursuit in the future.

The second type of lawsuit was against the peer-to-peer servers that provided illegal music. The RIAA had greater success here by prevailing in its lawsuits against large servers such as Napster and Grokster.[46] However, even here, the liability method of control has failed to have much effect in stemming illegal music downloading. For one thing, the sheer number of these peer-to-peer servers makes it extremely difficult to stop illegal downloading merely by suing the servers. Even putting aside the exorbitant costs, time, and effort of suing the numerous servers out there, for every suit that the RIAA wins, another peer-to-peer server is ready to take the place of the one that was shut down. In addition, peer-to-peer servers such as BitTorrent are growing increasingly smart in taking steps to mitigate liability such as avoiding the hierarchical nature of Napster or Grokster and adopting decentralized methods of spreading illegal content.[47] Tellingly, some media providers are recognizing that suing such providers of content is a losing battle and are instead collaborating with them.[48]

After the failure of these series of lawsuits against illegal content providers in the early 2000's, the RIAA shifted its focus to the third type of lawsuit, those against individual users.[49] Beginning in 2003, the RIAA began to sue its own consumers, and by 2005 there were 9000 suits underway against individual infringers.[50] However, these suits were likewise ineffective. Not only were

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44 *See* Jared S. Welsh, Comment, *Pay What You Like—No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses*, 58 EMORY L.J. 1495, 1514 (2009) (citing Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999)).

45 *See id.*

46 *See id.* at 1515–18 (discussing the RIAA suits against Napster and Grokster in greater detail). For a more detailed discussion of the numerous cases against peer-to-peer servers besides Napster and Grokster, see Miller, *supra* note 26, at 309–12.

47 *See* Welsh, *supra* note 44, at 1518–19.

48 *See id.* at 1519.

49 *See id.*

50 *See id.*

their costs much greater than suing the servers,[51] they generated much ill will from the public and ultimately were halted.[52] Although it is possible that they had some deterrent effect at the start,[53] ultimately, such suits obviously were not effective in the long run and suffer from the additional problem of negative publicity. Overall, it is clear that the music industry has gone from pursuing one source of illegal music piracy to another, but has ultimately failed in all three avenues of its liability method of control.

3. Institutional Controls

Institutional controls are those that work within the system,[54] and in this context, institutional controls may include utilizing technological barriers on legally distributed media to prevent illegal pirating or making illegal files themselves less attractive.

First, record companies attempted to stop illegal downloading by putting technological barriers onto legally bought content through digital rights management ("DRM").[55] DRM embeds software within the legally distributed media to prevent file sharing.[56] However, it has proven to be ineffective, as people have easily circumvented the technology.[57] Moreover, it has resulted in a

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51 *See id.*

52 *See* PEW INTERNET, THE STATE OF MUSIC ONLINE: TEN YEARS AFTER NAPSTER 10 (2009), *available at* http://pewinternet.org/Reports/2009/9-The-State-of-Music-Online-Ten-Years-After-Napster.aspx (noting that the music industry's five-year legal battle resulted in a loss of "reputation [for] the industry, now widely seen as one that sues its own customers and is out of step with current technology").

53 *See* PEW INTERNET PROJECT & COMSCORE, THE IMPACT OF RECORDING INDUSTRY SUITS AGAINST MUSIC FILE SWAPPERS 1 (2004), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/pew_internet_music_downloads_010504.pdf (finding that the RIAA lawsuits had a significant impact on peer-to-peer file sharing in 2004). However, Pew surveys should be taken with a grain of salt as they may be biased in lowering the impact of illegal downloading given respondents' fear of inviting a lawsuit; indeed, the problem is particularly acute after the RIAA lawsuits began in mid-2003. *See* Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 9 (2006).

54 *See* Wilkins, *supra* note 11, at 808 (viewing judicial controls as institutional methods of control because they fall within the institution in which attorneys work). Again, this Article is extrapolating liberally and using the basic framework as applied to the music industry context.

55 *See* Welsh, *supra* note 44, at 1520.

56 *See id.*

57 *See id.*

series of technological problems for consumers,[58] as well as legal problems for the record companies as angry consumers have sued them.[59] Ultimately, technological controls did not work, and the music industry reluctantly moved away from this method of control.[60]

Second, record companies have also attempted to make illegal files themselves less attractive. For instance, record companies have actually hired companies to deliberately clog up peer-to-peer networks by transferring illegal files extremely slowly.[61] Another tactic is to hire companies to share fake songs on peer-to-peer servers.[62] A third tactic is to use education to convince the public that illegal file sharing is ethically wrong.[63] However, all of these methods likewise failed as methods of control. Slowing down or giving the wrong files on the servers are only a minor deterrence as people will receive the correct files in the end, even if they must wait longer to do so or resort to another peer-to-peer network to find the correct files. Likewise, an education campaign will not do any good, as most people know that illegal downloading is wrong, but are obviously doing it anyway.[64] It is clear that institutional controls have failed and will continue to fail as a method of controlling illegal downloading.

B. An Outdated and Unresponsive Business Model: The Music Industry and Its Consumers

Even from a business perspective, record industries are failing to combat illegal piracy because they have been unsuccessful in offering an attractive alternative to illegal piracy. Not only is its current business model outdated, but it is also unresponsive to changing consumer desires.

1. The Current Business Model Is Outdated

The recording industry's current business model is outdated, and as such will grow increasingly out of step with consumers that are digitalizing mu-

58 *See id.*

59 *See id.* at 1520 n.214.

60 *See id.*

61 *See* Miller, *supra* note 26, at 312.

62 *See id.*

63 *See id.* at 311–12.

64 "The moral high ground will not help the RIAA in its fight against downloaders. The reality of the situation seems to be that a generation of Americans have grown accustomed to free music and file-sharing." *Id.* at 318. For a more detailed discussion of the moral conundrum in illegal downloading, see *id.* at 315–18.

sic and turning to illegal piracy. To understand just how outdated the current model is, this Article makes three key observations. First, this Article explains why the current model that is centered on CD album sales is outdated. Second, this Article suggests that the continued reluctance to change is partially a result of the music industry's traditional slowness to respond, a slowness which is exacerbated by the need for a transformative change to the model. Finally, this Article notes that perhaps due to the industry's inability to change its model, it instead resorts to grabbing money from existing sources of revenue. This generates negative publicity and results in a catch-up mode of operations, where the music industry is constantly one step behind those that are more innovative in adapting to the fundamental changes shaking the industry.

First, the current model is outdated as it is a broken and inefficient business model. Recording companies rely primarily on selling CDs to make profits,[65] but this model is more and more incompatible with music digitalization and consumer desires. This is clearly demonstrated by the steady decline of CD sales,[66] the fact that digital music now makes up forty percent of all music sales,[67] and the increase of illegal pirating.[68] Moreover, this model is inefficient because album costs are high, meaning much of the album price is going to overhead and resulting in low profit margins.[69] In addition, its hit prediction could use improvement as only ten percent of artists earn a profit.[70] While a one-in-ten success rate may have worked in the past, it may not prove to be sus-

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65 *See* Lapan, *supra* note 4, at 367 ("The music industry was primarily a pay-per-copy model that required consumers to purchase an entire album, even when the consumer only wanted one or two songs.").

66 *See* PEW INTERNET, THE STATE OF MUSIC ONLINE, *supra* note 52, at 7–8 (noting that "[r]ecord sales for the music industry continue to decline" after analyzing long-term effects after the introduction of peer-to-peer networks).

67 *See* NIELSEN SOUNDSCAN, THE NIELSEN COMPANY 2009 YEAR-END MUSIC INDUSTRY REPORT 4 (2009), *available at* http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/01/Nielsen-Music-2009-Year-End-Press-Release.pdf [hereinafter NIELSEN REPORT 2009].

68 While estimates vary, one source concludes that ninety-five percent of music was downloaded illegally worldwide in 2008. *See* IFPI 2009 REPORT, *supra* note 1, at 22. Whether or not this figure is actually correct, the fact does remain that many people download illegally now.

69 For a more thorough discussion of the typical costs of producing an album, see Miller, *supra* note 26, at 321.

70 *See id.* at 321. Another author has also argued that the industry's model is broken, though his explanations differ from the one I have offered because he focuses on the monopoly structure resulting in unfairness toward artists, as well as the inefficiencies of the business model. *See* Welsh, *supra* note 44, at 1521–22.

tainable in the future if the recording companies cannot find an appropriate answer to illegal downloading and if record sales continue to decline.

Second, perhaps part of the reason why the current model remains outdated is that efforts to change it have been hampered because the industry suffers from a traditional slowness to adapt to changes. It was slow to respond to prior new technology such as piano rolls or the radio,[71] and it was slow to respond to digital downloads of music. In these past cases, a pattern clearly emerges: the music industry initially fights new technology with all it has, then ultimately gives in and adapts to the new technology, which ironically results in increased profits.[72] Such a pattern may repeat with digital technology, but the problem is that slowness to change results in preventable losses of revenues such as those stemming from illegal pirating. [73]

It may well be that the slowness to change is exasperated in the current situation because the music industry is confronting a transformative change. [74] Unlike past changes that were incremental, digital music represents a transformative change because record companies have four big costs: recording, manufacturing, distribution, and promotion. Yet, all but recording have now essentially been removed and rewritten in the Internet age.[75] Transformative, not incremental, reform is necessary, but combined with the traditional slowness to change, the music industry has been stuck in its current outdated business model.

Indeed, perhaps as a consequence of the inability to change an outdated business model, record companies have resorted to the tactic of grabbing money from existing sources of revenues, with the result that it is subject to increasingly negative publicity and constantly playing catch-up with others who have successfully taken advantage of the new digital era. For instance, record companies began entering into 360 deals, which give record companies a bigger cut of art-

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71 *See* Miller, *supra* note 26, at 303 (noting that the recording industry has responded hostilely in the past to piano rolls and the radio).

72 For instance, even though the music industry initially fought the introduction of the radio, it ended up collaborating with radio and even making increased money off of it as the radio can be a promotional tool for the music industry. *See* Kevin C. Parks, *Black Hole or Celestial Jukebox? Section 114 and the Future of Music*, 1 NO. 2 LANDSLIDE 46, 50–51 (2008).

73 The debate about whether the pirating led to reduced profits is beyond the scope of this Article. Nevertheless, most reports conclude that it has reduced sales. *See* Liebowitz, *supra* note 53, at 3 (summarizing the results of prior studies done on the impact of illegal downloading on music sales and observing: "All of the papers of which I am aware, except one, find that file sharing brings about some degree of harm to copyright owners.").

74 *See* Steve Lawson, Transformative Vs Incremental Change, MUSIC THINK TANK (Nov. 14, 2009), http://www.musicthinktank.com/blog/transformative-vs-incremental-change.html.

75 *See id.*

ist tours, which are the primary source of income for artists.[76] However, these deals have resulted in negative responses from both artists and consumers,[77] further increasing the already existing public perception that record companies were cheating artists out of their money.[78] RIAA lawsuits as an attempt to grab revenues from its own consumers were also bad for public relations,[79] as were the numerous rounds of negotiations with online radios who argued that the industry's demand for high royalty payments would force them to shut down.[80]

Not only are these steps to grab cash streams from existing sources of revenue detrimental for public perceptions and avoiding the larger problem of what to do with illegal downloads, but these tactics have also led to a pattern where the music industry is constantly playing catch-up with those who have adapted. For instance, in the industry failing to embrace digital sales early on, iTunes essentially took over the online pay-for-music market.[81] This was undesirable because iTunes set the ceiling of $0.99 per song, but one study demonstrated that alternative pricing schemes would have been more profitable for the recording industry.[82] Indeed, Apple perhaps deliberately chose the single price

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76 *See* Matthew Reynolds, *Why Music Should Be Socialized*, 10 VAND. J. ENT. & TECH. L. 505, 508–09 (2008).

77 For a more detailed discussion about the unconscionability of 360 deals, see generally Ian Brereton, Note, *The Beginning of a New Age?: The Unconscionability of the "360-Degree" Deal*, 27 CARDOZO ARTS & ENT. L.J. 167 (2009).

78 Reynolds, *supra* note 76, at 508 (citing Edna Gundersen, *Bye, Bye, a Piece of the Pie*, USA TODAY, May 17, 2004, at 1D ("The record business abounds with tragic lore of music pioneers cheated out of earnings by predatory managers and labels.")).

79 *See* PEW INTERNET, THE STATE OF MUSIC ONLINE, *supra* note 52, at 10.

80 *The Future of Radio: Hearing of the Comm. on Commerce, Science, and Transp.*, 110th Cong. 1, 5 (2007) (testimony of Tim Westergren, Founder and Chief Strategy Officer, Pandora Media), *available at* http://commerce.senate.gov/public/_files/TimWestergren FINALFINAL1022505pm.pdf [hereinafter *The Future of Radio Hearing*]. Technically, the fight over royalty payments was a result of a ruling by the Copyright Royalty Board. *See id.* However, the general public likely conflated the royalty fees with the music industry, particularly as record companies had the power to alleviate the issue by reaching independent agreements, and in fact eventually did so in 2008.

81 *See* Joel Waldfogel, Music File Sharing and Sales Displacement in the iTunes Era 1 (June 15, 2009) (unpublished manuscript) (on file with the University of Pennsylvania), http://bpp.wharton.upenn.edu/waldfogj/pdfs/iTunes%20Era.pdf (noting that three quarters of digital music sold in 2008 were sold through iTunes).

82 *See generally* Ben Shiller & Joel Waldfogel, Music for a Song: An Empirical Look at Uniform Song Pricing and Its Alternatives (Sept. 21, 2009) (unpublished manuscript) (on file with the University of Pennsylvania), http://bpp.wharton.upenn.edu/waldfogj/pdfs/Shiller_Waldfogel_submission.pdf (finding that alternative pricings on music sales in iTunes would have resulted in greater profits for the recording industry).

so that it would sell more of its complementary goods, namely the iPod, which worked for Apple, but was not as beneficial for record companies.[83] By failing to set the terms for legitimate online music downloads, the recording industry lost an opportunity to make more profits. Though the industry has since convinced iTunes to offer variable pricing[84] through its familiar pattern of trying to divert more cash from existing sources of revenue, it should not repeat that mistake and continue to default to a plan that results in negative publicity and a catch-up mode of operations.

2. The Current Business Model Is Unresponsive to Consumer Desires

Consumers ultimately control the market, and the industry's current model has failed to understand or respond to the desires of the Internet savvy teenagers and young adults who are doing the illegal downloading.[85] For the purposes of this Article, the current model does not respond to three key facets of consumer desires: (1) consumers want permanent, uninhibited ownership of unlimited and portable music; (2) consumers buy new music primarily based on recommendations from others; and (3) consumers download for both economic and social reasons. Any proposal must take these desires into account if it is to have any hope of being a successful long-term solution.

First, consumers want permanent, uninhibited ownership of unlimited and portable music.[86] However, the recording industry was so set on keeping the CD model that it implemented technological barriers such as DRM to pre-

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83 *See id.* at 34 (noting that Apple derives revenue from selling hardware, in this case the iPod, to consumers who are induced to buy the hardware because their surplus from paying less for music makes buying the iPod more attractive).

84 *See* Erica Sadun, *Apple, Labels Both Win with DRM-free iTunes, Tiered Pricing*, ARS TECHNICA (Jan. 6, 2009, 1:48 PM), http://arstechnica.com/apple/news/2009/01/apple-labels-both-win-with-drm-free-itunes-tiered-pricing.ars.

85 *See* PEW INTERNET & COMSCORE, PEW INTERNET PROJECT AND COMSCORE MEDIA METRIX DATA MEMO 4 (2004), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/pew_internet_download_042504.pdf. Indeed, the biggest drop in CD purchasing appears to be with teenagers, as fifty percent of them did not buy CDs in 2007, up from thirty-nine percent in 2006. *See* Boehm, *supra* note 2, at 171.

86 *See* Reynolds, *supra* note 76, at 506–11 (extrapolating what consumers want after discussing the industry's failed attempts at DRM, RIAA lawsuits, and subscription services); *see also* PEW INTERNET, THE STATE OF MUSIC ONLINE, *supra* note 52, at 4 (noting that there are five selling points for consumers: cost, portability, mobility, choice, and remixability).

vent the spread of the songs, which naturally backfired.[87] Indeed, it is clear that working with this desire for uninhibited ownership of music can result in increased sales, as both Amazon and iTunes found that releasing DRM-free music resulted in an up-tick in sales.[88] Tied into this, consumers want to choose what they download and prefer to download singles from an album,[89] yet the music industry's album-centered focus has persisted and not changed to accommodate consumer desires for singles.

Second, the current business model has not been responsive to the fact that consumers buy new music primarily through recommendations from others.[90] Most people buy new music based on suggestions from friends or family, members in their social networks.[91] However, what may be going on here is that based on trusted recommendations, people are willing to listen to the music itself, and that prompts them to buy the music. After all, the network effects of listening to a sample or song from a new artist are implicit in music videos or radios promoting singles.[92] This seems to have translated online as Pandora, an online radio station which offers music recommendations based on its patented software and other users' tastes, and has been very successful in directing its listeners to buy more music,[93] perhaps due in part to the trust users have toward it. However, the music industry's current model has again failed to capitalize on this trend, and instead has been insistent on a push mode of operations in which

87 *See* Reynolds, *supra* note 76, at 507.

88 *See id.*

89 *See* Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 33 (2007) ("[M]ost file sharers obtain just a few tracks from a CD.").

90 *See* PEW INTERNET, THE INTERNET AND CONSUMER CHOICE, *supra* note 10, at 6.

91 *See id.*

92 In fact, the entire reasoning behind why terrestrial radio does not pay sound recording performance right royalties whereas satellite and online radio do lies primarily in the rationale that radios promote music by playing them. *See Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 1 (2007) (statement of Marybeth Peters) ("[I]n 1995, Congress accepted the notion that terrestrial over-the-air broadcasts offered no threat to the record industry and actually promoted the sales of records."). However, the controversy over this difference in royalties is beyond the scope of this Article. For more details and proposals regarding the consequences of these differences, particularly toward Internet radio, see generally Flavin, *supra* note 28; Mark D. Robertson, *Sparing Internet Radio from the Real Threat of the Hypothetical Marketplace*, 10 VAND. J. ENT. & TECH. L. 543 (2008).

93 *The Future of Radio Hearing*, *supra* note 80, at 4.

the music industry attempts to tell consumers what they want instead of recognizing that word of mouth and building trust are perhaps better drivers of sales.

Third, the current model does not respond to the fact that consumers are downloading for both economic and social reasons. On an economic level, people prefer to get free music of course, as a Nielsen survey revealed eighty-five percent prefer that free content remain free.[94] However, a more subtle point is that people's music valuation has decreased.[95] Indeed, students are primarily downloading music that they would never have bought.[96] In other words, given the relatively high pricing of CDs and the cumulative effect of buying digital downloads, the current model is so centered on making profits through album sales that it is missing out on the steadily growing numbers of people whose valuations for music have radically shifted.

In addition, the current model fails to be responsive enough to the fact that on a psychological level, people download primarily because they view it as a social or sharing activity.[97] The community aspect of music cannot be understated. For instance, one study found that after buying music, seventy-seven percent of people will talk about their music purchases with family or friends, forty-four percent will engage in some type of online activity such as reading blogs about the artist, and thirty-nine percent will visit the artist or band's website.[98] Although these social aspects have always existed, they are taking on greater importance given the proliferation of illegal downloading sites and the increasing ease of sharing music with friends through digital media. Yet, recording studios have neglected to respond to this social aspect of music.

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94 *See* NIELSEN, CHANGING MODELS: A GLOBAL PERSPECTIVE ON PAYING FOR ONLINE CONTENT 2 (2010), *available at* http://blog.nielsen.com/nielsenwire/reports/paid-online-content.pdf [hereinafter NIELSEN CHANGING MODELS 2010].

95 One study testing valuations of top singles at a college found that for most songs, the 25th percentile valuation was $0.10 and the 75th percentile valuation was $1.50. *See* Shiller & Waldfogel, *supra* note 82, at 14. If hit single valuations are at these levels, one can only imagine that the songs bundled with these singles on an album would receive valuations much lower than this. Regardless, it seems clear that people are just not willing to pay what they used to for physical albums or singles.

96 *See* Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, & Social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29, 31, 54 (2006) (finding that downloading tends to occur for low-valued albums, which indicates these albums would not have been purchased by consumers). Although these results were obtained only at one college and cannot be generalized to the broader population, the results are nonetheless useful to obtain some understanding of consumers.

97 *See* LaRose & Kim, *supra* note 10, at 268.

98 *See* PEW INTERNET, THE INTERNET AND CONSUMER CHOICE, *supra* note 10, at vii.

Moreover, as discussed earlier, legislative, liability, and institutional methods of controls have failed. However, an unstated psychological reason behind the failure of tactics such as assertions that downloading is illegal or even lawsuits[99] is that while they may have some effect on people's choice to download,[100] ultimately, people justify their actions to themselves by rationalizing that the industry prices are too high or believing that the industry has the responsibility to stop it.[101] Indeed, downloading has a habitual or addictive quality.[102] Aggregated on a societal level, this means consumers may develop norms outside of the law,[103] and it has resulted in the current norm where everyone downloads.[104] All of this means that the longer it takes to find an adequate solution, the harder it will be to change these behavioral patterns. By not treating illegal downloading seriously enough as a norm that needs to be reined back through an alternative music distribution model, the music industry has spent years mired in a business model that has been unresponsive to radically changing consumer desires.

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99 *See* LaRose & Kim, *supra* note 10, at 275.

100 One study actually concluded these external norms, such as school disapproval, had little bearing on an individual's intent to download. *See id.* (comparing two studies trying to find an explanation for why school disapproval or subjective norms has effect earlier but not as much two years later, and speculated that "persistent downloaders came to ignore their university's efforts to crack down on piracy in the two year gap between the two studies"). However, the authors of that study continued that even if this were true, these norms perhaps had an unconscious effect. *See id.*

101 *See id.* at 269. Of course, this study was much more nuanced in analyzing five normative dimensions, but this brief summation is enough for the purposes of this Article.

102 *See id.* at 268.

103 *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (discussing the ways in which people develop norms outside of the law). Although this book did its study on land disputes that were governed by communal norms instead of statutory law, the author extrapolates his findings to numerous other instances. *See id.* Arguably, the communal norms that have developed among the teenaged and young adult populations comprise other instances wherein people have developed a natural order without law.

104 *See* PEW INTERNET, TEEN CONTENT CREATORS AND CONSUMERS 13 (2005), *available at* http://www.pewinternet.org/~/media/Files/Reports/2005/PIP_Teens_Content_Creation.pdf.pdf (finding in a 2005 survey that seventy-five percent of teenagers who downloaded music agreed with the statement: "Music downloading and file-sharing is so easy to do, it's unrealistic to expect people not to do it.").

II. PROPOSAL: FOLLOW THE HULU MODEL

A bottom-up approach addressing consumer desires is necessary to solve the problem of illegal downloading,[105] and the answer lies in the Hulu model. This Article argues that the industry should take a cue from Hulu and partner with multiple online intermediaries to offer mostly free music streaming and downloading. Intermediaries would earn profits through online advertising, and then pay recording companies negotiated royalties through SoundExchange, an organization that is already collecting and distributing digital public performance royalty fees.[106] In the alternative, recording companies could be paid a profit-sharing percentage, or perhaps a higher of the two amounts. Ultimately, the goal is to create a social network site for music that would convert illegal downloading into a legitimate revenue stream benefiting all parties involved.

This proposal has two components. First, it explains why the Hulu model makes sense in the music realm. Second, it provides guidance for how to implement this model.

A. Why Should the Music Industry Follow the Hulu Model?

The Hulu model represents a drastic and transformative shift for the music industry, but it makes sense given its advantages over other proposed solutions and the discussion in Part I.

1. A Hulu Model is More Attractive than Other Proposed Solutions

This proposal is more attractive than other proposed solutions for the music industry's problems. The solutions generally fall into three categories: statutory, administrative, and free-market approaches.[107]

Statutory approaches argue changes should be made to copyright law such as streamlining the Copyright Act.[108] Alternatively, some statutory proposals argue that changes should be made to criminal law, such as making it a

105 *See* Reynolds, *supra* note 76, at 506.

106 *See* Mitchell, *supra* note 14, at 1255.

107 *See* Welsh, *supra* note 44, at 1528 (noting that proposed solutions for the music industry's problems generally fell into these three categories).

108 *See id.* at 1530 (summarizing the different statutory reform methods advocated by various authors with a focus on Professor Lessig's approach).

criminal offense to download illegally from peer-to-peer servers.[109] However, any copyright changes would be difficult and slow, and the money spent on lobbying could be better spent elsewhere.[110] Moreover, the fact remains that people are illegally downloading in spite of copyright laws, perhaps due to the lack of large-scale criminal enforcement, which means any changes here will likely not have enough of a deterrent effect. While increasing criminal penalties would have a much bigger effect, damages that are grossly disproportionate to the crime may be deemed unconstitutional and public outcry would make such a result highly unlikely.[111] Ultimately, statutory approaches suffer from many of the same problems as past legislative approaches; they can only lay the groundwork, and are not enough on their own to prevent illegal downloading.

Administrative proposals argue that the government should step in by administering a collective license.[112] While it is true that such an approach would solve the illegal downloading problem by making people pay for all downloads through taxes, this approach comes with its own set of problems. For instance, the public generally protests increased taxes, and any tax comes with its own corresponding criticisms.[113] Further, the logistics of setting up a new effective agency would be daunting, and this would take significant time.

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109 *See, e.g.*, David A. McGill, *New Year, New Catch-22: Why the RIAA's Proposed Partnership with ISPs Will Not Significantly Decrease the Prevalence of P2P Music File Sharing*, 27 ENT. & SPORTS L. 7, 9 (2009) (arguing that one solution to illegal music downloading is to criminalize peer-to-peer file sharing instead of allowing it to remain a civil matter).

110 A look at the past and current problems with this area of copyright law, and particularly §§ 114–115 of the Copyright Act, 17 U.S.C. §§ 114–115 (2006), is beyond the scope of this Article. Suffice it to say that the copyright law in this area is exceedingly complicated and very much in need of reform, but this Article's position is that while statutory reform is necessary in the long-run, a market solution is still the most effective solution for now. For a more detailed discussion of this area of copyright law, see generally Mitchell, *supra* note 14. In addition, to better understand the various rights, agencies, and stakeholders involved in the licensing scheme, a graphical representation is best such as that provided by Mitchell. *Id.* app. at 1292–93.

111 *See* Boehm, *supra* note 2, at 207.

112 *See* Welsh, *supra* note 44, at 1528–30 (summarizing the different variations of administrative approaches). Numerous other commentators have adopted this approach. *See, e.g.*, Reynolds, *supra* note 76, at 512–13 (proposing that the government impose a blanket tax on consumers); Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 695 n.51 (2009) (listing several other commentators who have adopted this approach).

113 Any taxation scheme comes with its own problems. For instance, a flat tax of the same amount on taxpayers would be a regressive tax that disproportionately penalizes those who make less money, though there are of course several responses to taxation problems. *See* Netanel, *supra* note 35, at 67–74 (discussing and responding to the concern about cross-subsidization, or the possibility that low-volume users will subsidize high-volume users).

Finally, free-market proposals advocate taking no action and allowing the market to settle at equilibrium.[114] However, inaction is hardly a satisfying answer to the problem of illegal downloading.[115] One additional recent proposal might be categorized as a free-market and statutory hybrid proposal, and that is to amend the Copyright Act to privilege non-commercial sound recordings of music—essentially allowing the public to share music so long as it is done without commercial profit.[116] In other words, this proposal would "merely hasten the already-occurring natural progression of the media market."[117] However, as one commentator pointed out, this approach "may be delightful to anti-establishmentarians, who welcome the disintermediation of what they see as companies leaching off of art's true creators, but sticking it to the man creates a dilemma: who will finance the creation and marketing of professional content while creators are busy bootstrapping themselves?"[118]

In contrast, this proposal relies on private contractual agreements. Such an approach is permissive as a musical composition under § 115 of the Copyright Act [119] and depending on the service, may in fact require negotiation as a sound recording under § 114 of the Copyright Act.[120] By focusing on private contractual agreements, the industry can save significant time and money. In addition, it fits into the existing structure for online royalty distributions as it utilizes SoundExchange, which already gathers and distributes royalties for digital performances of sound recordings,[121] instead of arguing for an entirely new structure such as creating a new government agency. However, above all, this proposal more fully addresses the problems inherent in the current outdated

114 *See* Welsh, *supra* note 44, at 1529.

115 *See id.*

116 *See id.* at 1532.

117 *Id.* at 1533.

118 Jonathan Handel, *Uneasy Lies the Head that Wears the Crown: Why Content's Kingdom Is Slipping Away*, 11 VAND. J. ENT. & TECH. L. 597, 636 (2009).

119 In essence, parties would negotiate royalty license fees for an amount less than that specified by the statutory rate. *See* Mitchell, *supra* note 14, at 1243 (noting that § 115 of the Copyright Act "served primarily as a ceiling for the amount a copyright owner could receive for the reproduction of her works" and that potential licensees would negotiate privately with this as a ceiling). Indeed, some of the Copyright Office's proposed solutions in 2005 to the licensing problem relied on privately negotiated agreements, as exemplified by the blanket license. *See id.* at 1264.

120 *See id.* app. at 1293. The distinctions in sound recording types, as well as their corresponding negotiation implications, is discussed *infra* Part II.B.1.

121 *See* Mitchell, *supra* note 14, at 1255.

model and also has the advantage of reconciling consumer desires with the industry's desire to make money.

2. A Hulu Model Addresses Many of the Problems Plaguing the Outdated Current Model

This proposal addresses many of the problems with the outdated current model discussed in Part I.B. First, the Hulu model is a better and more efficient model. It is better because it recognizes that the music market is shifting toward the digital realm,[122] and it does so in a way that gives record companies a means to convert illegal downloads into a revenue stream. After all, several studies have found that those who illegally download the most also tend to be those that buy the most music.[123] The Hulu model is also more efficient as companies can save money on music distribution by shifting their focus online.[124] More importantly, the industry can take advantage of these online music networks to cut down on promotion costs by relying on users to spread the word on artists.[125] The artist and repertoire staff can shift their focus to finding likely-to-be successful artists online and the industry has a great opportunity to gather infor-

[122] After all, sales of digital music are constantly growing and represented about a third of the total market or $2.7 billion in shipments in 2008, while digital downloads grew thirty percent to $1.6 billion. Press Release, Joshua P. Friedlander, RIAA Vice President, Research & Strategic Analysis, News and Notes on 2008 RIAA Shipment Data (2008), http://76.74.24.142/1D212C0E-408B-F730-65A0-C0F5871C369D.pdf. Indeed, the RIAA itself has acknowledged the "continuing maturation and adoption of the digital music download model" as demonstrated by the continued growth of digital album and single sales. *See id.*

[123] *See, e.g.*, Ken Fisher, *Study: P2P Users Buy More Music; Apathy, Not Piracy, the Problem*, ARS TECHNICA (Mar. 20, 2006, 12:33 PM), http://arstechnica.com/old/content/2006/03/6418.ars (finding in a Canadian RIAA study that peer-to-peer downloaders bought more music); Jacqui Cheng, *Study: Pirates Biggest Music Buyers. Labels: Yeah, Right*, ARS TECHNICA (Apr. 20, 2009, 11:31 PM), http://arstechnica.com/media/news/2009/04/study-pirates-buy-tons-more-music-than-average-folks.ars (finding in a Norwegian study that peer-to-peer downloaders were the biggest music consumers); Rachel Shields, *Illegal Downloaders 'Spend the Most on Music,' Says Poll*, THE INDEPENDENT (Nov. 1, 2009), http://www.independent.co.uk/news/uk/crime/illegal-downloaders-spend-the-most-on-music-says-poll-1812776.html (finding in a British independent poll that illegal downloaders spent more on average than those who did not download music illegally).

[124] *See* Welsh, *supra* note 44, at 1511 (noting that where digital distribution has some costs such as research and development, they are much more cost-effective at distributing the goods to consumers as they do not require shipping and handling).

[125] *See id.* at 1526 (citing Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 313–14 (2007)) (noting that online distribution has network effects resulting in reduced search costs for consumers and therefore increasing demand).

mation from its customers that can help them improve their own selections of what singles or artists should be promoted.[126]

A shift to digital distribution can also open the door to refocus on the singles market instead of primarily focusing on album distribution. After all, the music industry actually focused on singles in the early part of the twentieth-century, and only shifted to focusing on albums in the 1950's or 1960's; increasing attention to singles as a gauge for artist success via the digital distribution channels may save costs and avoid the flops and one-hit wonders that plague the music industry and lead to its low ten percent success rate.[127] In sum, the industry can focus on its core strengths of finding and promoting artists.[128]

Second, this proposal avoids the problems of scrambling for money from existing streams of revenue and always playing catch up. The Hulu model gives the music industry an opportunity to take a more innovative and forward-thinking strategy instead of playing catch up. By partnering with already existing intermediaries with solid bases that have the technology to make a social recommendation network,[129] the industry does not need to build a user base or

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126 Indeed, such a strategy has been suggested in one report. *See* G. KRISHAN BHATIA ET AL., WINDOWS INTO THE FUTURE: HOW LESSONS FROM HOLLYWOOD WILL SHAPE THE MUSIC INDUSTRY 75–76 (2001) (arguing that gradually A&R staff will spend less time roaming the country in search of new artists, but instead focus on monitoring the internet for new talent). As this report predicted, "A&R will be more about attracting, nurturing, and retaining a smaller stable of artists, and less about discovering a large number of unproven artists." *Id.* at 7. In addition, the recording industry has an excellent opportunity to more effectively market to its consumers, thereby increasing their own profits. *See id.* Companies could react faster to adjust marketing mixes or promotional efforts in response to perceived consumer reactions. *See id.* Likewise, companies can target their audiences more directly based on consumer information and purchasing history. *See id.*

127 *See* Miller, *supra* note 26, at 305–06.

128 Indeed, one report has predicted exactly that record companies would follow the path of the film industry because "[g]oing forward, major labels will focus less on physically distributing albums and more on managing a smaller set of artists, multiple distribution channels, and customer information." *See* BHATIA ET AL., *supra* note 126, at 74. The fact is that the music landscape has changed; much of the risks and rewards in online music have shifted to online intermediaries, and the industry needs to partner with these intermediaries and focus instead on its core strengths of finding and promoting artists. *See id.* at 78. For a more detailed discussion of ways the industry can focus on promoting talent, see IFPI 2009 REPORT, *supra* note 1, at 18–21.

129 Pandora, for instance, allows users to share radio stations with each other and already provides recommendations for artists that users might like based on a combination of what users tend to like as well as its patented Music Genome Project. *The Future of Radio Hearing*, *supra* note 80, at 1–2. Indeed, Pandora has already demonstrated remarkable conversions of listens to sales of music. *See id.* at 4 (noting that Pandora was one of the top referrers to iTunes and Amazon through its click-to-buy option, and that a 2007 Nielsen/NetRatings

have websites struggle to set up this type of model from scratch. Indeed, having multiple partners would mean that multiple online portals would be continuously competing and therefore innovating to find a music delivery solution that would best fulfill consumer desires. All the music industry has to do is sign licensing deals and then sit back to collect the fees.

Perhaps even more importantly, this proposal positions the industry well for the future of music, which may lie in streaming.[130] Cell phones doubling as music players may be the next frontier for how consumers listen to music[131] and indeed, Apple recognized this by buying Lala, an online music store known for storing user music collections and streaming them to the user on demand.[132] By following this proposal, the industry can go on the offensive instead of being stuck in an outdated current model, and making grabs for money from those that have successfully adapted to the transformative changes in digital media.

3. A Hulu Model Addresses Consumer Desires

This proposal addresses consumer desires as well by providing a responsive alternative to illegal downloading. First, free downloading and streaming of music means consumers can choose their selection and have permanent, uninhibited ownership of essentially unlimited and portable music. A large selection of music, including independent music, is critical to this proposal because consumers want unlimited music.[133] This means access not only popular artists who are often times signed to the big recording companies, but also to independent artists who are signed to smaller labels or not signed at all. Down-

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study found that its listeners were three to five times as likely to have bought music in the past ninety days than the average American). These technological attributes would probably be helpful in changing the site to a music network similar to social networks.

130 *See* PEW INTERNET, THE STATE OF MUSIC ONLINE, *supra* note 52, at 16.

131 *See* Joel D. Corriero, *Satellite Radio Monopoly*, 33 DEL. J. CORP. L. 423, 442–43 (2008). Other recent and future developments also support this assertion. For instance, people can already spend two dollars for an adaptor to listen to internet radio in the car through their cell phone, and in a few years this adaptor will not even be necessary as cars will have WiMAX broadband access. *See The Future of Radio Hearing*, *supra* note 80, at 3.

132 *See* Brad Stone, *Apple Strikes Deal to Buy the Musical Start-Up Lala*, N.Y. TIMES, Dec. 4, 2009, at B2.

133 *See generally* Chris Anderson, *About Chris Anderson*, THE LONG TAIL: CHRIS ANDERSON'S BLOG, http://longtail.typepad.com/the_long_tail/about.html (last visited Jan. 3, 2010) (summarizing the Long Tail model, which the author first wrote about in an online article and later expanded to a book). For a more detailed discussion about the Long Tail, see generally CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006).

loading is likewise essential because until wireless access is available everywhere, streaming music does not make it portable.

Second, consumers already primarily buy new music through social recommendations.[134] A move to a music social network means consumers are able to conveniently get these recommendations, thereby resulting in increased revenues for the industry whether it be through increased streaming or actual physical sales.

Third, this proposal addresses both economic and social reasons for downloading. On an economic level, the industry can capture consumers that value music for less and would not have bought either a physical CD or a digital single. Moreover, while the prospect of offering most music for free seems daunting initially, the industry needs to recognize that its competitors of peer-to-peer networks are all offering music for free.[135] The only way to compete is to offer free music because the reality is that even charging one cent for the product results in an entirely different market where consumers will flock to free.[136] On a social level, this proposal again acknowledges the community-sharing motivations behind downloading. Nevertheless, careful framing of this new approach will be important because as discussed earlier, illegal downloading is a habit or even an addiction. Record companies need to incentivize behavioral changes; they can do so by positioning these products as music networks where consumers can safely stream or download high-quality music while supporting

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134 *See* PEW INTERNET, THE INTERNET AND CONSUMER CHOICE, *supra* note 10, at 18.

135 Even if legitimate music streaming or downloading sites exist, ultimately the main competitor is peer-to-peer networks given the target consumer. This is a typical marketing case approach, though the Article does not define it as such for simplicity's sake. In relevant part, the inquiry here is into STP or segment, target, and position. The segment is the teenagers and young adults who are the relevant customers. Targeting analyzes ways to target this segment. Finally, position analyzes how the industry can position itself to be attractive to this segment in light of its competitors, which in this case are services that allow free downloading. For a more detailed explanation of market segmenting, targeting, and positioning, see Miklos Sarvary, Market Segmentation, Target Market Selection and Product Positioning (2000) (unpublished note) (on file with the Harvard Business School).

136 *See generally* DAN ARIELY, PREDICTABLY IRRATIONAL (2009) (discussing the ways people predictably behave irrationally, including a study that revealed people who were offered a choice between a one-cent Hershey's Kiss and a fifteen-cent Lindt truffle would generally choose the Lindt truffle, but when offered a choice between a free Hershey's Kiss and a fourteen-cent Lindt truffle would generally choose the Hershey's Kiss). For a more detailed argument for why music should be free, see Chris Anderson, *Free! Why $0.00 Is the Future of Business*, WIRED, Feb. 25, 2008, at 140. The author, Chris Anderson, later expanded his observations in a book, but for the purposes of this Article, the shorter article is enough. *See* CHRIS ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE (2009).

both artists and the industry.[137] It is only by doing so that the industry can win back estranged consumers and cause society to develop a social norm that favors going to these legitimate avenues for music.

B. How to Implement the Hulu Model in the Recording Industry

Given that the Hulu model is the best approach, the industry should follow four primary steps. In brief, the four parts of this proposal are: (1) offering free streaming and downloading for most music; (2) stemming potential cannibalization or loss of music sales by using careful marketing to entice buyers; (3) telling potential partners that the goal is to form an online music network; and (4) selecting multiple intermediaries who have an established base and who have interfaces that can transition easily into a social network. Finally, this proposal concludes by critiquing the case of MySpace Music, which is the recording industry's relatively unsuccessful foray into free music streaming, and explaining why its considerable departures from my proposal resulted in substantial missteps.

1. Offer Free Streaming and Downloading for Most Music

First, the industry should offer free streaming and downloading for most music. This Article will discuss each in turn as streaming and downloading implicate different rights. While ultimately this Article argues for private contractual negotiations with fees distributed through SoundExchange, which already oversees royalties for some online content,[138] it is useful to understand the current structure before articulating how and why my proposal differs.

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137 Essentially, these last traits are also a marketing-based approach in the STP framework discussed *supra* note 135, though again the Article does not explicitly state it for simplicity's sake. These traits deal with how to position this new alternative, which is important because record companies must be able to positively differentiate this new model from competing music services, including illegal downloading, for this proposal to succeed. Note that the industry must frame any new approach as something attractive to consumers, and not as a way for the industry to make more money, especially given the industry's already battered reputation. Again, a more thorough analysis of how this should be done is beyond the scope of this Article.

138 *See* Mitchell, *supra* note 14, at 1255.

a. *Free Streaming*

With regards to free streaming, record companies need to choose what type of streaming to focus on. There are two types of streaming services: interactive and non-interactive.[139] Out of these two, the industry should be focused on interactive streaming, which is "on demand," such as when users select a particular song to stream.[140] Interactive streams can be "user-created," such as when users select the songs they wish to hear, or be "generated," as in the case of Pandora where users input something such as an artist they like and generate a playlist of songs based on that input.[141] In contrast, non-interactive streaming occurs when users cannot manipulate the content; it is preprogrammed, as with webcasts,[142] and is not as desirable for consumers because they want to be able to choose the music they will listen to.

Under the current scheme, interactive streaming has two identities: first as sound recordings that implicate § 114 of the Copyright Act and therefore require direct negotiations with record companies to obtain public performance licenses,[143] and second as musical compositions that implicate § 115 of the Copyright Act and which require royalties to be paid to the PROs.[144] As this brief summary suggests, online intermediaries who wish to offer free streaming face a bewildering maze of trying to determine what rights are implicated, who to pay, and what to pay. It would be much easier if partners could negotiate directly with record companies to obtain the requisite licenses and pay the fees to one

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139 *See id.* at 1248 n.50.

140 *See id.*

141 *See id.* at 1257 n.101. The line between interactive and non-interactive can be fairly thin as demonstrated by the litigation in this area. *See, e.g.*, Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148, 164 (2d Cir. 2009) (determining that a webcasting service offering individualized playlists is nonetheless not an interactive service under the DMCA). However, this basic definition is enough for the purposes of this Article.

142 *See* Mitchell, *supra* note 14, at 1248 n.50.

143 *See id.* app. at 1293; Edward R. Hearn, *Digital Downloads and Streaming: Copyright and Distribution Issues*, 978 P.L.I. 477, 483 (2009) ("The companies that wish to perform the sound recording digitally must get . . . a voluntary license for interactive streaming . . . .").

144 *See* 37 C.F.R. § 385.10–.12 (2009); Hearn, *supra* note 143, at 488. There are three major PROs for public performance rights of musical compositions: the American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC"). Mitchell, *supra* note 14, at 1252. Of these three, ASCAP and BMI are the largest as they hold about ninety-seven percent of all American compositions. *Id.*

organization, assuming the PROs will relinquish control.[145] In addition, the recording industry should be open to accepting intermediaries who wish to experiment with non-interactive streaming. Although these intermediaries may potentially satisfy the criteria for a compulsory license and therefore need only pay statutory fees to SoundExchange in addition to the license with PROs,[146] again, record companies should negotiate fees lower than the statutory fee and simplify the process for them.

b. *Free Downloading*

This Article advocates that at least some of the intermediaries should concurrently offer free downloading, and specifically peer-to-peer downloading, for three reasons.

First, free downloading is necessary for the site to attract and retain consumers. As discussed earlier, consumers want portable music, and until wireless is available everywhere, consumers need to be able to download music for it to be portable. There is the possibility that the need for downloading will be eliminated as music streaming applications for mobile phones begin to offer the ability to store tracks for offline listening, but thus far, such applications seem to be limited to the iPhone and Android, which not everyone has.[147] Additionally, these are of course subject to space limitations, and only available to users who pay to subscribe to the music services. Moreover, any partnership will have peer-to-peer networks as competitors as they will be around for many years to come. Indeed, one group estimated that sixty percent of Internet traffic in America and Europe was due to peer-to-peer sharing.[148] If consumers will illegally download these files, perhaps it makes sense to offer the files concurrently and generate some revenues through advertising or other means.

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145 *See infra* Part II.B.1.c for a more in-depth discussion about the merits of having SoundExchange as the sole agency for collecting and distributing fees for online streaming and downloading.

146 *See* Hearn, *supra* note 143, at 482, 488.

147 For instance, Spotify currently only offers its application for iPod Touch, iPhone, Android, and Symbian users. *See Mobile*, SPOTIFY, http://www.spotify.com/int/help/faq/mobile/ (last visited June 17, 2010) (listing the platforms for which Spotify has an application). Grooveshark offers an application for the Android, jailbroken iPhones, which are those that circumvent official iPhone applications, Palm OS, and Blackberry. *See What Phones Are Grooveshark Mobile Available for?*, GROOVESHARK HELP, http://help.grooveshark.com/faq/article/2239-What-phones-are-Grooveshark-Mobile-available-for- (last visited Oct. 15, 2010).

148 *See* Ramon Casadesus-Masanell & Andres Hervas-Drane, *Peer-to-Peer File Sharing and the Market for Digital Information Goods*, 19 J. ECON. & MGMT. STRATEGY 333 (2010).

Second, allowing concurrent peer-to-peer downloading does not stifle iTunes-like digital or subscription markets, but rather complements them. For instance, one study found that services such as iTunes might actually be able to charge higher prices due to the existence of peer-to-peer networks.[149] Numerous other studies have also found that peer-to-peer users are the most likely to buy online music,[150] and offering peer-to-peer downloads concurrently with some reasonably priced digital downloads or subscriptions may spur increased sales. Indeed, some media companies have already begun to experiment with offering content through peer-to-peer downloads.[151] In a multiple intermediary model, the complementing aspect can be important as intermediaries differentiate themselves; some may choose to cater to specific types of consumers or offer niche music,[152] and by doing so, may have greater success in convincing site visitors to spend money on music. For instance, if one intermediary chooses to focus on independent music, those visitors who initially came for the free streaming and downloading may be more willing to pay for the latest singles, to subscribe for extra features, and to recommend music to other like-minded people in the same network, thereby generating more sales.

Third, peer-to-peer downloading is not very costly. In contrast to current technology, such as direct HTTP downloading that imposes significantly high costs on the servers, peer-to-peer downloading drastically reduces the cost by allocating it among numerous users.[153] Setting up a peer-to-peer server is fairly cheap.[154] The costs only continue to decrease by having multiple intermediaries offering downloading, as it spreads the cost out and avoids excessive congestion that slows downloading speed.[155] What type of peer-to-peer service

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149 *See id.* at 3.

150 *See id.*

151 *See* Ramayya Krishnan et al., *Digital Business Models for Peer-to-Peer Networks: Analysis and Economic Issues*, 6 REV. NETWORK ECON., 194, 195 (2007).

152 Again, consumers want unlimited music; one major benefit of peer-to-peer technology is that it makes available niche products which may not be stocked in a mainstream record store. *See id.* at 205–06.

153 *See id.* at 196 (noting that peer-to-peer networks result in cost savings "by using spare bandwidth, storage and processing cycles shared for free by its members").

154 The Cobb Group, *Client-Server Versus Peer-to-Peer*, MICROSOFT TECHNET (July 1997), http://technet.microsoft.com/en-us/library/cc751396.aspx ("Peer-to-peer networks aren't nearly as expensive to create, since you don't need a dedicated machine, server software, or special client licenses. In fact, all the software you need comes with Windows 95.").

155 *See* Casadesus-Masanell & Hervas-Drane, *supra* note 148, at 3 (noting that "congestion worsens as the size of the p2p networks grows," which may explain the existence of multiple peer-to-peer servers).

an intermediary chooses is beyond the scope of this Article,[156] as is how this proposal should be implemented.

Under the current structure, any online downloading requires direct negotiations with the Harry Fox Agency under § 115 and recording companies under § 114.[157] However, again, this proposal advocates that the industry simplify this process, so that as with streaming, partnered intermediaries would settle on a rate with those who own the rights and pay SoundExchange.

c. *SoundExchange as the Sole Distribution Agency: Fewer Transactions Costs and Increased Transparency*

A key feature of my proposal is that SoundExchange should be the sole distribution agency for the fees that online intermediaries will pay for the use of the music. The prior discussion makes it clear that the current scheme would force distributors of online music to negotiate and remit payments to numerous parties and agencies depending on whether they are offering streaming or downloading, as well as what right using the music implicates. However, this proposal advocates that this maze be simplified contractually, and that online music fees be collected and distributed by SoundExchange. A one-agency approach has two primary benefits: fewer transactions costs and increased transparency.

Designating SoundExchange as the sole collection and distribution agency will result in fewer transactions costs. Intermediaries will neither have to struggle to determine where their money should go nor deal with sending money to multiple differing agencies.[158] Record companies would not have to process the fees themselves, and instead could outsource this function to an agency that would be better at the job. Multiple agencies will likewise not end up sending multiple checks to the same copyright holder of a single song, which means that they may be more efficient in their work. Perhaps most importantly, one agency means that the overall amount to be distributed may increase. Even though agencies may be non-profit,[159] they deduct a percentage of the remitted

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156 For a summary of the three main classes of peer-to-peer architectures, which are centralized, distributed, and hybrid, see Krishnan et al., *supra* note 151, at 196–97.

157 *See* Hearn, *supra* note 143, at 483, 496. These implicate mechanical rights.

158 Indeed, it seems ridiculous that an intermediary who offers streaming and downloading may have to send varying fees to the Harry Fox Agency for mechanical rights, SoundExchange for performance rights of sound recordings, and multiple other performance rights agencies for performance rights of the musical composition.

159 For instance, SoundExchange is non-profit. Mitchell, *supra* note 14, at 1255.

fees for administration costs.[160] For instance, ASCAP, a PRO, collected $933 million fees but distributed only $817 million in 2008.[161] This means that $116 million was not distributed, and this was apparently its best year as it deducted its lowest ever operating expense ratio of 11.3%.[162] A single agency may potentially charge a one-time expense of say twenty percent for processing all the rights associated with the song instead of taking off eleven percent three or more times; the decreased operating expense may very well result in greater amounts to be distributed to copyright holders.

A single-agency approach will also result in increased transparency. A clearer and simple process of one agency overseeing distribution of royalties for a song means that it is easier to monitor cash inflows and outflows. An added benefit is that record companies and artists can keep better track of how much the agency owes them, particularly as a common artist complaint is that he or she is uncertain where his or her money is going. Overall, a single agency approach will result in both fewer transactions costs and increased transparency, and the industry should seriously consider it.

d. *Most Music: Offering Both Mainstream and Independent Music*

A key component of this Article's proposal is that the industry should offer most music. As discussed earlier, consumers desire unlimited music. Peer-to-peer networks offer the promise of this, and any intermediary needs to keep this in mind. This means that most if not all of the five big record companies should sign on to this proposal just as in the Hulu model, where three out of four of the main television studios combined their efforts. Independent labels should also sign on to this, as 38.9% of digital sales were of independent music, and Pandora, a successful online radio station, plays about fifty-five percent independent music.[163] In other words, a united effort among not just the major record labels, but independent ones as well, is ideal for this proposal to succeed.

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160 *See id.* at 1253 (noting that the PROs distribute royalties only after deducting overhead costs).

161 Press Release, ASCAP, ASCAP Announces Unprecedented Collections for Members in 2008 (Mar. 10, 2009), http://www.ascap.com/press/2009/0309_financials.aspx.

162 *See id.*

163 *See* Eliot Van Buskirk, *MySpace Music: What Went Wrong, and What's Being Done About It*, WIRED: EPICENTER (Apr. 1, 2009, 12:11 PM), http://www.wired.com/epicenter/2009/04/myspace-music-w/.

2. Stemming Potential Cannibalization: Windowing and Subscription Strategies

To address potential cannibalization of sales, or the possibility of taking revenues away from CD or other sales, the industry should adopt both a windowing and subscription strategy.

A windowing strategy here means that new albums should only be offered as physical sales or digital sales for the first month, with perhaps a few singles available for free, streaming at the same time, though this is open to many variations.[164] The industry must offer physical albums and digital albums concurrently because many consumers want digital music; in fact, forty percent of the music purchased in 2009 was purchased digitally.[165] While the details and timelines can vary, the important point is that the industry needs to position its product in each window to target various consumers such as targeting albums toward die-hard fans. Such an approach actually expanded the pie for the movie industry, which had movies earn money in theaters, on cable, on DVDs, and then finally in free broadcasts.[166] This approach could likewise result in more profits for the music industry if utilized carefully.[167]

Another way to stem potential cannibalization of sales is to use a subscription strategy. Here, a subscription strategy means sites can experiment with offering more advanced features, no ads, or increased streaming and downloading limits for users that are willing to pay more. For instance, Pandora is currently offering Pandora One, which is a subscription strategy that offers more features if consumers are willing to pay for it such as no limits on the number of hours the listener can listen to the site as well as no ads.[168] Indeed, the subscrip-

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164 *See, e.g.*, BHATIA ET AL., *supra* note 126, at 73–74 (suggesting a windowing strategy with a sole album release, followed by a digital single or album release, followed by a subscription service, and finally ending with record clubs). This Article's suggested windowing strategy differs from this alternative in numerous ways; for instance, it would argue that digital album sales need to be offered concurrently with the physical album instead of only offering it later because the record companies could lose business from people who prefer to buy digital albums. However, again, this is not an exact science and experimentation would probably be recommended.

165 *See* NIELSEN REPORT 2009, *supra* note 67, at 4.

166 *See* BHATIA ET AL., *supra* note 126, at 4.

167 *See id.* (observing that if the music industry employed a windowing strategy, "total revenues should expand as the industry taps into consumer segments that traditionally bought little or no music").

168 *See What Are the Benefits of Upgrading to Pandora One?*, PANDORA, http://blog.pandora.com/faq/#64 (last visited Jan. 3, 2010) (listing the benefits that come with Pandora One). This is only one approach toward subscription services, and more study

tion strategy seems to be working for Pandora given that it has been earning a profit recently.[169] This suggests that consumers are willing to adopt such a model. Both strategies would benefit from marketing studies regarding pricing and features, though the details are beyond the scope of this Article.[170]

3. Form an Online Music Social Network

The industry should focus on forming an online music social network to both pander to consumers who wish to share their music with others, as well as to take advantage of the built-in network effect to offer extra features, thereby generating increased sales.

First, to address consumer desires to share music with others, there should be an easy way for users to recommend songs to their friends. The industry needs to develop features on the websites, but perhaps even more importantly, music also needs to be easily shared through other social spaces. To that end, the industry should strongly encourage and invest in the development of application programming interfaces ("APIs"). APIs deal with mash-ups of differing sites, which in the music arena could mean embedding a song from imeem on Twitter, Facebook, or blogs so that people can listen to it.[171] The fact is that other online social spaces exist concurrently with any music site, and users will want to know that their music can be shared in alternative forums. APIs will allow this to happen if further developed.[172] Indeed, APIs may be all the more attractive as this proposal advocates for partnerships with multiple intermediaries that develop different niches and it may make sense to link these sites together.

Another goal for online music networks is to take advantage of the network effects and have features that will increase overall revenues for both the site and the music community as a whole, while perhaps simultaneously increas-

should probably be done about what would work best. An inquiry into whether a subscription service is a good approach is beyond the scope of this Article.

169 *See* Om Malik, *Pandora: Streaming Everywhere on Everything*, BLOOMBERG BUSINESSWEEK, Jan. 12, 2010 (noting that Pandora achieved its first quarterly profit in 2009 after the introduction of Pandora One, and intends to continue this in 2010).

170 In addition, subscription services would implicate different portions of the Copyright Act. *See* Mitchell, *supra* note 14, at 1254–55. However, the details are beyond the scope of this Article.

171 *See* Ted Greenwald, *Geeks to Music Industry, APIs Can Set You Free*, WIRED: EPICENTER (Dec. 8, 2009, 9:41 AM), http://www.wired.com/epicenter/2009/12/geeks-to-music-industry-apis-can-set-you-free.

172 *See id.*

ing the social experience. For instance, after buying the music, forty-seven percent of buyers will go to see an artist perform in concert, thirty-nine percent will visit the artist's webpage, and twenty percent will buy other merchandise such as t-shirts from the same artist.[173] This means that online music networks can take advantage of these buying patterns so that when users are listening to a song, they have an option to buy concert tickets if there is one in their vicinity, an option to buy merchandise related to the artist, or to follow a link to the artist's website. Besides making it more convenient for consumers who typically do follow-up purchases and which may therefore increase revenues, these options also provide more opportunities for both established and beginning musicians to gain increased exposure.

4. Partner with Multiple Intermediaries with Established Bases and Innovative Interfaces That Can Be Adapted to a Social Network Model

The fourth and perhaps most important part of this Article's proposal is that the music industry needs to partner with multiple intermediaries who have an established base and who have done something innovative that can be adapted to a social network model. This proposal envisions multiple partnerships with legitimate music streaming or downloading services including online radio stations or possibly social networking sites, though these are less desirable.

a. *Further Explicating the Term "Partnership"*

Although this Article has been fairly loose in its usage of the term "partnership" thus far, this proposal actually has a very specific definition of partnership in mind. Unlike Hulu, which was a joint venture,[174] in this context the large record companies should not be entering into a joint venture or even a venture capital type of investment. These investments offer greater rewards, but as Warner Brothers found when it had to write-off $33 million for its investments in Lala and imeem, former online music delivery sites, they also come with increased risks.[175] A better approach for record companies is to merely

173 *See* PEW INTERNET, THE INTERNET AND CONSUMER CHOICE, *supra* note 10, at 21.

174 Lapan, *supra* note 4, at 368.

175 Robert Andrews, *WMG's Bronfman: MySpace Music 'Disappointing,' Vevo Must Charge Users, No More Online Investment*, PAIDCONTENT.ORG (May 7, 2009, 8:41 AM), http://paidcontent.org/article/419-wmgs-bronfman-jr-no-more-online-investments/.

extend a licensing deal, and therefore only "partner" in the sense that the chosen intermediaries and the recording companies have the same goal of drawing increased users to the legitimate site, thereby increasing revenues from advertising or corollary music sales. As referenced earlier by this Article, record companies should be outsourcing the collection and distribution of royalties to SoundExchange because they would not be very good at doing that job. The same rationale applies here: record companies would not be good at rapidly adapting to consumer needs in the online arena, and would be much better off outsourcing the technological aspect and focusing instead on their core competencies of finding, developing, and promoting artists.

The licensing partnership that this proposal advocates is one that offers a favorable royalty rate, a profit-sharing percentage, or a greater of the two type of contract, such as the one offered to Pandora in a recent agreement.[176] Undoubtedly there would be many intermediaries interested in the legitimacy offered, as it could lead to more profits from advertisers who could be charged more,[177] as well as to the potential of monetizing the increased consumers that would flock to the site.

b. *Multiple Partners*

This Article argues that multiple partners are ideal. While a sole partnership initially appears to be good because it would act as a one-stop place

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176 *See* Tim Westergren, *Important Update on Royalties*, PANDORA (July 7, 2009, 12:24 PM), http://blog.pandora.com/pandora/archives/2009/07/important_updat_1.html. While a thorough discussion of what option is most appropriate, the industry should consider the statutory rates imposed under §§ 114–115 of the Copyright Act as a ceiling. In addition, the industry should recognize that different avenues of distribution have corresponding different weights of risk, and so profit-sharing types of contracts should reflect that shift in risk. *See* BHATIA ET AL., *supra* note 126, at 10 (discussing how the industry and intermediaries should apportion their share in rewards and risks).

177 For instance, Hulu has had greater success than YouTube in translating its content into a revenue stream, perhaps because YouTube's content is primarily user-generated and lacks legitimacy, leaving advertisers wary about having ads seen next to uncontrolled content, whereas Hulu offers premium content. *See* Lapan, *supra* note 4, at 368–69. Another point of interest here is that advertisers may be willing to pay more given that users can participate in the advertising experience. Again, Hulu is experimenting with interactive advertising where users can choose when to view the ads and can give thumbs up or down to ads that they like. *See id.* at 385. In addition, perhaps because of the interactive nature of the ads and the fact that people are viewing fewer ads, more people remember the ads and are more likely to buy the products. *See id.* at 385–86. Interactive marketing is evolving and can be an excellent tool for advertisers; intermediaries should be interested in harnessing this tool to generate greater profits.

where consumers would gather, it is not as attractive as multiple partnerships for several reasons.

First, a single partnership represents significant risk. If the chosen intermediary fails to deliver on its promise to consumers or makes missteps, this results in significant wasted time and of course lost potential revenues. This, in fact, seems to be exactly what happened with the music industry's choice of MySpace Music as its one-stop intermediary.[178] Moreover, if the intermediary consistently makes missteps, it will develop a negative reputation, making it more unlikely that consumers will use the server. In addition, there may be agency or free-riding problems, where the intermediary may become complacent and not expend as much effort in experimenting with different advertising schemes to generate greater profits, which in turn could hurt recording companies if the contract was a profit-splitting one. There may also be anti-trust concerns,[179] and even though Hulu and MySpace Music have not run afoul of this thus far, it may be better to have multiple competing partners as a preventative measure.

The better approach would be to pick a few intermediaries that have the potential to consolidate, and allow those services to compete with each other to generate the best services for consumers. The intermediaries could experiment with methods of music distribution, social interfaces, and advertising, learning from each other's mistakes and drive to eventually become the one-stop shop or to fulfill niche consumer desires. Indeed, one report already suggested that online intermediaries will gradually become more and more consolidated in the future.[180] From the industry's perspective, this allows it to reap the rewards of the competition without having to struggle with figuring out which sole intermediary would be best to start off with. After all, the music context is very different from the television or movie context. Hulu is successful because it is fairly clear how to deliver visual content, and peer-to-peer downloading alternatives are not as attractive given the large file sizes for visual content. However, there are greater variances in music delivery—people may like on-demand streaming, online radio, recommendations through music blogs or other online portals, and of course peer-to-peer downloading, which is easy to utilize given the low file sizes for music. Online music distribution is still evolving, and it

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178 *See infra* Part II.B.5.a–c (discussing why MySpace Music has not taken off despite its premise, which is similar to this Article's proposal).

179 *See* Boehm, *supra* note 2, at 192–93.

180 *See* BHATIA ET AL., *supra* note 126, at 8 ("We believe that, ultimately, a few consumer services will emerge to function as the primary intermediaries between the labels and consumers.").

may be better to choose a few intermediaries who will respond in different ways to changing desires. In the meantime, the music industry can stay uninvolved, allowing the intermediaries to determine what services are most attractive to consumers while collecting money for licensing its content from all intermediaries.

Indeed, a multiple intermediaries approach may also mean that the recording companies may get better terms on their contracts by encouraging intermediaries to compete for the opportunity to enter into the deal. The competition may in fact also serve as a source of enforcement as record companies that are dissatisfied with an intermediary's performance could merely move on to the next one. Certainly enforcements or methods of controls as applied to a few intermediaries would be much easier than trying to battle millions of customers, as the RIAA lawsuits attempted to do. For all these reasons, the music industry would do better to depart from the Hulu model and enter into partnerships with multiple intermediaries instead of one.

c. *Types of Partners*

The second major question then is what types of partners are best. This Article argues that partnerships with legitimate music streaming or downloading services, including online radio stations, are best, while social networking sites are not as desirable.

Current legitimate music streaming or downloading services are ideal, particularly those that have already begun a shift toward advertising-supported streaming models such as We7 and especially Spotify.[181] Spotify, a U.K.-focused desktop peer-to-peer streaming application, is particularly in line with what this proposal advocates, though currently it is unavailable in the United States,[182] as record companies seem unwilling to consider its free-streaming model in the States.[183] Spotify's content comes via the cloud, which essentially means it functions as though its entire library were readily accessible to users, allowing users to search through and organize over eight million songs into playlists.[184] People can access music from any computer, playlists can be shared

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181 *See* IFPI 2009 REPORT, *supra* note 1, at 11.

182 *See* Mark Milian, *With Momentum in Europe, Spotify Has Apple's iTunes in Its Sights*, LOS ANGELES TIMES (Feb. 2, 2010, 6:08 PM), http://latimesblogs.latimes.com/music_blog/2010/02/spotify-music-streaming-itunes.html.

183 *See* Brad Stone, *Still Hoping to Sell Music by the Month*, N.Y. TIMES, Oct. 14, 2009, at B1 ("American music labels are increasingly resistant to the idea of licensing their catalogs to any new service offering free music with ads . . . .").

184 *See* Milian, *supra* note 182.

easily via a link, and people can collaborate on playlists. Further, music quality is at least 160 kbps with an optional subscription option if users want higher quality along with more benefits, and it has a clean and user-friendly interface.[185] Though the service has some problems,[186] these are all features that are compatible with this Article's proposal. Likewise, online radio stations such as Pandora or Last.fm are also ideal partners as this Article has already noted that their technology could be convertible to an online music social network given the recommendations capability and the ability to share radio stations with friends.[187] These types of partners have already had significant experience with music delivery to consumers and have proven that they can draw in users. Also, they have already experimented with advertising as a revenue source, and thus most likely have important insights into visual and audio advertising, which again may mean higher revenue streams depending on what method of payment record companies choose. Moreover, these partners already have engineers as employees, which in turn means that they can more effectively respond to any technological glitches or future user desires. This is after all a learning process, and rapid adaptations may be crucial to avoid losing consumers.

In contrast, social networking sites such as MySpace or Facebook are less desirable. While initially they seem appealing because they have a large

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185 *See* Adam Pash, *Spotify Is the Best Desktop Music Player We've Ever Used*, LIFEHACKER (Aug. 6, 2009, 9:00 AM), http://lifehacker.com/5330148/spotify-is-the-best-desktop-music-player-weve-ever-used.

186 Some users complain about its limited catalogue and its inability to add users' own music. *See id.* However, perhaps its greatest failing right now is its lack of portability; even if it can sync with the iPhone, it is only for paying Spotify users and wireless is not available everywhere. *See* Dan Grabham, *Spotify for iPhone Review*, TECHRADAR, http://www.techradar.com/reviews/phones/mobile-phones/iphone-apps/entertainment/spotify-spotify-iphone--632987/review (last reviewed Sept. 7, 2009). Nevertheless, even this service has public relations problems as it has been criticized for failing to compensate independent artists signed to independent labels fairly, as well as its stance on refusing to stream unsigned artists. *See, e.g.*, Helienne Lindvall, *Behind the Music: the Real Reason Why the Major Labels Love Spotify*, THE GUARDIAN (Aug. 17, 2009, 3:03 PM), http://www.guardian.co.uk/music/musicblog/2009/aug/17/major-labels-spotify (noting the disproportionately low shares independent artists received and ultimately withdrawing a stamp of approval because of the unfair compensation scheme). Moreover, there has been some suggestion that Spotify's current way of doing business is much more aimed at building it big enough to attract interest and then promptly selling it off to a buyer that does not realize its current model is unprofitable. *See id.* Spotify does offer some promise though, and again, is probably closest to what this proposal is suggesting, though some marriage between online radio, social network, and Spotify's current set-up would be even more ideal.

187 Pandora is also an ideal partner as SoundExchange has already dealt extensively with Pandora recently in reaching a settlement about online radio royalty fees in July 2009. *See* Westergren, *supra* note 176.

user base and their business model is already focused on social networks, the major problem with such sites is that their core business does not center on music. Consumers want ready access to music first; the social aspect is an add-on, something that can only develop if the music itself is distributed to consumers in an attractive way. Indeed, a social networking site may flounder as a partner given that it must reposition itself as a music provider, it suffers from a lack of technical expertise in music delivery, and it has not experimented much with advertising revenues in a music context. Choosing legitimate online streaming services that have already moved to an advertising-supported model would be best.

5. MySpace Music: A Case Study in What Not to Do When Implementing This Proposal

This discussion would not be complete without addressing the recording industry's 2008 joint venture with MySpace Music, which offers free music streaming[188] and features four major record companies owning forty percent of the equity.[189] Although at first glance it may seem to be what this proposal is advocating, there are several critical differences. Consequently, even though it managed to achieve 12.1 million unique visitors in June 2009, which puts it third behind AOL and Yahoo's music services,[190] its inability to monetize its audience has led to it being called "disappointing" by its own backers.[191] A closer look at what went wrong with MySpace Music is helpful, as it highlights the consequences of straying from this Article's proposal.

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188 Technically, the joint venture between all the major labels and MySpace was launched in America in September 2008, but it only began rolling out internationally in 2009. *See* IFPI 2009 REPORT, *supra* note 1, at 11.

189 *See* Buskirk, *supra* note 163.

190 *Social Media Stats: Myspace Music Growing, Twitter's Big Move*, NIELSENWIRE (July 17, 2009), http://blog.nielsen.com/nielsenwire/online_mobile/social-media-stats-myspace-music-growing-twitters-big-move/.

191 Andrews, *supra* note 175; Greg Sandoval, *Labels Dissatisfied with MySpace Music Performance*, CNET NEWS (May 6, 2009, 12:11 AM), http://news.cnet.com/8301-1023_3-10234253-93.html. MySpace itself seems to lack clear leadership given that its CEO stepped down in February 2010 after less than a year on the job. *See* Brian Stelter, *After 10 Months, Chief of MySpace Steps Down*, N.Y. TIMES, Feb. 10, 2010, at B9.

a. *MySpace Music Did Not Offer Free Streaming and Downloading of Most Music*

Unlike this Article's proposal, MySpace Music did not offer free streaming and downloading for most music. More specifically, it did not offer downloading or a large enough selection of music, which runs counter to consumer desires.

First, although MySpace Music offered interactive streaming, it did not offer downloading,[192] which restricted the portability of its music. Moreover, it did not have mobile phone capabilities, which further hindered portability for even those users capable of accessing streamed music on their phones, though it may explore this in the future as it acquired imeem, which had an iPhone application for its server.[193]

Second and more importantly, MySpace Music did not offer most music, but rather focused on mainstream music. This Article has already discussed the importance of offering independent music. Yet, although MySpace had a reputation as a place where unknown artists could be heard, the service shut out indie music at its launch,[194] as well as in other markets that it expanded to such as Australia.[195] It has since added independent labels[196] and artists back into its database as of December 2009,[197] but the repeated pattern of leaving independent artists off the table is not good practice, as it ignores an important market.

b. *MySpace Music Failed to Deliver on the Promise of a Music Social Network*

MySpace Music also failed to deliver on the promise of a music social network, which this Article's proposal advocates. First, its on-site sharing features were impeded due to the difficulty of finding any particular song[198] or creating personal playlists.[199] Even when users found particular songs or created

192 *See* Buskirk, *supra* note 163.

193 *See id.*

194 *See id.*

195 *See* Rachel Shields, *Indie Labels Sign Download Deal*, THE INDEPENDENT, Nov. 22, 2009.

196 *See id.*

197 *See* Eliot Van Buskirk, *MySpace Music Agrees to Stream Indie Bands*, WIRED: EPICENTER (Dec. 14, 2009, 1:33 PM), http://www.wired.com/epicenter/2009/12/myspace-music-agrees-to-stream-indie-bands/.

198 *See* Buskirk, *supra* note 163.

199 *See id.*

playlists, they had no easy way of sharing music with each other and could only post up to ten songs on their profile page for people to listen to.[200] Sharing across other online spaces was also put on the back-burner: in acquiring imeem, another advertising-supported service in December 2009, the bundled API technology that could enable music sharing across different social spaces as well as smooth out future site integrations seemed to be perhaps permanently in limbo.[201]

MySpace Music is also having trouble monetizing the music social network it has built up and has not adopted many basic suggestions this Article proposes. Although MySpace Music made significant changes in its U.K. launch in December 2009 by offering some social monetizing features such as integrating blog and news coverage for the artist being played or possibly promoting tours for various artists,[202] some of these changes do not appear to be in the United States version. Simply put, the company is not exploring enough alternative potential revenue streams, though this may be because the company wants to prioritize how to make enough money from advertising,[203] particularly as comments from the CEO revealed the company was losing money due to the cost of streaming and was considering moving to a paid model.[204]

c. *MySpace Music Involved a Joint Venture with a Sole Intermediary that Was a Social Network Site*

Another major departure from this Article's proposal is that MySpace Music was a joint venture with a sole intermediary that was a social networking site.

First, MySpace Music was a joint venture with a sole partner, and therefore suffered from many of the problems brought up in this Article. The record

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200 *See* IFPI 2009 REPORT, *supra* note 1, at 12.

201 *See* Tom Slater, *Updated: MySpace Music Buys, Crushes Imeem*, SOCIAL BEAT (Dec. 8, 2009), http://digital.venturebeat.com/2009/12/08/news-corp-goes-godzilla-on-imeem/.

202 *See* Helienne Lindvall, *Will the Launch of MySpace Music Restore its Credibility?*, THE GUARDIAN (Dec. 3, 2009, 2:17 PM), http://www.guardian.co.uk/music/musicblog/2009/dec/03/myspace-music.

203 For instance, MySpace Music only began to experiment with audio ads as of February 2010. *See* Ryan Nakashima, *MySpace Music Experiments with Audio Ads*, USA TODAY (Feb. 8, 2010, 7:21 PM), http://www.usatoday.com/tech/news/2010-02-08-myspace-music-ads_N.htm.

204 *See* Paul Bonanos, *Would Anyone Pay for MySpace Music?*, BLOOMBERG BUSINESSWEEK, Nov. 15, 2009. However, there is a real question about whether users would be willing to pay for MySpace Music. *See id.*

companies are not doing much of the work here, but by choosing a joint venture, they are bearing a lot of risk. Moreover, the sole partnership has if anything proven to be detrimental. Record companies are wasting money but more importantly they are wasting time; numerous potential intermediaries could have been competing and trying to find better ways to deliver music, fulfill consumer desires, and to see if a free streaming ad-supported model can work. Instead, there is only MySpace Music.

Second, MySpace Music is a social network site, the exact type of intermediary this proposal is counseling against. Even putting aside the fact that MySpace in particular may not have been the best choice of a starting partner given its reputation as a poorly designed ad-filled space that has online predators,[205] like many social network sites, MySpace is ill equipped to make innovations in music delivery. Its technological struggles since its launch have been well documented, but its recent widely criticized acquisition of imeem[206] has made it even more obvious just how bad the site is with technology, which in turn is translating to consumer ire. Imeem users were not warned about the acquisition, so could not save their playlists;[207] to make matters worse, MySpace Music's public relations attempt to say that they had transferred over the playlists was not very effective as it soon became clear that many people's tracks had not transferred over.[208] Although there are no concrete figures, it is possible that many imeem users may be migrating to other sites.[209] Again, MySpace Music's struggles indicate that record companies should not focus on a joint venture sole intermediary approach with a social network, but should instead shift their focus to a multiple intermediary licensing approach with companies that have technological edges. There are additional problems with

[205] PC World named it the top worst website in 2006, describing it as the web's "most poorly designed and counterproductive" site and a "one-stop shopping mall for online predators." Dan Tynan, *The 25 Worst Web Sites*, PCWORLD (Sept. 15, 2006, 5:00 AM), http://www.pcworld.com/article/127116-7/the_25_worst_web_sites.html. Privacy features are slim; graphically, the site is a mess with poor presentations that take forever to load, spyware abounds, and the company has suffered from a series of public backlashes and well-publicized lawsuits. *See id.* None of this makes for a great social network experience, least of all a great music social network experience.

[206] *See* Michael Arrington, Posting of *MySpace Continues to Get Trashed Over Imeem Shutdown*, TECHCRUNCH (Dec. 13, 2009), http://techcrunch.com/2009/12/13/myspace-continues-to-get-trashed-over-imeem-shutdown/.

[207] Jason Kincaid, Posting of *MySpace Music Resurrects Imeem Playlists*, TECHCRUNCH (Jan. 15, 2010), http://techcrunch.com/2010/01/15/imeem-playlists-myspace.

[208] *See MySpace Restores Imeem Playlists*, TECH JOURNAL (Jan. 18, 2010, 12:00 AM), http://www.tj.com/social-media/myspace-restores-imeem-playlists.

[209] *See id.*

MySpace Music of course,[210] and the partnership may eventually still become successful given recent changes.[211] However, the fact remains that MySpace Music is not doing as well as record companies had hoped, which suggests that perhaps this is not the panacea for the music industry's woes.

d. *Alternatives to MySpace Music: Grooveshark and How It Differs from This Proposal*

Grooveshark is another popular online peer-to-peer streaming service that allow users to search for and stream music,[212] though it is in a legal grey area as it currently offers music without having reached a licensing deal with most recording companies[213] and its terms of service notes that users are liable

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210 For instance, MySpace Music may be developing a reputation as a site that does not support artists, which may go against part of the value proposition that attracts consumers. In acquiring imeem, MySpace Music left thousands of artists unpaid. *See* Eliot Van Buskirk, *MySpace/Imeem Deal Leaves Thousands of Artists Unpaid*, WIRED: EPICENTER (Dec. 11, 2009, 6:35 PM), http://www.wired.com/epicenter/2009/12/myspace-imeem-deal. There are also questions about whether the site will be fair about distributing royalty payments to artists, especially given the fact that the industry is essentially sitting on two sides of the deal and has an incentive to obfuscate royalty dues such that they never trickle down to the artists. *See* Eliot Van Buskirk, *MySpace Replaces Embedded Imeem Playlists with Ads*, WIRED: EPICENTER (Dec. 31, 2009, 2:32 PM), http://www.wired.com/epicenter/2009/12/myspace-replaces-imeem-playlists-with-ads/comment-page-1.

211 *See* Buskirk, *supra* note 163. MySpace may also succeed if it finds a successful way to integrate its acquisitions of imeem and iLike, a popular social music recommendation application on Facebook. *See* Michael Arrington, *Breaking: MySpace Close to Acquiring iLike for $20 Million*, TECHCRUNCH (Aug. 17, 2009), http://www.techcrunch.com/2009/08/17/breaking-myspace-close-to-acquiring-ilike/. It should also seriously consider developing a song identifier database to make future acquisitions less painful, as this should help in transferring playlists over and in paying artists. *See* Eliot Van Buskirk, *4 Ways One Big Database Would Help Music Fans, Industry*, WIRED: EPICENTER (Dec. 10, 2009, 4:17 PM), http://www.wired.com/epicenter/2009/12/4-ways-one-big-database-would-help-music-fans-industry.

212 *See* Jason Kincaid, *Grooveshark's iPhone App Is Great, But It's About to Get Smacked Down by Apple*, TECHCRUNCH (July 30, 2009), http://techcrunch.com/2009/07/30/groovesharks-iphone-app-is-great-but-its-about-to-get-smacked-down-by-apple. Indeed, as of July 2009 it had 1.3 million users a month, of which 750,000 were registered users. *Id.*

213 *See* Robin Wauters, *Grooveshark Slips Past EMI's Lawyers, Signs New Licensing Agreement Instead*, TECHCRUNCH (Oct. 13, 2009), http://techcrunch.com/2009/10/13/grooveshark-slips-past-emis-lawyers-signs-new-licensing-agreement-instead/ (noting that while Grooveshark has reached a licensing deal with EMI, it has not done so with the other major recording companies). *See also Labels List*, GROOVESHARK, http://www.grooveshark.com/labelslist (last visited June 17, 2010) (listing labels that have signed licensing agreements with Grooveshark). Universal Music sued Grooveshark in January 2010. *See* Matt Rosoff,

for any uploaded content.[214] At a glance, its set-up is very close to this proposal because it offers music streaming through a fairly easy to use interface, and it focuses on making music communal through allowing members to share songs with each other as well as in other social spaces.[215] Indeed, if the recording companies wanted to focus on a one-stop intermediary, Grooveshark would frankly have been a better choice than MySpace Music given that Grooveshark's interface is much easier to use including such features as better search capabilities to find the songs, an easier to use interface for making playlists, and greater facility at finding and sharing songs with other users.[216]

However, Grooveshark's set-up differs from this proposal in several key ways. First, while it offers free streaming, it does not offer downloading, nor does it offer most music as its music catalog is limited. The inability to download means that Grooveshark faces the problem that people want portable music, but until wireless is available everywhere, Grooveshark's music is not portable.[217] Additionally, while Grooveshark claims to offer seven million songs, it most likely offers far fewer given that many of its songs are uploaded by users, which sometimes results in dubious quality and song duplicates with varying file names.[218] In addition, its database does not seem as broad as competitors, which means it does not seem to do as well in offering independent or more obscure artists.[219] Second, although Grooveshark is much closer than MySpace Music in fulfilling the promise of a social network centered around music through its ease in allowing users to share music with other users as well as in

Grooveshark Sued By Another Record Company, CNET NEWS: DIGITAL NOISE (Jan. 11, 2010, 11:33 AM), http://news.cnet.com/8301-13526_3-10432132-27.html.

214 "You are solely responsible for any necessary payments that may become due to any third parties as the result of your posting of or linking to the User Content and EMG's use thereof." *Terms of Service*, GROOVESHARK HELP, http://help.grooveshark.com/faq/article/3034-Terms-of-Service (last updated July 23, 2009).

215 *See* Wauters, *supra* note 213.

216 *See id.*

217 The company is offering an app on jailbroken iPhones, which allows users to save or cache some music for offline play. *See*, *What Phones Are Grooveshark Mobile Available for?*, *supra* note 147. However, this is hardly a solution to the portability issue given that, even putting aside the questionable legality of the application, the songs do not remain when the phone or application restarts.

218 *See Spotify vs. Grooveshark vs. Pandora*, THE DANOSPHERE (Mar. 27, 2010), http://www.thedanosphere.com/2010/03/27/spotify-vs-grooveshark-vs-pandora.

219 *See* Matt Rosoff, *Meuzer Finds Free Music Online*, CNET NEWS: DIGITAL NOISE (June 11, 2009, 4:40 PM), http://news.cnet.com/8301-13526_3-10263141-27.html.

other social spaces,[220] Grooveshark does not have a very active community as compared to other communities such as Last.Fm.[221] Finally and most importantly, Grooveshark is only one single online intermediary, while a critical facet of this Article's proposal is that record companies need to partner with multiple online intermediaries. Grooveshark may do well on its interface for streaming music as well as its social network features, but other facets such as its music recommendations program cannot compete with online radio websites such as Pandora.[222] Likewise, Grooveshark's community is not as active as Last.Fm, which is also experimenting with music videos and showing lyrics to songs.[223] Again, because there is no settled single way to deliver music to consumers, record companies are much better off focusing on multiple intermediaries who can battle it out among themselves while the record companies collect the royalties. Overall, the industry should seriously consider the points brought up in this Article because, while not perfect,[224] this proposal is nonetheless a start.

III. CONCLUSION

The battle over digital music is not yet over. Although past methods of control and an inability to offer an attractive alternative to illegal downloading have hampered the music industry thus far, recording companies can still win back consumers by partnering with established online intermediaries to offer most released music to consumers for free streaming and downloading in a social environment. Such a proposal has significant advantages over other proposed statutory, administrative, and free-market solutions, and it addresses industry challenges as well as consumer desires. Indeed, recording companies have an opportunity to win back consumers through a careful value proposition.

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220 *See* Aditya Madanapalle, *Grooveshark vs. Last.Fm*, THINKDIGIT (Mar. 8, 2010, 1:24 PM), http://www.thinkdigit.com/Features/Grooveshark-Vs-Lastfm_4145.html.

221 *See id.*

222 *See Pandora vs. Grooveshark—Streaming Music Showdown*, 404 TECH SUPPORT (July 4, 2009), http://www.404techsupport.com/2009/07/pandora-vs-grooveshark-streaming-music-showdown.

223 *See* Madanapalle, *supra* note 220.

224 This Article does not fully explore the problems in this proposal, but obviously cannibalization of sales is a huge challenge that needs further analysis than a simple windowing and subscription strategy. Record companies should also probably give artists an opportunity to opt-out of this scheme if they desire it. Globalization should also be of concern. For instance, Hulu is actually restricted to only Americans, and one study found that only forty-five percent of illegal music downloading occurred from users in the United States. *See* Oberholzer-Gee & Strumpf, *supra* note 89, at 10. However, these details are beyond the scope of this Article.

Music has shifted to a digital realm, but the industry has still not recognized just how radical a shift has occurred. By following the Hulu model, record companies can take a much-needed step to combat illegal piracy and embrace the future of music.