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Common Sense, Accommodation and Sound Policy for the Digital Music Marketplace

By Bennett Lincoff*

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Introduction

“We stand here confronted by insurmountable opportunities.”

Pogo

The music industry is in desperate trouble. It has been in a decade-long death-spiral for which no one has yet offered a recovery plan that has worked. It is my purpose in this article to propose a comprehensive

approach to rights administration that will not only reverse the music industry's decline but will also simultaneously promote technological innovation, facilitate the growth of all manner of digital audio services, and allow consumers to participate in the lawful enjoyment of music when, where and how they want.

The plan I propose involves the creation of a new right for music industry rights holders specifically adapted for application to digital transmissions of sound recordings and the musical works they embody. This new right, the "digital transmission right," would be implemented through a combination of voluntary collective rights management and licenses freely negotiated between individual rights holders and those who would be legally liable for providing digital transmissions of recorded music.

The digital transmission right would not depend on the efficacy of access restrictions or anti-copying measures for its success. Its monetization would not involve the imposition of a statutory license or an Internet access tax. And it would not require the impressment of Internet service providers or colleges and universities as enforcers on behalf of music industry rights holders.

Through the digital transmission right, implemented as I suggest in this article, authorized transmissions of recorded music could be made available from the largest number and widest array of licensed sources, anytime, anywhere, to anyone with network access. This, in turn, would provide songwriters, music publishers, recording artists and record labels, in the aggregate, with their best opportunity to do as well—if not better—financially than they have done under the system that the digital transmission right would replace. That is the result for which I seek to lay a foundation in this article.

A. *The Source of the Problem*

The music industry's predicament is largely of its own making. It results from insistence by those who benefited most from how the industry operated before the Internet arose that the established relationships upon which their past successes were based be preserved as the digital music marketplace develops. Because of this unwillingness to change, the industry has failed to undertake the transformation now needed to prosper.

The major record labels have primarily driven the overall industry response to the challenges presented by advent of the Internet. They are committed to the single-minded pursuit of ways in which to make the Internet safe for the sale of recorded music on terms and conditions that they alone decide. They risked everything on the belief that through a combination of physical means, such as digital rights management

("DRM"), and the force of law, they could contain unauthorized Internet distribution of copies of their recordings.

This has proven not to be possible. In my view, the objective never was attainable. The Internet is fundamentally incompatible with a sales-based revenue model for works of popular culture that can be rendered in digital format. This is especially so for recorded music.

Prior to the Internet, large-scale piracy of physical products, such as records, tapes and CDs required an organizational infrastructure, manufacturing facilities, distribution channels and lots of capital. It was cumbersome at best and vulnerable at every turn to the industry's anti-piracy campaigns. Also in the past the copying of music by individual consumers was limited to the making of analog tape recordings the sound quality of which degraded significantly with each successive generation of copy. Moreover, the means by which consumers were able to distribute these tapes was limited to face-to-face transactions between individuals who handed-off copies to each other. This conduct, while troubling, never imperiled the industry.

The Internet changed this dynamic. Music piracy has become cheap, quick, easy, and ubiquitous. Record labels already have made nearly all recorded music lawfully available in digital format through the sale of CDs. Practically anyone can turn these recordings into digital audio files and make them available on the Internet. Every Internet user, whether or not involved in P2P file-sharing, file-streaming, or social networking, and every webcaster, podcaster, or other digital audio service provider in the world is a potential source of unauthorized mass distribution of recorded music in pristine and unprotected form. In addition, it is now possible to copy one's computer hard drive onto a pendant-sized device and loan that to a friend so that he or she can directly copy the tens of thousands of MP3 files that may be loaded there. From the music industry's perspective, this conduct is neither quaint nor benign.

Through the Internet, the market for sale of individual recordings can be saturated in a moment's time and without payment of any royalties to any music industry rights holders. The dollar amount at risk may well be greater for larger rights holders, but all rights holders, large and small, are impacted to the extent they share in revenue earned from the sale of recordings.

Given this, the industry's principal revenue model, based on the sale of hit recordings at thin margins, can no longer be sustained. Neither law, nor technology, nor moral suasion will change this result.

In practice, the labels' strategy to salvage their sales-based revenue model has compelled them to resist consumer demand for full, unfettered, DRM-free access to music. This has entailed a campaign

of copyright infringement litigation against audio service providers, P2P and social network operators, and individual Internet users. It has also required suppression of free markets for technology products and consumer electronics that may enable the commission of acts of access, copying and distribution for which music industry rights holders have exercised their prerogative under existing law to refuse to grant authorization.

Nevertheless, in 2006, the ratio of illegal to legal song downloads was 40:1, and 20 billion recordings were downloaded that year without authorization.¹

Record label revenue from the sale of recordings has steadily declined year after year.² According to the Recording Industry Association of America (the "RIAA"), CD sales generated \$14.3 billion for 2000.³ If revenue from the sale of CDs had only kept pace with the growth of the U.S. economy, the industry would earn approximately \$17 billion for 2007.⁴ Instead, the industry is expected to report only approximately \$10.3 billion in CD sales for 2007.⁵ In addition, the industry projects that global sales of physical products will drop by 61 percent by 2009.⁶

Record labels are not the only music industry rights holders to be harmed by these lost sales. They also mean lost record royalties for recording artists, and lost mechanical rights royalties for songwriters and music publishers.

Compounding these losses, the labels' strategy has undercut the ability of songwriters and music publishers, on the one hand, and recording artists and record labels themselves, on the other, to benefit financially from Internet streaming performances of their respective musical works and sound recordings. The major labels (and music publishers) fear that

1. Richard Wachman, *Pirates Still Have All The Best Tunes*, THE OBSERVER, May 27, 2007, available at <http://observer.guardian.co.uk/business/story/0,,2088830,00.html> (citing figures provided by IFPI).

2. Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, June 19, 2007, available at http://rollingstone.com/news/story/15137581/the_record_industrys_decline (citing sales figures provided by Nielsen SoundScan).

3. RECORDING INDUSTRY ASS'N OF AMERICA, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA'S 2000 YEAREND STATISTICS, available at <http://76.74.24.142/9C601D59-D955-CE22-6CC0-CF61CC8A829D.pdf> (last visited Dec. 15, 2007).

4. Greg Sandoval, *Radiohead's Web Venture Spooks Wall Street*, CNETNEWS.COM, Nov. 7, 2007, available at http://www.news.com/8301-10784_3-9812275-7.html (last visited on Dec. 15, 2007) (citing estimates prepared by Richard Greenfield, Pali Research (the research division of Pali Capital, Inc.)).

5. *Id.*

6. Alexandra Osorio, *IFPI, Pricewaterhouse Deliver Drizzly CD Sales Forecast*, DIGITAL MUSIC NEWS, June 4, 2007, available at <http://digitalmusicnews.com/stories/060407ifpi/> (last visited on Dec. 9, 2007), citing estimates prepared by IFPI, PricewaterhouseCoopers and Soundbuzz.

streaming will allow consumers to make unauthorized copies of the recordings being transmitted. Accordingly, because preservation of the sales-based revenue model is foremost in their minds, they have sought to suppress Internet streaming altogether, and to hobble, to the greatest extent possible, those audio service providers who are able to obtain authorization to offer streaming of recorded music.

For their part, music publishers, and the mechanical rights and public performance rights licensing organizations (the latter being “PROs”) with which they are affiliated, have pursued a separate but related Internet strategy no less maladapted to success than that of the record labels. They have based their Internet licensing efforts, in large part, on the proposition that every Internet transmission of a musical work involves both the making of a copy of that work as well as a public performance of it; and that separate license fees must be paid for each. For example, music publishers assert a right to collect mechanical license fees for on-demand streaming performances of their songs even though such performances do not result in permanent copies being retained by the end users who listen to them. They also assert a right to collect public performance license fees for transmissions that only result in downloads and which are not audible by end users while being sent.

This effort by music publishers and their licensing representatives to extract multiple license fees for a single transmission of a single song has caused considerable consternation among audio service providers who view it as “double dipping.”⁷ In a March 22, 2007, statement before the House Subcommittee on Courts, the Internet and Intellectual Property, the United States Register of Copyrights observed that, “One of the major frustrations facing online music services today, and what I believe to be the most important policy issue that Congress must address, is the lack of clarity regarding which licenses are required for the transmission of music.”⁸

Over all, the music industry’s Internet strategy has resulted in fewer licensed transmissions of fewer works and slowed the growth of royalties that songwriters, music publishers, recording artists and record labels otherwise may have earned. In Part I of this article, I will discuss in

7. See, e.g., Press Release, Digital Media Ass’n, Digital Media Association Asks Court to Deny Music Publisher Double-Dip on Music, Movie and Television Downloads (Feb. 28, 2007), available at <http://digmedia.org/content/release.cfm?id=7216&content=pr>.

8. *Reforming Section 115 of the Copyright Act for the Digital Age: Hearing before the House Comm. on the Judiciary, Subcomm. on Courts, the Internet and Intellectual Property*, 110th Cong. (2007) (Statement by Marybeth Peters, the Register of Copyrights, United States Copyright Office), available at <http://www.copyright.gov/docs/regstat032207-1.html>.

greater detail the music industry's responses to the challenges presented by the Internet and the negative consequences those responses have had for the industry itself as well as for the other stakeholders in the digital music marketplace.

B. *The Source of the Failure*

The music industry's strategy failed because it was based on a fundamental misapprehension, shared by Congress, regarding the impact the Internet would have on the industry's traditional ways of doing business.

When, in 1995, Congress first granted record labels a limited digital performance right in their sound recordings, it observed that, in light of the rise of digital technologies, then-current law was inadequate to protect the music industry's traditional business model. According to the Senate Judiciary Committee:

“[C]urrent copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenue derived from traditional record sales.”⁹

The goal of the Digital Performance Right in Sound Recordings Act of 1995 (the “DPRSA”)¹⁰ was to “provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies....”¹¹

Congress reaffirmed its understanding and intent regarding the matter when it passed the Digital Millennium Copyright Act of 1998 (the “DMCA”).¹² The House Conference Committee stated that the DMCA was intended to achieve two purposes:

“[F]irst, to further a stated objective of Congress when it passed the... [DPRSA] to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services.”¹³

9. S. REP. NO. 104-128, at 14 (1995).

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

11. S. REP. NO. 104-128, at 15 (1995)(DPRSA S. Rep.).

12. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 1, 112 Stat. 2860 (1998).

13. H.R. REP. NO. 105-796, at 79–80 (1998).

None of these goals has been achieved. The music industry no longer controls the market for distribution of its products; little licensing is going on; and the arrival of new technologies has been stymied.

Prior to the Internet, the reproduction and distribution rights, on the one hand, and the public performance right, on the other, were separate and distinct, exploited in different ways, and subject to different business models and licensing regimes. Digital technology generally, and the Internet in particular, has rendered unenforceable certain of these pre-existing rights and blurred the distinctions between others. Through the Internet, the means of reproduction, distribution and public performance of songs and of the recordings that embody them have been merged into a single act of digital transmission that can be initiated and completed on a massive scale in a matter of moments at practically no cost by anyone and everyone in the world with network access. The industry's strategy to salvage the sales-based revenue model proceeded in opposition to these changed circumstances which it never could have overcome.

The industry's traditional ways of doing business depend on the ability to control how consumers interact with music. However, it is not possible, either directly or indirectly, for the music industry to control the conduct of end users on the Internet. Consumers will continue to download and share whatever music they wish whether or not it is legal to do so. Sources beyond the industry's control will continue to provide consumers with the music that they demand whether or not rights holders approve or are paid. Digital audio services that the music industry does support but which fail to meet consumer demand for full, unfettered, DRM-free access to music will continue to leave the sales-based revenue model vulnerable to widespread infringement by consumers who will not accept less than they already know they can have.

In addition, the industry's existing revenue models depend on the ability to distinguish between which of the many rights in which works have been exploited, how and by whom. However, it is neither practical nor reasonable for the industry to base its licensing regimes on the need to know, in each of what is already tens of billions of instances, whether consumers merely listen to streaming performances, download and retain perfect digital copies of the recordings involved, or both.

The problem does not lie with the Internet. Nor does it lie with technology run amok. Nor with consumers who cannot be made to relinquish their newly-acquired ability to enjoy music when, where and how they want. Rather, the problem lies with the music industry's addiction to the sales-based revenue model. As long as its fortunes are tied to

sales it must continue punitive litigation against consumers and interference in the free markets for technology, consumer electronics, and digital audio services.

C. A Different Approach

Yet, even if the industry were now willing to undertake the transformation needed to meet the changed circumstances imposed on it by the Internet, it could not do so without Congressional assistance.

The rights of music industry rights holders do not arise from the “free market.” Congress, through the Copyright Law, specifies the rights that songwriters, music publishers, recording artists and record labels shall have in their musical works and sound recordings. In turn, the business models that the industry may lawfully pursue are delimited by the nature and scope of the rights Congress has granted it. Accordingly, there cannot be a “free market” solution, as such, to the crisis that grips the digital music marketplace. Congress alone has the authority to induce the change that is needed.

In my view, public policy should strongly support both the right and the opportunity of music industry rights holders to derive ample rewards from their contributions to culture and commerce. By the same token, however, the music industry should not have the right to demand that public policy support its desire to do business in a particular way. What is needed is an alternative to the existing rights structure and corresponding business models for digital transmissions of musical works and sound recordings. I propose such an alternative in Part II of this article.

I suggest that Congress should aggregate the rights of songwriters, music publishers, recording artists and record labels in their respective musical works and sound recordings and create a single right for digital transmissions of recorded music. This digital transmission right would be a new right, not an additional right. It would replace the parties’ now-existing reproduction, public performance and distribution rights for purposes of digital transmissions.

Part II examines the definition and scope of this new right; ownership and the authority of rights holders to grant licenses; the responsibility of rights holders to account to each other for royalties earned; conduct for which a license would be required; and the parties who would be liable for unauthorized transmissions of recorded music. Further, I will discuss the obligations under the digital transmission right of digital audio service providers (including, for example, web site operators and operators of P2P and social networks), and of consumers; and the

impact of infringing uses on the industry's ability to monetize the digital transmission right.

By its terms, the digital transmission right would apply to over-the-Internet transmissions of traditional broadcast radio stations. In Part II, I suggest that the entire operation of traditional broadcasters—both their over-the-air and their over-the-Internet transmissions—should be treated as a single transmitting entity under the digital transmission right; and that the total license fee liability of radio broadcasters should be calculated on the same basis and in the same manner as that of any other digital audio service provider. This would allow US-based recording artists and record labels to benefit from analog broadcast performances of recorded music (as their counterparts elsewhere already do, and as songwriters and music publishers everywhere always have) without the need for Congress to enact a separate analog performance right in sound recordings and without burdening traditional broadcasters with excessive new license fee obligations for their transmissions of recorded music.

In Part III, I provide a plan for implementation of the digital transmission right; a specific means by which to turn this new right into license fees and to turn those license fees into royalty payments for music industry rights holders. For these purposes, I favor a combination of licenses freely negotiated between rights holders and audio service providers, and voluntary collective rights management. In my view, the ideal marketplace would contain at least one collective in each territory whose catalog encompassed all or nearly all recordings and which was authorized to grant worldwide rights at its local rates for all digital transmissions of recorded music that originate in its territory.

Also in Part III I discuss the advantages of voluntary collective rights management; offer suggestions regarding governance, transparency, accountability and regulation of collectives; discuss the relationship of collectives to the individual rights holders who are their members; the relationship to each other of collectives in different territories; the relationship of collectives to digital audio service providers; the basis upon which collectives might license digital transmissions, including transmissions that begin in one territory and end in another; the role of direct licensing by individual rights holders in the context of collective management; the conduct of music use monitoring to support royalty distribution; and the allocation and payment of royalties to rights holders, including royalties payable for transborder transmissions.

I also suggest a basis for calculating license fees under the digital transmission right; though I will not suggest specifically how much license fees should be. That later function would require access to

economic data that I do not have. In any event, the setting of license fees themselves is, quintessentially, the proper subject of negotiations between the interested parties.

Nevertheless, in my view, license fees under the digital transmission right should reflect the *benefit realized* by service providers from their transmissions of recorded music. To this end, I will suggest a structure for calculating this benefit in different circumstances, including, for service providers who charge consumers to receive transmissions of recorded music; those who transmit recorded music in connection with advertising; those who transmit recorded music in connection with the sale of goods or services other than access to music itself; and those who do not charge consumers to receive transmissions of music, do not carry ads, and do not sell goods or services. I will also suggest license fee structures for over-the-air broadcast radio stations and the web sites they operate; for P2P file-sharing networks; and for those instances in which it may be necessary for individual end users to pay license fees under the digital transmission right.

Finally, in Part III I propose a means by which to secure the music industry's financial wellbeing during a limited period of transition from its traditional ways of doing business to the digital transmission right.

I. The Music Industry's Efforts to Preserve the Way Things Were, and Their Consequences

Music was the first killer app among consumer products on the Internet, and the threat to the music industry's traditional ways of doing business—especially its sales-based revenue model—was apparent from the outset. Unfortunately, though music has been available online for more than ten years, the industry has failed to undertake the transformation needed to succeed in the digital music marketplace. Instead, it has sought to preserve the established relationships upon which its past successes were based and to extend its sales-based revenue model well beyond what has turned out to be its effective reach.

To these ends, the industry has experimented with a variety of access restrictions and anti-copying measures. All of these efforts have engendered effective technological countermeasures and news of each successful hack quickly found its way to everyone who cared to know it. Those who create DRM tools for the music industry have proven to be no match for smart kids with computers, many of whom are beyond the easy reach of the law. Moreover, it is not necessarily desirable that the technology used to protect recordings should be beyond the grasp of young people. Nor is it realistic to seek to protect music as if it were

national security information. And while it is generally illegal to circumvent technological measures used to prevent unauthorized access to and copying of copyrighted content,¹⁴ there are circumstances in which circumvention is lawful.¹⁵ In any event, punishing music enthusiasts as criminals has not brought about the principal result that the industry seeks. The landscape is littered with failed DRM schemes and abandoned security initiatives. There is no reason to believe that the result will be different next time, or ever.¹⁶

The industry also has used its substantial lobbying resources in an effort to persuade lawmakers to protect music and other entertainment content according to current and sometimes inapposite legal mechanisms that effectively chill the development and distribution of new products and services.

The industry has pursued legislation banning hardware and software that might undermine the sales-based revenue model by inducing infringement.¹⁷ It has also sought to ban the use of digital audio file formats that cannot be configured to inhibit consumers from downloading music without authorization. It proposed legislation that would prohibit the use of file formats, such as MP3, by audio service providers who wish to avail themselves of the existing—albeit limited—statutory license in the United States for webcasting.¹⁸ Also, in connection with

14. See 17 U.S.C.A. § 1201.

15. The Copyright Office conducts periodic rulemaking proceedings to identify those classes of works to which technological measures have been applied which adversely affect users in their ability to make non-infringing uses of the works in question. In its most recent rulemaking on this subject, the Copyright Office identified six categories of works of which non-infringing uses are, or are likely to be, adversely affected by application of technological measures and regarding which circumvention is permissible. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed.Reg. 68,472 (proposed Nov. 27, 2006)(to be codified at 37 C.F.R. pt. 201), available at <http://www.copyright.gov/fedreg/2006/71fr68472.html>.

16. This is not to say that DRM does not have significant beneficial applications. It can be a valuable tool when used to prevent unauthorized access to digital files containing medical records, business information, private correspondence, and other non-public material. To be sure, DRM can be compromised when applied to these categories of content; but the nature of those who would seek to access such content without authorization, the resulting injury to the interested parties, and the degree of public tolerance of enforcement actions against such wrong-doers, is different in kind than the circumstances involved when the efforts of music industry rights holders to protect individual recordings through DRM are overcome.

17. See Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004).

18. See The Platform Equality and Remedies for Rights Holders in Music Act of 2006, S. 2644, 109th Cong. (2007), which would have amended Title 17 § 114(d)(2)(A) by adding after clause (iii) the additional requirement that qualifying webcasters must

settlement discussions following the new statutory license fee structure for webcasting announced by the Copyright Royalty Board (the “CRB”) on March 2, 2007,¹⁹ the industry announced it would seek to require webcasters to employ DRM to prevent end users from “engaging in ‘streamripping’—turning Internet radio performances into a digital library.”²⁰

The industry has also turned to the courts for assistance in maintaining the status quo as it existed prior to advent of the Internet. At the industry’s urging, the courts have shutdown services that offered consumers new and appealing ways either to acquire or to interact with music. For example, the courts closed Napster when it operated as a centralized P2P file-sharing service with more than 60,000,000 users,²¹ and closed MyMP3.com, a music locker service that provided consumers with online access to their music collections from anywhere in the world.²² In addition, and again at the music industry’s urging, the Supreme Court has upheld the proposition that those who distribute products and promote their use for activities that may infringe copyright are liable for copyright infringement committed by others.²³

As a result, consumer electronics makers, fearing liability, have been slow to offer greater interoperability between the many recording, playback, and communications devices that are available. They have also

employ such transmission technology “that is reasonably available, technologically feasible, and economically reasonable to prevent the making of copies or phonorecords embodying the transmission. . . .”

19. See Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order, 72 Fed. Reg. 24,084, 24,114 (May 1, 2007) (to be codified at 37 C.F.R. pt. 380), available at <http://www.loc.gov/crb/fedreg/2007/72fr24084.pdf>. See also *infra* note 41 and accompanying text.

20. Soundexchange.com, News, SoundExchange Confirms Minimum Fee Offer (July 13, 2007), available at <http://soundexchange.com>.

21. Transcript of Judge Marilyn Hall Patel’s Ruling, *A&M Records, Inc. v. Napster, Inc.* (N.D. Cal. July 26, 2000), available at <http://news.findlaw.com/legalnews/lit/napster/s/patelruling1.html>; John Borland and Cecily Barnes, *Judge Issues Injunction Against Napster*, CNET NEWS.COM, July 26, 2000, available at <http://www.news.com/2100-1023-243698.html>; *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002); see, also, Sam Costello, *Court Orders Napster to Stay Shut*, PC WORLD, March 25, 2002, available at <http://www.pcworld.com/article/id,91144-page,1/article.html>; Janelle Brown, *Napster’s Wake*, SALON.COM, May 17, 2002, http://dir.salon.com/story/tech/feature/2002/05/17/napster_wake/index.html.

22. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349 (S.D.N.Y. 2000); see also Brad King, *RIAA Wins Suit Against MP3.com*, WIRED, April 28, 2000, available at <http://www.wired.com/techbiz/media/news/2000/04/35933>.

23. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005), the Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”

been reluctant to offer new products with next generation capabilities, such as web-enabled home entertainment systems or embedded device recording capabilities. In addition, technology firms and their investors, also fearing liability, have withdrawn support for certain of their own previously released software products or located their operations off-shore. One can only speculate as to the magnitude of the revenue opportunities lost by consumer electronics makers and technology firms because of the continued irresolution of the crisis in digital music licensing.

Moreover, efforts to limit the market to copyright “friendly” files, players, and other devices and systems may raise fair use and free speech concerns depending on whether and how they impede individuals from communicating with each other. Besides, consumers want devices that accept all works, and recordings that play on all devices; they want to enjoy music when, where and how they themselves decide.

The industry also has steadfastly refused to authorize services that offer consumers full, unfettered, DRM-free access to music. To be sure, the industry supports services that offer DRM-encumbered music files; files in less well known formats, such as MPQ; files that are tethered to particular playback devices; files that cannot be shared; files that time-out; files only available while the consumer remains a subscriber of the service from which the music was obtained; or files subject to other use restrictions. Many of these industry-sanctioned services will do well, attracting enthusiastic and loyal users. However, they are, at best, alternatives to the services that consumers demand, not substitutes for them. Because these offerings fall short of responding to consumer demand, they leave the sales-based revenue model vulnerable to widespread infringement by consumers who refuse to accept less than they already know they can have.

In May, 2007, EMI released recordings from its catalog through iTunes in what EMI called “DRM-free formats.”²⁴ According to EMI’s then-serving CEO, Eric Nicoli, “We believe that fans will be excited by the flexibility that DRM-free formats provide, and will see this as an incentive to purchase more of our artists’ music.”²⁵ However, EMI’s offering through iTunes is not “DRM-free.” It relies on the use of

24. Amy Wong, *Apple Debuts Unprotected Songs Online*, AP TECHNOLOGY WRITER, May 30, 2007, available at <http://www.ibtimes.com/articles/20070530/apple-itunes-plus.htm>.

25. Press Release, EMI Group, EMI Music Launches DRM-Free Superior Sound Quality Downloads Across Its Entire Digital Repertoire (April 2, 2007), available at <http://www.emigroup.com/Press/2007/press18.htm>.

watermarking technology to encode each music file with information that personally identifies the consumer who purchases it.²⁶

EMI's use of watermarking does not signal abandonment of DRM. It merely indicates a shift in strategy regarding its use. Gone are EMI's efforts to restrict access to its recordings by physical means. Instead, if EMI were to discover that its watermarked files had been distributed over the Internet without authorization, it could use the personally identifying information contained in them to locate and sue the consumer who purchased the particular files from iTunes (or from whatever other online music retailers through which EMI may make its recordings available).

I doubt that this use of watermarking will reverse the erosion of sales of EMI's recordings. Eventually, the means by which to delete the personally identifying information from these music files will be publicly available on the Internet; as will the EMI recordings themselves, truly free of DRM. In any event, what will it benefit EMI, or any other record label, to obtain judgment in an infringement action against an individual from whom it will not be possible to recover in damages anything approaching the loss suffered because of the infringement? If the expected benefit is deterrence of other wrong-doers, that expectation likely will go equally as unfulfilled as it has with the industry's ongoing infringement litigation campaign against individual users of P2P file-sharing networks.

As of this writing, EMI has yet to release specific data regarding its sales of watermarked files through iTunes. Nevertheless, on August 6, 2007, EMI reported that revenue had fallen 5.1 percent during the preceding 18-week period compared to the same period in 2006.²⁷ This decline included a 26 percent increase in revenue from digital sales but a 19.8 percent decline in revenue from sales of physical products.²⁸

Universal Music Group also has announced that it will "test" the sale of its music in "DRM-free" formats, albeit not through iTunes.²⁹ It is unclear at this time, however, whether Universal will also rely on

26. Greg Sandoval, *Apple Criticized for Embedding Names, E-Mails in Songs*, ZDNET NEWS, June 2, 2007, http://news.zdnet.com/2100-9595_22-6188337.html?part=rss&tagg=feed&subj=zdnm.

27. Press Release, EMI Group, Interim Management Statement for the 18 Week Period from 1 April to 6 August 2007 (Aug. 6, 2007), available at <http://www.emigroup.com/Press/2007/press55.htm>.

28. *Id.*

29. Louis Hau, *Universal To Set Its Music Free*, FORBES, Aug. 10, 2007, available at http://forbes.com/business/2007/08/10/universal-music-download-biz-media-cx_lh_0810bizuniversal.html; *Universal Music Takes on iTunes*, BUSINESSWEEK.COM, Oct. 22, 2007, http://www.businessweek.com/magazine/content/07_43/b4055048.htm?chan=search.

watermarking technology when its music is sold without physical access restrictions.³⁰

By its refusal to meet consumer demand, the music industry has relegated consumers to unlicensed services. In turn, the industry has used technological measures in an effort to disrupt these services. For example, it seeds them with adware and spyware.³¹ It also engages in a practice known as “spoofing” by which consumers who search P2P networks for music files have instead been sent corrupted files that may damage their computers.³²

The industry has also undertaken an aggressive campaign of infringement litigation against consumers, already having sued more than 20,000 of its own customers, seeking ruinous damages for conduct occurring in the privacy of people’s homes and dorm rooms.³³ In connection with this effort, the industry has sought legislation that would authorize the Department of Justice to initiate civil actions for copyright infringement against those involved in P2P file-sharing or other forms of unauthorized distribution of recorded music with a value of greater than \$1,000.³⁴ It also has sought legislation that would require colleges and universities that participate in federal financial aid programs to act as enforcers on the music industry’s behalf.³⁵

30. One commentator at WIRED noted that “MP3 downloads of Universal recordings . . . do contain a watermark, presumably so Universal can track how many end up on peer-to-peer networks.” Seth Mnookin, *Universal’s CEO Once Called iPod Users Thieves. Now He’s Giving Songs Away*, WIRED, Nov. 27, 2007, available at http://www.wired.com/entertainment/music/magazine/15-12/mf_morris?currentPage=1.

31. Andrew Brandt and Eric Dahl, *Risk Your PC’s Health for a Song?*, PC WORLD.COM, December 29, 2004, <http://www.peworld.com/article/id,119016-page,1/article.html>.

32. Andrew Ross Sorkin, *Software Bullet is Sought to Kill Music Piracy*, THE NEW YORK TIMES, May 4, 2003, available at <http://query.nytimes.com/gst/fullpage.html?sec=technology&res=9FOCE1D7123CF937A35756C0A9659C8B63>; John Borland, *Start-Ups Try To Dupe File-Swappers*, CNETNEWS.COM, July 15, 2002, <http://news.com.com/2100-1023-943883.html>; *Record Industry ‘Spoofs’ Net Pirates*, BBC NEWS, July 4, 2002, available at http://news.bbc.co.uk/1/hi/entertainment/new_media/2093931.stm.

33. See, generally Ray Beckerman, “Recording Industry vs. The People,” <http://info.riaalawsuits.us/> (last visited Oct. 30, 2007) (Web site maintained by Ray Beckerman, a New York City-based attorney active in representing consumers in copyright infringement actions brought against them by the Recording Industry Association of America (“RIAA”)). See also *id.*, <http://info.riaalawsuits.us/documents.htm> (last visited Oct. 30, 2007) (Table of certain of these cases, including links to pleadings and other documents).

34. Intellectual Property Enforcement Act of 2007, S. 2317, 110th Cong. (introduced Nov. 7, 2007); see also Declan McCullagh, *Senators Want Justice Department To Sue P2P Pirates*, CNET NEWS.COM, Nov. 7, 2007, http://www.news.com/8301-13578_3-9813358-38.html.

35. College Opportunity and Affordability Act of 2007, H.R. 4137, 110th Cong., §§ 487 (Institutional and Financial Assistance Information for Students) and 494 (Campus-Based Digital Theft Prevention) (introduced Nov. 9, 2007).

Another element of the industry's strategy has been its efforts to suppress Internet streaming of recorded music. The industry fears that webcasting will allow consumers to make unauthorized digital copies of recordings if they know—or are reasonably able to anticipate—when particular recordings will be streamed. Accordingly, the industry, led by the major record labels, has sought to suppress Internet streaming altogether, and to hobble, to the greatest extent possible, those audio service providers who are able to obtain the authorization needed to offer streaming lawfully.

With the exception of services that qualify for a statutory license, the Copyright Law, revised as urged by the recording industry, grants record labels the exclusive right to authorize—or to refuse to authorize—the activities of all digital audio services that offer Internet streaming of recorded music. In combination with the exclusive right to distribute copies of their recordings over the Internet, the right to control streaming effectively allows the major labels to operate as gatekeepers of licensed Internet transmissions of recorded music within reach of United States law.

The principal exception to this broad grant of rights relates to that limited class of webcasters who qualify for a statutory license. However, in order to qualify, webcasters must comply with certain business model limitations, content restrictions, and user-interface requirements. For example, they may not offer interactive programming by which consumers can request that particular recordings be performed or that music programming be specially created for them;³⁶ may not offer programming dedicated to particular artists, or containing more than a few songs by the same artist or from the same recording;³⁷ may not promote their services by publishing program guides or by making announcements of the recordings they will stream, other than immediately prior to the transmission itself;³⁸ and may not offer archived programs shorter than five hours duration.³⁹ On the other hand, in order to promote the sale of recordings on behalf of the record labels whose music they stream, qualifying webcasters are required to identify in textual data to

36. In order to qualify as an “eligible nonsubscription transmission” service, a webcaster’s transmissions must be, *inter alia*, noninteractive. 17 U.S.C.A § 114(j)(6) (West 2005, Supp. 2007); *see, also*, H.R. REP. No. 105-796, at 87–88 (1998) (Conf. Rep.).

37. 17 U.S.C.A §§ 114(d)(2)(C)(i) and 114(j)(13) (West 2005 & Supp. 2007).

38. *Id.* § 114 (d)(2)(C)(ii) (West 2005, Supp. 2007); *see, also*, H.R. REP. No. 105-796, at 81–82 (1998) (Conf. Rep.).

39. 17 U.S.C.A §§ 114 (d)(2)(C)(iii), 114(j)(2) (West 2005, Supp. 2007); *see, also*, H.R. REP. No. 105-796, at 87–88 (1998) (Conf. Rep.).

be displayed on the end user's computer screen the title of the recording being streamed and the name of the recording artist.⁴⁰ This interference with webcasting has no counterpart in the music industry's relationship with non-digital audio program services. It diminishes webcasting unnecessarily, rendering it less compelling in many ways than over-the-air broadcast radio.

The record labels do not intend to allow webcasting to thrive; they have used the rate setting process as a means to throttle it. The expectation is that the increase in statutory license fees for webcasting announced by the CRB⁴¹—which measures between 300 percent and 1,200 percent over prior fees—will cause large numbers of existing webcasters to shutter their operations.⁴² In discussing the impact of the CRB's decision on the continued viability of webcasting, John Simson, Director of SoundExchange (which represents record labels in rate setting proceedings under the statutory license), asked rhetorically: "Is 10,000 stations the right number? Does having so many Web stations disperse the market so much that it hurts the artist? What's the right number? Is it 5,000? Is it less?"⁴³

Contrary to the implications of Mr. Simson's statement, limiting the number of webcasters who qualify for the statutory license is especially

40. 17 U.S.C.A. § 114(d)(2)(c)(ix) (West 2005, Supp. 2007); *see also* H.R. REP. NO. 105-796, at 84 (1998) (Conf. Rep.).

41. The CRB imposed a per-song, per-performance, per-listener license fee for all digital audio transmissions of copyrighted sound recordings by webcasters. The rate rises from \$.0008 per-performance for 2006 to \$.0019 per-performance for 2010. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order, 72 Fed.Reg. 24,084, 24,111 (May 1, 2007)(to be codified at 37 C.F.R. pt. 380), *available at* <http://www.loc.gov/crb/fedreg/2007/72fr24084.pdf>. In making this determination, the CRB noted that the applicable statute, 17 U.S.C. § 114(f)(2)(B), "directs us 'to establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace.' . . . Accordingly, the [CRB] Judges construe the statutory reference to rates . . . as the rates to which, absent special circumstances, most willing buyers and willing sellers would agree." *Id.*, 72 Fed.Reg. at 24,087. The CRB also determined that "a minimum fee of an annual non-refundable, but recoupable \$500 minimum per channel or station payable in advance is reasonable over the term of this license." *Id.*, 72 Fed.Reg. at 24,097.

42. Evan Moore, *Online Radio Stations Unhappy About Royalty Rate Hike*, CNSNEWS.COM, June 19, 2007, <http://www.cnsnews.com/ViewCulture.asp?Page=/Culture/archive/200706/CUL20070619b.html>; *see also* SaveNetRadio.org, <http://www.savenetradio.org/about/index.html> (last visited Dec. 9, 2007); Eliot Van Buskirk, *Royalty Hike Panics Webcasters*, WIRED, March 6, 2007, *available at* <http://www.wired.com/entertainment/music/news/2007/03/72879>; Daniel McSwain, *Webcast Royalty Rate Decision Announced*, RADIO AND INTERNET NEWS LETTER, Mar. 2, 2007, *available at* <http://www.kurthanson.com/archive/news/030207/index.shtml>.

43. *Webcasters and Rising Royalty Fees: Paying the Price for Innovation?*, WASHINGTONPOST.COM, March 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/16/AR2007031600514_pf.html.

injurious to recording artists. It impairs their ability to earn revenue from streaming performances of their sound recordings. Under the webcasting statutory license, recording artists receive a mandatory 50 percent share of all webcasting royalties available for distribution.⁴⁴ However, if a webcaster does not qualify for the statutory license yet desires to continue to operate lawfully, it must enter into direct licenses with each record label that owns a recording it will transmit (assuming, of course, that the labels in question are willing to issue such licenses). When webcasters enter into direct licenses with record labels, the recording artists and other musicians involved do not receive the mandatory 50 percent share of royalties they otherwise would have received under the statutory license. Rather, they receive whatever—likely much lower—amount that is provided for in their agreements with their record labels.⁴⁵

In addition, limiting the number of webcasters who qualify for the statutory license also limits the number of potential licensees for the PROs. This will impair the ability of songwriters and music publishers to earn revenue from Internet streaming performances of their copyrighted musical works.

In response to the CRB's decision, legislation was introduced in the House⁴⁶ and in the Senate⁴⁷ that would nullify the CRB's determination,⁴⁸ amend the standard to be applied by the CRB in setting rates for webcasters,⁴⁹ and substitute a transitional rate structure by which

44. 17 U.S.C.A. §§ 114(d)(2)(C)(g)(2)(B), (C), (D); *see also* Digital Performance Right in Sound Recordings Act of 1995, S. REP. No. 104-128, at 31 (1995).

45. *See* Posting of David Oxenford, A Tale of Two Press Releases—Who Is A Musician To Believe?, to Broadcast Law Blog (March 28, 2007), <http://www.broadcastlawblog.com/archives/internet-radio-a-tale-of-two-press-releases-who-is-a-musician-to-believe.html>.

46. Internet Radio Equality Act, H.R. 2060, 110th Cong. (introduced April 26, 2007); *see, also*, Daniel McSwain, *Internet Radio Equality Act Introduced in House*, RADIO AND INTERNET NEWS LETTER, April 26, 2007, *available at* <http://kurthanson.com/archive/news/042607b/index.shtml>.

47. Internet Radio Equality Act of 2007, S. 1353, 110th Cong. (introduced May 10, 2007).

48. *Id.*, Internet Radio Equality Act of 2007 at § 2.

49. In particular, the legislation would instruct the CRB to “establish rates and terms in accordance with the objectives set forth in section 801(b)(1).” *Id.*, § 3(a). In turn, 17 U.S.C.A. § 801(b)(1) provides that rates shall be calculated to achieve the following objectives: “(A) To maximize the availability of creative works to the public. (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions. (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication. (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.”

webcasters would be permitted, at their own election, to pay fees calculated at a rate of either thirty-three cents (\$0.33) per-listener hour or 7.5 percent of revenue.⁵⁰ Senators Sam Brownback (R-KS) and Ron Wyden (D-OR), explained that they co-sponsored the Internet Radio Equality Act in the Senate:

“[B]ecause the Copyright Royalty Board’s decision to dramatically increase royalties and apply what we see as unfounded minimum rates threatens to devastate the Internet radio industry. The fact is online radio services do not have enough revenue to support what will amount to unprecedented royalties. The \$500 per channel minimum fee alone will deliver an over \$1 billion annual windfall to record companies, a windfall that is not justified by any business or equity considerations.”⁵¹

Senators Brownback and Wyden also commented on the overall importance of webcasting:

“Internet radio is crucial to many segments of business and culture—to small and large webcasters building businesses; to independent artists trying to make it in a crowded industry; and to millions of music fans searching for new diverse music that corporate radio generally does not offer. Innovation and creativity are the winners if Internet radio flourishes, and are the losers if Internet radio stagnates.”⁵²

And, finally, in their Joint Statement, Senators Brownback and Wyden also expressed concern regarding the record labels efforts to use settlement negotiations under the statutory license as a means to impose mandatory DRM requirements on webcasters:

“Now we are hearing that the recording industry is attempting to use this aspect of the CRB decision to force webcasters to adopt recording restrictions far in excess of the controls that have governed broadcast content for decades. While we strongly support a negotiated solution, we will not allow the minimum fee issue to be used to force an agreement that mandates DRM technology and fails to respect the established principles of fair use and consumer rights.”⁵³

As of this writing, the future of webcasting remains uncertain.⁵⁴ On August 24, 2007, SoundExchange, representing the record labels, and the Digital Media Association (“DiMA”⁵⁵), representing the largest commercial webcasters, reached a limited agreement regarding the

50. *Id.*, § 3(b).

51. Press Release, Senators Sam Brownback & Ron Wyden, Brownback, Wyden Comment on Copyright Royalty Board’s Decision: Call CRB’s Rates for Webcasters “Unfounded” (Aug. 2, 2007), available at <http://brownback.senate.gov/pressapp/record.cfm?id=280375>.

52. *Id.*

53. *Id.*

54. See, Steven Gordon, *Who’ll Win the Webcasting War?*, THE REGISTER.COM, Aug. 16, 2007, available at http://www.theregister.co.uk/2007/08/16/steve_gordon_webcasting_stalemate/ (last visited on Dec. 9, 2007).

55. See generally <http://www.digmedia.org/>.

minimum fee to be paid under the CRB's new rate structure. According to one report, "the maximum a service would have to pay is \$50,000 under a provision requiring a \$500 per station advance for royalties. In other words, large Webcasters would not pay more than \$50,000 for the advance against royalties, no matter how many stations they own."⁵⁶ On the other hand, this agreement on minimum per-station fees would not affect the overall license fee increases set by the CRB.⁵⁷

Statutory relief from excessive license fees would help many webcasters to stay in operation. But that alone is only a stop-gap measure. It misses the point of the music industry's strategy regarding Internet streaming of recorded music: That webcasting must be tightly circumscribed because through it consumers can create digital libraries of the recordings that are streamed and thus subvert the music industry's sales-based revenue model.

The industry's treatment of webcasters exemplifies its approach to the licensing of digital audio services generally. By and large, rights holders are unwilling to offer licenses for digital uses of music that do not map to an identifiable right and associated business model in the analog world with which rights holders are comfortably familiar. Audio service providers who wish to offer music in ways that do not comply with the business model limitations, program content restrictions, and

56. K.C. Jones, *SoundExchange Inks Royalty Deal with Large Webcasters*, INFORMATION WEEK, August 24, 2007, available at <http://www.informationweek.com/internet/showArticle.jhtml?articleID=201802212>.

57. Daniel McSwain, *DiMA, SoundExchange Strike Deal to Cap Per-Channel Minimum Fee*, RADIO AND INTERNET NEWSLETTER, August 24, 2007, available at <http://kurthanson.com/archive/news/082407/index.shtml>.

Recently, SoundExchange and Music Choice, a digital cable music service, reached an agreement, under 17 U.S.C.A. §§ 114(f)(1)(A) and (B), on rates and terms for the statutory license applicable to digital audio subscription services that had commenced operation prior to 1998 (of which, Music Choice is the last remaining in operation). Pursuant to that agreement, for the period 2008 through 2011, the agreed upon license fee is 7.25 percent of residential subscriber revenue. For 2012, the fee rises to 7.5 percent of revenue. Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services: Notice of Proposed Rulemaking, 72 Fed. Reg. 61,585 (Oct. 31, 2007) (to be codified at 37 C.F.R. pt. 382), available at www.loc.gov/crb/fedreg/2007/72fr61585.pdf (last visited on Dec. 12, 2007). This settlement prompted Representatives Jay Inslee (D-WA) and Donald Manzullo (R-IL), co-sponsors of the Internet Radio Equality Act in the House of Representatives, to write a letter to John Simson, Director of SoundExchange, dated November 7, 2007. In their letter, the two Congressmen congratulated Mr. Simson on the voluntary agreement between SoundExchange and Music Choice. However, they also expressed confusion "about why SoundExchange has so vehemently opposed [the 7.5 percent rate suggested in the Internet Radio Equality Act] while simultaneously agreeing to nearly identical royalty rates with cable radio." Letter from Representatives Jay Inslee & Donald Manzullo, U.S. Congress to John Simson, Executive Director, SoundExchange (Nov. 7, 2007) (on file with author).

user interface requirements necessary to qualify for the statutory license may find it nearly impossible to obtain authorization for their services.

Moreover, even when rights holders are willing to discuss licenses for new configurations of use, negotiations tend to be protracted. And if a license is granted, it is likely to be strictly limited to the business model and transmission technology in use by the service provider at the time the agreement was made. This limits the ability of service providers to meet ever-changing consumer demand. Instead, they are authorized only to offer what consumers wanted yesterday.

In addition, the license fees demanded by music industry rights holders from service providers that offer industry-sanctioned “new business models” are so high as to limit the number of services that can possibly participate in the lawful marketplace. For example, it has been reported that Lala.com, a service that offers users free, on-demand streaming of recordings from two of the four major record labels, expects to pay in excess of \$160,000,000 in music rights license fees over the course of the site’s first two years of operation.⁵⁸ Lala.com believes it will recoup its music licensing costs through sales of recordings.⁵⁹ Another example is the agreement between Universal Music Group and Imeem.com, a service that offers advertiser-supported streaming.⁶⁰ The terms of this agreement have not been made public. However, an article at LATimes.com attributes to “a person familiar with the arrangement” the comment that Imeem will pay a minimum amount per song played even if no ads are viewed;⁶¹ and attributes to unnamed Imeem executives the statement that Imeem will pay approximately 50 percent of its advertising revenue to music industry rights holders.⁶²

When rights holders refuse to make licenses available for digital uses of their works, or only authorize activities of a very limited scope, or are unable to make licenses available in a timely manner, or charge license fees that are beyond the means of all but the most highly financed service providers, compliance is only possible by those who either forego the use of copyrighted music or cease doing business altogether. This

58. Cliff Kuang, *Free Music Now! Lala.com's Plan to Give Songs Away Could Upend the Industry*, WIRED, Oct. 23, 2007, available at http://www.wired.com/entertainment/music/magazine/15-11/ff_lala.

59. *Id.*

60. See, Joseph Menn, *Universal Music Group, Imeem Strike Deal*, LATIMES.COM, Dec. 10, 2007, available at <http://www.latimes.com/technology/la-fi-universal10dec10.1.5516678.story?coll=la-head>; Rob Kelley, *Making Music Free (and Legal)*, CNNMONEY.COM, Dec. 10, 2007, <http://money.cnn.com/2007/12/10/technology/imeem/index.htm>.

61. Menn, *supra* note 60.

62. *Id.*

choice among equally unappealing alternatives has fostered a culture in which many service providers consider it the better business practice to ask forgiveness from music industry rights holders for infringement rather than to seek permission from them in advance of launching a new service.

The Internet and related technologies have rendered certain traditional rights in musical works and sound recordings unenforceable and blurred the distinctions between others. This has injected uncertainty into the digital music marketplace that the industry has sought to turn to its advantage.

For example, music publishers and the public performance and mechanical rights licensing organizations they control demand double payments where only a single transmission of a work is involved. Both a mechanical and a public performance license fee are charged even where the only “copies” made reside on the transmission servers or are otherwise transitory and incidental to transmissions that are nothing more than performances, such as in on-demand streaming. Both fees are also charged even if the music is transmitted only for downloading and is not audible while being sent, such as in podcasting. Service providers have difficulty navigating this confusing and counterintuitive paradigm, and in accepting the industry’s rationale for the double payments it demands.

In April, 2007, in a rate setting proceeding brought under the anti-trust consent decree that governs ASCAP’s operations, the United States District Court for the Southern District of New York held that there is no public performance in an Internet transmission that is nothing more than a download of the musical work being transmitted.⁶³ Under this decision, the PROs, which are only chartered to license public performances of copyrighted musical works, would be precluded from licensing audio service providers to the extent that they offer downloads. The authority to license downloading, which implicates the reproduction and distribution rights—but not the public performance right—in the musical works involved has been reserved by music publishers for themselves.

The District Court’s decision highlights the manner in which songwriters and composers would be disadvantaged by continuation of the traditional distinction between the public performance and the mechanical rights in musical works. The court’s decision will impair the ability of songwriters and composers to earn royalties from digital

63. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F.Supp.2d 438 (S.D.N.Y. 2007).

transmissions of their musical works. For example, services may arise that offer consumers a full day of musical programming to be downloaded to a home entertainment system for later playback. If this programming were streamed instead of downloaded, songwriters who belong to PROs would receive 50 percent of the public performance royalties available for distribution. If, however, the programming is transmitted as a download and not as a streaming performance, songwriters will receive whatever—likely lesser—amount that is provided for in their agreements with their music publishers for the reproductions and distributions involved.

Finally, music industry rights holders also have been unable to grant licenses that are co-extensive with the worldwide reach of Internet transmissions.

The music industry operates globally, but rights in musical works and sound recordings are administered by local interests on a territory-by-territory basis. For example, music publishers enter into agreements with publishers in other countries, called subpublishers, who, in exchange for a percentage of the revenue collected, license rights in the publisher's songs in the subpublisher's territory. Similarly, record labels enter into agreements with distributors in other countries for the sale or other exploitation of the label's recordings in the distributor's territory. For their part, PROs throughout the world are linked through a network of reciprocal administration agreements.⁶⁴ These authorize each PRO to license public performances in its own territory of the musical works in the catalogs of all the PROs with which it is affiliated.

This structure provides a consistent basis by which the industry administers rights in musical works and sound recordings for uses that begin and end in a single territory. In those instances, a license from a local entity granting domestic reproduction, distribution or public performance rights, as the case may be, is sufficient to authorize the activities in question. This structure also establishes the principle that the party who owns local rights in a work for the territory in which the licensed use takes place is entitled to receive whatever royalties are generated by that use.

64. See, e.g., <http://www.ascap.com/about/affiliated.html> (list of PROs in 91 territories with which ASCAP is affiliated through reciprocal administration agreements) (last visited Dec. 9, 2007); <http://www.bmi.com/international/entry/C2257> (list of PROs in other territories with which BMI is affiliated) (last visited Dec. 9, 2007); <http://cisac.org/CisacPortal/afficherArticles.do?menu=main&item=tab2&store=true> (last visited Dec. 9, 2007).

Internet transmissions, on the other hand, are worldwide in origin and in reach. Every Internet transmission brings with it the possibility of worldwide liability. Internet transmissions are infringing if not authorized for the territory from which they originate. They also may be infringing if not authorized for the territories in which they are received. Audio service providers, whose transmissions traverse the global communications network, need licenses that grant worldwide rights. These are unavailable, however, because rights holders have been unable to resolve their conflicting claims regarding transborder transmissions.

For example, rights holders for the territory from which an Internet transmission originates and those for the territory in which it is received may both assert that all of the legally cognizable acts involved take place in their own territory. Accordingly, both may demand authority to license the transborder transmission in question. And regardless which party issues the license for the transmission, rights holders in the territory of origin and those in the territory of reception may both insist that the license fees prevailing in their respective territories should be charged.

This is problematic for service providers. As a practical matter, it is Internet users, not audio service providers, who determine the territory in which Internet transmissions will be received. Thus, if the license fees prevailing in the territory of reception are used, service providers will be unable to develop well-informed business strategies because they will be unable accurately to predict their music license fee costs. And while service providers can employ Internet protocol filtering to inhibit users located in particular territories from accessing their transmissions, a license requirement mandating the use of such filtering would deny service providers access to the worldwide market that the Internet otherwise affords them. This, in turn, would reduce the revenue base from which these licensed service providers could pay music industry license fees. In any event, mandating the use of Internet protocol filtering would not protect music industry rights holders from losses occasioned by unauthorized transborder transmissions of recorded music by services that operate without license agreements.

A further complicating factor had been the agreement among many PROs that they each would retain the right to license public performances on the Internet rendered by service providers whose economic residence was in the PRO's territory regardless of the territory from which the service's transmissions originate or in which those transmissions are received (the "Santiago Agreement"). A similar agreement was adopted by the world's affiliated mechanical rights licensing organizations (the "Barcelona Agreement"). These agreements were suspended as of

December 31, 2004, following the opening of an investigation by the European Commission as to whether they violated EC competition law.⁶⁵ Accordingly, other than on a work-by-work or catalog-by-catalog basis, it is not possible at this time to obtain worldwide rights from a single source for Internet transmissions of copyrighted musical works.⁶⁶

In April, 2007, the IFPI announced that it and various European-based sound recording rights collecting societies had put into place a framework for collective licensing of sound recordings “for certain streaming and podcast services across several territories.”⁶⁷ According to the IFPI press release, “Until now, obtaining cross-border online rights licenses for these services has involved dealing with each territory separately or approaching the rights holders directly. This new framework will offer users the alternative to obtain a license for broad repertoire and for all the participating territories from a single collecting society.”⁶⁸ Though IFPI’s press release fails to say so, the licenses to be offered under this new arrangement contain business model limitations, program content restrictions and user interface requirements similar to those imposed by the statutory license for webcasting in the United States.⁶⁹ Moreover, the license fees to be charged will be those that prevail in the territories in which each licensed Internet transmission is received.⁷⁰

The effect of the music industry’s position with respect to transborder transmissions of musical works and sound recordings is to compel service providers either to enter into separate agreements with the rights holders of each work in every territory; to enter into agreements with rights holders in their own territory granting worldwide rights but with payment of license fees dependent on the whims of rights holders in each territory in which the service’s transmissions are received; or

65. European Commission Opens Proceeding into Collective Licensing of Music Copyrights for Online Use, IP/05/586, May 3, 2004, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586&format=HTML&aged=0&language=EN&guiLanguage=en>.

66. See EurActiv.com Collecting Societies Split Over Online Music Royalties (July 20, 2007), <http://www.euractiv.com/en/infosociety/collecting-societies-split-online-music-royalties/article-165739> (updated July 24, 2007) (discussion of recent developments among European PROs involving rights administration for transborder Internet transmissions of musical works).

67. Press Release, IFPI, Major Step Forward in Cross Border Music Licensing Regime (Apr. 27, 2007), available at http://www.ifpi.org/content/section_news/20070427.html.

68. *Id.*

69. Telephone interview with an IFPI Spokesperson, in London, England, Aug. 16, 2007.

70. *Id.*

to enter into agreements with rights holders in their own territory for domestic transmission rights only and risk an unknown quantum of infringement liability under foreign legal regimes.

* * * * *

Music's success is also its undoing; at least as far as the industry's traditional business models are concerned. People regard music differently than they do other forms of cultural content. Music is portable. Music is ubiquitous. Music appears to be free. Everyone is a music consumer, whether they buy CDs, go dancing or to concerts, listen to radio and watch television, or network online while playing a previously downloaded podcast. People develop an ownership interest in the music they most like to hear. "They're playing *our* song," is a heartfelt refrain. The psychological effect on consumers of this sense of personal entitlement to other people's property should not be overlooked.

The market forces at work at the intersection of the Internet and the music industry's traditional business models are wildly asymmetrical and to the disadvantage of music industry rights holders. The network is everywhere and music is everywhere a part of it. Thus, despite the industry's efforts, the unauthorized digital distribution of recorded music continues unabated; P2P file- and stream-sharing networks proliferate; and new means of mass distribution, such as podcasting, blogging, RSS feeds (really simple syndication), and social networking services have arisen. If anything, the industry's efforts to date have resulted in fewer licensed transmissions of fewer recordings and slowed the growth of royalties that songwriters, music publishers, recording artists, and record labels otherwise may have earned.

In 1998, the year that the Digital Millennium Copyright Act became law,⁷¹ there were five major record labels in operation: Sony Music, BMG, EMI Recorded Music, Warner Music Group, and Universal Music Group. In 2003, Sony and BMG merged to form SBMG.⁷² In August, 2007, Terra Firma, a private equity firm, succeeded in a takeover bid for EMI.⁷³

71. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 1, 112 Stat. 2860 (1998).

72. Reuters, *Sony, BMG Agree on Music Merger*, CNN INTERNATIONAL.COM, November 7, 2003, <http://edition.cnn.com/2003/BUSINESS/11/06/sony.bmg.reut/>.

73. Associated Press, *Private Equity Firm Succeeds in Takeover Bid for Music Group EMI*, INTERNATIONAL HERALD TRIBUNE, August 1, 2007, available at <http://www.iht.com/articles/ap/2007/08/01/business/EU-FIN-COM-Britain-EMI.php>.

In May, 2007, Pali Research in New York reaffirmed a sell rating it had previously placed on the stock of Warner Music Group.⁷⁴ The Pali analysts reported that:

“[T]he music business is eroding faster than [record label] management expected and that recent cost cutting measures are dire measures to mitigate the pain of severe and completely unanticipated revenue declines. The recorded music business is in ‘freefall’ and the risk going forward is that the relative stability of music publishing revenues begins to crack. . . .”⁷⁵

One factor that may have favored the music industry has been the relatively slow deployment of broadband connections for the consumer market. Nevertheless, the rate at which consumers worldwide are subscribing to broadband has increased dramatically.⁷⁶ Of the approximately 1.1 billion people with Internet access, almost one-third use one or another type of broadband connection.⁷⁷ With a broadband connection instead of telephone dial-up access to the Internet, consumers may be inclined to connect more often and stay connected longer per session. Moreover, the faster their connection to the Internet the more quickly consumers can download music and pass it along to others. The worst outcome for the music industry would be extensive worldwide broadband penetration before a full, fair and feasible solution for the digital music marketplace is in place. The explosive growth of WiFi and web-enabled mobile communication devices highlights how urgently such a solution is needed.

II. A Newly-Created Right, Specific to the Digital Music Marketplace, is Needed for Musical Works and Sound Recordings

An alternative to the existing rights structure and corresponding business models is needed for digital transmissions of musical works and sound recordings.

I suggest this:

A. Definition and Scope

Congress should aggregate the rights of songwriters, music publishers, recording artists and record labels in their respective musical works and sound recordings and create a single right for digital transmissions

74. RICHARD GREENFIELD & MARK SMALDON, WARNER MUSIC GROUP (WGM)—COURT DOCUMENTS POINT TO MGMT’S OVERSTATED INDUSTRY FORECASTING; SELL (Pali Research, May 23, 2007).

75. *Id.*

76. Richard Wray, *Broadband Spreads Across Globe*, GUARDIAN UNLIMITED, June 13, 2007, available at <http://business.guardian.co.uk/story/0,,2102304,00.html>.

77. *Id.*

of recorded music. I call this right the “digital transmission right.” It could just as well be called the “X” right.

The digital transmission right would be a new right, not an additional right. It would replace the parties’ now-existing reproduction, public performance and distribution rights.⁷⁸ These would no longer have separate or independent existence for purposes of digital transmissions of sound recordings or the musical works embodied in them.

Under the digital transmission right the only acts that would require a license, or payment of a license fee, would be the digital transmission, retransmission, or further transmission of recorded music.⁷⁹ Every such transmission that is not subject to exemption would require authorization in order to be lawful. This does not mean that separate payment would be due for each transmission of each recording; only that, regardless how license fees may be calculated, all non-exempt transmissions, retransmissions, and further transmissions would require authorization.

Licenses under the digital transmission right would be made available unconstrained by the concerns that have driven the music industry’s failed-campaign to salvage its sales-based revenue model. The determinative consideration would be whether or not recordings had been digitally transmitted, not whether particular transmissions resulted in sales, are more or less likely to promote sales, or may cause sales of recordings to be lost. When digital transmissions occur, licenses will be needed; and, when needed, licenses should be made available free of the limitations and restrictions that have characterized the industry’s licensing efforts to date. Under the digital transmission right, all that will matter is the rate of compliance and the price of a license.

Accordingly, licenses under the digital transmission right would be made available without regard to whether recordings are transmitted for streaming, or downloading, or by some other means not yet devised; whether music programming is interactive or non-interactive, or contains this, that or another recording; whether the service that provides the transmission accepts or does not accept user-generated content, frames other sites, or facilitates the embedding on its site of content transmitted from another site or service. It will not matter if the service is advertiser supported, employs a subscription model, charges users on a per-listen or per-download basis, or has no revenue at all. How many copies, if any, that are made in the course of transmissions (including any server copies, or ephemeral, transitory or buffer copies that are necessary to effect a transmission), the

78. 17 U.S.C.A. § 106 (West 2005).

79. The digital transmission right could also be applied to analog transmissions of over-the-air broadcast radio stations. *See infra* Part II.H.

type of transmission technology used, and the file format in which recordings are transmitted will not be of concern. The presence or absence of any of these factors will not affect the availability of a license.

B. *Ownership*

Ownership of the digital transmission right in each recording will be held jointly by the songwriter(s), music publisher(s), recording artist(s) and record label(s) who contribute to it. Each of these parties will be treated as a co-owner of the digital transmission right of the recording in question whether their contribution was made intentionally and voluntarily (such as where the recording artist is also the writer of the song being recorded) or without purposeful intent and involuntarily (such as where the songwriter and music publisher are compelled by application of the compulsory mechanical license to allow cover recordings of their works⁸⁰).

C. *Authority to Grant Non-Exclusive Licenses; Accounting for Royalties Earned*

The interests of all co-owners of the digital transmission right in a recording would be implicated by every digital transmission of that recording. No one co-owner would be permitted to act as gatekeeper of the rights of all, with sole discretion to determine, by way of a veto, if, when, how, and by whom this newly-established right may be exploited. Rather, regardless of the nature of their relationships to each other under pre-existing agreements, or to particular recordings under current law, under the digital transmission right each rights holder would have independent and sufficient authority to grant non-exclusive licenses for digital transmissions of those recordings on any terms that they and their licensees find to be mutually acceptable.

By way of example, a record label, acting without the consent or, for that matter, prior knowledge of the songwriters, music publishers and recording artists involved, could license its entire catalog of recordings, or any part of it, on a non-exclusive basis to a digital audio service provider who offers subscription streaming. A recording artist could authorize fan sites to promote an upcoming concert by offering downloads of the artist's latest recording in exchange for voluntary contributions from consumers. And a songwriter could offer a Creative Commons license for digital transmissions of every cover recording of one of his or her compositions.⁸¹ (Why a songwriter might choose to do this is another matter entirely.)

80. See 17 U.S.C.A. § 115 (West 2005, Supp. 2007).

81. Model licenses for such purposes are available at the Creative Commons' web site. See, <http://creativecommons.org/license> (last visited Dec. 18, 2007).

Under the digital transmission right, the only limitation on the authority of individual rights holders to grant non-exclusive licenses would be the obligation to account to their co-owners for royalties earned. Rights holders of individual recordings should be free to make whatever arrangements they wish among themselves regarding this division of royalties. No doubt, the Internet will influence the dynamics of these negotiations.⁸²

There may be circumstances in which rights holders will not be able to reach voluntary agreement on the division of royalties; and others in which negotiations themselves may not be possible (e.g., with older works where rights holders have lost contact with each other; or in the case of cover recordings where, because of the compulsory mechanical license, the recording artist and record label involved will not necessarily ever have had direct contact with those who own rights in the

82. Recently, some established superstars who are no longer bound to the record labels whose backing helped create them have experimented with alternative means of distributing their recordings. These include, for example, Nine Inch Nails (which offered its latest CD, *The Rise and Inevitable Liberation of Niggy Tardust*, through its own web site for free download in MP3 format at 192Kbps, or for purchase for \$5.00 at 320Kbps or in FLAC lossless audio (see <http://niggytardust.com/saulwilliams/download> (last visited Dec. 15, 2007))), Radiohead (which released its latest CD, *In Rainbows*, through its own web site, allowing fans to pay whatever they wished, only to find that 62 percent of those who downloaded the CD chose to pay nothing for it at all (see For Radiohead Fans, Does “Free” + “Download”=“Freeload”? (Nov. 5, 2007), <http://www.comscore.com/press/release.asp?press=1883>)), and Prince (who gave away his latest CD, *Planet Earth*, by including it for free in the June 28, 2007 edition of the MAIL ON SUNDAY newspaper. He also sold out 21 concert dates in the U.K that summer (Alexa Baracaia and Andre Paine, *Prince £31-A-Ticket Shows Sell Out in Minutes*, DAILY MAIL, May 11, 2007, available at http://www.dailymail.co.uk/pages/live/articles/showbiz/showbiznews.html?in_article_id=454090&in_page_id=1773)).

In addition, unsigned artists who produce their own recordings have been able to obtain widespread early recognition of their work—though little, if any, direct financial benefit—through P2P file- and stream-sharing and the use of viral marketing. These efforts at self promotion may result in drawing more fans to concerts. In the mean time, however, CD sales will have been lost. I doubt that many of these emerging artists expect to build their careers through the use of P2P in its current debased form. More likely their hope is that this exposure will bring them to the attention of a major record label and result in a recording contract.

The major record labels continue to dominate what remains of the market in the context of the sales-based revenue model through their control of traditional distribution channels. However, the exigencies of a hit-driven market have already made the notion that record labels nurture artists’ careers an anachronism. Moreover, new businesses may arise to displace record labels as the source of funds to underwrite concert tours but without acquiring ownership of the artists’ creative output in exchange. And, as the digital music marketplace matures, the network itself will become the primary channel of “distribution,” and licensed transmissions (whether downloads or streams) will displace sales as the principal source of music industry revenues.

All of this suggests that the relative importance of the roles played by the major record labels—and music publishers for that matter—may diminish. On the other hand, record labels and music publishers may recreate themselves to serve some as yet undefined but enhanced role within the digital music marketplace. Whatever changes do occur, one would expect them to be reflected in the division of royalties among rights holders.

underlying musical work that was the subject of the recording in question). Therefore, as a starting point for negotiations generally, and as a default when voluntary agreement is not possible, I suggest that the interests of songwriters, music publishers, recording artists and record labels should each be allocated a 25 percent share of the total royalty earned from licensed digital transmissions of their recordings. In this way, singer-songwriters would receive 50 percent of all royalties earned from licensed transmissions of their recordings, and 100 percent of those royalties if they also self-publish and produce their own recordings.

D. Authority to Grant Exclusive Licenses

Co-owners of the digital transmission right in individual recordings would also be free to coordinate their licensing efforts. If all agree, they may license their jointly owned recordings to a single audio service provider for all purposes on an exclusive basis, or to multiple service providers, each on a different exclusive basis (e.g., time, territory, or type of service). Exclusive licenses, however, derive value from the ability of the license holder to exclude others from using the work in the same manner and during the period of exclusivity. The music industry's experience to date demonstrates the futility of efforts to restrict uses of recorded music on the Internet. Because of this, the useful lifespan of exclusive rights in the digital music marketplace will be short, their value uncertain. Audio service providers may do better being the first source of particular content rather than trying to maintain their status as the only source of it.

E. Conduct for Which a License Would Be Required; Parties Who Would Be Liable

The digital transmission right would be enforceable only against those involved in providing digital transmissions, retransmissions, or further transmissions of recorded music.

Accordingly, consumers would not incur any liability merely for surfing the web, accessing streaming media, or downloading music files. Copying for personal use also would not require authorization. Consumers still may be required to pay network operators for Internet access, and to pay audio service providers for their activities in connection with particular web sites or services. But whether consumers listen to streams or download recordings; make one or many copies of a recording for personal use; or use recordings on one or several playback devices would have no effect on their obligation to music industry rights holders. None of this conduct would require consumers to obtain licenses or to pay license fees under the digital transmission right.

Similarly, software developers and distributors, technology firms, consumer electronics makers, and telecommunications and Internet service providers, as such, would have no liability under the digital transmission right.⁸³

On the other hand, service providers would need licenses if they operate web sites or other services that provide digital transmissions of recorded music. Consumers, too, would need licenses whenever they act as digital audio service providers in their own right; that is, whenever they are responsible for the digital transmissions at issue. By way of example, consumers would need authorization if they operate personal music-enabled web sites, including “hobby” sites; if they upload music files to a web site or service that accepts user-generated content but that does not have its own license under the digital transmission right authorizing such activity by users of its service (known as a “through-to-the-user license”); or if they offer recordings to others through participation in a P2P file- or stream-sharing network, or similar service, that does not have a through-to-the-user license.

Most web sites and services that offer musical programming only allow users to access music, either through streaming, downloading, or both. They do not allow users to upload recorded music; they do not accept user-generated content. In these circumstances, only the service provider (or a consumer acting as a service provider in the case of a personal web site) would be engaged in providing digital transmissions of recorded music; and only the service provider would need authorization under the digital transmission right. Consumers, as transmission recipients, would not have any liability for these transmissions.

Other sites and services are configured specifically to enable users to upload recorded music and other content, as well as to access streams or download music files or programs from the service. Uploading to services such as these would involve the digital transmission of the recordings involved; and any consumer from whose computer or other device such uploads originate would need a license under the digital transmission right. Subject to the availability of a safe harbor from infringement liability, the service provider who enables the uploading of user-generated content would be jointly and severally liable with its users for their conduct.⁸⁴

83. *But see infra* Part III.I., where I suggest that a temporary levy should be imposed on consumer electronics and technology products to assist the music industry to maintain its financial wellbeing during a brief period of transition from its traditional ways of doing business to the rights administration structure proposed in this article.

84. Under the digital transmission right, safe harbors would be necessary only in very limited circumstances. *See infra* Part III.E.

For services that accept the upload of user-generated content, a license held either by the Internet user or by the service provider would suffice to authorize uploading to that service by that user of the recordings covered by the license. Alternatively, a single through-to-the-user license held by the service provider would authorize all transmissions for which the service provider and users of the service would be jointly and severally liable (e.g., user-generated uploading to the service), as well as all transmissions for which the service provider alone would be liable (e.g., streaming and downloading from the service to its users). A through-to-the-user license held by a service provider would eliminate the need for individual consumers who wish to upload recorded music to that service to obtain licenses in their own right.

It stands to reason that Internet users would seek out services that obtain through-to-the-user licenses that authorize their uploading of content to the service. Moreover, licensed services, being lawful, would be able to operate openly, attract investment capital (without exposing investors to copyright infringement liability), and offer consumers the sophisticated functionalities they desire. And there being no reason remaining for music industry rights holders to undermine them, licensed services would be free of many of the security, privacy, and related concerns that plague users of their black market counterparts.

Service providers who obtain through-to-the-user licenses would have a competitive advantage over those who do not, even though they would be required to pay license fees. The availability of through-to-the-user licenses would provide a positive economic incentive for service providers to secure the authorization they need. The issuance of through-to-the-user licenses should be standard practice under the digital transmission right.

A similar analysis applies to the P2P file- and stream-sharing context. P2P participants who only download music files or access streams through the network but who do not offer works to others would not need a license under the digital transmission right. On the other hand, individuals who facilitate transmissions of recordings to others through the network would need authorization.

Operators of centralized P2P networks would be jointly and severally liable with their network participants who share recorded music with others through the network. These operators would also be liable for the further transmissions or retransmissions through their centralized servers of the transmissions of recorded music initiated by users of their networks. For centralized P2P networks, a single through-to-the-user license held by the network operator would suffice to authorize all transmissions,

retransmissions and further transmissions of the licensed recordings through the network in question. In such circumstances, individual network participants would not need to obtain licenses in their own right, and yet would be free to share the licensed recordings through the network whenever they wished.

The situation is different for decentralized P2P networks; these do not have centralized servers through which file-sharing transmissions must pass. Moreover, by and large, the tens of millions of copies of file-sharing software for decentralized networks that already have been downloaded by Internet users are beyond the control of the distributors who released the software in the first place. Under the digital transmission right, developers and distributors who do not exercise control over the decentralized P2P networks that their software spawns would not incur any infringement liability by reason of the use of that software on those networks. Because of this, however, there would be no single entity through whom a network-wide through-to-the-user license could be made available. Accordingly, each participant in such a decentralized P2P file- or stream-sharing network would be responsible for securing authorization for his or her own conduct on that network.

On the other hand, distributors of file-sharing software for decentralized networks who wish to secure licenses for their services could do so if they configured future releases of their software to allow them to exercise certain key measures of control over the file- and stream-sharing that the software enables. For example, they would be required to use filtering to prohibit the sharing of specific recordings (which, as generally discussed in Part III, *infra*, will likely only rarely be necessary under the digital transmission right), and they would be required to monitor which recordings had been shared so that the rights holders-in-interest could receive royalties (as discussed in Part III.G, *infra*). By the same token, if the software distributor were able to monetize use of the network through advertising or other means, it would be deemed to exercise sufficient control to be liable under the digital transmission right; and this would be so even if the software distributor failed to filter and/or monitor uses of recordings on the network, though, in that case, the distributor would not be eligible for a license. Nevertheless, if the software distributor obtains a license, the authorization thereby granted would inure to the benefit of those network participants who accept and use the software that enables the needed filtering and music use monitoring to be conducted.

This approach favors users of licensed P2P networks (both centralized and decentralized), but also provides an opportunity for individuals who participate in otherwise unlicensed networks to act lawfully. Again,

however, it stands to reason that the vast majority of consumers who are interested in P2P would likely seek out networks that had secured licenses that authorize their file- and stream-sharing activities; especially if the sharing that is permitted actually offers consumers whatever it is that they want from the P2P experience at any given moment.

There are certain transmissions, retransmissions, and further transmissions for which more than a single site or service would be separately and independently liable. These include, for example, the further transmissions of recorded music through sites that use in-line linking and framing technology to incorporate content from a third-party site and to make it appear as if that content were part of the first site's overall offering. (Framing is different from Internet links which when clicked merely instruct the user's browser to open a new window in which the third party site appears.) Insofar as the site that is framed transmits recorded music, it would need authorization under the digital transmission right without regard to the fact that it is being framed by another site. In addition, however, the site that frames transmissions of recorded music that originate from another site also would need authorization for that further transmission whether or not the site that is being framed has a license in its own right. In my view, it would be manifestly unfair to music industry rights holders not to require both such sites to be licensed. However, while both sites would need a license, each site would pay a license fee based only on the benefit it realized from the transmission in question.⁸⁵

Similarly, when an audio player that is resident on one site becomes embedded in a third-party site such that the transmissions of recorded music that originate from the first site are further transmitted by the third-party site to its users, both sites would need authorization under the digital transmission right. Again, however, each site would pay a license fee based only on the benefit it realized from the transmissions in question.

F. Copyright Infringement Would Not Significantly Impair the Market for the Digital Transmission Right

The digital transmission right would not depend on the efficacy of access restrictions and anti-copying measures for its success. It would be all but impervious to copyright infringement.

Unlike the reproduction and distribution rights that underlie the sales-based revenue model, but like the public performance right, the digital

85. See *infra* Part III.F., for further discussion of license fees under the digital transmission right.

transmission right cannot be subverted by one or more unlicensed digital audio services, webcasters, P2P networks, social networking services, or the like. Whether or not particular transmissions are licensed would not significantly affect the market for the digital transmission right over all.

This is shown by the experience of ASCAP and BMI, in the United States, and their sister PROs around the world, with the licensing of over-the-air broadcast radio stations to publicly perform the copyrighted musical works that these PROs represent. Even if the largest radio station or group of stations was not licensed at a particular time, the ability of the PROs to license the thousands of other broadcasters would not be impaired. Despite infringement by the few, the overwhelming majority of broadcasters would continue to operate lawfully—as they have done for decades—by securing the public performance licenses they need. Those who act outside the law can and should be sued for copyright infringement.

So too would it be under the digital transmission right. If music industry rights holders made licenses available on reasonable terms that authorize the uses of recorded music that people want, the overwhelming majority of those whose digital transmissions would require authorization—audio service providers and, where applicable, individuals alike—would pay the license fees that are due. If this is not the case, then all is surely lost for the music industry. No doubt, no matter what is done, a “Darknet” of unauthorized uses of recorded music disguised by encryption will continue to operate. However, if licenses are made readily available to those who wish to comply with their obligations under the digital transmission right, there would likely be little, if any, public outcry over the industry’s litigation campaign against those who continue to infringe.

G. *Effect on Other Rights and Other Works*

For all purposes other than digital transmissions, current law relating to the ownership of rights in musical works and sound recordings would continue in effect without change. Nothing in this proposal is intended to grant songwriters or music publishers any right in any recording other than an interest in the digital transmission right in recordings embodying their own musical works. And nothing is intended to grant recording artists or record labels any right in any musical work other than an interest in the digital transmission right in their own recordings of particular songs. It is also not intended that the division of ownership of rights in musical works and sound recordings under the digital

transmission right be used as precedent when songs or recordings are incorporated into other works, such as motion pictures (e.g., the synchronization right, or the master use right), or for treatment of any other categories or types of copyrighted works that incorporate contributions from more than a single rights holder.

The compulsory mechanical license for the making of cover recordings would continue in force,⁸⁶ although the digital transmission right would govern the relations of the parties for purposes of digital transmissions of those recordings. On the other hand, the statutory licenses under existing law for eligible non-subscription transmission services (e.g., webcasters),⁸⁷ new subscription services,⁸⁸ and pre-existing subscription and pre-existing satellite digital audio radio services⁸⁹ will have been superseded.

H. *Application of the Digital Transmission Right to Over-the-Air Broadcast Radio Stations, As Well As to the Web Sites They Operate*

Under current law in the United States, as elsewhere, over-the-air radio broadcasters are required to secure authorization for their public performances of copyrighted musical works. Typically, broadcasters fulfill this obligation by obtaining licenses from the PROs; although licenses are also available directly from the copyright holders-in-interest. However, unlike elsewhere, US-based radio stations are not required to secure authorization for their over-the-air broadcast performances of copyrighted sound recordings. Because of this, US-based sound recording copyright owners do not earn royalties from these analog broadcast performances. The lack of a performance right in sound recordings applicable to over-the-air radio broadcasts, and the record labels' longstanding efforts to obtain one, have been an enduring cause of controversy.⁹⁰

On the other hand, when radio broadcasters make their over-the-air programming available on the Internet, they are required to obtain au-

86. 17 U.S.C. § 115 (West 2005 & Supp. 2007).

87. *Id.* § 114(f) (West 2005 & Supp. 2007).

88. *Id.*

89. *Id.*

90. See, e.g., *Internet Streaming of Radio Broadcasts: Hearing before the Subcomm. On the Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary*, 108th Cong. (2004) (statement of David O. Carson, General Counsel, United

thorization both from the owners of the copyrighted musical works involved as well as from the owners of the copyrighted sound recordings in which those musical works are embodied. Typically, broadcasters fulfill their obligation to secure the needed rights for over-the-Internet transmissions of musical works by obtaining licenses from the PROs. They also may be eligible for the webcasting statutory license for their over-the-Internet transmissions of sound recordings. However, to the extent that a radio station's Internet transmissions do not comply with the requirements of the statutory license (e.g., if the station's web site offers music on demand or archived programs that are less than 5 hours in duration), it must secure licenses directly from the individual record labels that own the sound recordings in question.

At the time of this writing, Congress is again considering extension of the existing performance right in sound recordings to cover analog, over-the-air radio broadcasts.⁹¹ On September 27, 2007, Representative Howard Berman (D-Cal.), Chairman of the House Judiciary Subcommittee on

States Copyright Office), *available at* <http://www.copyright.gov/docs/carson071504.pdf>.

For their part, the record labels (who own the copyrights in the sound recordings they produce), seek treatment equivalent to that of their counterparts in other territories who are empowered to license analog performances of their recordings. They also point to the fact that songwriters and music publishers receive royalties for the same analog radio performances for which US-based recording artists and record labels receive nothing. Moreover, in the labels' view, it is performance of the popular recordings that the labels produce and own that allows radio stations to attract listeners and, because of them, advertisers and their dollars. *See generally* <http://musicfirstcoalition.org> (last visited Dec. 12, 2007).

For their part, broadcasters claim that record labels seek this new and additional right as a means to offset the revenue losses the labels continue to suffer because of unauthorized distribution of CDs through P2P file-sharing and other means entirely unrelated to radio broadcasting. In addition, broadcasters claim that it is the repeated play of music on their stations that makes any particular recording popular; that their performances promote sales of sound recordings; and that the success of the record labels' sales-based revenue model has been based on the exposure recordings are given through much repeated radio airplay. This, they say, justifies the historic lack of a separate analog performance right for sound recordings. In addition, broadcasters claim that they are not in a position at this time to absorb additional license fees for their analog performances of sound recordings. *See generally* <http://www.freeradioalliance.org> (last visited Dec. 12, 2007).

For their part, the PROs are concerned that if the performance right in sound recordings is extended to cover over-the-air radio broadcasts, the songwriters and music publishers they represent may be forced to accept a reduction in the public performance license fees that the PROs collect from the broadcast radio industry.

And, for their part, webcasters chafe at being required to pay record labels for the right to digitally transmit sound recordings while over-the-air broadcast radio stations are not required to pay for their analog performances of the same recordings.

91. Hearing on Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century, *available at* <http://judiciary.house.gov/oversight.aspx?ID=363> (last visited on Oct. 27, 2007).

Intellectual Property, Courts and the Internet, announced that he would soon introduce legislation granting a “long overdue ‘performance right’ for music played by terrestrial radio stations.”⁹² On the other hand, on October 31, 2007, several members of the House of Representatives submitted a concurrent resolution stating that, “The Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air, or on any business for such public performance of sound recordings.”⁹³ No doubt, the question of whether and under what circumstances a performance right in sound recordings may be extended to over-the-air radio broadcasts will attract a great deal of Congressional attention in 2008.

I suggest that the digital transmission right should be applied to all transmissions of recorded music made by traditional broadcast radio stations; that the entire operation of traditional radio broadcasters—both their over-the-air and their over-the-Internet transmissions—should be treated as a single transmitting entity under the digital transmission right.

By applying the digital transmission right to both analog and digital transmissions made by traditional radio broadcasters, record labels would enjoy rights that are equivalent, for all intents and purposes, to the extended performance right in sound recordings that they seek. Songwriters, music publishers, recording artists and record labels would share royalties generated by license fees paid by radio stations to the same extent that they will share in license fees paid by all other digital audio service providers under the digital transmission right.

Radio stations may well be required to pay slightly more under the digital transmission right than they do under current law (where they pay nothing for the right to perform sound recordings over-the-air). However, the total combined license fee liability of radio stations to songwriters, music publishers, recording artists and record labels under the digital transmission right (for both over-the-air and over-the-Internet transmissions) would be calculated on the same basis and in the same manner as that of all other digital audio service providers including, for example, webcasters.

92. A Performance Right for Over-the-Air Radio: Berman Sets the Record Straight—Plans Special Accommodations for Small and Religious Broadcasters, *available at* http://www.house.gov/apps/list/press/ca28_berman/perf_rts_small.shtml (last visited on Oct. 27, 2007).

93. Concurrent Resolution Supporting the Local Radio Freedom Act, H. Con. Res. 244, 110th Cong. (submitted October 31, 2007).

III. The Most Efficient and Effective Way to Administer the Digital Transmission Right Is Through a Combination of Direct Licenses and Voluntary Collective Rights Management

Through the digital transmission right, authorized transmissions of recorded music could be made available from the largest number and widest array of licensed sources, anytime, anywhere, to anyone with network access. The matter that remains is how best to monetize this new right; how to convert the vast base of audio service providers into licensed accounts; and how to convert the license fees they pay into royalties for those songwriters, music publishers, recording artists and record labels whose recordings these services transmit.

As I suggested earlier, the digital transmission right would be implemented through a combination of license agreements freely negotiated by individual rights holders and audio service providers (known as “direct licenses”) and voluntary collective rights management.

In principle, direct licenses are to be preferred. Therefore, subject to the co-ownership rules discussed in Part II, above, individual rights holders and service providers should be free to agree upon whatever terms they wish for digital transmissions of recorded music. In practice, however, reliance on direct licenses alone will produce little more than a free-for-all. Some rights holders and service providers will benefit greatly; while others, perhaps most, will be all but excluded from participating in the lawful market for digital transmissions. The intermediation of collective rights management organizations is needed to avoid this undesirable result.

Collective management has been standard practice in the music industry since 1851, when the *Societe des Auteurs, Compositeurs et Editeurs de Musique* (“SACEM”), the French musical works rights society, was established.⁹⁴ Of the rights that the digital transmission right would replace, only the record labels’ right to sell recordings (the distribution right, which would no longer have separate or independent existence for purposes of digital transmissions) is not already administered to one degree or another by a collective. Under current law and corresponding music industry business models, collectives represent song-

94. See *SACEM*, SACEM: a love story between music and authors’ rights, <http://www.sacem.fr/portailSacem/jsp/ep/contentView.do?pageTypeId=536886881&contentTypeId=2&programId=536887001&contentId=536884208&from=MR¶m=retourListe> (last visited Dec. 18, 2007).

writers, composers and music publishers for public performance⁹⁵ and reproduction and distribution (“mechanical”) rights licensing of their musical works.⁹⁶ Collectives also represent record labels for webcasting⁹⁷ and, in those territories where it applies (among which the United States is not included), public performance rights licensing of sound recordings when played by over-the-air broadcast radio stations.⁹⁸ Each collective serves as a clearinghouse, making markets between the rights holders it represents and the multitude of those whose various uses of music and sound recordings require authorization.

Under the digital transmission right, the best results for rights holders and service providers alike (and, through them, consumers as well) would flow from a marketplace in which collective management was the norm and direct licensing the exception. In this regard, it would be ideal if there were at least one collective in each territory whose catalog encompassed all or nearly all recordings and which was authorized to grant worldwide rights at its local rates for all digital transmissions, re-transmissions, and further transmissions of recorded music that originate in its territory.

A. *The Advantages of Collective Rights Management*

Generally, the Copyright Law requires those who wish to use protected content to secure authorization for the use in advance of undertaking the conduct in question. Accordingly, under the digital transmission right,

95. Three such PROs operate in the United States: ASCAP, <http://www.ascap.com/> (last visited Dec. 10, 2007); BMI, <http://bmi.com> (last visited Dec. 10, 2007); and SESAC, <http://sesac.com> (last visited Dec. 10, 2007). PROs also operate throughout the world. *See, e.g.*, <http://www.ascap.com/about/affiliated.html> (last visited Dec. 12, 2007) (list of PROs in 91 territories with which ASCAP is affiliated through reciprocal administration agreements); <http://www.bmi.com/international/entry/C2257> (last visited Dec. 12, 2007) (list of PROs in other territories with which BMI is affiliated). *See also* International Confederation of Societies of Authors and Composers, <http://cisac.org/web/content.nsf/Builder?ReadForm> (last visited Dec. 12, 2007).

96. In the United States, the Harry Fox Agency (“HFA”) is the “foremost mechanical licensing, collection and distribution agency for music publishers.” *See* <http://harryfox.com/> (last visited Dec. 10, 2007). Similar mechanical rights collectives operate throughout the world. The Bureau International Des Societies Gerant Les Droits D’Enregistrement Et De Reproduction Mecanique (“BIEM”), the international organization representing mechanical rights societies, has 50 member organizations operating in 54 territories. *See*, <http://biem.org/SocietyShow.aspx> (last visited Dec. 10, 2007).

97. In the United States, SoundExchange fulfills this function. *See* <http://soundexchange.com> (last visited Dec. 18, 2007).

98. *See, e.g.*, What is PPL?, [http://www.ppluk.com/ppl/ppl_cd.nsf/PDFs/\\$file/PPLInformationSheets.pdf](http://www.ppluk.com/ppl/ppl_cd.nsf/PDFs/$file/PPLInformationSheets.pdf) (last visited Nov. 15, 2007) at 6 (discussion of licensing over-the-air broadcast radio stations for their performances of sound recordings); *id* at 8 (list of sound recording rights management organizations in other territories with which PPL is affiliated).

as under existing law, audio service providers would need to secure authorization to digitally transmit recordings prior to transmitting them. Failure to secure advance authorization would expose those responsible for the transmission to liability for copyright infringement.

Even though the legal burden is on service providers to secure advance authorization for their transmissions, the rate of compliance will continue to be low unless rights holders actively seek to license digital transmissions of their recordings. In order to maximize compliance, rights holders should make it as easy as reasonably possible for audio service providers to obtain and to administer the licenses they need. The over all burden of compliance, including the cost of license fees and the effort needed to fulfill music use reporting requirements, should be light enough so that a service provider's knowing non-compliance can only come from a willful and unjustifiable refusal.

There are hundreds of thousands of copyrighted songs and recordings. New works are created every day. Many different songs can share a common title; and popular songs often are recorded many times by different artists. There are also tens of thousands of music industry rights holders. Many of these are individual songwriters or recording artists. Others are small music publishing firms or record labels. Still others are larger independents. And, setting the industry's agenda is a handful of multinational entertainment conglomerates.

There is no quick and reliable way to determine who owns rights in which works. Registration of works is not required in order to secure copyright protection. Moreover, the identity of the music publisher or record label owning an interest in any particular song or recording will change as rights are assigned, publishing catalogs are bought and sold, and record labels come and go. So-called "label copy," information printed on a recording's label, jacket or liner notes identifying the rights holders, and its recent manifestation as metadata encoded in digital audio files, even if accurate on the day it was created (which may well not be so with respect to metadata created by service providers or end users) becomes unreliable as time goes by. And while the identity of the songwriter and recording artist of a particular recording cannot change once the recording has been completed, these people may not wish to be contacted by service providers or individual Internet users seeking licenses.

In the absence of collective management, each service provider who needs a license under the digital transmission right would be required to identify, locate and successfully negotiate a license with at least one rights holder of each recording that they wish to transmit. Some rights

holders will seek to facilitate the licensing process. Nevertheless, the time and effort necessary to clear rights in even a single recording may be beyond the capacity of many of those who will need a license.

It would be especially burdensome to clear rights in more than a few recordings, or in new works by emerging artists, or older works, or works of foreign ownership. By and large, service providers would not be able to obtain prior authorization for transmissions of recordings that they do not directly select and cannot identify in advance (e.g., those contained in user-generated content, those that originate from a third-party site and that have been framed by or embedded in the service provider's site, or those contained in transmissions through P2P networks).

In addition, in the absence of collective management, different rights holders will likely demand different terms and conditions for licenses to digitally transmit their recordings. These may include different start and ending dates for the licensed term; different periods for financial reporting and payment obligations; different data fields and formatting requirements for music use reports; different metrics for calculating license fees owed; and the obligation to employ possibly incompatible DRM regimes. Some rights holders will require most-favored-nations treatment; others will not.

The administration of inconsistent license agreements with multiple rights holders is complicated and costly. Service providers with the most resources to devote to rights clearance activities will have an advantage, though it will by no means be an easy matter even for them. The task will be more difficult for those with fewer resources, and most difficult for individual consumers when they, too, need licenses under the digital transmission right.

A marketplace that operates wholly without the intermediation of collective rights management organizations would not necessarily be a boon to music industry rights holders either. In the absence of collective management, each rights holder would need to undertake its own licensing efforts and establish its own rights administration infrastructure. Given the multitude of far-flung service providers and, possibly, individuals who will need authorization under the digital transmission right, success at licensing will require a systematic and comprehensive approach. This will be beyond the means of many individual rights holders when acting alone. Moreover, the effort needed to effectively monitor licensed transmissions to determine which recordings were transmitted and, therefore, who among rights holders is entitled to receive payment of royalties, will be no less daunting a task. Many larger rights holders are already unable to process the tremendous amounts of music use data generated by their limited Internet and mobile licensing successes to date.

In addition, because many digital transmissions will either originate from or be received outside of a rights holder's home territory, it will be necessary to establish and maintain a means by which to license digital transmissions and monitor music uses in foreign territories. This may involve regulation under foreign legal regimes.

In the absence of collective management, licenses for digital transmissions of many recordings may—by default—not be made widely available. Few audio service providers will be able to obtain licenses for all or even most of the recordings that they transmit. This does not mean that digital transmissions of recorded music would not occur in great abundance; only that a large portion of them will not be authorized. And, of course, transmissions that are not licensed cannot generate royalty payments for rights holders; they can only enrich free-riders and lawyers who litigate copyright infringement claims.

B. Formation and Regulation of Collectives

As a starting point, rights holders should be free to establish as many collective management organizations as they wish; and, as a general matter, collectives should be permitted to operate in any manner that they choose. For example, collectives should be permitted to restrict their membership on any lawful basis; treat some members one way and other members another; license service providers on whatever terms and conditions the market will bear; offer different terms and conditions to services that otherwise operate on the same bases; refuse to license certain service providers altogether; and use any basis that they wish to determine how to divide royalties among those they represent.

On the other hand, it may be necessary to establish criteria by which to determine whether by reason of their market position certain collectives should be subject to some degree of regulation. Consideration might be given to the number of rights holders a collective represents, the number of recordings in its catalog, or the proportion of all digital transmissions attributable to those recordings. Collectives that meet the threshold criteria for regulation, which should be low, should be required to accept into membership all songwriters, music publishers, recording artists and record labels who wish to join and who own an interest in at least one protected recording; treat all members on an equal and non-discriminatory basis, especially with respect to the manner in which music use is monitored and royalties are calculated and paid; license any service provider who requests authorization and who does not have an outstanding and indisputable license fee balance under a prior agreement with the collective; and offer the same terms and conditions of licensure to all service providers.

Regulated collectives should be required to operate in all respects on a transparent basis in order to further protect the interests of individual rights holders, service providers, and the public at large. Each collective should provide an accurate, current, and easily searched online database identifying every recording in its catalog, together with information identifying each rights holder of each such work (though contact information for rights holders who are individuals—as opposed to business entities—should only be made publicly available if the individuals in question unequivocally authorize such disclosure). The identity of licensed services, total license fee collections (though not the amounts paid by individual services), the collective's gross operating budget, the basis for its calculation of royalties, the total royalties paid (though not the amounts paid to particular rights holders), and all rules relating to governance of the organization should also be made publicly available. Finally, regulated collectives should be subject to government agency oversight or court supervision.

C. Relationship of Collectives to the Rights Holders They Represent; and the Right to License Transmissions of Particular Works

Within this general framework, individual songwriters, music publishers, recording artists and record labels should be free to affiliate with a collective, or not to join any collective at all. It would not be necessary for all rights holders with an interest in the same recording to belong to the same collective. They may each belong to a different organization. However, no individual rights holder should be permitted to belong to more than a single collective at any one time. Moreover, inasmuch as digital transmissions of their works can originate from any territory, rights holders should be free to join a collective in any territory that they wish. They should not be limited in this regard either by their nationality, by the territory in which they reside or by the territory in which they are incorporated or have their principal economic residence. In addition, existing collectives to which rights holders may belong for the administration of rights in their works under current law should not be permitted to interfere, either directly or indirectly, with their members' affiliation decisions for the newly-established digital transmission right. By the same token, existing collectives should be permitted to repurpose themselves to operate under the digital transmission right and to solicit any and all music industry rights holders to become members.

Each rights holder who joins a collective would grant it the non-exclusive worldwide right to license digital transmissions of all recordings

in which the rights holder has an ownership interest. This would include all recordings of songs written by a songwriter, or administered by a music publisher; all recordings made by a recording artist; and all recordings in the catalog of a record label. The grant would extend to all works in existence at the time the rights holder joins the collective. The only exception would be those recordings, if any, for which the digital transmission right was subject to a pre-existing grant of exclusive rights made by all of the rights holders-in-interest in the recording in question.⁹⁹ The non-exclusive grant to the collective would also include any additional recordings which are newly-created or in which the rights holder otherwise acquires an interest while a member of the collective (e.g., by assignment of a single work, or acquisition of an existing publishing catalog or record label). These would automatically become part of the collective's catalog upon their creation or upon the rights holder's acquisition of its interest in them, as applicable.

Each collective's catalog would be composed of all recordings in which any songwriter, music publisher, recording artist, or record label who is a member of the collective has an ownership interest. This would include recordings in which one or more co-owners had granted non-exclusive rights to whichever other collective(s) they may belong.

Rights holders should be free to terminate their membership in a collective. In the event of such termination, the collective would lose the right to license digital transmissions of the recordings in which the terminating-rights holder has an interest; but only to the extent of that rights holder's interest in those recordings. If other co-owners of such recordings are (and remain) members of the collective, then rights in those recordings themselves would remain in the collective's catalog and be available for licensing by that collective.

Collectives in different territories should be free to enter into reciprocal administration agreements; or to refrain from affiliating with each other. If a collective in one territory has reciprocal administration agreements with collectives in other territories, then the catalog of the local collective would also include the recordings in the catalogs of those affiliated foreign collectives; and the local collective would represent the interests of the songwriters, music publishers, recording artists and record labels who are members of the affiliated foreign collectives when their recordings are contained in digital transmissions that originate in the local collective's territory.

99. As discussed *supra* in Part II.D., given the nature of the global digital communications network, the expected useful lifespan of exclusive rights in the digital music marketplace will be short, their value uncertain. Because of this, exclusive licenses likely will be few and far between.

If all rights holders of a particular recording belong to the same collective, then that collective would be the only organization in its territory with authority to license digital transmissions of that recording that originate locally. If they belong to different collectives, then each of those collectives would have non-exclusive rights with respect to the recording in question. A license from any collective whose catalog contains a particular recording would be sufficient, standing alone, to authorize digital transmissions of that recording by any service provider holding the license. There would not also be a need for a license from any of the other collectives to which other rights holders of the work may belong.

D. The Role of Direct Licensing in the Context of Collective Rights Management

The opportunity for direct licensing would be preserved. Individual songwriters, music publishers, recording artists and record labels that join a collective would retain the right to issue direct licenses for digital transmissions of their recordings to any service providers with whom they choose to do business. Subject to whatever limitations rights holders of particular works may voluntarily agree to among themselves, and subject to the obligation of rights holders to account to their co-owners for royalties earned, individual rights holders and service providers should be permitted to agree upon any terms and conditions for direct licenses that they find to be mutually acceptable.¹⁰⁰

Direct licensing by rights holders who are members of collectives must be transparent. At a minimum, rights holders should be required to advise their collectives of the existence of any direct licenses they grant, the works that are involved, and the identity of the service provider whose transmissions have been authorized. These disclosures are necessary so that the collective will know not to seek to license the service provider in question insofar as the works that are subject to the direct license are concerned; and not to distribute royalties for transmissions of those works by that service provider. Such disclosures also will tend to safeguard the interests of co-owners of works who are not parties to the direct license.

In my view, the best practice would be for collectives to directly administer direct licenses issued by their members. The collective would

100. To be clear, rights holders of particular recordings should be free to agree among themselves that none of them will grant direct licenses with respect to their jointly-owned works. On the other hand, regulated collectives should not be permitted to deny their members the right to issue direct licenses.

collect the license fees specified in the direct license and distribute royalties to the relevant rights holders. The out of pocket expenses incurred by the collective in the administration of direct licenses could either be absorbed by all members of the collective as a cost of its doing business, or be deducted from the royalties otherwise due to the rights holders whose works are the subject of the direct license.

E. *Treatment of Service Providers; One-Stop Shops; Worldwide Rights*

Each collective would be authorized to issue licenses under the digital transmission right that grant worldwide rights for transmissions, retransmissions, and further transmissions that originate from its own territory. In this way, each collective would offer those whose digital transmissions require authorization a single source, a “one-stop-shop” with respect to the recordings in the collective’s catalog. I contemplate a single, simple form of license agreement to be offered by regulated collectives that would cover all service providers regardless of the business models they employ or the manner in which they transmit recorded music. The agreement would contain uniform terms and conditions applicable to digital transmissions of all covered recordings. These would include provisions relating to the calculation of license fees that would correspond to the fee categories discussed in Part III.F., *infra*, financial reporting and payment procedures, and standardization of the technology to be employed for identifying recordings, tracking how often they are transmitted, and reporting this music use data to the collective.

The license fees charged, including those for transborder transmissions, should be based on the rates prevailing in the territory of the collective issuing the license. As I mentioned earlier, if the license fees of the territory of reception are charged, service providers would be unable to develop well-informed business strategies because they would not be able accurately to predict their music license fee costs.

For their part, service providers should be free to operate their services from any territory that they wish, and to obtain needed authorization from the collective(s) operating in that territory. The license fees charged under the digital transmission right by local collectives in different territories may well be a factor that service providers consider in determining where to locate their services. On the other hand, if, as I suggest in Part III.F. *infra*, license fees are based on the *benefit realized* by service providers from their digital transmissions, the rates charged by collectives that wish to be affiliated with collectives in other territories may tend to equalize around a particular percentage. This would

discourage forum shopping for lower license fee rates. The choice of where to locate a service may also be influenced by the nature of the hosting services and the telecommunications infrastructure available in a given territory. On the other hand, by locating its service in a foreign territory, a service provider may become subject to the local law of that territory including, for example, for purposes of civil and criminal jurisdiction, and taxation. In any event, service providers should not be limited to obtaining licenses for their digital transmissions only from the collective in the territory in which they are incorporated or in which they have their principal economic residence.

The central question for service providers will be with how many sources they must deal in order to obtain the digital transmission rights they need on reasonably acceptable terms. The presence in each territory of at least one “one-stop-shop” from which to obtain a single license agreement granting worldwide digital transmission rights to nearly all recordings will be key to service provider compliance. In the absence of such a collective, service providers would be required either to enter into agreements with all collectives operating in their territory or to devote the time and resources necessary to scrutinize the recordings they transmit to assure that all are included in the catalog(s) of the collective(s) with which they do have agreements. A license from a “one-stop-shop” with an all-inclusive catalog would effectively eliminate the need for service providers to engage in such close scrutiny of their musical programming. If there were only two or three collectives in operation in a territory whose catalogs, taken together, included all recordings, service providers may well take licenses—albeit begrudgingly—with all of them rather than to incur the additional cost necessary to avoid even unintentionally infringing conduct. It is problematic, however, if there are ten or twenty or two hundred collectives in operation in a territory but no single collective with an all-inclusive catalog.

I suggest that a service provider who enters into a license agreement with a “qualifying” collective (one that has greater than a specified market share) should be entitled to assume that it has secured authorization through that license to digitally transmit any and all recordings.¹⁰¹ Such a service provider would not be liable for monetary damages as

101. For purposes of this safe harbor, the market share necessary for a collective to “qualify” should be high; and, again, the determination of market share could be based on either the number of rights holders a collective represents, the number of recordings in its catalog, or the proportion of all digital transmissions attributable to those recordings.

an infringer of the digital transmission right in any recording that is not in that collective's catalog unless, and until, a rights holder of such recording serves a notice demanding removal of the recording from the service. Only if the service provider fails to remove the work within a reasonable time after receiving the notice would it be liable for such damages. Moreover, once a work has been removed pursuant to a notice for takedown, the service provider must use commercially reasonable efforts including, for example, the use of industry standard filtering technology, to keep that recording from again being offered on the service without a license.

The structure I am proposing would allow service providers who transmit many different recordings, or who do not select or control the recordings they transmit, to obtain licensed access to what is essentially a worldwide catalog of recordings through an agreement with a single collective operating in the territory from which the service's transmissions originate. It also would allow those who transmit fewer recordings and who control their programming lineup to deal either with any specialty collectives that may exist and whose catalogs include the recordings that the service provider wishes to transmit, or to avoid collectives altogether, relying instead on direct licenses from the music industry rights holders-in-interest.

F. License Fees

One of the most contentious aspects of music rights management is the setting of license fees. Conflict is inherent in the process. Rights holders want to charge as much as possible and rights users want to pay as little as they can.

In the past, record labels were able to set the sale price for recordings because they controlled the channels of distribution. The "value" of music was the cost to consumers expressed as a per-unit charge. Today, the industry no longer controls the market for distribution of its products. Nevertheless, it continues to seek per-unit license fees from online retailers for their sales of recordings.

In addition, the industry uses license fees for streaming as an indirect means of giving life support to its moribund sales-based revenue model. It treats every streaming performance as if it displaced sale of the recordings involved. It seeks license fees from audio service providers based on the greater of a specified and often quite high percentage of revenue and either a unit payment per-song/per-stream/per-listener or payment based on the aggregate number of hours that users receive streaming transmissions of recorded music.

License fees calculated on either a per-stream or aggregate tuning hours basis can quickly exceed a service provider's revenue. They do not provide an incentive to comply. They penalize use and, therefore, discourage it. They will lead to fewer licensed transmissions as service providers are driven out of business or underground. And for it all, the music industry will not have saved its sales-based revenue model.

What consumers want—full, unfettered, DRM-free access to music—is not available at any price; yet it is available to everyone for free. In the digital music marketplace rights holders are not willing sellers, audio service providers and end users are not willing buyers, and the value of recorded music is effectively zero.

A reference other than a per-unit charge or its variant, the aggregate tuning hours model, is needed to set license fees in the digital music marketplace. I suggest that the *benefit realized* by audio service providers from their digital transmissions of recorded music should be the basis for calculating license fees due under the digital transmission right. The greater the *benefit realized* the higher the license fees that will be owed.

A *benefits realized* standard will allow music industry rights holders to participate in the growing bounty that will be created by digital transmissions of recorded music. It also will provide service providers with a license fee obligation that scales with the benefit they derive from their transmissions of music. It will encourage licensed transmissions.

As I mentioned earlier, I will suggest a structure for calculating license fees under the digital transmission right, though I will not recommend specifically how much license fees should be. My interest is in the elements that will comprise the base against which license fees will be calculated and not with the rate to be applied to that base to calculate the fee owed in particular instances. That later function is properly the subject of negotiations between rights holders and/or their collectives and audio service providers.¹⁰²

I think that the vast majority of those needing a license under the digital transmission right will fall into one or more of seven general categories. These include (1) service providers who charge users to receive transmissions of recorded music; (2) those who transmit recorded music

102. In the event that voluntary agreement on rates cannot be reached, an adjudicated rate setting proceeding will be needed. For this, the parties will have to rely on either the Copyright Royalty Board, or some other similar body such as the federal courts that conduct fee setting proceedings under the anti-trust consent decrees that govern the operations of ASCAP and BMI.

in connection with advertising; (3) those who transmit recorded music in connection with the sale of goods or services other than recorded music; (4) those who do not charge consumers to receive transmissions of recorded music, do not carry ads, and do not sell goods or services; (5) over-the-air broadcast radio stations and the web sites that they operate; (6) operators of centralized P2P file-sharing networks, and distributors of software for decentralized networks who exercise control over the file-sharing that their software enables (as discussed in Part II.E. *supra*); and (7) individual Internet users when they are responsible for the transmissions in question (e.g., when they operate their own web sites; or when they upload recorded music to services that accept user-generated content or offer recordings on P2P networks or similar services that do not have through-to-the-user licenses).

1. CATEGORY NO. 1: SERVICES THAT CHARGE USERS TO RECEIVE TRANSMISSIONS OF RECORDED MUSIC

Under a *benefit realized* standard, payments received from users for their receipt of transmissions of recorded music would be included in the base against which the service provider's license fee is calculated. Reportable revenue would include, for example, revenue derived from subscription music streaming or subscription download services; one-off charges for the download or streaming of individual songs, entire CDs, or musical programming containing one or more recordings; and an allocated portion of revenue derived from the sale of bundled products of which recordings comprise a part.

This Category should be construed to include revenue generated by any business model that might be devised by the entrepreneurial genius of audio service providers to induce consumers to pay to receive transmissions of recorded music.

Moreover, as this Category will only include commercial services, those that earn revenue directly from their transmissions of music, the license fee should be subject to a substantial minimum payment.

2. CATEGORY NO. 2: SERVICES THAT TRANSMIT RECORDED MUSIC IN CONNECTION WITH ADVERTISING

A site's advertising revenue may not be as clearly connected to its transmissions of recordings as is revenue directly derived from consumer payments to receive those transmissions. Therefore, under a *benefit realized* standard, it will be necessary to distinguish between ads that are—and ads that are not—sufficiently connected to transmissions of music so that the revenue generated from them can fairly be deemed attributable to those transmissions and, therefore, properly included in the license fee base.

I suggest that the base include all advertising revenue earned from areas of a site from which transmissions of music (whether streams or downloads) originate. It would also include advertising revenue from those areas in which streaming transmissions can be heard even though the music stream was launched from elsewhere on the site. If a service provider configures its site so that the music that is made available can be heard throughout the site, then all advertising revenue earned from the site would be included in the license fee base. Revenue from in-stream ads, and ads contained in pop-up or pop-out players (including ad revenue earned if the player continues to operate after the user has left the web site in question) would also be included; as would revenue from ads included in files containing recorded music that are downloaded by consumers for subsequent playback off line. On the other hand, revenue from ads that appear in areas of a site from which no transmissions of music originate and in which music cannot be heard would not be included in the base against which the license fee is calculated.

If a service in this Category also has revenue identified in Category No. 1, the service's license fee base would include the cumulative reportable revenue earned for both Categories.

In addition, insofar as this Category will only include commercial services, those that earn advertising revenue in connection with their transmissions of recorded music, the license fee should be subject to a substantial minimum payment. I suggest that the same minimum fee be applied to this Category as is applied to Category No. 1, but that only a single non-cumulative minimum payment would be required from services that fall into both Categories.

3. CATEGORY NO. 3: SERVICES THAT TRANSMIT RECORDED MUSIC IN CONNECTION WITH THE SALE OF GOODS OR SERVICES OTHER THAN RECORDED MUSIC

In my view, a service in this Category will have benefited from its transmissions of music if there is a sufficient connection between those transmissions and its sale of goods. However, I find it difficult to justify any effort to leverage ownership of rights in music into a share of revenue derived from the sale of goods other than music (such as cat food, cars or Christmas trees) merely because the Internet service through which the goods are sold happens to offer transmissions of music. An alternate means is needed to measure the *benefit realized* by services in this Category from their digital transmissions of music.

In this context, the aggregate tuning hours model can play a useful role. I suggest that license fees for services in Category No. 3 should be based on the aggregate number of hours that music is streamed to

consumers while they are accessing those portions of the site where goods or services are sold or offered for sale. If a service in this Category offers recorded music for downloading from an area of the site where such other goods and services are also offered for sale, the length of the work itself (the time it would take to stream the music file that is downloaded) should also be included in the total aggregate tuning hours reportable by the service.

To be sure, the aggregate tuning hours model may cause some services in this Category either to limit their transmissions of recorded music or to discontinue the use of music altogether. This is not necessarily a bad result. The services in this Category will be engaged in e-commerce. Music has an appeal for e-commerce sites, but music is an input without which such sites can continue to operate. On the other hand, use of the aggregate tuning hours model to calculate license fees payable by Internet radio sites (e.g., webcasters) and other music-centric services operates to deprive them of access to an input—recorded music—without which they cannot operate at all.

In any event, services in this Category No. 3 may also charge consumers to receive digital transmissions of recorded music (Category No. 1), and/or offer advertiser-supported streaming and/or downloading (Category No. 2). In such event, the service's total license fee would be the cumulative amounts due for all the Categories that apply.

In addition, because this Category will only include commercial services, the license fee should be subject to a substantial minimum payment. I suggest that the same minimum be applied to this Category as is applied to commercial services in Categories No. 1 and 2. However, though only a single non-cumulative minimum payment would be required from music-centric services that fall into both Categories No. 1 and 2, I suggest that the minimum to be paid by e-commerce services under Category No. 3 should be in addition to any minimum that may also be due for such services under Categories No. 1 and/or 2.

4. CATEGORY NO. 4: SERVICES THAT DO NOT CHARGE USERS FOR THEIR RECEIPT OF DIGITAL TRANSMISSIONS OF RECORDED MUSIC, DO NOT CARRY ADS, AND DO NOT SELL GOODS OR SERVICES

Services that fall into this Category do not operate on a commercial basis. Under a *benefit realized* standard, only a minimum license fee would be warranted.

I suggest that distinctions should be drawn with respect to the amount of the minimum license fee to be paid by services in this Category that are operated by businesses and those that are operated by individual

Internet users. Again, I do not have specific recommendations as to how much these minimums should be. I do suggest, however, that the minimum for noncommercial services that are operated by businesses should be less than the minimum to be charged to commercial services that fall into Categories No. 1, 2 and/or 3. The minimum for noncommercial services that are operated by individual consumers should be even less than that.

5. CATEGORY NO. 5: OVER-THE-AIR BROADCAST RADIO STATIONS
AND THE WEB SITES THAT THEY OPERATE

Each over-the-air broadcast radio station and any web site it may operate would be treated as a single audio service provider for purposes of calculating license fees due under the digital transmission right. They would only be required to pay a single license fee to cover both their over-the-air and their over-the-Internet transmissions. They would no longer be required to pay separate public performance license fees to the PROs or to SoundExchange; nor would a new and additional performance right in sound recordings be imposed on them for their analog over-the-air broadcasts.

For purposes of calculating the fee due, advertising revenue earned by the station from its over-the-air broadcasts would be included as revenue under Category No. 2. If the station also operates a web site, additional license fees under Category No. 2 would only be due if the web site carried Internet-only advertisements or if over-the-air advertisers paid a premium for the further transmission of their ads on the station's web site. If the station charges Internet users to receive transmissions of recorded music (e.g., if it offers a subscription streaming service or the opportunity for consumers to pay-per-download-per-podcast) the station's license fee also would include a calculation under Category No. 1. And if the station's web site directly offers goods for sale other than recorded music, a calculation would also be required under Category No. 3.

The requirements regarding minimum fees would apply to radio stations in this Category No. 5 in the same manner and to the same extent as they apply to all other audio service providers regardless of the Category or Categories in which they fall.¹⁰³

103. It may be appropriate to have separate fees for non-commercial radio stations and for those operated by non-profit educational institutions or religious organizations.

6. CATEGORY NO. 6: FEES IN THE CONTEXT OF P2P FILE-SHARING

Operators of centralized P2P file-sharing networks, and qualifying distributors of software for decentralized networks who obtain licenses under the digital transmission right (see the discussion at Part II.E. *supra*), would pay license fees based on revenue they derive from charges made to network participants for their file- and stream-sharing of recorded music (Category No. 1), and/or revenue they derive from advertising in connection with file- and stream-sharing activities on their networks (Category No. 2), and/or a calculation under Category No. 3 to the extent that goods or services are directly offered for sale through the network. In addition, operators of centralized networks would pay a flat dollar annual fee for each unique participant who engages in file- or stream-sharing through the network at any time during the year. Software distributors for decentralized networks also would pay such a minimum but only on the basis of the number of unique network participants who qualify for coverage under a through-to-the-user license (e.g., only those who engage in file- and/or stream-sharing of recorded music by means of software that enables filtering and monitoring to be conducted).

7. CATEGORY NO. 7: FEES FOR INDIVIDUALS

As mentioned in Part II.E. *supra*, under the digital transmission right individual users would not incur any liability merely for surfing the web, accessing streaming media, or downloading music files. Whether end users listen to streams or download recordings, make one or more copies of a recording for personal use, or use recordings on one or several playback devices would have no effect on their obligation to pay license fees to music industry rights holders.

On the other hand, Internet users would need authorization, and be required to pay license fees, whenever they act as digital audio service providers in their own right; that is, whenever they operate a web site or other audio service. In such instances, Internet users would be required to pay license fees (including any minimum fees) on the same basis as any other service provider, applying the factors identified in connection with Categories No. 1 through 4, *supra*, as appropriate.

Internet users would also need licenses if they upload music to sites or services that accept user-generated content but that do not have through-to-the-user licenses; or if they offer recordings to others through P2P networks or similar services that do not have such licenses. I suggest that these users should pay a flat-dollar annual license fee for the authorization needed so that their conduct may be lawful under the

digital transmission right. Again, I do not have a specific suggestion how much this fee should be. But, whatever the fee, payment could be made either directly to the rights holders-in-interest, to the collective(s) that administer rights in the recordings in question, or through Internet service providers who would pass-through music license fee charges to their subscribers.

An alternative to this approach would be to impose a universal license fee on all Internet users whether or not they ever access music online, let alone whether they ever transmit recorded music to others. Vis-à-vis Internet users this approach would operate as a tax that would be collected by Internet service providers. Such a tax would require Internet users to subsidize other people's entertainment for the support of private business interests (e.g., music industry rights holders). Vis-à-vis music industry rights holders this approach would operate as a compulsory license. The quid pro quo for the obligation that Internet users must pay a universal license fee would be that it authorized their digital transmissions of any and all recorded music. If, on the other hand, rights holders are given the opportunity to opt-out of the scheme, then Internet users are left without the assurance that their payment of the tax completely relieves them of the possibility of infringement liability. Moreover, if the Internet access tax were also extended to cover content categories other than recorded music, music industry rights holders may well find themselves in competition with other rights holder groups over a limited fund. In any event, neither a tax nor a compulsory license is a desirable end point for public policy on the matter. The need for an Internet access tax and/or a compulsory license could be avoided under the digital transmission right if only those who engage in digital transmissions of recorded music are required to pay license fees.

G. *Music Use Monitoring*

Collective management in the digital music marketplace begins and ends with the ability to monitor transmissions of the protected works in question. Knowing which recordings have been digitally transmitted and by whom underlies licensing, enforcement, contract administration, and royalty distribution. Initially, it is necessary to determine which web sites, audio services, P2P file- and stream-sharing networks, social networking services and, where applicable, individuals, are engaged in digital transmissions of protected recordings in order to know who may need a license. If a license is refused, identification of recordings transmitted without authorization is necessary for an infringement action. Once licensed, transmission data including, where applicable,

the aggregate tuning hours involved, may be needed to calculate license fees due. And, knowing specifically when and how often particular recordings were transmitted by each licensed entity, and the territories from which those transmissions were sent and in which they were received, will all be necessary in order to know which rights holders are entitled to receive royalty payments, and how much.¹⁰⁴

Internet transmissions are digital and occur in a networked environment. Therefore, at least in theory, it should be possible to identify every recording each time it is transmitted. A census-based royalty distribution system would assure that all rights holders, large and small, receive that share of royalties that is proportionate to the fees paid by licensed service providers for transmissions of their recordings. The principal drawbacks of such a system are the costs to develop and to administer it.

The alternative is to base royalty distribution on sampling. Sample surveys credit only a fraction of the transmissions that occur. Royalties generated from transmissions of recordings that fall within the sample would be paid to the owners of those recordings. However, royalties for licensed transmissions of recordings that do not fall within the sample would not be paid to the owners of those works; rather, they would be paid to owners of recordings that do fall within the sample. A royalty distribution system based on sampling necessarily results in the possibility that some rights holders—particularly those whose recordings are not regularly played on large commercial web sites—may never receive royalties for any licensed transmissions of their recordings. It also will result in payment of royalties to some right holders for licensed transmissions of recordings in which they have no ownership interest whatsoever.

Currently, music industry rights holders require audio service providers to shoulder the entire burden of music use monitoring for purposes of royalty distribution. However, as between rights holders and service providers, rights holders have the greater need to know how many times any particular recording has been transmitted. To be sure, this information may be useful to some service providers in planning future programming, but it is entirely irrelevant to most, and the obligation to gather and report it is an obtrusive and costly burden. Moreover, if license fees are linked either to the number of times a recording is transmitted or to the number of listening hours accumulated, service providers will have even less incentive to provide accurate use data.

104. See *infra* Part III.H., for discussion of specific rules relating to royalty distribution.

Rights holders need to find a way to maximize the depth and accuracy of monitoring while reducing the burden of it on service providers. One possible solution involves encoding recordings with copyright management information and using complementary software that would allow for automatic tracking of the encoded files by licensed service providers when they transmit them. I suggest that any such tracking software should be provided free of charge to licensed service providers. In addition, each collective might also directly provide licensed service providers with online access to encoded digital files of all recordings covered by the collective's license. These, too, should be provided free of charge.

On the other hand, service providers should not be required to use either the encoded files or the industry-standard tracking software. Rather, they should be offered a reduction in license fees as an incentive for their cooperation in music use monitoring through use of these preferred tools. Service providers who elect not to use these tools would not be offered a reduction in license fees but would still be required to meet the monitoring and reporting requirements of their license agreements.

H. Suggested Rules for Royalty Distribution

Each collective would pay royalties only to those rights holders whose interests it represents. Thus, if the rights holders of a particular recording belong to different collectives, they would each look only to their own collective for payment of royalties earned from that collective's licensing efforts on their behalf. Thereafter, and unless they have agreed otherwise among themselves, each rights holder would have the obligation to account to their co-owners for royalties received from their respective collectives. If all rights holders of a particular recording belong to the same collective, they would each receive their full share of royalties directly from that collective and there would be no need for later accounting and reconciliation among them.

The rules that govern royalty distribution under the digital transmission right would take into account that the catalog of the collective that licensed the transmission that gave rise to the royalty in question (the "local collective") will contain recordings regarding which one or more rights holders is a member of the local collective (recordings of "local origin") as well as recordings that are in the local collective's catalog because one or more rights holders with an interest in them is a member of an affiliated foreign collective (recordings of "foreign origin").

The royalty distribution rules also would take into account that some licensed transmissions will begin and end entirely within the territory of

the local collective, while others will begin in the territory of the local collective and end in another territory.

For royalty distribution purposes only, I suggest that transmissions should be treated as if they were composed of two legally cognizable and equal acts, one occurring in the territory from which the transmission originates, and the other in the territory in which the transmission is received. This will assure that rights holders in the territory from which a particular transmission originates as well as those in the territory where it is received will share in the royalties earned from that transmission.

Accordingly, royalties under the digital transmission right would be distributed as follows:

- If the recording is of local origin and the transmission giving rise to the royalty begins and ends entirely within the territory of the local collective, then the local collective would pay all the royalties available to those of its own members who have an interest in the recording. For example, if only the music publisher were a member of the local collective, then the music publisher would receive all royalties payable by the local collective for the transmission in question. On the other hand, if the songwriter, music publisher and recording artist were all members of the local collective, but the record label was a member of some other collective, or was not affiliated with any collective at all, then the local collective would pay the songwriter, music publisher and recording artist each one-third of the royalty available for distribution.
- If the recording is of foreign origin and the transmission begins and ends entirely within the territory of the local collective, then the local collective would pay the songwriter's share and the recording artist's share to the affiliated foreign collective to which those rights holders belong for subsequent distribution to them, and would pay the music publisher's share and the record label's share to those of its own members who have been granted local rights to the recording. If no local music publisher (subpublisher) and/or record label (distributor) has been designated, then the local collective would pay the music publisher's share and the record label's share to the affiliated foreign collective to which those rights holders belong for subsequent distribution to them.
- If the recording is of local origin and the transmission begins in the territory of the local collective and ends in the territory of an affiliated foreign collective, then the local collective would pay one-half of the music publisher's share and one-half of the record

label's share to those of its own members who have an interest in the recording, and the other half of the music publisher's share and the other half of the record label's share to the affiliated foreign collective (but only if that collective has members who have been designated to represent the music publisher's interest and the record label's interest in its territory). The local collective would pay the songwriter's share and the recording artist's share directly to the songwriter and the recording artist, but only if they were its own direct members.

- If the recording is of foreign origin and the transmission begins in the territory of the local collective and ends in the territory of an affiliated foreign collective, then the local collective would pay one-half of the music publisher's share and one-half of the record label's share to those of its own members who have been granted local rights to the recording. If no local music publisher (subpublisher) and/or record label (distributor) has been designated, then the local collective would pay the one-half shares in question to the affiliated foreign collective(s) to which the music publisher and the record label belong for subsequent distribution to them. The local collective would pay the other half of the music publisher's share and the other half of the record label's share to the affiliated foreign collective in the territory in which the transmission was received (but only if that collective has members who have been designated to represent the music publisher's interest and the record label's interest in its territory). And, finally, the local collective would pay the songwriter's share and the recording artist's share to whichever affiliated foreign collective they belong for subsequent distribution to them.

I. *A Period of Transition*

It is my intention that music industry rights holders in the aggregate should do at least as well financially under the digital transmission right as they have done under the system that the digital transmission right would replace. Therefore, as a near-term objective, industry revenues under the digital transmission right should equal the sum of total net profits for record labels and music publishers and total royalty income for songwriters and recording artists derived from sales and licensed public performances of their musical works and sound recordings.

Although the industry was unable to make the digital music marketplace safe for its traditional ways of doing business, its various Internet strategies have effectively suppressed the market for music-enabled

web sites and other audio services. Therefore, in the short-term, there may well be a short-fall between the base revenue amount (however much that turns out to be) and the amount that rights holders will collect in license fees under the digital transmission right.

I expect that service providers, who are eager to meet consumer demand by lawful means, will rush to enter into license agreements under the digital transmission right. To increase the likelihood of this favorable result (and, as I suggested earlier), the overall burden of compliance, including the cost of license fees and the effort needed to fulfill music use reporting requirements, should be light enough so that knowing non-compliance can only result from a willful and unjustifiable refusal. If these conditions are met, the duration of any revenue short-fall likely will depend on how quickly and how well music industry rights holders organize and roll-out the structures needed to implement their new right.

In the meantime, steps should be taken to make up any short-fall that may occur. For this limited purpose, I suggest that a temporary levy should be imposed on consumer electronics and technology products.

Consumer electronic makers and technology firms, as such, would have no liability under the digital transmission right. Nevertheless, because of the digital transmission right, they will be free to innovate in whatever ways and to whatever extent necessary to satisfy ongoing consumer demand for new music-related products and services. I think it is appropriate, therefore, that these businesses should bear the burden of the levy; they should not be permitted to pass the levy through to consumers.

It is not intended that the levy result in a windfall for music industry rights holders; it is only meant to make them whole during transition to the digital transmission right. Therefore, the levy should be adjusted downward in response to increases in music industry license fee collections. In addition, the levy should be subject to sunset; a definite date (I suggest two to four years from implementation) by which the music industry would be expected to thrive in the digital music marketplace without subsidies.

**Conclusion: Though the End Is Near, the Music Industry
May Not Yet Have Passed the Point of No Return**

On October 4, 2007, the RIAA won its first jury verdict in a copyright infringement action against an individual file-sharer. The jury in Duluth, Minnesota, found Jammie Thomas liable for copyright infringement

arising out of her participation in the Kazaa P2P file-sharing network. It awarded \$222,000.00 in damages to the plaintiff record labels (although the RIAA, which conducted the litigation, will retain whatever money it is able to collect from Ms. Thomas, a single mother of two).¹⁰⁵

The music industry's victory in the *Thomas* case likely will serve only to encourage it to continue its efforts to salvage its traditional ways of doing business. Ironically, however, the industry may have been better off had it lost the *Thomas* trial or, perhaps more importantly, had it lost the *Grokster* case in the Supreme Court.¹⁰⁶ Commenting on the verdict in *Thomas*, Paul Resnikoff, editor of *Digital Music News* observed: "In the face of a negative precedent, majors would be forced to craft more consumer-friendly approaches, accelerate their shift away from content protection, and adopt radically different access and pricing models. And they would stop committing valuable financial and legal resources towards an incredibly unsuccessful product preservation strategy."¹⁰⁷

The music industry is in free fall and, to date, all that it has accomplished through its brute force efforts is to waste time, lose money, and squander goodwill. No time remains for stop-gap measures. There can be no justification for further delay in the implementation of needed change.

To be sure, the digital transmission right, administered as I have suggested, would represent a major shift in leverage and economics within the music industry, and it almost goes without saying that those rights holders—and the organizations that represent them—who have enjoyed the strongest position historically, will likely be reluctant to embrace such a change. Nevertheless, the digital transmission right would provide songwriters, music publishers, recording artists and record labels, in the aggregate, with their best opportunity to do as well—if not better—financially than they have done under the system that the digital transmission right would replace.

105. Eric Bangeman, *RIAA Trial Verdict Is In: Jury Finds Thomas Liable for Infringement*, ARS TECHNICA, Oct. 4, 2007, available at <http://arstechnica.com/news.ars/post/20071004-verdict-is-in.html>; David Kravets, *Jury Finds Minnesota Woman Liable for Piracy, Awards \$222,000*, WIRED Blog Network (Oct. 4, 2007), <http://blog.wired.com/27bstroke6/2007/10/riaa-jury-finds.html>.

106. See *supra* note 23 and accompanying text.

107. Paul Resnikoff, *Resnikoff's Parting Shot: Why Major Labels Just Lost*, DIGITAL MUSIC NEWS, Oct. 4, 2007, available at <http://digitalmusicnews.com/stories/100407parting/view>.

Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere

Aaron Schwabach*

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“There is probably more misinformation about China than about any other country in the world.”¹

I. The Perception Gap

There is a widespread but incorrect perception in the United States that intellectual property (IP) piracy is only or primarily a problem in developing countries, especially East Asian countries, and most especially China. This misperception is most evident in the screeching China-bashing of the mainstream media and some elected representatives, but it pervades discourse at every level. I recently encountered a discomforting example when my publisher sent me a proposed cover

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1. EUNICE TRETJENS & LOUISE STRONG HAMMOND, BURTON HOLMES TRAVEL STORIES: CHINA 209 (William H. Wheeler & Burton Holmes eds., Wheeler Publishing Co. 1931).

for a book on intellectual property law.² The cover showed a card table covered with DVDs and VCDs, presumably offered for sale. The DVDs, labeled in Chinese, were recognizable as recent Hollywood movies.

I rejected the cover, partly because the book was a general overview of IP law, and DVD piracy (or even IP piracy generally), for all of the media coverage it receives, is only a very small part of IP law and receives only brief discussion in the book. My initial reaction to the picture, however, was not so calmly reasoned, but visceral: It looked sinophobic to me. The publisher had not initially realized what message the picture would send, but agreed that it had no wish to send that message; instead, it substituted a rather pleasant picture of an approved U.S. patent application.

Shortly afterward, Professor Wang Heng of Xinan (Southwest) University of Political Science and Law invited me to speak on international intellectual property law at a conference on the WTO in Chongqing. The conference organizers expected, another professor later told me, "yet another dreary scolding on IP piracy," but I knew at once what I had to say: The problem of IP piracy in China is really not as bad as all that.

Politicians in search of a safe, non-voting scapegoat often target foreigners. The unfortunate xenophobia that characterizes public political discourse on everything from immigration to trade policy, not just in the U.S. but worldwide, is the result of this cost-minimizing behavior by politicians. It will always be safer for a senator from Michigan to blame Detroit's economic woes on Japanese carmakers (for somehow competing unfairly) than on Detroit's carmakers for making lousy cars. Lawyers and legal academics are not politicians, however, and have no such excuse. Indeed, it is our duty to counteract political hyperbole with facts and reason, rather than buying into it.

A welcome example of the facts-and-reason approach is Peter K. Yu's 2003 article *Four Common Misconceptions about Copyright Piracy*.³ The four misconceptions referred to in the title are that "(1) copyright piracy is merely a cultural problem, (2) copyright piracy is primarily a development issue, (3) copyright piracy is a past phenomenon for technologically-advanced countries, and (4) copyright piracy is a necessary byproduct of authoritarian rule."⁴ As applied to China (and

2. AARON SCHWABACH, *INTELLECTUAL PROPERTY: A REFERENCE HANDBOOK* (ABC-CLIO, Inc. 2007).

3. Peter K. Yu, *Four Common Misconceptions about Copyright Piracy*, 26 *LOJ. L.A. INT'L & COMP. L. REV.* 127 (2003).

4. Yu, *supra* note 3, at 130.

my apologies to Professor Yu if I stretch his points too far) (1) there has been a frequent and inaccurate portrayal in English-language publications, including scholarly publications, of IP piracy as somehow rooted in Chinese culture and Otherness; (2) China's rapidly-increasing level of economic development is not directly (or inversely) related to IP piracy rates; (3) technological advances in the U.S. have actually brought about a resurgence in U.S. IP piracy; and (4) authoritarian rule may actually have a dampening effect on IP piracy. This article addresses these ideas and their consequences: Not only is copyright piracy in China (and perhaps other countries with similar development profiles) less of a problem for U.S. copyright holders than it is often portrayed as being, but copyright piracy in developed countries is a much greater problem.

II. Blaming China

The upcoming 2008 presidential election has brought on a wave of China-bashing from presidential candidates. On August 7, 2007, Hillary Clinton declared "I do not want to eat bad food from China...or have my children having toys that are going to get them sick."⁵ While voters may be accustomed to taking everything said by candidates for office with several grains of salt, when Ms. Clinton expressed this concern, her only child, Chelsea, was 27 years old.⁶ In the same debate, Barack Obama declared, somewhat more moderately, "China is a competitor, but they don't have to be an enemy."⁷ Someone who hijacks airplanes and flies them into buildings full of people is an enemy. Someone who sells pirated copies of *Rush Hour 3* is not. Apparently, though, political discourse in the U.S. has grown so irrational that concerns about intellectual property rights, currency exchange rates and leaded paint add up to enmity. And China-bashing, like Japan-bashing before it, has become an industry from which people can make money.⁸

5. Bronwen Maddox, *Democrats Found Wanting as China-bashing Comes to Fore*, THE TIMES, Aug. 9, 2007, available at http://www.timesonline.co.uk/tol/comment/columnists/bronwen_maddox/article2224879.ece.

6. Chelsea Clinton was born on February 27, 1980. The toy danger may have been exaggerated by an American company, Mattel, erring on the side of over-recalling. See Ben Blanchard, *Mattel Apologizes to China for Toy Recalls*, REUTERS, Sept. 21, 2007, available at <http://www.reuters.com/article/topNews/idUSPEK10394020070921?rpc=92>.

7. Maddox, *supra* note 5.

8. See, e.g., PETER NAVARRO, THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON (Keith Cline ed., Financial Times Press 2d. 2007); RAY EBERTS & CINDELYN EBERTS, THE MYTHS OF JAPANESE QUALITY (Lynne Lackenbach ed., Prentice Hall 1995).

When it comes to intellectual property rights, *Business Week* magazine has been among the reliable beaters of the China-scare drum. A sample of headlines from the past few months includes *China: Putting a Stop to IP Piracy*;⁹ *Chinese Fakes: Tough to Police*;¹⁰ *U.S. Takes Piracy Pushback to WTO—Intellectual-Property Rights Violations in China Cost the U.S. Billions Each Year, Leading to Complaints to the World Trade Organization*;¹¹ *Deaf to Music Piracy: Chinese Search Engines Make It Easy to Steal Net Tunes*;¹² and *How to Win the China Piracy Battle*.¹³ *Business Week* often portrays IP piracy as an Asian issue, even when China is not specifically mentioned: *Asia: The Steep Cost of Software Piracy*;¹⁴ *Software Piracy Still a Scourge in Asia*;¹⁵ *Asia's Digital Music Free-For-All*;¹⁶ *Asia's Maddening Music Biz—Universal Music Is on a Star Search for Hot Acts in China and Japan, but Illegal File-sharing and CD Piracy Woes Present Major Headaches*.¹⁷ Russia

9. Alistair J. Nicholas, *China: Putting a Stop to IP Piracy*, BUS. WK., March 22, 2007, available at http://www.businessweek.com/globalbiz/content/mar2007/gb20070322_286139.htm?chan=search.

10. Frederik Balfour, *Chinese Fakes: Tough to Police*, BUS. WK., Apr. 9, 2007, available at http://www.businessweek.com/globalbiz/content/apr2007/gb20070409_915993.htm?chan=search. The article, like many mentioned here, praises the Chinese government for its sincere anti-piracy efforts. The unfortunate cumulative effect of the headlines is the report of an editorial choice made by the magazine, rather than of the individual authors.

11. Frederik Balfour, *U.S. Takes Piracy Pushback to WTO—Intellectual-Property Rights Violations in China Cost the U.S. Billions Each Year, Leading to Complaints to the World Trade Organization*, BUS. WK., April 10, 2007, available at http://www.businessweek.com/globalbiz/content/apr2007/gb20070410_466097.htm?chan=search.

12. Bruce Einhorn & Xiang Ji, *Deaf to Music Piracy: Chinese Search Engines Make It Easy to Steal Net Tunes*, BUS. WK., Sept. 10, 2007, available at http://www.businessweek.com/globalbiz/content/aug2007/gb20070830_502991.htm?chan=search or http://www.businessweek.com/magazine/content/07_37/b4049058.htm?chan=search (same article). The (absurd) implication is that using English-language search engines to aid copyright piracy is somehow difficult.

13. Shaun Rein, *How to Win the China Piracy Battle*, BUS. WK., June 20, 2007, available at http://www.businessweek.com/globalbiz/content/jun2007/gb20070620_006304.htm?chan=search.

14. Eileen Yu, *Asia: The Steep Cost of Software Piracy*, BUS. WK., May 16, 2007, available at http://www.businessweek.com/globalbiz/content/may2007/gb20070516_812794.htm?chan=search.

15. Jeanne Lim, *Software Piracy Still a Scourge in Asia*, BUS. WK., May 24, 2006, available at http://www.businessweek.com/globalbiz/content/may2006/gb20060524_858766.htm?chan=search. The article does observe that: "The incidence [of IP piracy] has dropped in India and China. . . ." The justification for the headline is that "in the Asia-Pacific region as a whole, [IP piracy has] risen, says a new study." *Id.* The article includes a figure of \$6.9 billion for software piracy losses in the U.S., as against \$3.9 billion in China and \$3.2 billion in France. *Id.*

16. Brian Bremner, *Asia's Digital Music Free-For-All*, BUS. WK., May 30, 2007, available at http://www.businessweek.com/globalbiz/content/may2007/gb20070530_090440.htm?chan=search.

17. Brian Bremner, *Asia's Maddening Music Biz—Universal Music Is on a Star Search for Hot Acts in China and Japan, but Illegal File-sharing and CD Piracy Woes Present*

also merits mention: *Software Piracy: Will Russia Crack Down?*¹⁸ It is rare, however, to see piracy linked to a developed European or North American country, although there are occasional exceptions: *Software Piracy Still Rife in Britain*.¹⁹

In the slightly more distant past, *Business Week* has even linked IP piracy to national security, as if unlicensed copies of *Shrek the Third* might bring down the American political-economic system.²⁰

The reality is somewhat different. Just as more Americans have died from contaminated American-grown spinach than from imported Chinese produce,²¹ domestic piracy probably costs the U.S. content industry more money than piracy in any other country (although not more than in all other countries combined). And many developed countries continue to engage in more piracy, per capita, than many developing countries. While much of this piracy may escape media attention

Major Headaches, *BUS. WK.*, July 23, 2007, available at http://www.businessweek.com/globalbiz/content/jul2007/gb20070723_879431.htm?chan=search.

18. Renate Zoeller, *Software Piracy: Will Russia Crack Down?*, *BUS. WK.*, August 28, 2007, available at http://www.businessweek.com/globalbiz/content/aug2007/gb20070828_851680.htm?chan=search.

19. Sylvia Carr, *Software Piracy Still Rife in Britain*, *BUS. WK.*, May 23, 2006, available at http://www.businessweek.com/globalbiz/content/may2006/gb20060523_033850.htm?chan=search. The article even compares Britain unfavorably to China, India, and Russia, noting that while software piracy had decreased in those countries, it had not decreased in Britain. A recent article in the *Wall Street Journal* also provides a welcome respite: Anil K. Gupta & Haiyan Wang, *How to Get China And India Right*, *WALL ST. J.*, Apr. 28-29, 2007, at R4. The article advises businesses "Don't obsess over intellectual property." *Id.* In the print edition, however, the effect is somewhat undercut by the China-scare ad that appears on the back of the page: A full-page black rectangle with a tiny red airplane and the nonsensical question: "If a plane departs Shanghai at 9:00 pm and flies due west at 500 mph, how much time do you have to stop a deadly pandemic?" *Id.* at R3. The ad provides a link to an equally meaningless IBM video on bird flu, filled with talking heads saying things like: "The influenza virus is a nasty virus" over scary-movie background music. It is hard to tell what purpose the ad serves, other than labeling China a source of disease and danger. *Id.*; http://www.03.ibm.com/innovation/us/adv/special/index.shtml?maven_referralPlaylistId=cca2c88b3aa9f6a51bc2eb35c9645964539b55a4&maven_referralObject=441250499 (last visited Sept. 14, 2007). It also shows contempt for the intelligence of the *Wall Street Journal's* readers: A plane flying due west from Shanghai is on a very short domestic flight, or might be a special-purpose military or scientific flight. Westbound long-distance flights in the northern hemisphere generally follow great circle routes, and there are no great circle routes originating in Shanghai and initially heading due west, because Shanghai is not on the equator. A plane flying from Shanghai to London, for example, would start out flying somewhat north of northwest. (Eastbound flights in the northern hemisphere may deviate from great circle routes, to take advantage of the jet stream.)

20. Patricia O'Connell, *Piracy and "Economic National Security": From Lost Jobs to Shrunk Profits, Intellectual Property Theft Is a Major Threat to the U.S., Says the Justice Dept.'s David Israelite*, *BUS. WK.*, Aug. 2, 2004, available at http://www.businessweek.com/bwdaily/dnflash/aug2004/nf2004082_1497.htm?chan=search.

21. In 2006 three Americans died from eating contaminated spinach grown and packed in the U.S. Nor has the problem of contaminated U.S. food been resolved. In Sept. 2007, Dole Food Co., a U.S. company, recalled more than 5,000 bags of salad vegetables

because it is online and thus less visible, the card table covered with pirated DVDs and CDs is still more common in the U.S. than one might expect from the public, political and scholarly discourse on the topic.²²

Even in reports of piracy within the U.S., the identification of IP piracy with the Other continues. Latin music, in particular, is singled out, giving the casual reader the impression that IP piracy within the U.S. is confined to an immigrant, “foreign” subculture.²³ It is common to read reports of arrests at swap meets containing gratuitous references to the seized discs as containing “100% Latin” music, while in other arrests the content is simply not described;²⁴ seeing the content described as “100% Anglo music,” even if accurate, is about as likely as reading an account describing the French Revolution as “white-on-white violence.”

GrayZone, a private anti-piracy firm, provides monthly lists of “RIAA Anti-Piracy Seizure Information” on its website. A particularly egregious example is the listing for September 2003, which describes 48 enforcement actions within the U.S. and in doing so uses the phrase “Latin” nineteen times, including “100% Latin” six times.²⁵ The same list also describes three enforcement actions in the Dominican Republic, a Spanish-speaking country, and notes, perhaps unnecessarily, that all of the music seized in each of the three raids was also “Latin.”²⁶ The list notes sixteen raids in which “urban” CDs were seized, while the terms “country” and “pop” appear on the list once each, in describing a raid that also included Latin and urban music.²⁷ Twenty-four items do not describe the type of music seized. These twenty-four non-specific descriptions may simply be examples of responsible law enforcement, but it still seems a bit odd that Latin and urban music merit such frequent

grown in the U.S. after a sample tested in Canada was found to be contaminated with bacteria. *Dole Recalls Salad Mix for E. Coli Risk: About 5,000 Bags of Hearts Delight Sold in Nine States and Parts of Canada Affected by Recall*, CNNMONEY.COM, Sept. 17, 2007, available at <http://money.cnn.com/2007/09/17/news/companies/bc.lettucerecall.ap/index.htm?cnn=5>. Although the article is about contamination originating in the U.S. affecting other countries as well as the U.S., on September 18, 2007, the CNNMoney article nonetheless includes links stating: “China starts recall system for food, toys” and “A new legislative initiative requires detailed labeling on food products about countries of origin.”

22. See, e.g., *25 Busted at Swap Meet*, NORTH [SAN DIEGO] COUNTY TIMES, Nov. 17, 2005, available at http://www.nctimes.com/articles/2005/11/18/news/sandiego/21_43_5911_17_05.txt.

23. Latino-bashing and Mexico-bashing, unfortunately, are also on the rise—mainstream media figure Lou Dobbs, for one, seems determined to make a career of them.

24. See, e.g., GrayZone, RIAA Anti-Piracy Seizure Information, <http://www.grayzone.com/usabusts.htm> (last visited Sept. 12, 2007).

25. *Id.*

26. *Id.*

27. *Id.*

mention in connection with piracy.²⁸ (The discs are also variously described as “counterfeit,” “pirated,” and “piratical,” the last term conjuring up images of Captain Jack Sparrow, or perhaps Errol Flynn.)

III. Measuring Piracy

As with any illegal activity, it is difficult to get reliable information on how much digital piracy actually takes place. In addition to this reporting problem, there’s also a problem of valuation: The record industry might like to believe that a single downloaded song (“Sci-Fi Wasabi,” by Cibo Matto) represents a lost \$19 album sale. More realistically, it might represent a lost 99¢ iTunes sale, although even that may be too high: Many who download music for free do so out of curiosity, and would not listen to the song if doing so cost even a small amount of money. These free riders benefit from the willingness of someone, somewhere, to pay for the song and of someone (possibly not the same person) to make it available for download, but as the downloaders would not otherwise have bought the song, they do no direct economic harm.²⁹

Free-rider downloading also serves an advertising function that may actually benefit music-copyright owners: Some free-rider downloaders may like “Sci-Fi Wasabi” enough to go out and spend 99¢ per song for other Cibo Matto tunes from iTunes, or even \$11 for the album *Stereo Type A* or \$19 for *Pom Pom: The Essential Cibo Matto*. If the downloader (or another who hears the downloaded copy) becomes a fan, hundreds of dollars in sales may result; if no download takes place, all of these

28. *Id.*

29. The problem of valuation and displaced sales has been extensively discussed elsewhere. See, e.g., Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC’Y U.S.A. 497, 505-08 (1998); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1914 (2007); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U.L. Rev. 975, 983 (2002); Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795 (2006); Rafael Rob & Joel Waldfogel, *Piracy on the High C’s: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29 (2006); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 936-39 (1994) (Jacobs, J., dissenting) (“[O]ne cannot put a finger on any loss suffered by the publisher in the value of the individual articles or in the traditional market for subscriptions and back issues. The district court found that Texaco would not purchase back-issues or back volumes in the numbers needed to supply individual copies of articles to individual scientists.”); *Duffy v. Penguin Books USA Inc.*, 4 F.Supp.2d 268, 275 (S.D.N.Y. 1998) (“Because Fashion Formula was out-of-print at the time, Nanfeldt was unable to purchase the book. Thus, Duffy lost nothing as a result of Nanfeldt’s decision to photocopy portions of the book.”). See generally Susan Tiefenbrun, *The Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects Upon International Trade: A Comparison*, 461 BUFFALO L. REV. 1 (1998).

potential future sales would be lost.³⁰ Even if the total number of such sales represents only a tiny portion of downloads, it still exceeds the number of sales in the absence of downloading, which would be zero.

Movie piracy is somewhat easier to quantify. The same problem of reporting exists: People are unlikely to be truthful about their illegal downloading habits, and police detection of illegal downloads or DVD seizures can provide only a very rough estimate of actual downloads and sales. The valuation problem is simpler, however: Typically a DVD contains only one movie, so the downloader or purchaser of an unlicensed copy is not likely to buy a licensed copy of the DVD. The free-rider problem still remains: Not every unlicensed copy necessarily represents a lost sale. Many who might have been willing to pay 60 cents for a pirated³¹ DVD of the mind-numbingly awful conclusion to the *Pirates of the Caribbean* trilogy³² would have been unwilling to pay \$22 for a licensed copy, or \$11 per person to see the movie in a theater—or would have demanded their money back if they had. And there is still the possibility of legitimate sales resulting from initial introduction through unlicensed copies: A friend's recommendation may lead a curious teenager to download *Porco Rosso*,³³ in turn leading to a lifelong interest in anime and the spending of hundreds of dollars on the work of Hayao Miyazaki and Studio Ghibli alone, and may lead to other interests: If, for example, the hypothetical downloader is a German speaker, the discovery that Sidonie von Krosigk (the voice of Chihiro in the German release of *Spirited Away*³⁴) also starred in two German fantasy films, *Bibi Blocksberg*³⁵ and its sequel, *Bibi Blocksberg und das Geheimnis der blauen Eulen*,³⁶ may lead to the purchase of licensed copies of those films as well as of recordings of the many, many episodes of the long-running Bibi Blocksberg television cartoon.

IV. Movie Piracy by Country: Motion Picture Association Study Results

In May 2006 L.E.K. Consulting, a multinational business consultancy, completed a study commissioned by the Motion Picture Association (MPA; the international counterpart of the Motion Picture Association

30. Kurlantzick & Pennino, *supra* note 29, at 511.

31. Or piratical.

32. *Pirates of the Caribbean: At World's End* (Walt Disney Pictures 2007).

33. *Porco Rosso* (Studio Ghibli 1992 (in Japan, as *Kurenai no Buta*; U.S. release 2005)).

34. *Chihiros Reise ins Zauberland* (Studio Ghibli 2003).

35. *Bibi Blocksberg* (Kiddinx Entertainment GmbH 2003).

36. *Bibi Blocksberg und das Geheimnis der blauen Eulen* (Bibi Blocksberg and the Secret of the Blue Owls) (Kiddinx Entertainment GmbH 2005).

of America (MPAA)) on the global cost of movie piracy.³⁷ L.E.K. surveyed more than 20,000 consumers in twenty-two countries and territories: Australia, Brazil, Canada, China, France, Germany, Hong Kong, Hungary, India, Italy, Japan, Korea,³⁸ Mexico, the Netherlands, Poland, Russia, Spain, Sweden, Taiwan, Thailand, the United Kingdom, and the United States. The study looked at piracy of all movies, with a special focus on movies produced by the MPA member studios: Buena Vista (Walt Disney), MGM, Paramount, Sony, Twentieth Century Fox, Universal City Studios, and Warner Brothers. The study concluded that in the preceding calendar year (2005) the MPA movie studios had lost \$6.1 billion to piracy, 80% of it outside the U.S.³⁹ This figure is subject to the uncertainties described above, and the report's description of the method used for valuation does not make it clear whether each pirated copy is counted as a lost sale, or perhaps more than one lost sale: "The study's piracy loss calculation is based on the number of legitimate movies—movie tickets, legitimate DVDs—consumers would have purchased if pirated versions were not available."⁴⁰

Even with these reservations, however, the results show piracy to be a more multi-sided problem than is often assumed. Of the supposed \$6.1 billion in losses to U.S. studios, 2.3 billion, or 38%, were lost to Internet piracy, while 3.8 billion, or 62%, were lost to hard-goods piracy.⁴¹ The three countries in which the losses to U.S. studios were highest were not East Asian countries, and two of them were not developing countries: Mexico, the United Kingdom, and France accounted for over \$1.2 billion in lost revenues, or 25% of the non-U.S. total—and slightly less than the U.S. total of \$1.3 billion.⁴² The three countries have a combined population of about 225 million, somewhat less than the United States' 293 million, giving them a slightly higher per capita piracy rate.⁴³

V. MPA Members' Lost Revenues, Per Capita

Russia came in fourth on the L.E.K. Report's dollar-value list, while China came in sixth. When population is taken into account, the differences are still more dramatic:

37. L.E.K. CONSULTING, THE COST OF MOVIE PIRACY (May 2006), http://www.mpaa.org/2006_05_03leksumm.pdf [hereinafter L.E.K. Report].

38. In the L.E.K. Report and throughout this paper, "Korea" refers to South Korea.

39. L.E.K. Report, *supra* note 37, at 4.

40. *Id.* at 13.

41. *Id.* at 4.

42. *Id.* at 7.

43. *Id.* at 7; THE 2005 WORLD ALMANAC AND BOOK OF FACTS 776, 802, 841, 843 (2005).

Country	Revenues lost by U.S. MPA members ⁴⁴ (in millions)	Population ⁴⁵ (in millions)	Loss per capita
USA	\$1,311	293	\$4.47
Mexico	\$483	105	\$4.60
UK	\$406	60	\$6.77
France	\$322	60	\$5.37
Russia	\$266	144	\$1.85
Spain	\$253	40	\$6.33
China	\$244	1,299	\$0.19
Japan	\$216	127	\$1.70
Italy	\$161	58	\$2.78
Germany	\$157	82	\$1.91
Thailand	\$149	65	\$2.29

In only four of the countries listed in the L.E.K. Report as the top ten markets for losses to U.S. producers does the average person steal more from U.S. studios than do the Americans themselves. Three of these four countries are developed members of the European Union: France, Spain, and the United Kingdom. Mexico aside, the developing countries on this list have far lower per capita piracy rates. (As a percentage of total sales, however, these countries' rates are still high, because they also have lower per capita legitimate sales rates.⁴⁶) Russia, often portrayed in the media as a lawless Wild West dotted with organized-crime fiefdoms, has a per-capita rate only slightly higher than that of notoriously law-abiding Japan, and lower than that of equally staid Germany.⁴⁷

With China, the difference is exceptionally stark: The per capita cost of piracy is negligible, an order of magnitude lower than Germany's. While it might be that a significant percentage of China's 1.3 billion people are excluded from participation in the modern information society—that is, don't have televisions and DVD or VCD players, let alone broadband Internet access—the probable explanation lies elsewhere. China has over 400 million televisions (approximately one for every 3.25 people), which suggests that most people have access to video entertainment.⁴⁸ And even if only the wealthiest one-tenth of China's population is considered, the

44. L.E.K. Report, *supra* note 37, at 7.

45. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 763, 776, 778, 789, 790, 802, 823, 831, 836, 841, 843 (2005).

46. See generally L.E.K. Report, *supra* note 37, at 6.

47. This is not to suggest, of course, that Japan is actually unusually law-abiding (whatever the crime statistics may show) or that Germany is staid, but only that the publicly perceived images of these countries—their national brands—incorporate these stereotypes.

48. China Press, Media, TV, Radio, Newspapers, n.d., <http://www.pressreference.com/Be-Co/China.html> (last visited Sept. 20, 2007).

per-capita cost of piracy would be no higher than Germany's. It seems that if any countries are systematically looting U.S. intellectual property rights in movies, they are to be found not in Asia but in the European Union.

Language might be one reason. There is more incentive to buy and steal English-language movies if you speak English. No matter what Rex Harrison might have said, nearly everyone in the U.K. does; many people in Europe do; few people in Russia or China do. China also has a robust film industry of its own, producing films in Chinese and more closely suited to the tastes of Chinese audiences than imported films.⁴⁹ Video piracy is indeed a serious problem in China, but piracy of U.S. movies is only a tiny part of it.

A look at the data for the remaining twelve countries in the study provides partial support for the hypothesis that persons in countries with a large domestic film industry are less likely to pirate U.S. films:

Country	Revenues lost by U.S. MPA members ⁵⁰ (in millions)	Population ⁵¹ (in millions)	Loss per capita
USA	\$1,311	293	\$ 4.47
Canada	\$118	33	\$3.58
Hungary	\$102	10	\$10.20
Poland	\$102	39	\$2.62
Brazil	\$101	184	\$0.55
Taiwan	\$98	23	\$4.26
Australia	\$93	20	\$4.65
Netherlands	\$36	16	\$2.25
Sweden	\$32	9	\$3.56
Korea	\$9	49	\$0.18
India	\$7	1,065	\$0.01
Hong Kong	\$4	7	\$0.57

49. Protectionism may be another reason: Chinese law severely limits the theatrical release of foreign films, possibly reducing demand for those films on DVD—although, as many films are thus available only on DVD, the effect of protectionism might actually be to increase demand for certain DVDs. China has the highest percentage of MPA members' potential market lost to piracy—90%—of any country in the study, possibly because the legitimate outlets for MPA movies are restricted in order to protect China's film industry, forcing viewers to purchase unlicensed copies if they want to see certain movies at all. See L.E.K. Report, *supra* note 37, at 6. On unfair non-IP-related trade practices in the international film industry generally, see Claire Wright, *Fugitive Production*, L.A. DAILY JOURNAL, Sept. 12, 2007, at 6. Pirated movies may also be manufactured for export; exporting these movies to the U.S. market would be easier from Mexico or Canada than from China or Russia.

50. E-mail from Julie Kenworth, Motion Picture Association of America, to Aaron Schwabach (Oct. 1, 2007) (on file with author).

51. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 751, 757, 760, 783, 784, 793, 806, 821, 833, 835, 843 (2005).

India, with the world's largest film industry, has a per-capita loss rate for U.S. filmmakers even lower than China's; the other East Asian country on the list, Korea, has a rate similar to China's, while the rate for the Chinese territory of Hong Kong is also low; Korea and Hong Kong also have commercially significant film industries. Tiny Hungary, on the other hand, leads the piracy league by this measure. Conditions in Hungary may be ideally conducive to piracy of U.S. movies: Near-universal access to home video entertainment⁵² and no commercially significant domestic film industry.⁵³

VI. MPA Members' Lost Consumer Spending Due to Movie Piracy, Per Capita

Looking at the L.E.K. Report's figures for lost consumer spending (as opposed to MPA members' lost revenues) gives different numbers, still falling in to the same general groupings:

Country	Total MPA member consumer spending lost to movie piracy ⁵⁴ (in millions)	Population ⁵⁵ (in millions)	Loss per capita
USA	\$2,561	293	\$8.74
Mexico	\$954	105	\$9.09
UK	\$787	60	\$13.12
Russia	\$622	144	\$4.32
France	\$604	60	\$10.07
China	\$565	1,299	\$0.43
Spain	\$478	40	\$11.95
Japan	\$375	127	\$2.95
Germany	\$353	82	\$4.30
Italy	\$316	58	\$5.45
Thailand	\$271	65	\$4.17
Taiwan	\$220	23	\$9.57

52. Nearly 90% of households in Hungary have at least one color television set. THE ECONOMIST, POCKET WORLD IN FIGURES 92 (2007).

53. Many Hungarian films win international critical acclaim, but the film industry of the land of Béla Tarr has not yet achieved a dependable record of international (or even, for the most part, domestic) commercial success. See, e.g., Nóra Lakos, *Hungarian Films Win Big at Festivals... But Who Sees Them? Distribution a Problem for European Films as Hollywood Maintains Grip on Market*, BUDAPEST WK. ONLINE, May 10, 2007, <http://www.budapestweek.com/newsites/trends/trends02.html>.

54. L.E.K. Report, *supra* note 37, at 10; Kenworth, *supra* note 50.

55. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 751, 757, 760, 763, 776, 778, 783-84, 789-90, 793, 802, 806, 821, 823, 831, 833, 835, 836, 841, 843 (2005).

Country	Total MPA member consumer spending lost to movie piracy (in millions)	Population (in millions)	Loss per capita
Canada	\$211	33	\$6.39
Poland	\$200	39	\$5.13
Hungary	\$184	10	\$18.40
Brazil	\$172	184	\$0.93
Australia	\$171	20	\$8.55
Netherlands	\$84	16	\$5.25
Sweden	\$66	9	\$7.33
Korea	\$28	49	\$0.57
India	\$12	1,065	\$0.01
Hong Kong	\$8	7	\$1.14

As with the previous chart, three countries in the top ten—France, Spain and the U.K.—have a significantly higher per capita lost consumer spending rate than the others, with Mexico not too far behind, while one country in the top ten—China—has a significantly lower per capita piracy rate than the next lowest top-ten country, Japan. Hungary's per capita consumer spending loss is the highest of any country on the list, by a wide margin, while Australia and Sweden approach U.S. levels. Per capita loss for Korea and Hong Kong are nearly as low as for China, while per capita loss for India is, again, virtually nil.

The actual difference in piracy rates may be even higher: While assessing the quantity of any illegal activity is difficult, the value of on-line piracy (which does not involve a physical product) is probably even harder to assess than the value of DVD piracy (which does). And online piracy of movies, which requires broadband to be practical, is likely to be more concentrated in countries with greater access to broadband. With only 4 broadband connections per 100 inhabitants as late as June 2006,⁵⁶ compared to about 20 per 100 in the U.S., France and Japan and about 22 per 100 in the U.K., China has a lower percentage of people able to pirate DVDs online. Thus piracy is forced out into

56. See ITFACTS BROADBAND, TOP BROADBAND COUNTRIES IN Q4 2006: USA, CHINA, JAPAN, GERMANY (Apr. 9, 2007), <http://www.itfacts.biz/index.php?id=P8268>; Wikipedia, List of Countries by Broadband Users, http://en.wikipedia.org/wiki/List_of_countries_by_broadband_users#_note-China (last visited Sept. 14, 2007); Organization for Economic Cooperation and Development Directorate for Science, Technology and Industry, OECD Broadband Statistics to December 2006, http://www.oecd.org/document/7/0,3343,en_2649_34223_38446855_1_1_1_1,00.html (last visited Sept. 14, 2007).

the open, relatively speaking: Out to the swap meets and card-table sidewalk vendors, whose wares can be more readily seized and counted.

While this may contribute some error to the assessment of losses due to IP piracy, the greater harm it causes is to public perception. People see street vendors selling DVDs, and they see images of the vendors in the media. They don't see online downloading, which happens inside private homes and would be fairly boring to watch. Online piracy may lead to lawsuits, but rarely to arrests. Even when it does, the arrests are rarely spectacular. But arrests of DVD pirates and vendors are media-genic; they present the spectacle of thousands of videos scattered on the ground, crushed beneath the feet of police officers.⁵⁷ These images—card tables covered with obviously pirated DVDs, street vendors being led away in handcuffs, huge piles of DVDs being destroyed—stand out in the memory. And when the images come mostly from East Asia, the impression left in the public mind is that IP piracy is an East Asian problem, rather than a North American, European, or world problem.

VII. Total Consumer Spending Lost to Movie Piracy, Per Capita

Looking at total lost consumer spending changes things somewhat; people in some countries (the U.S., Australia, and Canada, for example) seem to pirate mostly U.S. movies, while in others (especially China and India, but also France, Hong Kong and Korea) they seem to pirate mostly non-U.S., probably domestic, movies. The L.E.K. Report puts the total loss of consumer spending due to movie piracy in China at \$2,689 million—the highest total amount of any country in the study other than the United States, although far from the highest per capita. Listed by total amounts of consumer spending lost to piracy, rather than just piracy of MPA members' IP, China takes the top spot after the U.S., followed by France, Mexico, the U.K., and Russia.

Country	Total consumer spending lost to movie piracy ⁵⁸ (in millions)	Population ⁵⁹ (in millions)	Loss per capita
USA	\$2,724	293	\$9.30
China	\$2,689	1,299	\$2.07

57. See, e.g., *Police Destroy 2.5 Million Fake VCDs, DVDs*, JAKARTA POST, Sept. 20, 2007, available at <http://www.thejakartapost.com/detailgeneral.asp?fileid=20070912143534&irec=69>.

58. L.E.K. Report, *supra* note 37, at 10; Kenworth, *supra* note 50.

59. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 751, 757, 760, 763, 776, 783-4, 789-90, 793, 802, 821, 823, 831, 833, 835, 836, 841, 843 (2005).

Country	Total consumer spending lost to movie piracy (in millions)	Population (in millions)	Loss per capita
France	\$1,547	60	\$25.78
Mexico	\$1,114	105	\$10.61
UK	\$1,007	60	\$16.78
Russia	\$901	144	\$6.26
Japan	\$742	127	\$5.84
Spain	\$670	40	\$16.75
Germany	\$491	82	\$5.99
Thailand	\$465	65	\$7.15
Italy	\$442	58	\$7.62
Canada	224	33	\$6.79
Hungary	199	10	\$19.90
Poland	272	39	\$6.97
Brazil	198	184	\$1.08
Taiwan	255	23	\$11.09
India	186	1,065	\$0.17
Australia	179	20	\$8.95
Netherlands	130	16	\$8.13
Sweden	107	9	\$11.89
Korea	64	49	\$1.31
Hong Kong	24	7	\$3.43

Once again, China's per capita piracy rate is the lowest among the top ten, but it is about five times as high as the rate of piracy on the previous chart. While that total may include movies from England, France, Japan, and other countries, the majority is probably made up of Chinese movies. Once again France, Spain and the United Kingdom lead the countries in the top ten; of the entire group of twenty-two countries, Hungary's per capita rate is the second highest, after France's. None of the Asian countries on the list reaches U.S. per capita levels except Taiwan; the sole South American country on the list, Brazil, is similarly low.

The pirating in China of Chinese movies offers the greatest incentive for enforcement of intellectual property protection of movies in China.⁶⁰ A property regime that protects the interests of foreign rather

60. On the problems and practice of intellectual property protection in China, see generally DANIEL C. K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 205-49 (Kluwer Law International 2002); DELI YANG, INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA (Pervez N. Ghauri

than domestic stakeholders is unlikely to prove popular in any country, and in China, as in many other countries, such a regime has unpleasant historical associations. China retains bitter memories of the European and Japanese colonialist onslaught of the nineteenth and early twentieth centuries, which saw the country's sovereignty and property handed over bit by bit to foreigners and which China barely survived as a nation. Foreign insistence on enforcement of IP rights arouses an intensity of resentment in China that it does not in France or the U.K. People have apparently been sentenced to death in China in the name of U.S. IP interests;⁶¹ many in China see the penalties imposed on IP pirates as a sacrifice made by their government to appease the U.S. This raises unhappy echoes of the colonialist era, when Chinese civilians were killed at the insistence of foreign powers as reprisals for crimes committed against foreign missionaries (but not committed by the people who were killed). Mark Twain famously condemned the practice in his essay opposing the U.S. imperialist adventure in the Philippines, "To The Person Sitting in Darkness," describing an incident in which Western missionaries in China demanded not only excessive cash reparations, but also 680 human heads.⁶²

VIII. Retail Sales Value of Music Piracy, Per Capita

While, as noted above, music piracy figures are less reliable, they also tend to show a low per-capita piracy rate in China. The figures provided by the International Federation of the Phonographic Industry (IFPI), a recording industry group, probably overstate the actual cost of piracy, but place the per capita level of pirated recording sales at about one-third of the level in the U.S.:

ed., Pergamon 2003); JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 563–617 (ABA Publishing 2d ed. 2005).

61. See WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 91 (Stanford University Press 1997) ("[S]uch undertakings [to enhance IP protection] have led to the imposition of the death penalty on at least four individuals...."); see also Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 418–19 (2003); *China Sentences Three To Life In Prison For CD Piracy In Harshes Sanction So Far*, BNA PATENT, TRADEMARK & COPYRIGHT LAW DAILY, Dec. 11, 1997, at D2.

62. Mark Twain, *To The Person Sitting in Darkness*, NORTH AMERICAN REV. (1901), reprinted in THE COMPLETE ESSAYS OF MARK TWAIN 282, 283 (Charles Neider ed., Doubleday & Company, Inc. 2000). This practice of collective punishment—that is, the murder of innocent people—was a common tactic of the imperialist nations. See e.g., CAROLINE ELKINS, IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA (Henry Holt & Co. 2005); ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (Mariner Books 1998) (addressing the Belgian Congo, the subject of Mark Twain's *King Leopold's Soliloquy*). In an interesting twist, two Americans have also been sentenced to terms in Chinese prison for DVD piracy. See Michael Janofsky, *2 Americans*

Country	Total retail sales value of pirated recordings ⁶³ (in millions)	Population ⁶⁴ (in millions)	Per capita value of pirated recording sales
China	\$878	1,299	\$0.68
Mexico	\$686	105	\$6.53
Russia	\$646	144	\$4.49
USA	\$612	293	\$2.09
Italy	\$401	58	\$6.91
Japan	\$272	127	\$2.14
India	\$260	1,065	\$0.24
Brazil	\$242	184	\$1.32
UK	\$178	60	\$2.97
Spain	\$114	40	\$2.85
Germany	\$114	82	\$1.39
France	\$103	60	\$1.72
Netherlands	\$87	16	\$5.44
Taiwan	\$67	23	\$2.91
Thailand	\$65	65	\$1.00
Poland	\$61	39	\$1.56
Canada	\$38	33	\$1.15
Australia	\$35	20	\$1.75
Hungary	\$33	10	\$3.30
Korea	\$25	49	\$0.51
Hong Kong	\$16	7	\$2.29
Sweden	\$13	9	\$1.44

Held in China On Charges Of Film Piracy, N.Y. TIMES, July 31, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9503E4DB1E3DF932A05754C0A9629C8B63>; Jonathan Landreth, *China Jails Americans For Piracy*, BILLBOARD LAW NEWSLETTER, April 26, 2005, available at <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4402298-1.html>; Joshua Davis, *The Decline & Fall of Randolph Hobson Guthrie III*, WIRED, Oct. 2005, available at http://www.wired.com/wired/archive/13.10/guthrie.html?pg=1&topic=guthrie&topic_set=.

63. STEPHEN E. SIWEK, THE TRUE COST OF SOUND RECORDING PIRACY TO THE U.S. ECONOMY, INSTITUTE FOR POLICY INNOVATION/IPI CENTER FOR TECHNOLOGY FREEDOM POLICY REPORT 188 (August 2007), at 19, [http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/\\$File/SoundRecordingPiracy.pdf?OpenElement](http://www.ipi.org/ipi/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf?OpenElement); see also IFPI, THE RECORDING INDUSTRY 2005 COMMERCIAL PIRACY REPORT (June 2005), available at <http://www.ifpi.org.uk/content/library/piracy2005.pdf>. The figures are almost certainly exaggerated because they assume that each pirate sale displaced one licensed sale at a prevailing market rate for each country determined by IFPI, while in reality many consumers of pirated goods would not have purchased a licensed copy at that price. See note, *supra*.

64. THE 2005 WORLD ALMANAC AND BOOK OF FACTS 751, 757, 760, 763, 776, 783-4, 789-90, 793, 802, 821, 823, 831, 833, 835, 836, 841, 843 (2005).

In developed countries, pirated recording sales are probably only a tiny portion of online piracy figures, as nearly everyone in these countries has Internet access and downloading music files is simpler and faster than downloading movies. Thus Spain, viewed by the IFPI as "Europe's most serious piracy problem country where rampant street CD piracy has shrunk the legitimate market by one third in the last three years,"⁶⁵ actually shows a per capita pirated recording sales value no higher than that of the UK. Another industry group, however, the Entertainment Software Association, "reports that Spain, along with Italy and France, is consistently among the top five countries in which infringing activity occurring online (particularly through P2P networks) is persistently high. In addition, the ISPs in Spain are generally non-responsive to the notices of infringement sent to them by the ESA."⁶⁶ And despite the near-universal availability of Internet access in the U.S., per capita sales of pirated music recordings are actually higher in the U.S. than in 11 of the 21 other countries and territories listed here, including China, India, Korea, and Thailand, and comparable to rates in Hong Kong, Japan and Taiwan.⁶⁷

IX. Why Does the Perception Gap Matter, and What Can Be Done to Correct It?

IP owners, more intent on watching the money than on gaining viewers, readers, or votes with scare stories, are more inclined to concentrate efforts on developed countries such as Canada, where half of the world's pirated movie recordings may originate.⁶⁸ Unfortunately, distortions of public perception and extrinsic political concerns may ultimately distort U.S. trade law and policy in ways that can be harmful to U.S. IP owners' interests.

The gap between the perception and reality of international IP policy matters because it affects U.S. policy. Incorrect understanding of the problem may influence trade laws and foreign relations, and law enforcement resources may be misallocated. And if the U.S. fails to appreciate the efforts already made by developing countries to address

65. IFPI, *One in Three Music Discs Is Illegal but Fight Back Starts to Show Results* (June 23, 2005), http://www.ifpi.org.uk/content/section_news/20050623.html.

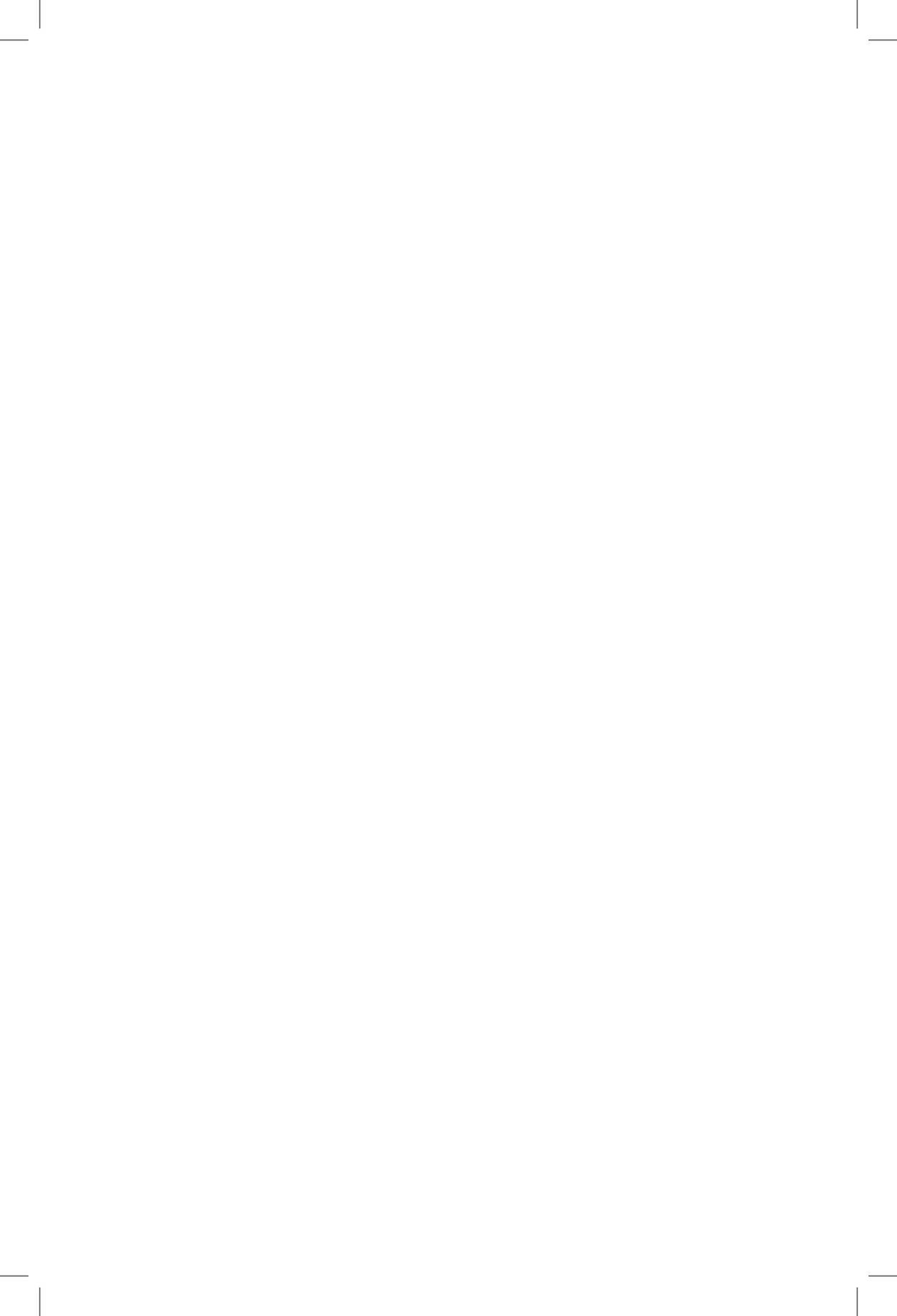
66. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2007 SPECIAL 301 REPORT: SPAIN 435, <http://www.iipa.com/rbc/2007/2007SPEC301SPAIN.pdf>.

67. The IFPI report lists more countries than the twenty-two included in the L.E.K. Report; the table here includes, for comparison, only the countries and territories in the L.E.K. Report.

68. See, e.g., Vito Pilioci, *Hollywood Blames Canada for Half of Movie Piracy*, CANADA.COM., Jan. 24, 2007, <http://www.canada.com/topics/technology/story.html?id=f8ae08f5-b82d-4e87-97b9-67ff7097638f&k=65095>.

IP piracy issues, those countries may have little incentive to continue those enforcement efforts.

To a certain extent, the problem may correct itself: Some countries, like China, may find that they have a strong stake not only in enforcing IP laws but in being seen to do so. The current overall piracy rate (as a percentage of total domestic sales) in China is high, but total pirate sales are falling and should continue to fall, while licensed sales continue to increase. This attacks the piracy percentage problem from both ends at once. While there will be some lag, public perception should improve as China's piracy percentage falls. However, even with low per capita piracy rates, China's total piracy level will remain high, because it is the world's most populous country. In addition, the effect of increased IP protection in China will be to move the problems of real and perceived piracy to other countries, like Vietnam and Ukraine. The problem will remain unless and until responsible commentators restructure the discourse to reflect reality, reason and accuracy rather than media scare-mongering or political vote-chasing.



Does China Hope to Remap the Internet in its Own Image?

Richard Winfield and Kristin Mendoza*

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Introduction

In their book, *Who Controls the Internet?*, the authors quote law professor Peter Yu, who warns, "the question is no longer how the Internet will affect China. It is how China will affect the Internet."¹ This article surveys the literature on China's actions and statements in recent years in an effort to offer some tentative answers to Professor Yu's question. The importance of the question and these tentative answers to freedom of the press cannot be sufficiently emphasized. To imagine an Internet remapped in China's image, incorporating the vision that China has publicly announced, is to contemplate a world of unparalleled censorship and repression. This article addresses the threats posed by China's Internet vision.

Conventional wisdom suggests that globalization, with the Internet as its principal facilitator, will inevitably lead to open societies. By making Internet technology widely available to Chinese citizens, therefore, some believe that the Chinese Communist Party has sown the seeds of its own demise.² Yet, China has shown a remarkable ability to use this new media to promote economic development and simultaneously to inhibit political expression by investing in "ever-more automated internal control and filtering systems."³ In this way, China's Internet is a tool for security authorities to identify, monitor and arrest potential dissidents. Many worry that the 'Chinese model' of the Internet is spreading globally.⁴

This article explores the following issues:

- *Whether China is establishing future global Internet norms and standards that will curtail freedom of the press globally; and*
- *The extent to which China exports Internet censorship technology and expertise.*

1. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? 104 (2006).

2. See, e.g., Thomas Friedman, Op-Ed., *Chinese Finding their Voice*, N. Y. TIMES, Oct. 21, 2005, at A25 ; Nicholas Kristof, Op-Ed., *In China It's ***** vs. Netizens*, N. Y. TIMES, June 20, 2006, at A17; Nicholas Kristof, Editorial, *Death by a Thousand Blogs*, N. Y. TIMES, May 24, 2005, at A21.

3. Goldsmith & Wu, *supra* note 1, at 97.

4. Richard Spencer, *China's Internet Censorship Spreads*, THE TELEGRAPH, June 7, 2007, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/06/06/wchina206.xml>.

I. Whether China is Establishing Future Global Internet Norms and Standards that will Curtail Freedom of the Press Globally

A. China has Created a Vast Market for this Technology and Expertise

China fosters the development of Internet censoring technology by creating a high demand for the fastest, most sophisticated network possible without requiring it to cede authoritarian control. China's needs drove the development of these Internet technologies by U.S. and other firms. But for China's market, there may not have been sufficient demand driving the production of ever-more sophisticated monitoring and filtering technology. China is in a unique position to create its own sphere of influence over network norms. Its market power gives China control over the most basic building blocks of network design and standards.⁵ And as China seizes control over certain standards, it determines what kind of products reaches its market and ultimately shapes network norms.⁶

B. China is Lobbying in the International Arena for Greater Control Over Internet Resources, Adoption of its Proposed Internet Norms, and Acceptance of its Practices

China's Internet policy is reflected in the recent statement of Hu Jintao that he aimed to "purify the [Internet] environment" and "[e]nsure that one hand grasps development while one hand grasps administration."⁷ Hu Jintao made this statement to the Politburo in early 2007, but China has long been pushing acceptance of its policy on the international plane in several ways:

1. CONTROL INTERNET RESOURCES

China's goal is to increase its control over critical Internet resources. China is among the leaders in lobbying for a United Nations (UN) organization to take over regulation of the Internet from the Internet Corporation for Assigned Names and Numbers (ICANN). Many other countries have supported this proposal, including the European Union and Brazil, the site of an important Internet Governance Forum (IGF) meeting in November 2007.⁸ This proposal alarms human rights advocates

5. Goldsmith & Wu, *supra* note 1, at 101.

6. *Id.*, at 102.

7. Lester Haines, *China's top red vows to 'purify' net*, THE REGISTER, Jan. 24, 2007, available at http://www.theregister.co.uk/2007/01/24/china_purifies_net/.

8. Other countries promoting its model are Brazil, Iran and Saudi Arabia. Malcolm Hutto, *A Score Draw in Geneva*, May 25, 2007, LINX PUBLIC AFFAIRS, <http://publicaffairs.linx.net/news/?p=672>.

who have seen the negligent attitude of the UN toward human rights abuses, and those who fear that governments that censor the Internet and imprison cyber-dissidents and journalists will be in charge of the flow of online information.⁹ While Chinese demands were dismissed at the World Summit on the Information Society (WSIS) in 2003, where the IGF was created as an agreeable alternative to a UN institution such as International Telecommunication Union (ITU), China succeeded in restoring “management of critical Internet resources” (DNS root servers and IP addresses) to the agenda of the next IGF meeting in Brazil.¹⁰ So far, Chairman Desai of the IGF has emphasized that IGF could not ever itself become an inter-governmental negotiation.¹¹ That fails to preclude another UN institution from usurping ICANN’s role.

2. PURSUE ADOPTION OF PROPOSED NORMS

The government-endorsed Internet Society of China conducted a workshop at the Athens meeting of the IGF in November 2006, at which “A Proposed Framework of World Norm of Internet” (“World Norm”) was circulated. A copy of this remarkable document is attached in Appendix A to this article. It contains, among others, these provisions: “Anyone has the rights to contribute true and trusty information to others via Internet;” “The openness of Internet should never be utilized for any harmful purpose to users;” “any kinds of unhealthy contents . . . should be forbidden;” and “Users should never violate the regulation for secured, trusty and efficient use of the networks.” The proposal also articulates the need for an organization under the UN to handle Internet related disputes and a permanent mechanism under the UN to generate governance proposals. While it encourages “open doors” and information to be “freely disseminated,” such information can only be “true and trusty,” or otherwise “good” content.¹²

In mid-November 2007, a year later, at the IGF meeting in Brazil, the same Chinese entity presented and lobbied for an almost identically titled second version (World Norm 2.0), a copy of which is also attached

9. Reporters Without Borders, Reporters Without Borders will go to IGF Venue in Athens to put free expression on agenda (Oct. 27, 2006), http://www.rsf.org/article.php3?id_article=19481.

10. *Id.* See also, THE DRAFT PROGRAMME OUTLINE FOR THE SECOND MEETING OF THE INTERNET GOVERNANCE FORUM (IGF) (2007), http://www.intgovforum.org/Rio_Meeting/DraftProgramme.30.04.2007.rtf.

11. See *supra*, note 8.

12. A Proposed Framework of World Internet Norm (Nov. 1, 2006) (memorandum circulated at the Internet Society of China workshop at the Athens meeting of the IGF) (on file with author).

in Appendix B. No less remarkable than its 2006 predecessor, World Norm 2.0 proclaims that China “triumphally organized” the 2006 IGF event where it had presented its initial version.

For “a better Internet Governance,” World Norm 2.0 repeats the demand for “international collaboration” through an “organizational authority [not ICANN] to monitor the quality of services, diagnose the faults of operations, and arbitrate disputes.” The powers to be exercised globally by the Governance authority are breathtaking in scope, “cover[ing] all aspects of openness, security, diversity and access.” The Governance authority shall command the “firm support” of all related parties.

Regulation of content is made necessary under World Norm 2.0 by the repeated insistence that Internet content must be “trustworthy and valuable.” In six iterations on two pages, World Norm 2.0 employs the term “trustworthy and valuable” to delimit what constitutes authorized content. Internet users should “strictly observe the regulations when accessing and utilizing the Internet.” World Norm 2.0 warns against letting the Internet “become a tool for those with ulterior motives.” It warns against abuse that might “introduce harms to others, compromise confidential information protected by laws and regulations.” The document’s invocation of such themes as “beautiful dream,” “peaceful world,” “happy life,” a “better life,” and “ethics and moralities by consensus” completes the Orwellian vision urged by China in World Norm 2.0.

It is important to consider the implications of the two Chinese World Norm proposals to freedom of the press. First, the record of China as the source is more than relevant. As a founding member of the UN, China is morally bound by the Universal Declaration of Human Rights (UDHR), including its guarantee of freedom of expression in Article 19. To the contrary, the findings of respected international monitors of press freedom—such as Freedom House, Amnesty International, Human Rights Watch, the U.S. Department of State, Reporters Sans Frontieres, International Press Institute, and Committee to Protect Journalists—are unanimous that for both new and traditional media, China is among the world’s most repressive regimes.¹³ The World Norms would make global the Chinese value system of an unfree press, a system of repression and censorship.

13. See, e.g., FREEDOM HOUSE, THE WORST OF THE WORST: THE WORLD’S MOST REPRESSIVE SOCIETIES 2007 (2007), http://www.freedomhouse.org/uploads/press_release/worstofworst_07.pdf; AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2007: CHINA 85–87 (2007), <http://thereport.amnesty.org/document/15>; HUMAN RIGHTS WATCH, WORLD REPORT 2002: CHINA AND TIBET (2002); <http://www.hrw.org/wr2k2/pdf/china.pdf>; U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005: CHINA (2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm>;

Second, the World Norm and World Norm 2.0 are explicit in imposing content regulations, authorizing governments and relevant inter-governmental organizations to limit the Internet to only that expression which satisfies governmental standards of being “true and trusty.” “good,” and “trustworthy and valuable.” Governments would find support in the World Norms for comprehensive schemes of prior restraint to prevent use of the Internet for purposes and content that are neither true, trusty, good, trustworthy nor valuable. Internet content that governments regard as “harmful” or “unhealthy” to users could be censored and punished. The invocation of terms of comparable vagueness and arbitrariness continues. The World Norm contemplates that governments and relevant intergovernmental organizations would regulate “secured, trusty and efficient” use of the Internet, and punish users’ violations of those regulations. World Norm 2.0 would sanction actions by governments to censor or punish content providers, not excluding the media, whose only crime was having “ulterior motives.” It would legitimize punishment of providers whose content the government thought was merely harmful, not illegal. And in the name of security and diversity, the all-powerful Internet Governance authority, a mega-ministry, would regulate global content and content providers, the media not excluded, in ways that can only be imagined.

To offer a contrasting view, Article 19 of the UDHR states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹⁴ To measure the two World Norms’ endorsement of vague and comprehensive Internet content controls against the guarantees of press freedom in Article 19 is to conclude that the World Norms represent nothing less than a draft international charter legitimizing censorship and repression.

3. PRESENT PRACTICES AS BENIGN

Chinese government officials present the Chinese approach to Internet censorship as entirely benign. China’s Representative to the UN

REPORTERS SANS FRONTIERES, INTERNET UNDER SURVEILLANCE 2004: CHINA (2004), http://www.rsf.org/article.php3?id_article=10749; INTERNATIONAL PRESS INSTITUTE, WORLD PRESS FREEDOM REVIEW 2006: CHINA (2006), http://www.freemedia.at/cms/ipi/freedom_detail.html?country=/KW0001/KW0005/KW0114/; COMMITTEE TO PROTECT JOURNALISTS, ATTACKS ON THE PRESS IN 2006: ASIA: CHINA (2006), <http://www.cpj.org/attacks06/asia06/chi06.html>.

14. United Nations Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948), art. 19.

Permanent Mission in Geneva, Yang Xiaokun, reacted to statements that China arrests journalists by explaining that “there are criminals in all societies and we have to arrest them. But these are legal problems. It has nothing to do with freedom of expression.”¹⁵ At the IGF meeting in Athens, Yin Chen, the director general, department of foreign affairs, ministry information industry said: “Our approach is to balance development with security. It is necessary to respect the need for the security of Internet content according to the law.”¹⁶

Chinese officials have been quite candid about their censoring activities. China has shown a willingness to defend its filtering regime in the international arena. In a rare briefing, the supervisor of Internet Affairs for the Information Office of the Chinese State Council, Liu Zhengrong, did not dispute that China operates a firewall to protect the Chinese Communist Party against challenges to it from within and without. He described that system as in compliance with the international norm, and explained that U.S. newspapers reserve the right to delete or block harmful content from their reader discussions online, U.S.-based companies regulate employee Internet use, and the U.S. government under the USA PATRIOT Act monitors websites and email communications for harmful information online as well.¹⁷ If China frames its policy within international norms, through repetition and acceptance, international norms can take the shape of the Chinese policy.

It is disingenuous to say that China is establishing these norms merely by its poor example, since, historically, governments that believe they have reason to repress their citizens will not need a model to help them to justify their acts. Nevertheless, China has promoted its agenda for Internet standards at international venues concerning global communications at least since the meeting of the World Summit of the Information Society,¹⁸ and this agenda shows Chinese resolve to shape global standards that would hamper freedom of the press globally.

15. Transcript of the Openness Session of the Internet Governance Forum Meeting in Athens, Greece (Oct. 31, 2006), <http://www.intgovforum.org/meeting.htm>

16. Darren Waters, *Reporter's Log: Internet Governance Forum*, BBC News ONLINE, Oct. 31, 2006, <http://news.bbc.co.uk/2/hi/technology/6090394.stm>.

17. See Joseph Kahn, *China Says Web Controls Follow the West's Lead*, N. Y. TIMES, Feb. 15, 2006, at A6.

18. In response to China's expressed preference to have the dominance of national law regimes mentioned, the United States wanted to add “consistent with the need to preserve the free flow of information” to the possibly restrictive paragraphs. Monika Ermert, *World+dog fight over World Summit of the Information Society*, THE REGISTER, Sept. 27, 2003, available at http://www.theregister.co.uk/2003/09/27/world_dog_fight_over_world/

C. *China is Building Local Capacity to Remap the Physical Infrastructure and Protocols of the Internet*

China plays an even larger role in establishing these norms as it develops its own expertise, which it is successfully doing now. China, then, is not simply an importer of technology or an export platform for outsourced R&D, but is “gearing up to become a producer of indigenous technology and a global knowledge player.”¹⁹ Its investment promotion strategy is to give preference to companies that are willing to transfer technology. And a recent Economist Intelligence Unit study shows China as the number one target for companies contemplating offshore R&D, ahead of the U.S. and India.²⁰ Chinese companies, originally copycats, are more attuned to domestic needs and interests, and are gaining in market share.²¹ These companies are poised to take the lead globally and export to other regimes with similar “needs.”

For example, when the Chinese telecom giant Huawei was founded in 1988, it mostly resold imported equipment for the domestic market. Through reverse engineering, and perhaps even intellectual property theft,²² Huawei is now a major manufacturer of wireless phone and networking equipment. The government supports Huawei largely because it serves a long-term goal of China: to develop its own technical standards. In 2004, for example, China announced mandatory WAPI standards, a technology requiring Wi-Fi users to register with a centralized authentication point. However, the effort was indefinitely suspended due to World Trade Organization (WTO) proceedings insisting it was a trade barrier.²³ As Chinese companies roll out technologies such as these, it can easily export them to its markets. Already, Huawei boasts that more than half of its orders come from markets outside of China.²⁴ In addition to these technical advances, the Ministry of Information Industry has urged Chinese companies to develop their own codecs,

19. Oded Shenkar, *Learning from China's Export Boom*, BUSINESS WEEK, Jan. 19, 2006, available at http://www.businessweek.com/technology/content/jan2006/tc20060119_322122.htm.

20. THE ECONOMIST INTELLIGENCE UNIT, SCATTERING THE SEEDS OF INVENTION: THE GLOBALIZATION OF R&D 9 (2004), http://graphics.eiu.com/files/ad_pdfs/RnD_GLOBILISATION_WHITEPAPER.pdf.

21. Rowan Callick, *China's Great Firewall*, AUSTRALIAN IT, Mar. 28, 2007, available at <http://www.australianit.news.com.au/story/0,24897,21362878-15400,00.html>.

22. Craig Simons, *China's Telecom Giant: The Huawei Way*, NEWSWEEK INTERNATIONAL, June 16, 2006, available at <http://web2.westlaw.com/search/default.wl?rs=wlw7.10&fn=top&sv=split&db=NEWKINTL&yr=2.0&rp=%2fsearch%2fdefault.wl&mt=LawSchool>.

23. Goldsmith & Wu, *supra* note 1, at 101 (2006).

24. Simons, *supra* note 22.

another way in which China is remapping the physical infrastructure and protocols of the Internet.²⁵

II. The Extent of China's Known Exports of Internet Censorship Technology and Expertise

A. *China Still Relies Heavily on its Import of U.S. Technology and Expertise to Conduct its Censorship Activities, Making it a Net Importer*

China is a net importer of Internet technology,²⁶ and the technologies that enable its censorship activity come from U.S. information technology (IT) companies. Though the U.S. government restricts some exports destined for use by Chinese security forces, such as tear gas and handcuffs, they do not restrict hi-tech exports, such as database software and video probes.²⁷ U.S. IT companies have exported these and similar products to China for years, and customers include the Chinese Ministry of Public Security.²⁸ Some companies altogether deny selling their technologies to repressive regimes.²⁹ Some claim they cannot—and have no obligation to—determine whether security forces will use their technology for repressive ends.³⁰ The Chinese authorities do, however, execute a high level of surveillance and monitoring, and use imported technologies to achieve this end. And these companies market and often custom-make technologies for the Chinese government.³¹ U.S. firms

25. Posting of Tricia Wang to YouMeiTI (May 24, 2007, 7:02 p.m.), <http://www.youmeiti.com> (“This can be seen as a move in the direction to have more control in surveillancing [sic] digital information, or it can be seen in the direction of fighting US companies’ patent monopolies.”).

26. Shenkar, *supra* note 19.

27. Letter from Marc Rotenberg, President, Electronic Privacy Information Center, to Carlos M. Gutierrez, U.S. Secretary of Commerce (Sept. 20, 2006), http://www.epic.org/privacy/intl/doc_china_letter.pdf. (on file with author).

28. *Id.*

29. See, Richard Walters, *Repressive governments widen range of stifling techniques*, FINANCIAL TIMES (UK), Mar. 15, 2007 at 8. Websense said that it does not sell to repressive regimes, and ONI reports that Yemen uses Websense. THE OPENNET INITIATIVE, INTERNET FILTERING IN YEMEN IN 2004–2005: A COUNTRY STUDY (2006), available at http://www.opennetinitiative.net/studies/yemen/ONI_Yemen_Country_Study.pdf. Fortinet also denied that it sold its software to Myanmar. Reporters Without Borders, *supra*, note 9.

30. See, Walters, *supra* note 29 (Cisco says that the routers it sells are all configured to behave in the same way, and it has no control over how they are used.).

31. See, Bruce Einhorn, Ben Elgin, & Peter Burrows, *Helping Big Brother Go High Tech*, BUSINESS WEEK, Sept. 18, 2006, at 46. Business Week reported that Cisco distributed brochures at a police technology trade show in Shanghai in 2002 where the company touted its products as “strengthening police control” and “increasing social stability.” *Id.* It was also reported that Cisco specifically designed and developed a special router/firewall box for China. See, Ethan Gutmann, *Who Lost China’s Internet?*, THE WEEKLY STANDARD, Feb. 25, 2002, at 24.

design special routers, integrators and firewall boxes³² programmed to monitor traffic and detect keywords, enabling China to monitor sites in real time and identify site owners and visitors.³³

B. *U.S. Companies Supply Directly to the Majority of Repressive Regimes Suspected of Following the 'Chinese Model'*

1. MIDDLE EAST/NORTH AFRICA

The majority of Middle Eastern states rely on commercial filtering software produced by the U.S.-based companies Secure Computing and Websense. For example, Tunisia, which blocks material on political opposition, human rights, and methods of bypassing the filtering, uses SmartFilter software, created by the U.S. company Secure Computing.³⁴ Saudi Arabia uses SmartFilter,³⁵ which customized filtering software to target sites “defaming” Islam or the royal family and politically charged sites.³⁶ Iran also uses SmartFilter.³⁷ The United Arab Emirates uses the SmartFilter filtering software to block “objectionable” content,³⁸ while it guides use of the Internet to establish itself as an economic leader in the region. Yemen uses Websense, also a U.S.-based company.³⁹

2. ASIA

Among Asian governments, Myanmar most aggressively censors the Internet. The U.S.-based company Fortinet supplies Myanmar's Internet filtering software. The company manufactures Fortiguard, but

32. ETHAN GUTMANN, *LOSING THE NEW CHINA: A STORY OF AMERICAN COMMERCE, DESIRE AND BETRAYAL* 130 (Encounter Books 2004). (China Telecom purchased several thousand of these special firewall boxes.)

33. REPORTERS WITHOUT BORDERS, *INTERNET UNDER SURVEILLANCE, 2004: CHINA* (2004), http://www.rsf.fr/article.php?id_article=10749.

34. THE OPENNET INITIATIVE, *INTERNET FILTERING IN TUNISIA IN 2005: A COUNTRY STUDY* (2005), available at http://www.opennetinitiative.net/studies/tunisia/ONI_Tunisia_Country_Study.pdf.

35. THE OPENNET INITIATIVE, *INTERNET FILTERING IN SAUDI ARABIA IN 2004* (2004), available at <http://www.opennetinitiative.net/studies/saudi/>.

36. Jennifer Lee, *Companies Compete to Provide Internet Veil for the Saudis*, N. Y. TIMES, Nov. 19, 2001, at C1.

37. THE OPENNET INITIATIVE, *INTERNET FILTERING IN IRAN IN 2004–2005* (2005), available at http://www.opennetinitiative.net/studies/iran/ONI_Country_Study_Iran.pdf.

38. THE OPENNET INITIATIVE, *INTERNET FILTERING IN THE UNITED ARAB EMIRATES IN 2004–2005: A COUNTRY STUDY* (2005), available at http://www.opennetinitiative.net/studies/uae/ONI_UAE_Country_Study.pdf.

39. THE OPENNET INITIATIVE, *INTERNET FILTERING IN YEMEN IN 2004–2005: A COUNTRY STUDY* (2006), available at http://www.opennetinitiative.net/studies/yemen/ONI_Yemen_Country_Study.pdf.

denies that it has any commercial ties with countries under embargo.⁴⁰ However, the Open Net Initiative and Reporters Without Borders confirmed Myanmar's purchase of filtering software from Fortinet.⁴¹ While Vietnam emulates China's Internet filtering methods,⁴² researchers have yet to determine from whom it attained its sophisticated system.⁴³ However, the U.S. company Verint and the British company Silver Bullet sell equipment to the Vietnamese police for tapping mobile phones.⁴⁴

C. *China's Assistance of Regimes in Africa is Based Upon Less Evidence than Speculation*

Of the most repressive African regimes censoring the Internet, none can be conclusively linked to China. Based on public sources, an unqualified statement that China is exporting Internet censorship technology to African countries would be speculative. It is supported only by (1) the sale of Chinese jamming technology to Zimbabwe to block a London-based opposition short-wave radio broadcaster,⁴⁵ (2) accusations of Ethiopian exiles that their government consulted with Chinese technicians for blocking sites via Yahoo search engines,⁴⁶ and (3) suspicions arising from strengthening ties of many African governments to China.

Observers suspect cooperation based on a Chinese involvement in Africa more generally, but China's involvement in Internet censorship capacity building in Africa remains unproven. In recent years, China has developed an Africa strategy, sending large amounts of no-strings

40. *Junta blocks Google and Gmail*, ASIANEWS.IT July 3, 2006, <http://www.asianews.it/view.php?l=en&art=6597>.

41. THE OPENNET INITIATIVE, *INTERNET FILTERING IN BURMA IN 2005: A COUNTRY STUDY* (2005), available at http://www.opennetinitiative.net/studies/burma/ONI_Burma_Country_Study.pdf; See also Reporters Without Borders, *Do Internet companies need to be regulated to ensure they respect free expression?* (June 1, 2006), http://www.rsf.org/print.php3?id_article=16110.

42. *Regimes copy China and Cuba to Control Internet*, SYDNEY MORNING HERALD, Feb. 10, 2003, available at <http://www.smh.com.au/articles/2003/02/10/1044725717836.html>.

43. Shawn W. Crispin, *A quantum leap in censorship*, ASIAN TIMES ONLINE, Sept. 22, 2006, http://www.atimes.com/atimes/Southeast_Asia/HI22Ae01.html.

44. Reporters Without Borders, *supra*, note 9.

45. As reported in the January/February 2006 issue of FOREIGN AFFAIRS by a Reporters Without Borders spokesperson. See, Reporters Without Borders, *State sabotage" of radio station's broadcasts* (Nov. 10, 2005), http://www.rsf.org/article.php3?id_article=15561. See also, Reporters Without Borders, *Jamming of radio stations extends to VOA* (July 6, 2006), http://www.rsf.org/article.php3?id_article=18218.

46. Paul Leonard, *Blog helps connect exiled Ethiopians*, THE COLUMBIA JOURNALIST, May 7, 2007, http://www.columbiajournalist.org/The_International_Newsroom/2005/article.asp?subj=international&course=The_International_Newsroom&id=1522.

foreign aid, organizing summits and formal meetings emphasizing friendship,⁴⁷ and cooperating militarily.⁴⁸ The American Foreign Policy Council insists that China is also aiding and training African regimes on Internet monitoring, but its evidence is weak:

Tracing China's efforts in this area is difficult, but China's official press even alluded to these media initiatives. On November 11, 2005, the People's Daily proclaimed, 'In the information sector, China has trained dozens of media from 35 African countries for the past two years.' The day before, the group Reporters Without Borders released an analysis of Mugabe's media activities, finding that, 'the use of Chinese technology in a totally hypocritical and non-transparent fashion reveals the government's iron resolve to abolish freedom of opinion on Zimbabwe.'⁴⁹

Proponents of this theory repeatedly cite the Zimbabwe link.⁵⁰ More study is required to discover the extent of China's provable IT assistance to African governments.

D. *Some Regimes Follow the 'Cuban Model' that Does Not Rely on Filtering Technologies, But On Denial of Computer Use and Internet Access*

Cuba, North Korea, Singapore, and to some extent Myanmar, censor the Internet by severely limiting access to computers and the Internet altogether, contrary to China's policy of widely encouraging their development and use. The Carnegie Endowment for International Peace released a study showing that governments control the Internet either by filtering content or limiting access to computers and the Internet.⁵¹ The former represents the 'Chinese model,' while the latter represents the 'Cuban model.' North Korea has an isolated, domestic intranet consisting of around thirty government-approved sites that are available only

47. Some believe that "Events like these provide a venue for rolling out Beijing's technical assistance, and where the idea of China as a benign actor in Africa can be tacitly emphasized." Joshua Eisenman and Joshua Kurlantzick, *China's Africa Strategy*, CURRENT HISTORY 221 (2006), available at <http://www.carnegieendowment.org/files/Africa.pdf>.

48. *Id.*, at 219. Zimbabwe, Sudan and Ethiopia are three of Africa's most strategically important states with which China has developed close military ties.

49. *Id.*, at 223.

50. The link has been cited over and again. Tom Malinowski, in his testimony to the Congressional Human Rights Caucus stated: "China is already exporting technology for monitoring the Internet to other repressive governments—Zimbabwe, for example." Testimony of Tom Malinowski, Washington Advocacy Director, Human Rights Watch (Feb. 1, 2006), <http://www.physorg.com/news64765266.html>; *see also*, <http://www.technologynewsdaily.com/node/4069>.

51. Shanthi Kalathil & Taylor C. Boas, *The Internet and State Control in Authoritarian Regimes: China, Cuba, and the Counterrevolution*, (Global Policy Program, Carnegie Endowment for International Peace, Working Paper No. 21, 2001), available at carnegeieendowment.org/files/21KalathilBoas.pdf.

to a privileged minority.⁵² Cuba also severely limits public access and has plans for a similar intranet.⁵³ Singapore also censors mainly by limiting access.⁵⁴ Finally, Myanmar, while it uses some filtering technology, also relies heavily on its ability to prevent access to the Internet.⁵⁵

Conclusion

The question that Professor Peter Yu asked, “how will China affect the Internet,”⁵⁶ may be answered in part by looking at China’s professed goals. China is driving the demand for Internet censoring technology; it is lobbying in the international arena for greater control over Internet resources, adoption of its proposed Internet norms, and acceptance of its practices; and it is also building local capacity to remap the physical infrastructure and protocols of the Internet. If it succeeds in these goals, there is no doubt that it will have the effect of curtailing freedom of the press globally.

52. <http://opennet.net/research/profiles/north-korea>, (last visited Nov. 1, 2007).

53. Kalathil & Boas, *supra*, note 51 at 12, 15.

54. Peng Hwa Ang and Berlinda Nadarajan, *Censorship and Internet: a Singapore Perspective* (Internet Society Hypermedia Proceedings Information Conference Paper 1995), <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN004065.pdf> (last visited Nov. 1, 2007). The OpenNet Initiative reports that Singapore’s Internet content regulation depends primarily on access controls and legal pressures not to post objectionable content rather than technological methods to block it. The OpenNet Initiative reports that Singapore’s Internet content regulation depends primarily on access controls and legal pressures not to post objectionable content rather than technological methods to block it. THE OPENNET INITIATIVE, INTERNET FILTERING IN SINGAPORE IN 2004-2005: A COUNTRY STUDY (2005) http://www.opennetinitiative.net/studies/singapore/ONI_Country_Study_Singapore.pdf.

55. THE OPENNET INITIATIVE, INTERNET FILTERING IN BURMA IN 2005: A COUNTRY STUDY (October 2005) http://www.opennetinitiative.net/studies/burma/ONI_Burma_Country_Study.pdf.

56. Goldsmith & Wu, *supra* note 1, at 104.

APPENDIX A

A Proposed Framework of World Norm of Internet (V.1)

A. Openness

A-1. Anyone has the *rights to contribute true and trusty information* to others via Internet.

A-2. Any true and trusty information should be allowed to *freely disseminate* around the world via Internet.

A-3. It is wise for nations and individuals to *open doors* for learning from others through Internet.

A-4. The openness of Internet should *never be utilized for any harmful purpose to users*.

B. Security

B-1. *The content should be good* for better understanding the nature/environment/society, for economic progress and social development.

B-2. *The content should be good* for mutual understanding and friendship among all people and for maintaining human ethics, morality and world peace.

B-3. *Spam, virus, violence and any kinds of unhealthy contents* to all people, particularly to women, children, disabled and weak groups *should be forbidden*.

B-4. The content security relies also on the network security and *any behaviors harmful* to networks made by any parties *should not be allowed*.

C. Diversity

C-1. Encourage the content be created by *all interested parties in all nations/regions/races*.

C-2. Encourage the contents be expressed *in its own native language*.

C-3. The developed parties has the responsibility to *assist the minorities and weak groups of people* to modernize their languages, writing and spoken.

C-4. Encourage the development of advanced *translation machines* for facilitating the mutual exchanging among cultures.

D. Ubiquitous

D-1. The Internet should be able to cover wherever people live, cities and rural areas.

D-2. Access to Internet should be made easy, convenient and affordable to average people.

D-3. The network should have good roaming ability so that users can *access information worldwide with no barriers*.

D-4. *Users should never violate the regulations* for secured, trusty and efficient use of the networks.

E. Harmoniousness

E-1. UN is suggested to take the responsibility to promote the collaboration for networks convergence.

E-2. Set up *international organization under UN* for handling all the disputes related to Internet via the principle of consultation with the base of equality.

E-3. Set up a *permanent mechanism under UN*, like IGF, for soliciting the suggestions, comments, and contributions from related parties worldwide.

E-4. All related parties to Internet should give their *support to the organizations for collaboration*.

****Welcome to Give Suggestions and Comments Any Time Write To* yuxi-aoxiao@cast.org.cn, or yxzhong@ieee.org.

APPENDIX B

A Proposed Framework on World Internet Norm (Ver. 2)

1. Preface

We all live in a single globe and each of us has a beautiful dream of having a peaceful world and a happy life. The Internet emerged as an information highway connecting more and more computers and people. Fascinating commerce activities such as banking, electronic shopping, bill payment, taxation, etc. are being shifted to the Internet for high efficiency and low cost. Doing things online has a great benefit of an always-on availability to the users everywhere in the world. We are witnessing a change of our society towards e-commerce, e-business and e-government and towards an increasing reliance on the internet.

Nevertheless, new vulnerabilities and risks resulting from the development become a major barrier to the success of the Internet online usages. Not only the good guys, but also the criminals can use the state of the art technology to introduce harms on the Internet. On the other hand, even for the good guys, due to different social, cultural and religious background, they may have different understanding of nature and the society and thus may employ different strategies and approaches to the same goal.

Consequently, the governance of Internet is of great importance. Internet Governance can be regarded as complex system engineering, and it should cover all aspects of openness, security, diversity, and access. Realizing that the world is never going to be perfect, either on- or offline, we have to proceed to realize our final goal of having a better life step by step.

As the first step to approaching the goal, we are going to propose a Framework on World Internet Norm (hereafter referred to as WIN for short). The crux of the matter is that the WIN, based on ethics and moralities by consensus, may be expected to maximally conform to the benefits of the most individuals and groups of people on the globe and therefore could possibly gain the support from the related parties.

We triumphantly organized a Workshop entitled "Global Culture for Cybersecurity" at the Inaugural IGF meeting taking place in Athens, Greece from 30 October to 2 November, 2006. A draft WIN (Ver. 1) was proposed at the workshop and attracted significant coverage from the participants. Although the version one of the Norm proposed may not come to perfection, but we may improve it gradually and we hope that it may finally become the consensus of opinion at the some subsequent meeting.

According to the feedbacks and comments, we proposed a refinement of the WIN (Ver. 2) here, and welcome more comments and suggestions.

2. Contents of WIN

(A) The Openness of the Internet

The openness of Internet is of vital significance. It reflects the vitality, universality and popularity of the Internet. The basic requirements for achieving the openness of Internet are the following.

A-1. All individuals and organizations have the privileges to contribute their trustworthy and valuable information/knowledge to other individuals and organizations by Internet.

A-2. The information and experience/knowledge stored in Internet should be allowed to freely access, visit and disseminate around the world.

A-3. It is suggested that all nations and individuals open their doors for receiving and learning trustworthy and valuable information and knowledge provided by other nations and people.

A-4. It is suggested that all nations and individuals not set up barriers for blocking information flows to and from Internet.

A-5. Some universal architecture, framework, policies and protocols for the Internet should be established worldwide so that the openness and interoperability can be guaranteed.

A-6. The openness of Internet should, however, not be abused by any individuals and groups to, for example, introduce harms to others, compromise confidential information protected by laws and regulations.

(B) The Security of the Internet

Hackers today have become more sophisticated and the Internet security has faced more challenges. As a result, to protect the Internet users from various attacks dozens of tasks have to be done. Some of the necessary measures need to be taken are as follows.

B-1. It is requested that the operators of the networks take on the responsibility for making efforts to keep the high reliability and high quality of services (QoS).

B-2. It is requested that the users of Internet be strictly observe the related regulations when accessing and utilizing the Internet.

B-3. All nations and individuals should go along shoulder to shoulder to take all measures to defeat various attacks and cyber crimes, such as Trojans, viruses, worms, spyware, spam and phishing.

(C) The Content Creditability on the Internet

The Internet needs to be a good place for people to share trustworthy and valuable information. We have to work together not to let the Internet become a tool for those with ulterior motives.

C-1. It is requested that all information created for, and contributed to, the Internet be trustworthy and valuable for the evolution of human being and prosperity of the world.

C-2. The contents created for, and contributed to, the Internet should be trustworthy and valuable for maintaining human ethics and morality, for the protection of privacy and human rights, for the protection of all people, particularly women and children, disabled people and weak group of people.

C-3. The contents created for, and contributed to, the Internet should be trustworthy and valuable to all nations and people, regardless of race or creed.

(D) *Diversity*

The world is composed of many countries, big and small, with different political systems, living standards, races and nationalities. The world is also colorful; there are miscellaneous forms of religion and belief, philosophical systems, and natural environment. The Internet applications are required to have the characteristic of diversity.

D-1. The contents created for, and contributed to, the Internet should be allowed to embody all types of experience and knowledge from all over the world.

D-2. The information and knowledge stored on Internet should be allowed to express in any different native languages. This should be protected by international regulations.

D-3. It is necessary for the related parties to assist the minorities and weak groups of people to modernize their languages, writing and spoken, by using ICT and Internet.

D-4. Individuals, companies and related parties are encouraged to develop advanced as well as affordable technology of Machine Translation that can make the mutual exchange and learning among different cultures more convenient.

(E) *Access*

To make the Internet more powerful and easy to use, especially resistant against the denial of service attacks, we need to set up the following self-disciplinary agreements.

E-1. The governments and the operators of Internet should do their best to spread the networks to cover every place where people are living, whether in city or in rural areas.

E-2. The governments and the operators of Internet as well as the related parties should make policy for people's access to the networks with convenience and affordable prices.

E-3. The operators of Internet should provide the users with the roaming ability from one region to others so that users are able to access the information and knowledge with no barriers.

E-4. The users themselves, when using the Internet, should never violate the regulations that made for supporting the secure and efficient utilization of the networks.

E-5. The information society and individuals all over the world should do their best to defeat the denial of service and other attacks to make Internet an always-on accessible facility.

(F) *International Collaboration*

Internet Governance can be viewed as complex system engineering, hence in order to arriving at a better Internet Governance the international collaboration is a prerequisite.

F-1. It is desirable and necessary for Internet authority and telecommunications authority to have better cooperation on the integration between Internet and telecommunication so that more advanced information services can be provided to the public.

F-2. It is needed to have an organizational authority to monitor the quality of services maintaining, diagnose the faults of operations and arbitrate disputes. All related parties should give firm support to the authority.

F-3. It is desirable and necessary to establish several permanent forums, such as the Internet Governance Forum, each has its specific tasks, for timely and effectively soliciting the suggestions, comments and contributions from all parties, including governments, NGOs and professionals.

PS. The version 2.3 created on 2007-11-4.



Building Open Societies: Freedom of the Press in Jordan and Rwanda

Enrique Armijo*

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Introduction

No right to expression is absolute, and no two presses are “free” in the same way. Taking a comparative perspective, this article explores how governments engaged in internal nation-building view the media’s role in attaining or frustrating that goal. Media scholars often expound

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on the press's function in "society" in general terms, as if all societies have the same needs, share the same histories, and aspire to the same goals. However, as we will see, it is the context of the relevant country that determines the shape and content of media policy, not the level of protection a particular state's constitution affords the press, or the country's degree of technological development towards an information economy. Media regulation, like most contested areas of the law, is informed more by recent history on the ground than by longstanding tradition or common themes.

In many ways, Jordan and Rwanda, the two countries examined here, are recognized by the international community as the success stories of their respective regions. Jordan is a West-friendly, peaceful nation, modern and religiously tolerant by Middle Eastern standards, located in a powderkeg of a region. Construction cranes fill the sky of Amman, the capital city. Likewise, builders and developers flock to Kigali, Rwanda's capital. Not even fifteen years after its population was decimated by genocide, the country is considered to be "the most-improved sub-Saharan nation"¹ based on factors such as safety, security and human development.²

Both nations are relatively booming today, but during the span of four months in 1994, each experienced a historic moment that would define it in the eyes of the rest of the world for years to come. In July of that year, Jordan had entered into the Washington Declaration,³ a nonbelligerency agreement with Israel; the Declaration commenced the negotiations that would eventually lead to a peace treaty in October of the same year. The treaty, while controversial with the Jordanian public, brought a stable peace. The area surrounding the border region of the Jordan River, once peppered with landmines, was opened to religious pilgrims seeking to visit the site of Jesus' baptism and tourists traveling between Jordan and Israel.⁴ Around the same time that Jordan and Israel began to negotiate an agreement that promised to put an "end to bloodshed and sorrow,"⁵ however, Rwanda would shed as much bloodshed and sorrow as the postwar world had ever seen. These two more or less contemporaneous events—one positive, one

1. *Rwanda 'most improved' in Africa*, BBC NEWS, Sept. 25, 2007, at 1, available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/7010846.stm>.

2. *Id.*

3. The Washington Declaration: Israel-Jordan-The United States (July 25, 1994), http://www.knesset.gov.il/process/docs/washington_eng.htm.

4. *Id.* § F.4.

5. *Id.* § A.

tragic—affected the development of the media space in the two countries in ways both predictable and unanticipated. The issue both Jordan and Rwanda share is the degree to which their respective recent pasts are shaping their media's future.

I. Jordan

Generally, Jordan enjoys an environment for press freedom that is more tolerant than that of explicitly hostile regional neighbors such as Syria, where commercial radio stations are licensed on the condition they agree not to air news,⁶ and Saudi Arabia, where journalists who write government exposés can be detained without charge and banned from the profession.⁷ Jordan's Constitution expressly protects freedom of expression, but states that press outlets must operate "within the law."⁸ That "law," as we will see, is a set of regulations and proscriptions administered by a number of agencies and entities that often fails to give media outlets clear guidance and invites selective prosecutions. Following the Constitution's mandate to operate within the "law" is therefore often a difficult task.

A. Media Regulation Structure

Previously, Jordan's Ministry of Information kept centralized control over all aspects of the media in the executive branch. In November 2001, however, King Abdullah II called for the Ministry of Information to be dissolved,⁹ and its roles and functions have now been placed under different governmental bodies, most notably the Audiovisual Commission and the Press and Publications Department.¹⁰ Several administrative functions have been moved to either the Prime Ministry or the Ministry of Industry and Trade,¹¹ whose jurisdictions and principals often overlap.

6. IREX, MEDIA SUSTAINABILITY INDEX 2005—MIDDLE EAST AND NORTH AFRICA 124 (2006), http://www.irex.org/programs/MSI_MENA/2005/download.asp.

7. See Arab Press Freedom Watch, Saudi Arabia: 7 Liberal Reformers Detained, Journalist Faris Al-Harbi Banned, (Mar. 16, 2004), <http://www.apfw.org/print.asp?fname=news/english/2004\12433.htm>.

8. See JORDAN CONST. (The Constitution of The Hashemite Kingdom of Jordan) ch. 2, art. 15, §§ i-ii, available at http://www.kinghussein.gov.jo/const_ch1-3.html ("The State shall guarantee freedom of opinion. Every Jordanian shall be free to express his opinion by speech, in writing, or by means of photographic representation and other forms of expression, provided that such does not violate the law. Freedom of the press and publications shall be ensured within the limits of the law.")

9. SA'EDA KILANI, PRESS FREEDOMS IN JORDAN 37 (Euro-Mediterranean Human Rights Network 2002), available at <http://www.euromedrights.net/93>.

10. IREX MEDIA SUSTAINABILITY INDEX 2005, *supra* note 6, at 80.

11. *Id.* at 84.

1. BROADCASTING

Jordan's 2002 Provisional Law No. 71 for the Audiovisual Media transferred most broadcasting-related functions from the Prime Minister's Cabinet to the newly-created Audiovisual Media Commission (AVC).¹² It also allowed for the licensing of private broadcasters in Jordan for the first time.¹³ The AV Law states that the AVC "shall enjoy a financial and administrative independen[ce],"¹⁴ and the AVC's bylaws grant it responsibility for hearing and deciding complaints of the public about broadcasters,¹⁵ as well as disputes between licensees.¹⁶

The AVC's enabling statute gives it the authority to issue instructions on programming,¹⁷ to consider complaints against broadcasters,¹⁸ and to take action against violators.¹⁹ The AVC's authority in licensing decisions, however, is significantly limited: it serves only an advisory function, "referring [its] recommendation[s] to the Minister regarding the granting, renewal, amendment or cancellation of broadcasting licenses. . . ."²⁰ It is then the Council of Ministers' decision (likely the Prime Minister's, although the statute is not explicit on the point) as to whether a license is awarded. In making such a decision, "the Council of Ministers may refuse to grant broadcasting licenses to any entity without stating the reasons for such rejection."²¹ The AV Law also requires that certain terms and conditions are included in each license agreement, including the licensee's commitment to "adhere to the type of Radio and TV programs defined in the granted license,"²² to "honor the human entity . . . and rights of others, . . . the objectivity of broadcasting the news . . . and the observation of public order, national security requirements and public interest prerequisites";²³ and to refrain from broadcasting "any thing that might disrupt the national unity or invoke terrorism, racism and religious discrimination or offend the Kingdom's relations with the other countries"²⁴ or "any economic issue or comment which would jeopardize the integrity of the national economy."²⁵

12. See Audiovisual Media Law, arts. 1-35 (2002) [hereinafter AV Law].

13. See *id.* art. 8.

14. *Id.* art. 3(a).

15. *Id.* art. 8(j).

16. *Id.* art. 8(k).

17. *Id.* art. 8(l).

18. *Id.* art. 8(k).

19. *Id.* art. 8(i).

20. *Id.* art. 8(d).

21. *Id.* art. 18(b).

22. *Id.* art. 21(a).

23. *Id.* art. 20(l).

24. *Id.* art. 20(n).

25. *Id.* art. 20(o).

Another content-based practice, set out in the AVC's bylaws, is to require a 50% fee surcharge for license applications from prospective broadcasters who plan to air news or local affairs programming.²⁶ A number of excessive fines are imposed for a licensee's failure to comply with these regulations; for instance, the AVC has the power "to suspend the [licensee's] broadcasting for a maximum of two months."²⁷

The Telecommunications Regulatory Commission (TRC), established in 1995, controls the technical aspects of broadcasting, issues telecommunications licenses, regulates information technology services, and generally manages the use of the radio frequency spectrum.²⁸ The AV Law requires that the AVC "seek the approval of the Telecommunications Regulatory Commission regarding any matters falling within its jurisdiction, specifically the licenses for frequencies."²⁹ In addition to its responsibilities in managing the broadcast part of the spectrum, the TRC is charged with stimulating competition in the telecommunications and information technology sectors,³⁰ and encouraging industry self-regulation.³¹

2. PRESS

The Press and Publications Department (PPD), first established in 1939, is responsible for licensing and regulating the Jordanian printed press. Its primary role is to enforce the Press and Publications Law, the legislation that, along with the Penal Code and others, most directly affects journalists practicing in Jordan.³² Jordan's press law has undergone a number of iterations in the period leading up to and through King Abdullah's ascension.³³ The first press law, passed in 1993, ushered in a new era of journalistic freedom in the Kingdom.³⁴ The law guaranteed an individual's right to start a newspaper and abolished the government's power to suspend and shut down press outlets without judicial review.³⁵ After 1993, private newspapers flourished, and the private press played a major role in providing news and opinion in contrast to that of the official government press by publicizing

26. ARTICLE 19, MEMORANDUM ON THE AUDIO VISUAL LAW (PROVISIONAL LAW NO. 71, 2002) OF THE KINGDOM OF JORDAN 17 (2006).

27. AV Law, art. 29(b)1.

28. See The Telecommunications Law of 1995, ch.III, art.6 (1995) (amended 2002), available at http://www.trc.gov.jo/index.php?option=com_content&task=view&id=3&lang=english [hereinafter Telecom Law].

29. AV Law, art. 19.

30. Telecom Law, art. (6)e.

31. *Id.* art. (6)g.

32. See KILANI, *supra* note 9, at 7.

33. *Id.* at 6.

34. *Id.* at 11.

35. *Id.*

human rights critiques of official practices and divulging corruption in the Jordanian government.³⁶ In May 1997, however, after several years of press criticism of official policies such as the government's relation with its Arab neighbors and the then-ongoing negotiations with Israel that eventually led to the 1994 Israel-Jordan peace treaty, an intensive, official campaign accused the press of harming Jordan's image and imperiling national security.³⁷ In response to the campaign, the government passed the 1998 Press and Publication Law.³⁸ More repressive in nearly every respect as compared to the prior statute, the 1998 Law:

- Expanded the list of content-based restrictions on the press to prohibit publication on a range of matters, including any material that might be disparaging to the King, Royal Family or judiciary, information on troop numbers and equipment of the Jordanian Armed Forces, false information, rumors, or material that encourages perversion, leads to moral corruption, harms national unity or the dignity or reputation of individuals, or incites strikes, sit-ins, or public gatherings in violation of Jordanian law;³⁹
- significantly raised the fines for violations of the press law;⁴⁰
- restored the government's power to license and shut down newspapers;⁴¹
- required two copies of any book to be published in the Kingdom to be deposited with the PPL prior to publication;⁴²
- granted authorities power to pre-censor any foreign publication entering the Kingdom;⁴³
- set out a licensing requirement for establishing "a printing press, a publishing house, a distributing house, a studies and research centre, a public opinion polling centre, a translation house, or a publicity and advertising agency";⁴⁴
- required journalists' mandatory membership in the state-sanctioned Jordan Press Association;⁴⁵

36. *Id.*

37. *Id.* at 12.

38. *Id.* at 67-68.

39. *Id.* at 68.

40. *Id.*

41. *Id.*

42. *Id.* at 59.

43. *Id.* at 68.

44. *Id.* at 55.

45. *Id.* at 22. *But see* IREX MEDIA SUSTAINABILITY INDEX 2005, *supra* note 6, at 81 (reporting that despite this proscription, approximately 150 practicing journalists in Jordan are not members of the JPA.).

- set out minimum experience requirements for editors-in-chief;⁴⁶ and
- increased minimum capitalization requirements for the commencement of newspaper operations to 100,000 Jordanian Dinars.⁴⁷

After three months under the new law, thirteen Jordanian newsweeklies were forced to end operations because of insufficient capitalization.⁴⁸

King Abdullah II ascended to the throne in 1999 after his father's death and, promising a more open Jordanian press, submitted a new media bill to the Jordanian Parliament that sought to amend the 1998 Law.⁴⁹ The 1999 Amendments removed the list of topics that were off-limits for journalists,⁵⁰ restricted the government's ability to shut down press outlets,⁵¹ and provided foreign journalists with greater access to government information;⁵² however, many of the more problematic provisions of the 1998 Law remained.⁵³

In May 2007, the Press and Publications Law was amended again.⁵⁴ While several of the most press-restrictive Articles such as the licensing requirements for journalists were not changed, the 2007 Amendments also added four new content-based restrictions to the law that already appeared in Jordan's Penal Code and increased the monetary penalties associated with their publication. The 2007 Amendments added to the PPL the Penal Code's proscriptions on publishing:

- any material that contains any contempt or insult or vilification or harm directed at any of the religions whose liberty is guaranteed by the Constitution;
- any material containing insults against or vilification of founders of religions or prophets by writings, drawing, symbols, pictures, or any other means;
- any material that is injurious to sentiments or religious beliefs, or that incites denominational or racial hatred; or
- any material that harms the dignity and personal freedoms of individuals, or any material that includes false information or rumors about them.⁵⁵

46. See KILANI, *supra* note 9, at 56.

47. *Id.* at 79.

48. *Id.*

49. *Id.* at 16-7.

50. *Id.* at 39.

51. *Id.* at 32.

52. *Id.* at 35-6.

53. *Id.* at 20-1.

54. The Press and Publications Law of 1998 (amended 2007) [hereinafter PPL].

55. *Id.* art. 38.

The first and second Amendments were clearly drafted with both Islamic prohibitions on the portrayal of the Prophet Muhammad and the Danish cartoon controversy in mind. One journalist punished under this provision, the publisher of the weekly *Al-Mehwar* Jihad Momani, was arrested and charged for reprinting the cartoons in an article critiquing their publication, along with a list of Danish companies operating in Jordan that the article suggested readers should boycott. Momani was sentenced to a two-month prison sentence in May 2007.⁵⁶

The 2007 Amendments also amended the 1998 Law to include an objectivity requirement, stating that “a publication shall... adhere to accuracy, neutrality, and objectivity in publishing journalistic materials.”⁵⁷ The article that this new provision amends, Article 5, requires journalists to “refrain from publishing anything that conflicts with the principles of freedom, national responsibility, human rights, and values of the Arab and Islamic nation,”⁵⁸ and was the basis for a significant number of cases brought against journalists after the passage of the 1993 law.

Despite these additions, the 2007 Amendments also provide for greater press protections in some areas than previous versions of the law had provided. For example, the Amendments removed the additional pre-capitalization requirements for newspapers, and now new publications in Jordan are subject only to generally applicable corporate registration law.⁵⁹ Such a change will likely benefit new and alternative media hoping to commence operations that were previously precluded from doing so under the repressive capital requirements of the old law. In addition, the pre-publication deposit requirement was also amended to provide for deposit that is contemporaneous with, rather than prior to, publication,⁶⁰ thereby removing a procedural requirement to publication that

56. Reporters Without Borders, First prison sentences announced for the reprinting Mohammed cartoons (May 31, 2006), http://www.rsf.org/article.php?id_article=17864.

57. PPL, art. 5.

58. *Id.*

59. *Id.* art.13.

60. *Id.* art. 35. The amended Article does, however, continue to vest in the Director of the Press and Publications Department, upon court decision, the authority to “confiscate” the publication and “prevent its distribution” if he “comes to know that the publication includes material that contravenes the valid laws.” Ironically enough, some authors expressed concern after the Amendment’s passage that while they would no longer be subjected to pre-publication censorship, the lifting of the deposit requirement, combined with the PPL’s harsh penalties for defamation and the increased sensitivities of the Jordanian public, would exponentially increase their exposure to risk. See Daoud Kuttab, *The End of Censorship?* JERUSALEM POST, June 5, 2007, at 14, available at 2007 WLNR 12826728; see also Robin Moroney *Without A Censor, Jordan’s Publishers Feel Vulnerable*, WALL ST. J. ONLINE, June 5, 2007, available at <http://blogs.wsj.com/informedreaders/2007/06/05/without-a-censor-jordans-publishers-feel-vulnerable>.

often operated in combination with other aspects of the law as a prior restraint.⁶¹ Perhaps most importantly, the 2007 Amendments make clear that “arrests may not be effected because of an expression of opinion verbally, in writing, or other means of expression.”⁶²

3. PENAL CODE

In addition to the restrictions set out in the PPL, both print and television journalists are also subject to the harsher, and arguably more broad, provisions of the Jordanian penal code. A series of amendments to the Code in 2001, enacted after the September 11th attacks in the United States, set out stricter penalties for violations of the press law, including significant fines, prison sentences ranging from three months to three years depending on the charge, or both. Many of the content-based restrictions removed from the 1998 Law through the 1999 Amendments were added to Article 150a of the Penal Code, allowing the government to imprison anyone who prints, writes, or broadcasts in any means through a newspaper or any other publication, any statement that

harms national unity, sows the seeds of hatred and spite and dissension among individuals, incites racial discrimination, harms the dignity of individuals, their reputation through promoting delinquency or immorality or through spreading false or libelous information, shakes the society’s political situation through promoting delinquency or immorality or through spreading false or libelous information, incites demonstrations and sit-ins or public meetings in a way that is contradictory with effective legislation, intends to, or results in, stirring up sectarian or racial tension or strife among different elements of the nation; or infringes on the country’s dignity, standing, or reputation.⁶³

The vagueness of these restrictions is obviously problematic; as one Jordanian journalist stated, “writing about the Jordanian currency could be explained as harming the national interest,” and “writing about the influx of Iraqis in the advent of the war could be explained as sparking sectarian strife.”⁶⁴

A separate provision, Article 195, was amended to criminalize and imprison from one to three years any person proved of having committed *lèse majesté* (insulting the dignity of the King), or of any oral, written, electronic communication or publishing any picture or cartoon in a way that infringes on the dignity of the King and other members

61. See Press Release, Article 19, Jordan: Prior Censorship Must Be Abolished (May 4, 2007) (in 2005 and 2006, the PPD had prohibited the circulation of more than 160 books on the grounds they were violative of the PPL), available at <http://www.article19.org/pdfs/press/jordan-censorship-pr.pdf>.

62. *Id.* art. 42(F).

63. Penal Code, art. 150(a) (2001) (Jordan).

64. IREX MEDIA SUSTAINABILITY INDEX 2005, *supra* note 6, at 82.

of the royal family. Article 191 sets out the punishment for defamation: imprisonment for a term between three months to two years if directed against the Parliament or its members in the course of their work, or against an official body, court of law, public institution, the army, or any public servant in the discharge of his functions. Other provisions define and criminalize innuendo and affront. Recent prosecutions of journalists and non-journalists alike seem to confirm the government's use of the laws to suppress speech that it deems controversial or unpopular.⁶⁵

Jordanian journalists face jurisdictional challenges from the bifurcated nature of the court system as well. The State Security Court's official jurisdiction is limited to those activities deemed harmful to the state, and publication crimes in Jordan often fall within this category. Punishments range from three to six months in prison, with fines of up to \$7,000 USD.⁶⁶ One former Parliamentarian, Ahmad Oweidi Abbadi, was prosecuted before the State Security Court for undermining the country's reputation by allegedly publishing a statement on the website of the Jordanian National Movement, an organization chaired by Abbadi, criticizing Jordan and its officials. The site also included an open letter to U.S. Senate Majority Leader Harry Reid which accused senior government officials of corruption and claimed the country was suffering setbacks in freedom of the press and in "the abuse of detainees."⁶⁷

B. *The Jordanian Media Sector Today*

1. PRINT JOURNALISM IN JORDAN

Despite the restrictive nature of the PPL and Penal Code, Jordan's print sector is fairly vibrant, most likely owing to a highly literate population to serve as a readership.⁶⁸ The country currently has seven dailies and nearly two dozen weeklies and biweeklies. The *Jordan Times*, an English daily, is widely seen as in agreement with the government; during the first week of September 2007, for example, King Abdullah's diplomatic efforts on an upcoming peace conference took up every day's lead story, and the first story on page 3 focused on the Queen's

65. See Jordan: Rise in Arrests Restricting Free Speech, Human Rights Watch (June 17, 2006), <http://hrw.org/english/docs/2006/06/17/jordan13574.htm> (detailing prosecutions against four members of Parliament for speech for "stirring up sectarian or racial tension" after they consoled Jordanian Al Qaeda leader Abu Mus'ab al-Zarqawi's family after his death).

66. See IREX MEDIA SUSTAINABILITY INDEX 2005, *supra* note 6, at 80.

67. *Id.*

68. UNICEF, at a glance: Jordan, http://www.unicef.org/infobycountry/jordan_statistics.html.

humanitarian work throughout Asia and the poorer parts of the country. The government also owns a substantial stake in two Arabic dailies, *Al Rai* and *Ad-Dustour*, and influences the editorial line of the others by its selective placement of advertisements.⁶⁹ Pan-Arab papers such as *Al Hayat* are also widely available.

A broad number of outlets, however, do not necessarily result in a diverse range of positions and opinions being expressed in the print media. As one senior reporter has stated, “the papers and state TV do not give the opposition space to express their views . . . when it comes to major issues like increasing the fuel prices, most papers—private and public—have similar headlines, stories and opinion pieces that justify the government’s measures.”⁷⁰

2. THE JORDANIAN BROADCASTING SECTOR: THE ATV EXAMPLE

While the regulatory regime for broadcasters in Jordan is fairly well-developed, the difficulties of the first private television licensee, ATV, shows the difficulty of applying these seemingly straightforward rules to the television sector, as well as a possible disconnect between free press rhetoric and reality. ATV’s principals spent more than two years developing the station’s talent and infrastructure, and had planned to include political programs and news on the new station.⁷¹ It collected a staff of media professionals and new individuals, conducted legal and writing workshops, and developed its own stylebook.⁷² The station began operating a pilot signal on July 23, 2007, and during this preview period it aired a news program on Jordan’s then-upcoming municipal elections.⁷³

During a July 31 press conference the day before the station’s scheduled launch, General Manager Mohannad Khatib received a letter from the AVC’s Director of Engineering stating that the station’s broadcast and satellite signals were disconnected.⁷⁴ The reason given was that

69. See IREX MEDIA SUSTAINABILITY INDEX 2005, *supra* note 6, at 81 (Haitham Atoom, director of foreign services at state radio broadcaster JRTV); ARAB CENTER FOR THE DEVELOPMENT OF RULE OF LAW AND INTEGRITY & IFES, COMPARATIVE REPORT ON THE STATE OF THE MEDIA IN EGYPT, JORDAN, LEBANON AND MOROCCO 19 (May 2007).

70. IREX MEDIA SUSTAINABILITY INDEX 2005, *supra* note 6, at 84 (Jihad Al Mansi, reporter, *Al Ghad* newspaper).

71. Austyn Allison, *Jordan’s TV’s Troubled Reality Show*, KIPPREPORT, Oct. 22, 2007, <http://www.kippreport.com/article.php?articleid=710&day=4>; AlBawaba.com, Jordan: ATV Officially Launches, <http://albawaba.com/en/countries/Jordan/215653> (last visited Nov. 6, 2007).

72. Panel Discussion with ATV General Manager Mohannad Khatib, “Media and Law,” Amman, Jordan, Sept. 4, 2007.

73. *Id.*

74. Allison, *supra* note 71.

ATV owed more than \$2 million under a five-year agreement with Jordan Radio & Television Corporation, the corporate arm of state broadcaster JRTV, that allowed ATV to lease the infrastructure of a second terrestrial channel that JRTV was no longer using.⁷⁵ On August 2, the AVC halted the launch of ATV's satellite license as well, claiming the station failed to comply with a requirement to notify the AVC of its plans to broadcast at least one week in advance and to complete required technical paperwork.⁷⁶

While the issue simmers, ATV is suffering monumental losses, totaling approximately \$25 million Jordanian dinars, or over \$35 million USD, as of September 2007.⁷⁷ The station developed a special package of serial programming to air during the holy month of Ramadan, when most Jordanians are celebrating at home with their families, at a cost of \$2 million dinars, that it has been unable to air.⁷⁸ Its 330 employees continued to be paid wages.⁷⁹ In the meantime, ATV has begun broadcasting over the Internet.⁸⁰

II. Rwanda

As in the Middle East, governments in East Africa have historically subjected private media outlets to content and structural regulations explicitly designed to suppress possible dissent. For example, Africa's entrenched traditions of private media ownership restrictions date back

75. *Id.*

76. Zawya, Jordan: Several reasons behind suspensions of ATV launch (Aug. 3, 2007), <http://www.zawya.com/printstory.cfm?storyid=ZAWYA20070803081711&l=081700070803> See Mohammed Ghazai, *ATV Considers New Measures To End Deadlock On Launch*, JORDAN TIMES, Sept. 4, 2007, at 1. Eventually ATV was re-granted its satellite authority after the channel was sold to a Jordanian company, but its launch remains pending. See *ATV Receives Green Light to Start Satellite Transmission*, JORDAN TIMES, Oct. 3, 2007, available at <http://jordantimes.com/>. Other aspiring broadcasters have faced licensing difficulties; AmmanNet, an online radio station, has planned for the past five years to air terrestrially, but was not granted a license. Its application was purely for entertainment programming, as it could not afford the \$25,000 JD surcharge it would have had to pay if it had planned to air news or political coverage. Like ATV, during the license applications process AmmanNet was asked for information regarding its producers and programming. AVC has also stated that leading up to the launch, the AVC asked it to provide information on all of its representatives, presenters and writers, as well as synopses on the programs intended to be aired.

77. Allison, *supra* note 71.

78. *Id.*

79. *ATV General Manager Quits Post*, JORDAN TIMES, Sept. 25, 2007, available at <http://jordantimes.com/index.php?news=2422&searchFor=broadcast>.

80. See Mohammed Ghazai, *Private Station To Transmit Programmes Over Internet*, JORDAN TIMES, Sept. 6, 2007, available at <http://jordantimes.com/index.php?news=1998&searchFor=broadcast>. ATV's broadcast can be viewed at www.ikibis.com/atv.

to the colonial period.⁸¹ As Francis Nyamnjoh notes, the colonialists established “strict laws regulating the right of Africans to set up and operate newspapers, and aimed at stifling the spread of ‘subversive’ ideas, [and e]conomic measures were also imposed to make it difficult for African newspaper proprietors to import newsprint and other technical facilities.”⁸² Broadcasting was subject to even tighter controls.⁸³ The practice of stringent governmental authority over media ownership extended into the postcolonial period; even though independence transferred control into indigenous hands, from the 1960s through the 1980s African governments nationalized outlets and discouraged private initiatives.⁸⁴

Despite this tradition, Rwanda, like Jordan, provides constitutional protection to freedom of expression; indeed, its Constitution expressly refers to press freedom.⁸⁵ However, the Rwandan government, faced with the unique challenge of ensuring that its media could never reprise the direct role it played in inciting the genocide, has balanced the provision of constitutional guarantees with the need to craft a new country, one where media outlets cannot be used as instruments of sectarianism and hate. Where the media was so prominent in destroying the country, officials have been exceedingly cautious in deciding how the media should be used to rebuild it.

A. *The Media and the Genocide*

1. HISTORY⁸⁶

The media-fueled ethnic separatism that fueled the Rwandan genocide had its seeds in the colonial era. In the late 1800s Rwandan *Mwami* (King) Rwabugiri developed a system to distinguish between two tribes, Hutus and Tutsis, largely on the basis of vocation.⁸⁷ Under Belgian rule,

81. FRANCIS B. NYAMNJOH, *AFRICA'S MEDIA: DEMOCRACY & THE POLITICS OF BELONGING* 40 (2005).

82. *Id.* at 41.

83. *See id.* at 44.

84. *Id.* at 42, 45 (“Having thus been made [by the colonial powers] to see broadcasting as a most sensitive institution, the African nationalists, once in power as a government, were likely to seek exclusive ownership and control of radio and television.”).

85. *See RWANDAN CONST.* art. 34.

86. The foregoing discussion of the political situation leading up to the Rwandan genocide is necessarily brief and therefore incomplete. For a more comprehensive analysis, see generally GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1995) and PHILLIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* (1999).

87. Gerald Caplan, *Rwanda: Walking the Road to Genocide*, in *THE MEDIA AND THE RWANDA GENOCIDE* 20 (Allan Thompson ed., 2007).

however, Roman Catholic missionaries exploited the caste system to “attribute superior qualities to the country’s Tutsi minority.”⁸⁸ In short, colonialists promulgated the myth that Tutsis were closer in biology and development to whites than were the innately inferior majority Hutu tribe, and doled out favors, education, and positions of status to the Tutsis.⁸⁹ With independence approaching in the mid-1950s, however, Belgium became concerned with a perceived move in the educated Tutsi towards Marxism; it then switched its support to Hutu elites just before granting Rwanda its independence in 1962.⁹⁰ The Belgians also issued mandatory ethnic identity cards to every Rwandan, a system that was maintained for more than 60 years.⁹¹ The identity cards would later allow genociders to identify their victims with chilling efficiency.⁹²

These tensions simmered during the postcolonial period until political conflict fired them anew. In the early 1990s, a Tutsi group of exiles who had fled the country to Uganda to avoid ethnic tensions and anti-Tutsi attacks banded together as a rebel army calling itself the Rwandan Patriotic Front (RPF), and challenged the Hutu government then in power.⁹³ The ruling regime cast the RPF’s charge in ethnic terms, calling on all Hutus to defend Rwandan sovereignty against all “invading” Tutsis, whether they were part of RPF’s forces or not.⁹⁴ Extremists in the new Hutu Power movement began calling for the extermination of all *gisenyi*, the word for “cockroaches” in Rwanda’s native Kinyarwanda that was now being used to refer to Tutsis.⁹⁵ During the early 1990s, fifteen smaller-scale massacres of Tutsi took place throughout the countryside, executed by mobs associated with political parties, sometimes with the assistance of police and army.⁹⁶ In each case, the mobs’ efforts were incited by radio broadcasts.⁹⁷

The most effective tools in the Hutu Power propaganda movement were two media outlets: the Kinyarwanda- and French-language

88. *Id.*

89. Intermarriage between the two groups was common, [*Id.* at 21] and during the genocide would lead to a Hutu wife or husband being spared while their Tutsi spouse and children were massacred. Mark Hubbard, Rwanda-The Genocide, <http://crimesofwar.org/thebook/rwanda-the-genocide.html> (last visited Nov. 24, 2007).

90. Stephen Kinzer, *Big Gamble in Rwanda*, 54 N.Y. REV. OF BOOKS 5 (Mar. 29, 2007), available at <http://www.nybooks.com/articles/19996?email>.

91. Caplan, *supra* note 87, at 20.

92. *Id.* at 20.

93. *Id.* at 22.

94. *Id.*

95. Alison Des Forges, *Call to Genocide: Radio in Rwanda, 1994*, in *THE MEDIA AND THE RWANDA GENOCIDE* 48 (Allan Thompson ed., 2007).

96. Caplan, *supra* note 87, at 24.

97. *Id.*

newspaper *Kangura*,⁹⁸ and the private radio station Radio-Television Libre des Mille Collines, or RTLM. *Kangura* was a bimonthly paper established in May 1990 and headed by a former bus driver, Hassan Ngeze; beginning in 1991, the newspaper was subtitled “The Voice that Awakens and Defends the Majority People.”⁹⁹ *Kangura* was largely responsible for developing a vocabulary of genocidal colloquialisms that would later be used by RTLM, popularizing the idiomatic use of such terms as *gukora*, or “to work,” to refer to the extermination of Tutsis.¹⁰⁰ Its most notorious article was published in its December 1990 issue; the piece, commonly referred to as the “Hutu Ten Commandments,” set out a list of directives and proscriptions that called on all Hutus to sever any ties with Tutsis because of the latter tribe’s treacherousness, bloodthirstiness, and overriding self-interest in ethnic superiority.¹⁰¹ The cover of its Issue No. 26 asked the question, “What weapons shall we use to conquer the *Inyenzi*,” or Tutsis, “once and for all?”¹⁰² Below the headline was a depiction of a machete.¹⁰³

RTLM began broadcasting soon after the ruling Hutu government and the RPF entered into a failed attempt at a peace accord in August 1993.¹⁰⁴ RTLM was immediately popular, as its programming focused on the popular Congolese music of the time as compared to Radio Rwanda’s more traditional playlist.¹⁰⁵ Its on-air talent also struck a more informal, unscripted tone than the state station’s often-staid newsreaders.¹⁰⁶ Listeners could call in to request songs and chat with hosts, and co-hosts conducted on-air man-on-the-street interviews.¹⁰⁷ As Alison Des Forges notes, “[a]ccording to one Rwandan well acquainted with the media in his country, RTLM offered comments that sounded like a conversation among Rwandans who knew each other well and were relaxing over a *Primus* in a bar.”¹⁰⁸ Beginning in October 1993, however, RTLM’s programming took a much darker turn. The Hutu president

98. *The Verdict: Summary Judgement from the Media Trial*, in *THE MEDIA AND THE RWANDA GENOCIDE* 279 (Allan Thompson ed., 2007).

99. *Id.*

100. See Des Forges, *supra* note 95, at 49.

101. Full text of the Hutu Ten Commandments, <http://www.trumanwebdesign.com/~catalina/commandments.htm>; *The Verdict: Summary Judgement from the Media Trial*, in *THE MEDIA AND THE RWANDA GENOCIDE* 280 (Allan Thompson ed., 2007).

102. *Id.* at 281.

103. *Id.*

104. Des Forges, *supra* note 95, at 43-44.

105. *Id.* at 44.

106. *Id.*

107. *Id.*

108. *Id.*

of neighboring Burundi was assassinated, sparking conflicts between Burundian Hutus and Tutsis.¹⁰⁹ RTLM reported sensationally on the assassination, repeating unconfirmed and in some cases false reports regarding torture of the victim by Burundian Tutsis.¹¹⁰ RTLM framed its broadcasts within the theme of ethnic separatism—supposedly inherent differences between Hutus and Tutsis; the violent and untrustworthy nature of the latter tribe; the danger of the RPF's incursion and its intent to subjugate the minority Hutu population—with increasing frequency.¹¹¹ On-air hosts also referred to, and in some cases read aloud, *Kangura* editorials, spreading the paper's ideological contamination among the overwhelmingly illiterate population.¹¹²

A still-unsolved rocket attack that shot down Rwandan President Juvenal Habyarimana's plane and assassinated the president on April 6, 1994 triggered the commencement of the genocide.¹¹³ First, RTLM turned its vitriol to the Belgian UN peacekeeping force stationed in the country, accusing them of having shot down the plane; Rwandan soldiers, pursuant to a pre-arranged plan by the Hutu government, brutally killed ten members of the force, leading Belgium to withdraw its forces.¹¹⁴ Later, during the genocide, RTLM's broadcasts performed two equally critical, and equally deadly, functions in the perpetration: continuing the spread of genocidal ideology through propaganda, and the mobilization of a radicalized force with intent to execute mass killings.¹¹⁵ At times, the two functions merged, as in when its broadcasts offered names, addresses, and license plate numbers of *gisenyi* to be exterminated.¹¹⁶ At the height of the killing in late April and early May, one commentator revealed a Tutsi hiding place on a hill in woods near the capital city.¹¹⁷ Killers would call into the station with the news of their acts, and would be congratulated by commentators on the air.¹¹⁸ Broadcasts called on all Rwandans to "rise up as a single man" to defend their country in one final war, which would "exterminate Tutsi from the globe [and] make them disappear once and for all."¹¹⁹

109. *Id.* at 44.

110. *Id.*

111. *Id.*

112. *Id.*

113. See Caplan, *supra* note 87, at 27.

114. Des Forges, *supra* note 95, at 48.

115. *Id.* at 47-48.

116. *Id.* at 48.

117. *Id.* at 49.

118. *Id.*

119. *Id.* at 48.

While both *Kangura* and RTLM were private outlets, both were closely connected to the Hutu extremist wing of the Rwandan government. As Frank Chalk notes, Hutu Power officials and members of the president's Coalition for the Defense of the Republic (CDR) party members participated through "stock ownership, seats on the board of directors, cross consultation, and even the broadcasting of editorials" from *Kangura* onto RTLM for Rwanda's largely illiterate population.¹²⁰

As Gerald Caplan writes, "little more than 100 days later," the genociders had completed the most efficient human mass killing since the Second World War:

Perhaps as many as a million women, children, and men, the vast majority of them Tutsi, lay dead. Thousands more were raped, tortured, and maimed for life. Victims were treated with sadistic cruelty and suffered unimaginable agony.¹²¹

As many as 15 percent of Rwanda's population were killed in those 100 days.¹²² The sound of blaring radios could be heard from the genociders' roadblocks and from pickup trucks carrying death squads.

2. THE MEDIA TRIAL

On December 3, 2003, the International Criminal Tribunal of Rwanda found RTLM directors Ferdinand Nahimana and Jean-Bosco Barayawiza, and *Kangura* editor Hassan Ngeze guilty of public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity for the roles their respective outlets played in the events of April 1994.¹²³ Nahimana and Ngeze were sentenced to life in prison; Barayawiza to 35 years.¹²⁴

Of particular relevance to the Tribunal's decisions were the actions of the International Military Tribunal at Nuremberg in finding that Julius Streicher, the editor-in-chief of the vehemently anti-Semitic Nazi newspaper *Der Stürmer*, had incited mass murder despite the fact that there was not necessarily "specific causation . . . linking the expression at issue with the demonstration of a direct effect."¹²⁵ In other words, there was no allegation at Nuremberg that Streicher's publication was

120. Frank Chalk, *Intervening to Prevent Genocidal Violence: The Role of the Media*, in *THE MEDIA AND THE RWANDA GENOCIDE* 377 (Allan Thompson ed., 2007).

121. Caplan, *supra* note 87, at 27.

122. *Id.* at 29.

123. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

124. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence ¶¶ 1105-08 (Dec. 3, 2003).

125. See *id.* ¶¶ 980-82.

linked to any particularized act of violence; rather, its “injection into the minds of thousands of Germans a ‘poison’ that caused them to support the National Socialist policy of Jewish persecution and extermination” was sufficient evidence of guilt. In her article on the trial, Catherine MacKinnon noted that the ICT’s trial of Nahimana, Barayawiza, and Ngeze represented the first time since Nuremberg that a tribunal had confronted the media’s culpability in offending international criminal justice principles for its alleged contributions to genocide. She also found the case doubly historic, since the principals were found guilty not simply of having instigated genocide, but of having committed it as well.¹²⁶ The court found the media’s words to be as deadly as machetes.

B. *Post-Genocide Media Regulation*

1. LAWS

Relying on *Kangura* and RTLM as a cautionary tale of the destruction an unchecked media can cause,¹²⁷ the government’s Penal Code and 2002 Press Law both subject Rwandan journalists to a host of criminal penalties for a variety of offenses. The law mandates criminal punishment for defamation, “publications that endanger public law and order threaten, public decency,” or contempt for the President, as well as recording, transmitting or recounting words uttered privately or confidentially.¹²⁸ The most serious crime a journalist or media outlet can be accused of in Rwanda under either statute, however, is divisionism, a broadly defined charge that in essence equates any discussion of Rwandans in terms of Hutus and Tutsis with the separatist ideology that caused the genocide. As defined in the Penal Code, divisionism is

the use of any speech, written statement, or action that divides people that is likely to spark conflicts among people, or that causes an uprising which might degenerate into strife among people based on discrimination.¹²⁹

Many have pointed out that such a policy offers political benefits to the RPF, a Tutsi-heavy government, since Hutus still comprise an overwhelming majority in the country—in part because only about 15% of

126. Catherine A. MacKinnon, *Prosecutor v. Nahimana, Barayahwiza, & Ngeze. Case No. ICTR 99-52-T*, 98 AM J. INT’L L. 325, 328 (2004). The International Military Tribunal sentenced Streicher to death. *Id.* at 328.

127. See Yaroslav Trofimov, *As Horror Recedes in Time, Rwanda Still Restrains Press*, WALL ST. J., Apr. 30, 2004, at A1 (quoting RPF official Tito Rutaremara as stating “[t]here are some things that have to be banned . . . the killers are still here, and so are the victims. We have to be vigilant all the time.”).

128. Lars Waldorf, *Censorship and Propaganda in Post-Genocide Rwanda*, in *THE MEDIA AND THE RWANDA GENOCIDE* 404, 407 (Allan Thompson, ed. 2007).

129. *Id.*

Rwandans are Tutsis, in part because the genocide decimated the Tutsi population.¹³⁰ Where the government sees its erasure of ethnicity as a necessary concomitant to the development of a national identity, those in the opposition see it as suppression of democratic resistance.¹³¹

Rwanda's Press Law also regulates participation in the media sector. It defines a "journalist" as someone who has studied and is experienced in the subject, and who holds a press card issued by the High Council of the Press, the body that regulates the Rwandan media.¹³² Organizations interested in launching a new publication must also register with the government a notification that includes, among other information, "terms of reference clarifying the orientation of the publication,"¹³³ while broadcast licensees must provide information regarding the "general characteristics of the[ir] programme[s]."¹³⁴

2. HIGH COUNCIL OF THE PRESS

The High Council of the Press is widely seen by Rwandan journalists as being closely aligned with the ruling party.¹³⁵ This perception is attributable in part to the Council's advisory role under its founding charter, a 2002 Presidential Order which stated that the Council would make recommendations regarding licensing and sanctions of media outlets to the Minister of Information, who was free to adopt or deny them.¹³⁶ A new draft Council law, proposed in 2006, allows for the industry to elect three Councilors (two from the private media, and one from the public media), and grants the Council final authority in decision-making, subject to judicial review in a few areas.¹³⁷ However,

130. The government's conduct in the non-media context tends to bear this theory out: in the months leading up to the 2003 elections, the ruling RPF accused a rival party of divisionism when it sought to advocate on behalf of Tutsi (rather than "Rwandan," presumably) genocide survivors. See Waldorf, *supra* note 128, at 406. Similar charges were leveled against international non-governmental organizations after the election. See *id.* International election observers noted that "[a]ccusations of separatism and divisionism, which are grave in the Rwandan context, had a tendency to be used as arguments for limiting the freedom of speech of political opponents during the election campaigns." *Id.*

131. See Caplan, *supra* note 88, at 35.

132. See Press Law 2002, art. 59, art. 60 (Rwanda) [hereinafter Press Law].

133. Press Law, art. 16. These requirements were carried over in a revision to the Draft Law proposed in 2006, but not yet fully adopted by Parliament. See also Draft Press Law, arts. 10, 68-69, *Gazeti ya leta ya Republika Rwandaise*, 2006 [hereinafter Draft Press Law].

134. Press Law art. 34.

135. See Steven Baguma, Rwanda: Politicians Making it a Norm to Muzzle the Press, Committee of Concerned Journalists (May 24, 2007), <http://www.concernedjournalists.org/print/789>.

136. Press Law art. 74, art. 75.

137. See Draft Press Law, art. 25 (2006) (Rwanda) (on file with author).

even these proposals may not relieve the Council of its reputation as an institution closely aligned with the government. Even under the draft law the Prime Minister rather than the Parliament retains the power to appoint or dismiss Councilors.¹³⁸ The Council cannot be truly independent if it continues to rely on the state for its entire budget, and unlike other commissions, who report to the Parliament, the Council reports to the Executive.¹³⁹

Many in the Cabinet hoped that the new Council law would make the Council more independent, and would assist the Council in its obligation to both protect and regulate the press. This “protection,” however, seems to be from government sanction. During my time in Rwanda, no private journalist could ever recall an instance where the Council intervened *on behalf* of a journalist, nor has it ever reported on harassment of journalists. Few if any media practitioners saw the Council as an advocate designed, as the draft Council law states, “to fight for freedom and protection of the press and to consider its promotion.”¹⁴⁰ Many journalists felt that the Council operates as a prosecutor of the media, rather than its advocate; its Monitoring Reports are regularly turned over to the Prosecutor General for possible criminal investigation. Journalists also felt the Council was not fulfilling its obligation to empower the press, and was not working to build capacity in the media industry. Accordingly, both the Council’s structure and its actions compromise its independence in the eyes of journalists.¹⁴¹

The Council’s Media Monitoring Project publishes periodic reports on topics such as media bias and political coverage, and distributes them to stakeholders in the government and press.¹⁴² As a general matter, it is difficult to see the value of these reports. The reports—and the entire Media Monitoring Project—do not move the Council towards its remit of guaranteeing and protecting freedom of expression in media.¹⁴³ In fact, by involving government in the monitoring and criticism of media outlets, it arguably works contrary to that goal.

138. *See id.* art. 7.

139. *See id.* arts. 20, 25.

140. *See id.* art. 4.

141. Interviews with various media practitioners in Rwanda (Feb. 2007); Interview with Patrice Mulama, Executive Secretariat, High Council of the Press, Rwanda (Feb 7, 2007).

142. About the Rwanda Media Monitoring Project, <http://hcp.gov.rw/pages/rmmpnzp.htm> (last visited Nov. 24, 2007).

143. Press Law, art. 74; High Council of the Press Mission Statement, <http://www.hcp.gov.rw/pages/mission.html> (last visited Nov. 24, 2007).

C. Rwanda's Media Today

Because of challenges in developing an Internet infrastructure, Rwandans' current media usage is overwhelmingly limited to the traditional, non-digital outlets of newspapers, television and radio.¹⁴⁴ Even newspapers remain largely unaffordable, and the literacy rate hovers around 34 percent.¹⁴⁵ As of 2002, about 11 percent of the population owned radios. Less than one percent, however, owned televisions.¹⁴⁶ The state of the media sector is discussed in more detail below.

1. BROADCAST MEDIA

Public outlets dominate Rwanda's broadcast sector. The country currently enjoys one state-owned television station, Television Rwandaise (TVR), operated by the Rwanda Office of Information, or ORINFOR.¹⁴⁷ The largest radio station, the state-run Radio Rwanda, broadcasts in English, French, Kinyarwanda and Swahili.¹⁴⁸ The 2002 Press Law authorized the licensure of private broadcasters for the first time since the genocide; however, the first private radio station did not launch until 2004.¹⁴⁹ The four nationally licensed private radio stations currently operating in the country focus on music and entertainment, but have begun inching up their respective levels of news and public affairs programming. One of these stations, Contact FM, broadcast a live call-in program with President Kagame in September 2006.¹⁵⁰

While the government has allowed nonstate media outlets to operate in the country in recent years, it has retained firm control over them via the threat of expulsion. In November 2006, the correspondent for a French radio station, Radio France International, was forced to leave the country and the station's transmitter was shut down when Rwanda

144. See Ron Nixon, *Africa, Offline: Waiting for the Web*, N.Y. TIMES, July 22, 2007, at BU1. (noting that less than one percent of the Rwandan population is connected to the Internet, and connection fees via satellite service can run up to \$90 per month where incomes average about \$220 per year).

145. Waldorf, *supra* note 129, at 411.

146. Rwanda general data of the country, <http://www.populstat.info/African/rwandag.htm> (last visited Nov. 11, 2007).

147. COUNTRY INFORMATION & POLICY UNIT, HOME OFFICE RWANDA COUNTRY REPORT, § 6.12.

148. *Id.* § 6.10.

149. Some argue that the government's reluctance to allow private outlets prior to the 2003 elections explains the delay. See Waldorf, *supra* note 129, at 411. At present, there are fourteen radio stations operating in the country; in addition to the private outlets discussed above, Radio Rwanda has three affiliated community stations, two private community low-power stations, and four private religious stations.

150. Peter Coles, Sense and Censorship, UNESCO (Apr. 23, 2007), http://portal.unesco.org/en/ev.php_URL_ID=37610&URL_DO=Do_Topic&URL_Section=201.html.

broke off diplomatic relations with France after a French judge issued international arrest warrants against President Kagame and his aides for what he deemed was their alleged involvement in the shooting down of President Habyarimana's plane back in April 1994.¹⁵¹ The Minister of Information has also been highly critical of the correspondents of outside outlets such as Voice of America and the BBC, who have aired stories regarding unfavorable country reports by international human rights organizations such as Human Rights Watch and Amnesty International.¹⁵²

2. NEWSPAPERS

With approximately 25 private newspapers, Rwanda currently has more press outlets than at any time in its history.¹⁵³ The most purely independent of these are the tabloid-style papers published in Kinyarwanda, on a biweekly, weekly, or monthly basis. These papers—most notably *Umuseso* and *Umuco*, as well as the English-language weekly *News Line*, are often critical of the government and its policies. These papers focus on opinion pieces and stories on alleged official corruption; their reporters rely heavily on anonymous sources and implication.

These outlets operate in a difficult and often hostile climate. Prior to the passage of the 2002 Press Law, the Rwanda Independent Media Group (RIMG), a collaborative of several Kinyarwanda papers and *News Line*, reported that ten journalists had fled the country and four were arrested or harassed as a result of their reporting.¹⁵⁴ Even after the passage of the law, journalists for *Umuseso* alleged being detained for stories written about the 2003 election,¹⁵⁵ and a parliamentary commission on genocidal ideology accused the paper's editors of being "propagandists of divisionism."¹⁵⁶ Later, in 2004, the High Council of the Press recommended that the paper be suspended for four months for publishing "divisionism" in a series of stories alleging that the vice-president of the lower house of Parliament, Dennis Polisi, was marshaling a cadre of Tutsi returnees from neighboring Burundi to challenge President Kagame's leadership of the country and the RPF.¹⁵⁷ The High

151. See *Rwanda Takes French Radio Off Air*, BBC NEWS, Nov 27, 2006, available at <http://news.bbc.ca.uk/2/hi/africa/6188559.stm>.

152. Waldorf, *supra* note 128, at 412.

153. REPORTERS WITHOUT BORDERS, RWANDA ANNUAL REPORT (2006), available at http://www.rsf.org.article.php3?id_article=13571 and 2006 at [article=17398](http://www.rsf.org.article.php3?id_article=17398).

154. Interview with Charles Kabonero, Editor, *Umuseso*, in Rwanda (Feb. 9, 2007).

155. See Trofimov, *supra* note 127.

156. Waldorf, *supra* note 128, at 409.

157. *Id.*

Court of the Government of Rwanda eventually acquitted the paper and its editor, Charles Kabonero, of the divisionism charge, but sentenced Kabonero to a one-year suspended prison sentence and granted a damages award of approximately one million Rwandan Francs (about \$1800) to Polisi for criminal defamation and insulting the dignity of a public official.¹⁵⁸

Incidents of police detention of journalists seem to have decreased recently; a Cabinet official stated in February of this year that the government made an explicit decision to refrain from detaining journalists without charge,¹⁵⁹ and the head of RIMG stated that no journalist working for a member paper had been arrested or detained since 2004.¹⁶⁰ Indeed, officials even point to the independent press as evidence of a healthy climate for such media outlets in the country.¹⁶¹ However, despite the improving media environment, the relationship between the government and the Kinyarwanda-language newspapers is contentious. In public press conferences, President Kagame has chastised the private media for its reporting methods,¹⁶² and private journalists complain of lack of access to information as compared with the level of openness afforded to the government's and government-friendly outlets.¹⁶³ At one press workshop, before a crowd of more than forty journalists, the Executive Secretariat of the Council discussed specific stories in the Kinyarwanda papers—reading excerpts from recent issues from the stage—as examples of the private press's failure to comply with the standards and ethics of its profession; he also accused one of the papers of intentionally attempting to pass on anti-government opinion as reported fact.¹⁶⁴

Parties interested in commencing press operations also face structural obstacles. One provision of the 2002 Press Law requires new

158. *Id.* at 410-411.

159. Interview with Ambassador Joseph Mutaboba, Secretary General, Ministry of Internal Affairs, in Rwanda (Feb. 6, 2007).

160. Interview with Charles Kabonero, Editor, *Umuseso*, in Rwanda (Feb. 9, 2007).

161. Interview with Ambassador Joseph Mutaboba, Secretary General, Ministry of Internal Affairs, in Rwanda (Feb. 6, 2007).

162. Edwin Musoni, *Kagame Attacks ORINFOR*, THE NEW TIMES, Oct. 17, 2006, available at http://www.rwandagateway.org/article.php3?id_article=3288 (criticizing private media's ethics and interest in profits over accuracy).

163. Interview with Charles Kabonero, Editor, *Umuseso*, in Rwanda (Feb. 9, 2007). To be fair, President Kagame has often been an equal-opportunity criticizer; he has characterized the state news service ORINFOR as "sick," in response to a concern raised by a northern district mayor that the service was not adequately covering issues in his region. Musoni, *supra* note 162.

164. Patrice Mulama, High Council of the Press Executive Secretariat, Comments at Journalists' Workshop Kigali, Rwanda (Feb. 8, 2007).

papers to register with the Ministry of Information a notification of the publication's editorial policy, initial capitalization, format, and language of publication, as well as proof that the Editor in Chief has not been imprisoned or convicted of a crime.¹⁶⁵ While nominally just a formality, the registration requirement has been used by the government to subject private outlets to arbitrary enforcement.¹⁶⁶ Recently, the Ministry of Information closed the English-speaking newspaper *The Weekly Post* three days after the publication of its debut issue.¹⁶⁷ The *Post*, whose staff was composed largely of former writers and editors from the government-friendly daily the *New Times*, received notice from Rwanda's Minister of Information that its license authorizing publication would be revoked because its managers had provided inaccurate information in its initial registration application to the Ministry.¹⁶⁸ The *Post*'s editors have petitioned the High Council of the Press to intervene on their behalf, but the editors have not yet received a reply.¹⁶⁹

Individual journalists in the private media also tell of intimidation such as anonymous phone calls and surveillance, and report regular self-censorship. One private outlet claimed it had received an official letter from a government institution asking it to end its reporting on a possible official controversy.¹⁷⁰ And an extreme incident of possible intimidation was the beating of Jean-Bosco Gasasira, the managing editor of *Umuvugizi*, on the evening of February 9, 2007.¹⁷¹ Initial reports indicated that one of the perpetrators was a decommissioned soldier.¹⁷² The government has reportedly investigated the incident, but has made no public mention of its findings.¹⁷³

165. See Press Law, art. 24.

166. Steven Baguma, Rwanda: Newspaper Banned—No Reason Given, Committee of Concerned Journalists (June 16, 2007), www.concernedjournalists.org.

167. *Id.*

168. *Id.* Baguma, a former *New Times* writer, maintains that *Post* editors have claimed the real culprits behind the *Post*'s closure are the *New Times* and its well placed governmental benefactors, who sought to foreclose possible criticism. See *id.* Kenya's Media Institute reports that several *Post* founders' ties to Uganda, whose relations with Rwanda continue to be strained due to the Second Congo War of the late 1990s and the early 2000s, served as a motivating factor behind the paper's closure. See Media Institute, Newspaper's Ties to Uganda May Have Precipitated Closure (June 15, 2007), <http://www.ifex.org>.

169. *Id.*

170. Interview with private media editor, in Kigali, Rwanda (Feb. 2007).

171. See International Freedom of Expression Exchange, Newspaper Editor Brutally Beaten Following Publication of Articles Critical of Government (Feb. 12, 2007), <http://www.ifex.org/en/content/view/full/81077>.

172. *Id.*

173. Jennie D. Burnet, COUNTRIES AT CROSSROADS: RWANDA (2007), <http://www.freedomhouse.org/uploads/ccr/country-7259-8.pdf>.

The independent press also ostensibly includes the aforementioned English-language *New Times*, the only daily publishing regularly in the country. It is widely seen as pro-government, if not supported by the government directly,¹⁷⁴ and one reward the *New Times* receives for its official-friendly editorial line is favorable advertising treatment it receives as compared to the Kinyarwanda-language papers.¹⁷⁵ The various public ministries and departments who are by far the largest ad-buyers in the country purchase space in the *New Times*, while papers such as *Umuseso* often fail to attract such sales. In addition, while the *New Times* is allowed to use the government's printing press, the only such press in Rwanda,¹⁷⁶ the Kinyarwanda papers are forced to print their issues on rented Ugandan presses across the border, and editors have alleged that the trucks carrying their papers in from Kampala are often stopped by government officials upon entering the country.¹⁷⁷

Both the government and the *New Times* have publicly complained regarding the level of professionalism in the private media.¹⁷⁸ In a thinly-veiled jab at the Kinyarwanda press, a *New Times* editorial published around the time Rwandan Parliamentarians were meeting with journalists regarding a draft revised Press Law stated that for certain "kinds of reporters, the 'other side of the story' is not an issue," and that "newspaper editors pass their near-perverted opinions about respectable people and institutions for front page news stories."¹⁷⁹ According to one study

These incidents, more than any adopted regulation or law, and whether they are the product of an officially organized response or not, cause the greatest harm to independent reporting. As a study group developing the media policy in Iraq recently stated, "[v]iolence is its own form of regulation . . . [a]t a time when journalists and broadcasters are threatened, where insecurity may predominate, the nuances of official regulation may seem distant and almost insignificant." MONROE E. PRICE, DOUGLAS GRIFFIN & IBRAHIM AL-MARASHI, TOWARD AN UNDERSTANDING OF MEDIA POLICY AND MEDIA SYSTEMS IN IRAQ: A FOREWORD AND TWO REPORTS (Ctr. for Global Communication Studies 2007), available at http://www.global.asc.upenn.edu/docs/CGCS_OcPa_1.pdf.

174. International Freedom of Expression Exchange, Committee to Protect Journalists Press Release (June 12, 2007), ifex.org/en/content/view/full/84142. According to reports, the paper is owned by several high-ranking officials in the Rwanda Patriotic Front, the government's ruling party.

175. Media Groups Halt Publishing in Protest Over the Government Harassment, International Freedom of Expression Exchange Clearinghouse (Oct. 26, 2007), at <http://allafrica.com/stories/printable/200710261331.html>.

176. Interviews with Private Rwandan Journalists (Feb. 7–9, 2007).

177. REPORTERS WITHOUT BORDERS, RWANDA ANNUAL REPORT (2005), http://www.rsf.org/article.php3?id_article=13571. This differential treatment is common in Africa; in Mozambique and Botswana, for example, the private press are subjected to taxes on ads and production equipment, while the government-controlled media are exempt from similar charges. See NYAMNJOH, *supra* note 81, at 77.

178. The level of professionalism in the private media is also an issue in other parts of the continent. See NYAMNJOH, *supra* note 81, at 93.

179. Editorial, *Media May Not Be of Value, But Has To Earn Respect*, THE NEW TIMES, Feb. 13, 2007 (on file with author). Along similar lines, another *New Times* article

less than 20 percent of practicing journalists hold bachelor's degrees,¹⁸⁰ and with the country's only journalism school in Butare, two hours away from the capital in Kigali, private journalists find it difficult, if not impossible, to receive continuing education.¹⁸¹ Journalism graduates also tend to choose careers in NGOs or the government where compensation is higher, although the director of the journalism program reported several recent graduates working in media outlets around the country.¹⁸²

Members of the private media acknowledged their lack of training, and were supportive of both establishing minimum qualifications for the profession and a certification program that would allow them to meet those qualifications. Several government officials have discussed plans to establish an independent media institute in the capital city that would provide evening classes and eventual certification for journalists, and the Ministry of Public Service, Skills Development and Labour recently announced its intention to undertake a needs assessment of the country's practicing journalists in order to build capacity in the profession.¹⁸³ The heads of private media houses and associations have been very supportive of the idea, and have expressed a willingness to participate in ongoing professional development. Since much of the Rwandan government's critique of the private press is based on what officials view as a lack of professionalism, once the majority of private media practitioners become adept with their profession's techniques and ethics, the officials' concerns should decrease. When the media's capacity increases, freedom of expression advocates will learn whether the government's concern with the private press is its methods rather than its content.

Conclusion

Here in the West, most students of media philosophy follow Justice Holmes: the best antidote to speech is more speech.¹⁸⁴ A look at how

accused media houses of "grossly abus[ing] their responsibility" by "promoting distrust between the state and the populace" for the service of "foreign interest." Rutazigwa Alphonse *Stop Lunacy in the Guise of Press Freedom*, THE NEW TIMES, (Nov. 12, 2007), available at <http://www.newtimes.co.rw/index.php?issue=1287&article=912>.

180. Edward K. Mwesigye, *80 Percent of Rwandan Journalists "Have No Degree,"* THE NEW TIMES, Mar. 28, 2007, available at http://www.rwandagateway.org/article.php3?id_article=4774 (reporting on study by human rights organization Ligue des Droit de la Personne dans les Grands Lacs).

181. *Id.*

182. Interview with Jean Pierre Gatsinzi, Director, School of Journalism, National University of Rwanda, in Butare, Rwanda (Feb. 7, 2007).

183. Gnatius Suuna, *Government to Audit Journalists' Skills*, THE NEW TIMES, June 19, 2007, available at http://www.rwandagateway.org/article.php3?id_article=6107 (needs assessment initiative a result of concerns identified by officials at the Rwandan government's annual retreat at the Akagera Game Lodge).

184. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

media is regulated in states like Jordan and Rwanda, however, raises a possibility that some Western media scholars and practitioners may not have considered: freedom of expression may be a relative, not an absolute, term, shaped more by context than by principle. As President Kagame told western journalist Stephen Kinzer in response to a question regarding the right to expression, “[f]or me, human rights is about everything... This is the killing of societies or nations we’re talking about. This constitutes the greatest violation of human rights.”¹⁸⁵

Should a democratically elected government in a transition state exert direct influence over the media in the name of rebuilding the country? The question can be a difficult one. But even the possibility of such official action requires both a legitimate electoral process, so that those exercising the influence have political legitimacy, and a well-functioning, independent judiciary able to check and balance legislative and executive conduct that might be insufficiently protective of, or outright hostile to, speech and the press. In Mill’s terms, for truth to be found, those who claim it must be able to speak without fear of persecution, even in a transitional or post-conflict state.¹⁸⁶ In most cases, this means letting listeners and viewers, rather than the government, be the arbiters of what constitutes worthy debate in areas of public concern.

Jordan illustrates the possible conflict between abstract freedom of expression principles and the *realpolitik* of the region. A Western official might be hard-pressed, for example, to meaningfully push diplomatic channels for media opportunities for the party in opposition to the government, when that opposition is the Muslim Brotherhood-linked Islamic Action Front and the government is pro-West and Israel-friendly. It is also probably true that many of the Palestinian émigrés that form more than half of Jordan’s population are not in favor of the Jordanian government’s normalization of relations with its neighbor across the Jordan River. Indeed, it was press critiques of the country’s warming of its policy toward Israel, at least in part, that led to the restrictions in the 1997 Press Law. However, it is also the case that suppression in the name of stability can be a convenient excuse for the maintenance and consolidation of power by those in positions of authority. Provisions in the Jordanian Press Law that forbid discussion of issues that might “harm national unity,” to take but one example, are aimed not at

185. Kinzer, *supra* note 90.

186. JOHN STUART MILL, *ON LIBERTY* 46 (David Spitz ed., W.W. Norton & Co., Inc. 1975) (1859).

instability, but at dissent. The government should recognize the distinction, not blur it.

As for Rwanda, the challenge is to ensure that the prohibitions on content put in place to protect the country from repeating its history do not inhibit the press from performing its essential role in the burgeoning democratic process. Not all criticism of the government undermines the morale of the country, and not every anti-government opinion is divisionism. In fact, an environment that encourages criticism, debate and independent viewpoints could lead to a stronger Rwanda, whose political successes would be viewed as more legitimate in the eyes of the international community.

Piracy in Our Backyard: A Comparative Analysis of the Implications of Fashion Copying in the United States for the International Copyright Community

Matthew S. Miller*

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Introduction

The United States is at the forefront of providing copyright protection to authors, artists and other creative types. The copyright law of the

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United States is extensive¹ and deeply rooted in our country's historical beginnings. The United States Constitution provides in pertinent part:

The Congress shall have the Power . . . [to] Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.²

As advances in technology continue to shape the emerging global market, concerns for protecting the rights of American copyright owners from the unauthorized use, reproduction and distribution (i.e., "piracy") of their works abroad have increased dramatically. This issue is complicated both legally and practically because the protections afforded to copyright owners under domestic copyright laws do not extend beyond national borders. In other words, United States copyright law has no "extraterritorial effect."³ As a result, whether a work that is afforded copyrighted protection in the United States will enjoy the same level of copyright protection abroad, or any protection at all, will depend on the governing laws of the country where an alleged infringement occurs. Even though the United States copyright law stops at its borders, the economic stakes for copyright owners who are rewarded from the exploitation of their works do not. This conundrum is by no means unique to copyright owners in the United States. Rather, it is one that is shared by copyright owners throughout the world who are concerned with protecting their original works of authorship from unauthorized uses beyond their own national borders.

Over the years, numerous countries have entered into multi-national treaties that provide for international copyright protection in order to harmonize copyright laws throughout the world.⁴ Nonetheless, because such treaties often require only "minimum standards" for copyright protection,⁵ and because the vast majority of foreign nations are not

1. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1101 (2006)).

2. U.S. Const., art I, § 8, cl. 8.

3. *Subafilms, Ltd. v. MGM-Pathé Communications Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994).

4. The United States, for example, now adheres to eight multi-national treaties: (1) WIPO Performances and Phonograms Treaty; (2) WIPO Copyright Treaty; (3) WTO TRIPs Agreement; (4) Berne Convention; (5) Satellite Convention; (6) Phonograms Convention; (7) Universal Copyright Convention; and (8) Buenos Aires Convention. Note, however, that the United States is not a party to two important multi-national copyright treaties: (1) International Convention for the Protection of Performers, Phonograms and Broadcasts (the "Rome Convention"); and (2) Treaty on the International Registration of Audiovisual Works. LIONEL S. SOBEL, *INTERNATIONAL AND COMPARATIVE COPYRIGHT LAW* 2.23-2.24 (2007).

5. Berne Convention for the Protection of Literary and Artistic Works, art. 36, Sept. 9, 1886, as last revised at Paris on July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27, 25 U.S.T. 1341, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

even signatories, international piracy continues to thrive. It should also come as no surprise that copyright owners in the United States, which is the “single most important producer of entertainment products” in the world,⁶ have a vested interest in closely monitoring piracy havens and encouraging foreign governments to take appropriate measures to end such practices.⁷ “Priority watch lists” maintained by public interest groups such as the International Intellectual Property Alliance (“IIPA”), single out countries such as China, Russia and Venezuela as havens for piracy that must be closely monitored.⁸

It might, however, come as a huge shock to learn that the United States has itself been a haven for the pirating of what many consider a type of artistic expression—fashion design. Each year American companies specializing in the production and sale of copies of original fashion designs, or “knock-offs” as referred to in the fashion industry, generate millions of dollars in revenues from the fruits of others’ creative labors.⁹ In fact, Allen Schwartz, President of clothing company A.B.S., admits to watching the Academy Awards, sketching the dresses that the stars so poignantly strut down the red carpet, and then deciding which designs he will recreate.¹⁰ At the same time, such blatant copying is costing designers of original fashion apparel millions of dollars annually.¹¹ This practice has become so acceptable in the United States that there even exists a website shamelessly titled “Anyknockoff.com,” offering over 2,000 handbag styles resembling designer models.¹² This “knock-off free for all,” as one author has described it,¹³ is especially alarming when one considers that New York City, along with London, Paris and

6. LIONEL S. SOBEL & DONALD E. BIEDERMAN, *INTERNATIONAL ENTERTAINMENT LAW* 1 (2003).

7. See Susan C. Schwab, U.S. Trade Representative, Announcement of Requests for Consultations with China on IPR and on Certain Market Access Issues for Copyright Intensive Industries (Apr. 9, 2007) (announcing steps taken by the United States to crack down on intellectual property violators in China).

8. Posting of Mark Hefflinger to digitalmediawire, <http://www.dmwmedia.com/news/2007/02/15/u-s-copyright-owners-want-canada-added-to-list-of-piracy-havens> (Feb. 15, 2007, 11:51 PST) (noting that the IIPA has recently asked the U.S. Trade Representative to add Canada to the list of piracy havens).

9. See Ben Winograd & Cheryl Lu-Lien, *Can Fashion Be Copyrighted? The Debate Over Knockoffs*, PITTSBURGH POST-GAZETTE, September 12, 2006, available at <http://www.post-gazette.com/pg/06255/721170-314.stm>.

10. Julie P. Tsai, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 LEWIS & CLARK L. REV. 447, 450 (2005).

11. *Id.* at 449.

12. See Winograd & Lu-Lien, *supra* note 9.

13. See Christine Magdo, Protecting Works of Fashion From Design Piracy, <http://leda.law.harvard.edu/leda/data/36/MAGDO.html> (unpublished comment, on file with the Legal Electronic Document Archive at the Harvard Law School Library) (last visited Nov. 2, 2007).

Milan, is touted as a fashion capital¹⁴ in a “global fashion industry that sells more than \$750 billion of apparel annually.”¹⁵ However, to call the practice of knocking-off original fashion designs an act of piracy may be misleading. Under the current laws of the United States, original fashion designs receive no copyright protection because they are considered “useful articles,” as opposed to works of art.¹⁶ After all, if knocking-off a fashion design is not specifically prohibited in the United States, then arguably there is no act of piracy when one engages in this type of activity. But since the absence in the United States of copyright protection for fashion designs is in stark contrast to the copyright protection (and other intellectual property safeguards) afforded in many foreign countries, particularly those European countries that are home to fashion capitals as well,¹⁷ it becomes apparent that whether knocking-off fashion designs in the United States is “piracy per se” may depend on who you ask.¹⁸

Instead, a more fundamental issue that needs to be addressed is the impact that the current level of copyright protection, or lack thereof, afforded to fashion designs in the United States has on the international copyright community—the same international copyright community the United States continues to press for international copyright protection parallel to the protection provided under its own domestic laws. As mentioned above, even though the laws of the United States stop at its borders, the economic incentives for domestic and foreign fashion designers whose works are being knocked-off in the United States do not. Therefore, a thorough analysis of the lack of copyright protection afforded to fashion designs in the United States and the resulting trend for knock-offs within its borders cannot be made without taking into account the international copyright implications of such a system. This article will address the piracy issue in that context.

14. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovative and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1693 (2006) (“Fall shows are held during consecutive weeks in February and March, first in New York, then in London, then Milan, and finally, in Paris. Spring shows are held during consecutive weeks in September and October, in the same cities and order”).

15. *Id.*

16. *E.g.*, *Whimsicality, Inc. v. Rubie's Costume Co., Inc.*, 891 F.2d 452, 455 (2d Cir. 1989); *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 416 (5th Cir. 2005).

17. See, e.g., CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.PROP.INT.] art.L.122-5 (Fr.), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=36&r=2498#art9780> (Fr.) (last visited Nov. 2, 2007). (discussed in detail below); see also Copyright, Designs and Patents Act, 1988, c. 48, § 213(1) (Eng.) (recognizing design right as a property right).

18. This is not to suggest that the issue is solely a matter of international opinion. In fact, there is a large constituency in the United States, namely, those whose original designs are copied, who vehemently oppose the act of knocking-off and consider it nothing short of piracy.

The comparative analysis discussed herein is by no means a novel approach to this topic.¹⁹ However, rapid advances in technology and the ever changing landscape of the global market require the analysis to be revisited every few years as this issue becomes a matter of greater international concern each day.²⁰ In fact, now is a particularly important time to revisit this topic following the fashion industry's most recent failure in 2006 to reform the United States copyright law to provide protection for fashion designs.²¹

To highlight this growing concern, consider the early procedure for the fashion design pirate described in *Johnny Carson, Inc. v. Zeeman Mfg. Co., Inc.*²² In that case, the defendant purchased plaintiff's top selling men's suit, which was also its lead model for the spring 1974 season.²³ The defendant then had its design team copy the suit and made less expensive replicas available to the general public.²⁴ The plaintiff eventually discontinued production of the suit, in part because of the availability of the cheaper knock-offs provided by the defendant.²⁵

In the international fashion market, copying of fashion designs has historically moved at an even slower pace. One author described the copying of fashion designs from the French couture houses in Paris in the 1950s as a very arduous task:

The manufacturers flew in from New York, laid the (couture) clothes out on a table, and measured each seam. They went back to New York to copy the dresses and then [the Chicago-based department store Marshall] Field's bought the copies.²⁶

In 2008, the era of digital downloads and instant electronic delivery of data throughout the world, the stakes are much higher:

[Piracy] is a practice that designers may have grudgingly accepted in the past, when less expensive copies took some time to reach stores and only those consumers who could afford the designer-label originals could be the first to follow a trend. This practice is now costing designers dearly as more advanced technology makes

19. See, e.g., Leslie J. Hagin, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 TEX. INT'L L.J. 341 (1991).

20. In fact, the issue was most recently addressed in 2002. See Safia A. Nurbhai, *Style Piracy Revisited*, 10 J. L. & POL'Y 489 (2002).

21. See discussion *infra* Part III.

22. No. C75-544A, 1977 U.S. Dist LEXIS 12269, at *4 (N.D. Ga. Nov. 4, 1978).

23. *Id.*

24. *Id.*

25. *Id.* at *5.

26. Raustialia & Springman, *supra* note 14, at 1696 (quoting TERI AGINS, *THE END OF FASHION: HOW MARKETING CHANGED THE CLOTHING BUSINESS FOREVER* 175 (HarperCollins Publishers, Inc. 2000)).

it possible to see high-quality copies appear in stores before the original has even hit the market.²⁷

Within the context of this growing concern, the next, and perhaps more difficult issue that this article will address is why, in light of the emerging global market and continued pressure from the fashion industry and other interest groups for copyright reform, the United States remains a haven for fashion knock-offs. One theory, which is examined in great detail below, is that the domestic fashion industry is able to thrive despite “low” intellectual property protection and, for historical reasons related directly to the fashion industry, the United States has never, as a matter of practice, concerned itself with the international copyright implications of its failure to afford copyright protection for fashion designs.²⁸

Before addressing these issues, however, a brief history of the application of copyright law to fashion designs in both the United States and Europe is necessary.

I. Comparison of Laws Governing Copyright Protection for Fashion Designs in the United States and Europe

A. *United States: No Copyright Protection for Fashion Designs*

As mentioned in the introductory remarks, original fashion designs receive no copyright protection under the current laws of the United States because they are considered useful articles. To understand this concept, it is first necessary to understand several important aspects of the American copyright system.

Copyright protection in the United States is founded upon economic principles.²⁹ The Supreme Court of the United States has explained:

27. Magdo, *supra* note 13; *see also* Raustialia & Springman, *supra* note 14, at 1714–15 (observing that “[d]igital photography, digital design platforms, the Internet, global outsourcing of manufacture, more flexible manufacturing technologies, and lower textile tariffs have significantly accelerated the pace of copying,” and that “[c]opies are now produced and in stores as soon as it becomes clear a design has become hot, if not before”).

28. *See* discussion *infra* Part IV

29. *See* THOMAS D. SELZ, MELVIN SIMENSKY, PATRICIA ACTON & ROBERT LIND, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 16.1 (3ded. 2007) [hereinafter Lind] (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), stating that: “[The limited grant of copyright protection] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”). According to Lind, the economic basis in the United States differs from the European basis for copyright protection as a “natural right of an author to be able to protect her creations.” *Id.*

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in “Science and useful Arts.”³⁰

As this language suggests, Congress is empowered to issue copyrights and as such, copyright law in the United States is a creature of federal statutory law. The United States Copyright Act of 1976 (the “Act”), sets forth, among other things, the subject matter of copyright protection, the duration of a properly obtained copyright, and the exclusive rights granted to a copyright owner.³¹ In addition, the Act provides a non-exhaustive list of eight categories of works in which copyright protection subsists.³² Fashion designs are noticeably excluded from this list.

Absent an express provision in the Act providing protection for fashion designs, the question of whether such works are protected by copyright has become a challenge for the American judiciary. The courts do, however, proceed with some direction from Congress. Specifically, section 101 of the Act provides in pertinent part:

[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features *that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.*³³

Digging a little deeper, the legislative history of the Act even explicitly provides that copyright protection would not be afforded to “ladies’ dress” unless such articles contained an element that was separable from its form.³⁴

Given there is little disagreement that clothing designs serve the functional purpose of a “useful article” by covering the human body,³⁵ the focal point of the analysis becomes separability—in other words,

30. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

31. 17 U.S.C. § 101 et. seq. (2006).

32. “Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” *Id.* § 102.

33. *Id.* § 101 (emphasis added).

34. CHRISTINE COX & JENNIFER JENKINS, *BETWEEN THE SEAMS, A FERTILE COMMONS* 8 (The Norman Lear Ctr. 2005) (research report prepared for Ready to Share: Fashion Ownership Creativity, a Norman Lear Center conference held on January 29, 2005, and available at <http://learcenter.org/pdf/RTSJenkinsCox.pdf>).

35. Olivera Medenica, *Bill Would Protect Fashion Designs: Designers Seek to Protect Cheaper Knockoffs*, NATIONAL LAW JOURNAL, Aug. 28, 2006, at S13, available at <http://www.wrlawfirm.com/Blog/2006/10/fashion-copyright-bill-analysis-by-wm.html>.

whether the design can be separated from the utilitarian aspect it serves. There are two types of separability: “physical” and “conceptual.”³⁶ Physical separability means that “[i]f copyrightable elements can be identified as physically separable from the utilitarian aspects of the article, then those elements will be protected.”³⁷ This is, of course, an atypical case for a fashion design because the design itself and the useful article are one and the same.³⁸ Conceptual separability, on the other hand, means that “[i]f the copyrightable elements can be identified as conceptually separable from the utilitarian aspects of the article, then those elements will be protected.”³⁹ Although one might suspect that fashion designs could receive copyright protection under the conceptual separability approach, courts have been unwilling to extend protection for fashion designs under either approach. In *Whimsicality, Inc. v. Rubie’s Costumes Co., Inc.*, the Second Circuit stated:

[C]lothes are particularly unlikely to meet [either the physical or conceptual separability] test—the very decorative elements that stand out being intrinsic to the decorative function of the clothing.⁴⁰

Under the conceptual separability test, “fabric designs, for example, the distinctive pattern imprinted on an article of clothing, fall within the current subject matter of copyright.”⁴¹ Fabric designs, though, need to be distinguished from clothing or fashion designs, “that is, the shape, contour, and cut of an entire garment.”⁴² As the lower court in *Whimsicality, Inc.* stated:

[A] chair is not copyrightable, but a carving on the back of it might be; similarly, while an ordinary garment is not copyrightable, a sculpture (of foam, or fabric, for example), or a detailed embroidery, or some other two-dimensional drawing or graphic work, affixed to a portion of the garment, might be copyrightable. Moreover, the existence of the copyrightable engraving on the vase or the copyrightable carving

36. *Pivot Point Int’l, Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 917 (7th Cir. 2004).

37. *Mazer*, 347 U.S. at 218.

38. *See* *Medenica*, *supra* note 35, at S14.

39. *See* ROBERT C. LIND, COPYRIGHT LAW 40 (3d ed. 2006) (noting that there is a split of authority regarding the test of conceptual separability); *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) (designer must have intended to exercise artistic judgment independent of functional influences); *Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984) (multifactor test); *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985) (artistic features of the article must be superfluous or wholly unnecessary to the performance of the utilitarian function).

40. 891 F.2d 452, 455 (2d Cir. 1989); *see also* *Galiano v. Harrah’s Operating Co.*, 416 F.3d 411 (5th Cir. 2005).

41. Eric J. Schwartz, *United States*, § 2[2][e][vi], in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, at 58 (Paul Edward Geller, ed., LexisNexis 2006).

42. *See id.*

on the chair does not make the entire vase or chair copyrightable. In other words, a copyrightable feature of an item does not entitle the entire item to copyright protection.⁴³

In addition, clothing designed for the sake of art rather than for wearing,⁴⁴ as well as certain fashion accessories,⁴⁵ have been held to fall within the ambit of copyright protection.

Finally, it is also important to note that fashion designs often fail to meet the requisites for other intellectual property protections afforded under federal and state laws in the United States:

Design patents are intended to protect ornamental designs, but clothing rarely meets the demanding criteria of patentability, namely novelty and nonobviousness [sic]. Trademarks only protect brand names and logos, not the clothing itself, and the Supreme Court has refused to extend trade dress protection to apparel designs.⁴⁶

The result is that “fashion designs fall between the seams of traditional intellectual property protections,”⁴⁷ and the domestic fashion industry, at least in the United States, operates in what has been called a “low-IP equilibrium,”⁴⁸ thereby creating an environment that fosters fashion piracy.

B. *Europe—Copyright Protection Afforded for Fashion Designs*

The copying of fashion designs is not a practice limited to the United States.⁴⁹ Unlike the United States, however, European fashion capitals have historically extended copyright protection for fashion designs.⁵⁰ For the purposes of this discussion, French law will serve as the model of copyright protection afforded in European fashion markets because of France’s rich fashion history and commitment to protecting its fashion designers.⁵¹

43. *Whimsicality, Inc. v. Rubie’s Costume Co., Inc.*, 721 F.Supp. 1566, 1573 (E.D.N.Y. 1989).

44. *See Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984).

45. *See Kieselstein-Cord v. Accessories by Pearl Inc.*, 632 F.2d 989 (2d Cir. 1980).

46. *COX & JENKINS*, *supra* note 34, at 6; *see also Hagin*, *supra* note 19 (analyzing the lack of protection afforded to fashion designs under other intellectual property regimes in the United States).

47. *COX & JENKINS*, *supra* note 34, at 6.

48. *Raustiala & Springman*, *supra* note 14, at 1699.

49. *See* Press Release, Office for Harmonization in the Internal Market (EU), Industrial property: Registration of “Community Designs” (Apr. 1, 2003) (on file with author), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/77&format=HTML&aged=1&language=EN&guiLanguage=en> (discussing the European Union’s system for protection of community designs as a means to combat piracy).

50. *See Hagin*, *supra* note 19, at 374.

51. *See id.*

Before discussing the intricacies of French copyright law, it is necessary to shed some light on the overall trend for protection of fashion designs throughout Europe. The United Kingdom, for example, has also enacted laws to protect fashion designs.⁵² There, a fashion design receives copyright protection if it can be related back to a copyrighted drawing.⁵³

Recently, the European Union (“EU”) adopted a significant regulation for the protection of “registered and unregistered community designs,” which provides a more uniform system for protecting designs from infringement in other EU member countries.⁵⁴ According to the Office for Harmonization in the Internal Market, the purpose of the system is to “foster creativity and innovation by making it easier to protect designs throughout the Internal Market with a single application.”⁵⁵ For these purposes, a “design” is defined as “the appearance of a whole or part of a product resulting from . . . the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.”⁵⁶ A quick review of the community design application indicates that articles of clothing squarely fall within the definition of a “design” under the EU system.⁵⁷

In order to be eligible for protection under the EU system, designs must be new and must have an individual character.⁵⁸ In other words, “it must be apparent to the public that they are different from products which existed previously.”⁵⁹ A holder of a community design will have the exclusive rights “to use the design concerned and to prevent any third party from using it anywhere within the European Union.”⁶⁰ Protection under the current EU community design system lasts up to 25 years for registered designs (with required renewals every five years) and three years for unregistered designs.⁶¹ The primary difference in the level of protection is that registered designs “will be protected against

52. United Kingdom Copyright, Designs and Patents Act, 1988, c. 48, § 213 (Eng).

53. Medenica, *supra* note 35, at §14.

54. See Council Regulation 6/2002, pmbl. para. (17), 2002 O.J. (L 3) 1, 2 (EC).

55. Press Release, Office for Harmonization in the Internal Market, *supra* note 49, at 1.

56. Council Regulation 6/2002, art. 3(a), 2002, art. 3, 2001 O.J. (L 3) 1, 4 (EC).

57. Office for Harmonization in the Internal Market, Application for Registered Community Design [Rule 15], (http://oami.europa.eu/search/eurolocarno/la/en_EL_SearchAction.cfm?CFID=1330679&CFTOKEN=33550603) (last visited April 28, 2007).

58. Council Regulation, 6/2002, art. 4, 2002 O. J. (L 3) 1, 4 (EC).

59. Press Release, Office for Harmonization in the Internal Market, *supra* note 49, at 2.

60. *Id.* at 1.

61. Council Regulation, 6/2002, art. 12, 2002 O.J. (L 3) 1, 5 (EC).

both deliberate copying and the independent development of a similar design,” whereas unregistered designs “will be protected only against deliberate copying.”⁶² The Office for Harmonization in the Internal Market states that one of the primary goals of the community design system is to combat counterfeiting and piracy.⁶³ Although the measures passed by the EU do not afford copyright protection per se, they nonetheless reflect the reverence of fashion designs in the European community.

1. COPYRIGHT PROTECTION FOR FASHION DESIGNS IN FRANCE

While walking through a high-end retail store recently, I observed the following exchange:

A very attractive lady, fashionable by all means, was walking through the store when she approached a sales associate. The customer stated to the sales associate, “I could use your help...the French have great taste.” The sales associate smiled and said “ah yes, but how did you know I was French?” To which the customer replied, “you looked at my shoes before you looked at me.”

France is synonymous with fashion and has long been recognized as the “epicenter of the fashion industry.”⁶⁴ This reputation is rooted in France’s longstanding recognition that fashion designs are works of art.⁶⁵ For example:

The term “haute couture,” or high fashion, is not merely a descriptive term but rather an official designation. Indeed, to be called an haute couture business in France signifies that one is a member of the Syndical Chamber for Haute Couture in Paris, which is regulated by the French Department of Industry.⁶⁶

Fashion designs in France were first afforded copyright protection, as applied art, under the Copyright Act of 1793.⁶⁷ They were subsequently extended additional protection as both non-functional designs and patterns under the Act of 1909.⁶⁸ The current French copyright law contains specific statutory provisions for fashion designs. Article L. 112–2 of the French Intellectual Property Code includes the following in its non-exhaustive list of so called “works of the mind”:

[C]reations of the seasonal industries of dress and articles of fashion. Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion

62. *Id.* at 2.

63. *Id.* at 1.

64. Hagin, *supra* note 19, at 374.

65. *See* Medenica, *supra* note 35, at S14.

66. *Id.*

67. Hagin, *supra* note 19, at 374.

68. *Id.*

and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries.⁶⁹

Like general copyright principles in the United States and the United Kingdom, the requirement that a work contain sufficient originality is at least implicitly required for a fashion design to obtain copyright protection under French law.⁷⁰ French courts determine originality “on an ad hoc basis, looking to any works which may have inspired the design at issue.”⁷¹ Copyright protection for fashion designs attaches from the date of creation, and one must simply corroborate the date of creation to establish copyright eligibility.⁷² The term of protection, however, is less certain:

[I]t is left to the discretion of judges who generally allow that protection should last so long as the design is capable of being effectively exploited (the duration is often from 18 months to two years in the area of fashion).⁷³

The quintessential example of the application of French copyright law to fashion design is the case of *Société Yves Saint Laurent Couture S.A. v. Société Louis Dreyfus Retail Management S.A.*⁷⁴ Yves Saint Laurent (“YSL”) sued Ralph Lauren (“RL”) under French copyright law for RL’s \$1,000 imitation of YSL’s \$15,000 tuxedo dress.⁷⁵ A French court found that RL had copied YSL’s dress and fined the American designer \$383,000 in France.⁷⁶ Most notably, even though YSL recovered for RL’s sale of the knock-offs in France, there was no redress for the sale of the same articles in the United States.⁷⁷

II. International Implications of the United States’ Failure to Provide Copyright Protection for Fashion Designs

With a basic understanding of the underlying laws governing the protection of fashion designs in both the United States and Europe, we can now turn to the implications of the competing degrees of protection

69. CODE DE LA PROPRIÉTÉ INTELLECTUELLE, art. I, 112-2, para. 14 (Fr.).

70. Hagin, *supra* note 19, at 374 (citing 2 GUIDE JURIDIQUE DALLOZ § 32, at 204–205 (1987)); *but see* Medenica, *supra* note 35 (“French law does not require the element of originality in the design; it provides copyright protection once the design becomes popular with the general public.”).

71. Hagin, *supra* note 19, at 374 (citing 2 GUIDE JURIDIQUE DALLOZ § 32, at 204–205 (1987)).

72. *See id.*

73. *Id.* (quoting 2 GUIDE JURIDIQUE DALLOZ § 37, at 204–205 (1987) (trans.)).

74. [1994] E.C.C. 512 (Trib. Comm. (Paris) (English translation unavailable)).

75. *See* Tsai, *supra* note 10, at 464–65.

76. *Id.* at 465; *see also* *Sarl Louis Feraud Int’l v. Viewfinder, Inc.*, 406 F.Supp.2d 274 (S.D.N.Y. 2005), *vacated*, 489 F.3d 474 (2nd Cir. 2007) (acknowledging that a French court recognized a cause of action for copyright infringement of fashion designs).

77. *See* Tsai, *supra* note 10, at 465.

afforded to fashion designs in the United States and Europe for the international copyright community. The following hypothetical and the analysis that follows will help demonstrate how competing copyright regimes are problematic in the emerging global market.

A. *The Story of the Golden Boy—A Case Study*

The story of B. Shaps, a.k.a. the “Golden Boy,” and Donny Maharelli is one deeply rooted in the competitive lore of the fashion industry:

At the age of 12, the Golden Boy began working in the Paris warehouse of a well-known French garment manufacturer. The Golden Boy demonstrated extraordinary potential from the start, so much so that by the age of 15 he was his company’s top earning sales representative. Before long, the Golden Boy moved up the ranks to become a fashion designer at the company. By age 27, the Golden Boy had started his own fashion apparel company. The Golden Boy’s vision was to “reinvent the European classics.”

Meanwhile, several time zones away in Chicago, Donny Maharelli was following a similar track as the Golden Boy. Born into a family of well-known American fashion designers, Donny’s designs for his family’s American based garment company were showing up on runways across the United States by the time he reached the age of 15. By the age of 27, Donny had started his own fashion apparel company as well. Donny’s vision was to “reinvent the American classics.”

It came as no surprise to those in the fashion industry that the visions of the Golden Boy and Donny paralleled one another—after all, the two had been roommates at a prestigious fashion overnight camp in Eagle River, Wisconsin, in their early teens. As the story goes, the Golden Boy edged out Donny in the annual fashion show on the last night of camp and a bitter rivalry was born. As the Golden Boy and Donny continued to develop as fashion designers, they kept close tabs on one another, each using the other as a benchmark to measure his own success.

In 2008, Donny’s business began to experience decreased sales as a new group of talented designers sprung up across the states. To the contrary, the Golden Boy was experiencing his highest sales ever as the “European Classics” look was gaining hold not only in Europe, but in America as well. With his upcoming spring fashion line in doubt, Donny concocted an unthinkable plan, namely to knock-off the Golden Boy’s spring fashion line for sale in both the United States and Europe at a significantly reduced price.

Within a few days, Donny’s trusted assistants were showing up at fashion shows throughout Europe, taking pictures of the Golden Boy’s

designs, and instantaneously sending them to Donny in Chicago via e-mail. Donny then forwarded those pictures to his factory, where the designs were copied. The process was so quick that Donny's knock-offs reached the public before the Golden Boy's original designs, resulting in significantly decreased sales for the Golden Boy.

B. Application of the Laws of France and the United States

The Golden Boy's fashion designs, which would be considered works of French origin, would undoubtedly fall within the purview of protected "creations of the seasonal industries of dress and articles of fashion" under the French I.P. Code.⁷⁸ Although France is a civil law system and the doctrine of *stare decisis* is inapplicable, if the Golden Boy brought suit against Donny for copyright infringement in France, a French judge would likely interpret the French Intellectual Property Code in accordance with the *YSL* case and the underlying French case discussed in *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*⁷⁹—in other words, a French court would be likely to provide redress to the Golden Boy for the distribution and sale of Donny's knock-offs in France.

The United States, while not affording copyright protection for fashion designs, would still be likely to enforce a French judgment against Donny for copyright infringement of fashion designs under the principle of "comity." The principle of comity is best described as follows:

Comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.⁸⁰

As the court in *Sarl Louis Feraud Int'l* stated:

If the United States has not seen fit to permit fashion designs to be copyrighted, that does not mean that a foreign judgment based on a contrary policy decision is somehow repugnant to the public policies under the Copyright Act and trademark law.⁸¹

The Golden Boy's designs would also qualify for protection under the EU community design system. Therefore, the Golden Boy would be able to protect his designs, albeit not under the auspices of copyright law, from infringement in other EU member states.

The Golden Boy's designs, however, would not receive copyright protection in the United States because his designs would be considered

78. See *supra* text accompanying note 69.

79. 406 F.Supp.2d 274 (S.D.N.Y. 2005) *vacated*, 489 F.3r 474 (2nd Cir. 2007).

80. *Id.* at 279.

81. *Id.* (applying New York's Uniform Foreign Recognition Act, N.Y. C.P.L.R. 5302) (internal quotation marks omitted).

useful articles. Therefore, Donny would be able to continue exploiting his knock-offs of the Golden Boy's fashion designs in the United States unfettered.

It is necessary to reiterate here that the United States and France are both signatories to the Berne Convention for the Protection of Literary and Artistic Works ("Berne").⁸² The preamble to Berne provides that signatories are "equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works."⁸³ Berne defines "literary and artistic works" to include:

[E]very production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.⁸⁴

Some have suggested that Berne actually mandates copyright protection for fashion designs and therefore the United States is in violation of its Berne commitment.⁸⁵ Although fashion designs presumably qualify as "literary and artistic works," the matter has never been addressed by the World Intellectual Property Organization ("WIPO"), which acts as the administrative arm of Berne. As a result, this argument is very difficult to assess.

Even if Berne does not explicitly require copyright protection for fashion designs, a country such as France, which provides protection for fashion designs under its domestic copyright regime is required under the "national treatment" provision of Berne to extend that protection to authors in all signatory countries:

Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which

82. *See supra* text accompanying note 5.

83. Berne Convention, *supra* note 5, preamble.

84. *Id.* art. 2(1).

85. *See* E-mail from Peter D. Arnold, Executive Director, Council of Fashion Designers of America, to Mark Mowrey, Deputy Assistant United States Trade Representative for Europe and the Mediterranean (December 17, 2004) (on file with author) [hereinafter CFDA], available at http://www.ustr.gov/assets/World_Regions/Europe_Middle_East/Transatlantic_Dialogue/Public_Comments/asset_upload_file637_7044.pdf ("[t]he United States is a party to the Berne Convention, an international copyright treaty, which requires that works such as fashion designs be protected by copyright here.").

their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.⁸⁶

In other words, if the facts of the above hypothetical were reversed and the Golden Boy was knocking-off Donny's fashion designs, Donny would likely have redress for copyright infringement in France as well. Even though the Golden Boy's designs would not receive copyright protection in the United States, national treatment under Berne is not contingent on reciprocal treatment.⁸⁷

From an international copyright perspective, the disparity should now be clear—American fashion designs receive copyright protection in Europe (i.e., France), but European fashion designs do not receive copyright protection in the United States. Despite the divergence in these laws, the emerging global market continues to take shape and national borders become less of an obstacle for international markets like the fashion industry. As a result, harmonization of international copyright laws becomes increasingly important. Nevertheless, the United States, at least as it pertains to copyright protection for fashion designs, is failing to play its role in facilitating that harmonization.

III. Attempts at Reform in the United States

The lack of copyright protection afforded to fashion designs in the United States has by no means gone unnoticed or unchallenged. Fashion designers and their legal and political counterparts have long pushed for copyright reforms that would end the “knock-off free for all” in the United States.⁸⁸ Those campaigning for reform have relied on an orthodox view of intellectual property law, which holds that “piracy is a serious, even fatal threat to the incentive to engage in creative labor.”⁸⁹ Playing on Congress' flexibility to expand copyright laws, proponents of reform analogize fashion designs to other works which were once unprotected but later granted protection to help combat rampant copying. One author stated:

Piracy is not a problem peculiar to apparel. What is peculiar is the systematic manner in which Congress has neglected the apparel industry's piracy problem while addressing the analogous problem in other industries through copyright law. For example, when the piracy of musical recordings reached the \$100 million mark in 1971, Congress deemed the problem chronic enough to warrant copyright protection for the recordings. Likewise, in the face of more than \$100 million a year in pirated

86. Berne Convention, *supra* note 5, art. 5(1).

87. See SOBEL, *supra* note 4, at 4.2.

88. See, e.g., Hagin, *supra* note 19.

89. Raustiala and Springman, *supra* note 14, at 1717.

computer chip designs in the semiconductor chip industry, Congress in 1984 granted copyright-like protection to semiconductor chips.⁹⁰

Most recently, the Council of Fashion Designers of America (“CFDA”) spearheaded an anti-piracy campaign in the United States through the lobbying efforts of top designers such as Zac Posen, Narciso Rodriguez and Diane Von Furstenberg.⁹¹ Peter D. Arnold, Executive Director of the CFDA, summarized the council’s stance:

The practical effect of the inadequate U.S. protection has been that creative designers and their U.S. businesses have increasingly struggled against low-priced knock-offs, which sometimes appear in the marketplace even before the originals do. By permitting competitors to copy original clothing design created through the imagination and hard work of designers, the law rewards this unfair competition and has *an adverse impact on innovation in some segments of the fashion industry*, not to mention the consequent loss of U.S. jobs and reduced U.S. and local tax revenue.⁹²

On March 30, 2006, the efforts of the CFDA came to fruition when Representative Bob Goodlatte (R-Va) introduced House Bill 5055 in the Second Session of the 109th Congress.⁹³ The bill’s directive was for Congress to provide copyright protection for fashion designs by amending section 1301 of the Act⁹⁴ to include fashion designs as a separate classification of protected works.⁹⁵ Pursuant to the bill, a “fashion design” was defined as “the appearance as a whole of an article of apparel, including its ornamentation.”⁹⁶ The term “apparel,” as incorporated in the bill meant:

- (A) an article of men’s, women’s, or children’s clothing, including undergarments, outerwear, gloves, footwear, and headgear;
- (B) handbags, purses, and tote bags;
- (C) belts; and
- (D) eyeglass frames.⁹⁷

90. Hagin, *supra* note 19, at 346–47; see also *Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary, House of Representatives*, 109th Cong. (2006) [hereinafter *Hearing*], available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.128&file_name=28908.wais&directory=/diskb/wais/data/109_house_hearings) (Representative Berman stating that Congress has provided design protection “for buildings through the Architectural Works Copyright Protection Act” and protections for “semiconductor mask works and boat hulls”).

91. Medenica, *supra* note 35, at S1.

92. CFDA, *supra* note 85 (emphasis added).

93. H.R. 5055, 109th Cong. (2006).

94. Section 1301(a)(1) of the Act provides: “The designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection provided by this chapter upon complying with and subject to this chapter.” 17 U.S.C. § 1301 (a) (1) (2006).

95. See H.R. 5055, 109th Cong (2006).

96. *Id.*

97. *Id.*

The proposed term of copyright protection for a fashion design under House Bill 5055 was three years.⁹⁸ The bill further provided that, in addition to compensatory damages, a court would be permitted to increase damages to an amount not exceeding the greater of \$250,000 or \$5 per copy.⁹⁹

Despite the fashion industry's enthusiasm over House Bill 5055 and extensive congressional hearings on the matter,¹⁰⁰ 2007 came without any further action on the bill.

IV. The Multi-Million Dollar Question—Why Does the United States Refuse to Afford Copyright Protection for Fashion Designs?

Why, in today's emerging global market, does the United States continue to deny copyright protection for fashion designs? Several plausible answers to this question have been offered, the most persuasive of which can be found in a recent law review article by two prominent intellectual property law professors, Kal Raustiala and Christopher Sprigman. Raustiala and Sprigman take the position that the United States continues to deny copyright protection for fashion designs because the current system works.¹⁰¹ In other words, the lack of copyright protection afforded for fashion designs is not the result of doctrinal barriers, but instead reflects the workings of an industry that defies copyright theory altogether. Raustiala and Sprigman maintain:

The standard theory of IP rights predicts that extensive copying will destroy the incentive for new innovation. Yet, fashion firms [operating within the United States copyright regime] continue to innovate at a rapid clip, precisely the opposite behavior of that predicted by the standard theory.¹⁰²

Raustiala and Sprigman assert, counter-intuitively as they admit, that copying is not harmful to creators of fashion design and in fact might actually promote innovation and benefit them, hence the "piracy paradox."¹⁰³ In essence, Raustiala and Sprigman have turned the CFDA's argument on its head. They believe that the fashion industry

98. *See id.*

99. *See id.*

100. *See Hearing, supra* note 90 (discussed in greater detail below).

101. *See* Raustiala & Sprigman, *supra* note 14.

102. *Id.* at 1689.

103. *See id.* at 1691.

survives, and perhaps even thrives in a low-IP equilibrium because of two interacting factors that they term “induced obsolescence” and “anchoring.”¹⁰⁴

According to Raustiala and Sprigman “induced obsolescence” is the process in which low intellectual property protection for fashion designs “accelerate[s] the diffusion of designs and styles.”¹⁰⁵

If copying were illegal, the fashion cycle would occur very slowly. Instead, the absence of protection for creative designs and the regime of free design appropriation speeds diffusion and induces more rapid obsolescence of fashion designs . . . The fashion cycle is driven faster, in other words, by widespread design copying, because copying erodes the positional qualities of fashion goods. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales.¹⁰⁶

The second factor, “anchoring,” refers to the process by which the fashion industry is able to put consumers on notice of changes in fashion trends.¹⁰⁷ Raustiala and Sprigman describe the process as follows:

[i]f the fashion industry is to successfully maintain a cycle of induced obsolescence by introducing one or more new styles each season, it must somehow ensure that consumers understand when the styles have changed. In short, to exist, trends have to be communicated as well as created. A low-IP regime helps the industry establish trends via a process we refer to as “anchoring.” Our model of anchoring rests on the existence of definable trends. While the industry produces a wide variety of designs at any one time, readily discernible trends nonetheless emerge and come to define a particular season’s style. These trends evolve through an undirected process of copying, referencing, receiving input from consultants, testing design themes via observation of rivals’ designs at runway shows, communication with buyers for key retailers, and coverage and commentary in the press . . . Copying helps to anchor the new season to a limited number of design themes, which are freely workable by all firms in the industry within the low-IP equilibrium. A regime of free appropriation helps emergent themes become full-blown trends.¹⁰⁸

In short, “[i]nduced obsolescence and anchoring are thus intertwined in a process of quick design turnover,” which contributes to “a market in which consumers purchase apparel at a level well beyond that necessary simply to clothe themselves.”¹⁰⁹ Raustiala and Sprigman do not claim that induced obsolescence and anchoring have directly caused

104. *See id.* at 1722, 1728.

105. *Id.* at 1722.

106. *Id.*

107. *See id.* at 1728–32.

108. *Id.* at 1728–29.

109. *Id.* at 1733.

low intellectual property protection for fashion designs, but rather that “these phenomena help explain why the political equilibrium of low-IP protection is stable.”¹¹⁰

The claims advanced by Professor Raustiala and Professor Sprigman are very persuasive. In light of their detailed findings and expertise on this topic, it is not surprising that Professor Sprigman provided key testimony during the congressional hearings on House Bill 5055.¹¹¹ Indeed, it may be reasonable to conclude that Raustiala and Sprigman’s findings played a significant role in staving off House Bill 5055. But, as the following passage indicates, Raustiala and Sprigman appear to leave the door open for reform:

We also do not claim that the current regime is optimal for fashion designers or for consumers. We recognize that the fashion industry may also be able to thrive in a high-IP environment that offers substantial protections to originators against copying—protections analogous to those afforded to other creative industries. Since a formal high-IP regime has never existed in the fashion industry (at least in the United States), it is difficult to say with any certainty whether raising IP protections would raise consumer or producer welfare.¹¹²

It seems then, that Raustiala and Sprigman are looking for something above and beyond the orthodox view of intellectual property to support a change in the copyright law for fashion designs.

In considering Raustiala and Sprigman’s findings, in conjunction with the congressional hearings on House Bill 5055, a fundamental concern was not addressed: the United States’s view of copyright protection for fashion designs is insular, without regard to international implications. To maintain that the United States expresses an entirely egocentric attitude toward international copyright protections for fashion designs is somewhat disingenuous. Due in large part to historical reasons, the United States has been, to this point in time, justified in negating an altruistic approach to this matter.

Despite the current “low-IP equilibrium” for fashion designs, the United States has not always been a haven for fashion knock-offs, at least among domestic competitors. In fact, in 1932, the budding fashion industry in the United States established a “nationwide cartel to limit copying within the small but growing ranks of American designers.”¹¹³ It did so by establishing the Fashion Originators’ Guild of America

110. *Id.*

111. *See Hearing, supra* note 90 (Professor Sprigman testifying that House Bill 5055 is both unnecessary and potentially harmful to the fashion industry).

112. Raustiala & Springman, *supra* note 14, at 1734.

113. *Id.* at 1697.

(“Guild”), an organization that “urged major retailers to boycott known copyists.”¹¹⁴ American fashion designers registered their original sketches with the Guild.¹¹⁵ Accordingly, “[r]etailers and manufacturers signed a declaration of cooperation wherein they pledged to deal only in original creations.”¹¹⁶ This “extra-legal system of design protection” involved a two-pronged approach to enforcement: (i) non-compliant retailers were subject to boycott; and (ii) guild members who dealt with non-compliant retailers faced guild-imposed monetary sanctions.¹¹⁷ The Guild system proved to be an effective means for curtailing fashion piracy among its members.¹¹⁸ However, in 1941 the United States Supreme Court held that the Guild’s practices amounted to a restraint of interstate trade, in violation of the Sherman Antitrust Act and the Clayton Act.¹¹⁹ The demise of the Guild marked the beginning of the current knock-off frenzy in the United States.¹²⁰

In reviewing the Guild’s era of quasi-copyright protection in the United States, the most pertinent consideration is that European fashion designs (and other foreign fashion designs) were not protected under the Guild system. Indeed, one author has observed that despite Guild practices, “Seventh Avenue has a long, rich tradition of knocking off European designs.”¹²¹ At a rudimentary level, the exclusion of European fashion designs from the Guild system highlights the United States’ unwillingness to view fashion piracy as a matter of international concern.

The United States’ approach to fashion piracy, however, is no more than a reflection of the economic realities of a trend in the fashion industry itself. That is, American fashion designers have historically knocked-off European fashion designs, while European fashion designers have not

114. *Id.*

115. Magdo, *supra* note 13; *see also* Raustiala & Springman, *supra* note 14, at 1697.

116. Raustiala & Springman, *supra* note 14, at 1697 (quoting Nurbhai, *supra* note 20, at 495–96) (internal quotation marks omitted).

117. *Id.* at 1697, 1699.

118. *Id.* (“By 1936 over sixty percent of women’s garments selling for more than \$10.75 (approximately \$145 in 2005 dollars) were sold by Guild members.”).

119. *Fashion Originator’s Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941).

120. Magdo, *supra* note 13; *see also* Raustiala & Springman, *supra* note 14, at 1698 (noting that since the demise of the Guild, American fashion designs “have remained unprotected...[thus] [r]etailers and manufacturers alike have freely copied designs...”).

121. Raustiala & Springman, *supra* note 14, at 1695–96 (quoting Teri Agins, *Copy Shops: Fashion Knockoffs Hit Stores Before Originals As Designers Seethe*, WALL ST. J., Aug. 8, 1994, at A1).

reciprocated.¹²² When we speak of lost revenues from fashion piracy, at least on a purely domestic basis, we must assume the old adage that “one man’s loss is another man’s gain.” From an economic perspective then, the effect of fashion piracy on the domestic economy would presumably be minimal, especially if it is true that, as Raustiala and Sprigman claim, copying does not decrease incentives for creation and innovation.¹²³ If in fact they are correct in asserting that piracy actually promotes innovation, then the economic gain is obvious. The economic upside is further tilted when one considers the American trend for knocking-off European fashion designs. Each time a European fashion design is copied in the United States, money comes through the door of the U.S. economy. However, because European fashion designers have not historically copied American fashion designs, it is not a revolving door—hence, there is no economic downside to copying European fashion designs. The United States’ position is further leveraged by the more encompassing safeguards in place in Europe to protect American fashion designs; if an American fashion design was copied by a European firm, presumably the American designer would have some form of redress in Europe.

It is for these reasons that the United States’ stance on fashion piracy can be considered “justifiably insular.” This insular view also provides a reasonable explanation why, even during the most recent congressional hearings on House Bill 5055, international copyright implications were overlooked. While European copyright protection for fashion designs has not been ignored, it has only been looked at as a measuring stick for determining whether domestic protection is warranted. For instance, Professor Sprigman stated in his testimony:

Some of the proponents of this bill have said, well, Europe has this protection. If Europe has this protection, why don’t we? Professor Raustiala and I have looked closely at Europe. And when you look at Europe, you find that, yes, in fact there is an E.U.-wide rule protecting fashion designs, but virtually nobody uses it. If you look in the registry, it is true, and it reflects what Mr. Banks predicts, very few registrations and virtually no major firms register anything, and virtually no litigation. It is not as if, in Europe, fashion firms are not copying.¹²⁴

122. See *Hearing, supra* note 90 (testimony of Jeffrey Banks, Member, Council of Fashion Designers of America).

123. See Raustiala & Springman. *supra* note 14, at 1689, 1691 (arguing that copying does not stifle innovation because it is not harmful to the originators).

124. *Hearing, supra* note 90 (testimony of Professor Christopher Springman, Associate Professor, University of Virginia School of Law). The question of whether the European system in fact works is outside the scope of this comment. However, whether it works is not vital to an overall international copyright analysis. Quite frankly, it is the hand the international copyright community has been dealt.

To summarize, the United States continues to deny copyright protection for fashion designs because our domestic fashion industry is able to thrive in a low protection environment and, until recently, the historical workings of the fashion industry have permitted the United States to view fashion piracy purely as a matter of domestic policy.

Conclusion—Looking Toward the Future

Because of modern advances in technology and the proliferation of the global market, maintaining an insular position toward fashion piracy is no longer justified, and it puts the United States in a precarious situation. It is no secret that the United States has been trying for years to infuse the European market with its own fashion designs. For example, in 1980 the Commerce Department issued a report to the United States apparel industry calling for concentrated efforts to sell clothing expressing “U.S. lifestyles” to Europe.¹²⁵ The report provides in pertinent part: “U.S. product strength, as far as European retailers and consumers are concerned, lies primarily in areas that relate to U.S. lifestyles. These are areas in which U.S. styling or product development has gained a recognized image.”¹²⁶

Since the Commerce Department’s report, issued almost thirty years ago, the United States apparel industry has made great strides in domestic growth, and recently in international growth. Consider the following testimony from Jeffrey Banks, a fashion designer, during the congressional hearings on House Bill 5055:

Much in fashion has changed during those 30 some years. For one, fashion has grown into a very significant and important US industry, generating approximately \$350 billion in the United States each year and supporting the printing, trucking, and distribution, advertising, publicity, merchandising and retail industries as well. And of course, all the industries which support the production and dissemination of men’s and women’s fashion magazines. Although New York is often thought of as the U.S. fashion capital because fashion is the second largest money-making business in the city, after the stock market, with the exponential growth of America’s fashion and design industries other fashion centers have come into existence across the country—Los Angeles, Dallas, and Atlanta come to mind. That wasn’t the case 30 years ago, when most of the fashion in the United States was copied from the European fashion centers of Paris and Milan. Back then there weren’t multitudes of talented young American designers generating their own original designs as there are today. The fashion industry in the last few years in America has become a very significant influ-

125. U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, GLOBAL MARKET SURVEY, APPAREL, THE EUROPEAN MARKET I (1980), *quoted in* Hagin, *supra* note 19, at 367.

126. *Id.* at 26, *quoted in* Hagin, *supra* note 19, at 367–68.

ence in trends and the way the fashion industry is perceived by consumers. American style. American design. It has meaning. And it has value.¹²⁷

As American fashion designs have continued to develop global appeal in only the last several years, the ramifications of an insular approach to fashion piracy in the United States have become clear. For instance, the CFDA recently reported to the United States Trade Representative that “fashion design has matured to the point where U.S. original creations are increasingly being copied abroad, and we therefore have an interest in ensuring continued reciprocal protection for these original works.”¹²⁸ The most telling statement to come out of this report follows: “*European designers and their trade associations are becoming increasingly dissatisfied because, even though Europe protects U.S. designs, the U.S. does not adequately protect European designs.*”¹²⁹

It is not unrealistic to envision a time, in the not-too-distant future, when American fashion will have a global appeal on par with our European counterparts. If and when that time comes, international copyright protection for American fashion designs will certainly be of paramount importance; lest we lose money generated from American artists' creative endeavors to copying in foreign countries. Yet, one must wonder whether a country like France, for example, will feel obligated to enforce the rights of American fashion designers, when its own fashion designers do not receive reciprocal treatment in the United States. Bear in mind that the “national treatment” requirement under Berne only applies to the extent such protection is afforded to nationals under a country's own domestic copyright regime.¹³⁰ France, a member of the EU, could, simply by amending its IP Code, stop providing copyright protection for fashion designs and simply rely on protection under the EU community design system.

Would France really take such drastic measures? If history is any indication, the French response might not be that different from that of the French man sitting at a café over 100 years ago who, when he was confronted by an American author about the unauthorized reproduction and sale of his works in France, told the American “when your government starts protecting our works, we will pay you your dues.”¹³¹ The American author was Mark Twain, who later returned to the United States

127. *Hearing, supra* note 90.

128. CFDA, *supra* note 85.

129. *Id.* (emphasis added).

130. *See supra* text accompanying note 5.

131. Professor Robert Lind, Lecture at Southwestern Law School (Sept. 27, 2006).

and testified before Congress for copyright reform, and “world-rights issues.”¹³²

In today’s global market, the United States needs to recognize and address the international copyright implications stemming from fashion piracy in its own backyard. Twain wrote, “[o]nly one thing is impossible for God: To find any sense in any copyright law on the planet.”¹³³ Perhaps we can prove Twain wrong.

132. Margalit Fox, *The Rights of Writers As a Twain Obsession; In a Rediscovered Manuscript, Wisdom Seeker and Statesman Spar*, NEW YORK TIMES, Feb. 16, 1998, at E1.

133. Mark Twain, Brainy Quote, <http://www.brainyquote.com/quotes/quotes/m/marktwain163473.html> (last visited Dec. 11, 2007).

