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The Internet is fundamentally incompatible with a sales-based revenue model for works of popular culture, especially music. Every Internet user, P2P participant, webcaster or other audio service provider in the world is a potential source of unauthorized distribution of recorded music.

Through the Internet, the market for sale of individual recordings can be ruined in a moment's time and without payment of any royalties to songwriters, music publishers, recording artists or record labels. Given this, the sales-based revenue model for music will soon no longer be sustainable.

Neither law, nor technology, nor moral suasion will change this result.

Unfortunately, instead of transforming itself to meet these changed circumstances, the industry has focused only on ways to extend its sales-based revenue model into the digital age.

It has: Experimented with technological access restrictions & anti-copying measures; pursued legislation to limit the business opportunities of technology firms, consumer electronics makers, and webcasters; and sued consumers, seeking ruinous damages for conduct occurring in the privacy of people's homes.

Despite these efforts, the unauthorized downloading of recorded music continues unabated; and P2P networks proliferate.

The industry is now supporting services that provide partial, restricted, DRM-encumbered P2P. But any licensing scheme that falls short of allowing full, unfettered, DRM-free file-sharing leaves the sales-based revenue model vulnerable to widespread infringement by consumers who refuse to comply.

And even if the industry were to license the full range of P2P capabilities that consumers demand, so long as its fortunes are tied to the sales-based revenue model, it will have to continue its aggressive infringement litigation campaign and its interference in the free markets for technology, consumer electronics and digital audio services.

In the meantime, the industry's effort to salvage its legacy business model has had collateral consequences. It has:

- Slowed the deployment of high-speed broadband connections for the consumer market;

- Blocked consumer electronics makers from offering new devices with next generation capabilities;

- Limited the growth of webcasting and other digital audio services;

- Chilled free-speech and interfered with academic freedom on college campuses;

- Caused distortions in the music licensing marketplace;

- Exposed consumers to liability for enjoying music when, where and how they want;

And, by ignoring consumer demand, and refusing to sanction lawful access to full, unfettered, DRM-free file-sharing, the industry has relegated consumers to black-market services where adware, spyware, pornography and privacy violations abound.

And for it all, there have been fewer licensed transmissions of fewer works and fewer royalties than otherwise may have been earned.

Public policy should strongly support the opportunity of music industry rights holders to earn ample rewards from their contributions to culture and commerce. By the same token, however, the industry has no right to demand that public policy support its desire to do business in a particular way.

An alternative to the sales-based revenue model is needed. I suggest this:

Congress should aggregate the separate rights of songwriters, music publishers, recording artists and record labels in their respective works, and create a single, unified digital transmission right.

This new right would replace the reproduction, public performance and distribution rights for purposes of digital transmissions.

The right would extend to all acts that may be implicated in the digital transmission of music to end users, including, with respect to P2P, downloading works from the network, as well as offering works to others.

The right should be enforceable against all those involved in digital transmissions of music, including: Service providers who offer streaming; those who offer downloads; P2P network operators; and all P2P participants.

Under the new right, all that would need to be known was whether or not a work had been transmitted. Thus, it would no longer matter whether end users only listened to transmissions or also downloaded them; how many copies, if any, were made in the course of a transmission; whether transmitted copies were stored on a temporary or on a permanent basis; or whether works were used on one audio playback device or another.

Moreover, the new right would not depend on access restrictions and anti-copying measures for its success; nor would it require continued suppression of the free markets for digital audio services, technology products and consumer electronics.

Rather than limiting access to music, rights holders would have the incentive to encourage the most extensive uses possible. This would free the industry from pursuit of unhackable technology, allowing it to focus on development of monitoring techniques to support royalty distribution.

And with respect to royalties: They should be paid on a census of all licensed transmissions (which, of course, a digital network allows). Only through a census can it be assured that royalties go only to those whose works are actually transmitted; and that all rights holders, large and small, receive that share of royalties that is precisely proportionate to the license fees paid for transmissions of their works.

The new right would be bullet proof against copyright infringement.

Unlike the reproduction and distribution rights that underlie the sales-based revenue model, but like the public performance right, the digital transmission right cannot be subverted by one – or even several – unlicensed services, networks, or end users.

Whether or not particular transmissions are licensed would not affect the market for the digital transmission right over all.

Moreover, with respect to P2P, if the industry offered what consumers really want, the overwhelming majority would pay. (And if that's not true, then all is surely lost.) And, the industry having met consumer demand, there would be no

further justification for public outcry over the industry's campaign against those who continue to infringe.

The new right should be subject to a statutory license.

There are millions of copyrighted musical works and recordings, and hundreds of thousands of music industry rights holders. In a free market, multiple licenses on inconsistent terms – including possibly incompatible DRM systems – may well be required for each work transmitted.

A statutory license would provide a one-stop shop, guaranteeing all those who qualify access to a single license for all rights in all works transmitted.

Such a license: Would contain non-discriminatory fees, and provide for centralized payment. It would also allow for use of standard technology to enable a census based royalty distribution system.

To qualify for the statutory license, one need only comply with music use reporting requirements; and pay license fees in a timely manner.

And, while a statutory license is warranted, a parallel free market could also operate in which individual rights holders and anyone needing a license could enter into voluntary, non-exclusive agreements on any terms they find acceptable.

A statutory license would enable transmissions to be made available from the largest number and widest possible array of competitive licensed sources – including through P2P networks – anytime, anywhere, to anyone with Internet access.

Obviously, a fully free market is to be preferred. But, statutory licensing or its equivalent is already standard practice in the music industry. Indeed, the record business itself is built on the backs of songwriters and music publishers through the compulsory mechanical license. And given the experience to date, experimentation with a free market for the digital transmission right would likely result in continued market failure.

If one looks beyond the interests of the music industry alone, and also considers those of technology firms, consumer electronics makers, audio service providers, and consumers, it is clear that a digital transmission right subject to a statutory license would enhance the free market over all.

Change is needed. Congress should induce it.