

**When Your Recording Agency Turns into an Agency Problem:**  
**The True Nature of the Peer-to-Peer Debate**

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ABSTRACT

*This article examines the music industry, and particularly its reaction to the file-sharing phenomenon, through the prism of the agent-principal problem. The file-sharing phenomenon shined a spotlight on the divergence of interests between the creators of music and their ultimate representatives in copyright debates, the recording industry. The economic interests of creators are focused on maximizing revenues from their works. Record companies, in contrast, are not content with their share in the revenue pie, rather are interested in maximizing their control over the exploitation of such works, in order to secure the dominant position they currently hold in the market. The constitution, however, is designed to protect creators' incentives to create, not the market-controlling position of record companies.*

*The Article analyzes the measures taken to combat file-sharing, and concludes that the source of the resistance to file sharing is not its effect on revenues as outwardly claimed by the recording industry, but rather its potential to decentralize the control over music distribution and use. In that sense, the war against file-sharing is an extreme expression of the agency problem stated above. At the same time, the article points to the potential of file-sharing to minimize agency costs, by creating a more balanced power-relationship within the music industry, and concludes that legitimizing file-sharing may produce circumstances which are most likely to be consistent with the interests of both creators and society at large.*

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## INTRODUCTION

The debate over file-sharing is typically framed in terms of the “incentive-access paradigm” - the tension between the desire to provide artists with an incentive to create and the desire to provide the public and later creators with access to works which have already been created.<sup>1</sup> File-sharing, it has been argued, increases access to existing works but at the same time evades compensating creators, thus reducing the incentive to create.<sup>2</sup>

This article, which focuses on the music industry, argues that although on the surface, the focus of the resistance to file-sharing is on the compensation of creators, it is truly the fight for control over the market of copyrighted works by the big record companies that drives the lion’s share of the resistance to file-sharing.

This article proposes that the anti file-sharing course adopted by the music industry is best understood as an agent-principal problem. It is aimed at strengthening the control for the agents – i.e. the record companies – over the market, to the detriment of the principals - the creators.

The consequence of this analysis is that the validity of anti file-sharing measures should not be examined merely through the prism of the incentive-access paradigm, as

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<sup>1</sup> See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 73 (2003) (conceiving of artists as competitors, and aiming to arrive at an optimal level of protection in order to provide space for both previous and later artists in order to optimize creativity). See also, Glynn S. Lunney, Jr., *Reexamining Copyright's Incentive-Access Paradigm*, 49 VAND L REV 483 (1996).

<sup>2</sup> See, e.g., McDaniel, *Accounting for Taste: An Analysis of Tax-and-Reward Alternative Compensation Schemes*, 9 TUL. J. TECH. & INTELL. PROP. 235, 238 (2007) (Analyzing the arguments that “file-sharing actually hurts artists and art by reducing the revenue streams of musicians and destroying incentives to create music in the future.”).

simply striking a balance between creators on the one hand and consumers on the other.<sup>3</sup> Instead, the analysis should identify the powers that initiate these measures and their motives, and point to the likelihood in which these measures truly represent creators' interests as opposed to merely benefiting the agents-recorders.

The article will proceed as follows. *Chapter I* will explicate the nature of the agency problem in the music industry, its sources and development to date. *Chapter II* will aim at showing that the methods utilized by the music industry in combating file-sharing are intended not to extract revenues out of the file-sharing phenomenon and not to protect the creators' rights, but rather to strengthen the industry's grip on the market to the benefit of record labels. *Chapter III* will be focused on the impact of file-sharing on potential revenues. Building on existing economic and legal literature, this chapter will challenge the industry's claims regarding adverse economic effects of file-sharing, and will identify the various ways in which file-sharing in its current state or with slight modifications could potentially enhance the revenues for artists. *Chapter IV* will expound on the effects file-sharing has on the control structure of the industry, and will demonstrate that from a point of view of both artists and society at large, a decentralized market for musical works is preferable over a central structure which is controlled by the industry giants.

By focusing on the issue of agency costs, this analysis shifts the discussion from the incentive-access paradigm and questions whether the creators-principals' interests are adequately represented in this debate. The question then becomes: which file-sharing

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<sup>3</sup> Ryan Roemer, *Locking Down Loose Bits: Trusted Computing, Digital Rights Management, and the Fight for Copyright Control on Your Computer*, [http://www.lawtechjournal.com/articles/2003/08\\_040223\\_roemer.pdf](http://www.lawtechjournal.com/articles/2003/08_040223_roemer.pdf). ("Copyright law strives to balance public access to works with creating incentives to produce").

regime minimizes agency costs and produces circumstances that are most likely to be consistent with the interests of both creators and the public. The answer offered by this article is that such a result will be best reflected in a regime which legitimizes file-sharing, enhancing both the economic incentives of artists and public access to their works.

## I. THE AGENCY PROBLEM AND THE DICHOTOMY BETWEEN THE MARKET OF REVENUE AND THE MARKET OF CONTROL

In the file-sharing debate, as in additional copyrights-technology debates, the record companies, headed by the Recording Industry Association of America (RIAA), has taken the lead in representing the copyrights side of the equation.<sup>4</sup>

As a general matter, and despite its claims that it does not oppose technology as such,<sup>5</sup> the RIAA's reaction to technologies that affect music dissemination has been dogmatically negative, an attitude often shared by the entertainment industry at large.<sup>6</sup> Thus, from the invention of the piano roll,<sup>7</sup> through the development of the VCR<sup>8</sup> up until the current file-sharing technology, novel dissemination technologies have been fought

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<sup>4</sup> See *infra*, discussion in chapter II. See also, RIAA home page, <http://riaa.com/faq.php>. (“we work to protect intellectual property rights worldwide”). See also discussion in chapter II below (analyzing the measures taken by record companies and the RIAA to combat file-sharing).

<sup>5</sup> See, e.g., Committee on Commerce, Science, and Transportation of the United States Senate on *MGM v. Grokster* (Statement of Mitch Bainwol, Recording Industry Association of America Chairman and CEO, July 28, 2005). (“[L]abel[ing] us anti-technology or against innovation... may make for good soundbites, but [is] far from the truth.”)

<sup>6</sup> See, e.g., Jonathan W. Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835 (2007).

<sup>7</sup> *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1907).

<sup>8</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (hereinafter: *Sony*). See also, Motion Picture Association of America President Jack Valenti's statement that “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone” (U.S. House, Apr. 12, 1982).

with full force by the entertainment industry even when, economically speaking, they were harmless, and often highly beneficial.<sup>9</sup>

It was never seriously questioned whether the resistance to new dissemination technologies truly represented the interests of creators. For years, distributors in all areas of copyrights have led the fight for creators and carried out the copyright agenda.<sup>10</sup> Their interests were viewed as aligned with those of creators,<sup>11</sup> mainly due to the then high costs of distribution and the necessity for tangible forms of music consumption, such as records, audio tapes and CDs.<sup>12</sup>

In fact, however, the relationship between creators and the record companies has routinely suffered from the costs associated with an agency problem. These have included, *inter alia* and as will be demonstrated below, the labels biting deep into the shares of artists' revenues, advancing their own narrow interests in Congress and in courts, and primarily, aiming at strengthening the companies' controlling position in the market, often at the expense of exploiting to the fullest the revenues for musical works which are shared with the artists.

The source of the agency relationship between the creators and their labels is at the commencement of the contractual relationship between them. In essence, the nature of these contracts is to place the artist's works within the exclusive ownership and control

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<sup>9</sup> The VCR, for example, which was attacked by the movie industry in *Sony*, *supra* note 8, opened a whole new market for home video sales, amounting in 2004 to 72% of domestic industry revenues. See, Digital Entertainment Group website, *Industry Boosted by \$21.2 Billion in Annual DVD Sales and Rentals*, <http://www.dvdinformation.com> (2005); See also, U.S. Entertainment Industry: 2004 MPA Market Statistics, Motion Picture Assoc. America, Worldwide Market Res., Washington, D.C. (2005).

<sup>10</sup> See, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, (1970).

<sup>11</sup> See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325 (1989).

<sup>12</sup> See, Raymond S.R. Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 293, 294 (2002) ("until now the bundling of interests was acceptable because the cost of producing the vessels--CDs, books, and DVDs--for content, and distributing those vessels, was an essential component of making content available to the public.").

of the label, in return for services and a share in the revenues resulting from the works.<sup>13</sup> The labels typically demand the copyrights on the work as a whole,<sup>14</sup> and at the very least, demand ownership of the original record (the “master”), from which every copy must be authorized.<sup>15</sup> The labels usually indirectly acquire the full publishing rights of the album as well, after encouraging the artist to publish the album through an affiliated company.<sup>16</sup> Typically, the artist is bound by an exclusivity provision, preventing her from recording with other companies in parallel.<sup>17</sup> The long terms and wide scope of the contracts intensify the level of control exercised by the label over the artist: the contracts typically obligate the label to produce one album, and the artist - to record six more albums under the same contract, if the label so wishes.<sup>18</sup> Perhaps the most extreme mode of control that the record contracts provide is granting the label exclusive control over the album content, including the graphic art, the producer’s identity, and most remarkably, the selection of songs.<sup>19</sup>

The immediate result of such a contract is turning the label into the sole decision-maker regarding the work, including its content, promotion, distribution, pricing and all other aspects it may entail. The rationale underlying this process is that the interests of

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<sup>13</sup> Phillip W. Hall jr., *Note: Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT L.J. 189 (2002).

<sup>14</sup> Musical works are regularly registered as work-made-for-hire, although the legal status of such a claim is debatable. Contractually, “[m]ost contracts contain clauses specifying that the works... are works made for hire. Such contracts generally contain an additional clause providing that if the work created is found by courts to fall within... the definition of works made for hire, that the performer assigns all his rights to the record company.” *See*, United States House of Representatives, Committee on the Judiciary - Subcommittee on Courts and Intellectual Property, 106<sup>th</sup> Congress, 2<sup>nd</sup> Session, May 25, 2000 (Statement of Marybeth Peters - The Register of Copyrights: Sound Recordings as Works Made for Hire), available at <http://www.copyright.gov/docs/regstat52500.html> (last visited: Mar. 16, 2009).

<sup>15</sup> Kaleena Scamman, *ADR in the Music Industry: Tailoring Dispute Resolution to the Different Stages of the Artist-Label Relationship*, 10 CARDOZO J. CONFLICT RESOL. 269, 275 (2008).

<sup>16</sup> If the artist turns to a different publisher, the label will typically co-own publication rights. *See, id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See, McDaniel, supra* note 2, at 280; Scamman, *Id.*, at 274.

<sup>19</sup> *See, Scamman, id.*, 275.

the artists and the industry for maximizing revenues are aligned, and therefore, that the labels will conduct the business in a way that maximizes the revenues, to the benefit of both the company and the artists.

However, this process, in which the control over all aspects of the work wanders away from its original proprietor - the artist, to the label, is the source of a considerable agency problem, as the interests of these two groups are divergent far more than they are aligned.

Generally speaking, creators are motivated by economic as well as non-economic factors.<sup>20</sup> Among the non-economic motivations are the desire for expression, fame and wide exposure,<sup>21</sup> while economic interests include exploiting the revenues from the use of the works to support the artist's well-being and ability to continue to create.<sup>22</sup> The exploitation of musical works creates what can be referred to as *the market of revenue*, that includes all of the revenues that are potentially received through exploiting the musical works. The size of the market of revenue depends, except in cases where the law sets it,<sup>23</sup> on the prices set or negotiated by the copyright owners – typically, the record labels. As stated above, it is assumed that the record labels, like the artists, should be

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<sup>20</sup> See, e.g., James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003) (“One person works for love of the species, another in the hope of a better job, a third for the joy of solving puzzles, and so on. Each person has his own reserve price, the point at which he says, “Now I will turn off Survivor and go and create something.””).

<sup>21</sup> Lydia Pallas Loren, *the pope's copyright? Aligning incentives with reality by using creative motivation to shape copyright protection* 69 LA. L. REV. 1, 12 (2008) (“Many artists, authors, musicians, poets, and other highly creative individuals create as a means of expressing themselves, rather than for an extrinsic reward”).

<sup>22</sup> See, e.g., Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH L REV 462, 471 (1998) (“By guaranteeing authors certain exclusive rights in their creative products, copyright seeks to furnish authors and publishers, respectively, with incentives to invest the effort necessary to create works and distribute them to the public”). See also, Landes & Posner, *supra* note 11.

<sup>23</sup> See, e.g., the compulsory license fixed in 17 U.S.C. §115 (license for “cover” music); 17 U.S.C. §114(d)(2) (license for digital transmission of sound recording).

interested in maximizing the market of revenue in which they are the majority stakeholder.

The label's eye, however, is not focused solely, or even predominantly, on the market of revenue. Rather, the recording industry's main concern lies in maintaining its position in what can be termed *the market of control*, meaning a monopoly over the artists' work on the one hand and securing the position of the main supplier of music to the market on the other. The business of the recording industry is similarly two-functioned: contracting and managing of artists, and providing authorizations and setting prices for basically any exploitation of musical works.<sup>24</sup> The source of the label's economic interests does not lie as much in maximizing the revenues from these transactions, as it lies in preserving its position as the only body which can conduct them, as will be elaborated below.

The two abovementioned functions of the music industry are inter-related: strengthening the grip on the artist increases the grip on the consumption side, as consumers have fewer alternatives to access the artists in any other way. Similarly, strengthening the hold among consumers increases the control over the artists, as it controls more of the channels to the artists' audience.

Indeed, control over the copyrighted works on the one hand and over their exploitation on the other, is the only way record companies can preserve the powerful position they currently hold in the music business. In order to preserve their economic interests, the record companies cannot simply be focused on expanding the market of

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<sup>24</sup> Vivek V. Mali, *An Alternative Operating Model for the Record Industry Based on the Development and Application of Non-Traditional Financial Models*, 15 UCLA ENT. L. REV. 127, 132-33 (2008).

revenue. Unlike the artists, whom they supposedly represent, and who would prefer to have the market of revenue exploited even at the price of decentralizing the market of control, the recording industry would not protect the market of revenue at the cost of risking its status as the dominant power in the market of control.

For many years there was no conflict and clear distinction between the market of control and the market of revenue. As there were few alternatives to the channels of communication between artists and consumers offered by the labels, their principal possession of the market of control was secured, and basically every person or entity who wished to either produce music or consume it had to pass through their tollbooth and receive their approval.

However, the agency problem has deepened as technology has developed, threatening to undermine the recording industry's monopoly over the channels of communication, and effectively diminishing the importance of its role. Thus, while artists could well benefit (economically and non-economically) from technologies which would increase the access to their works, the recording industry "dies a little" every time a new technology emerges that decentralizes its monopoly in the market of control.<sup>25</sup>

The ever-existing agency problem arrived at a critical point with the creation of the completely decentralized communication mode of file-sharing. While the artist-concerned market of revenue and their non-economic motivations remained unharmed, and have probably even been enhanced,<sup>26</sup> this technology created an earthquake

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<sup>25</sup> See, *Home Audio Recording Act: Hearings on S. 1739 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 99th Cong. 90 (1985) (statement of Stanley Gortikov, President, Recording Industry Association of America) ("Are we to stand by passively and watch the greatest musical creative community in the world strangle to death from newer and newer generations of copyright killer machines?").

<sup>26</sup> See *infra*, discussion at chapter III.

underneath the power basis of music distributors. The new technology does not only make copying cheaper as did the development of the Rio portable music playing device,<sup>27</sup> it eliminates the costs associated with it entirely.<sup>28</sup> It does not merely add new players to the market of dissemination as did the opening of record rental stores, a business that was completely wiped out owing to the industry's legislative efforts.<sup>29</sup> It brings the dissemination power to every household, in an exponential rather than linear method of distribution.<sup>30</sup>

The emergence of file-sharing, thus, shined a spotlight on the divergence of interests between creators and distributors and shed light on the actual nature of the industry's quarrel over control. As the ultimate gate-keepers, the labels are fighting to eliminate the creation of a world without gates. At this critical point, the fight over control is for the recording industry, and especially for the RIAA, a fight that is intended not only to maximize revenues, but also to prevent the fading of their power base, resembling an organism struggling for its own survival.

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<sup>27</sup> The RIAA sought an injunction against the manufacturing and distribution of the Rio under the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 codified at 17 USC §§ 1001-10 (1994) ("AHRA"). However, the Court ruled that computer hard drives were not 'digital audio recording devices' for the purposes of the AHRA and denied the injunction. *See*, Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9th Cir. 1999).

<sup>28</sup> *See*, Miriam Bitton, *A New Outlook on the Database Protection Debate*, 47 IDEA 92, 127 (2006) ("[I]n the world of the internet, the marginal cost of production for the underlying raw data is zero; in other words, each additional copy of the data costs nothing to produce").

<sup>29</sup> Determined to protect the music industry from the threat contained in the improving and widely available analog cassette recorders, Congress enacted the Record Rental Amendment of 1984, Pub. L. No. 98-450, 98th Cong., 2d Sess., 98 Stat. 1727 (1984) (codified at 17 U.S.C. § 109(b)) (2000)), which prohibited the rental of sound recordings, thus debarring this business of entitlement to the application of the first-sale doctrine. (A doctrine that enables owners of a physical object containing copyrighted work to transfer it to third parties upon their own decision; *see*, 17 U.S.C. §109(a)). *See also*, Computer Software Rental Amendments of 1990, Pub. L. No. 101-650, 101<sup>st</sup> Cong., 2d Sess., 104 Stat. 5089, 5134-37 (1990) (codified at 17 U.S.C. § 109(b)) that later extended this law to computer software as well.

<sup>30</sup> *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 331-32 (S.D.N.Y. 2000). ("Every recipient is capable not only of... perfectly copying plaintiffs' copyrighted DVDs, but also of retransmitting ... and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear").

The big problem for the recording industry, however, is the absence of any basis to protect their interests independently. The source of the copyright protection in the U.S. is the constitutional clause that empowers Congress “*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*”.<sup>31</sup> This clause is now enshrined in the Copyright Act, which grants to authors certain exclusive rights to their works for a limited time.<sup>32</sup>

As the constitution justifies the copyright regime solely by protecting authors’ incentives, the divergence of interests between the record industry and the artists they supposedly represent threatens to pull the foundations from under the firm footing of their control. The labels must therefore tie, at least for the sake of appearance, their own interests with the interests of creators. In order to preserve their position in the market of control, therefore, they must justify this control over the market with the notion of safeguarding artists’ incentives, which, as shown above, is centered on the market of revenue and not on the market of control.<sup>33</sup>

Thus, record companies established the link between the market of control and the market of revenue. This link can be represented in two forms. In its “soft” version, the industry’s control over the market is a necessary condition to assure artists’ revenues, and therefore - artists’ incentives to create. In its “hard” and preferable version for the record industry’s interests, the industry’s control over the market is not only a necessary

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<sup>31</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>32</sup> *See*, 17 U.S.C. §§ 102, 106 (1994 & Supp 1999).

<sup>33</sup> Indeed, before technology changed the picture, it was assumed that it is justified to extend the notion of incentives in the constitution to enabling the industry as a whole and not merely creation. However, even according to this view, advances in technology rendered such incentives unnecessary. *See*, Ku, *supra* note 12, 267.

condition for revenues, meaning, that revenues will only be produced if the industry possesses control, but is also a sufficient condition, meaning that assuring their control over the market ensures artists' economic welfare.

The next chapter will demonstrate the axiomatic use the industry has made of this link in order to justify its anti-file-sharing agenda. As will be demonstrated below, the key measures against file-sharing were in fact designed to strengthen the record companies' grip over the market, utilizing the perceived equation between their control and artists' compensation. The two chapters that will follow will aim at severing this connection, by showing that file-sharing does not constitute a threat to the market of revenue (chapter III), yet it threatens to topple the record industry's market of control (chapter VI). The collapse of the centralized market of control is the key to minimizing the agency problem, to the benefit of both the artists and the public.

## **II. THE PRACTICALITY OF THE WAR AGAINST FILE-SHARING**

As shown by the discussion in the previous chapter, the music industry fiercely objects to file-sharing, overtly claiming that it is inherently to the economic detriment of artists, while being covertly concerned with preserving for the recording industry the market of control. Along the same lines, this chapter is aimed at showing that the path taken by the music industry to combat file-sharing is not designed to the end of increasing revenues but rather to eliminate competitors in the monopolist market of music distribution, even at the cost of actually reducing revenues.

## 1. The Legislative Front

The music industry, headed by the RIAA and cooperating ad hoc with parallel industries such as the film and software industry, has constantly raised awareness to the copyright agenda in Congress even before the rise of the peer-to-peer phenomenon.<sup>34</sup> Since the penetration of the Internet to the market of music dissemination towards the turn of the millennium, more than a hundred and fifty copyrights legislative initiatives were considered by Congress, a considerable amount of which touched on music copyrights in the digital world.<sup>35</sup> The majority of the legislative initiatives have been focused on regulating access to works and limiting distribution of works, and not on increasing revenues from the exploitation of these works.

The most palpable example in this regards is the 1998 Digital Millennium Copyright Act (DMCA)<sup>36</sup> that preceded the file-sharing revolution by approximately two years. As will be analyzed below, the DMCA in effect grants the labels a high level of control of all access to copyrighted works which they choose to protect by technological means, such as by encryption.<sup>37</sup> The direct subject matter of the DMCA is control over access and use of works, rather than the increase of the prospect of revenues stemming from them.<sup>38</sup> This agenda demonstrates the focus on retaining the monopoly over distribution and access and not on the method by which this access is actually translated into revenues.

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<sup>34</sup> See, Peter S. Menell & David Nimmer, *Legal Realism In Action: Indirect Copyright Liability's Continuing Tort Framework And Sony's De Facto Demise*, 55 UCLA L. REV. 143 (Oct., 2007).

<sup>35</sup> For the full list of legislative initiatives in the copyright area See the U.S. Government website, <http://www.copyright.gov/legislation/archive> (last visited Dec. 6, 2008). See also, Cardi, Jonathan W., *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835 (2007).

<sup>36</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

<sup>37</sup> See *infra*, note 90 and accompanying text.

<sup>38</sup> Declan McCullagh & Milana Homsy, *Leave DRM Alone: A Survey of Legislative Proposals Relating to Digital Rights Management Technology and Their Problems*, 2005 MICH. ST. L. REV. 317, 318.

Since the emergence of peer-to-peer, a torrent of bills was introduced in Congress and in state legislatures to address the file-sharing phenomenon, including many that were initiated by the RIAA. As in the pre-file-sharing era, these bills have not been designed to increase creators' revenues even indirectly, rather they regulated the market of control over works, by directing the bills to regulate the ways the public can access works as opposed to assuring a secure revenue stream from such access.

In this framework, the RIAA initiated regulation on educational institutions to direct their students to obtain music exclusively from sites authorized by the industry.<sup>39</sup> More blatantly, it supported a bill to exempt copyright owners from criminal and civil liability for interfering with file-sharing activity.<sup>40</sup>

The RIAA's agenda has often been covertly slipped into bills which have been partially relevant at best, often concealed from the eyes of both the public and the artists. The most recent example of this was the attempt by Senator Feinstein of California to clandestinely include in the 2009 economic stimulus plan an amendment to declare ISP monitoring for copyright violations to be reasonable network management.<sup>41</sup>

More deliberately, the agency problem comes into expression through the RIAA's use of the same tortuous techniques not only to center its efforts in protecting solely the

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<sup>39</sup> *E.g.*, A Resolution Expressing the Sense of Congress that Institutions of Higher Education Should Adopt Policies and Educational Programs on Their Campuses to Help Deter and Eliminate Illicit Copyright Infringement Occurring on, and Encourage Educational Uses of, their Computer Systems and Networks, 109th Cong., 2d Session, S. RES. 438 (Apr. 7, 2006). Part of this initiative indeed found its way into legislation in a recent amendment to the Higher Education Opportunity Act. *See infra* note 131 and accompanying text.

<sup>40</sup> This bill was designed to allow the "disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file sharer." H.R. 5211, 107th Cong. (2002).

<sup>41</sup> *See*, H.R. 1, 111th Cong., 1st Sess. Amen. text available at: <http://www.publicknowledge.org/node/1985>. *See also*, Alex Curtis, Update: Copyright Filtering in Stimulus Bill, (Feb. 10, 2009), <http://www.publicknowledge.org/node/1984>.

labels' interests in control as shown above, but also to harm artists' interests. Consider the example of the 1999 bill designed to include musical works as categories of works which are deemed to be work-made-for-hire.<sup>42</sup> This inclusion effectively excluded musicians from the right to recapture the copyrights of their works from the labels-assignees thirty five years after they were assigned.<sup>43</sup> As in the previous pattern, this bill is not designed to increase the labels' share in the revenue pie, rather to perpetuate the controlling position over the artist in order to exploit the market of control.

It is troubling that these legislative processes often lack any equal representation of all relevant stakeholders even for the sake of appearance.<sup>44</sup> Consequently, this process has led to a distorted result which is largely biased towards the interests of the labels, often at the expense of creators, consumers,<sup>45</sup> technology providers<sup>46</sup> and the public at large.<sup>47</sup> Such a process disregards the existence and destructive effects of the inherent

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<sup>42</sup> This amendment, Pub. L. No. 106-13, added "sound recordings" to the limited list of *per se* "works made for hire". It was inserted as a "technical correction" to the existing copyright law at the RIAA's request, by a House staffer in the last days of the first session of the 106th Congress without any public hearing. The law was changed back a year later. *See*, Work Made For Hire and Copyright Corrections Act of 2000 Pub. L. No. 106-379 (106th Cong. 2d Sess.).

<sup>43</sup> 17 U.S.C. § 203 (2000).

<sup>44</sup> *See e.g.*, Robert C. Piasentin, *Unlawful? Innovative? Unstoppable? - A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom and Canada*, 14 INT'L J.L. & INFO. TECH. 195, 199 (2006).

<sup>45</sup> *See, e.g.*, No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2(b), 111 Stat. 2678 (1997) (codified as amended at 17 U.S.C. § 506 (2000)). *See also*, A Bill to Enhance Criminal Enforcement of the Copyright Laws, to Educate the Public About the Application of Copyright Law to the Internet, and for Other Purposes, H.R. 4077, sponsored by Rep. Smith, Lamar (introduced March 31, 2004).

<sup>46</sup> *E.g.*, A Bill to Amend Chapter 5 of Title 17, United States Code, Relating to Inducement of Copyright Infringement, and for Other Purposes, sponsored by Sen. Hatch, Orrin G. [UT] (introduced June 22, 2004). *See also*, Melvyn J. Simburg, Suong T. Nguyen, Julie Lipscomb, Bruce Horowitz, David W. Maher, Scott Bain, Brechtje Lindeboom, Lori E. Krafte, Ulrich Baeumer, David Buxbaum, Navine Karim, *International Intellectual Property: International Legal Developments in Review: 2004*, 39 INT'L LAW 333 (2005).

<sup>47</sup> *See, e.g.*, *Copyright Infringement and Peer-To-Peer Technology*, 28 Wm. Mitchell L. Rev. 1001, 1006 (2002) ("Of course, neither the public nor industries based on technology arising after the adoption of a copyright statute are represented at these negotiations. Thus, they usually find themselves excluded from the elaborate scheme of statutory rights, licenses and exemptions embedded in the copyright law"). *See also*, Piasentin, *supra* note 44, 199.

agency problem within the music industry and entails adverse effects on the general societal welfare.

## 2. The Litigation Front

Like mushrooms after the rain, lawsuits against file-sharing users and services were initiated on a wide scale after the penetration of the file-sharing phenomenon into the market. Throughout the years in which these lawsuits were carried out, scholars and activists pointed to their ineffectiveness, economic inefficiency and social harm. The lawsuits have nevertheless continued, as they were designed not to increase revenues as the critics assumed, but rather to fortify the ivory tower of the industry in the market of control.

### *i. Direct infringement litigation*

Since 2003 and until the end of 2008 when the RIAA declared that for the most part it had ceased bringing new lawsuits against individuals,<sup>48</sup> more than thirty thousand lawsuits have been filed against file-sharers by the RIAA alone.<sup>49</sup> The exclusivity of the federal system in copyright law, which generally favors plaintiffs,<sup>50</sup> together with the resource gap between the parties, incentivized defendants to prefer even an unfavorable

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<sup>48</sup> See, Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., <http://online.wsj.com/article/SB122966038836021137.html?mod=testMod>, Dec. 19, 2008. *But see*, Ray Bekerman, *RIAA claim not to have filed new cases "for months" is false*, Recording Industry vs The People Blog, [http://recordingindustryvspeople.blogspot.com/2008\\_12\\_01\\_archive.html#1104859189661357526](http://recordingindustryvspeople.blogspot.com/2008_12_01_archive.html#1104859189661357526), Dec. 19, 2008.

<sup>49</sup> The Electronic Frontier Foundation, *RIAA v. The People: Five Years Later*, <http://www.eff.org> (2008). (Hereinafter: *EFF 2008 Report*). See also, David Kravets, *RIAA Copyright Campaign Finally Goes to Trial*, Wired (Oct. 2007); McBride & Smith, *id.*

<sup>50</sup> See, John Conyers, Jr., *Class Action "Fairness"-A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 506 (2003); see also, Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 404 (1992) (finding that plaintiff lawyers generally prefer filing a suit in a federal rather than a state court as it imposes higher litigation costs upon the defendant); Gregory M. Cesarano & Daniel R. Vega, *So You Thought a Remand Was Imminent?: Post-Removal Litigation and the Waiver of the Right to Seek a Remand Grounded on Removal Defects*, FLA. BAR J., Feb. 2000, at 22, 23-24 ("Litigation in federal court is also generally more expensive and time consuming than most state court actions").

settlement agreement over an expensive and time consuming litigation which may lead to higher civil and criminal charges at the end of the day.<sup>51</sup> As a result, the courts have played a negligible role in these lawsuits. In fact, of the tens of thousands of lawsuits, only twelve resulted in legal challenges by a defendant, and most cases died out before reaching the stage of a trial on the merits.<sup>52</sup>

These lawsuits have been largely criticized as unfair, singling out a random assortment of individuals for disproportionate sanctions while taking advantage of their financial and procedural inferiority.<sup>53</sup> The reports on offensive lawsuits,<sup>54</sup> and of lawsuits which targeted “dead grandmothers”<sup>55</sup> or individuals who never had internet service,<sup>56</sup> increased the doubts regarding the legitimacy of this path.

Needless to say, the lawsuits did not increase the payments to artists by even one penny.<sup>57</sup> Overall, in terms of revenues, these lawsuits had little, if any effect. The majority of these cases were settled for amounts ranging from \$3,000 to \$11,000,<sup>58</sup> while the cost of pursuing these lawsuits has often exceeded these sums.<sup>59</sup> Indeed, the RIAA

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<sup>51</sup> Anthony Ciolli, *Lowering The Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1002 (2008).

<sup>52</sup> See, Ray Beckerman, *How the RIAA Litigation Process Works*, (Partially updated: Apr. 9, 2008). [http://info.riaalawsuits.us/howriaa\\_printable.htm](http://info.riaalawsuits.us/howriaa_printable.htm) (last visited Feb. 2, 2009).

<sup>53</sup> See, e.g., *EFF 2008 Report*; Kristina Groennings, *Note, Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH L.J. 571, 589-590 (2005).

<sup>54</sup> *EFF 2008 Report*, at 7 (RIAA insisted on receiving a wealth of documents to verify the financial and health status of a fully disabled widow and veteran who downloaded songs she has already owned, in order to reduce her debt to \$2000). See also: Cassi Hunt, *Run Over by the RIAA Don...t Tap the Glass*, THE TECH, Apr. 4, 2006, <http://wwwtech.mit.edu/V126/N15/RIAA1506.html>. (The RIAA offers an MIT student to withdraw from studies to pay her \$3750 debt).

<sup>55</sup> Associated Press, *Music Industry Sues 83-year-old Dead Woman*, BOSTON GLOBE, Feb. 4, 2005, [http://www.boston.com/news/odd/articles/2005/02/04/music\\_industry\\_sues\\_83\\_year\\_old\\_dead\\_woman](http://www.boston.com/news/odd/articles/2005/02/04/music_industry_sues_83_year_old_dead_woman).

<sup>56</sup> *RIAA Drops Another Case In Chicago Against Misidentified Defendant*, Recording Industry v. The People Blog, (May 3, 2007), <http://recordingindustryvspeople.blogspot.com/2007/05/riaa-dropsanother-case-in-chicago.html>.

<sup>57</sup> See, e.g., Iain Thomson, *RIAA faces lawsuits from artists*, Computing.co.uk, Feb. 29, 2008, <http://www.computing.co.uk/vnunet/news/2210889/riaa-faces-lawsuits-artists>.

<sup>58</sup> *EFF 2008 Report*, at 5.

<sup>59</sup> According to a 2003 American Intellectual Property Law Association's (AIPLA) economic survey, the median total costs of these suits is as follows: Low-Stakes case - <\$1 million; Thru discovery - \$101,000;

has initiated various programs intended to reduce the costs associated with filing and litigating these lawsuits and make the process more cost-effective.<sup>60</sup> However, the record labels have admitted years ago that these lawsuits, economically, have been a loss.<sup>61</sup>

This lawsuits policy, which continued for five years, is counter-intuitive only under the assumption that the goal of the process is to extract revenues from them. However, it makes perfect sense in light of the understanding of that process as “*a battle on the heart and mind of consumers*”,<sup>62</sup> designed to inculcate the notion that file-sharing is illegal.<sup>63</sup> This, in turn, is designed to maintain control over the market by driving out competitors from the distribution arena. Indeed, few voices remained maintaining that the copyright laws were never intended to be enforced on personal uses,<sup>64</sup> and that file-

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Thru trial and appeal \$249,000; Medium-stakes case - (\$1-\$25 million); Thru discovery - \$298,000; Thru trial and appeal \$499,000; High-stakes case - (>\$25 million); Thru discovery - \$501,000; Thru trial and appeal \$950,000; *See*, Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, n.121 (May 2004). *See also*, Kim F. Natividad, *Note: Stepping It Up And Taking It to The Streets: Changing Civil & Criminal Copyright Enforcement Tactics*, 23 BERKELEY TECH. L.J. 469, 478 (“The RIAA must pay SafeNet, as well as its own legal team, to investigate infringement and pay the legal fees associated with initiating the lawsuits”).

<sup>60</sup> Such as the creation of the website, [www.P2Plawsuits.com](http://www.P2Plawsuits.com), which enables payment for pre-litigation letters’ settlements with a credit card. Engaging the universities themselves in enforcement is an additional example for such a measure. *See infra* note 125 and accompanying text.

<sup>61</sup> *See*, e.g., head of Sony BMG’s litigation department Jennifer Pariser’s testimony in *Capitol Records, Inc. v. Thomas*, No. 06-cv-1497, 2007 WL 3054014 (D. Minn. Oct. 4, 2007), according to which, record companies are “spending millions” on lawsuits against direct infringers, and have “lost money on this program”. *See*, Eric Bangeman, *RIAA Anti-P2P Campaign a Real Money Pit, According to Testimony*, *ARS TECHNICA*, Oct. 2, 2007, <http://arstechnica.com/tech-policy/news/2007/10/music-industry-exec-p2p-litigation-is-a-money-pit.ars>.

<sup>62</sup> Steven A. Hetcher, *The Music Industry’s Failed Attempt To Influence File-sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10, 17 (2004).

<sup>63</sup> *See*, Marc Galanter, *When the Haves Come Out Ahead*, 9 L. & SOCY. REV. 95, 98-104 (1974) (arguing that litigants who have the resources to be repeat players in the litigation arena seek to shape the law in ways that favor their interests).

<sup>64</sup> *E.g.*, Jessica Litman, *Billowing White Goo, Symposium: Fair Use: “Incredibly Shrinking” or Extraordinarily Expanding?*, 31 COLUM. J.L. & ARTS 587 (2008); *See also*, Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001) (“There is doctrinal support for the contention that copyright never assured authors even a limited monopoly over all forms of exploitation”).

sharing may not be illegal.<sup>65</sup> Generally speaking, the position according to which every use, even personal use of a copyrighted material must be authorized is now almost a truism.<sup>66</sup> The effect of such an understanding is within the realm of the market of control, not the market of revenue. This reality is to the benefit of the recording industry, not for artists, who would have generally preferred the scope of access to increase.<sup>67</sup>

*ii. Indirect infringement litigation*

The concern for the industry's image, among others, made the option of suing indirect infringers, such as the providers of file-sharing services, more palatable.<sup>68</sup> The recording industry found an attentive ear in this regard within the court system, which added fire to its fight over control. The Ninth Circuit's decision in *A&M Records, Inc. v. Napster Inc.*<sup>69</sup>, the Seventh Circuit's decision in *In re Aimster Copyright Litigation*<sup>70</sup> and above all, the Supreme Court decision of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,<sup>71</sup> are emblematic of this attitude.

Napster's technology was the first file-sharing software designed for exchanging music files. The said files were transferred among users without crossing Napster's server, and Napster's site included only indexes of the songs that were actually residing on other users' hard drives. About 70% of the materials exchanged utilizing Napster's

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<sup>65</sup> Niels Schaumann, *Copyright Infringement and Peer-to-peer Technology*, 28 WM. MITCHELL L.REV. 1001, 1001 (2002) (pointing to "[t]he breathtaking sweep of [Napster's] holding--that almost one-quarter of the population of the United States was engaging in illegal (and perhaps even criminal) activity").

<sup>66</sup> Surveys show that file-sharers are "aware" of their conducts' illegality and about half of them even consider it as morally wrong. *See, e.g.*, Herkko Hietanen, Anniina Huttunen & Heikki Kokkinen, *Criminal Friends of Entertainment: Analysing Results from Recent Peer-to-Peer Surveys*, 5:1 SCRIPT-ED (Apr., 2008). Compare with, *A&M Records, Inc. v. Napster*, 239 F3d 1004, 1011-12 (9th Cir 2001) (hereinafter: Napster), where defendants were still claiming file-sharing to be fair use.

<sup>67</sup> *See supra* note 21.

<sup>68</sup> Nonetheless, suits against individual file-sharers continued in parallel, *see supra* note 48 and accompanying text..

<sup>69</sup> *Supra* note 66.

<sup>70</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643 (7<sup>th</sup> Cir. 2003) (hereinafter: "Aimster"), *Cer. Denied sub nom.*; *Deep v. RIAA* 540 U.S. 1107 (2004).

<sup>71</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S.Ct. 2764 (2005).

platform were copyrighted works owned by record companies, who sued Napster for contributory and vicarious infringement.<sup>72</sup> As a defense for the suit, Napster emphasized its capability for substantial non-infringing uses,<sup>73</sup> namely, transfer of non-copyrighted files, files whose owners consented to their transfer and promotion of new artists.<sup>74</sup> Both the district court and the Ninth Circuit rejected this argument and ruled for the record companies.<sup>75</sup>

Following the decision, Napster attempted to enter into a licensing agreement with the record labels, which by then had begun to organize their own internet distribution services, MusicNet and Pressplay, but the labels refused to tolerate any modified version of Napster.<sup>76</sup> Finally, in mid-2001, MusicNet was willing to enter into an agreement. This agreement limited Napster in entering into parallel licensing agreements, and mandated a separate pricing structure for any content licensed from another entity. Napster filed a motion for additional discovery, based on the unduly restrictive conditions imposed in the licensing agreement and on the anti-competitive nature of the plaintiffs' entry into the online market.<sup>77</sup> The court went as far as to state that “[t]he evidence ... suggests that plaintiffs' entry into the digital distribution market may run afoul of antitrust laws.”<sup>78</sup> Unfortunately for Napster, and perhaps not for Napster

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<sup>72</sup> For a discussion of these theories of infringement, see: Charles W. Adams, *Indirect Infringement from a Tort Law Perspective*, 42 U. RICH. L. REV. 635, sec. VI (2008).

<sup>73</sup> Based on the doctrine originated in *Sony*, according to which a capability of a technology of non-infringing use shields its provider from liability. (Hereinafter: “The Dual-use Technology safe harbor”).

<sup>74</sup> Napster provided the “New Artist” function, that allowed new artists to post an informational page, provided they agreed to allow Napster users to share their music. See *A&M Records, Inc. v. Napster Inc.*, 114 F Supp 2d 896 (N. D. Cal. 2000), 904.

<sup>75</sup> *Id.*; see also, Napster.

<sup>76</sup> *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1093-94 (N.D. Cal. 2002). EMI, BMG and Warner joined to form MusicNet, while Sony and Universal formed Pressplay.

<sup>77</sup> *Id.*, 1093-94.

<sup>78</sup> *Id.*, at 1102.

alone, the motion was automatically stayed when Napster filed for bankruptcy in June of 2002.

Napster opened a new world for enthusiastic consumers and clever programmers, who followed its lead. Aimster, for example, was a file-sharing service that operated within the framework of an IM (Instant Messaging) network, basically allowing simultaneous users of chat rooms to exchange files among themselves. Following the Napster decision, Aimster engaged in negotiations with record labels intended to constitute some form of business relationships. The negotiation process proved fruitless and subsequent to receiving a cease and desist letter from the RIAA, Aimster filed for declaratory relief for its legality.<sup>79</sup> The RIAA joined with other copyright owners to bring countersuit against Aimster and its founder, programmer and operator for indirect copyright infringement. Akin to Napster, Aimster argued for various defenses, and akin to *Napster*, they were rejected. Aimster was held liable in both District Court and the Seventh Circuit and was forced to close down.<sup>80</sup>

In 2005, the Supreme Court added its unanimous decision in the *Grokster* case. As in the already familiar pattern, this case involved the defendants' distribution of free file-sharing software that led to a secondary liability suit by music and movie copyright owners.<sup>81</sup> Grokster was less of an ongoing service provider and more of a discrete product retailer who could not affect its users' conduct, since, unlike the former services, it utilized no central server and had only one contact with the users - at the moment of downloading the software. Accordingly, Grokster prevailed in the district court and in the

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<sup>79</sup> See, In re Aimster Copyright Litigation 252 F.Supp.2d 634, 646 (N.D.Ill.,2002).

<sup>80</sup> See, Aimster.

<sup>81</sup> See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd, 259 F. Supp. 2d 1029 (C.D. Cal. 2003); Metro-Goldwin-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154, 1159 (9th Cir. 2004).

Ninth Circuit.<sup>82</sup> The Supreme Court, however, reversed direction, concluding that Grokster was *inducing* users to utilize the technology in an infringing manner, and is thus debarred from the application of the *dual-use technology* safe harbor.

The litigation processes against secondary infringers reflect the disparity of powers between the file-sharing services and the music industry. The resource disparity and the duration of the process resulted in disincentives to carry the lawsuits to a final judgment,<sup>83</sup> and the RIAA forced upon the defendants extreme settlements that advanced its interests in control.<sup>84</sup>

The suing of peer-to-peer technology providers is another escalation in the fight to achieve control in the arena of distribution of copyrighted works. The lack of control that a technology provider has over the future uses of its product renders it impossible for providers to design a file-sharing program which will be invulnerable to illegitimate uses altogether. These lawsuits and their success thus affect the likelihood of law conscious companies entering the field of information dissemination, which may well be the main purpose of these lawsuits. By creating this very incentive, the music industry attempts to keep for itself the full control over dissemination, although these technologies may in fact increase the potential for revenues.<sup>85</sup>

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<sup>82</sup> Grokster, *supra* note 71.

<sup>83</sup> Grokster lawyer Michael Page stated that despite his belief that the company would have prevailed at trial, he could not afford a protracted legal battle. *See*, Gary Gentle, *Details of Grokster Settlement Emerge*, LAW.COM, Nov. 9, 2005, <http://www.law.com/jsp/article.jsp?id=1131457369803>.

<sup>84</sup> Most notably, Grokster, which settled after the Supreme Court decision, accepted a settlement that required it to stop distributing its software, pay 50 million dollars, send anti-piracy messages to its users and change its website to read, "... There are legal services for downloading music and movies. This service is not one of them. Don't think you can't get caught. You are not anonymous". *See*, Grokster Home Page, <http://www.grokster.com> (last visited Mar. 3, 2009). *See also*, Ciolli, *supra* note 51, 1004-1005. Streamcast, the additional defendant in the *Grokster* case, continued fighting until it filed for bankruptcy under Chapter 7 in the U.S. Bankruptcy Court for the District of Oregon towards the middle of 2008. *See*, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=711922>.

<sup>85</sup> *See* discussion, *infra* chapter III.

At the end of 2008, the RIAA declared that it had largely ceased filing suits against individuals (while continuing the suits already issued, reserving the right to sue “heavy infringers” and not ceasing the suing of technology creators).<sup>86</sup> This decision was made only when the RIAA sensed the tilt of the scale in courts,<sup>87</sup> and public figures and academics got involved in litigation processes in favor of the defendants.<sup>88</sup>

In parallel, the RIAA has developed an alternative to the lawsuit path, by voluntarily or coercively collaborating with Internet Service Providers (ISPs) and quasi-ISPs, in tracking and preventing of file-sharing.<sup>89</sup> Such a step, which will be discussed later in this chapter, can minimize procedural and other costs associated with lawsuits, and at the same time, combined with the continuing use of indirect and perhaps a few direct lawsuits, as well as the other methods discussed in this chapter, substantially increase the grip over the market of control.

### 3. The Technological Front

In parallel to progressing in the path to achieve control through the legislative and litigation arenas, the industry has utilized technology of its own to limit access to or exploitation of its digital materials.<sup>90</sup> These technologies, collectively named Digital Rights Management (DRM), utilize various tools, such as encryption, watermark and metadata, to control users’ ability to either access materials (“access control”) or use of it

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<sup>86</sup> See, *supra* note 48.

<sup>87</sup> See, *e.g.*, *Capitol Records Inc. v. Thomas D. Minn.*, September 24, 2008, No. 06 - 1497 (vacating a jury’s 2007 copyright infringement verdict and award of \$222,000 in damages to RIAA members and granting the defendant, Jammie Thomas, a new trial).

<sup>88</sup> See, *e.g.*, Defendant’s Opposition to Plaintiffs’ Motion to Dismiss Counterclaims, in *Sony BMG Music Entertainment, et al. v. Joel Tenenbaum*, 593 F.Supp.2d 319 (D. Mass., 2009). See also, 12 *Andrews Telecomm. Industry Litig. Rep.* 8, Judge Oks Webcasting of Hearing In File-Sharing Case (2009).

<sup>89</sup> See *infra*, note 114 and accompanying text.

<sup>90</sup> Molly Shaffer Van Houweling, *Communications’ Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L. 97, 103 (2005).

(“usage control”), e.g., by limiting the possibility to print, copy, download or modify the material.<sup>91</sup>

The use of DRM is backed by the DMCA<sup>92</sup> which implements the WIPO treaties of 1996.<sup>93</sup> The DMCA bans DRM circumvention,<sup>94</sup> as well as manufacturing, trafficking or marketing of DRM circumvention appliances,<sup>95</sup> and fixes criminal and civil sanctions for such actions.<sup>96</sup>

Unless based on the link between the market of revenue and the market of control, the DRM function and the legislation surrounding it have little effect on the market of revenue. The subject matter of the legislation is not revenue, rather the very access is entirely blocked.<sup>97</sup> In fact, studies suggest that the profitability of copyrighted content markets is often unrelated to the effectiveness of DRM applications. For example, although the DeCSS circumvention technology for DVD’s DRM is widely available online, the DVD industry continues to be quite profitable in the US and abroad.<sup>98</sup>

In terms of control, however, the ability of copyright owners to track individuals’ actions in order to enforce their financial interests implies a wide range of potential control that is unprecedented and uncomparable to other contexts, including to the

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<sup>91</sup> See, Yuko Noguchi, *Freedom Override by Digital Rights Management Technologies: Causes in Market Mechanisms and Possible Legal Options To Keep a Better Balance*, 11 INTELL. PROP. L. BULL. 1, 5 (2006).

<sup>92</sup> *Supra* note 36.

<sup>93</sup> World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997), art. 11, World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997), art. 18.

<sup>94</sup> 17 U.S.C. § 1201(a)(1).

<sup>95</sup> 17 U.S.C. § 1201(a)(2), (b)(1).

<sup>96</sup> 17 U.S.C. § 1203, §1204.

<sup>97</sup> These characteristics of the DMCA attracted a vast amount of criticism. See, e.g., Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 814 (Sep., 2001); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH L. J. 519 (1999).

<sup>98</sup> See, Noguchi, *supra* note 91, at 21-22 (noting that “DVD sales have continued to grow steadily in both the U.S. and Japan”).

copyright context in the analog world.<sup>99</sup> The DMCA prohibitions are inclusive, and except for few specific exemptions,<sup>100</sup> apply to DRM circumvention perpetually<sup>101</sup> and for any purpose,<sup>102</sup> including purposes which were acknowledged as legitimate prior to the enactment of the DMCA, such as fair use<sup>103</sup> or the first sale doctrine.<sup>104</sup>

The use of DRM is controversial. Advocates argue that it is necessary in order to prevent unauthorized duplication of copyrighted works and thus to ensure continued revenue streams.<sup>105</sup> From a different angle, DRM helped in convincing copyright owners to release their materials for digital commercialization.<sup>106</sup> Opponents maintain that it constitutes a harmful expansion of existing copyright law towards a nearly absolute

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<sup>99</sup> Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 NYU L REV 354, 422 (1999) (“Books simply cannot prevent you from flipping the page, but digital files can. Video cassettes cannot ask you for your name and password every time you watch them, but a digital video disk or a movie downloaded “on-demand” can”).

<sup>100</sup> Such as the use of circumvention technologies by educational institutions in order to determine whether to purchase a copyrighted product (17 U.S.C. § 1201(d)) or circumvention in order to achieve “interoperability” of computer programs through reverse-engineering (17 U.S.C. § 1201(f)).

<sup>101</sup> See, Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure For Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001) (noting that by the mere placing of DRM, access can be controlled for unlimited time, contrary to the constitution).

<sup>102</sup> Benkler, *supra* note 99, 421 (“[The DMCA] does not prohibit circumvention for the purpose of infringement of the copyright owner's exclusive rights. It prohibits circumvention per se...”).

<sup>103</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (holding that the DMCA bans circumvention of DRM technologies even for the purpose of fair use). See also, David Nimmer, *How Much Solicitude for Fair Use Is There in the Anti-Circumvention Provision of the Digital Millennium Copyright Act?*, THE COMMODIFICATION OF INFORMATION 193, 211-15 (Niva Elkin-Koren & Neil W. Netanel eds., 2002); Pamela Samuelson, *Digital Rights Management {and, or, vs.} the Law*, 46 COMM. ACM 4, 41-45 (Apr. 2003), available at [http://people.ischool.berkeley.edu/~pam/papers/acm\\_v46\\_p41.pdf](http://people.ischool.berkeley.edu/~pam/papers/acm_v46_p41.pdf). (Arguing that these exemptions “fail to recognize many legitimate reasons for circumventing technical measures[.]”).

<sup>104</sup> See, e.g., Cohen, *supra* note 101, 472 (noting that DRM undermine the idea “in the nondigital world, [that] the first sale of an object embodying a copyrighted work exhausts the copyright owner's exclusive distribution right”).

<sup>105</sup> See, John M. Williamson, *Rights Management in Digital Media Content: Case For FCC Intervention in the Standardization Process*, 3 J. TELECOMM. & HIGH TECH. L. 309 (2005).

<sup>106</sup> “Without DRM [...] it will be very difficult for us to convince all the rights holders to give us access to commercialize the contents.” See, Noguchi, *supra* note 91, 7 (quoting Bob Ohlweiler, Senior Vice President of Business Development at Musicmatch, an online music store).

protection of works,<sup>107</sup> creates a chilling effect on innovation<sup>108</sup> and constitutes an anti-competitive practice.<sup>109</sup>

The effectiveness of DRM is also questionable, as clever programmers around the world love to play cat-and-mouse games with DRM creators by decrypting their DRM as soon as it is launched.<sup>110</sup> Nonetheless, in order to license its material to online stores, the recording industry has required DRM protection of the files,<sup>111</sup> a technique which reduces consumer satisfaction and which is costly to develop and maintain.<sup>112</sup> This has increased the costs associated with online distribution and harmed revenues, but nevertheless contributed to enhancing the control over the market.

The industry's recent signals show that it may be abandoning DRM for certain purposes,<sup>113</sup> undergoing a similar process to the one that the software industry underwent in the Eighties of the previous century. Still, like the litigation path against individuals, the technological control-protection did not cease to exist until alternatives were consolidated - not to achieve revenues but to control access.

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<sup>107</sup> See, e.g., Cohen, *supra* note 101, 472-73 (noting that DRM can undermine important limitations on copyright law, and enable prohibition on "reuse of the ideas, facts, or functional principles contained in a work--all elements that copyright law expressly leaves unprotected in order to stimulate further creativity--or prohibiting reuse of formerly copyrighted expression that has fallen into the public domain.").

<sup>108</sup> See, Noguchi, *supra* note 91, 21.

<sup>109</sup> See, Fred von Lohmann, *Do You Need an Exemption from the DMCA?*, EFF, Oct. 16, 2008, <http://www.eff.org/deeplinks/2008/10/do-you-need-exemption-dmca>.

<sup>110</sup> See, e.g., Roemer, *supra* note 3, at 12; Noguchi, *supra* note 91, at 21-22. See also, Steve Jobs: The Rolling Stone Interview, Dec. 3, 2003, <http://www.rollingstone.com/features/featuregen.asp?pid=2529> ("It only takes one person to pick a lock. Pick one [digital] lock - open every door." Steve Jobs is Apple's co-founder, Chairman, and CEO).

<sup>111</sup> See *supra* note 106 and accompanying text. See also, Jobs' interview, *id.*

<sup>112</sup> The contract between Apple and the record companies up until 2009 obliged it to solve within six weeks any ineffectiveness of its DRM protection. See, Steve Jobs, *Thoughts on Music*, Feb. 6, 2007, <http://www.apple.com/hotnews/thoughtsonmusic>.

<sup>113</sup> iTunes as well as other online-stores have already signed deals with copyright owners to carry a large number of DRM-free tracks. See, IFPI Annual Report on Digital Music 2009, 10, available at <http://www.ifpi.org/content/library/DMR2009.pdf>. (hereinafter: IFPI 2009 report).

#### 4. The Front of Control over the “Keys to the Internet”

The gate-keepers of the Internet are Internet Service Providers (ISPs) and quasi-ISPs, such as universities, which provide Internet access to their customers. For years, ISPs were attractive deep-pocketed defendants for the music industry, and were frequently called to the litigation arena in the framework of both subpoenas to reveal users’ identity in direct infringement suits and secondary infringement suits.<sup>114</sup>

Drawing ISPs into the litigation scene became harder over time. Beyond its above discussed function, the DMCA structured safe harbors for ISPs that exempted them from involvement in most infringement litigations. Accordingly, the RIAA’s attempts to sue ISPs after the DMCA enactment have failed,<sup>115</sup> even though the courts expressed dissatisfaction with the unsuitability of the DMCA to the peer-to-peer era.<sup>116</sup> For the time being, ISPs were left as an isolated island in the widening ocean of industry control.

Nevertheless, the industry’s eye has never really moved from ISPs. Recently, ISPs are being dragged again into the copyright waters. The “role of ISPs” or “ISP cooperation” are the latest agenda topics for the music industry internationally,<sup>117</sup> vigorously lobbied in Europe<sup>118</sup> and in the United States.<sup>119</sup>

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<sup>114</sup> Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 15, 25 (2006).

<sup>115</sup> See *Recording Indus. Ass’n of Am., Inc., v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (hereinafter: *Verizon*); See also *re Charter Commc’ns, Inc.*, 393 F.3d 771 (8th Cir. 2005) (hereinafter: *Charter*).

<sup>116</sup> See *Verizon*, 1238-39, *Charter*, 777. See also: Brechtje Lindeboom, Lori E. Krafte, Ulrich Baeumer, David Buxbaum & Navine Karim, *International Intellectual Property: International Legal Developments in Review: 2004*, 39 INT’L LAW 333 (2005).

<sup>117</sup> See, IFPI 1999 Report, at 22.

<sup>118</sup> For example, France’s new regime, endorsed by President Sarkozy, mirrors the scheme desired of the IFPI. See, IFPI, *UK Government to Push for ISP Cooperation*, Feb. 12, 2008, [http://www.ifpi.org/content/section\\_news/20080212.html](http://www.ifpi.org/content/section_news/20080212.html). A bill to impose liability on ISPs for copyright infringements was also introduced in Britain by the BPI, the British equivalent of the RIAA, but ultimately rejected. *Id.* (See the bill’s full text at: <http://www.iplegality.com/pdf/p2p-BPI-amendment.pdf>.) See also, Monica Horten, *UK Music Companies Demand ISP Liability in Copyright Law*, IPTEGORITY, Jan. 28, 2009, [http://www.iplegality.com/index.php?option=com\\_content&task=view&id=235&Itemid=9](http://www.iplegality.com/index.php?option=com_content&task=view&id=235&Itemid=9).

As for now, the heavy legislative hand was not yet put on to the matter in the U.S., but the RIAA claims that voluntary covert agreements are already being negotiated with ISPs regarding collaboration against file-sharing.<sup>120</sup> The scheme probably includes sending warning letters from the RIAA to file-sharers through ISPs, and, after three alerts, disconnecting their Internet service.<sup>121</sup>

Although no ISP to date approved engagement in such negotiations,<sup>122</sup> ISPs' interests are aligned with those of the music industry against peer-to-peer traffic. Peer-to-peer traffic reallocates costs from the distributor of content to ISPs due to the absence of a central server. Conventionally, digital communication is done to and from centralized servers which host the information and transmit it to clients reactively. In a peer-to-peer network, the peers themselves simultaneously fulfill the functions of servers and clients among each other, initiating requests and reacting to other peers' requests for content. ISPs therefore must be able to support high bandwidth capacity for the consumers who transfer files simultaneously between them. For this very reason, Comcast recently attempted to block BitTorrent traffic, and was rebuked by the Federal Communication Commission (FCC) for engaging in network management and interfering with Net neutrality.<sup>123</sup>

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<sup>119</sup> See, e.g., *supra* note 41 and accompanying text.

<sup>120</sup> See, e.g., Greg Sandoval, *RIAA president: No talk of blacklisting file sharers*, CNET, Dec. 19, 2008, [http://news.cnet.com/8301-1023\\_3-10127313-93.html](http://news.cnet.com/8301-1023_3-10127313-93.html).

<sup>121</sup> A British survey supports this assumption. See, *Natte Anderson, Survey: warnings from ISPs could slash file-swapping by 70%*, *ARS TECHNICA*, Mar. 2008, <http://arstechnica.com/old/content/2008/03/survey-warnings-from-isps-could-slash-file-swapping-by-70.ars>.

<sup>122</sup> David Kravetz, *Top Internet Providers Cool to RIAA 3-Strikes Plan*, *WIRED*, Jan. 5, 2009, <http://blog.wired.com/27bstroke6/2009/01/draft-verizon-o.html>.

<sup>123</sup> See, FCC Commissioner Deborah Taylor Tate, *United States Broadband Policy: From Sea to Shining Sea*, Global Forum 2008, COLLABORATIVE CONVERGENCE: USERS EMPOWERMENT IN THE GLOBAL DIGITAL ECONOMY, Oct. 21, 2008, available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2008/db1021/DOC-286177A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db1021/DOC-286177A1.pdf). See also: Sascha D. Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward An Open Internet*, 12 NO. 6 J. INTERNET L. 1 (2008).

If the mass lawsuits against individual file-sharers were done in a way that blocked the justice system *de facto*, by driving individuals and start-up companies to settle out of court (or driving them to bankruptcy), siding with ISPs blocks the justice system *de jure*. The degree of control the industry will have in this scheme is enormous. Instead of laws and courts that may review its actions at least in theory, the RIAA will be the prosecutor, sole adjudicator and co-executor (together with ISPs) of everyone it claims to be engaging in file-sharing.

While commercial ISPs may hope for reduction of congestion as a result of contracting with the RIAA, quasi-ISPs, universities in particular, have generally been more reluctant to cooperate. The RIAA's attempts to recruit universities to the file-sharing war began in 2005 with sending "pre-litigation" letters to universities, requesting them to forward them on to file-sharers-students, who were identified by their IP address. The letters offered the student a "reduced" settlement of approximately \$3,000 and threatened with initiation of legal actions with damages upwards of \$750 per song if the offer would not be accepted.<sup>124</sup> In parallel, the RIAA published a list of "top piracy schools", identifying the twenty five institutions in which the file-sharing phenomenon is the widest.<sup>125</sup> The reaction among faulted institutions varied, ranging from fully siding with the RIAA,<sup>126</sup> through partial assistance as "passive conduit"<sup>127</sup> to refusing to team up

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<sup>124</sup> Thomas Mennecke, *RIAA Announces New Campus Lawsuit Strategy*, SLYCK, Feb. 28, 2007, <http://www.slyck.com/story1422.html>. See also, *EFF 2008 Report*, at 7.

<sup>125</sup> See, Jacqui Cheng, *Forget party schools: The RIAA lists the top piracy schools in the US*, ARS TECHNICAL, Feb. 22, 2007, <http://arstechnica.com/news.ars/post/20070222-8900.html>.

<sup>126</sup> Stanford University, e.g., forwards letters on, disconnecting students from the net and charging them for reconnection. See, *Student DMCA Complaint Policy & Reconnection Fee*, [http://www.stanford.edu/dept/legal/Recent/DMCA\\_Reconnect\\_fee\\_Final1007.pdf](http://www.stanford.edu/dept/legal/Recent/DMCA_Reconnect_fee_Final1007.pdf). Michigan State University forces repeated offenders to watch an anti-piracy DVD, and threatens three-time offenders with one semester suspension. The University of Tennessee cuts off Internet connections for repeated offenders until they physically take their computers to a lab to delete their file-sharing programs. See, Cheng, *id.*

with this effort.<sup>128</sup> In the last two years, the industry has followed up by calling institutions' presidents to implement anti-file-sharing educational programs.<sup>129</sup>

In parallel, the RIAA has constantly lobbied to compel universities to apply a system that will track and impede file-sharing activity and in parallel direct students to authorized music acquiring sites.<sup>130</sup> These efforts bore fruit with the 2008 inclusion of the anti-file-sharing provisions in the Higher Education Opportunity Act.<sup>131</sup>

Apparently, if higher education institutions, from which most of the file-sharing activities are conducted, will block file-sharing and direct the students solely to RIAA's authorized channels, and if commercial ISPs will cooperate in cutting off file-sharers from the internet, the RIAA is closer than ever to combat the threat of file-sharing. The path to complete control is not yet paved, but the map is beginning to unfold.

#### 5. The War on the Hearts and Minds

The RIAA and the record industry fight file-sharing also by the vague, though not less influential, tools of education, campaigns and rhetoric. During its 2008 national and international "campaign on hearts and minds",<sup>132</sup> the recording industry was engaged in as many as 70 campaigns worldwide, including television advertising, documentary

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<sup>127</sup> See, *EFF Report*, at 8 ("Most universities... appear to be forwarding RIAA pre-litigation letters on to their students, apparently on the assumption that a student will be better off settling sooner, at the "discounted" rate, rather than later").

<sup>128</sup> See, e.g., Harvard's refusal to serve as "the unpaid enforcement arm of the provincial interests of the RIAA". See, Charles Nesson & John Palfrey, *Universities to RIAA: Take a Hike*, BERKMAN CENTER FOR INTERNET AND SOCIETY AT HARVARD UNIVERSITY, Jul. 9, 2007, <http://cyber.law.harvard.edu/node/479>. See also, [http://www.law.harvard.edu/news/2007/05/01\\_nesson.php](http://www.law.harvard.edu/news/2007/05/01_nesson.php). The University of Wisconsin, the University of Maine and the University of Kansas exemplify a similar attitude. See, *EFF Report*, 8.

<sup>129</sup> *Id.* See also: Timothy B. Lee, *Analysis: RIAA wants universities to do its dirty work*, ARS TECHNICA, Sep. 3, 2007, <http://arstechnica.com/news.ars/post/20070903-analysis-riaa-wants-universities-to-do-its-dirty-work.html>.

<sup>130</sup> Cheng, *supra* note 125.

<sup>131</sup> Pub. L. no 110-315 (Aug. 14, 2008) §§ 488(a), 493(a).

<sup>132</sup> IFPI 2009 report, at 26.

productions and live debates.<sup>133</sup> The industry's efforts have been focused on teachers and parents and included production and wide distribution of guides, information and additional resources furthering their agenda. These communications were often endorsed by public and governmental bodies.<sup>134</sup>

In these efforts, as in other arenas, the industry has advanced its agenda largely via utilizing the metaphor of real property.<sup>135</sup> If copyright is akin to real property, such as land, then virtually any unauthorized use is forbidden.<sup>136</sup> Using this metaphor, it was asserted that DRM deserves legal protection befitting locked doors,<sup>137</sup> that circumvention of DRM equals breaking and entering someone's home,<sup>138</sup> that new technologies are "copyright killer machines"<sup>139</sup> and that file-sharing is both theft<sup>140</sup> and piracy.<sup>141</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> Such resources include, e.g., the guide "Young People, Music and the Internet" (*see*, IFPI national report, 26) as well as the book "Faux paw's adventures in the internet - Keeping Children Safe Online", which is designed to endow "the values of safe and legal Internet use" to children at a much younger age, and is endorsed by the FCC. *See also*, Katie Dean, *Copyright Crusaders Hit Schools*, WIRED, Aug. 13, 2004, <http://www.wired.com/entertainment/music/news/2004/08/64543> (elaborating on copyrights' educational programs).

<sup>135</sup> *See*, Bill D. Herman, *Breaking and Entering My Own Computer: The Contest of Copyright Metaphors*, 13 COMM. L. & POL'Y 231 (2008).

<sup>136</sup> *But see*, Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN L REV 981, 1022 (1996) (noting that "[e]ven in the case of real property, the Supreme Court has recognized that "ownership does not always mean absolute dominion," and that in some circumstances an owner's rights may "become circumscribed by the statutory and constitutional rights of those who use" the property").

<sup>137</sup> Herman, *supra* note 135, 232.

<sup>138</sup> *Id.*

<sup>139</sup> *See*, Statement of Stanley Gortikov, *supra* note 24.

<sup>140</sup> "when you go online and download songs without permission, you are stealing". *See*, RIAA home page, <http://www.riaa.com/faq.php>.

<sup>141</sup> As was presented in 2005 on the RIAA Internet site: "No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. Today's pirates operate not on the high seas but on the Internet, in illegal CD factories, distribution centers, and on the street." *See*, David W. Opperbeck, *Peer-To-Peer Networks, Technological Evolution, And Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685 (2005). Today, however, the RIAA claims that the term piracy is "too benign" to actually describe its damages. *See*, <http://riaa.com/physicalpiracy.php> (last visited: Mar. 4, 2009).

Legally, the equivalence of copyrights and real property is erroneous and misleading.<sup>142</sup> Although the copyright regime carries property-like features such as exclusivity and injunctive remedies, these characteristics exist alongside considerable non-property features, such as compulsory licensing schemes<sup>143</sup> and exemptions.<sup>144</sup> Indeed, originally, for the most part, this metaphor supported the argument that the law *should* resemble the law of real property, rather than claiming that it already does.<sup>145</sup>

Regardless of its legal inadequacy, as a metaphor, the equivalence of copyrights to real property is exceptionally powerful.<sup>146</sup> As observed by various legal scholars, within the spheres of culture, law and politics, *property* implies a particularly broad scope of rights.<sup>147</sup> The implications of this rhetoric are successful not merely in shaping public positions, but also in designing the paradigms of the discussion and determining how copyrights are conceptualized.<sup>148</sup>

The metaphor of property does not promote the idea of revenues. The attempt to utilize someone's property does not entitle the latter to a monetary compensation, rather

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<sup>142</sup> See, R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 Colum. L. Rev. 995, 999, (2003) (clarifying that “the control we offer owners of intellectual property rights is simply not the control we offer landowners”). See also, *United States v. Dowling*, 473 U.S. 207, 216 (1985) (“The copyright owner, however, holds no ordinary chattel. A copyright [...] comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protection”); Cohen, *supra* note 136, 1022 (“Copyright, unlike real property, reflects a careful, expressly-drawn balance between private (author's) rights and public rights”).

<sup>143</sup> See, e.g., *supra* note 23.

<sup>144</sup> E.g., the fair use doctrine, now enshrined in 17 U.S.C. § 107. See Dan L. Burk, *Patenting Speech*, TEX. L. REV. 79, 99, 158 (2000).

<sup>145</sup> See, WILLIAM W. FISHER, *PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT*, STANFORD UNIVERSITY PRESS, 134 (2004).

<sup>146</sup> *Id.* (“In a nation with remarkably deep respect for property rights, copyrights are property puts copyright holders on the side of both God and country, and those who violate this right are thieves, sinners, pirates and communists”). See also, Lawrence Lessig, *The Creative Commons*, 55 FLLR 763 (“There thus emerges an equivalence in our culture between “property” and “intellectual property” because we are a property-loving nation”).

<sup>147</sup> See, Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?* 38 CATH. U. L. REV. 365, 398 (1989); Julie Cohen, *Overcoming Property: Does Copyright Trump Privacy?* U. ILL. J. L. & TECH. POL'Y 375, 379 (2002).

<sup>148</sup> See Herman, *Supra* note 135.

to an injunction - the ability to prohibit such use altogether. Choosing the metaphor of property thus sheds light on the real purpose of the record companies, to perpetuate their grip in the market of control.

Despite the achievements of the record companies on all fronts, beyond the court and Congress walls, the file-sharing phenomenon flourished.<sup>149</sup> High levels of demand and rapid technological developments prevented any wide-ranging achievements resulting from litigation.<sup>150</sup> Apparently, shutting down Napster created the online equivalent of the California gold rush with scores of companies emerging to fill the void Napster's demise created.<sup>151</sup>

If the market of revenue was the focus of the battle, this state of affairs would be quite paradoxical. The industry was pouring out a huge amount of expensive resources for lobbying, lawsuits, contracts, propaganda and campaigns in order to fight a technology that, as will be analyzed below, can provide a resource-efficient distribution mechanism, and this - in the face of palpable evidence that this fight leads to no evident success.<sup>152</sup>

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<sup>149</sup> See, Strumpf & Felix Oberholzer, *The Effect of File-sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007). See also, Verizon, 351 F.3d, 1231 (“millions of people ... continue to share digital .mp3 files of copyrighted recordings using P2P computer programs such as KaZaA, Morpheus, Grokster, and eDonkey”). See also, William Sloan Coats & Melissa Keyes, *Recent Developments in Vicarious Liability and Copyright Licensing for Music*, 915 PLI/PAT, 257, 266 (2007).

<sup>150</sup> In the case of the RIAA- MetaMachine Inc. settlement in 2006, e.g., the agreement, that included the closing down of eDonkey2000 had little, if any, impact on the eD2k network, as eMule (and Shareaza) had been the dominant client on the network since 2002, and already represented over 90% of the network at the time of the agreement. See also, *EFF 2008 Report*; Choi, Bryan H., *Note, The Grokster Dead-End*, 19 HARV. J.L. & TECH. 393 (2006).

<sup>151</sup> Robert Menta, *Aimster: the legal file swap program*, MP3 NEWSWIRE2, Sep., 2000, <http://www.mp3newswire.net/stories/2000/aimster.html>.

<sup>152</sup> Among the reasons for the failure of the litigation war is that the chances to be sued are viewed as extremely miniscule. See, Hietanen, Huttunen & Kok, *supra* note 66, 39; see also, Thomas Mennecke, *RIAA's Grand Total: 10,037. What Are Your Odds?*, SLYCK, May 2, 2005, <http://www.slyck.com/news.php?story=769>.

Moreover, there was readiness of some networks to negotiate with the recording industry in a way that will share the control over digital distribution, yet would provide a stable stream of revenues for the music industry. Even the Napster and Aimster services had attempted at a number of stages in the conflict to engage in negotiations with the labels, in a way that would have allowed the services to survive while compensating artists through the record companies.<sup>153</sup> However, the plaintiffs agreed only to a settlement which would leave the maximum amount of control in their hands, and both negotiation processes proved futile.<sup>154</sup>

The explanation of the record companies for this paradox is that they stand in an impossible position, since the market can only function if the recording industry does not have to compete with free distribution.<sup>155</sup> However, the evidence regarding the actual effects of file-sharing, which will be analyzed in the next chapter, suggests that file-sharing is in fact a gold mine and not a mine field.

Indeed, the arguments that support the assertion regarding economic effects of file-sharing are based on the highly speculative equation between the market of control and the market of revenue in either “soft form” (revenues can only be produced if the industry possesses control) or “hard form” (framing industry control as sufficient to assure artists’ revenues).

The next two chapters untie this knot in both its forms. The next chapter will demonstrate that file-sharing can support an uncontrolled, decentralized market of revenue, thus rebutting the “soft” form of the equation which implies that such a state of

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<sup>153</sup> See *supra* notes 76, 79 and accompanying text.

<sup>154</sup> *Id.*

<sup>155</sup> See, e.g., Committee on Commerce, Science, and Transportation United States Senate on M.G.M. v. Grokster (Statement of Mitch Bainwol, Recording Industry Association of America Chairman and CEO, (Jul. 28, 2005).

affairs is impossible. The fourth chapter will demonstrate that the market of control has in fact created an adverse impact on artists' revenues, thus rebutting the "hard" form of this equation, which assumes that the grip of the industry in the market of control is translated into revenues for creators. The fourth chapter will then conclude that a decentralized uncontrolled market is far more advantageous for both artists and society as a whole.

### III. FILE-SHARING AND THE MARKET OF REVENUE

In his cross-examination during the PirateBay trial in February of this year, IFPI chairman and CEO John Kennedy suggested that file-sharing is responsible for the 30% global decline in music revenues.<sup>156</sup> The argument, which echoes the industry's accusation over many years, is striking in its simplicity: consumers, who would otherwise purchase the music, consume it free of charge and distribute it to others who do the same, thus harming the market of revenue for artists.<sup>157</sup>

The market of revenue for artists is ostensibly the main concern of the anti-file-sharing line. However, the notion, inculcated by the music industry into the common knowledge, that file-sharing inherently excludes revenues to artists, is far from evident.<sup>158</sup>

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<sup>156</sup> See, Nate Anderson, *IFPI boss at TPB trial: you're either with us or against us*, ARS TECHNICA, Feb. 25, 2009, <http://arstechnica.com/tech-policy/news/2009/02/ifpi-boss-youre-either-with-us-or-against-us.ars>. The International Federation of the Phonographic Industry, or IFPI, is an international organization that represents the recording industry worldwide. Its membership comprising some 1400 record companies in 72 countries and affiliated industry associations in 44 countries. See, <http://www.ifpi.org/>.

<sup>157</sup> See, e.g., RIAA's position in *United States of America v. Daniel Dove*, 585 F.Supp.2d 865, 870 (W.D.Va. 2008); the government's position in *United States v. Chalupnik*, 514 F.3d 748, 755 (8th Cir. 2008).

<sup>158</sup> See, e.g., Boyle, *supra* note 20, at 43 ("The Internet does lower the cost of copying and, thus, the cost of illicit copying. Of course, it also lowers the costs of production, distribution, and advertising, and dramatically increases the size of the potential market. Is the net result, then, a loss to rights-holders...? A large, leaky market may actually provide more revenue than a small one over which one's control is much stronger").

The RIAA reports stating a steady decline of net revenues since the year 2000,<sup>159</sup> have raised speculations, resulting, *inter alia*, from its unconventional accounting methods.<sup>160</sup> Yet, even ignoring these speculations, the attribution of these claimed losses, particularly the *entirety* of these losses, to file-sharing is questionable.<sup>161</sup>

Empirically, in order to establish the connection between file-sharing and the music industry's losses, a set of presumptions must be set. It must be assumed, *inter alia*, that file-sharing completely substitutes sales with free downloads,<sup>162</sup> that file-sharers would otherwise purchase the music for the full price offered by the music industry,<sup>163</sup> and that none of the resources not spent on music purchases is spent on music through other channels which are not reflected in the sales charts.<sup>164</sup>

There are, however, sufficient reasons to challenge these assumptions. If truth be told, attributing the *entire* decline in sales to file-sharing ignores various additional

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<sup>159</sup> Recording Industry Association of America, 2007 Year-End Shipping Statistics. Available at <http://www.scribd.com/doc/6386390/RIAA-Annual-Music-Sales-Data-2007-Year-End>. (hereinafter: RIAA's Statistics).

<sup>160</sup> See e.g., Martin F. Halstead, *The Regulated Become the Regulators, Problems and Pitfalls in the New World of Digital Copyright Legislation*, 38 TULSA L.J. 195, 226 (2001). ("An accounting system in which possible but unrealized income is considered a loss appears an unrealistic basis for policy formulation, yet it is a primary accounting theory on the industry side of the piracy question"). See also, Julian Sanchez, *750,000 lost jobs? The dodgy digits behind the war on piracy*, ARS TECHNICA, Oct. 7, 2008, <http://arstechnica.com/articles/culture/dodgy-digits-behind-the-war-on-piracy.ars/1>.

<sup>161</sup> Even the RIAA and other plaintiffs in lawsuits against file-sharers prefer to base their damages claim on punitive damages according to 17 U.S.C. § 504(c) (2006) and not on actual damages which they cannot measure nor prove. See, e.g., Complaint at para. 18, Capitol Records Inc. v. Thomas, No. 06-CV-1497, 2006 WL 1431921 (D. Minn. Apr. 19, 2006).

<sup>162</sup> However, "[c]ustomers who download music and movies for free would not necessarily spend money to acquire the same product... RIAA's request problematically assumes that every illegal download resulted in a lost sale", Dove, *supra* note 157, 870. See also: Chalupnik, *supra* note 157 (finding that the government had failed to prove the losses to the copyright holder and vacated the restitution awarded in the district court).

<sup>163</sup> See, *United States v. Hudson*, 483 F.3d 707, 710 (10th Cir. 2007) ("As an initial matter, we are very skeptical of the implicit suggestion that [the customer's] agreement to purchase 537 copies of the [counterfeit] software for a total price of less than \$86,000 proves that [the customer] would have agreed to purchase the same number of copies from Microsoft for more than \$321,000").

<sup>164</sup> It is possible, for example, that there is correlation between the increased exposure to music through file-sharing to the increase in Wii games and cellular purchases that share profits with the music industry. However, the "RIAA maintains that policymakers should only take into account the effect on record industry revenues, reflected in sales displacement." U.S. Cong., Off. of Tech. Assessment, Copyright and Home Copying: Technology Challenges the Law (GPO 1989), 173-74.

processes that have occurred over the last decades.<sup>165</sup> Such processes include, for example, the shift from audio cassettes to media which do not degrade over time, such as CDs and digital files, the reduction of recording equipment prices, which resulted in the rise of independent and smaller recording companies (whose data is not reflected in the losses-chart)<sup>166</sup> and the availability of competing entertainment activities beyond music. Above all, the rise of online music stores, whose success stands in reverse correlation with offline sales,<sup>167</sup> enabled what may have been long desired by consumers - the purchasing of music on a single track basis. As the one-track music is cheaper than CDs, the music revenues are indeed impacted. However, in this case, the smaller revenue market represents no problem, rather implies that the larger market was inflated, resulting from the lack of choice for customers.<sup>168</sup>

Empirically, the impact of file-sharing on sales is not consensual. Some researchers maintain that file-sharing has a negative effect on music sales,<sup>169</sup> others estimate the effect as negligible at best,<sup>170</sup> and several scholars hold that file-sharing has a positive influence on sales,<sup>171</sup> or observe a differential effect among groups of artists,

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<sup>165</sup> See, Seung-Hyun Hong, *The Effect of Napster on Recorded Music Sales: Evidence from the Consumer Expenditure Survey*, SIEPR POLICY PAPER 03-018 (2004) (identifies additional factors that had greater influence on sales reduction).

<sup>166</sup> In 1984, for comparison, estimates suggested that it cost \$125 million to maintain a national record distribution operation. See, Ku, *supra* note 12, 294.

<sup>167</sup> See, RIAA Statistics.

<sup>168</sup> See also, Lydia Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 675 (2003) (arguing that digital technology is not the main factor in the industry's crisis, rather it "has laid bare the flaws of the current system that have been created by a process of accretion.")

<sup>169</sup> See e.g., Stan J. Liebowitz, *File-sharing: Creative Destruction or Just Plain Destruction?*, XLIX J. L. & ECON., 1 (Apr. 2006); Stan j. Liebowitz, *A Comment on the Oberholzer-Gee and Strumpf Paper on File-Sharing* (Sep., 2007). Available at SSRN: <http://ssrn.com/abstract=1017418>; Norbert Michel, *The Impact of Digital File-sharing on the Music Industry: An Empirical Analysis*, 6(1) TOPICS IN ECONOMIC ANALYSIS & POLICY, ART. 18 (2006); <http://www.bepress.com/cgi/viewcontent.cgi?article=1549&context=bejeap>.

<sup>170</sup> See, e.g., Strumpf & Oberholzer, *supra* note 149 (finding that file-sharing had "an effect on [music] sales which is statistically indistinguishable from zero").

<sup>171</sup> Birgitte Andersen & Marion Frenz, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*, (May 2007) <http://www.ic.gc.ca/eic/site/ippd->

while the majority incurs a positive effect.<sup>172</sup> The speculative data regarding the actual damage that file-sharing imposes upon the music industry renders questionable at best the severe and resource-thirsty measures currently taken to combat file-sharing, as discussed above in chapter II. It strengthens the suspicion that the industry's fight is not centered around increasing revenues.

Even without deciding between the contradicting empirical analyses, regarding its impact on sales, file-sharing probably causes the music business more benefit than harm.<sup>173</sup> The exposure to music can facilitate new opportunities and open new markets. The increase of music-related entertainment opportunities such as “Guitar Hero” and “Rock Band”, which license the music from the record companies, may well be the result of wider access to music.<sup>174</sup> Enhanced exposure can increase artists' recognition and facilitate new methods to obtain income as a result of increased fame of artists, such as live performances, licensing of works, commercial consumption, sponsorship and advertisements.<sup>175</sup> In fact, these new markets may also lead, at the end of the day, to an

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dppi.nsf/vwapj/IndustryCanadaPaperMay4\_2007\_en.pdf/\$FILE/IndustryCanadaPaperMay4\_2007\_en.pdf (finding that “P2P file-sharing tends to increase rather than decrease music purchasing”).

<sup>172</sup> David Blackburn, *On-line Piracy and Recorded Music Sales*, (Dec. 2004), available at [http://www.katallaxi.se/grejer/blackburn/blackburn\\_fs.pdf](http://www.katallaxi.se/grejer/blackburn/blackburn_fs.pdf). (Finding that three quarters of artists increased their sales as a result of file-sharing, while the most popular quarter's sales have declined).

<sup>173</sup> Ku, *supra* note 12, at 300. See also, Prof. Roger Wallis's testimony in the PirateBay litigation in Sweden, see, *Entertainment Lawyers Attack Pirate Bay Witness' Qualifications*, WIRED, <http://blog.wired.com/27bstroke6/2009/02/entertainment-1.html> (Feb. 26, 2009).

<sup>174</sup> Nevertheless, some labels entered into a conflict with these games' producers over the license fee. See, Michelle Quinn & Alex Pham, *Music exec wants bigger cut on video games*, CHICAGO TRIBUNE, Aug. 25, 2008. See also, Jeff Howe, *Why the Music Industry Hates Guitar Hero*, WIRED, Feb. 23, 2009, [http://www.wired.com/culture/culturereviews/magazine/17-03/st\\_essay](http://www.wired.com/culture/culturereviews/magazine/17-03/st_essay).

<sup>175</sup> See, e.g., Ku, *supra* note 12, 308 (“musicians can and do earn significant income by means other than selling copies of their works.”). See also, Patrick Klepek, *Activision: ‘Guitar Hero’ A Bigger Money-Maker For Aerosmith Than Any Album*, *MTV Multiplayer Blog*, Sep. 15, 2008, <http://multiplayerblog.mtv.com/2008/09/15/gh-money-for-aerosmith/>.

increase in CD sales, mainly due to the promotional effect of the exposure to a high volume of consumers.<sup>176</sup>

Even before the expression of these long term effects, the immediate result of openly allowing file-sharing can constitute a shift to a less expensive distribution scheme that will increase rather than harm the market of revenue. File-sharing offers the music industry an opportunity to allocate the resources now spent on distribution for private consumption to other channels, as most of the distribution and promotion will be done effectively, even more effectively than today, without their intervention.<sup>177</sup>

The current distribution scheme for music is a combination of central online and offline sales through licensees-retailers. In contrast to offline sales, distribution through file-sharing does not endure the large scale costs of CD and DVD burning, wrapping, stamping, shipping, storage and shelf space, wholesale transactions and stock management.<sup>178</sup> It will as well render redundant both the need to estimate demand in advance and the cost of waste in case that the predictions were exaggerated. Indeed, as digital files lack features such as liner notes or cover art,<sup>179</sup> it is only realistic to assume that CDs may still have a place in the market even after allowing file-sharing to operate

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<sup>176</sup> Musicians often hold different views than their labels regarding the effect of free consumption of music on sales. *See, e.g.,* Janis Ian, *The Internet Debacle: An Alternative View*, (May, 2002), <http://www.janisian.com/articles.html> (“every time we make a few songs available on my website, sales of all the CDs go up. A lot”).

<sup>177</sup> The music industry examined the use of the peer-to-peer technology only in a modified form that will allow it to maintain the control over the network, and thus could not encompass the entirety of the advantages free file-sharing can provide. *See, Pablo Rodriguez, SeeMong Tan & Christos Gkantsidis, On the feasibility of Commercial, Legal P2P Content Distribution, ACM/SIGCOMM CCR (2006), research.microsoft.com/~pablo/papers/CCR.pdf.*

<sup>178</sup> Elkin-Koren, *supra* note 114, at 21. (“The superiority of peer-to-peer as an efficient distribution method is self evident when compared with the distribution of physical copies of copyrighted works (such as CDs)”).

<sup>179</sup> *See, Strumpf & Oberholzer, supra* note 149, at 28.

freely. However, for most private uses, file-sharing can probably replace the more expensive offline mechanism of distribution.<sup>180</sup>

File-sharing is efficient in comparison to online sales as well, as all costs associated with maintaining a central server can be eliminated. Instead of a central server that hosts the content and must be strong enough to react to high, parallel demands, file-sharers utilize their own resources for distribution, including content, bandwidth, storage space and computing power.<sup>181</sup> File-sharing is particularly effective for dealing with a large volume of users. A central system is characterized by an inverse relationship between the amount of users and the system's capabilities, as more users share the server's fixed amount of resources. In contrast, in a peer-to-peer system, growth in user volume implies a greater selection of files and system resources, as every peer adds its own resources to the pool.<sup>182</sup> As a peer-to-peer system's capacity is in a direct relationship with demand, it has exponential abilities to grow and increase its rapidity.

As a comparison, iTunes and other online music stores store the purchased music locked on the users' hard drives (such as in the iTunes library), in order to reduce the need for users to access the server.<sup>183</sup> Yet, the acquiring and downloading of music from the iTunes store is done through its central server and carries all the vulnerability associated with maintaining such a server.

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<sup>180</sup> *But see*, Charles Mann, *The Heavenly Jukebox*, ATLANTIC MONTHLY 39, 57 (Sep. 2000) (predicting an absolute absence of market for the sale of content embedded in physical objects and relocation of all existing content onto the Internet).

<sup>181</sup> *See*, Elkin-Koren, *supra* note 114, at 21. *See also*, [www.kazaa.com/us/help/glossary/p2p.htm](http://www.kazaa.com/us/help/glossary/p2p.htm). Indeed, this may represent reallocation of costs to ISPs, *See* discussion *supra* note 122 and accompanying text.

<sup>182</sup> *See*, Elkin-Koren, *supra* note 114, at 22 ("A user who wishes to distribute a file on BitTorrent no longer needs a powerful server that can respond to users' requests in a timely manner. Instead, the network takes advantage of the distributed resources of all users who participate in uploading and downloading"). *See also*, Lemley & Reese, *supra* note 59, at 1381.

<sup>183</sup> *See*, [support.apple.com/kb/HT1660](http://support.apple.com/kb/HT1660).

A related benefit of file-sharing is its enhanced robustness and reliability. In a central system, a failure of a single server can disable the whole network. Peer-to-peer networks, in contrast, replicate data over multiple peers and therefore have no single point of failure.<sup>184</sup> New peer-to-peer technologies such as BitTorrent creatively intensify this idea by simultaneously downloading file segments from multiple hosts, increasing both the robustness and the swiftness of the downloading process.<sup>185</sup>

While in economic terms, file-sharing can be more efficient than central methods for online acquiring of music, as explained above, the path of contracting with a small number of online stores makes perfect sense if the goal is not to make the most profitable deal in terms of revenues, but rather to strengthen the control over the access to copyrighted works. The current model, in which online access to music is done mainly through a number of main music stores, not only perpetuates the already centralized market, but also engages new powerful partners in the interest of keeping the market highly centralized. It should come as no surprise that these companies are occasionally accused of utilizing their derived control to their own benefit, as a means to increase their power and to drive competitors out of the market.<sup>186</sup>

It is true that the model of online stores is a notable development compared to an exclusive offline sales model, and that it further opened the market for subsequent, less

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<sup>184</sup> Elkin-Koren, *supra* note 114, at 21; *see also*, Jordan S. Hatcher, *Mesh Networks: A Look at the Digital Future*, 11 J. INTERNET L. 1, 16 (2007) (exemplifying such a system).

<sup>185</sup> *Id.*, *see also*, Lemley & Reese, *supra* note 59, at 1382.

<sup>186</sup> It is constantly claimed against Apple that it defeats RealNetworks' attempts to penetrate the market with its own DRM music by preventing Real's DRM from working on the iPod. *See*, <http://www.roughlydrafted.com/RD/RDM.Tech.Q1.07/2A351C60-A4E5-4764-A083-FF8610E66A46.html> (last visited Dec. 6, 2008). *See also*, Andy Dornan, *Apple's demand for a state-sponsored monopoly shows that DRM aims to stop competition, not piracy*, INFORMATION WEEK, Mar. 23, 2003, [http://www.informationweek.com/blog/main/archives/2006/03/apples\\_demand\\_f.html](http://www.informationweek.com/blog/main/archives/2006/03/apples_demand_f.html).

centralized services as well.<sup>187</sup> Moreover, the driving force behind opening of online stores was probably the need to stay viable in face of the emergence of the peer-to-peer phenomenon.<sup>188</sup> Yet, the centralized manner in which entering the online market was designed, is not intended to maximize the profits from the transactions for maximizing revenues, but rather to strengthen the hold of the industry itself on the digital distribution market.

But even assuming an honest and deep pessimism among record companies that leaves them unconvinced that the mere permitting of file-sharing will provide adequate compensation for artists, they could consider a modified version of it, which would allow a direct revenue stream. Various such schemes have already been suggested in academia and by market players that were calculated to achieve an amount of revenue which is at least equal to the alleged losses of the industry.

One set of models, which was offered by several commentators in different variations, is the imposing of a levy on devices and services that facilitate digital copying. Neil Netanel advances a model allowing unrestricted noncommercial file-sharing in return for a levy of approximately four percent of sales on related services and products.<sup>189</sup> Similarly, Raymond Ku supports a levy on Internet service and equipment

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<sup>187</sup> Such as the one provided by MySpace, founded in September 2008 following a lawsuit settlement with Universal Music. *See*, MySpace music page, [music.myspace.com](http://music.myspace.com); see also: Michael Arrington, *Confirmed: MySpace To Launch New Music Joint Venture With Big Labels*, TECHCRUNCH, Apr. 2, 2008, <http://www.techcrunch.com/2008/04/02/myspace-to-launch-new-music-joint-venture-with-big-labels/>.

<sup>188</sup> *See*, Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015 (2008).

<sup>189</sup> Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-To-Peer File-sharing*, 1 HARV. J.L. & TECH. 17, at 10-11 (Fall, 2003).

(but only if revenue from analog sources proves insufficient as an incentive for creation and distribution).<sup>190</sup>

An additional proposed scheme includes raising the royalty surcharge under the Audio Home Recording Act (AHRA),<sup>191</sup> and broadening the definition of “*digital audio recording devices*”<sup>192</sup> to include computers and all digital devices that contain hard drives.<sup>193</sup> A modified levy scheme is offered by the Electronic Frontier Foundation (EFF), basically consisting of a voluntary license offered by the copyright owners to allow file-sharing for a low periodical fee.<sup>194</sup>

An additional model, discussed by William W. Fisher, includes slightly increasing the federal income tax. Apparently, in order to collect the amount necessary to run the entertainment industry through taxes, each household would only pay an additional \$27 per year.<sup>195</sup> As either an alternative or as a precursor to the tax system, Fisher suggests that copyright holders will form an “Entertainment Coop”, a nonprofit organization, which will be responsible for the licensing of works for unrestricted use by individuals that are coop members and pay a monthly rate.

Daniel Gervais suggests, based on a 2004 Canadian court decision,<sup>196</sup> to apply existing collective licensing to the peer-to-peer context.<sup>197</sup> Lawrence Lessig supports

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<sup>190</sup> According to Ku’s calculation, a two percent levy could yield approximately \$1.3 billion annually. *See*, Ku, *supra* note 12, at 313 (2002).

<sup>191</sup> Pub. L. No. 102-563, 106 Stat. 4237 codified at 17 U.S.C. §§ 1001-10 (1994) imposes a 3% levy on the sales of blank digital audiotapes and a 2% levy on the sale of digital audiotape equipment. *See* 17 U.S.C. §1004.

<sup>192</sup> *See*, 17 U.S.C. § 1001(3) (1992) for the current definition of digital audio recording devices.

<sup>193</sup> Mary R. Wagman & Rachel E. Kopp, *The Digital Revolution is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J., 271, 304-305 (2006).

<sup>194</sup> Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File-sharing* (Feb. 2004), available at [http://www.eff.org/share/collective\\_lic\\_wp.pdf](http://www.eff.org/share/collective_lic_wp.pdf).

<sup>195</sup> FISHER, *supra* note 145, at ch. 6.

<sup>196</sup> *BMG Canada v. Doe* [2004] F.C. 88 (Can.).

such a solution as well, arguing for application of a tax in the meantime until permanent licensed music streaming replaces the current distribution scheme.<sup>198</sup>

Yet another model which was offered to allow file-sharing includes providing a free or low fee service that shares advertisement revenues. Such cooperative models have begun to emerge in the marketplace as well. Typically, these models are based on license agreements between copyright owners and technology providers that include profit-sharing scheme networks that share proceeds from the sale of advertising space with the copyright owners,<sup>199</sup> or through collection of low fees for downloads, and compensation of both copyright holders and users who upload music.<sup>200</sup>

Beyond valid criticism of each of these models,<sup>201</sup> their novelty is the abandoning of the pay-per-use scheme in favor of a more feasible collection system. In addition to providing the required revenue stream, these models include additional potential benefits. First, they all enable direct information on consumer preferences, reflected in their consumption. Such information can direct the industry better than the current model which is based on deducing future preferences from past preferences.<sup>202</sup> Second, it

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<sup>197</sup> Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 55-70 (2004).

<sup>198</sup> LAWRENCE LESSIG, FREE CULTURE 133-39 (2004).

<sup>199</sup> See, e.g., Qtrax (<http://music.qtrax.com/loginUserAction.do?action=loginPage>); SpiralFrog (<http://corp.spiralfrog.com/about.aspx>) and Ruckus (<http://www.ruckusnetwork.com/aboutus.php>) which secured deals with the big labels. See also, Robert Levine, New Model for Sharing: Free Music With Ads, NY TIMES, Apr. 23, 2007, <http://www.nytimes.com/2007/04/23/technology/23qtrax.html>.

<sup>200</sup> See, e.g., Grooveshark (<http://www.grooveshark.com/>). See also Altnet, an extension of the KaZaA service, which charges users for file-sharing services and shares the proceeds with copyright owners. See, <http://www.altnet.com/about/about.aspx>. (last visited, 3.17.09).

<sup>201</sup> See, e.g., Salil K. Mehra, *The Ipod Tax: Why The Digital Copyright System Of American Law Professors' Dreams Failed In Japan*, 79 U. COLO. L. REV. 421 (2008) (illustrating the difficulty of implementing a levy system in the real world given the possibility of regulatory failure). Christian L. CASTLE, Amy E. Mitchell, *What's Wrong With ISP Music Licensing?*, 26-FALL ENT. & SPORTS LAW. (2008); McDaniel, *supra* note 2.

<sup>202</sup> Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 389 (“Predicting whether a given work will succeed or fail has proven nearly impossible ... Despite the efforts of talent scouts (such as artist and repertoire, or “A&R,” specialists), record labels have not been able accurately to predict what music will prove popular.”).

provides a platform for creating and distributing more music, and thus increases revenue potential. In today's model, limited distribution resources prevent record companies from investing in all types of diverse music. Such models enable a market of revenue which is unharmed and probably enhanced, and, at the same time, allow unrestricted access to existing works, perhaps, at last, solving the incentive-access paradox.

Yet, the abandoning of the idea that every song is a tollbooth,<sup>203</sup> and therefore the common denominator of the above discussed models is the shift of the control over the works from the copyright holder to the general public at the moment it arrives in the public sphere.

This explains the RIAA's unwelcoming response to all of these proposals. It insists on not only receiving revenue for dissemination but also on maintaining control over the methods of distribution. The RIAA explains that *any* voluntary license creates a problem of free riding and thus is unfair, and that *any* compulsory license would involve the government in setting the price for music, thus being unacceptable.<sup>204</sup>

Other copyright owners reacted differently. Many private artists and marginal distributors who did not hold a dominant position in the market in the first place, often contentedly accepted the leeway that was opened by the file-sharing options, claiming that it opened broad opportunities for recognition and penetration into the market and for making profits in the process.<sup>205</sup>

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<sup>203</sup> See, Benkler, *supra* note 99, at 422.

<sup>204</sup> Lindsay Martell, *A License to Share: Group Proposes Music Licensing Scheme for Music File Networks*, ABCNEWS.COM, Mar. 1, 2004, [http://abcnews.go.com/sections/scitech/TechTV/music\\_download\\_license\\_techtv&uscore;040301.html](http://abcnews.go.com/sections/scitech/TechTV/music_download_license_techtv&uscore;040301.html).

<sup>205</sup> See, e.g., *Josh Kelly – Biography*, <http://artists.letsingit.com/josh-kelley-42nf1/biography> (“[Napster] helped me on this first album because nobody knew about it. It made it easier for people to know about the music.”); Courtney Love, *Courtney Love Does the Math*, Salon.com (June 14, 2000), available at: <http://www.salon.com/tech/feature/2000/06/14/love/print.html> (last visited: Mar. 6, 2008). Yet, the band

The agency problem prevents the expression of an efficient state of affairs that all parties could have gained from, and prevents bilaterally profitable bargaining in the file-sharing context. The industry, which purportedly fights for the interests of the artists, in fact holds them as hostages in its own battle for control. Indeed, the artists have long ago given up all control over their works and transferred it to the record companies, remaining with limited rights for revenues alone.

The claims of the industry, according to which revenues depend on control, topple like a house of cards in the face of the wealth of options to economically exploit the file-sharing uncontrolled market. The question that is left to examine therefore, is whether it is justified to provide the industry with the keys to the market of control.

#### IV. FILE-SHARING AND THE MARKET OF CONTROL

As opposed to the potential positive effect of file-sharing on the market of revenue, its effect on the market of control is indeed patently destructive,<sup>206</sup> an effect which is likely to increase if file-sharing becomes completely embraced and legitimate.

The essence of file-sharing is spreading out the dissemination mechanisms to a point where no central moderator is needed.<sup>207</sup> This concept is radical from the point of view of the record companies, as control of dissemination mechanisms is a key to controlling additional primary functions as well. For example, control of dissemination channels effectuates decision making power regarding content. In the current reality,

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Metallica sued Napster independently. *See*, *Metallica v. Napster, Inc.*, 2001 WL 777005 (N.D.Cal. Mar 05, 2001).

<sup>206</sup> Perhaps “creative destruction”. *See*, JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 81-86 (1976).

<sup>207</sup> *See, e.g.*, Elkin-Koren, *supra* note 114, 23 (Emphasizing the “decentralized architecture, lacking central control mechanisms” of peer-to-peer networks).

which is already substantially eroded de facto by file-sharing, the power to determine what, and whose, music will be recorded, released, distributed and promoted resides solely with the labels.<sup>208</sup> The artist is contractually obliged to accept their decision-making power,<sup>209</sup> and the public is a passive recipient of the material resulting from that power. As the dissemination power is decentralized, decision-making power will be derivatively decentralized as well. Materials will be released regardless of the labels' decisions, distributed independently and motivated by the audience's alternative decision-making power.

Similarly, the selection of the time and manner of releasing new music is undoubtedly impacted as well. Recently, a RIAA investigation led to filing a lawsuit by the Federal government against a person who uploaded songs from a Guns N' Roses album to the Internet before the album was officially released.<sup>210</sup> The RIAA, which took seventeen years to complete the album, demanding \$2.2 million in compensation, based on arguably 350,000 downloads of the songs, multiplied by the \$6.39 "wholesale legitimate price".<sup>211</sup> In fact, the album has reached the third place in charts anyway,<sup>212</sup> thus showing that apparently the early release did not result in a severe harm in the market of revenue. Nevertheless, the RIAA firmly opposes penetration into its control territory by an unauthorized entity.

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<sup>208</sup> See supra note 23 and accompanying text.

<sup>209</sup> See supra note 13 and accompanying text.

<sup>210</sup> See, *Unites States of America v. Kevin Cogill*, cr-01222-PLA. The RIAA's letter to AUSA Craig Missakian, U.S. Attorney's office in California of March 10, 2009, filed as Appendix B in the abovementioned trial. Available at <http://blog.wired.com/27bstroke6/files/linares.pdf> (last visited: 3.16.09).

<sup>211</sup> The federal prosecution of Los Angeles argues in this case for a compensation of \$371,622, in addition to a six months imprisonment. See *id.*

<sup>212</sup> David Kravets, *Feds Demand Prison for Guns N' Roses Uploader*, WIRED, Mar. 13, 2009, <http://blog.wired.com/27bstroke6/2009/03/feds-demand-6-m.html>.

In addition, the recording industry currently holds, at least theoretically, the control over the supply of musical works in the market. This control is destined to dissolve as well as supply becomes a direct function of demand in a file-sharing system.<sup>213</sup>

Prices of musical works will be affected as well, since the labels will truly need to compete in a free market of distribution, and perhaps to offer incentives to customers, such as additional features in their products, in order to motivate them to purchase, as opposed to freely consume, the music. Indeed, the RIAA asserts that this effect is already occurring, as reflected in the sales-decline.<sup>214</sup> However, instead of reacting by adjusting its prices or features to this reality, the RIAA is endorsing CD purchases by attempting to convince consumers that CD prices are in fact reasonable.<sup>215</sup>

Hence, the suppressing of competing dissemination technologies well serves the interests of the record companies in the market of control and fortifies their grip on it. In their controlled file-sharing-free market, no one can independently participate in the determination of the availability of music, and it is far harder to distribute for downloading even one's own self-created music without going through the industry's selection and contracting mechanism. File-sharing, even in its current unaccepted form effectually changes this state of affairs, and, as aforesaid, threatens to shake the market of control.

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<sup>213</sup> See, *supra* note 178 and accompanying text.

<sup>214</sup> See, RIAA Statistic.

<sup>215</sup> "Forty years ago, fans could walk into their local record store and buy an album for about \$3.75. That certainly sounds like a bargain, but adjust for the buying power of a dollar in 1967 versus a dollar now, and that album would cost nearly \$22 in today's currency! ... While many forms of entertainment have increased in price in both nominal and real terms, the price of a CD has actually decreased in real terms, and when adjusted for inflation, CDs are less expensive today than ever before." See, Recording Industry Association of America, *CDs: A Better Value Than Ever - An RIAA Report Prepared By the Communications and Strategic Analysis Department of the Recording Industry Association of America*, Aug. 2007, <http://76.74.24.142/F3A24BF9-9711-7F8A-F1D3-1100C49D8418.pdf>.

The consequences of the collapse of the market of control appear to be centered on two levels: the artist-label relationship and the public-music relationship. On both levels, the labels will probably move down in the power scale to a stance in which they will resemble a service-providing company rather than the ultimate representative of the music industry and leader of the copyrights agenda as a whole.

On the artist-label level, the opening of alternatives to the traditional distribution scheme can drastically transform the power balance in the industry. The labels' controlling status towards artists derives mainly from the inability of the latter to directly connect with their audience and to turn their music into a means for sustaining their living.<sup>216</sup> File-sharing is part of a line of technologies already emerging that open a direct communication lane and therefore potentially diminish the control of the labels.<sup>217</sup>

The most straightforward effect of the opening of alternatives would be utilizing them. Thus, artists will be able to produce and distribute their music on their own, perhaps outsourcing some functions to companies who offer these services for either flat rates or revenue-sharing.<sup>218</sup> Musicians will then have the ability to choose whether they prefer the larger service pack offered by the record labels or a more limited one offered by such companies, and they may well choose the latter for achieving a larger piece of the royalty pie.

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<sup>216</sup> See, e.g., Love, *supra* note 205.

<sup>217</sup> Other examples include sites and technologies that allow artists to create their own distribution means, e.g., <http://www.youlicense.com/>; alternative distribution channels which allow artists to maintain their royalties; <http://www.tunecore.com/>. See also, Nate Anderson, *Bands pressing major labels for control over copyright, more*, ARS TECHNICA, Oct. 6, 2008, <http://arstechnica.com/old/content/2008/10/bands-pressing-major-labels-for-control-over-copyright-more.ars>.

<sup>218</sup> See , Horace S. Manges, *Lecture--Surfing and Stealing: An Author's Perspective*, 23 COLUM. J.L. & ARTS 127, 132 (1999) (hypothesize such a shift regarding book authors). See also, <http://www.tunecore.com/>, a startup company which provides such service, *supra* note 217.

An indirect potential effect of opening alternative distribution schemes is the compelling of labels to offer competitive contracts to artists, in terms of both revenue-sharing and control over their works. Apparently, artist-label standard contracts can benefit from rebalancing. For years artists have tried to change their contracts to no avail,<sup>219</sup> due to the imbalance in bargaining power between record companies and artists.<sup>220</sup>

Traditionally, and until this very day, recording contract structures simultaneously enable the labels to make a considerable profit off an album, yet leave the artist indebted to the label for the same album for quite a while.<sup>221</sup> The artists' share of the revenue pie is normally 8-25% of the suggested retail list price of an album in the U.S..<sup>222</sup> Regarding sales abroad, some record contracts provide that such sales do not entitle artists to royalties at all.<sup>223</sup> Regularly, the label pays artists recoupable advances, and invests returnable or recoupable sums in promotion, distribution and further services.<sup>224</sup> Artists begin earning royalties only after these sums are fully returned to the label.<sup>225</sup> The

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<sup>219</sup> Sound Recordings as Works Made for Hire, *supra* note 14. (“Although the recording industry has changed considerably since the 1960s, the contracts signed between record companies and performers appear to have changed very little”).

<sup>220</sup> William Henslee, *Marybeth Peters Is Almost Right: An Alternative To Her Proposals To Reform The Compulsory License Scheme For Music*, 48 WASHBURN L.J. 107 (2008).

<sup>221</sup> See, Marshall Brain, *How Recording Contracts Work*, <http://entertainment.howstuffworks.com/recording-contract2.htm> (last visited Mar. 17, 2009). See also, Ku, *supra* note 12, at 307.

<sup>222</sup> Buche & Associates, P.C., *Music Law*, <http://www.westerniplaw.com/music.html> (last visited Mar. 17, 2009).

<sup>223</sup> See, Scamman, *supra* note, at 278. As per 2002, record companies were only paying royalties for sales abroad, if the artists had opened a foreign bank account in the country in which the music was sold. Needless to say, the artist had no control over the decision regarding in which countries her music will be sold and over their policy regarding holding a bank account. See, Hall, *supra* note 13, at 207.

<sup>224</sup> See, Scamman, *supra* note 15, at 274 (2008). The sums are recoupable and not returnable if they only need to be paid out of the records' proceeds and do not need to be returned in the absence of such proceeds.

<sup>225</sup> Record contracts usually include stipulations stating that the label does “not have to pay the artist any royalties... until the label has recovered, through a recoupment from the artist's royalties, its out-of-pocket production costs and advances.” See, Scamman, *supra* note 15, at 274 (2008).

striking data is that as of 2002, an estimated 99.6 percent of artists remained indebted to their labels.<sup>226</sup>

If the artist ever pays off her debts,<sup>227</sup> her share in the revenue-pie is still vulnerable to manipulations. As mere examples, at least 25% of royalties are regularly retained in a “reserve account”; royalties are discounted by up to 15% to cover the risk of breakage during shipping, by up to 25% to cover the cost of packaging, and by approximately 15% for records distributed for free at the label’s discretion. Absurdly, technological developments had the effect of increasing these fees although the price of conducting the service was reduced in pure economical terms.<sup>228</sup>

A transformation in the power balance can also increase the transparency in distribution of royalties to artists. The accounting system utilized by the labels is unconventional, to put it mildly.<sup>229</sup> The key according to which royalties are distributed among artists is often in the exclusive possession of the labels, and artists’ power to object to the figures is often impractical.<sup>230</sup> Transparency in this field can further empower artists and provide them with a larger share of the market of revenue as a result of decentralizing the market of control.

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<sup>226</sup> Hall, *supra* note 15, at 190. *See also* Love, *supra* note 205 (discussing how musicians end up in debt to major record labels); David Segal, *Aspiring Rock Stars Find Major-Label Deals-- and Debts*, WASH POST A1 (May 13, 1995) (same).

<sup>227</sup> As per 2002, an estimated 75% of releases from the major labels were not even in production and distribution, leaving artists with a debt they have no means of repay. *See* Hall, *supra* note 15, at 190-191.

<sup>228</sup> Even today, when the costs of digital distribution are practically nonexistent, some record labels have demanded that artists surrender even larger portions of their royalties for the cost of encoding the song to digital format, encryption, and digital delivery. *See*, Ku, *supra* note 12, at 307.

<sup>229</sup> “[I]n 99.99% of the audits [of a record label’s accounting for an album], the labels are found to have underpaid the artist”. *See*, Neil Strauss, *Behind the Grammys, Revolt in the Industry*, N.Y. TIMES, Feb. 24, 2002 (quoting Dixie Chicks’ manager, Simon Renshaw).

<sup>230</sup> The contracts allow the artists a year or two to object to the accounting figures, after which they become final. Although the contracts allow for artists to audit the label’s books, the costs involved in this process render it impractical for many artists. *See*, Scamman, *supra* note 15, at 277.

The current contracts have been uneven to the extent that multi-platinum selling bands have chosen to disband rather than ever record again under their contracts<sup>231</sup> and successful artists were filing for bankruptcy in order to release themselves from their recording contracts.<sup>232</sup>

Still the one thing that seems to trouble artists the most is the loss of the creative control in their work.<sup>233</sup> Artists protest against the requirement to surrender their artistic expression to their labels.<sup>234</sup> Yet, until recently, the imbalanced bargaining power and the absence of alternatives rendered every change in this state of affairs unrealistic. If the file-sharing technology can bring upon such change, it might increase the welfare and the creativity of artists to the benefit of all.

The “take it or leave it” nature of recording contracts and the basically identical conditions provided by each of the big companies enhance the unfairness of the contracts. Moreover, courts have not had an opportunity to hear challenges to these contracts. Artists are unlikely to sue, risking both financial resources and the future of their career, and when they threaten in suing, the labels settle the suits or renegotiate the contracts.<sup>235</sup>

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<sup>231</sup> Stan Swocher, *THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT* 46 (Schirmer Books 1999).

<sup>232</sup> Jennifer A. Brewer, *Note, Bankruptcy and Entertainment Law: The Controversial Rejection of Recording Contracts*, 11 *AM. BANKR. INST. L. REV.* 581, 582 (2003). The RIAA lobbied aggressively to amend the bankruptcy law in order to bring to a halt the bankruptcy escape route. At their behest, a bill that excluded “recording artists” from the ability to void burdensome contracts when in bankruptcy, at the courts’ discretions, was tucked into a 177-page bill by Florida Republican Rep. Bill McCollum. *See*, Katharine Q. Seelye, *Bankruptcies By Musicians Inspire a Bill*, *N.Y. TIMES* (May 15, 1998), available at <http://query.nytimes.com/gst/fullpage.html?res=9400E0D61330F936A25756C0A96E958260&sec=&spon=&pagewanted=all>.

<sup>233</sup> *See supra* note 19 and accompanying text.

<sup>234</sup> RadioHead’s explanation of the circumstances leading to leaving their record company was based exactly on this point: “What we wanted was some control over our work and how it was used in the future ... [EMI] was not interested.” *See*, *FYI\_If You Care*, <http://www.radiohead.com/deadairspace/index.php?a=324> (Dec. 29, 2007).

<sup>235</sup> Hall, *supra* note 15 at 191.

The justification for providing copyright owners with control is in essence to provide them with an incentive to create.<sup>236</sup> The justification is eroded as control wanders away from artists and moves to the label as explained above.<sup>237</sup> As stated by Jessica Litman, the recording industry perhaps provides the best demonstration that artists create even when money is not forthcoming.<sup>238</sup> If the idea of providing incentives to create is to be taken seriously, and its sense of justice calls upon society to compensate artists, empowering artists and changing the power balance between them and their record companies appears to be an appealing scenario.

The industry's control is not a desired state of affairs in the public-music relationship as well. As opposed to the controlled nature of music, file-sharing creates both alternative markets for music and a market for alternative music. Our culture is built upon the delicate tension between sharing of the same cultural components on the one hand and diversifying the content on the other, and a decentralized structure enhances them both.

As for the first aspect, file-sharing has the power to significantly increase the access to music to the benefit of society,<sup>239</sup> as access stands in a reverse relationship with prices. For a long period of time, not only was this point demonstrably missing from the debate, but was also explicitly denied by some judges and scholars. Justice Blackmun, for example, noted in the *Sony* case that “*When the ordinary user decides that the owner's*

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<sup>236</sup> See, Wagner, *supra* note 142, 1018 (2003) (“As a general matter, greater control should yield greater incentives, and thus greater production of works”).

<sup>237</sup> See, *supra* notes 13-19 and accompanying text.

<sup>238</sup> See Litman, *Supra* note 64.

<sup>239</sup> See, Darrow, Jonathan J. & Ferrera, Gerald R. , *Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?*, 6 NW. J. TECH. & INTELL. PROP., 1 (2007).

*price is too high, and forgoes use of the work, only the individual is the loser*”.<sup>240</sup> This view is reflected in the *Napster* and *Aimster* decisions as well.<sup>241</sup> Such views attribute no societal value to the exploitation of copyrighted works, and accordingly tend to entitle copyright owners to high levels of control over the works. Similarly, the industry does not at all internalize the social costs of limited access to music nor the positive externalities that are created by such access. On the contrary, every free consumption is, in its view, a loss.<sup>242</sup>

In fact, however, access to music carries tremendous importance from a societal point of view, as it implies access to language as well as to a variety of educational, cultural and societal content.<sup>243</sup> The dependency of consumption upon central and often costly resources stemming from the industry’s control entails social costs, as a result of exclusion of certain groups (usually those who cannot afford to purchase the music) from this collective. An affordable distribution service enables the free exchange of culture and ideas regardless of economic status,<sup>244</sup> and thus increases the ability to take part in the cultural discourse, which is in the interest of society and of the individuals who are part of it.<sup>245</sup>

As for the second aspect, removal of centralized control can promote the creation of alternative and diverse music, stemming from the fact that, as explained above, control

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<sup>240</sup> See, *Sony*, at 477 (Justice Blackmun dissenting).

<sup>241</sup> See, *Napster*, *supra* note 69, *Aimster*, *supra* note 70 and accompanying text.

<sup>242</sup> See the RIAA’s representative statement in Congress, *supra* note 164.

<sup>243</sup> See also, PLATO, *THE REPUBLIC OF PLATO* 400 (1908) about the importance of music to the individual.

<sup>244</sup> Meghan Ruesch, *Note. Creating culture: protection of traditional cultural expressions and folklore and the impact on creation and innovation in the marketplace of ideas*, 35 SYRACUSE J. INT’L L. & COM., 369, 398 (2008).

<sup>245</sup> See, Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH L J 535, 558 (2000) (“[F]ree information flows are central to freedom—both in the sense of personal autonomy, and in the sense of political or democratic self-governance. Policies that block off various flows of information, or maldistribute access to and control over our information environment, affect all of our abilities—both as individuals and as members of communities—to be self-governing”).

over dissemination effectuates control over content. A centralized dissemination model subjugates the availability of music to the business interests of the record industry, which favors mainstream music, as such music would most probably return the investment.<sup>246</sup> The mainstream preference may be to the detriment of both most artists and the public at large, and due to the unavoidable effect of designing the audiences' preferences, it creates a cycle that sustains itself and further strengthens the grasp of the industry's control. In contrast, in a decentralized model, availability will reflect preferences of consumers and not the commercial interests of the industry.

Along the same lines, while new or marginal artists represent for the record companies a source for risk, for society they represent creativity and wider selection opportunities.<sup>247</sup> Reducing the industry's control can therefore bring marginal work, including works that were marginalized as a result of inferior treatment, to the front of the stage.

A related and extremely interesting effect of a decentralized model is the reshaping of the classic dichotomy between producers and consumers of music. The shift to a decentralized model enhances the ability to create authentic music and bring it to recognition without contracting with industry players who pressure creators towards the mainstream taste. Turning individuals from passive consumers into an active participant in designing the new generations of music through selection, creation, or distribution<sup>248</sup> engages individuals in the public sphere, thus enhancing the democratic nature of

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<sup>246</sup> See, Elkin-Koren, *supra* note 114, at 23.

<sup>247</sup> *Id.*

<sup>248</sup> Today's inexpensive technology created a wave of altruism, individuals who upload materials for no expectation of profit, to contribute their share to the system's functioning. See, Keidar, Roie Melamed & Ariel Orda, *EquiCast: Scalable Multicast with Selfish Users*, PROC. OF THE 25TH ACM SYMPOSIUM ON PRINCIPLES OF DISTRIBUTED COMPUTING, 63 (2006).

society.<sup>249</sup> Paradoxically, it is the phenomenon of mass user-created content through file-sharing and other technologies that is under attack by the RIAA as threatening creativity.

The existence of an agency problem prevents an efficient state of affairs from which all relevant parties could benefit. Record labels' control is not only unjustified on a constitutional basis, but is also to the detriment of both artists and society, who are trapped in an agency problem that forces the recording industry upon them as representatives and as mediators, depriving them of the advantages of new technological advances and denying the artists revenues and creative channels they seek to explore.

Interestingly, the industry is resisting a process it created with its own hands for artists half a century ago. It compelled them to surrender control over their works and be satisfied with the market of revenue alone. Today, reality and technology have led record companies down the path they delineated for artists – release control and let revenues suffice. Their resistance is apparent, but the structure they created for the music industry provides the best demonstration that the Gordian knot between the market of control and the market of revenue was, in fact, already untied.

## CONCLUSION

With an eye towards the future, the interesting question that arises from the above analysis is, where is this process headed from here? One prediction for the near future is a collapse of the RIAA, mainly due to the challenges posed by digital technology. The

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<sup>249</sup> See, Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002).

future may perhaps lead to the RIAA's merging into the global IFPI organization. The mass lay-offs in the RIAA in the past month may support such a forecast.<sup>250</sup>

An additional possibility is a gradual understanding by the RIAA that the age of control has passed, resulting in a gradual surrendering of control. The contracts with powerful companies which operate online stores can indicate, in support of this view, a willingness to divide the control pie. The abandoning of DRM devices in a number of frameworks may signal an additional step further in this direction. Rumors about a covert scheme to apply a levy system on file-sharing have been around for a while,<sup>251</sup> and may contribute to the strength of such a theory.

Yet, not all are optimistic regarding the readiness of the recording industry to surrender the keys to the market of control. "Pessimists" point to the new agenda topic of contracting with ISPs, still-uncompromising recording contracts with artists and widening campaigns, as well as to the additional measures discussed above which are still employed by the industry. The prediction stemming from these measures is an even stronger attempt to apply censorship and tracking of file-sharing services and users.

Only the future will tell what the day will bring and what will be the path the industry has chosen to follow. Beyond its advantages, the file-sharing phenomenon is already out there, and apparently is here to stay, at least until a newer technology emerges to take its place. The industry must ultimately choose between remaining a relevant player in the swiftly changing market, or standing its ground in the fight over control, a fight in which history has shown that useful technology tends to emerge as the victor.

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<sup>250</sup> See, e.g., David Kravets, *Report: RIAA Undergoing Massive Layoffs*, WIRED, Feb., 27, 2009, <http://blog.wired.com/27bstroke6/2009/02/riaa-undergoing.html>.

<sup>251</sup> Frank Rose, *Music Industry Proposes a Piracy Surcharge on ISPs*, WIRED, Mar. 13, 2008, [http://www.wired.com/entertainment/music/news/2008/03/music\\_levy](http://www.wired.com/entertainment/music/news/2008/03/music_levy).