Ending the Power to Say No: The Case for Extending Compulsory Licensing to Cover Digital Music Reproduction and Distribution Rights

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Abstract: This paper argues that the recording industry has abused its power to deny uses of copyrighted music and has failed to satisfy the constitutional purpose of copyright of providing for the public benefit. As a result, this power should be removed and replaced with a compulsory license system similar to the Section 115 Reform Act of 2006 (SIRA), which would create a blanket collective license covering digital reproduction and distribution rights for musical works. Additionally, in order to remove the cloud of uncertainty which surrounds music used in user-generated videos, Congress should consider extending the compulsory license regime to cover audio-visual synchronization rights for user-generated video on websites such as YouTube.
If there is one thing the previous decade has taught us about the recording industry, it is that the major record labels never miss an opportunity to miss an opportunity. From their initial failure to embrace Napster in 1999 to the public relations disaster of their failed lawsuit campaign against tens of thousands of online file-sharers, record labels have consistently failed to respond to the wishes of their customers and provide them with a convenient and cost-effective means of acquiring digital music. Over the last ten years, the major record labels have used their exclusive right to control the reproduction and distribution of musical works first as a way to prop up failing business models that proved unsustainable in the digital world of the Internet, then as an anti-competitive strategy to pick favorites among digital music distributors and to impose odious limitations on consumer freedom in the form of digital rights management (DRM). Such behavior will only continue to occur as long as the recording industry relies on a business model of top-down, monopolistic control rather than one that is competitive and driven by meeting consumer demand.

Because the recording industry has a demonstrated history of failing to exercise its right to say “no” to uses of copyrighted music in a responsible and socially-beneficial manner, this paper argues that power should be taken away and replaced with compulsory licenses covering all digital reproduction and distribution of music. First, it will examine the constitutional and economic basis for granting copyright owners exclusive rights to approve or deny uses of copyrighted material. Second, it will describe how the recording industry has failed to exercise these rights responsibly, and how it has instead acted to the detriment of society. Finally, the paper will propose extending compulsory licenses to cover all digital reproduction and distribution rights for musical works, and will examine the benefits of this solution.
I. The Constitutional and Economic Basis for Granting Exclusive Copyrights

United States copyright law grants copyright holders five basic exclusive rights: (1) reproduction, (2) distribution, (3) preparation of derivative works, (4) public performance, and (5) public display.\(^1\) Any use of a copyrighted work which is not authorized by the copyright holder and which infringes one of these rights is unlawful. Exceptions are made for uses which fall under the statutory “fair use” exception and for uses which are covered under “compulsory licenses,” under which anyone is allowed to make use of copyrighted material provided copyright holders are paid a standard fee set by statute. Copyright holders have no power to prevent these uses. Currently compulsory licenses cover most types of public performances such as radio play, as well as the right to produce “cover” recordings of a composer’s song once an initial recording has been made.\(^2\) In all other circumstances, copyright holders (which in the case of music are usually record labels) have an absolute right to approve or deny any use of a copyrighted work.

The constitutional purpose of copyright law is “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.”\(^3\) Fundamentally, copyright law exists to promote the production of creative works, and in doing so must balance two distinct interests—the right of society to have access to and benefit from creative works, and the need to allow creators to benefit financially from those works in order to motivate their production.\(^4\) This balance is achieved by granting creators a temporary monopoly over the use of their works, which gives them the incentive and financial means to produce the works.\(^5\) Creators’ rights, however, are always considered secondary to the public

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\(^3\) U.S. Const. art. I, § 8.
benefit. As commentator Mark Nadel states, “Granting the copyright holder a virtual monopoly by prohibiting the unauthorized copying and sales of copyrighted works is a necessary evil for attracting the financial investments needed to promote the creation and distribution of these creative works.”

Contrary to the claims of many copyright holders, copyright is not based on the recognition of a fundamental right to control and benefit from intellectual property, but is rather an economic bargain to encourage socially beneficial creativity. Indeed, Congress has explicitly rejected the idea that copyright is based on natural rights, but has instead stated that its purpose is for the benefit of the public. Economically, creative works (also called “information goods”) such as music are considered “public goods,” which are characterized by non-rivalry (one use does not compete with another) and non-excludability (difficult or impossible to limit access to). These goods are typically difficult to profit from, and because they generally have fairly high production costs, there would be little incentive for people to produce them unless there is some guarantee that they can profit from their efforts.

Copyright laws protect producers’ ability to price information goods above their cost of production by artificially limiting the supply of those goods and restricting access to them, reintroducing rivalry and excludability to what would otherwise be public goods. These restrictions

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5 Id.
6 United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”).
8 See H.R. REP. NO. 60-2222, at 7 (1909) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served. . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given . . . .”).
10 Id. at 24 (“To the extent that an information producer is unable to recover the costs of production, incentives for the production of information goods, such as copyright material, are undermined.”).
allow creators to profit from creative works, motivating the production of works that would not otherwise be created. While this involves some deadweight loss to society through decreased access to copyrighted works, the monopoly created by copyright is considered justified as long as it results in a net gain to society in the form of more information goods being produced. Conversely, when the exclusive rights granted by copyright do not result in a net benefit to society, they are not justified. Therefore, if a particular right granted by copyright law does not produce a net benefit to society, it should be removed.

II. The Recording Industry’s Failure to Exercise its Rights in a Socially Beneficial Manner

A. “Push” vs. “Pull” Marketing and Why the Music Industry Will Always Resist Innovation in Digital Music Distribution

The music industry has traditionally followed what copyright scholar William Patry terms a “push marketing” system, in which businesses sell products based on what they want to sell to consumers rather than what consumers want to buy. Because the major record labels have a virtual monopoly on recorded music with little meaningful competition, they can afford to sell music entirely on their terms, and are thus insulated from having to respond to consumer preferences like traditional businesses. Patry likens this system to the command-and-control economy of the Soviet Union, in which the Politburo determined what goods the people could buy, in what quantities, and for what price, rather than allowing normal market forces of supply and demand to operate.

Likewise, the music industry has long been accustomed to dictating the terms under which consumers may buy their music. Prior to the mid-1990s, the exclusive rights granted by

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11 See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) (“The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”).


13 Id. at 6.

14 Nadel, supra note 7, at 787.
copyright allowed record labels to control nearly all aspects of the production, distribution, and sale of musical recordings. Music was produced in the record label’s recording studios and sold either at stores directly owned by the music labels (such as Virgin Records stores) or by approved distributors who paid the labels royalties for each sale. No one obtained a new copy of music except through the labels’ approved distribution channels. As a result, the music labels could sell music on whatever terms they wanted, and consumers either had to accept those terms or simply not buy music. As Patry states, “Due to their push mentality, the copyright industries view the entirety of copyright as unidirectional: the public is a passive participant, whose role is simply to pay copyright owners, or to stop using copyrighted works.”15

Such a system, however, is completely reliant on exercising absolute control over the entire distribution chain, since any competition in format or distribution methods would reveal the inevitable disparity between the music industry’s products and actual consumer preferences. This would quickly cause the record labels to lose business to those better able to meet consumer demand. As a result, copyright holders are extremely resistant to any innovations in technology or business models which weaken their control over the distribution of their products.16

This resistance to innovation is especially strong with regard to Internet distribution systems, since the Internet inherently leads to “pull marketing.”17 In contrast to “push marketing,” in “pull marketing” sellers take their cues from consumers, and must constantly adapt their products to rapidly changing consumer preferences in a highly competitive environment. “Push marketing” treats consumer demand as something which can be foreseen ahead of time by marketers who then sell products based on what they expect consumers to buy. “Pull marketing” treats demand as uncertain and endeavors to quickly respond to consumer

15 Id. at 8.
16 Id. at 6.
17 Id.
preferences with an ever expanding range of options, harnessing the creative ideas of consumers in order to offer goods and services more closely tailored toward meeting their needs.¹⁸

Unlike traditional media business models which were based on one-way distribution from producers to consumers, the Internet is inherently participatory and collaborative, blurring the line between producer and consumer. The user-generated “remix culture” of the Internet (blogs, comment systems, YouTube videos, etc.) allows consumers to interact directly with producers and make their preferences known, and in some cases to become creators themselves by “remixing” and transforming existing creative works into something new.¹⁹ This participatory culture coupled with the high degree of competition among online services and the ability of Internet users to share files directly amongst themselves, “renders push marketing and vertical monopolization impossible.”²⁰

Because the ethos of the Internet is completely antithetical to their traditional business models, it is natural for the copyright industries to fear it. As a result, when given the power to say “no” to new modes of online distribution that compete with their traditional top-down approach to marketing and distribution, copyright holders will almost always say “no,” unless great pressure is brought to bear on them to decide otherwise. As seen below, such has been the history of the major record labels’ interactions with online music distributors, which have exhibited a consistent pattern of initial outright refusal by the record labels to endorse new business models, followed by eventual, grudging acceptance. Any innovation that has occurred in online music distribution has occurred in spite of the copyright holders, not because of them, and it is for this reason that their power of refusal must be taken away.

¹⁸ Id. at 6–7.
¹⁹ Id. at 7.
²⁰ Id.
III. The Record Labels’ History of Saying “No” to Innovations in Digital Music

With the advent of the Internet, record labels lost the ability to have complete control over distribution of sound recordings. Peer-to-peer (P2P) file-sharing networks such as Napster allowed consumers to rapidly transmit high quality copies of music anywhere on the planet without the approval of the record labels. Napster posed a direct threat to the record labels’ control of distribution channels and their business model of selling albums rather than individual songs, and they quickly moved to shut it down.\(^\text{21}\) Only recently have music industry executives begun to acknowledge that this was a mistake, for in doing so they missed a key opportunity to embrace the advantages that a digital distribution system such as Napster could have offered, and also missed the chance to head off many of the problems of the file-sharing wars that followed.\(^\text{22}\)

According to William Patry, “Napster is reported to have offered a billion dollars to the industry to settle the litigation and to be permitted to operate Napster solely as a licensed subscription service, paying a monthly subscription fee of $10, split fifty-fifty between Napster and the music industry.”\(^\text{23}\) Patry states that if even half of Napster’s users had signed up for the service, the music industry could have made $792 million a year from the deal.\(^\text{24}\) However, the record labels refused the offer and Napster was forced to shut down in 2002, only to be bought by another company which operated it as a DRM-crippled subscription service with only a fraction of the users of the original Napster.\(^\text{25}\) The music industry had lost its chance, both to make a large profit from digital distribution of music at the outset of the technology, and to give consumers what they truly wanted—cost-effective and easy access to unlimited amounts of

\(^\text{21}\) Id. at 2.
\(^\text{23}\) PATRY, supra note 13, at 1.
\(^\text{24}\) Id.
digital music. As journalist Steve Knopper wrote, “Label chiefs were so bogged down in the file-sharing battleground that they refused to act on the digital future of the business. Many figured they would simply win in the courts and the CD-selling business would go back to normal.”

In the wake of the Napster shutdown, the P2P market fragmented. Instead of one monolithic file-sharing service that nearly everyone used, numerous other networks sprang up (Grokster, Kazaa, Limewire, Bittorrent, etc.), and as soon as one file-sharing service was shut down another took its place. When suing file-sharing services failed to stem the tide of online music piracy, the labels turned to suing individual users of these services. Between 2003 and 2008, the Recording Industry Association of America (RIAA) either sued or threatened legal action against over 30,000 Americans, typically securing settlements of around $3000. This lawsuit campaign resulted in a widespread backlash against the recording industry by consumers and the press, and not only failed to cause any substantial reduction in file-sharing but also caused the labels to lose more money through litigation costs than was lost through file-sharing alone.

In December 2008, the RIAA finally announced that it would end its policy of pursuing mass lawsuits against consumers, preferring instead to work with Internet service providers (ISPs) to cut off Internet service to those accused of music piracy in so-called “graduated response” programs. However, over one year later such agreements have failed to materialize, as not one U.S. ISP will acknowledge cooperating with the RIAA to terminate users accused of

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26 Patry, supra note 13, at 9.
28 Id.
30 Patry, supra note 13, at 11.
piracy. While several other countries including France, Britain, South Korea, and Taiwan have passed some form of “three-strikes” legislation to terminate Internet access for users accused of file-sharing, such legislation has yet to appear in the United States and would be highly unlikely to pass, both for political reasons and constitutional concerns over due process.

Even as it engaged in mass lawsuits against file-sharers, the recording industry made at least some progress in offering legal alternatives for acquiring digital music. Two years after Napster was shut down the labels opened their own subscription services, PressPlay and MusicNet. According to Patry, “those services were predictable failures because they offered songs only from their own label owners.” According to a federal anti-trust action over these services which the Second Circuit recently allowed to proceed, in order to obtain music from all four major record labels, a consumer would have had to sign up for both services at a combined cost of $240 per year. Subscribers were also required to submit to onerous DRM restrictions which prevented copying music onto portable players, limited how many songs they could copy to CDs, and required them to repurchase songs every year. After these services came under Department of Justice Investigation for being designed to impede the growth of authorized digital music stores in a manner that could not compete with CDs, the labels reluctantly began licensing music to other digital stores (though initially only under the same terms as PressPlay

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33 PATRY, supra note 13, at 8.
34 Starr v. Sony BMG Music Entm’t, 592 F.3d 314, 318, 327 (2d Cir. 2010).
35 Id. at 318.
36 PATRY, supra note 13, at 9.
and MusicNet\textsuperscript{37}). One of these was Apple’s iTunes service, which became a great success and soon grew to dominate digital music sales.\textsuperscript{38}

However, even then the labels refused to give consumers what they really wanted and insisted that all music sold in digital format be crippled with DRM, which limited the number of computers songs could be played on and often prevented consumers from transferring music onto the MP3 player of their choice.\textsuperscript{39} DRM also prevented consumers from exercising their rights to make transformative uses of music under the fair use doctrine, and in some cases when online music stores went out of business and took their authentication servers offline, users lost access to their legally purchased music entirely.\textsuperscript{40}

Finally in 2007 the recording industry began to yield to growing pressure from consumers to begin selling music without DRM. However, this would not come without a price, as the major labels used DRM-free music as a means to manipulate the digital music industry in their favor. All four labels began allowing Amazon to sell DRM-free music in January 2008, but it was not until more than a year later that Apple was allowed to do so, and only after Apple agreed to abandon its blanket ninety-nine cent per track price in favor of a three-tiered pricing structure.\textsuperscript{41} Offering other music stores DRM-free tracks while denying them to Apple thus enabled the music industry to undermine Apple’s dominant market position and increased its

\textsuperscript{37} Starr, 592 F.3d at 318.
bargaining power with Apple—a clear abuse of the recording industry’s monopoly power to manipulate external markets through anti-competitive behavior.

While all digital music stores that sell music are now DRM-free, all digital music subscription services continue to employ restrictive DRM. While studies have indicated that people are willing and eager to pay for unlimited, DRM-free subscription services, the recording industry’s insistence that subscription services continue to use DRM has significantly hindered their potential to compete with P2P networks, even when offered for free.

In 2007, two innovative subscription services, Ruckus and SpiralFrog, were launched. Both offered free, licensed, ad-supported music downloads. While SpiralFrog was available to the general public, Ruckus specifically targeted college students and required an “.edu” email address to sign up. However, both services only offered music using Microsoft’s PlaysForSure DRM, which prevented users from burning music to CDs or transferring it to portable music players. This severely limited these services’ popularity, and both sites were forced to shut down in 2009 when their business models proved unsustainable. Once again the recording industry had missed its chance to meet consumer demand through its short-sighted insistence on control.

IV. The Case for Extending Compulsory Licenses to Cover Digital Reproduction and Distribution Rights

A. Collective Licensing and the Section 115 Reform Act of 2006 (SIRA)

Each of the music industry’s failures to meet the demands of consumers described above stem from a common theme—the record labels’ refusal to license uses of copyrighted music that

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would have been beneficial to the public yet threatened the industry’s existing business models. The result has been decreased innovation, unnecessary mass lawsuits against consumers, and public outrage against the industry. As William Patry states, “Copyright has become the mechanism to eliminate consumer choice, innovation, and the creation of culture. Copyright is now a serious impediment to technological and social progress.”45 Because giving record labels the power to say “no” to uses of copyrighted works has proven detrimental to our society, this power must be taken away and replaced with a system of blanket compulsory licensing for all digital reproduction and distribution of musical works.

Collective licensing has been proposed as a solution to file-sharing for years, as it would allow P2P networks to become legitimized.46 While organizations like the Electronic Frontier Foundation have stated that voluntary collective licensing would be preferable to compulsory licensing, they have also acknowledged that if the music industry refuses to agree to a collective licensing system, a compulsory system may be necessary to “force their hand.”47

The best system of compulsory licensing yet proposed was the Section 115 Reform Act of 2006 (SIRA), which would have created a blanket license covering all rights necessary for digital reproduction and distribution.48 According to commentator Stephanie Booth, “SIRA compels the grant of a blanket license, which provides for an automatic grant to any digital music provider that wishes to distribute online music.”49 Under SIRA, once a potential licensee files a notice with a copyright holder’s designated agent, that licensee would be entitled to distribute all of that artist’s past musical works upon payment of a blanket license fee to a

45 Patry, supra note 13, at 121.
49 Id.
performing rights society, at a rate set by the Copyright Royalty Board.\textsuperscript{50} Easy access to licensable music is facilitated by an online database compiled by the Copyright Office (which copyright holders would be required to register with in order to secure copyright protection), containing a complete catalogue of copyrighted music and contact information for designated agents.\textsuperscript{51}

Even though SIRA failed to pass in 2006, the need for a collective licensing system for digital music distribution is strongly supported by the Copyright Office. In her testimony before the House Judiciary Committee’s Subcommittee on Courts, the Internet, and Intellectual Property, Register of Copyrights Marybeth Peters acknowledged that, “While it was widely recognized that the performance right could be cleared easily with blanket performance licenses from the three performing rights societies, it became apparent that no similar mechanism existed to clear the reproduction and distribution rights with equal ease.”\textsuperscript{52} Peters argued that digital distribution of music often blurs the line between distribution and performance, making it difficult for providers of online music services to determine which license is required. This combined with the high cost of negotiating separate (and in some cases redundant) licenses with multiple rights holders for the same songs makes starting an online music service highly prohibitive. Those companies that have created successful online music stores have only done so in the face of considerable legal uncertainty and the continuous threat of lawsuits.\textsuperscript{53}

Peters said it is critical that Congress pass legislation to clarify the rights implicated by digital music distribution, and to alleviate the significant burden of negotiating licenses with

\textsuperscript{50} Id. at 17.
\textsuperscript{51} Id. at 19.
\textsuperscript{52} Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 110th Cong. (1st Sess. 2007) [hereinafter Hearings] (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), http://www.copyright.gov/docs/regstat032207-1.html.
\textsuperscript{53} Id.
individual rights holders by establishing a blanket compulsory license covering all the rights necessary for such distribution. Because “[t]he problems associated with clearing the mechanical rights for musical works are fundamentally the same as those associated with clearing the performance rights for sound recordings,” Peters considered it logical to provide the same collective licensing system for distribution rights as is currently available for performance rights, and to unify them under a single blanket license.\textsuperscript{54}

Such a system would greatly reduce the burden of clearing rights by providing “one-stop shopping to the music services both for the license and for the payment of the royalty fees.”\textsuperscript{55} It would also benefit rights holders in two ways, first by allowing economies of scale to reduce the administrative costs associated with collecting and distributing royalties, and second, by increasing the possibility that an individual artist’s work will be used and sold because it is easier to license. Peters concluded that, “If music licensing reform is successful, consumers will be able to access more legal music online, through a variety of competing services, and be less tempted by piratical services that today can already offer every song ever written for free.”\textsuperscript{56}

\section*{B. Proposals for Improving SIRA}

As originally proposed, SIRA had several flaws which would need to be corrected in any version of the legislation that is ultimately adopted. First, SIRA should address the current ambiguity over whether a digital download is considered a performance or a delivery.\textsuperscript{57} Because digital music can take on characteristics of both a performance and a distribution of a copy, it is often unclear whether digital music stores must license either distribution or public performance rights. Music publishers argue that digital transmissions of songs implicate both rights, and

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Booth, supra note 48, at 22.
frequently attempt to require distributors to pay both license fees for the same act of transmission.\textsuperscript{58} Any blanket license system that is adopted must clarify which rights are implicated by different types of digital transmissions—a point on which, according to Booth, SIRA as originally proposed was vague.\textsuperscript{59} Since under SIRA both distribution and performance rights would be covered by blanket, compulsory licenses, the simplest option would be to merge the two rights and merely require all digital music services (whether streaming or download) to acquire a single, unified license covering all rights necessary to distribute digital music.

Second, as originally proposed, SIRA only offered a collective license system covering all rights necessary to distribute a wide collection of songs.\textsuperscript{60} Booth argues that SIRA should be amended to include the option for licensees to choose to license songs on an individual basis, rather than only having the blanket option.\textsuperscript{61} As Booth explains:

Larger companies who favor dealing in bulk will likely choose the collective license option of a particular organization that carries a large catalog of popular titles. The per song option should still be available for those digital music services who want to specialize and offer a more tailored catalog to its consumers.\textsuperscript{62}

Allowing licensees to choose between a blanket license and a per-song license would therefore allow for maximum flexibility in the types of business models supported by the new compulsory licensing regime, maximizing the potential for flexibility and innovation in the digital music market.

Finally, Congress should consider allowing user-generated video sites such as YouTube to take advantage of the compulsory licensing regime established by SIRA. Currently, many of the most popular types of videos on YouTube and similar sites use copyrighted music in the

\textsuperscript{58} Hearings, supra note 52 (statement of Marybeth Peters).
\textsuperscript{59} Booth, supra note 48, at 22.
\textsuperscript{60} Id. at 23—24.
\textsuperscript{61} Id. (“The companies licensing the download should be free to decide for themselves how to offer their service. Even performing rights societies offer broadcasters the choice to license songs on a per program basis or blanket basis depending on what best suits the licensee's business model.”).
\textsuperscript{62} Id. at 24.
background. These videos range from teenagers singing covers of copyrighted songs in their bedrooms to “fanvids,” where amateur video editors take popular songs and create music videos using video footage from their favorite movies, TV shows, and video games. While the latter videos are often quite sophisticated and creative, they exist under a cloud of legal ambiguity. While some may qualify as “fair use” and would therefore not infringe copyright, because these videos frequently use entire copyrighted songs, fair use as it is currently interpreted would be unlikely to apply.\(^\text{63}\) It is thus likely that the majority of user-generated videos on sites like YouTube using copyrighted songs are technically infringing, and are liable to be taken down by copyright holders at any time.

Even though under the safe harbor provision of the Digital Millennium Copyright Act of 1998 (DMCA) it is under no legal obligation to do so, YouTube has attempted to provide some measure of protection for its users’ videos by negotiating blanket licenses with record labels allowing their songs to be used in user-generated videos on the site.\(^\text{64}\) In exchange, YouTube agrees to share with the record labels a percentage of the revenue it gains from showing advertisements next to these videos.\(^\text{65}\)

However, YouTube has frequently run into difficulties negotiating these licenses, as record labels will often hold out for a higher share of the ad-revenue, and if they are unable to reach a compromise YouTube is forced to block all videos on the site using music by that record label.\(^\text{66}\) This most famously occurred in December 2008, when YouTube failed to reach a licensing agreement with Warner Music Group (WMG) when WMG demanded much higher

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\(^\text{64}\) See Press Release, YouTube, Sony BMG Music Entertainment Signs Content License Agreement with YouTube (October 9, 2006), http://www.youtube.com/press_room_entry?entry=2cwCau7cKsA.

\(^\text{65}\) Id.

license fees than they had previously been paid, and YouTube subsequently blocked thousands of user-generated videos using WMG’s songs (many of which may have been fair use). Much valuable creativity on the site was lost due to WMG’s intransigence in its refusal to license its songs at rates YouTube could afford. If YouTube could obtain a compulsory license for the music used in videos on its site, the frustrations of negotiating licenses with individual record labels and the lost creativity that results from breakdowns in these negotiations could be avoided.

While music used in videos technically falls under the derivative works right, when made available on streaming sites like YouTube, distribution and performance rights are implicated as well. It would be relatively simple for Congress to extend the compulsory licensing regime created by SIRA to cover audio-visual synchronization rights for user-generated video sites. As individual users on sites like YouTube currently have no other means to license music for their videos, allowing user-generated video sites to take advantage of compulsory licenses to indemnify users against liability for infringement would be the simplest solution to this dilemma.

C. The Benefits of Enacting Compulsory Licensing

The most immediate benefit of enacting a compulsory licensing system like SIRA would be a significant increase in the number of online music services following a wide variety of business models. Once freed from having to negotiate licenses with each individual record label and other rights holders, it would be relatively easy to start an online music store. New all-you-can-download subscription services similar to Ruckus or SpiralFrog would be more likely to succeed when not required to impose onerous DRM restrictions as a condition of securing licenses from record labels.

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One example of an innovative online music service that could be made possible by compulsory licensing is Spotify, which is an unlimited, on-demand music streaming service currently available only in Europe.69 Under the current system, in order to qualify for a compulsory digital performance license, music streaming services must be “non-interactive,” which means they must follow a sequential playlist similar to a terrestrial radio station, and users may not choose what songs to play. “Interactive” services must negotiate licenses with each individual rights holder.70 Spotify offers a completely interactive streaming service, where users do not actually download songs but play them streaming on demand over a peer-to-peer based system.71 Users may choose from either a free, ad-supported account or a premium, paid account, but both types of accounts have the same unlimited access to streaming music.72

While Spotify eventually hopes to launch in the United States, licensing disputes with record labels have thus far prevented it from being available in this country, as record labels are refusing to grant licenses unless at least 15% of users are paid subscribers (the current number is 5%), spurring speculation that Spotify may have to abandon its ad-supported model in favor of only paid subscriptions in order to enter the U.S. market.73 If a compulsory collective licensing system was in place, it would be much easier for services like Spotify to operate in the U.S. without having to fundamentally alter their business models to suit American record labels.

SIRA would also allow for the enactment of a number of proposed solutions to online file-sharing, including legalized P2P networks able to offer all copyrighted music without DRM

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70 M. WILLIAM KRASILOVSKY ET AL., THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 72 (10th ed. 2007).

71 Martens, supra note 69.

72 Id.

73 Id.
restrictions for a reasonable subscription fee.\textsuperscript{74} Such services could also be bundled with users’ Internet service, either voluntarily or through taxes on Internet service.\textsuperscript{75} While current P2P networks are by design highly decentralized, making it impossible to track song downloads, legalized P2P services could be built with the ability to track the relative popularity of downloaded music, allowing performing rights societies to distribute royalties in proportion to popularity.\textsuperscript{76} The Electronic Frontier Foundation estimates that under such a system, “Starting with just the 60 million Americans who have been using file-sharing software, $5 a month would net over $3 billion of pure profit annually to the music industry.”\textsuperscript{77}

The advantages to such a system are tremendous. Copyright law scholar Lawrence Lessig states that had such a system been adopted ten years ago, the disaster of the RIAA’s lawsuit campaign could have been avoided, artists could have made far more money by monetizing black markets which would have existed regardless, and “there would have been an explosion in innovation around [P2P] technologies,” because music distribution would not have been limited to “a few who could strike deals with the ever terrified recording industry.”\textsuperscript{78} Most importantly, “we wouldn’t have a generation of kids who grew up violating the law.”\textsuperscript{79} Because the music industry has thus far proven incapable of adopting such a socially beneficial system voluntarily, the time has come for Congress to force its hand and enact it through legislation.

\textbf{V. Conclusion}

Given the recording industry’s consistent failure to adapt to the digital music market in a manner that benefits society and meets the constitutional goals of copyright, it is clear that the

\textsuperscript{75} Id.
\textsuperscript{76} See ELEC. FRONTIER FOUND., supra note 47, at 3.
\textsuperscript{77} Id.
\textsuperscript{78} LAWRENCE LESSIG, \textit{REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY} 111 (2009).
\textsuperscript{79} Id.
music industry is incapable of responsibly exercising its privilege of denying uses of music. That privilege must therefore be taken away, and SIRA represents a viable alternative for a compulsory licensing system that properly balances both the need for artists to be compensated for their works and the right of the public to benefit from the production of copyrighted music.

While SIRA is not perfect, it would represent a significant step forward in digital copyright. As Booth states, SIRA is designed “to level the playing field between legitimate digital music providers and the black market,” and has the potential to “settle the consumer appetite for speedy digital delivery by allowing legitimate music providers to rapidly clear the licenses necessary to distribute music over the internet.”

As William Patry notes, while over the last few decades Congress has greatly expanded copyright protections and done away with formalities, “at the same time it dramatically increased the number of compulsory licenses.” The time has come to do so again, for only then may the proper balance of copyright be restored.

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80 Booth, supra note 48, at 16.
81 PATRY, supra note 13, at 110.