



WAKE FOREST  
INTELLECTUAL PROPERTY  
LAW JOURNAL

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VOLUME 10

2009 - 2010

NUMBER 3

**THE MORAL OF THE STORY... MUSICAL ARTISTS MUST PROTECT  
THEIR OWN RIGHTS IN DIGITAL MUSIC**

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INTRODUCTION

The advent of digital music did more than provide a new means for distributing, listening to, and stealing music. It also paved the way for new players to enter the music business, ushered in new consumptive trends, and ended the reign of the CD. Notwithstanding the variety of rights and economic interests implicated, discourse about digital music tends to focus on one issue, piracy, and one set of interests,<sup>2</sup> those of Business.<sup>3</sup> This institutionalizes pro-business frames,<sup>4</sup> while minimizing competing interests and facts that undermine them.<sup>5</sup>

Guided by this Symposium's consideration of the rights of musical artists, this article asserts that the piracy story privileges Business at the expense of the artist. Indeed, the story marginalizes

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<sup>2</sup> See JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* 137 (1st ed. 2001) (stating that policies and laws regarding digital copyright generally include only some interests, and privilege those of business and copyright holders); *cf. id.* at 194 (questioning whether the interests of business adequately protect the "derivative" interests of third parties).

<sup>3</sup> This article uses the term "Business" broadly to refer to the institutional entity comprised of the music industry, record labels, distributors, and others similarly situated.

<sup>4</sup> Chris Riley, *The Rite of Rhetoric: Cognitive Framing in Technology Law*, 9 *NEV. L.J.* 495, 498, 507 (2009) (explaining the use of framing and defining "piracy" as a pro-business frame).

<sup>5</sup> See generally LITMAN, *supra* note 2, at 193-94 (stating that solutions require that all interests be understood and considered).

their interests and may even impede the development of a sustainable digital music mart that would lead to increased revenues.

Accordingly, this article identifies areas in which the interests of musical artists are distinct from or at odds with those of Business (such as free distribution of music, DRM, and pricing of digital tracks) and emphasizes neglected information that helps produce a fuller picture of the issues involved in digital music. From this foundation, the article argues that artists should neither surrender to Business's desires nor believe that it will protect them: simply, Business is not a white knight duty-bound to protect artists, but sometimes a wolf in sheep's clothing.

### STORIES

Empirical research has shown that the framing of an issue<sup>6</sup> or the story told about it can impact the way that people understand that issue.<sup>7</sup> For instance, when the media consistently frames an issue in a particular way—such as depicting excessive alcohol use as the disease of “alcoholism”—the public tends to adopt that framework in thinking through the issue.<sup>8</sup> Although the frame does not tell us *what* to think (i.e., what conclusion to draw), it guides the way we think or provides the lens through which we examine a given issue.<sup>9</sup> By guiding our

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<sup>6</sup> Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ALWD 75, 82 (2009) [hereinafter Stanchi, *Persuasion*]; Mira Sotirovic, *How Individuals Explain Social Problems: The Influences of Media Use*, 53 J. COMM. 122, 132 (2003); Yarif Tsfati, *Does Audience Skepticism of the Media Matter in Agenda Setting?*, 47 J. BROADCASTING & ELECTRONIC MEDIA 157, 158-59 (2003).

<sup>7</sup> Because we think in terms of narratives, they are a natural mode of understanding. JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS, CULTIVATION THEORY AND RESEARCH 192-93 (1999); NORMAN J. FINKEL, COMMON SENSE JUSTICE 69 (1995).

<sup>8</sup> See MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 11-13 (Jennings Bryant & Dolf Zillman eds., 1994) (explaining the framing and agenda-setting control of media by newspapers and reporting); Kimberlianne Podlas, *Respect My Authority!: South Park's Expression Of Legal Ideology and Contribution To Legal Culture*, 11 VAND. J. ENT. & TECH. L. 491, 500-01 (2009) [hereinafter Podlas, *South Park*]; Sotirovic, *supra* note 6, at 133-34. See generally Fuyuan Shen, *Chronic Accessibility and Individual Cognitions: Examining the Effects of Message Frames in Political Advertisements*, 54 J. COMM. 123 (2004).

<sup>9</sup> Jodi Baumgartner, *The Daily Show Effect: Candidate Evaluations, Efficacy, and American Youth*, 34 AM. POL. RES. 341, 341-43 (2006); Young Mie Kim & John Vishak, *Just Laugh! You Don't Need To Remember*, 58 J. COMM. 338, 338-42 (2008); see also Stuart Levine, *Peabody Awards Announce Winners*, DAILY VARIETY, Apr. 1, 2009, <http://www.variety.com/article/VR1118001974.html?categoryid=1985&cs=1> (showing the impact of *Saturday Night Live's* political parodies on the 2004 election”).

analytical process, the frame can then impact the opinions we form about those issues.<sup>10</sup>

This also applies to the law.<sup>11</sup> As exemplified by the litigation adage “[t]he best story wins,”<sup>12</sup> the framing of a legal dispute often impacts its outcome.<sup>13</sup> Studies reveal that stories are central to juror decision-making; they help juries make sense of the evidence,<sup>14</sup> adopt

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<sup>10</sup> See, e.g., R. Lance Holbert, et al., *Political Implications of Prime-Time Drama and Sitcom Use: Genres of Representation and Opinions Concerning Women’s Rights*, 53 J. COMM. 45, 57 (2003); Kim & Vishak, *supra* note 9, at 338-39 (2008); Kimberlianne Podlas, *Guilty On All Accounts: Law & Order’s Impact On Public Perceptions of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1 (2008); Podlas, *South Park*, *supra* note 8, at 499-502; LaVonda N. Reed-Huff, *Offensive Political Speech from the 1970s to 2008: A Broadcaster’s Moral Choice*, 8 MD. J. RACE RELIGION GENDER & CLASS 241, 244 (2008); Riley, *supra* note 4, at 498.

<sup>11</sup> WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW* 11 (2004) (showing that narratives pervade and shape society’s understanding of law); Michael Asimov, *Law and Popular Culture: Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 552 (2000); Podlas, *South Park*, *supra* note 8, at 495-96, 499-503.

<sup>12</sup> See Clark D. Cunningham, *But What Is Their Story?* 52 EMORY L.J. 1147, 1151 (2003); Stanchi, *Persuasion*, *supra* note 6, at 75.

<sup>13</sup> See Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION 521 (1988) (explaining the impact of framing on a verdict). See generally Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411.

<sup>14</sup> FINKEL, *supra* note 7, at 65; Nancy Pennington & Reid Hastie, *Evidence Evaluation In Complex Decision Making*, 51 J. PERSONALITY & SOCIAL PSYCHOL. 242, 242, 252-53 (1986) [hereinafter Pennington & Hastie, *Evidence Evaluation*]; Nancy Pennington & Reid Hastie, *Explaining The Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOCIAL PSYCH. 189, 192 (1992) [hereinafter Pennington & Hastie, *Tests*]; Pennington & Hastie, *supra* note 13, at 521; Stanchi, *Persuasion*, *supra* note 6, at 76.

some notions<sup>15</sup> over others,<sup>16</sup> determine causality,<sup>17</sup> and assign blame.<sup>18</sup>

Stories even influence the decision-making of courts<sup>19</sup> and the way that those decisions are communicated to lawyers and laypeople.<sup>20</sup> Particularly, in the field of intellectual property and technology, courts regularly reach out for stories and analogies to simplify and explain complicated issues.<sup>21</sup> These can impact the outcome of a case or the public's acceptance of legal principles.<sup>22</sup> For example, framing a copyright or technology issue as "piracy"<sup>23</sup> can impact the way that a court understands secondary infringement or the scope of a statutory exemption under the Digital Millennium Copyright Act.<sup>24</sup> Of course, the story chosen can also obscure issues,<sup>25</sup> eliminate important nuances,<sup>26</sup> and privilege certain interests.

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<sup>15</sup> See generally LITMAN, *supra* note 2, at 193-94 (explaining that solutions to digital copyright require that all interests be understood and considered).

<sup>16</sup> THOMAS SANNITO & PETER J. MCGOVERN, *COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS* § 5.4 (1985) (describing "primacy effect" of story-telling); Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 *LAW & PSYCHOL. REV.* 1, 1 (1984) (indicating that stories prompt inferences); Michael Owen Miller & Thomas A. Mauet, *The Psychology of Jury Persuasion*, 22 *AM. J. TRIAL ADVOC.* 549, 568-69 (1999).

<sup>17</sup> Pennington & Hastie, *supra* note 13, at 521; Pennington & Hastie, *Tests*, *supra* note 14, at 189 (demonstrating that individuals construct a causal model to explain available facts). Ultimately, the story that the jurors adopt must be able to explain what happened. Pennington & Hastie, *Tests*, *supra* note 14, at 189; FINKEL, *supra* note 6, at 65; Pennington & Hastie, *Evidence Evaluation*, *supra* note 14, at 242.

<sup>18</sup> Kimberlianne Podlas, *The Tales Television Tells: Understanding the Nomos Through Television*, 13 *TEX. WESLEYAN L. REV.* 31, 36 (2006) (explaining that stories include moral and ethical components) [hereinafter Podlas, *Power of Stories*]; Podlas, *Tests*, *supra* note 14, at 190.

<sup>19</sup> Timothy E. Lin, *Social Norms and Judicial Decision-Making: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 *COLUM. L. REV.* 739, 759 (1999); Podlas, *Power of Stories*, *supra* note 18, at 33, 35; see also Stanchi, *Persuasion*, *supra* note 6, at 76 (explaining that the persuasiveness of the story is critical in legal advocacy).

<sup>20</sup> Cf. Podlas, *supra* note 10, at 13-15.

<sup>21</sup> Dr. Andrew Chin, Professor of Law, University of North Carolina, Address at the Wake Forest Intellectual Property Law Journal Symposium: Copyright v. Copyleft (Mar. 5, 2010); see also Riley, *supra* note 4, at 496-97, 512; S.S. Wineburg, *Historical Problem Solving: A Study of the Cognitive Processes Used in the Evaluation of Documentary and Pictorial Evidence*, 83 *J. EDU. PSYCHOL.* 73, 77 (1991) (describing heuristic reasoning in legal decision-making).

<sup>22</sup> Riley, *supra* note 4, at 503.

<sup>23</sup> The term "piracy" evokes both notions of stealing and uncontrollable lawlessness. LITMAN, *supra* note 2, at 84-85; Riley, *supra* note 4, at 505.

<sup>24</sup> Riley, *supra* note 4, at 503; see also Mark F. Schultz, *Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music*,

## ONCE UPON A TIME, PIRACY DESTROYED THE MUSIC INDUSTRY...

Stories and frames play a part in the legal and cultural discourse regarding rights and interests in digital music.<sup>27</sup> Generally, the issue is framed as “piracy”<sup>28</sup> and the story is about how piracy has caused music sales to plummet,<sup>29</sup> and threatens the continued existence of the music industry.<sup>30</sup>

Like most stories, this tale sets up a two-sided fight. Here, the battle is the innocent music industry versus the pirate-consumer.<sup>31</sup> The story also tells us who the good guys are (Business) and who the bad guys are, as well as who is to blame for the musical artist’s predicament (the pirate). Moreover, the story characterizes Business

17 J. INTELL. PROP. 59, 64-65, 68 (2009) (arguing that recent changes in copyright law enshrine the interests of certain players in the music industry).

<sup>25</sup> Kurt A. Carlson & J. Edward Russo, *Biased Interpretation by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 91 (2001).

<sup>26</sup> FINKEL, *supra* note 7, at 5 (explaining that stories enable people to deal with large amounts of information, but also filter that information); Carlson & Russo, *supra* note 25, at 91.

<sup>27</sup> See Litman, *supra* note 2, at 81 (cultural stories about copyright); *id.* at 80-82 (shift in metaphor of copyright, into a property right); Riley, *supra* note 4, at 496.

<sup>28</sup> The concept of “piracy” originated in maritime law. Prior to 1856, international law recognized only people (who were subject to the laws of their own governments) and states. The Declaration of Paris created a third category: pirates, i.e., people who were neither subject to nor protected by governments and who lacked the sovereignty (and legitimacy) of states. Douglas R. Burgess Jr., *The Dread Pirate Bin Laden*, LEGAL AFF., July-Aug. 2005, available at [http://www.legalaffairs.org/issues/July-August-2005/feature\\_burgess\\_julaug05.msp](http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp).

<sup>29</sup> See PATRICK BURKART & TOM MCCOURT, DIGITAL MUSIC WARS 74 (2006) (“[T]he recording industry has argued . . . that peer-to-peer systems pose an immediate and absolute danger to its survival.”); Shana Dines, “*Actual Interpretation Yields Actual Dissemination*”: An Analysis of the “*Make Available*” Theory Argued in Peer-to-Peer File Sharing Lawsuits, and Why Courts Ought to Reject It, 32 HASTINGS COMM. & ENT. L.J. 157, 157 (2009) (“No one is a stranger to the steady decline of the music industry that has occurred throughout the past decade as a result of online music piracy.”); Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 315 (2009) (noting that the business has made apocalyptic pronouncements); Riley, *supra* note 4, at 496 (“[N]ewspapers and magazines have exploded with . . . terror stories of the death of the music industry as a result of illegal downloading.”); *id.* at 507 (explaining the framing paradigm of “piracy” versus “innovation” and “privacy”).

<sup>30</sup> See BURKART & MCCOURT, *supra* note 29, at 74; Dines, *supra* note 29, at 157.

<sup>31</sup> See Litman, *supra* note 29, at 315-17 (describing the polarized debate on the issue and lamenting the disappearance of a middle ground).

not only as a victim of copyright theft but also as the morally and legally appropriate protector and enforcer of copyright law.<sup>32</sup>

#### THE MORAL OF THE STORY

This story cultivates certain understandings about the rights and interests involved, as well as their relative importance<sup>33</sup> and the threats to them. The story teaches the musical artist that the consumer-pirate is the primary threat and that they need protecting from us.<sup>34</sup> It also instructs that Business is the entity best able and obligated to protect them. Furthermore, the story treats Business's interests (as expressed through litigation strategy, contracts with ISPs and digital music sites, and legislation) as aligned with those of the musical artist. Ultimately, the moral of this story to the musical artist is twofold: (1) her failure to obtain a fair share of the revenue from digital music is due entirely to piracy, and (2) if she leaves Business to pursue its interests, musical artists will receive their fair share and live happily ever after.

#### HERO OR VILLAIN?

The moral of the story and the facts supporting it reveal a fairytale more than reality. Indeed, there are several problems with this tale. Setting up the issue as a two-party, two-sided battle of Business against the Pirate marginalizes the musical artist. In fact, the musical artist is not even a main character.<sup>35</sup> Protecting artist and copyright holder rights, distributing economic benefits, and building a viable way to monetize digital music is not restricted to two parties. Rather, it includes at least three parties and three sets of interests.<sup>36</sup> Additionally, despite the binary framing of the dispute, the issues involved do not exist on a single continuum. Often they exist on wholly different planes or without identifiable counterpoints.

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<sup>32</sup> See Riley, *supra* note 4, at 505 (“[T]o call an individual who makes an illegal copy . . . a ‘pirate’ . . . is to import a sense of stealing and uncontrollable lawlessness . . . into the world of the Internet—even if the legal and factual circumstances are considerably different.”); *id.* at 507 (“[P]iracy’ . . . casts individuals as wrongdoers”).

<sup>33</sup> See *id.* at 507 (defining the piracy frame as a “pro-industry” frame).

<sup>34</sup> That is, that they need to be protected from the consumer or fan, as opposed to the business.

<sup>35</sup> It should not be a radical proposal that the discussion of musical artist rights should at least acknowledge the existence of the musical artist and their interests.

<sup>36</sup> See BURKART & MCCOURT, *supra* note 29, at 4 (noting the multiple interests involved in digital music).

Moreover, equating the interests of the musical artist with those of Business subjugates the artist's interests to those of Business, if not eliminating them from the equation altogether. Inherent in the story is that Business is protecting all of the interests of the musical artist. There is also a presumption that the interests of Business and musical artist are aligned. Thus, whatever Business does in pursuit of its interests or benefit is thought to serve the interests of the musical artist. The interests of these parties, however, are not the same.

#### CONFLICTING INTERESTS

The interests of the musical artist and the music industry are not the same. Although both want us to buy more music, purchase CDs rather than single tracks, and not download music without paying for it, the strategies and priorities for achieving these goals differ. Sometimes the interests and priorities of Business run counter to those of the musical artist. This is hardly surprising: the record label is not the guardian ad litem of the musical artist, and the music industry is not a public arts organization established on behalf of artists. To the contrary, there is a long history of record companies taking advantage of musical artists.<sup>37</sup> Business is not, nor should it be, a prince who will ride in on a white horse to rescue the musical artist from the oppressive forces of capitalism, copyright theft, or their own ignorance.

The piracy story obscures or downplays interests that are incongruent with those of Business. Nonetheless, they are important in protecting the rights of musical artists. Hence, to the extent that musical artists abide by this story, they contribute to their victimization and maintain a system that both minimizes their participation in the digital music revenue stream and hampers the development of a more rational, sustainable digital music market.

The following sections outline these conflicting interests and identify additional facts and perspectives that reframe the prevailing story of piracy.

#### I. DIGITAL RIGHTS MANAGEMENT

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<sup>37</sup> See STEVE KNOPPER, APPETITE FOR SELF-DESTRUCTION 132 (2009) ("For years, label executives had reputations for taking advantage of artists . . ."); Jacqui Cheng, *Artists' Lawsuit: Major Record Labels are the Real Pirates*, ARS TECHNICA, Dec. 7, 2009, <http://arstechnica.com/tech-policy/news/2009/12/artists-lawsuit-major-record-labels-are-the-real-pirates.ars> (noting that the Canadian Recording Industry Association faces potential damages of \$6 billion for infringing on musical artists' rights and illegally using music without payment).

Musical artists and Business possess different perspectives on digital rights management (DRM). DRM refers to using technology to control the use of (and hence rights in) digital content.<sup>38</sup> In terms of music, it encompasses the panoply of technological means to alter a music file so that it expires,<sup>39</sup> cannot be copied excessively,<sup>40</sup> cannot be played on certain devices,<sup>41</sup> or lowers the sound quality of the track<sup>42</sup> so as to deter file sharing.<sup>43</sup> For example, some DRM-wrapped tracks render music purchased through subscription unplayable after the subscription lapses.<sup>44</sup> Other times, DRM prevents interoperability, so that music purchased online can be replayed only on that computer or device.<sup>45</sup> One example is FairPlay: in iTunes's early years, the music industry insisted that iTunes install FairPlay on tracks so that iTunes-purchased tracks could be played only on iPods.<sup>46</sup>

For the most part, musical artists have not been on board with the use of DRM, believing instead that consumers should be able to access purchased music without undue technological restrictions.<sup>47</sup> Indeed, limiting how and when music consumers can enjoy their music hurts the ability of that music to become popular. Furthermore, it often lowers the sound quality of a recording, thereby reducing the quality of the artist's music. None of this is what a musical artist, even an economically-driven one, favors.

By contrast, the music industry christened DRM its savior, believing that it would end piracy and even develop new revenue

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<sup>38</sup> See generally WILLIAM ROSENBLATT, WILLIAM TRIPPE & STEPHEN MOONEY, DIGITAL RIGHTS MANAGEMENT: BUSINESS AND TECHNOLOGY vii (2002) (defining digital rights management).

<sup>39</sup> M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 430 (10th ed. 2007).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; ROSENBLATT, ET AL., *supra* note 38, at 28-29.

<sup>42</sup> KRASILOVSKY & SHEMEL, *supra* note 39, at 438; ROSENBLATT ET AL., *supra* note 38, at 98-102. One example is dithering, where a low-level noise is inserted into the recording. BURKART & MCCOURT, *supra* note 29, at 102-03; ROSENBLATT ET AL., *supra* note 38, at 98-102, 142-44.

<sup>43</sup> ROSENBLATT ET AL., *supra* note 38, at 5-6.

<sup>44</sup> BURKART & MCCOURT, *supra* note 29, at 102; Antony Bruno, *Subscription Renewal*, BILLBOARD, Oct. 31, 2009, at 8.

<sup>45</sup> KRASILOVSKY & SHEMEL, *supra* note 39, at 430; *cf.* KNOPPER, *supra* note 37, at 251 (advocating that DRM be abandoned).

<sup>46</sup> KNOPPER, *supra* note 37, at 180, 232 (describing how Apple was forced into using FairPlay DRM); *cf. id.* at 229 (claiming that fans want interoperability in digital music).

<sup>47</sup> Shane Wagman, *I Want My MP3: Legal and Policy Barriers to a Legitimate Digital Music Marketplace*, 17 J. INTELL. PROP. L. 95, 96 (2009).

streams (since consumers would have to re-purchase tracks).<sup>48</sup> DRM, however, failed to live up to these expectations and backfired.<sup>49</sup>

The most well-known and ill-fated use of DRM was by Sony BMG. Sony BMG released 52 titles (approximately 5 million CDs in all) containing rootkits<sup>50</sup> to prevent consumers from pirating or making excessive copies of CDs.<sup>51</sup> A rootkit is a type of software that installs spyware on a computer or provides third party (often a hacker who might to install malicious programs and viruses) access to the hard drive.<sup>52</sup> The rootkits were included in the CDs without the knowledge of consumers. Worse than that, they caused consumers' computers to crash, destroyed their CD drives, and exposed their computers to viruses. This led to significant consumer backlash.<sup>53</sup> The company ultimately recalled 4.7 million CDs, lost millions of dollars<sup>54</sup> and paid an estimated \$50 million in class action settlements.<sup>55</sup>

## II. PRICE

Although both Business and musical artists seek to replace the action of illegal downloading with the norm of legal purchasing, their

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<sup>48</sup> See generally BURKART & MCCOURT, *supra* note 29, at 5-6, 102-04 (outlining the benefits of DRM to the music industry to the detriment of consumers); KNOPPER, *supra* note 37, at 231; ROSENBLATT, ET AL., *supra* note 38, at viii-x, 19-35. The DRM movement is exemplified by the Secure Digital Music Initiative, a think-tank, [and that a] glorified committee formed in 1998 which suggested specifications for SDMI-compliant devices, a copyright encryption standard, plans to inject watermarks into online tracks requiring an electronic device to detect them in order to play the music, and other various plans to thwart music piracy. SDMI was, however, plagued by conflicting interests, aspirations that were impossible to fulfill, and unworkable devices. KNOPPER, *supra* note 37, at 150-55. It disbanded in 2002. *Id.* at 156.

<sup>49</sup> DRM has been abandoned by many record labels, and Apple—originally forced into a DRM scheme in order to negotiate contracts for music content when it started—has been able to convince labels to stop. KNOPPER, *supra* note 37, at 232.

<sup>50</sup> *Id.* at 223.

<sup>51</sup> *Id.* See generally ROSENBLATT, ET AL., *supra* note 38, at 83-88 (describing DRM technologies).

<sup>52</sup> KNOPPER, *supra* note 37, at 222-24. See generally BURKART & MCCOURT, *supra* note 29, at 117-18 (describing the impact of DRM on unknowing consumers).

<sup>53</sup> See KNOPPER, *supra* note 37, at 223-27; Dan Mitchell, *The Rootkit of All Evil*, N.Y. TIMES, Nov. 19, 2005, at C5. See generally Lynn Hirschberg, *The Music Man*, N.Y. TIMES, Sep. 2, 2007, § MM (Magazine), at 26-50 (describing fiasco, public repercussions, and impact on artists such as Neil Diamond).

<sup>54</sup> KNOPPER, *supra* note 37, at 227; Ethan Smith, *Sony BMG Pulls Millions of CDs Amid Antipiracy-Software Flap*, WALL STREET J., Nov. 17, 2005, at D5.

<sup>55</sup> Smith, *supra* note 54, at A14.

methods and patience in doing so differ. Their economic priorities, as well as the economic outcomes of various responses, are also sometimes opposed.

Consumers downloaded music from Napster and similar services for a variety of reasons. Some simply did not want to pay for music (free downloaders).<sup>56</sup> Others did not think that the behavior was wrong (ignorant downloaders).<sup>57</sup> Still others liked the ease of finding music and single tracks, instead of entire CDs (convenience downloaders).<sup>58</sup> These various motivations necessitated a menu of strategies for preventing illegal music downloading. Whereas deterrence and punitive sanctions might work best with the free downloaders, and education and normative formation would work best with the ignorant downloaders, a substitute service would work best with the convenience downloaders. Indeed, this segment of music consumers was the most likely to be converted into purchasers.

Thus, for the convenience downloader, the solution was to make digital music easy and available: In other words, to replace illegal Napster with a legal version of Napster. Provided downloading digital tracks was easy enough,<sup>59</sup> cheap enough, and at a sufficient sound quality, a convenience downloader would buy them.<sup>60</sup> As purchasing behavior replaced file-sharing behavior, not only would digital music generate revenue it had not before, but also this would become a norm for this segment of consumers.<sup>61</sup> (Additionally, would-be-pirates have less of an incentive to download music illegally.)<sup>62</sup> This could eventually displace illegal downloading,<sup>63</sup>

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<sup>56</sup> See Dave Tianen, *Downloads Continue to Erode CD Sales and Hurt Retailers*, MILWAUKEE J. SENTINEL, Mar. 19, 2009, at E Cue, 1.

<sup>57</sup> When Napster emerged, most file-sharers saw nothing wrong with their behavior. Over the past decade, however, that understanding gradually changed. See Riley, *supra* note 4, at 509-11.

<sup>58</sup> BURKART & MCCOURT, *supra* note 29, at 56, 72-73 (recognizing some research that even suggested fans sampled music on Napster and then purchased it, or spurred CD sales).

<sup>59</sup> ROSENBLATT ET AL., *supra* note 38, at 20-21 (noting that inconvenience is a bar to purchasing, and free is easier).

<sup>60</sup> See Wagman, *supra* note 47, at 96-97 (describing FMC's position that the antidote to Napster was a similar legal, for payment, service).

<sup>61</sup> See Zac Locke, *How to Save the Recording Industry? Charge Less*, 16 UCLA ENT. L. REV. 79, 83 (2009). It is difficult to convince a generation that grew up with free trading and downloading to adopt new behaviors. In part, this is due to the pure economics of the situation, i.e., why pay for music if you can get it for free. In part, it is due to the norm and trying to replace the initial norm of file sharing with one that identifies it as wrong and illegal. *Pretty Persuasion*, BILLBOARD, Dec. 5, 2009, at 8.

<sup>62</sup> Locke, *supra* note 61, at 82-83.

permeate other segments of music consumers, and establish a normative belief (among the ignorant downloaders) that file-sharing was wrong.<sup>64</sup>

Embracing this model, pay services began selling individual tracks.<sup>65</sup> iTunes, using a \$0.99 price point for individual tracks, established itself as the leader in (and one of the only successful) internet music sites.<sup>66</sup> Consistent with this premise, a 2004 Pew Internet Project Report reported that 14% of individuals had stopped illegal downloading;<sup>67</sup> at the same time, digital sales rose.<sup>68</sup>

Yet, just as this model of monetizing digital music is beginning to work, and a norm of purchasing is emerging, Business changed a key variable in the formula for converting illegal downloading into sales: selling at a price that the market will bear,<sup>69</sup> and that encourages consumers to buy.<sup>70</sup> Businesses suddenly increased the price of digital

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<sup>63</sup> Studies show that norms are powerful mechanisms for compliance with the law. See Schultz, *supra* note 24, at 64-65.

<sup>64</sup> See Riley, *supra* note 4, at 509-10. When Napster emerged, most file-sharers saw nothing wrong with their behavior. Over the past decade, however, that understanding gradually changed.

<sup>65</sup> In some instances, musical artists and Business differ on the sale of individual tracks. Although a greater profit is realized from the sale of a CD (largely because of the price differential) than a single, businesses recognize that selling something is better than selling nothing. Musical artists are not merely selling units of a product, but are, after all, artists. Some believe that the songs on a CD are not simply twelve separate tracks arranged in order of radio-friendliness. Rather, to a musical artist, the CD works as a whole, where songs tell a story or follow a progression. Tianen, *supra* note 55. To some of these artist-creators, maintaining the integrity of the work as a whole can rival the value of the sales of a digital track. Ben Sisario, *Music Sales Fell In 2008*, N.Y. TIMES, Jan. 1, 2009, at C1 (noting performing artists' complaints that selling individual tracks breaks up the continuity of the full album); see also KNOPPER, *supra* note 37, at 245 (observing performing artists' opinion that music is devalued when thought of as merely a computer file).

<sup>66</sup> In 2007, iTunes constituted 75% of U.S. digital music sales. Evan Serpick, *Amazon Takes a Bite Out of Apple*, ROLLING STONE, Dec. 13, 2007, at 18. iTunes launched in 2003, and since then has sold 8.5 billion individual songs. Pete Barlas, *Digital Music's Growth Hits a Sour Note Revenue Hike Plateauing?*, INVESTOR'S BUSINESS DAILY, Feb. 16, 2010, at A05.

<sup>67</sup> PewInternet.org, *The State of Music Downloading and File-Sharing Online*, [http://www.pewinternet.org/~media/Files/Reports/2004/PIP\\_Filesharing\\_April\\_04.pdf](http://www.pewinternet.org/~media/Files/Reports/2004/PIP_Filesharing_April_04.pdf) (last visited July 1, 2010).

<sup>68</sup> See chart *infra*. at 16.

<sup>69</sup> Indeed, digital music services that have lowered prices have increased music sales. Barlas, *supra* note 66. When Rhapsody reduced prices to \$0.49 per song, sales increased 600%. Steven Levy, *How Much is Music Worth?*, NEWSWEEK, Oct. 29, 2007, at 20.

<sup>70</sup> Locke, *supra* note 61, at 82-83.

tracks.<sup>71</sup> Recently, iTunes and other digital music marts such as Rhapsody bowed to music industry pressure and raised the price of individual downloads.<sup>72</sup> On iTunes, prices of popular songs increased by 30%, from \$0.99 to \$1.29.<sup>73</sup> It appears that Business lost its patience and became willing to gamble away the long-term strategy of building a viable pay model in favor of recouping CD losses as quickly as possible.<sup>74</sup>

The gamble of increasing prices may or may not pay off for Business. It might (1) reduce sales (because tracks are more expensive, so fewer are purchased); (2) reduce sales but maintain profit (because the higher price makes up for the sales lost); or (3) increase profit by selling the same number of tracks at a higher price. On balance, the risk of the price increase may be relatively low to Business.

This is not true for the musical artist. A price increase cannot increase the artist's profit because the price increase does not go to the musical artist. A musical artist does not receive a percentage of the consumer retail price, but is paid royalties.<sup>75</sup> Royalties, typically 7-15% for a newer recording artist,<sup>76</sup> are calculated on the wholesale price of the CD to the dealer,<sup>77</sup> not the retail cost to the consumer. Therefore, increasing the retail price can have no positive economic effect on the musical artist. A price increase can, however, have a negative economic impact: Increasing the price could decrease sales, thereby, reducing royalties. Hence, increasing price is a gamble that can only maintain the status quo or harm the musical artist.

### III. INTERNET MARKETING AND FREE MUSIC

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<sup>71</sup> Barlas, *supra* note 66.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> In fact, iTunes' previous \$0.99 per-song price might even be too high. The ceiling on iTunes' growth suggests that that price point is inflated beyond long-term market viability. A sustainable price for digital tracks might be closer to \$0.25 per digital single. Locke, *supra* note 61, at 81, 82.

<sup>75</sup> *Id.*

<sup>76</sup> BURKART & MCCOURT, *supra* note 29, at 18-19 (showing rates of 7-12% for new artists; 15% or higher for popular, established artists); MARK HALLORAN, *THE MUSICIAN'S BUSINESS AND LEGAL GUIDE*, 308 (4th ed. 2008) (listing rates of 12-15%); Jared S. Welsh, *Pay What You Like—No Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses*, 58 EMORY L.J. 1495, 1508 (2009) (new artist rate averages 14%).

<sup>77</sup> HALLORAN, *supra* note 76, at 308, 355; Welsh, *supra* note 76, at 1507 (showing that this is referred to as PPD, i.e., the published price to the dealer).

A number of musical artists have come to embrace the internet as a marketing tool.<sup>78</sup> In a way, the online environment is an extension of the physical environment: whereas musical artists have always toured to promote an album, today, they supplement this with “tours” in cyberspace. Making music available online can get their music heard and develop a fan base. This fan base can translate into music purchases<sup>79</sup> and concert ticket sales.<sup>80</sup>

Using free digital distribution as a platform for commercial sales can be quite effective. Indeed, it is an established marketing tool of rap and hip-hop artists. Rather than fearing the internet, these artists recognized it as a cheap way to widely disseminate music.<sup>81</sup> Consequently, free, self-produced mixtapes are a popular, promotional model.<sup>82</sup> Last year, two songs that originated on mixtapes, Kid Cudi’s “Day N’ Night” and Drake’s “Best I Ever Had,” were subsequently released as CDs by major labels.<sup>83</sup> Moreover, free distribution does not necessarily supplant sales, but can spur them. Lil Wayne’s mixtapes in 2007 and 2008 built tremendous hype for his 2008 major label release “Tha Carter III”<sup>84</sup> — and helped it sell nearly 3 million copies.<sup>85</sup> In 2007, Radiohead took this approach of internet marketing to the next level, self-distributing a “pay-what-you-will” CD “In Rainbows.”<sup>86</sup> Furthermore, the publicity surrounding this strategy translated into ticket sales for the band’s 2008 tour.<sup>87</sup>

Until recently, most labels did not understand the value of internet marketing,<sup>88</sup> and did not favor unmitigated internet

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<sup>78</sup> BURKART & MCCOURT, *supra* note 29, at 131-32; Tianen, *supra* note 55 (Nielsen Sound scan number).

<sup>79</sup> BURKART & MCCOURT, *supra* note 29, at 130-31. As artists become more successful in this realm/this method, it will reduce their dependency on major labels for financing, manufacturing, and marketing, the very factors that keep musical artists in these bad relationships.

<sup>80</sup> Sisario, *supra* note 65, at C1 (concert ticket sales are up).

<sup>81</sup> Andrew Barker, *Will Grammy Noms Build Mixtape Mojo?*, DAILY VARIETY, Jan. 28, 2010.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (both were also nominated for 2010/09 Grammys).

<sup>84</sup> *Id.*; Evan Serpick, *How Lil Wayne Became a Superstar*, ROLLING STONE, June 26, 2008, at 15 (reporting how the label was concerned about making mixtapes available on-line).

<sup>85</sup> Barker, *supra* note 81; Ayala Ben-Yehuda, *'08 Music Sales Hit Record High*, HOLLYWOOD REPORTER.COM, Jan. 4, 2009, Music Index.

<sup>86</sup> Welsh, *supra* note 76, at 1495-96; Barker, *supra* note 81.

<sup>87</sup> KNOPPER, *supra* note 37, at 244-45. Not every artist is as critically acclaimed and beloved as Radiohead, thus not every artist can market their own music without the financial support of a label. Welsh, *supra* note 76, at 1495-96.

<sup>88</sup> KNOPPER, *supra* note 37, at 198-99.

distribution.<sup>89</sup> Although they have adopted some aspects of internet marketing, such as providing music on social networking sites to publicize new bands,<sup>90</sup> major labels have not been able to replicate the success of this model.<sup>91</sup>

#### IV. LAWSUITS

In 1997, the Recording Industry Association of America (the “RIAA”) (the trade and lobbying group that represents 90% of the recording industry)<sup>92</sup> was the first to notice on-line music file sharing.<sup>93</sup> Its initial response was to send a cease-and-desist letter. When that strategy worked,<sup>94</sup> it became the foundation for future litigation.<sup>95</sup> By July 2002, the RIAA had shifted its litigation resources away from suing software companies and peer-to-peer services, to suing the individuals who downloaded music.<sup>96</sup> This “John Doe” litigation<sup>97</sup> involved sending a letter threatening a downloader with a lawsuit, while also proposing a \$2,000-3,000 settlement.<sup>98</sup> In addition to the monetary settlement, these lawsuits also sought to deter individuals from file sharing.<sup>99</sup>

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<sup>89</sup> *Id.* at 196 (stating that Radiohead intentionally leaked *2000 Kid A* to fan-operated websites. Most labels believe this thwarts an album’s sales potential); *id.* at 198 (noting that in 2000, Columbia Records prevented the Offspring from doing a free release in MP3 format as part of an MTV promotion).

<sup>90</sup> *Id.* at 201-02.

<sup>91</sup> *See* Barker, *supra* note 81. Moreover, the internet is not some magic charm that will work for every group.

<sup>92</sup> *See* BURKART & MCCOURT, *supra* note 29, at 4; ROSENBLATT ET AL., *supra* note 38, at 13-14; Dines, *supra* note 29, at 162. Its membership is comprised of companies that create, distribute, and manufacture sound recordings. *See* ROSENBLATT ET AL., *supra* note 38, at 13.

<sup>93</sup> *See* KNOPPER, *supra* note 37, at 120.

<sup>94</sup> *Id.*

<sup>95</sup> Lawsuits are on behalf of the recording company, as the owners of the copyright in the sound recording, i.e., the CD, album, or digital track. *See* KRASILOVSKY & SHEMEL, *supra* note 39, at 200; Dines, *supra* note 29, at 162.

<sup>96</sup> *See* BURKART & MCCOURT, *supra* note 28, at 69.

<sup>97</sup> *See* Dines, *supra* note 29, at 167; *see also* Steve Knopper, *What Happens When the Record Biz Sues You*, ROLLING STONE, June 16, 2005, at 26. *See generally* LITMAN, *supra* note 2, at 195 (illustrating the glut of lawsuits by music industry).

<sup>98</sup> *See* Dines, *supra* note 29, at 167. Closely related to this was the RIAA’s poorly-received amnesty program that would spare suspected pirates of lawsuits who would admit and agree to have their names entered into a database. *See* BURKART & MCCOURT, *supra* note 29, at 69-70. By September 2004, RIAA had settled 1,024 suits for an average of \$5,000. *Id.* at 71.

<sup>99</sup> *See* Schultz, *supra* note 24, at 72-73.

Although musical artists initially endorsed the RIAA litigation, many have changed their tune. They criticize this self-help enforcement as overly punitive,<sup>100</sup> if not counterproductive, and intruding on the privacy of consumers.<sup>101</sup> Thus, recently, several musical artists have asked labels to stop suing their fans.<sup>102</sup>

#### REWRITING THE STORY: OTHER FACTORS

To follow the piracy story as the authoritative narrative and comply with its lessons ignores alternative perspectives and the insight and solutions they offer for better protecting artist rights and building a viable digital music mart.

Moreover, framing the decline of CD sales and collapse of the music industry as resulting entirely from piracy, causes commentators to craft solutions to piracy, with the hopes of correcting problems unrelated to piracy. Though piracy is a factor in the decline of CD sales, it is not the only factor,<sup>103</sup> and not the only issue that needs to be addressed.

In fact, despite apocalyptic pronouncements about the downfall of the industry,<sup>104</sup> the numbers tell a different story. Music sales are not down; they are up.<sup>105</sup> According to Nielsen Soundscan, overall music sales in 2009 exceeded ten billion.<sup>106</sup>

The decline that the story continues to publicize refers to the decline in physical CD sales.<sup>107</sup> Since hitting their peak in 2000, CD

<sup>100</sup> Penalties so harsh that they are out of line with society's sense of fairness can be counterproductive. *Id.* at 72; see Knopper, *supra* note 97.

<sup>101</sup> See BURKART & MCCOURT, *supra* note 29, at 8-9; Schultz, *supra* note 24, at 68-69.

<sup>102</sup> Cf. KNOPPER, *supra* note 37, at 251 (advocating that consumer lawsuits cease). The RIAA has also revealed that its interests in legal change are sometimes opposed to musical artists'. KRASILOVSKY & SHEMEL, *supra* note 39, at 29 (suggesting RIAA's position that bankruptcy law prevent artists from filing bankruptcy where doing so might alter record contract).

<sup>103</sup> See BURKART & MCCOURT, *supra* note 29, at 72-73.

<sup>104</sup> See Litman, *supra* note 29, at 315.

<sup>105</sup> Ken Barnes, *Music Sales Boom, but Albums Fizzle; Digital Track Downloads Top 1 Billion to Set Record*, USA TODAY, Jan. 2, 2009, at 6B; Phil Gallo, *Album Sales Continue to Slide in '08*, VARIETY, Jan. 1, 2009, <http://www.variety.com/article/VR1117997892.html> (reporting that in 2008, digital sales rose 27%); Phil Gallo, *Digital Music Sales Hit 1 Billion Mark*, VARIETY, Dec. 19, 2008, <http://stage.variety.com/article/VR1117997655.html>.

<sup>106</sup> Jennifer Chancellor, *Music Sales Top 1.5 Billion in '09; Vinyl Stronger*, TULSA WORLD, Jan. 10, 2010, at D5.

<sup>107</sup> According to Nielsen SoundScan, in 2009, physical CD/album sales declined 12.7% to a total of 374 million. In 2008, 428.4 million were sold. Christopher Morris, *Music Reborn Online in '09*, DAILY VARIETY, Jan. 7, 2010, at 1. In 2007,

sales have fallen 45%.<sup>108</sup> CD sales, however, do not provide a full picture of the complex new economics of music.<sup>109</sup> Nevertheless, the story implies that all music sales have declined, and they have declined because of piracy. Neither assertion is accurate.

It is not that all consumers steal all of their music instead of buying it, but that consumptive trends changed.<sup>110</sup> Napster did more than make music available for free and facilitate theft;<sup>111</sup> it taught consumers that they did not have to pay \$15 for a bloated CD just to get the two or three songs they wanted.<sup>112</sup> Rather, digital music services enabled them to get just those good songs.<sup>113</sup> In doing so, it forever changed the sales paradigm of the music industry.<sup>114</sup>

Today, many people purchase music on-line rather than physical CDs<sup>115</sup> or buy individual digital tracks instead of full CDs.<sup>116</sup> Indeed, as CD sales have declined,<sup>117</sup> and CD prices increased, digital music purchases have consistently and incrementally increased.<sup>118</sup> In 2008-09, digital sales accounted for 40% of music purchases.<sup>119</sup>

To substantiate this trend, the following chart parses together some of the CD and digital track sales statistics from the height of the CD to present day.

physical album sales declined by 15%. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 152 (6th ed. 2006).

<sup>108</sup> Barnes, *supra* note 105; Andrew Dansby, *Needle Points North on Vinyl Sales*, HOUSTON CHRONICLE, June 19, 2009, <http://www.chron.com/dispatch/story.mpl/ent/music/6488087.html>.

<sup>109</sup> Sisario, *supra* note 65, at C1.

<sup>110</sup> See BURKART & MCCOURT, *supra* note 29, at 72.

<sup>111</sup> Cf. Wagman, *supra* note 47, at 96 (describing Napster making music available for free).

<sup>112</sup> See Tianen, *supra* note 56, at E1.

<sup>113</sup> RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY* 484 (2005) (cherry-picking songs); Barlas, *supra* note 66 (reporting that digital music allows consumers to purchase individual songs without the whole album); Tianen, *supra* note 56, at E1.

<sup>114</sup> See Wagman, *supra* note 47, at 96.

<sup>115</sup> According to the NPD Group, 48% of teenagers did not buy a CD in 2007. See Press Release, The NPD Group, *Consumers Acquired More Music in 2007 but Spent Less* (Feb. 26, 2008), [http://www.npd.com/press/releases/press\\_080226a.html](http://www.npd.com/press/releases/press_080226a.html) (last visited July 1, 2010).

<sup>116</sup> See HALLORAN, *supra* note 76, at 312; Barlas, *supra* note 66.

<sup>117</sup> See Locke, *supra* note 61, at 79; Sisario, *supra* note 65.

<sup>118</sup> PASSMAN, *supra* note 106, at 1523 (up by 45% in 2007); Barlas, *supra* note 66; Christopher Morris, *Music Reborn Online in '09*, DAILY VARIETY, Jan. 7, 2010, at 1; Phil Gallo, *Album Sales Continue to Slide in '08*, VARIETY, Jan. 1, 2009, <http://www.variety.com/article/VR1117997892.html> (in 2008, digital sales rose 27%).

<sup>119</sup> Morris, *supra* note 118.

	<b>CD/ album sold</b>	<b>Percentage change (+/-)</b>	<b>Digital tracks sold</b>	<b>Percentage change (+/-)</b>	<b>Comment</b>
<b>2009</b>	374 million <sup>120</sup>	declined 12.7% <sup>121</sup>	1.15 billion <sup>122</sup>	increased 8.3% from 2008 <sup>123</sup>	2008-09 digital accounted for 40% of music purchases <sup>124</sup>
<b>2008</b>	428.4 million <sup>125 126</sup>	declined 14% from 2007 <sup>127</sup>	1,070,000, 000 <sup>128</sup>	increased 27% from 2007 <sup>129</sup>	2007-08 digital accounted for 32% of music purchases <sup>130</sup>
<b>2007</b>	500.5 <sup>131</sup>	physical album sales declined by 15% <sup>132</sup>	844.2 <sup>133</sup>	increased 45% from 2006 <sup>134</sup>	digital sales up from 2006 <sup>135</sup>
<b>2006</b>				increased 65% from 2005 <sup>136</sup>	
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<sup>120</sup> *Id.*<sup>121</sup> *Id.*<sup>122</sup> Barlas, *supra* note 66.<sup>123</sup> Barlas, *supra* note 66; Shelly Freierman, *Popular Demand*, N.Y. TIMES, Jan. 11, 2010, at B11.<sup>124</sup> Morris, *supra* note 118.<sup>125</sup> *Id.*<sup>126</sup> Ben-Yehuda, *supra* note 85.<sup>127</sup> *Id.*<sup>128</sup> Barnes, *supra* note 105.<sup>129</sup> Ben-Yehuda, *supra* note 85.<sup>130</sup> Chancellor, *supra* note 106.<sup>131</sup> Ben-Yehuda, *supra* note 85.<sup>132</sup> PASSMAN, *supra* note 107, at 1522.<sup>133</sup> Barnes, *supra* note 105.<sup>134</sup> Barlas, *supra* note 66.<sup>135</sup> KNOPPER, *supra* note 37, at 231 (data provided by Nielsen SoundScan).<sup>136</sup> *Id.* at 231.

<b>2004</b>	666.7 million <sup>137</sup>				
<b>2003</b>			19 million <sup>138</sup>		
<b>***</b>					
<b>2000</b>	785 million <sup>139</sup>				

#### ADDITIONAL FACTORS

Some of the CD's decline can be attributed to shrinking retail space.<sup>140</sup> In the 1990s, record labels and distributors began shifting their marketing efforts<sup>141</sup> to Big Box stores,<sup>142</sup> causing many of the smaller music stores to close.<sup>143</sup> This reduced the total floor space available across all retail establishments to display and sell CDs.<sup>144</sup> When the Big Box stores then reduced floor space devoted to CDs,<sup>145</sup> it further reduced the number of and types CDs that could be sold.

Additionally, from an economic standpoint, the market may no longer support the CD, at least not at its current price.<sup>146</sup> Because digital music services and their alternative pricing model are viable substitutes for the \$15 CD,<sup>147</sup> the market value of the CD has

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<sup>137</sup> Tianen, *supra* note 56.

<sup>138</sup> Sisario, *supra* note 65.

<sup>139</sup> BURKART & MCCOURT, *supra* note 29, at 72.

<sup>140</sup> *Id.*; Sisario, *supra* note 65.

<sup>141</sup> Along with this were discounts to Big Box stores for purchasing in "bulk."

<sup>142</sup> KNOPPER, *supra* note 37, at 198. Within those stores, they often marketed select CDs by adapting the "pay-to-play" strategy to a "pay-for-position" strategy. *Id.* at 202. Record distributors would pay to get the records that they were promoting closest to the door or best highlighted in displays. *Id.* at 109-10.

<sup>143</sup> *Id.* at 112; Tianen, *supra* note 56.

<sup>144</sup> Tianen, *supra* note 56. Often this meant that stores did not have the room for niche or less popular genres; therefore, those CDs were not stocked. In turn, the music available in bricks and mortar was homogenized. *See generally* BURKART & MCCOURT, *supra* note 29, at 72.

<sup>145</sup> Much of this space was taken by DVDs which have a much higher profit margin for the store. Tianen, *supra* note 56.

<sup>146</sup> *See generally* Steven Levy, *How Much is Music Worth?*, NEWSWEEK, Oct. 29, 2007, at 20.

<sup>147</sup> *Id.*

declined.<sup>148</sup> (Yet, as digital music was exploding, the average price of a CD increased 7.2%.<sup>149</sup> Some authors and economists believe that for the CD to survive, it must adjust its price point downward<sup>150</sup> to approximately \$10.<sup>151</sup>

#### DIVERSION

The piracy story also diverts attention from the business tactics and missteps that contributed to the situation—such as Business’s inability to modernize, infatuation with obsolete business models, and inflated CD prices that the market can no longer bear.<sup>152</sup>

Several problems in creating a workable digital music model stem from Business’s inability to adapt to technology,<sup>153</sup> or refusal to recognize that its old business models are inapt.<sup>154</sup> When business was first confronted with the internet and piracy, Business did not change its sales models or marketing strategies,<sup>155</sup> but clung to existing models of CD sales.<sup>156</sup> Indeed, it continues to look for new ways to

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<sup>148</sup> See *id.*; see also Locke, *supra* note 61, at 80-81; cf. KNOPPER, *supra* note 37, at 251 (advocating that businesses abandon old business models and replace them with high-tech content houses, drastically reducing prices for digital music).

<sup>149</sup> BURKART & MCCOURT, *supra* note 29, at 72.

<sup>150</sup> Locke, *supra* note 61, at 80-81; see KNOPPER, *supra* note 37, at 251.

<sup>151</sup> Locke, *supra* note 61, at 80.

<sup>152</sup> It also obscures the fact that some of the music industry’s response to “piracy” is actually a justification to recover lost profits rather than an attempt to build a viable digital music model.

<sup>153</sup> KRASILOVSKY & SHEMEL, *supra* note 39, at 426; Dines, *supra* note 29, at 157; Welsh, *supra* note 76, at 1496-97. Business has always been resistant to embrace new technologies. BURKART & MCCOURT, *supra* note 29, at 127. Furthermore, business’s monopolistic characteristics render it inefficient and inflexible when it comes to adapting to technological change. Welsh, *supra* note 76, at 1497, 1521.

<sup>154</sup> See generally BURKART & MCCOURT, *supra* note 28, at 8-9 (showing the music industry initially saw technology as *only* a threat, rather than as new means of distribution); Wagman, *supra* note 47, at 97 (showing the failure of new models to break with the past and respond directly to internet environment).

<sup>155</sup> See generally BURKART & MCCOURT, *supra* note 29, at 8-9 (noting the music industry initially saw technology as *only* a threat, rather than as a new means of distribution); KNOPPER, *supra* note 37, at 118-23 (describing lack of awareness of the music industry); Welsh, *supra* note 76, at 1522.

<sup>156</sup> See KNOPPER, *supra* note 37, at 144 (noting the industry managed and responded to the situation entirely wrong). Some individuals in the music business later confessed that because this was wrapped up in a technology issue they felt incompetent to deal with it. *Id.* at 113; KRASILOVSKY & SHEMEL, *supra* note 39, at 426.

recover revenue from the dying CD breed. Yet, the existing structure of the music industry cannot survive.<sup>157</sup>

Monetizing digital music has been difficult, and Business has not made it any easier.<sup>158</sup> Web services (such as Rhapsody) attempting to comply with copyright complain that the music industry's anachronistic models of commerce and desire to maximize short-term profits at the expense of long term solutions have hamstrung the establishment of viable pay-for-music models.<sup>159</sup> For instance, Rhapsody spent eight years negotiating publisher royalty rates for digital downloads. During that time, Rhapsody had to keep millions of dollars in escrow pending an agreement.<sup>160</sup> Negotiations by other pay services (and music industry threats of legal action, should negotiations fail) took so long that some services were forced to shut down or reduce their catalogues of songs.<sup>161</sup>

LOOK AT THE PIRATE! NO – THE OTHER PIRATE!

It is true that piracy denies musical artists revenue for their recordings: if music is not paid for, there is no sale on which to pay royalties. Business, however, while not a pirate, in some respects resembles a privateer who also plunders the revenues of musical artists. Inasmuch as piracy is portrayed as the reason musical artists are cheated out of digital music royalties, it diverts attention from the privateering of Business.<sup>162</sup>

Record labels do not pay musical artists full royalties on digital music sales. For a CD sold wholesale (PPD) for \$15, a new musical artist with a 12% royalty rate will be paid \$1.32 (12% x \$15). If one hundred CDs are sold, the musical artist will be paid \$132 (100 x \$1.32). Royalties on digital sales, assuming they are even paid,<sup>163</sup> are

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<sup>157</sup> Welsh, *supra* note 76, at 1521.

<sup>158</sup> See Wagman, *supra* note 47, at 97 (noting several models have attempted to monetize digital music, but few have succeeded); *id.* at 102 (stating that Business has impeded development of pay models).

<sup>159</sup> KNOPPER, *supra* note 37, at 119-120; Wagman, *supra* note 47, at 102.

<sup>160</sup> Wagman, *supra* note 47, at 102.

<sup>161</sup> See *id.* at 102-03. Pandora, for instance, had to block overseas access and reduce its catalogue. *Id.* at 103.

<sup>162</sup> Musical artists may believe that the reason they receive so little in royalty payments from digital sales is because of piracy, which thereby diminishes royalty payments.

<sup>163</sup> See KRASILOVSKY & SHEMEL, *supra* note 39, at 429 (noting some contracts exclude digital music as “promotional” media); Neil Strauss, *Behind the Grammys, Revolt in the Industry*, N.Y. TIMES, Feb. 24, 2002, § 4 (reporting that 99.99% of artists were underpaid by Business).

much less. Industry practice excludes digital sales from the “normal retail channels” on which royalties are based, and reduces them 50-75%, as “new media.”<sup>164</sup> Hence, the royalty of \$1.32 is reduced to \$0.39 (or \$39 per 100 sales) because the music is sold on-line. Obviously, if 100 songs are illegally downloaded, the musical artist would lose \$132. But in the digital sale scenario, where consumers are paying for music, the musical artist loses \$93 (\$132-\$39 = \$93). This is not stolen by the music pirate but kept by the record label and enabled by the standardized contract’s reduced royalty clause.<sup>165</sup>

Importantly, royalty rates and revenue flow are not dictated by law, but by the industry contracts.<sup>166</sup> Although these contracts give legal legitimacy to the disparate power relationship between the musical artist and Business,<sup>167</sup> it is the artist who agrees to sign. She may do so because she does not have the initial capital investment, is unwilling to accept the financial risk, is ill-equipped to market her music, or because she simply does not know any better. Nonetheless, it seems that a number of artists, especially newer ones, are not making a cost-benefit analysis, but are ignorant of contract ramifications or do not realize how the math diminishes earnings.<sup>168</sup>

Additionally, labels have continued to deduct from royalties the costs of packaging, shipping, warehousing, and even breakage,<sup>169</sup> though digital music does not have these costs.<sup>170</sup> This unfairly benefits Business<sup>171</sup> and allows it to increase its proportion of profit.<sup>172</sup> As Mr. Monath, a participant in this Symposium panel noted, the

<sup>164</sup> See HALLORAN, *supra* note 76, at 313 (showing reduced royalties of 75% or more for “new technology formats”); Welsh, *supra* note 76, at 1510-11 (noting royalties are based on sales from “normal retail channels,” which excludes digital sales).

<sup>165</sup> See David Byrne, *The Fall and Rise of Music: The CD? It’s dead*, WIRED, Jan. 2008, at 124.

<sup>166</sup> Welsh, *supra* note 76, at 1503, 1505.

<sup>167</sup> BURKART & MCCOURT, *supra* note 29, at 17. Of course, the parties also bear a disparate amount of risk. The record label carries the financial risk of the record-making venture—only 10% of recordings break even, and record companies recoup investments on only 5% of artists. *Id.* at 21.

<sup>168</sup> Byrne, *supra* note 166, at 124-29. Napster also instigated some musical artists to read and question their contracts. KNOPPER, *supra* note 37, at 132-33. Established artists such as the Dixie Chicks have also warned about the new 360 degree deals taking additional revenue streams from musical artists and giving it to the music business. *Id.* at 241-43.

<sup>169</sup> KNOPPER, *supra* note 37, at 132; PASSMAN, *supra* note 106, at 77. “Breakage” originally accounted for the percentage of shellac record albums that would break during shipping.

<sup>170</sup> Locke, *supra* note 61, at 80-81.

<sup>171</sup> It is unfair because there are no associated costs, but the business still deducts them from the royalties paid to the artist. HALLORAN, *supra* note 76, at 392-93.

<sup>172</sup> *Id.*

music industry has begun modernizing contracts to more accurately account for digital sales and eliminate these irrelevant, obsolete discounts. This is a significant step in modernizing these contracts and creating a more equitable distribution of digital revenues.

#### TELLING THEIR OWN STORY

This article does not argue that the interests of record labels and the music industry are subservient to those of the musical artist, or that the artist should be endowed with new property rights.<sup>173</sup> Rather, it urges musical artists that the pro-business story is neither accurate nor beneficial to their interests in digital music<sup>174</sup> and that they cannot rely on Business to protect their interests. Consequently, artists must accept the responsibility for telling their own story and advocating for their own interests.

To that end, groups such as the Featured Artist Coalition, the Future of Music Coalition, and the Recording Artists Coalition are

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<sup>173</sup> It is important to clarify the rights of the musical artist under copyright law and the standard recording contract. A record/digital recording involves multiple rights. First, there is the song or composition. The song-writer possesses the panoply of rights granted under § 106 of the Copyright Act, including the right to publicly perform the song. Typically, the song-writer transfers her rights to a music publisher. Performing rights societies then contract with the publisher to license its song catalog and administer (and divide the fees for) performances of the song. Welsh, *supra* note 76, at 1500-01, 1504-05. Second, there is the sound recording of the song, or what the consumer knows as the CD. *Id.* at 1500-01. The record label licenses the song from the publisher, *id.* at 1504, hires the musical artist to perform it, KRASILOVSKY & SHEMEL, *supra* note 39, at 27, and records it on a CD. Under §114(a), the record label possesses the rights in the sound-recording only, and (pursuant to §114(b)) has only the rights to reproduce, distribute, and make derivative works of that sound recording. The Digital Performance Rights in Sound Recording Act (1995) gives the record label the exclusive right to control the digital performance of the sound recording over cable and satellite. The DMCA grants it that same right with regard to internet (webcasting) and wireless broadcasts. The rights of the musical artist come from the employment contract with the record company. That contract pays the artist royalties for sales of CDs. KRASILOVSKY & SHEMEL, *supra* note 39, at 27. (These contracts typically deal only with the sound recording and the rights associated with it. Welsh, *supra* note 76, at 1506.) The musical artist, however, has no copyright in the song or CD. Rather, the only rights the artist might possess are under the DPRSA, which gives the musical artist an interest in (and royalties for) a digitally-transmitted broadcast of the sound recording. This right is usually assigned (as part of the recording contract) to the record label. *Id.* at 1506-07.

<sup>174</sup> See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008) (stating that individuals besides Business have interest in and can make choices about the underlying premises of changes in copyright law).

adding their perspectives to the debates regarding digital music.<sup>175</sup> UK's Featured Artist Coalition (which includes Robbie Williams and members of Radiohead and Travis) is attempting to increase awareness among musical artists and the public about business tactics and contracts with internet music providers that deny artists revenue from digital music sales and licensing.<sup>176</sup> Similarly, the FMC wants to ensure that artists are fairly compensated for their creations,<sup>177</sup> while acknowledging that both market factors and technology impact the economic value of music.<sup>178</sup> Indeed, as the internet facilitates the distribution of music, the economic value of a distributor (and justification for Business receiving its present proportion of profits) declines.

These groups, along with other artist rights advocates, have proposed alternative methods of artist compensation,<sup>179</sup> shifting to artist-controlled digital distribution, and adjusting royalties for digital downloads.<sup>180</sup> With regard to the latter, royalty rates could simply be made the same regardless of musical form. Another possibility would be a standardized three-tier royalty contract: the musical artist would opt for the traditional royalty payment, an equal royalty payment<sup>181</sup> or a sliding scale where the artist would choose a higher digital royalty rate but a lower traditional rate. This would keep money in the pocket of Business,<sup>182</sup> while allowing a musical artist to assert her own interest—and bear the risk for doing so—where her interests conflict with those of Business. Other proposals might require legislation.<sup>183</sup> For instance, a copyright protection for the musical artist as an interested party providing that, if the business sues and settles, the musical artist will receive a proportion of that settlement.

Adjusting to the digital music marketplace requires integrating and valuing a variety of interests and models of commerce; otherwise

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<sup>175</sup> See generally Dan Sabbagh, *Top Musicians Unite to Form Copyright Lobby Group*, TIMES ONLINE, Mar. 10, 2009, [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/music/article5883885.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article5883885.ece).

<sup>176</sup> *Id.*

<sup>177</sup> Wagman, *supra* note 47, at 96.

<sup>178</sup> *Id.* at 96-97.

<sup>179</sup> Dines, *supra* note 29, at 175.

<sup>180</sup> See Kristin Thomson & Brian Zisk, *iTunes and Digital Downloads: An Analysis*, FUTURE OF MUSIC COALITION, June 15, 2003, <http://www.futureofmusic.org/article/article/itunes-and-digital-downloads-analysis>.

<sup>181</sup> This might lead to reduced rates for traditional sales, in order to account for the increased rate for digital sales.

<sup>182</sup> It may behoove business to recalculate compensation for musical artists. Giving up some short-term revenue is better than allowing artists to form a collective, skip the middle-man of the label, and sell music online themselves.

<sup>183</sup> BURKART & MCCOURT, *supra* note 29, at 17.

its full commercial potential is suffocated.<sup>184</sup> Hence, some new players, (such as pay-music and subscription services) have entered the game, and should be rightful players,<sup>185</sup> some established players and business modes should be retired, and those who have been on the sidelines, such as musical artists, must step up to the plate. More importantly, however, musical artists must become aware and be active advocates, rather than merely accepting whatever role Business decides they will play and then waiting to be rescued.

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<sup>184</sup> Welsh, *supra* note 76, at 1521.

<sup>185</sup> Business might also wish to rethink its negotiation stance (in terms of royalty payments, licensing, and DRM) with digital music services, lest these attempts to monetize digital music collapse.