

# WHAT'S THE DOWNLOAD<sup>®</sup> MUSIC SURVIVAL GUIDE

*Written by:*

*The WTD Interactive Advisory Board*

*Inspired by:*

*Thousands of perspectives from two years of work*

*Dedicated to:*

*Anyone who loves music and wants it to survive*

**\*A special thank you to Honorary Board Members  
Chris Brown, Sway Calloway, Kelly Clarkson, Common,  
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JD Natasha, Mark McGrath, and Kanye West  
for sharing your time and your minds.**

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## **What's The Download® Interactive Advisory Board: WHO WE ARE**

Based on research demonstrating the need for a serious examination of the issues facing the music industry in the wake of the rise of illegal downloading, in 2005 The Recording Academy® formed the **What's The Download Interactive Advisory Board (WTDIAB)** as part of **What's The Download**, a public education campaign created in 2004 that recognizes the lack of dialogue between the music industry and music fans.

We are comprised of 12 young adults who were selected from hundreds of applicants by The Recording Academy through a process which consisted of an essay, video application and telephone interview. We come from all over the country, have diverse tastes in music and are joined by Honorary Board Members that include high-profile music creators and industry veterans. Since the launch of our Board at the 47th Annual GRAMMY® Awards, we have been dedicated to discussing issues and finding solutions to the current challenges in the music industry surrounding the digital delivery of music.

We have spent the last two years researching these issues and gathering thousands of opinions on issues such as piracy, access to digital music, and file-sharing. We have spoken to everyone from music fans to artists to retailers to label executives to producers and engineers at industry conferences, local Recording Academy Chapters, recording studios, and our own universities. In the process we have created what you are about to read: the *What's The Download Music Survival Guide*.

Our report synthesizes our research, focuses on the state of the digital music industry and gives constructive solutions for the music industry to ensure music's survival. We hope you learn as much from reading it as we did from writing it.

Sincerely,

**The Interactive Advisory Board for What's The Download**

*Matthew Annerino, Chicago, Ill.*  
*Jill Apelgren, Boston, Mass.*  
*Babareh Batmanghelidj, Los Angeles, Calif.*  
*Brittany Frey, Murfreesboro, Tenn.*  
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# Introduction

In the 50 years since commercial rock ‘n’ roll was born, everything about music has changed, from the way it’s made to what it sounds like to how it’s marketed and sold. The most dramatic difference, however, has perhaps come in the last decade. Spurred by the introduction of the Internet, the act of discovering music and, subsequently, sharing it, have evolved in ways artists, record companies and listeners never imagined. Gone are the days of walking over to a friend’s house with a stack of vinyl long-playing records under your arm—a deeply personal, one-on-one experience that, often, ended in generating a future sale. Today, connecting with music happens in an instant, involves an incomprehensible number of people, and a method that’s nearly impossible to trace.

Like many times before in its history, the music industry is at a crossroads. Faced with declining album sales and a public that lives—but doesn’t always buy—online, the traditional brick and mortar model, which has weathered its share of technological innovations (from 8-tracks to tapes to compact discs), can no longer function as it was designed; at least not for profit. At the same time, consumers are battling music providers with issues centered on perception (the perceived greed of record companies and the perceived wealth of popular artists) and one undeniable reality: that acquiring music is easy and, depending on where you are getting it, free. While the conscience may debate the act of illegal downloading, is it enough to steer the listener towards a legitimate purchase or is a legal threat necessary? If you are willing to pay, will you be able to own the music or will copy-protection software ostensibly mean you’re renting it?

These are some of the many questions that this report tackles. It was compiled by a 12-member panel of 18 to 24-year-old music fans from every walk of life that have spent the better part of two years collecting viewpoints and opinions through interviews and roundtable discussions with artists, producers, songwriters, executives and peers. The *What’s The Download<sup>®</sup> Music Survival Guide* is an unedited look at today’s state of music and a genuine attempt to decipher what’s working, what’s not, and where we go from here.

To encapsulate the opinions of hundreds, if not thousands, of music makers and consumers into one succinct and presentable document is no easy feat, but more important, it is not necessarily fact. As such, the What’s the Download Interactive Advisory Board (WTDIAB) analyzed both historical and current data in addition to their own findings. The resulting report represents a first in that it draws a blueprint of possible solutions to these very complex issues that

are clearly not going away. And while the Board conducted its work under the guidance of leaders of The National Academy of Recording Arts & Sciences, Inc. (The Recording Academy®), the opinions expressed here are not necessarily those of The Recording Academy but rather of music fans, the unspoken majority in this chess game.

It's time to listen...and learn.

—*Shirley Halperin*  
*What's The Download*® *Honorary Board Member;*  
*US Weekly Entertainment Editor*

# 7 Music Survival Tips

## (Excerpts from the Guide)

### **#1: Educate to Eradicate Piracy**

“Unaware of the large number of people who collaborate to make a record, many consumers have turned to illegal file sharing as a response to the high price of music, believing that they are not hurting all of the 'rich' musicians. They simply do not understand the ramifications of their actions.”

### **#2: Make Music Retail Therapy**

“Sometimes when you go to a record store, you bump into a record. You bump into people that may hip you up to records. It’s a whole other experience. And we need that journey. It’s important that as artists we take time to dig, to see the roots of where everything is coming from so that we can offer it to the fans, and they all can offer it to the next generation.”

### **#3: Declare a Music/Tech Truce**

“Simply put, the industry does not make it easy for consumers to purchase and use digital music online legally, while piracy delivers what companies hold back. Digital music is a vital force in the industry and technology needs to be properly embraced to provide ease of use to consumers.”

### **#4: Commit to Artist Development**

“If the music industry wants to win back the financial loyalty of fans lost to illegal means of obtaining music, the major labels should work with artists to cultivate their talent, rather than casting an artist aside after a commercially unsuccessful release.”

### **#5: Embrace New Music Avenues**

“If the music industry hopes to survive, it must embrace the new face of musical community to reach out to potentially dedicated fans. Labels as well as artists should take the time to interact online with their fans in the interest of developing an artist-fan relationship that will entice fans to support artists monetarily as well.”

### **#6: Offer What Piracy Doesn't**

“So how can companies drive illegal file sharers to legal Web sites? This is something many are struggling to figure out, and there is not one clear answer or solution. However, if legitimate Web sites and online companies want to continue to grow, they must offer what piracy cannot.”

## **#7: Make Music a Priority**

“More people are discovering more new music—and a greater variety of music—than ever before. There are tremendous challenges facing traditional music businesses, but for artists and fans this is an incredibly exciting time. One day, we will look back on this period in music history as a kind of Internet adolescence—a confusing, sometimes awkward transition that in the end leaves us stronger, smarter...and a little less innocent.”

# 1. BACKGROUND OF DIGITAL MUSIC

**Topics covered in this section:**

- A. Decline in Music Sales**
- B. Illegal File Sharing: Legal Precedents and Recent Court Cases**
- C. Illegal Downloading and the Future of Music**
- D. The Rise of Legal Downloading**

## **A. Decline in Music Sales**

Over the years, organizations such as the Recording Industry Association of America (RIAA), International Federation of the Phonographic Industry (IFPI) and SoundScan have provided statistical data about music sales to the United States and the rest of the world. This data is used not only by the music industry to determine trends and problems, but it also is often used by popular music publications such as *Billboard* and *Rolling Stone* to supplement articles read by the general public.

Most recently, these statistics have been used to illustrate the impact of digital music on the music industry. While such data is believed to accurately reflect the state of the industry, it sometimes is used in questionable ways, from deliberately misleading spin to inaccurate representation of trends in music to poor analysis of the effects of peer-to-peer downloading; often, the statistics do not tell the whole story. Our goal is to analyze these numbers in a way that allows for a different, and hopefully more accurate, interpretation.

What's The Download does not support illegal downloading and fully subscribes to the philosophy of intellectual property – illegal downloading can and should be considered property theft, but it seems somewhat myopic to represent illegal downloading as the only culprit.

For example, in 2002 the RIAA reported that CD sales had fallen by 8.9 percent. However, in that same period, revenues fell just 6.7 percent.<sup>1</sup> These numbers do not seem to correlate. If Internet piracy alone were responsible for these changes, we could expect an equal decrease in revenues. These numbers suggest that other explanations exist for the decline in music sales and revenues. One such factor could be the total number of albums released during the same period. SoundScan reports that there was a decline of more than 20 percent in the number of albums released worldwide between

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<sup>1</sup> RIAA, *Yearend Statistics*

1999 and 2002.<sup>2</sup> This decrease could certainly account for some of the reduction in both sales and revenues.

Another possible cause of the decline in music revenues is the price of music in retail stores. From 1999 to 2001, the average price of a CD rose 7.2 percent, from \$13.04 to \$14.19.<sup>3</sup> Russ Crupnik, president of NPD Music, noted in an NPD report that “according to a consumer survey conducted earlier this year, one out of three CD buyers rank the price of CDs ‘important’ or ‘very important’ in his or her purchase decision.”<sup>4</sup> It seems probable that the rise in prices resulted in some decline in music sales, while reflecting a lesser decline in revenue, as evidenced by trends in 2003 and 2004, during which the industry saw the price of CDs fall to nearly equal their 1999 levels. The NPD report states, “The average price of CDs in the U.S. has reached a low of \$13.29, versus \$13.79 in 2003.” This fact should have led to an increase in sales, but it did not, making this argument more confusing for consumers who want to understand the root cause of decline in revenues.

A similar pattern was observed for the Top 50 sellers in Q1 2004, when the average price was \$13.36 nationwide, a drop of 3.1 percent versus a year ago.”<sup>5</sup> This decline suggests that the music industry responded quickly to the idea that the high prices of CDs were responsible, in some part, for the overall decline in music sales and revenues.

Similarly, the RIAA represents the statistics in such a way that suggests that each illegal download represents a lost sale. In other words, downloading a file for free is exactly equivalent to taking a physical copy of this record from the shelf of a store. While this correlation is certainly true in a court of law, the effects on revenues suggest otherwise. This misleading representation is based on the idea that if a person digitally copies a CD, there is one less physical CD for sale or even one less buyer. This idea, with the advent of digital technology, is antiquated. Lawrence Lessig notes in his work *Free Culture*:

In the same period that the RIAA estimates that 803 million CDs were sold, the RIAA estimates that 2.1 billion CDs were downloaded for free. Thus, although 2.6 times the number of CDs sold were downloaded for free, sales revenue fell by just 6.7 percent . . . If every download were a lost sale . . . then the industry would have suffered a 100 percent drop in sales [in 2002], not a seven percent drop.<sup>6</sup>

That being said, if every one of the 2.1 billion CDs had been paid for at an

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<sup>2</sup> Lessig, Lawrence. *Free Culture*, 70.

<sup>3</sup> Black, Jane. “Big Music’s Broken Record,” *Business Week* online, February 13, 2003.

<sup>4</sup> [http://www.npd.com/dynamic/releases/press\\_040603.htm](http://www.npd.com/dynamic/releases/press_040603.htm)

<sup>5</sup> *Ibid.*

<sup>6</sup> Lessig, Lawrence. *Free Culture*, 71.

average of \$10 per CD, the industry would have experienced a \$21 billion increase in sales; an increase beyond any industry's wildest projections and hopes. The eMarketer Online Music Report states that, in 1999, the U.S. music industry revenue peaked at \$14.6 billion.<sup>7</sup> Add the \$21 billion "lost" to illegal downloading and the industry should have experienced revenues of \$35.6 billion, or about a 150 percent increase. This estimation should appear startling. As these numbers suggest, the claim that every download represents a lost sale is unfounded in reality.

In short, while Internet music piracy should certainly concern the music industry, the effects do not seem to be nearly as damaging as the RIAA would have the public believe.

## **B. Illegal File Sharing: Legal Precedents and Recent Court Cases**

To understand recent American court cases regarding file sharing technology, we must first understand three precedent-setting cases from the not-so-distant past:

### **Sony** (Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417 (1984))

The primary case cited by present-day technology defendants is the 1984 Sony Betamax case. At issue in Sony was whether Sony's sale of video tape recorders to the general public violated any of the rights conferred to the owners of copyrighted television programs.<sup>8</sup> The Court held that: (1) authorized "time shifting," in which a VTR user recorded a television show to watch it at another time, did not constitute copyright infringement; and (2) private, non-commercial time shifting, even if unauthorized, constituted fair use under existing copyright law.<sup>9</sup> Because Sony was able to establish a substantial non-infringing use of its VTRs, the Supreme Court refused to hold Sony liable for the distribution of a product with alternative lawful and unlawful uses in the absence of any affirmative steps by Sony to foster infringement.<sup>10</sup>

### **Napster** (A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (2001))

In A&M v. Napster, the plaintiffs, numerous record companies, sued Napster for contributory and vicarious copyright infringement. The plaintiffs claimed Napster provided users with a service that let them copy digital files without payment or permission of copyright holders. Specifically, Napster servers

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<sup>7</sup> eMarketer, Online Music: Downloads, Streaming, Radio, Mobile. August 2005.

<sup>8</sup> Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 420 (1984)

<sup>9</sup> *Id.* at 446, 454-55.

<sup>10</sup> *Id.* at 456; *see also* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (discussing Sony decision).

stored lists of all users' available files, even though the actual files were never housed on Napster servers.<sup>11</sup> Napster claimed:

- It was not liable for *contributory infringement* because the primary purposes of its software and network—sampling<sup>12</sup>, space-shifting<sup>13</sup> and permissive distribution by new and established artists—constituted fair use under copyright law;
- It was not liable for *vicarious infringement*<sup>14</sup> because the service generated no revenue; and
- As it was technologically impossible for Napster to shut down infringing uses and non-infringing uses (like chat rooms, message boards and the New Artist Program) separately, a forced shut down of their services would be a violation of First Amendment rights.

On the claim of contributory infringement, the trial court held that Napster's version of "sampling," in which a user could download free, full and permanent copy of a song, was a commercial use, not a fair use.<sup>15</sup> The appellate court affirmed.<sup>16</sup> The trial court further held that Napster's version of "space-shifting," in which copyrighted songs became simultaneously available to millions of Napster users, did not constitute fair use under copyright law.<sup>17</sup> The appellate court affirmed.<sup>18</sup> Finally, the trial court noted that the plaintiffs were not seeking to enjoin non-infringing uses such as chat

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<sup>11</sup> A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1012 (2001).

<sup>12</sup> *Id.* at 1018. Napster argued that its users were downloading MP3s to sample music in order to determine whether to purchase the recording. *Id.* The court distinguished Napster's supposed "samples"—full, free, permanent copies of the recording—from genuine song samples such as the streams or clips that are available on retail Internet sites from which record companies collect royalties. *Id.*

<sup>13</sup> Napster argued that one use of its program was "space-shifting," where a user could download a song that he or she already owned on an audio CD. *Id.* at 1019. Napster urged the court to apply the time-shifting analysis from the Sony case to its case. *Id.* The court rejected Napster's analogy because once a user shifts a song (even if from an owned CD) to the Napster system, it becomes available to millions of people, not to just the original owner. *Id.*

<sup>14</sup> Under copyright law, vicarious liability applies to a defendant who "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Id.* at 1022 (internal citations omitted).

<sup>15</sup> *Id.* at 1018.

<sup>16</sup> *Id.* at 1019.

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

<sup>18</sup> *Id.*

rooms, message boards and the authorized distribution of music by new artists.<sup>19</sup> This determination was not challenged on appeal.<sup>20</sup> Based on the foregoing, the appellate court held that Napster was not entitled to a fair use defense and that the plaintiffs were likely to succeed on a claim for contributory infringement.<sup>21</sup> On the claim of vicarious infringement, the trial court found that Napster had both actual and constructive knowledge that its users were exchanging copyrighted music.<sup>22</sup> On appeal, the court distinguished the architecture of Napster's system from Sony's VTR in the Sony case.<sup>23</sup> The appellate court noted that in Sony, the Supreme Court declined to impute knowledge of actual infringement where Sony sold equipment capable of both infringing and substantial non-infringing uses.<sup>24</sup> The appellate court did not need to impute knowledge of copyright infringement to Napster, holding instead that "Napster ha[d] *actual* knowledge that *specific* infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material."<sup>25</sup> Coupled with the appellate court's affirmation of the trial court's finding that Napster derived a financial benefit from registering additional users and that Napster had the ability and right to supervise its users' conduct but failed to do so, the court held that the plaintiffs were likely to succeed on a claim of vicarious infringement.<sup>26</sup>

**Grokster/Streamcast** (MGM Studios Inc. v. Grokster, Ltd., 125 S.Ct. 2764, 2775 (2005))

"From the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners." – The Hon. Sidney R. Thomas

The companies Grokster, Ltd. and StreamCast Networks, Inc. added a twist to the Napster system. Instead of housing any information on their own servers, the companies provided software that allowed user to connect directly to one another and share copyrighted materials such as music and movies.<sup>27</sup> A group of motion picture studios, recording companies, songwriters, and music publishers sued Grokster and StreamCast for the

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Because the plaintiffs were seeking a preliminary injunction, the proper standard was a likelihood of success on the merits.

<sup>22</sup> *Id.* at 1020.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1022 (original emphasis).

<sup>26</sup> *Id.* at 1024.

<sup>27</sup> MGM Studios Inc. v. Grokster, Ltd., 125 S.Ct. 2764, 2770 (2005)

copyright infringement of their users.<sup>28</sup> The trial court found in favor of the defendants on allegations of both contributory and vicarious infringement, and the plaintiffs appealed. The Court of Appeals affirmed. The Ninth Circuit reasoned that because of the decentralized systems of Grokster and StreamCast, the defendants did not necessarily know about specific instances of infringement nor did they monitor or control use of the software.<sup>29</sup> Therefore, applying the Sony case, since the software was capable of being used for non-infringing purposes and the defendants did not have actual knowledge of infringement, the Court of Appeals held that the defendants were not liable, either under contributory or vicarious infringement theories, for the copyright infringement of their users.

The Supreme Court, on appeal, focused not on whether Grokster and StreamCast had actual knowledge of infringement, but whether they intended to create a product to be used to infringe copyrights.<sup>30</sup> The Court explained that under Sony, the Court would not presume or impute intent solely based on the design or distribution of a product with a substantial lawful use that also will be used for infringing purposes.<sup>31</sup> But when there was evidence of actual intent that a product be used to infringe copyrights, the Court would base contributory infringement liability on the actual intent, without the need to presume or impute intent.<sup>32</sup> Therefore, where there was evidence that: (1) the defendants attempted to attract former Napster users by advertising the ability of their programs to be used for illegal file sharing,<sup>33</sup> (2) neither defendant attempted to develop a tool to filter out the sharing of copyrighted materials, and (3) the defendants were deriving income from selling advertising space on their software, the plaintiffs were entitled to proceed with their claims of contributory and vicarious infringement.<sup>34</sup>

### ***Analysis***

It is interesting to see how things changed from Sony to Grokster. Today, most of us do not think of VTRs (or VCRs) as being especially

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<sup>28</sup> *Id.* at 2771.

<sup>29</sup> *Id.* at 2774-5.

<sup>30</sup> *Id.* at 2778.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2779-80.

<sup>33</sup> *Id.* at 2772-3. The Court found several examples of the defendants promoting the software to infringe copyright. In evidence were e-mails in which the distributors responded with guidance to user's questions about playing copyrighted movies they had downloaded. In their marketing they expressed the intention that recipients of the software use it to download copyrighted material. One StreamCast advertisement said: "Napster Inc. has announced that it will soon begin charging you a fee. That's if the courts don't order it shut down first. What will you do to get around it?"

<sup>34</sup> *Id.* at 2780-82.

threatening to intellectual property rights. It invites the question: Are the recent decisions a necessary measure to protect copyrights, or are we delaying an inevitable change in the way the industry works?

The primary distinctions between the three cases are: (1) what constitutes fair use and (2) what steps the defendant took to facilitate or encourage copyright infringement. The Court in Sony found that there was minimal harm associated with recording a television show and watching it at a later time. At the time of the broadcast, the VTR owner was entitled to view the show. Furthermore, the copyright owner would benefit from the increased viewership even if the VTR somewhat diminished the value of the viewing by allowing the user to skip commercials. Therefore, even though Sony knew, with almost absolute certainty, that some users would use their VTRs to infringe copyrights, Sony could not monitor the individual use of the VTR and, more importantly, the non-infringing use was significant.

In Grokster and Napster, the courts found that the sharing of copyrighted files was not fair use. Rather, this was commercial use and did not constitute a substantial non-infringing use. Furthermore, the courts found that the defendants had the ability to separate the infringing uses from the non-infringing uses, or at least minimize the infringing activity, and chose not to because of the economic benefit derived from the illegal file sharing.

Many people question the difference between burning mixed CDs for friends and Internet file sharing. Either way, one party is making an illegal copy of the song for the purpose of giving it to someone else. But based on the recent decisions, a court would not likely hold the manufacturer of CD burners liable for contributory infringement because the use of CD burners for backing up data, storing pictures, or even backing up software or music, is a substantial non-infringing use.

In the Sony case, the court found that many people used VTRs in the intended manner: to record a show for later viewing and then erase it. Others built entire libraries of movies by taping them from television. Those people will always exist. No matter how many incentives or lawsuits or campaigns there are to get people to stop downloading illegally, some people will always seek to get something for nothing if they can.

Based on this reality, the music industry should proactively confront the widespread use of digital file sharing. In Grokster, the court warned against upsetting the balance between encouraging creativity and promoting innovations in technology. These areas, however, are not mutually exclusive. The movie industry discovered a lucrative new market with the advent of the VCR and home video rentals. Book sales, it turns out, were not destroyed by copy machines. With time, although it may seem idealistic now, the music industry will use its own innovations in technology to embrace digital file sharing so that it is no longer detrimental to the industry.

### C. Illegal Downloading and the Future of Music

When revenues from music sales began to fall in the late 1990s, the industry started searching for an explanation. It did not take long for the likes of Napster and other peer-to-peer (P2P) file sharing networks to receive the brunt of the blame. As a result of these networks, any information that could be transformed into a digital format could now be shared openly and freely.

As these file-sharing networks do not discriminate between copyrighted and non-copyrighted information, copyrighted information is passed into the hands of consumers without them paying for rights of use. Suddenly presented with the option of receiving and giving music at no cost, Napster users began sharing at an unprecedented rate. At its peak in February of 2001, more than 1.5 million users were simultaneously logged on to the network at any given time.<sup>35</sup> Even more astonishing is the fact that in its first 18 months, Napster amassed close to 80 million registered users.<sup>36</sup> These shocking numbers deliver us to our current state of music affairs: the relationship between digital technology and the music industry.

Since the days of the first iteration of Napster, many other P2P networks have arisen in its stead. Illegal downloading remains an important issue that the industry and technology companies need to address. The extent of the impact of P2P technology, however, remains a question mark.

This argument is supported in a study done of the demographics of Internet users. Jupiter Research reports that young adults aged 18 to 24 are far more likely than people over the age of 25 to use P2P services. Thirty-one percent of young adults used file sharing services in 2004, compared with four percent of people who are over 25 years old. Why these differences in usage between age demographics? Differences in financial stability certainly may account for some of these statistics. It seems that the history of personal computers however, helps to elucidate this discrepancy as well. Dennis Sellers reported in *Macworld* that, in 2002, more than 70 percent of households with children ages 19 and younger used computers<sup>37</sup> compared with zero percent in 1976. These facts suggest that the consumer base is becoming increasingly familiar with computer-based living. It is not surprising then, that the consumers who have grown up with computers and similar technology are more inclined to use that technology.

The prevalence of computers in young consumers' consciousness has prepared them not only for illegitimate computer use, but computer use in general. This suggests why legitimate online music sources are becoming

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<sup>35</sup> <http://archives.cnn.com/2001/TECH/internet/06/28/napster.usage/index.html>

<sup>36</sup> <http://www.wired.com/news/business/0,1367,52532,00.html>

<sup>37</sup> Sellers, Dennis. "Personal Computers on the Rise Among Households with Kids," <http://www.macworld.com/news/2002/05/24/computers>.

increasingly popular as well: the majority of the interested consumer base knows how to use the technology.

Prior to P2P technology, and Napster in particular, there existed no widespread, mainstream way to access music with computers. Napster thrust digital music into the public's consciousness. Suddenly, the computers that the younger public was becoming increasingly familiar with made music easily accessible. Of course, technology also made the music free, which probably helped increase its popularity and use; however, more generally, Napster created the recognition of digital music for the general public. This development is evidenced by the fact that even in its short life; the original Napster grew exponentially with the use of personal computers. Those consumers who grew up with computers, today's young adults, were also the first to understand the possibility of digital music.

### ***Perspectives on Illegal Downloading***

As we enter the age of digital entertainment, there are a variety of views on pirated music. While more and more consumers shift to obtaining their music primarily online, there is still the question of how exactly they get their music. Some go to online stores, such as iTunes, and purchase individual downloads. Others download as many songs as they desire for a set monthly rate as part of a subscription service such as Napster 2.0. Still others order CDs and other mediums of tangible music from online music retailers. But this is only half the story.

Some music fans choose to use music-pirating software and receive digital copies of their desired music for free. In this scenario, the person often downloads a copy of the music directly from another user (such is the case with P2P services LimeWire or eDonkey). Under copyright law, acquiring music in this fashion is illegal because a copyright owner retains the right to control all uses of his or her material.

When a 22-year-old Nashville resident was asked how he gets his music he said, "I download it off of the Internet. Why should I pay \$15 for a CD when I can get it online for free?"

An Auburn University senior had a similar outlook: "Music is grossly overpriced. I'm trying to support myself and pay rent, so I rarely have extra money to spend on music." He admitted to feeling guilty for downloading illegally but justified his actions by saying, "I know that people aren't getting paid when I bootleg their music but if I couldn't download it for free, then I just wouldn't get it because I can't afford to pay for it. It's not like they missed out on a sale, because I would not purchase it anyway."

A high school junior said that while she does not download using peer-to-peer networks, she has friends who do. She does own several burned CDs of music that her pals acquired on these services. She said, "The record

labels and artists have enough money as it is. It's not really hurting them if I don't buy CDs."

Artists and members of the industry have spoken to the WTDIAB on numerous occasions and shared differing sentiments about illegal downloading. WTDIAB Honorary Member and GRAMMY®-winning rapper/producer Kanye West said, "Go to that person that really honestly can't afford all of the music they want or has a love for music. It's Stevie Wonder right now who will be the product of the download era, that will give so much that he wouldn't have been able to give if he hadn't have been able to hear all this music." He further noted that, "It's those people that illegally download music with the intention to sell that I think should be pinpointed because that's stealing. They're taking your music and they're trying to make money off of it that they don't deserve. It's not for the love." (*WTDIAB Roundtable Discussion, February 2005*)

Members of the industry have differing views. Some believe illegal downloading can be beneficial, while others are adamantly against it:

**Linkin Park, GRAMMY®-winning Rock Band:** "Downloading is funny because everybody's got their opinion. It works differently for different artists. Most established artists think it's more dangerous. But especially with young aspiring artists, especially unsigned ones, you know downloading is a great way for them to be able to get their music out there. In fact, I have a new project called Fort Minor, it's a new hip-hop project and downloading has been a big part of our group kind of getting off the ground, you know. So, it's different in every situation. It's kind of like, from one thing to the next, take it as it comes." (*48th Annual GRAMMY Awards, February 2006*)

**Sean Paul, Reggae Rapper:** "I think that [digital downloading] has really gotten a lot of people to know me. Web sites alone – people sometimes bounce on the Web site when they have never heard my songs and check them out, so I think it does help people to get to know my work. Also it's like a test. They will download one song, then they might download another one and then they might want to get the album because it's good stuff. I use it. I think it's an advantage." (*48th Annual GRAMMY Awards, February 2006*)

**DJ Splyce, Electronica DJ:** "I have pretty controversial viewpoints on [digital downloading] for an artist. I think of music now more as a business card than anything else, honestly. I just recently played in Istanbul in Turkey, and I had 7,000 or 8,000 kids at a show and half the people there came up to me with CDRs and tracks of mine that they burned. I think that we place so much importance on the sort of dollar transaction between music and a consumer that we're losing sight of the fact that in actuality in a traditional record label model, a record label gobbles up 87 percent of the goods and they keep you strung along enough so you never make any money anyway. So, I think what's happened actually is about to topple this incredible behemoth and start a new model where artists are actually interacting directly

with their audiences. And I think that's a very positive thing." (*48th Annual GRAMMY Awards, February 2006*)

**Dido, Alternative Rock Singer/Songwriter.** "I have mixed feelings [about digital downloading]. I love people hearing my music, however they hear it. I do think that people need to know what the consequences of it are going to be, which is that they won't be exposed to as many new artists. New music is not going to get a chance, which means less variety because what seems to be happening is that the more illegal downloading is taking off, the more the record companies are suffering, and the more that they're only concentrating on the big artists. The little ones, who are probably making far better music, quite frankly, aren't getting heard. I think everyone loses at that point." (*46th Annual GRAMMY Nominations Press Conference, December 2003*)

**Chris Brown, R&B/Pop Artist and WTDIAB Honorary Member.** "I want people to love my music and be able to hear my music. But at the same time, I want it to be done legally, so my label can get paid, so I can get paid, so I can keep making music, and keep my well-being out there as an artist, and let people see me, and say, "Okay, Chris Brown can perform!" (*WTDIAB "Rap Session," February 2006*)

**Jimmy Jam, GRAMMY-winning Producer.** "I always thought music should be a utility. It should be, like, you turn on water and the more of it you use, the more you pay for it. I think music should be like that in terms of the accessibility of it. I think everybody should be able to get it as easily as possible, which I think downloading allows you to do. But, once again, the problems arise where—and a lot of it is due to the fact that people don't realize that music is not free—they listen to music on the radio and they think that it's free because they turn on the radio and there it is. They don't realize that the radios have sponsors, they have commercials, they have things that pay for the music and that some of the money goes to BMI, it goes to the Performance Right organizations and the songwriters and everybody gets paid for it. So that's the difference." (*48th Annual GRAMMY Nominations Press Conference, December 2005*)

**DJ Tony Okungbowa.** "As an artist and a DJ, I would tell people that are illegally downloading that the fines they're levying at the moment are really enough to scare anybody. The fact that you could get literally locked away now or get in some serious trouble is really not worth it. There are so many places you can get music nowadays. It's 99 cents a song on iTunes. It's really not worth taking the risk. There is also the moral issue of it, with regard to the fact that you're taking money away from someone who's worked hard at their craft. How would you feel if someone did that to you?" (*46th Annual GRAMMY Awards, February 2004*)

**Brad Paisley, Country Singer/Songwriter.** "As a songwriter and performer, I think the same things that other songwriters would think, which is: 'Please, let's find ways to make sure that people aren't taking our music for

granted, taking it for free off the Internet.' If you build something for someone you expect to be compensated, it's the same with a song. If you write it, you want to be compensated. The thing that people don't understand, the general public is basically innocent in the fact that they don't realize, it doesn't occur to them, that this is someone's property that they're taking. I think that if they just knew that it wasn't the right thing to do, they would gladly pay. I go on iTunes and pay 99 cents every time I want a song from a particular artist. If I need something quickly it's a great way to do it, although I do feel that CD quality is better." (*46th Annual GRAMMY Awards Nominations Press Conference, December 2003*)

**Rodney Jerkins, GRAMMY-winning Producer.** "When it's illegal it hurts. It hurts us. It hurts the songwriters, producers and the artists. It's okay to download music when it's legal and I think we have to push that issue more than anything to try to keep people involved." (*48th Annual GRAMMY Awards, February 2006*)

**Akwid, Spanish Hip-Hop/Rap Duo.** "Personally, we feel that illegal downloading definitely affects more than just the music industry; it affects the artist as well. Everybody is trying to look for a way to get music in a much cheaper format, but it destroys the industry from within. We are definitely against it 100 percent." (*46th Annual GRAMMY Awards, February 2004*)

While viewpoints vary, one thing is certain: the effects of illegally downloaded music on the music industry are considerable.

### ***Impact on the Industry***

One of the most tragic of these effects is the loss of jobs all across the board within the industry. According to the Third Annual BSA/IDC Piracy Study (May 2006), decreasing piracy by 10 percent over four years would add more than 2.4 million new jobs and almost \$70 billion in tax revenues to local governments worldwide. Piracy has many negative economic consequences, including lost tax revenues and jobs due to the lack of a legitimate market. While no single factor can be held responsible for declining record sales, many industry insiders, including the RIAA, place the blame on Internet piracy, although there are too many variables to confirm or deny this accusation. Whether illegal downloading is the culprit or not is yet to be determined, but the issue of waning sales is one of great concern to many within the industry.

John Poppo, a world-recognized engineer, producer, and songwriter, notes about Internet piracy: "It's all trickle-down economics. The ultimate product is a saleable commodity. Demand for music hasn't really changed and the supply is still there. What has happened is someone neutralized the currency. You're selling less CDs because people are getting [them] for free."

Many record labels have been forced to cut back on spending and have even downsized, rendering thousands of people jobless. Others have had no choice but to shut down their operations completely. These effects trickle down far past the record label—the losses get passed along to the music makers. Since there are fewer labels signing artists and releasing music, there is less of a demand for songwriters, singers, musicians, producers, engineers, and even studios. The most talented maintain a steady income despite the cutbacks; however, not everyone is as fortunate. Many have had to take a lower pay rate or even find work outside of the music business.

Artists, too, are adversely affected by online piracy. On “Tears,” a song by the Los Angeles hip-hop duo Self Scientific, rapper Chace Infinite expresses his outlook on the current state of the industry; “*CDs ain’t holdin us down/The record industry’s f\*\*\*\*\* up, it’s all about them downloads now/Fans figure why pay, if the music is free/But nevermind what it’s doing to me.*”

Chace’s attitude on the piracy issue is understandable and shared by many artists. Geoff Tate, lead singer of Queensryche, petitions for education on the part of the fans: “People who engage in illegal file sharing activities need to realize that maybe the top few sellers will be able to continue, but the midlevel to underground type bands will disappear,” he explains. “Bands cannot work for free and we will all be losing musical choices. This idea may seem simple but if so many people get it then they should also get that everyone who steals music from the Internet affects musicians and their ability to produce music for the public.” (*46th Annual GRAMMY Awards, February 2004*)

Since illegal downloading does not compensate musicians for their art, they must seek other ways to supplement their income. The decline in sales, combined with the introduction of affordable, high-quality home recording technology has led to smaller advances and budgets for albums. As a result, many artists are forced to cut corners in the album creation process, and it is often apparent in the final product. According to Poppo, “Budgets are being sliced exponentially and it’s going to compromise the end product.” This frequently causes the perceived value of the music to fall short of consumer standards, which is one of the main reasons for piracy in the first place.

For high-volume artists, online piracy can be the cause of thousands and even millions of lost sales. For smaller artists on independent labels, it can cut into an already small royalty check, making it difficult to make ends meet. Singer/songwriter Stacie Orrico addresses the misconceptions held by fans about artists in the industry: “I get questions all the time like, ‘Oh, so what kind of car do you drive? How big is your house?’ People just assume that the second you have a song on the charts you’re a millionaire, and truth is I’ve been in the industry for six years and still working towards the financial benefit.” (*46th Annual GRAMMY Nominations Press Conference, December 2003*)

Some albums, like one by GRAMMY winner Fiona Apple, have even been leaked onto the Internet prior to their release and pirated so rampantly that they were never commercially released. The result of this can be devastating for artists, as it stalls their careers and sometimes even leads to them being dropped from their labels altogether.

While online piracy cannot be blamed completely for the downturn in the industry over the last few years, it is the main scapegoat of industry insiders. According to RIAA statistics, record sales have declined each year from 2000 through 2003 before making a slight improvement in 2004. As sales decrease and less money is being spent on music, everyone within the music industry is affected, and the number of people employed within the industry also decreases. All business entities involved are forced to cut back, and many have tried to restructure and even reevaluate their business models.

In the United States, we are fortunate that piracy has been held in check in comparison to many other nations. In several countries, such as China, Brazil, and India, more people pirate music than purchase it legally. If we do not act soon, the United States could join that list as well. If this were to happen, it would deliver a devastating blow to an already struggling industry, and the effects could be permanently crippling.<sup>38</sup>

#### **D. The Rise of Legal Downloading**

Even as Internet piracy remains at an all-time high, the use of for-pay Internet music services is increasing at an encouraging rate. From December 2003 to December 2004, the number of U.S. consumers who paid a fee to download music from an online distributor rose from four percent to 11 percent, almost a 300 percent increase.<sup>39</sup>

Similarly, G2 and the Berkman Center for Internet and Society at Harvard Law School reported that in 2004, six percent of online households in the United States subscribed to an online music service. The group estimates that this number will swell to 30 percent in 2008. This rate of increase is astounding. In addition, the increasing rate of legitimate Internet use for acquiring music was accompanied by an eight percent decrease, from 2002 to 2004, of U.S. consumers who downloaded digital music files from a P2P network.<sup>40</sup> These trends suggest that consumers are increasingly willing to use a legitimate online music service.

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<sup>38</sup> Cohen, Warren. "Wal-Mart Wants \$10 CDs." *Rolling Stone*. October 12, 2004. IFPI. "IFPI Digital Music Report 2005." [www.ifpi.com](http://www.ifpi.com)  
Poppo, John. Telephone interview. February 17, 2006.

Recording Industry Association of America. "2004 Yearend Statistics." [www.riaa.com](http://www.riaa.com)

<sup>39</sup> See footnote 9.

<sup>40</sup> See footnote 9.

Jupiter Research reports that online music sales, including both subscription and download services, reached \$99 million in 2003, and predicts that by 2009, total online music sales in both formats will reach \$1.7 billion, an astounding increase.<sup>41</sup>

In short, there is much reason to cheer these projections. David Goldberg, general manager of Yahoo! Music, notes, “We believe that music is going to be completely digital over the next 10 to 15 years.”<sup>42</sup> If these projections are accurate, and even if the growth of the industry does not quite reach these predictions, online music sales are quickly becoming the norm in the market.” (*WTDLAB Roundtable with NARM, December 2005*)

As the use of legitimate online music services grows, so too does the use of P2P file sharing networks. eMarketer found that in 2004, about 7 million Internet users were using P2P networks. In 2005, that number was about 8.5 million. The numbers suggest that P2P sites are becoming more popular; however, it seems possible and probable a correlation exists between the growth of both P2P networks and legitimate online music services.

Despite their illegality, Napster and other P2P networks prepared today’s music consumer for the advent of legitimate online music services, and forced technology companies to develop digital music distribution centers. In a Pew Internet and American Life Project survey conducted in March 2005, 27 percent of respondents say they currently use for-pay online downloading services such as iTunes or buymusic.com; 16 percent say they use P2P file sharing sites. Additionally, 17 percent replied, “No, but have in the past” when asked if they used P2P file sharing services. These numbers suggest that, if given a viable online download service, consumers will begin to use this technology.

Most important, because the consumer base is increasingly familiar and even, perhaps, reliant on these new technologies, it would be wise for the music industry to expand by embracing these technologies and developing legitimate uses of them.

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<sup>41</sup> JupiterResearch, 2004, BearingPoint, March 2005.

<sup>42</sup> See footnote 9.

## 2. TECHNOLOGY: ADVANCEMENTS AND IMPEDIMENTS

Topics covered in this section:

- A. General Principles of Industries and Technologies
- B. Legal Online Music Services
- C. Copy Protection and Fair Use
- D. Digital Rights Management
- E. Lack of Interoperability
- F. Cell Phones

### A. General Principles of Industries and Technologies

Every age has a technology that redefines the way people view the world. During the 19th century, the railroads changed the face of the nation and the world. In the 20th century, the automobile had a similar effect. In the 21st century, the Internet will certainly take the honor. The Internet has already helped spawn one of the most important trends in the history of the world—globalization—and we have only seen this technology in its infancy. The benefits of the Internet for the music industry are numerous and somewhat incalculable, as discussed earlier. But many specific Internet technologies also threaten certain aspects of the industry. It is our responsibility to come up with solutions that are agreeable to all sides.

New, useful technology often threatens the livelihood of a particular industry. For example, it is no stretch to imagine the horrifying problems that digital technology presented to the film and photography industries. However, Kodak and other camera and film industry participants embraced the new technology, and digital photography is now embedded in our culture, or at least until a new and improved technology comes along to supplant it.

Industries must do what they can to embrace and follow new technology, rather than attempting to arrest its proliferation in favor of a particular and temporary way of doing business. In his book *Free Culture*, Lawrence Lessig notes: “Just because technology has weakened a particular way of doing business, it doesn’t follow that the government should intervene to support that old way of doing business.” Copyright violation, which is a matter of law, may be an issue that surrounds the music industry’s relationship with downloading of digital music. However, whether the peer-to-peer technologies themselves, rather than their users, actually violate copyright laws

remains a very difficult and, as yet, unanswered question.<sup>43</sup> When there can be no complaint on the part of an industry against the illegality of a particular technology, it is the responsibility of that industry to develop methods of doing business through that technology, especially when it has become, or is in the process of becoming, embedded within our cultural framework.

File sharing technologies present the industry with unbelievable prospects for marketing, advertising, and even sales. These prospects will be discussed later as ways the industry could begin to embrace certain technologies.

### ***Innovations***

Advances in technology and the Internet have changed the way people discover, listen, share, access, and purchase music in ways that would have been unimaginable just six years ago. Though technological advances initially hurt the record industry, many forward-thinking people, entrepreneurs, and innovative companies are harnessing these advances.

One example is the company Snocap, founded by Shawn Fanning, the former creator and founder of the original Napster. Snocap Inc. is “the first end-to-end provider of digital licensing and copyright management services for the digital music marketplace.” Fanning and others at Snocap have developed a revolutionary way of selling and distributing music online through *legal* P2P sites.

Here’s how it works: when record labels or artists register their sound recordings with Snocap, each song is assigned a “digital fingerprint.” This fingerprint allows Snocap to monitor activity on legal P2P sites that have signed up with Snocap and ensure the proper allocation of sound recording royalties. All of the major labels and many independent record labels and solo artists have signed on with Snocap. With Snocap, software and technology developers also can continue to thrive and grow in a legal environment without fear of being shut down. A new P2P network called Mashboxx is being developed using the Snocap fingerprinting technology. iMesh, another P2P site, has made the transition from illegal to legal file sharing and uses a similar fingerprinting technology called Audible Magic.

## **B. Legal Online Music Services**

As a result of the Internet, music is more ubiquitous and more available than at any time in history. When music is purchased online, it is digitally

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<sup>43</sup> The Grokster decision reads, “We hold that one who distributes a device *with the object of promoting its use to infringe copyright* ...is liable for the resulting acts of infringement by third parties.” Therefore, the legality of file sharing networks which do not explicitly encourage infringement has not yet been decided or even taken up as a question.

downloaded as a transmission via Internet, cell phone, satellite, or other channels. The downloaded music can then be burned onto a CD or placed on a portable music device like an iPod.

The most popular online music distribution service is Apple's iTunes Music Store, with its current model of 99 cents per song. Other popular services, such as the new legal Napster and Rhapsody, use a subscription model. These services allow for online listening through streaming-on-demand that can be transferred to other portable devices. When the subscription expires, access to the music is no longer granted. In a sense, it acts like a music rental system, or what the industry refers to as a "celestial jukebox" that does not allow you to keep the music, only listen to it. In more recent years, however, subscription services have permitted the option of purchasing a song for an additional cost. Despite the addition of this option, subscription services have not been able to compete with Apple's vast dominance of the market.

### *iTunes*

In 2001, Apple introduced iTunes, its digital media player application, in the United States. Today, more than 3.5 million tracks are available on iTunes from all of the major labels and more than 600 independents. iTunes is the largest and the most diverse legal digital download service. The program organizes music and video files and is the interface used for Apple's digital media player, iPod. It can connect to the online iTunes Music Store, which allows users to purchase digital music and movie files.

iTunes originally was released as a Macintosh-only application, but was later opened to Windows users in 2003. iTunes is compatible with Mac OS X, Windows 2000, and Windows XP operating systems. Users who do not have a Mac or a newer version of the Windows operating system cannot install iTunes on their computers. However, an illegal patch can be downloaded from the Internet to allow Windows 98 SE to run iTunes. In other words, an unauthorized, illegal patch needs to be installed in order for a Windows 98 SE user to legally purchase music through iTunes.

This lack of compatibility has led to increased competition among digital music providers. The iPod acts as a tool to drive computer sales: Before the iPod, Apple had maintained about five percent of the computing market; today, Apple holds about 8.5 percent. While Apple gains as a result of lack of compatibility, many users are stymied from using the most popular digital player, iPod, or the most popular interface, iTunes.

It is important to look at how Apple functions in other nations because Apple has developed a strong role in the music industry and sets precedents for the online digital music market. French lawmakers have acknowledged the compatibility problem and have proposed a copyright legislation that requires online music vendors to make all songs available to use

on any digital player. Consequently, Apple may withdraw from the French market. This will not be the first time Apple has withheld its services within a foreign market. Although the iPod is a popular digital device in Japan and Australia, the launch of the iTunes Music Store was delayed in both countries. The delay was caused by negotiations over compatibility and pricing differentials (charging more for a song depending on how new the song is and how much demand there is). When the iTunes Music Store opened in both Japan and Australia, Sony BMG did not license its music due to these issues. Such a delay has meant that, even if they want to, consumers cannot legally purchase music to download onto their iPods. This causes consumers to obtain music through other means that may not be legal. “There needs to be a device that can actually compete with the iPod,” states David Levin, vice president of New Media at Sony/BMG. “There’s got to be something that people want that works.” (*WTDLAB Roundtable with NARM, December 2005*)

Apple is by far the leader of music download services in the United States. Currently, Apple maintains approximately 70 percent of U.S. online music sales, and it generates the majority of its revenue from sales of the iPod. (The music industry receives much of the money from music sold through online music stores, but does not receive revenue from the sale of digital music devices.) “Of the 99 cents charged per single-track download, an average of 72 cents goes to the music label, eight cents of which is paid by the label to the music publisher, and (in Apple’s case) approximately 28 cents is the gross margin per song.”<sup>44</sup> Not even Wal-Mart’s cheaper 80 cents per song model has been able to penetrate the market place the way Apple has.

The two dominant legal models available—owning and streaming—for acquiring music on the Internet raise the question of whether consumers will insist on owning music or whether they will be satisfied with just listening to music as a stream. When What’s the Download asked visitors on its Web site whether they preferred to own or stream (through a subscription service) music online, 650 votes were tallied. Nearly 86 percent favored owning, while 14 percent chose streaming. This non-scientific evidence supports the argument that subscription models like Napster and RealNetworks cannot compete with Apple in today’s market. This does not mean that subscriptions will not be able to compete in the future, but rather that they need to build an audience.

### ***Subscription Services***

As previously mentioned, in 1999, Shawn Fanning created Napster, a file sharing service. But due to lawsuits, Napster was shut down in 2001. In 2002, Bertelsmann acquired its assets. Later that year, Napster declared

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<sup>44</sup>[www.digitaljournal.com/news/?articleID=4475](http://www.digitaljournal.com/news/?articleID=4475)

bankruptcy, and Roxio bought its assets during an auction. Soon after, Roxio purchased PressPlay and developed the pay service dubbed Napster 2.0.

Napster 2.0 users can stream available songs up to five times each, or they can subscribe for \$9.95 per month. Access to the site allows the ability to stream more than 1 million full-length tracks. Songs can be downloaded to a computer and can be listened to on up to three PCs. Napster is compatible only with Windows 2000 or Windows XP operating systems—but not with Apple’s Macintosh. Like iTunes, then, Napster has a compatibility issue.

In addition, the Napster subscription fee allows users to purchase individual songs for 80 cents. If users do not wish to pay a subscription fee, Napster offers Napster Light, an online digital music store that sells individual tracks for 99 cents. In 2004, Napster launched another subscription model, Napster to Go (N2G), for \$14.95 per month, which allows unlimited transfer of music to a compatible MP3 player, not including the iPod. When the subscription ends, all transferred music that was not purchased expires. Napster also sells ring tones and digital wallpaper for mobile phones.

Although there are various subscription offerings such as Yahoo! Unlimited and Urge, Rhapsody is Napster’s closest competitor. RealNetworks—creator of RealAudio, RealVideo and RealPlayer—acquired Rhapsody from Listen.com in 2003 and renamed it RealRhapsody, but then shortened it back to Rhapsody. Like Napster, Rhapsody is a subscription site that allows access to stream more than 1 million songs on demand for \$9.99 per month, \$26.97 per quarter, or \$99.99 annually. Rhapsody also provides the option to purchase a song for 99 cents. Depending on the applicable content agreements with the record companies and underlying music publishing rights, some songs are not available via the subscription offering but may only be purchased on an a la carte basis as permanent downloads. (The same holds true for other subscription services.) Users also have the option of Rhapsody To Go for \$14.99 per month, which allows music to be transferred to a portable player that will expire once the subscription ends.

Rhapsody uses Helix, its own Digital Rights Management, to allow music to work on compliant devices, such as those created by Creative, like iRiver. While the service is compatible with Windows 98 SE, Windows 2000, and Windows XP, it cannot be used on a Macintosh. However, users could previously use a plug-in called Harmony that was distributed by RealNetworks to convert tracks purchased from the Rhapsody music store into FairPlay AAC files so they could be played on the Apple iPod. Apple modified the firmware on iPods through updates to prevent playback of the converted files.

Apple introduced the first iPod for Windows in 2002, using the audio player MusicMatch Jukebox to manage and transfer music to the iPod. However, Apple stopped using MusicMatch a year later when it developed iTunes for Windows. In 2004, Yahoo! acquired MusicMatch. Jukebox Plus, an advanced version of the Jukebox, can be purchased for a one-time fee of

\$19.99, and the latest version is compatible only with Windows XP. Music can be purchased through its music store for 99 cents. However, the selection offered by MusicMatch is limited.

All online services have a limited catalog of music. A problem consumers face on legal music downloading sites is the inability to access a large music catalog. Users often cannot find unreleased concert recordings or rare b-sides. Moreover, some artists' music is not available through online services.

Some labels are now postponing the release of a single to increase CD sales. The R&B song "So Sick" by Ne-Yo could not be purchased online until after the release of his CD, *In My Own Words*, which debuted at No. 1. As the availability of music online has had a big impact on music retailers, rack jobbers, major, independent and one-stop distributors, such tactics could be seen as helpful. Yet the Ne-Yo CD was offered at a discounted rate of \$7.98 at retailers, raising the question of what caused the success of the CD. In the long run, it should not be overlooked that withholding music for any reason from consumers through legal online services could lead to an increase of piracy. Consumers already face many restrictions when purchasing music online, and withholding music could frustrate consumers even more.

### C. Copy Protection and Fair Use

In an effort to prevent illegal file sharing, record companies such as Sony BMG and EMI implanted copy protection software on compact discs. It was only recently that this practice generally ceased, at least in the United States. The software limits the number of physical copies that can be made from the CD. Placing such copy protection software on music CDs sold to consumers has come into question. This issue affects not only consumers who buy the music, but retailers who sell the music and artists who create it.

Extended Copy Protection (XCP), the copy protection software that Sony BMG used, was flawed in that it made computers that installed the software vulnerable to hackers. Aside from placing harmful software on a computer, a copy-protected CD can stop a disc from playing correctly if it is not played in a traditional home stereo. It will not play in car stereos, computer sound systems, and DVD players.

As a result of the problems XCP presented, some rock bands like Switchfoot, the Foo Fighters, and Dave Matthews Band "posted notes on Web sites decrying restrictions and offering tips for how to skirt the system."<sup>45</sup> In fact, the copy protection software is not a foolproof prevention method and can be bypassed easily (one can merely upload a Sony CD onto Windows Media Player, burn a copy of the CD, and then upload it onto iTunes DRM-

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<sup>45</sup> Jefferson, Graham. *USA Today*. 2006.

free). This software just irritates the consumer more than it achieves the goal for which it was created.

The consumer buys a CD to listen to it. If this is prevented by any means, the consumer does not get what was purchased. Thus, when the CD can be downloaded illegally and accessed with no restrictions, consumers adopt a “why pay for it?” attitude. It is these restrictions, playing problems, and the record companies’ apparent quick fix-it solutions that force people—sometimes people who want to buy CDs—to get their music online. Accessing digital music online is easier, faster, and more convenient than buying a CD from a record store.

Copy protection might be embraced if it did not cause problems with playing a CD on non-traditional stereo systems and if songs could be easily transferred to iPods. However, the idea of copy protection may need to be eradicated all together if consumers are to continue to buy CDs at all. Consumers may never like the restrictions placed on a product they believe they own because they bought it. Also, the difficulty of using and listening to CDs makes copy protection and subsequently playing CDs more of an inconvenience than a fix-it solution for record companies.

### ***Fair Use***

Fair use is a defense to copyright infringement under U.S. copyright law that allows, in certain instances, limited use of copyrighted material without requiring permission from the rights holders. Fair use has become a factor in the debate over how consumers can legally use digital music files, such as format-shifting and space-shifting (ripping a CD onto a hard drive and importing it onto an iPod).

As part of the on-going Digital Millennium Copyright Act rule-making proceedings, the RIAA and other organizations submitted a filing that included arguments that format-shifting and space-shifting are not non-infringing uses. According to Fred von Lohmann, attorney for the non-profit digital rights group Electronic Frontier Foundation (EFF), this stance represents a reversal of earlier arguments made in MGM v. Grokster, during which attorney Don Verrilli argued before the Supreme Court that it is “perfectly lawful to take a CD that you’ve purchased, upload it onto your computer, and put it onto your iPod.”<sup>46</sup>

Almost certainly the concept of fair use will continue to evolve to accommodate new technologies, but fair use will always be distinguishable from commercial use. The boundaries of music reproduction and distribution are likely to evolve, and DRM technologies will evolve as well. To the greatest extent possible, DRM technologies should be designed to take into account what constitutes fair use so that they are not implemented in a manner that is,

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<sup>46</sup> <http://www.digitalmusicnews.com/#021606fair>

on the one hand, overreaching, or, on the other hand, underprotective. Record companies should take into account the interests of their legitimate customers (and not just the actions of wrongdoers) in evaluating the manner in which DRM technologies should be implemented, lest they go too far in undermining the perceived “fair use” of content by legitimate purchasers. This concept is as important as the protection of copyrights. In other words, record companies should strive to maintain a balance, or else they will almost certainly alienate their consumers.

## D. Digital Rights Management

Digital Rights Management (DRM) limits what a consumer can do with a digital music file—or a song—once it has been ripped onto a computer. “DRM, as it is known in the entertainment industry, uses computer software to make it tougher to copy entertainment purchases. It is what prevents users of RealNetworks’ Rhapsody, Microsoft’s MSN Music and Yahoo! Music from transferring legally purchased digital music directly to the world’s most-popular digital player, Apple’s iPod.”<sup>47</sup>

Like copy protection software, DRM can prevent the playing of music on certain types of stereo systems. “DRM is a Catch-22 for consumers,” notes Dave Berlind, executive editor of ZDNet, a computer-oriented Web site. “We want to be law-abiding citizens, and we certainly respect companies’ desires to protect their content, but the whole thing has become a rotten mess. You go out and buy music, and guess what, it doesn’t play everywhere it should, and you have to jump through hoops to make it play. That’s just wrong.”<sup>48</sup>

In some cases, usually through subscription services, music that is purchased online is restricted to protect the rights of copyright owners in the format of a tethered download. In other words, consumers are not permitted to have complete control over the download through various methods, such as enabling the copy to be burned to a CD, or allowing only a certain number of copies, or placing a time limit on the number of days the download can be kept, or all of the above.

Under the U.S. Copyright Act, copyright owners have six exclusive rights: 1) the right to reproduce the work; 2) the right to create derivative works of the original work; 3) the right to distribute the work; 4) the right to perform the work publicly; 5) the right to display the work publicly; and, in the case of sound recordings, 6) the right to perform the work publicly through a digital audio transmission. These six rights are referred to as a “bundle of rights” under Section 106 of the Copyright Act. While Section §106(1)

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<sup>47</sup> Graham, Jefferson. *USA Today*. 2006.

<sup>48</sup> Graham, Jefferson. *USA Today*. 2006.

provides copyright owners the exclusive right to reproduce the copyrighted work (17 U.S.C. §106 (1)), the Audio Home Recording Act (AHRA) of 1992 added Chapter 10 to the Copyright Act to allow consumers to copy music for private and noncommercial use (17 U.S.C. §106 (1)).

To compensate copyright owners for lost income from such copying, a royalty system was established. Sections 1003 and 1004 of the AHRA require a royalty on sales to be paid by distributors and manufacturers of digital audiotapes and digital audio recorders (17 U.S.C. §1003 & §1004). The definition of “digital audio recording devices” did not include analog recording equipment, professional audio recording equipment and audiovisual recording equipment. Computers also were not included in the definition because their primary purpose was not attributed to recording digital audio. While AHRA has served some purposes for recording digital media, the efficacy of the law has been called into question, given that most digital copies are made with computers and not dedicated digital audio duplication equipment, which is subject to the AHRA.

Moreover, under section 1002, the AHRA requires digital recorders to prevent serial copying (making copies from copies) through a specific technological protection system. The AHRA specified the use of Serial Copy Management System (SCMS) as a protection system but mentioned that other systems may also be used. SCMS was a form of DRM. The manufacture and sale of devices whose primary intent is to circumvent SCMS also was prohibited (17 U.S.C. §1002 (c)).

DRM technology is a wrapper that protects the media file; compatible devices must respect the DRM wrapper to access the content. At the sole discretion of the media distributor, DRM implementation can include any management or control of file access that deals with layering, description, analysis, valuation, altering, sharing, copying, removing and monitoring of the rights held over a digital work. In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), which made any efforts to circumvent DRM systems illegal (17 U.S.C. §1201). Along with DRM, the industry uses copy protection and technical protection measures (TPM), which are technologies that restrict and/or control access and the use of digital media content on electronic devices through installation of the technology.

Generally, existing methods of copy protection and DRM systems have failed to meet the intent of protecting the rights of copyright owners while adhering to the rights of the purchaser of a copy, as indicated by the following examples:

- In 2005, Sony BMG implemented Extended Copy Protection (XCP) technology on its CDs as an attempt to protect copyrighted songs against piracy. Upon inserting a CD with the XCP technology into a computer, an end-user license agreement dialogue box appears and requests to install

proprietary software required to play the content on the CD. Not only does the licensing agreement not provide enough information on the software being installed, but the software itself is potentially invasive because it can be used to collect information about the user and it includes the installation of a rootkit, technology that hides deep within the root of a computer. When asked to comment, Thomas Hesse, the head of Sony BMG's global digital business, told National Public Radio that the software will not be used to collect information and that "most people, I think, don't even know what a rootkit is, so why should they care about it?" Traditionally, hackers use rootkits to hide viruses; thus, the protection caused users' computers to be vulnerable to hackers. Removing the software required disabling the CD drive. As a result, Sony BMG recalled five million discs that contained the harmful copy-protection software and reported that additional 5.7 million CDs pose the security risk for consumers. In addition, a patch available at <http://www.sonybmg.com/mediamax> can fix the problem. Consumers also can trade in the harmful CD for a version of the CD that does not contain the technology, as well as opt to receive the CD in MP3 format (*SonyBMG*). (Ulaby, 2005)

- The Beastie Boys' No. 1 2004 album, *To the 5 Boroughs*, created controversy because it included copy-protection that stifled the ability to rip the CD in a PC. In addition, the CD installed the copy-protection software without telling users it was doing so. (*MusicTarget*)
- Avex, Japan's biggest independent record company and ranked second among Japanese music companies, became the first Japanese label to issue copy-controlled CDs known as CCCD, in March of 2002, as a response to the piracy problem (McClure, "The Market Leaders;" "Recording Industry Assn.;" "Sony Music"). However, as of October 2004, Avex reduced the number of titles that were protected. Sony Music Entertainment Japan (SMEJ) announced that by November 17, 2005, it would omit copy protection from all of its new releases (McClure "Copy Control Fades"). The decision to no longer use CCCD stemmed from its unpopularity among retail consumers as well as from regular complaints from customers experiencing problems, such as a reduction in sound quality. These complaints created a greater demand for imported CDs that do not have the protection releases, which led to an increase of parallel imports (McClure, "Copy Control Fades"). Plus, with the introduction of online music downloading sites, labels had to rethink their CCCD practices.
- In 2002, Sony released a number of CDs, including the Celine Dion CD, *A New Day Has Come*, with copy protection that prevented them from being duplicated or even played on a PC. The CDs were harmful in that they could damage a PC's firmware. If inserted into an iMac, the CD drive would jam, the computer could not be restarted, and the machine would have to be sent for repair. All CDs carried the warning that they "Will not work on a PC/Mac."(*MusicTarget*)

- Also in 2002, CD protection involved programs like Cactus Data Shield 100/200 and KeyAudio that proved to be ineffective because it could be defeated by using electrical tape or a marker on the copyright protected audio CD. (*MusicTarget*)<sup>49</sup>

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<sup>49</sup> Works cited in this section:

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## E. Lack of Interoperability

A further concern with DRM lies in the fact that it is at the root of the interoperability problem. Microsoft uses its own Windows Media DRM; Apple incorporates FairPlay; RealNetworks pushes Helix; Sony has OpenMG, and the list continues. As a result, paying consumers cannot use different digital hardware from vendors, different online services, or different software. For example, music purchased on Apple's iTunes does not work in a Windows Media environment and vice versa.

The burden caused by lack of compatibility increases with the use of different codecs such as MPEG-2 for video and MP3 for audio, with vendors creating their own specific codecs (Microsoft uses Windows Media while Apple uses AAC). As a result, consumers often are forced to be "tech savvy" simply to play the content they purchase.

Peter Lee, an executive at Disney notes, "If consumers even know there's a DRM, what it is, and how it works, we've already failed." A similar statement can be made for codecs. "The user shouldn't know or care what format they're using," states James Poder, an engineer at Comcast, because "consumers don't want to be IT administrators for their own home." (*Science Fiction*, 2005)

From a business point of view, a lack of compatibility is justifiable. Apple does not want people filling their iPods with music purchased from Sony's Web site and vice versa. But from the consumer's perspective, incompatibility is not only frustrating, but also can deter consumers from using legal online services. If music is to be purchased, there needs to be freedom to play the music without restrictions. It is the responsibility of technology companies to create interoperability among devices and services for the future. If this does not happen, it will harm consumers, the marketplace, advances in technology, and, of course, music.

Amid the ongoing battles between consumer electronics products and the copyright industries, Recording Academy® President Neil Portnow called for a "truce," and outlined a new vision for mutual cooperation in a keynote speech delivered at The Recording Academy's 6th Annual GRAMMYs on the Hill<sup>SM</sup> dinner on Sept. 6, 2006, in the nation's capital.

"How did these two mutually dependent industries become entangled into what author Howard Rheingold called 'The War Over Innovation?' Or more importantly, how can we become disentangled?" asked Portnow. "Well, if we really are in the midst of 'A War Over Innovation,' then it is time for a truce: A Music and Technology Truce."

Before an audience consisting of the top executives from nearly every music association in the country (AFM, AFTRA, ASCAP, BMI, NARM, NMPA, RAC, RIAA, SESAC, SoundExchange, among others) and numerous members of Congress, Portnow encouraged the audience to end the "zero-

sum game” between the two industries. He ended his remarks by challenging the two industries’ leaders “to prove that we can be both pro-copyright and pro-technology. Let the truce begin.”

Simply put, the industry does not make it easy for consumers to purchase and use digital music online legally, while piracy delivers what companies hold back. Digital music is a vital force in the industry, and technology needs to be properly embraced to provide ease of use to consumers. As Quincy Jones, a well-established member of the music industry (27 GRAMMY Awards to his name) and one of the original members of The Recording Academy, advised in 2006, “You need to ride technology or have it ride you.”

## F. Cell Phones

With the growing increase of societal reliance on mobile technology, cell phone companies started to look at ways to appeal to customers in a personal way. Cell phone companies began to offer custom ring tones for consumers who wanted to individualize and differentiate their phones. The quality of ring tones improved rapidly from monophonic tones (one tone played at a time) to polyphonic ring tones (multiple tones played simultaneously) to master tones or true tones (“music that has been re-mastered and down sampled for playback on a cell phone”<sup>50</sup>). The ring tone market has grown dramatically over the last three years, and it has proved to be an important source of income for the music industry.

BMI recently projected that the music ring tone market would surpass \$600 million in the 2006 calendar year, up from \$500 million in 2005, \$245 million in 2004, and \$68 million in 2003.<sup>51</sup> This market includes ring tone sales through cell phone services that offer single downloads as well as through unaffiliated subscription services like [www.3gupload.com](http://www.3gupload.com). The remarkable growth of the ring tone industry has shown significant fidelity to chart-topping singles, but may also be correlated to the increase in selection of ring tones. Based on a typical \$2.50 ring tone sale (master tone by an “aggregator”) the proceeds are distributed as follows: A carrier like Verizon typically receives about \$1.12, or 45 percent of the sale, the parent label receives about \$1 (or 40 percent of the total), and out of that pays the artist a royalty. At an estimated 18 percent royalty, the artist would receive about 29 cents. The publishers collectively receive about 25 cents, or 10 percent. From that share, the writers are each estimated to receive between 9 cents and 11

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<sup>50</sup> Rebbapragada, Narasu. “Ring Tones Are Music Too.” *PC World*. March 22, 2006. <<http://www.pcworld.com/resource/>

<sup>51</sup> “BMI Forecasts U.S. Ring tone sales to hit \$600 million in 2006.” <http://www.symbianone.com/content/view/3064>. Retrieved April 4, 2006.

cents. Performance societies such as the American Society of Composers, Authors and Publishers (ASCAP), would receive an estimated 3.5 percent of the total, or roughly 9 cents.<sup>52</sup>

As technology continues to advance, companies keep working to minimize the number of devices a person needs. Cell phones now act as day planners and cameras with access to the Internet, and offer streaming video clips and video games. With the success of personal MP3 players, many in the mobile industry have looked to the music industry to offer musical components to their cell phones in an attempt to monopolize personal device markets. The theory is to offer everything a person could want in a single handheld device: cell phone capabilities, high-quality digital pictures, Internet access, the ability to download and play CD-quality music, and anything else the user can think of.

Despite recent efforts, however, the cell phone industry has failed to capitalize on the desire to consolidate devices musically. The appeal of mobile music resides in the ability to acquire music anytime, anywhere, and according to hip-hop producer/MTV personality and WTDIAB Honorary Member Sway Calloway, those in the industry must work to appease this desire: “Retailers have to embrace change. People definitely want to have everything they need in one take. It’s like a Quick-Stop. If you want to download [music] off of your phone, you should be able to do that.” (*WTDIAB “Rap Session,” February 2006*)

Many carriers offer a variety of musical options on particular phones, including services that allow a user to download music directly to a phone instantaneously. This ability, in conjunction with the ability to purchase songs online and download them to a capable phone, appeals to more than half of consumers surveyed by the market research firm NPD Group. Problems arise, however, in the same areas as other legal downloading services: selection and user-friendly downloading processes. The music selection in music stores offered by wireless carriers is a fraction of that of iTunes and minute in comparison with peer-to-peer networks. Sprint offers a catalog of 250,000 songs, and Verizon offers 500,000 in its V-Cast music store. Motorola’s SLVR—a sleeker version of its original musically integrated phone, the ROKR—offers the selection of the iTunes library, but lacks the user-friendly capabilities of iTunes.

More specifically, mobile music providers have fallen short of consumer desires technologically, but these shortcomings will soon be corrected due to the fast pace of developing new and improved hardware. Most fans have noted that they would not replace their MP3 player with a phone, but this statistic could be based more on the notion that cell phones

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<sup>52</sup> Leeds, Jeff. “In a gloomy music year, hope stirs in ring tones.” *New York Times*. December 25, 2005.

have very limited memory space—most hold fewer than 100 songs. Consumers who value the ability to transport large quantities of music are less inclined to spend the money to get a phone that holds a very small percentage of the music they enjoy. If a phone offered the same storage capacity as the larger players, more consumers would possibly look to purchase a phone that could function as their main MP3 player.

Another problem is interoperability, which also crops up with MP3 players. To entice consumers to use these phones for musical purposes, cell phone providers need to offer devices and software that have the capability of working with a computer and MP3 player. Comparably, consumers demand the ability to use multiple forms of media at the same time, and most current mobile music equipped cell phones do not allow this. By continually enhancing the technological capabilities of the cell phones, the music industry can work to effectively capitalize on the interests of consumers.

Pricing is a major, persistent problem. Currently, music purchased from cell phone providers generally costs \$2.50 per song in addition to a monthly data access fee, which can range from \$15 to \$25. As this price far exceeds the price of legal online downloads, consumers are less inclined to pay for their music, regardless of the ability to acquire it at any time in any location or the ability to download a track to a computer later. According to an NPD Group report, the optimal price of a single purchased on a mobile music device is \$1.75.<sup>53</sup> Music fans are willing to pay a premium for mobile resources, but are unsure if the current services offered are worth the cost.

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<sup>53</sup> Gaudiosi, John. "Cell Phones Merging with Music." *The Hollywood Reporter*. October 3, 2005  
([http://www.billboardradiomonitor.com/radiomonitor/news/business/digital/article\\_display.jsp?vnu\\_content\\_id=1001220304](http://www.billboardradiomonitor.com/radiomonitor/news/business/digital/article_display.jsp?vnu_content_id=1001220304))

### 3. CONSUMER PERCEPTION OF THE MUSIC INDUSTRY AND ITS EFFECTS

**Topics covered in this section:**

- A. Deregulation, Consolidation and Homogenization of Radio**
- B. The Effects of Payola**
- C. The Myth That All Musicians Are Rich**
- D. Music Industry Lawsuits**

#### **A. Deregulation, Consolidation and Homogenization of Radio**

During the course of the last decade, the music industry has taken steps to restructure many areas of its business in the interest of cost-effectiveness, combating piracy, and manufacturing hit records. These changes have manifested in many ways, through direct actions by label and radio corporations as well as through legislative acts deregulating radio. The resulting consolidation has led to a homogenization of popular music, alienation of music fans, and a turn toward the Internet as a means for learning about and distributing new music.

In 1996, Congress passed the most significant piece of legislation concerning United States telecommunications policy in 62 years. A modification of the Communications Act of 1934, this law concerns the deregulation and promotion of competition of the telecommunications industries. For radio in particular, the act relaxed ownership restrictions, allowing one company to own eight stations rather than four in a given market, and it eradicated restrictions on the number of stations a company can own nationwide.

Rather than promoting competition within the industry, the Telecommunications Act of 1996 opened the doors for major companies to exponentially expand their ownership of radio stations. In 1996 and 1997 alone, 4,407 stations were sold, and between 1996 and 1998, the number of radio station owners decreased by 14 percent, while the total number of stations increased by three percent.<sup>54</sup> The effects of this consolidation on the music industry, and particularly the consumer perception of the music industry, are staggering.

The radio stations that were acquired by large corporations became homogenized. Regional radio shows were replaced by pre-recorded programming known as voice tracking, which can be sent to multiple stations across the country. Conglomerate radio executives claim that this type of

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<sup>54</sup> DeBarros, Anthony. "Consolidation changes face of radio." *USA Today*. July 7, 1998.

programming serves as a quality control for the radio talent, and prevents local stations from having to resort to mediocre talent. In reality, however, pre-programming allows the owners of the radio stations to cut costs by paying only one radio personality. Such “cookie cutter” programming correlates directly to the recent homogenization of popular music, since the same programs are played in multiple states throughout the country.

These executives assert that ownership of multiple stations allows them to tailor specific stations more readily to particular listeners—creating “niche markets.” Yet this does not take into account that most people have musical tastes that go beyond the genres that the music industry classifies. The industry can hardly realize its potential for diversity when a handful of companies own the majority of the media.

Some radio stations, however, have worked to break from the tyrannical control of consolidated radio. For example, in San Diego, alternative rock favorite 91X (XTRA) was billed since the early 1980s as a legendary station known for broadcasting music at the discretion of the disc jockeys. Many local bands got their start on 91X, further bolstering the station’s reputation in San Diego. In 1996, 91X was swept up in the large scale consolidation, and for nine years was subject to the rules and regulations of Clear Channel Broadcasting, although listeners were clearly disgruntled by the homogenization of the music on their favorite station. Recently, a group of investors comprised of former 91X employees came together to create Finest City Broadcasting, which bought 91X back from Clear Channel on December 1, 2005.<sup>55</sup>

## **B. The Effects of Payola**

Most people involved in music today—both consumers and producers—are aware of the payola scandals that plague the industry. Regulations governing the relationships between record labels and radio programmers were established in the 1960s and 1970s. The general public was first made aware of these laws when DJ Alan Freed was prosecuted in the late 1950s for his acceptance of gifts and money in exchange for radio play of specific artists.

Today, as a result of the deregulation of radio, the problem has become more widespread. If one of the larger companies is involved in payola, this can affect what music is played across the entire country.<sup>56</sup> The law that addresses payola states that if something of value (i.e., money) is given to a radio station with the understanding that a particular song must be played in

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<sup>55</sup> “The Beginning of a New Beginning.” [Weblog entry.] 91X profile on MySpace (<<http://www.myspace.com/91xfm>>). September 20, 2005.

<sup>56</sup> Manly, Lorne. “How Payola Went Corporate.” *New York Times Online*. July 31, 2005.

order for the station to receive such compensation, the broadcaster must disclose any incentives to play such song to listeners.

Record labels and radio stations have found many loopholes by which they can circumvent the law. For example, the label pays an independent promoter (or indie) to “promote” certain songs to radio stations in hopes of getting airtime for the song. The indie “promotes” by paying the radio station a fixed amount for the exclusive right to promote songs to that station, or it pays for individual songs to be added to the radio station’s playlist. These radio station fees can range from \$800 to \$5,000 for the addition of a single song. These additions do not guarantee that the single will be spun consistently, so the promoter is not paying the station for spins of the song on air, only the chance that the single could be played, and thus tiptoes around the payola laws.

A concrete, more revealing, explanation for the lack of diversity and airplay granted to a few select artists has come to light in the last year due to an investigation by New York Attorney General Eliot Spitzer into the payola prevalent throughout the music industry. Spitzer’s investigations disclosed that payola works in other ways. He found that beyond the use of independent promoters, record labels gave outright bribes directly to programmers, contest giveaways for listeners, “spot buys” for extra spins of a song, and airtime for songs that is made to look like advertising.

Spitzer began his investigations in 2005 by subpoenaing four major record labels in the industry (EMI, Universal Music Group, Sony BMG Music Entertainment, and Warner Music Group) as well as three major media corporations (Clear Channel, Entercom, and Infinity Broadcasting). Since then he has reached settlements with Sony BMG and Warner Music Group for \$15 million. Universal Music Group also recently settled. The Federal Communications Commission (FCC) also got involved, probing major radio corporations on suspicions of involvement in the payola scandals.

Legislatively, politicians are beginning to increase efforts to not only put an end to pervasive payola, but also deal with the problems associated with deregulation of radio and concert promotion. Senator Russ Feingold presented a bill called the Radio and Concert Disclosure and Competition Act of 2005, which addresses the anti-competitive processes associated with deregulated radio, payola, and crossover power between radio and concerts which allows one company to control an artist’s entire livelihood. This bill would combat these issues by closing loopholes in payola laws and increasing transparency of corporations in the music industry by bolstering FCC power in investigations.

### **C. The Myth That All Musicians are Rich**

When an artist is signed to a recording contract, he or she will typically receive a cash advance from the record label. The label also will pay for studio time,

promotion and other functional costs. Most money paid to the artist or on the artist's behalf under a recording agreement is considered "recoupable," meaning that the artist must pay back the amount from the royalties generated based on album sales.

Essentially, an artist will not receive any royalty checks until all recoupable costs have been paid back to the record company. For instance, if an artist makes \$1 per record sold, and the recoupable advance and other costs total \$100,000, the artist would have to sell 100,000 copies of an album before receiving any royalties. If the artist makes \$75,000 on royalties, he or she will still have a deficit of \$25,000. Approximately 80 percent of all records released never reach the point at which an artist breaks even, much less makes a profit.<sup>57</sup>

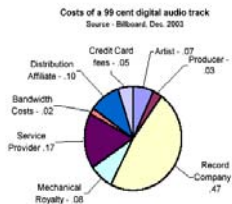
Even less appealing than the royalty rates of traditional albums are the royalty rates for digital music performances. GRAMMY-winning producer Jimmy Jam addresses the lack of payment received from downloads:

"The biggest problem I see is that with the [current] business model, songwriters and various people in our industry, producers, for instance, still aren't necessarily getting paid for legal downloads. People listen to music on the radio and they think that it's free because they turn on the radio and there it is. They don't realize that the radios have sponsors and they have commercials, all of which pays for the music." (*48th Annual GRAMMY Awards Nominations Press Conference, December 2005*)

Digital music performances fall under two umbrellas: interactive and non-interactive. Interactive royalties refer to downloading song files from such services as iTunes or streaming specific songs on a service such as Napster or Rhapsody. Non-interactive royalties refer to digital radio performances from such services as XM or Sirius.

*Billboard* magazine provides a good example of how interactive royalties work for a 99-cent digital download:

Figure 7—Revenue model for US digital download



F40 Research Inc., March 2004, with data from *Billboard*

<sup>57</sup> Passman, Donald S. *All You Need To Know About the Music Business*.

Apple iTunes also provides a good example of how royalties are divided. The label charges a wholesale price, and iTunes keeps the difference between retail and wholesale. Of the 99 cents charged per downloaded song, Apple takes a flat fee in the range of 30 cents. The artist gets paid out of the remaining 70 cents. Assuming the label has given the artist an “all in” (100 percent) royalty rate of 15 percent, we can assume the artist will walk away with 12 percent after the producer royalty of three percent is subtracted. With a standard wholesale markup of 130 percent, it would look something like this:

**iTunes Royalty: Artist**

\$0.99 download single song price to the consumer  
*less* \$0.34 to Apple  
*left* \$0.65 x 130% (wholesale markup)  
 x 12% (net artist net rate) = \$0.10

**iTunes Royalty: Producer**

\$0.99 download single song price to the consumer  
*less* \$0.34 to Apple  
*left* \$0.65 x 130% (wholesale markup)  
 x 3% (producer rate) = \$0.025<sup>58</sup>

The royalty rate of 10 cents does not add up to a lot of money. On top of that, the overhead cost of manufacturing, shipping, distribution, sales, etc. is all but nullified when a label grants rights to a digital service rather than making physical albums. In addition, the above contract is simply theoretical, and some labels deduct the mechanical royalty fee from the 70 cents that is derived from iTunes before calculating the artist’s royalty. It looks something like this:

**iTunes Royalty: Artist**

\$0.99 download single song price to the consumer  
*less* \$0.34 to Apple  
*left* \$0.65 *less* a digital mechanical royalty of \$0.085 cents  
*left* \$0.565 x 130% (wholesale markup)  
 x 12% (net artist net rate) = \$0.088

**Producer iTunes Royalty**

\$0.99 download single song price to the consumer  
*less* \$0.34 to Apple  
*left* \$0.65 *less* a digital mechanical royalty of \$0.085 cents  
*left* \$0.565 x 130% (wholesale markup)  
 x 3% (producer rate) = \$0.022<sup>59</sup>

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<sup>58</sup> LaPolt, Dina. “New Media Deals in the Music Industry.” Musicbizacademy.com.

WTDIAB Honorary Member Ralph Johnson of GRAMMY-winning trio Earth, Wind & Fire observes, “We have to start with the education of the consumer so they thoroughly understand how this whole [artist] payment breaks down.” (*WTDLAB Roundtable Discussion, February 2005*). Clearly, artists do not reap a majority of the sales of digital downloads, or even a significant percentage. With the continuation of illegal downloads, and thus the decline of record sales, it becomes increasingly harder for artists to recoup their costs, and ultimately, make money from their music.

When a label decides to put out a record by an artist, it is making a significant financial investment, and expects to get paid back. The advantage to the artist in this situation is that he or she will not have to pay back the deficit out of his own pocket. Of course, if an artist cannot sell records, he or she will quickly be released from the label, walking away with little else but the advance.

Illegal downloading affects the bottom line of a record label’s investment in a record or artist, and many labels have become more guarded about taking chances on new talent. GRAMMY-winning singer/songwriter John Legend notes:

“I think a lot of people don’t realize that we [artists] make these albums with money. It takes money to make them and it takes money to support the industry so that new artists can be developed and new art can be created. I think people don’t realize when they do the peer-to-peer file sharing, that they’re taking food from somebody’s mouth ... If you do enjoy someone’s work, then go ahead and give them your 99 cents or \$9.99. I think it’s worth it for you and it’s worth it for our culture because you’re supporting the ability for new artists to develop and continue the culture of popular music.” (*48th Annual GRAMMY Nominations Press Conference, December 2005*)

This is a detriment to the industry and will continue to negatively affect the future of new music. Because consumers are unaware of the intricacies of recording contracts and cannot see the breakdown of the monies paid out, they are left to assume that the artists they see in the media who are making copious amounts of money are the norm. The fact is, these artists are few and far between, and if consumers do not understand all of the effects of downloading illegally, they will continue to do so without any reservations.

Hip-hop producer/rapper and WTDIAB Honorary Member Common exposes these misconceptions: “It’s not all about just money coming in; that’s not the truth of the industry. Every artist is not making millions and every artist is not rich with diamonds. It’s a job, just like you all are striving to achieve whatever profession you want to achieve.” (*WTDLAB “Rap Session” February 2006*).

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<sup>59</sup> Ibid.

Unaware of the large number of people who collaborate to make a record, many consumers have turned to illegal file sharing as a response to the high price of music, believing that they are not hurting all of the “rich” musicians. They simply do not understand the ramifications of their actions.

Record labels need to help consumers understand that there are many hands in the development of a hit record, and most of these hands are not making millions of dollars. GRAMMY-winning singer/songwriter and WTDIAB Honorary Member Kelly Clarkson pointed to the multiple contributors to each particular song: “I’m the face on the CD, obviously, but there are a whole lot of people that you don’t see that make it possible. From the drummers, who are very, very talented musicians that have families, to the engineers, and everybody else that plays a part on the record.” (*WTDIAB “Rap Session,” February 2006*)

WTDIAB Honorary Member and CEO/Founder of online media measurement company BigChampagne Eric Garland notes, “Music downloading is a fact of life, and it’s not negotiable. The question is not whether people will continue to download more popular entertainment. The question is, when are we going to really get to work in earnest on getting creators paid?”

## **D. Music Industry Lawsuits**

The increasing prevalence of peer-to-peer (P2P) file sharing networks and the music industry’s subsequent fear about lost revenues prompted the Recording Industry Association of America (RIAA) to begin filing lawsuits, not only against P2P technology companies but against individual file-sharers as well. This tactic has historical roots, which require a brief exposition in order to fully understand the chain of events in recent years.

When the RIAA won its initial case against Napster in 1999, the centralized technology for Internet file sharing was held to be illegal. In response to this decision, two new technological approaches emerged. Some attempted to create overseas servers in an effort to skirt U.S. law, while others developed decentralized servers, such as KaZaa, which make individual users responsible for any copyright infringement activities.

As a result, since September 2003 the RIAA has filed more than 17,000 lawsuits against individual users of file sharing technologies.<sup>60</sup> While the RIAA contends that the lawsuits have helped in the effort to curb the use of illegal file sharing networks, it also has succeeded in fostering a negative perception of the music industry. The RIAA argues that it is pursuing claims against the most “egregious offenders who are engaging in substantial amounts

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<sup>60</sup> Gross, Grant. “Music Labels Sue More File-Sharers”. IDG News Service. <http://www.pcworld.com/news/article/0,aid,123946,00.asp>.

of illegal activity.”<sup>61</sup> While it is true that lawsuits against extreme sharers of copyrighted content are warranted, many of the lawsuits could be labeled equally egregious on the part of the RIAA.

### *Egregious Cases*

In the first round of lawsuits filed in September 2003, the RIAA filed suit against 12-year-old Brianna LaHara for uploading, or sharing, close to 1,000 files through the file sharing program KaZaa. Upon learning of the lawsuit, LaHara said that she thought her actions were legal because her mother had paid a \$29.95 fee to KaZaa. Sylvia Torres, LaHara’s mother, eventually settled the case for \$2,000. This settlement was the first for the RIAA.

In the same round of lawsuits, the RIAA filed suit against 71-year-old Durwood Pickle, of Richardson, Texas, because his grandchildren used his computer to download music over a file sharing network.<sup>62</sup> Although Mr. Pickle was unaware of his grandchildren’s actions and their possible illegality, the RIAA felt that Mr. Pickle represented an “egregious” abuser of file sharing technology.

In yet another noteworthy case, the RIAA filed suit against 83-year-old Gertrude Walton for sharing more than 700 songs through a file sharing network. Upon further examination, the RIAA discovered that not only was Walton innocent, she also was deceased.<sup>63</sup>

If the RIAA contends to be pursuing suits against the most “egregious” file sharers, these cases and others undermine this claim and have helped to foster a negative perception of the music industry.

Because the identities of file-sharers are anonymous within the particular technology, the RIAA must identify users through their Internet Service Provider, or IP addresses. Due to the prevalence of wireless Internet connections, and the ease with which an individual can link to another’s wireless connection, it is possible that many of these lawsuits target people whose IP address was identified as having a file sharing account, but whose owner has never engaged in file sharing activities. In other words, if a person is connected to someone else’s wireless IP address and “pirates” music, the person whose name is attached to that IP address can be held responsible, regardless of his actual use or non-use. This situation is similar to the one that led to the Gertrude Walton case.

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<sup>61</sup>Mark, Roy. “Senator Releases RIAA Subpoena Data.”  
<http://dc.internet.com/news/article.php/3065301>.

<sup>62</sup>Mook, Nate. “RIAA Sues 261, Including 12-Year-Old Girl.”  
<http://www.betanews.com/article/1063159635>.

<sup>63</sup>Mook, Nate. “RIAA Sues Deceased Grandmother.”  
[http://www.betanews.com/article/RIAA\\_Sues\\_Deceased\\_Grandmother/1107532260](http://www.betanews.com/article/RIAA_Sues_Deceased_Grandmother/1107532260).

The consumer backlash caused by these cases is evident in many places. Internet sites and blogs such as [www.boycott-riaa.com](http://www.boycott-riaa.com) and [www.recordingindustryvspeople.blogspot.com](http://www.recordingindustryvspeople.blogspot.com) receive a large number of comments and posts detailing consumer frustrations. The message boards on What'sTheDownload.com are full of malcontent toward these suits,<sup>64</sup> and any Google search containing keywords "RIAA, lawsuits, consumers" will return a plethora of anti-lawsuit information. It is not difficult to find instances of this frustration and observe the negative effect that these lawsuits have on consumers' perceptions of the music industry.

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<sup>64</sup> [http://whatsthe-download.com/the\\_community/sound\\_off/index.aspx](http://whatsthe-download.com/the_community/sound_off/index.aspx).

## 4. SUGGESTIONS AND SOLUTIONS

### Topics covered in this section:

- #1: Educate to Eradicate Piracy**
- #2: Make Music Retail Therapy**
- #3: Declare A Music/Tech Truce**
- #4: Commit to Artist Development**
- #5: Embrace New Music Avenues**
- #6: Offer What Piracy Doesn't**
- #7: Make Music a Priority**

### **#1: Educate to Eradicate Piracy**

In a recent *Los Angeles Times* entertainment poll, teens were asked about downloading songs from an unauthorized file sharing network, and 61 percent said they would never do it (even among those who identified themselves as religious of any faith, it was 63 percent; interesting to note as the remaining 37 percent do not consider illegal downloading as a moral issue).<sup>65</sup> Educating consumers about copyright infringement is absolutely crucial to addressing the problem of illegal downloading and file sharing. Lawsuits may be an effective deterrent, but they do little to engender a community of music fans, which is essential for a healthy music industry. When consumers are educated, they can make informed decisions, instead of fearful ones.

In 2004, negative perceptions and misconceptions abounded about the music industry and what was legal and illegal. After months of primary and secondary research, The Recording Academy's first national consumer education campaign launched What's The Download (WTD), which tackles issues surrounding illegal music downloading. In 2005, the WTD Interactive Advisory Board, comprised of 12 students from across the country to act as peer Ambassadors, was created; and Honorary Board Members were secured soon after to increase campaign visibility, from music makers from various genres including Chris Brown, GRAMMY winner Kelly Clarkson, Common, GRAMMY-winning trio Earth, Wind & Fire, JD Natasha, Mark McGrath (Sugar Ray front man and Extra! co-host), and GRAMMY winner Kanye West to industry veterans/experts including Sway Calloway (MTV personality/hip-hop producer), Shirley Halperin (*US Weekly* Entertainment Editor and authority on all things music), and Eric Garland (CEO/Founder of online media research company BigChampagne). There have been nearly 2 million

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<sup>65</sup> "Boucher, Geoff. "Pirating Songs of Praise." *Los Angeles Times*. October 10, 2006.

visitors to the Web site ([www.WhatsTheDownload.com](http://www.WhatsTheDownload.com)) since its inception, proving that people want to be educated.

The responsibility for educating fans must be shared among the music industry and artists. Gospel singer Cece Winans notes, “We have to strive to teach and educate young people as well as old on what’s right and what’s not right; what’s fair and what’s not fair. I think if we all strive to do the right thing, we’ll know when we do something illegal.” (*48th Annual GRAMMY Awards Nominations Press Conference, December 2005*)

One consumer education program is run by i-SAFE, a non-profit foundation whose mission is to educate and empower youth to make their Internet experiences safe and responsible. When the Internet was created, the dangers of certain uses of it were not foreseeable. These dangers prompted i-SAFE to develop an educational curriculum based upon safe and responsible use. The program’s goal is to educate students about how to avoid dangerous, inappropriate, or unlawful online behavior. What’s The Download worked with i-SAFE in 2005 to develop K-12 interactive DVD lesson plans that teach young people about responsible Internet use and copyright infringement. It has since reached 500,000 students in all 50 states.

Many consumers also remain unaware of the number of people who are affected by illegal downloading. Songwriter Billy Mann expressed the following desire:

“I wish there was a way that I could take a downloader through the motions of what it takes to write, record, produce, A&R, mix, master, license, research, negotiate, release, manage, market, launch, promote, advertise, PR, distribute, radio tour, eat a lot of fast food, van tour, learn what un-recouped means, lawyer, business manager, new lawyer, no return phone call.... They would realize that there are so many people connected to that one song. Since there isn’t, at least we can try to educate the public while we are inventing new ways to change the business.” (*46th Annual GRAMMY Awards Nominations Press Conference, December 2003*)

To provide consumers with an understanding of copyright infringement, What’s The Download launched an online simulation that allows users to create a song and learn about copyrighting it. Although users can gain a better understanding of copyright, the simulation cannot possibly explain all the “motions” that Billy Mann lists. However, it promotes comprehension of copyright infringement and stimulates communication. GRAMMY-winning R&B artist Anita Baker perhaps best sums up the importance of consumer education:

“[T]he phrase ‘illegal downloading’ is self-explanatory. It’s against the law! I don’t think that a lot of young people understand why it’s against the law; therefore I think that communicating that to them is paramount. I think that

once people understand that downloading my music or anyone else's music not only deflates an entire industry that brings music to fans all around the world, but it also depletes revenue for artists who make a living making this music. I think people will realize that we can all find some common ground.”  
*(46th Annual GRAMMY Awards Nominations Press Conference, December 2003)*

The Gospel Music Trade Association also is doing its part to educate. The “Millions of Wrongs Don’t Make a Right” campaign used well-known Christian artists as spokespeople against piracy, but the perception that lingers is that all musicians are wealthy, so it is difficult to determine how effective they are as voices in such a debate. That’s why the Association’s attendance at youth events and organizations with presentations that frame the question of digital downloading as a purely ethical issue is the better move. The Association adopted WTD PSAs to educate consumers at various GMA festivals across the country during the summer of 2006.

“We are all conflicted, it’s true,” said John Styll, president of the Gospel Music Trade Association. “This is not a business first, but it still must be a business at some point to keep it going.”<sup>66</sup>

**The bottom line is we need to educate to eradicate piracy. With the reality of lawsuits, education becomes as much about consumer protection as it is a remedy for the ills of the industry. If consumers are well-informed about what does and does not involve copyright infringement, they will be more likely to make informed decisions, and if the music industry is educated about what consumers want, then it is a win-win situation for everyone.**

## **#2: Make Music Retail Therapy**

Until recently, the only place consumers could obtain the music they loved was in local record stores. Dedicated fans went to the record store to find new music beyond the scope of commercial radio, to learn more about favorite artists, and to surround themselves with others who shared a similar passion for music; more simply, a trip to the store was an experience. In the last decade, everything about buying music has changed. The rise of the Internet and its convenient tools for acquiring music, as well as the consolidation of media retailers, has given consumers more options. The introduction of technology like Apple’s iPod now allows consumers to purchase music conveniently from home. “[I]t’s tough to compete with an iPod,” notes Adam Mirabella, vice president of e-Commerce at Warner Music Group. “You can’t say it plainer than that. The [consumer] experience has to get smoother,

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<sup>66</sup> Ibid.

simpler, plug-and-play before retailers can really compete in the digital marketplace.” (*WTDLAB Roundtable with N.ARM, December 2005*)

In many ways, however, recent changes have worked to eradicate the communal environment that flourished at music retailers. Online communities and media superstores have displaced many independent retailers, who are unable to compete with the convenience of buying music at home or with chains that use music as a loss leader. Because Wal-Mart, Best Buy and Target offer music at prices below cost, it is difficult for retailers that sell only music to compete. They employ this tactic to drive consumers into their stores in hopes that they also will purchase other goods, which will yield a net profit. Wal-Mart, however, is tired of taking a loss on the sales and has been seeking cheaper wholesale prices for music, straining an already struggling industry.

According to a story in *Rolling Stone* magazine, Wal-Mart accounts for 20 percent of music sales, making it the dominant domestic music retailer. But music sales account for only two percent of Wal-Mart’s total sales. This means that Wal-Mart could stop carrying music altogether without risking a significant loss, while the major labels that sell music to Wal-Mart would be devastated. This gives Wal-Mart all of the bargaining power. As the perceived value of music has declined over the past few years due to piracy, Wal-Mart has demanded lower wholesale prices, which would provide the industry with even less revenue. The cheaper prices may please music fans, but they are driving retailers that cannot compete—especially independent retailers and small chains—out of business.

A perfect example is the recent bankruptcy and dissolution of Tower Records, the music industry’s most famous retail brand. As retailers close their doors, it makes it increasingly difficult for independent artists and labels to reach their consumers. With fewer artists able to reach their niche markets, the variety of music available to music fans becomes progressively more limited. It will be interesting to see what will become of Virgin Megastores, Musicland, and other music industry retailers over the next few years.

Despite this decline in local record stores, many fans still purchase music at retailers, and they are looking for a few simple features when they search for new music, which typically are not available at large-scale chain retailers. Hip-Hop producer/MTV personality and WTDLAB Honorary Member Sway Calloway indicated why he enjoys going to record stores:

“I like to discover music. Record stores are becoming defunct now. People don’t go to record stores and dig in the crates. People don’t go to second-hand stores and find those old albums you could get for half-price.” (*WTDLAB “Rap Session,” February 2006*)

Large-scale retailers do not offer a local community that independent stores provide. For example, Twist and Shout in Colorado and Amoeba music

store in California dedicate a large section of their shelf space to local artists, offer local concert listings, and host in-store performances by local artists that generate a sense of community within the store. Fans who purchase music at local retailers also feel that they are supporting their own community rather than a national corporation.

Staffing is another issue in the retail market. Stores like Wal-Mart and Target that do not specialize in music sales will not provide a staff that will be able to help the music fan. Even media-focused stores like Best Buy and Circuit City do not list music knowledge among the criteria for employment. Consumers often look to music stores to learn about artists as well as offer suggestions for new music. Successful independent record stores, such as Ear-X-Tacy in Louisville, Ky., require staff to pass an extensive music test before being hired. When staffers can suggest artists to a customer, he or she may buy albums he or she might not have otherwise known about, and, according to David Levin, VP of New Media at Sony/BMG, “There’s that sense of discovery that we need to recreate at music retail.” (*WTDLAB Roundtable with NARM, December 2005*)

### ***Sampling, Selection, Stock***

One way consumers discover new music is by sampling it before buying it. David Brinker, senior director of Corporate Development and Business Affairs of Musicland, recalls his experience with listening stations:

“I went to school in Boston and the Tower Records that used to be on Newberry Street was a temple to me. It was the place that sucked me into the music business. On Tuesdays there were six listening stations with 12 CDs on each of them. That’s where I bought my music and that’s why it was worth paying a little more.” (*WTDLAB Roundtable with NARM, December 2005*)

Prior to its recent bankruptcy, Tower Records was one of the only large retailers that offered a large kiosk where customers could listen to full albums instead of one track or even 30 seconds of a song. Some independent retailers offer stations where customers can listen to any album in stock. As a result, the customer is kept in the store longer and is more likely to make a purchase.

Another factor that retailers both large and small must take into account is selection. Small independent stores offer a catalog of artists and releases typically unavailable at most chain stores. Large retailers such as Best Buy stock the most popular releases of the most well-known artists; they do not stock back catalogs of even legendary artists. Bob Zimmerman, who recently was the store manager of the Lincoln Center Tower Records, notes the following about retailers:

“There is a level of frustration. Fans hear music on the radio. A DJ says the record is in the stores and when they come in it isn’t there. Why isn’t the record in the stores? The DJ said it was.” (*WTDLAB Roundtable with NARM, December 2005*)

If customers make a trip to the store to buy music, they want to be sure that the albums they want will be in stock. In a local store like Lou’s Records in San Diego, fans can find nearly any album they want from any genre, and if the store does not carry a particular album, it will order it. This dedication to pleasing customers generates a loyalty to the store.

Furthermore, artists have taken steps to ensure that their fans continue to support smaller retailers. Hip-Hop producer/rapper and WTDIAB Honorary Member Common emphasizes the importance of artists backing the experience found at smaller retailers:

“Sometimes when you go to a record store, you bump into a record. You bump into people that may hip you up to records. It’s a whole other experience. And I think we need that journey. It’s important that as artists that we take time to dig, to see the roots of where everything is coming from so that we can offer it to the fans, and they all can offer it to the next generation.” (*WTDLAB “Rap Session,” February 2006*)

In addition, releases by some artists on independent labels, like Iron and Wine and Bright Eyes, are available only at independent stores. Twist and Shout designated certain albums as “indie store exclusives.” This entices music fans, bringing them physically into the store because they are able to purchase this music only at these retailers. Also, by pledging their support for independent stores, the artists show fans what types of stores they support, encouraging listeners to do the same.

The inadequacies of chain stores include their impersonal feel, lack of selection, and general lack of customer service. However, the mega-stores do offer albums at discount prices, which entice customers to actually come to the store and pay for their music. The best way an independent retailer could emulate this business practice would be to offer a discount the first day or week an album is released. Even if a customer comes in only to purchase that one album, the communal atmosphere of the smaller store might lure them into buying more albums and supporting the independent store even more steadfastly.

Physical record stores always will have an appeal. WTDIAB Honorary Member Mark McGrath of Sugar Ray explains why some fans still want to own a tangible product: “If you truly love music, you want to know who’s writing these songs, who is producing them, where the studio is ... Maybe that was a gritty street vibe. There’s a total domino theory by buying the entire CD package” (*WTDLAB Roundtable Discussion, February 2005*).

Moreover, music fans crave the experience of going to a store to buy music rather than sitting at a computer. “I don’t think sitting alone in front of a lighted box is the way to experience music,” suggests Jim Donio, president of the National Association of Recording Merchandisers (NARM). “What is very unique and special about music is the fact that there is an emotional attachment. You want to turn to somebody and say, ‘Isn’t that great?’” (*WTDLAB Roundtable with NARM, December 2005*)

**The bottom line is buying music is retail therapy. Brick-and-mortar retailers must work to please their customers by offering what purchasing music online never can: ambiance.**

### **#3: Declare a Music/Tech Truce**

There are many advantages of downloading legally; the most important is that a person is not breaking the law and will not face major fines or possible jail time. In addition to the legal problems one might face from engaging in peer-to-peer downloading (P2P), there are other disadvantages of getting music through an illegal site. Viruses, spyware, poor quality MP3s, and unwanted material are some of the major disadvantages of using illegal P2P software.

There are many legal alternatives to copyright infringing P2P sites—approximately 335 legal online alternatives worldwide—and they are slowly and steadily growing in popularity and profit. The IFPI reported in its *2006 Digital Music Report* that in 2005 the global revenues of legal downloads tripled to \$1.1 billion from 2004’s revenues, and the number of licensed songs doubled from 1 million to a little more than 2 million in the past year. Nielsen SoundScan also reported that in 2005 there were 353 million single-track downloads in the United States alone, up from 143 million in 2004. Member subscription services such as Napster and Rhapsody also have seen growth, up from 1.5 million to 2.8 million subscribers globally in 2005, the IFPI reports. Mobile sales and satellite radio subscribers also grew since the previous year.

These numbers are impressive, and they prove that legal file sharing alternatives are growing and that they are a valid source of revenue for record labels and artists. Despite this growth, however, copyright-infringing P2P sites are still very healthy and show little signs of slowing. The IFPI reports, “The number of infringing music files available on the Internet (in 2005) at any one time is estimated at 885 million.” This number is staggering when compared to the licensed music files available on the major legal Web sites.

How can companies drive illegal file sharers to legal Web sites? This is something many are struggling to figure out, and there is not one clear answer or solution. However, if legitimate Web sites and online companies want to continue to grow, they must offer what piracy cannot.

### ***Compatibility and Ease of Use***

Online music is a format that consumers, not industry members, have selected to acquire and listen to music. Now that online music downloading has become a vital source of revenue for the industry, members of the industry embrace it more. GRAMMY-winning singer/songwriter John Legend applauds the online delivery of music and its growing importance: “It’s easy [legal downloading], and it supports an industry that’s making the music that you’re buying or listening to. Without that, new artists can’t be developed.” (*48th Annual GRAMMY Nominations Press Conference, December 2005*) Similarly, GRAMMY-winning artist Sarah McLachlan notes:

“There are now so many great Web sites where you can pay a reasonable amount for a song. They’re incredibly easy. iTunes is a perfect example of user-friendly technology where anybody can log on, and you can get thousands and thousands of fantastic songs on there. I think [people need to be] educated and aware that there are legal options and good options, instead of just getting it hot or stealing it.” (*46th Annual GRAMMY Awards Nominations Press Conference, December 2003*)

It is true that there are legal means to download music; yet, it should not be overlooked that consumers are faced with problems when using legal services. Such services lack compatibility of file formats, and offer a limited selection of songs, which do not give consumers the ease of use and song choices provided by illegal Web sites.

The availability of portable digital players, like Apple’s iPod, has grown tremendously over the last two or three years, and Apple clearly is the leader in the marketplace. Though iPods generally work well, offer sleek design, and come in a decent number of models, colors, shapes, and sizes, they can be complicated at first for the average computer user, and downright intimidating for older people. The iPod is just one among hundreds of portable digital devices available for purchase, and iTunes is just one of hundreds of legal downloading services. Choice and variety drive our global markets, but the many options of digital players and services may be doing more harm than good.

The various audio formats and DRM technologies associated with digital media are a major hurdle for technology companies to overcome. Compatibility and interoperability between digital players has been frustrating for consumers, and this issue must be resolved in order for the digital marketplace to continue growing and maturing.

The American public generally knows the term “MP3,” but most people do not understand that the MP3 format is just one of many digital audio formats. So when selecting a digital player for purchase, one must consider the different audio formats supported by each digital player. Furthermore, people must make sure their portable digital device is compatible

with the software and service from which they wish to download legal music. Some of the audio formats supported by digital players today are MP3, WMA, ACC, AIFF, WAV, ATRAC3, ATRAC3plus, ASF, AAC, and Audible.

Music purchased from Apple's iTunes is encoded in AAC format and will only play on iPods. Music purchased from Sony Connect is encoded in ATRAC3 format and can only be played on Sony devices. Many other legal online services offer music in WMA format, which can be played on numerous portable players, but not on the iPod. The exceptions are unprotected MP3-encoded files. As such, many Apple competitors would like to sell music in MP3 format so they can compete with iTunes and still be compatible with the popular iPod device. Perhaps the most successful example of this is eMusic. Despite a music catalog limited to independent label fare, the service facilitates more music downloads than any other save iTunes. The reason is that eMusic's entire catalog is available to consumers as unprotected MP3s. But the major record labels by and large insist their music must have some sort of DRM protection before they'll license it for digital distribution. Increasingly, the wisdom of this stance is coming under scrutiny.

The lack of compatibility is not an accident, and, from a business point of view, it is very justifiable. Apple does not want people filling their iPods with music from Sony's Web site; they want people shopping on iTunes and vice versa. But from a consumer perspective, the resulting incompatibility is frustrating, and can be a big turn-off for new and existing consumers. If consumers purchase music online, they want the freedom to play that music on all their players and not be limited to one or two devices. It is the responsibility of technology companies to create interoperability among devices and services in the future. If this does not happen, it will eventually harm consumers, the marketplace, advances in technology, and, of course, music.

According to the most recent SoundScan year-to-year figures, digital album sales through October 1, 2006, have grown 115 percent over the same period last year, while downloaded individual tracks have grown 72 percent. Yet these gains have not yet closed the gap with still-declining physical sales, which are down 8.3 percent from last year. DRM opponents say a la carte sales could do more to close that gap if restrictions were removed, but it is impossible to quantify whether this is in fact the case. Yahoo! Music is attempting to prove the theory that they can close the gap made by making pop artist Jesse McCartney's new album available in both protected and unprotected formats at the same price via a deal with Hollywood Records.<sup>67</sup>

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<sup>67</sup> Bruno, Antony. "Digital Rights in question as a business model." *Billboard*. October 16, 2006.

### ***Are Taxes the Solution?***

Instead of placing Digital Rights Management (DRM) and copy protection on CDs, record labels in other countries have placed a special tax—a levy—on materials and devices that can be used in conjunction with illegally distributed music. All of the European Union countries, with the exception of the United Kingdom, Ireland, and Luxembourg, have some form of levy on devices that can play, share, or create digital music files.

These levies are in place to recoup finances for artists who are losing money because of people copying their music rather than buying it. According to Mitch Bainwol, Chairman and CEO of the Recording Industry Association of America (RIAA), illegal burning and ripping of CDs are great threats to the industry. At the 2005 National Association of Recording Merchandisers (NARM) convention in San Diego, Bainwol said 12 percent of all households are burning CDs and 17 percent are burning more than 10 CDs per month.<sup>68</sup>

Levies are employed by different countries in different ways:

**France:** France has imposed “artist taxes” on video and audio tapes for years. But new technology is reducing cash generated by these taxes as people turn to new media such as recordable CDs to store songs and films. To make up the shortfall, the French government is extending the tax to cover blank CDs, recordable DVDs and MP3 players. French Culture Minister Catherine Tasca called extending the French levy policy to include CD burners and hard disks in computers “logical” and said 75 percent of any cash generated by the tax would go to established artists and the remainder would be used to encourage new talent.<sup>69</sup> The plan was condemned by the French electronics industry, because they said it penalized everyone, rather than just those pirating music and movies.

**Canada:** In Canada, the Canadian Private Copying Collective (CPCC), a recording industry association representing Canadian artists, collects a levy that applies to blank CDs, Mini Discs, and MP3 players. These charges range from 77 cents for blank audio CDs to \$25.00 for MP3 players.<sup>70</sup> Those opposed to the levy say the tax is unfair because it is placed on blank media that can be used for backing up many different types of files. “The CPCC’s logic is based on the assumption that any blank media or media recording/playback device will be used at some point to make pirated copies of copyrighted songs. With the increase in popularity of these devices, the CPCC argues, there must be a corresponding increase in pirated music, thus higher levies must be assessed to fairly compensate music artists and music production companies for all this rampant corruption.”<sup>71</sup>

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<sup>68</sup> Gallo, Phil. “Will the RIAA Target Homemade CDs?” *Variety.com* (Accessed on: [http://www.forbes.com/digitalentertainment/2005/08/15/riaa-targets-cds-cx\\_variety\\_0815riaa.html](http://www.forbes.com/digitalentertainment/2005/08/15/riaa-targets-cds-cx_variety_0815riaa.html))

<sup>69</sup> Ward, Mark.

<sup>70</sup> [http://www.ccfda.ca/subsections/eng\\_whoare.html](http://www.ccfda.ca/subsections/eng_whoare.html) (21)

<sup>71</sup> <http://www.geek.com/news/geeknews/2003Dec/gee20031212023060.htm> (30)

In Canada, uploading to a peer-to-peer network is illegal, but downloading music for personal use is considered legal. The Recording Industry Association of America (RIAA) has been critical of Canada's copyright laws. This is because the country has not instituted provisions similar to those found in the U.S. Digital Millennium Copyright Act, which makes it illegal to break, or to distribute tools for breaking, digital copy protection mechanisms, such as the technology used to protect DVDs from piracy.<sup>72</sup>

Although Canada has not adopted all of the measures taken in the Digital Millennium Copyright Act, and artists should be compensated for illegal downloads, the country "could become a model for countries seeking to find a balance between protecting copyright holders' rights and providing consumers with more liberal rights to copyrighted works."<sup>73</sup> In Canada, "funds collected from the levy are divided among 10 collecting societies and split between authors, performing artists and producers when it comes to audio and video. Though criticism has surfaced about levies on media like CDRs that are often used to make back-ups or for other non-copyright related purposes, in general the levy system on blank media seems to create a fair balance between the interests of users and rights holders."<sup>74</sup>

**Other countries:** Japan has abandoned plans to introduce a levy on portable music players—a so-called "iPod tax"—because opponents deemed the tax unfair since it penalizes all consumers, failing to distinguish between legitimate and illegitimate device and media usage.<sup>75</sup> Meanwhile, the German government has gone one step further than other EU countries and imposed a levy on computers of about 60 DM (\$35). The main argument against the levies is that because most iPods have Digital Rights Management (DRM) protection, consumers will be paying twice for the copyright if they are taxed for the player as well. In addition, if MP3 players were not DRM protected, the levy might lead to infringement of copyright by users who may argue that they will have already paid for the copyright through the levy. Consumer electronics companies such as Apple, Sony and Philips are concerned that the tax could hurt sales and also fear that the proposed tax will deter hardware companies from launching new products in Europe."<sup>76</sup>

Although a handful of people may only download legally or load songs that they purchased onto their computer, a great majority of computer owners do at some point illegally download or import music onto their computer. A tax rate that is reasonably reached would be a fair way for record companies and artists to be compensated for any illegal use of their music.

Despite arguments that a tax is unfair because it does not distinguish between illegal and legal downloads, imposing a tax on media devices may be a

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<sup>72</sup> [Borland](#), John. CNET News.com

<sup>73</sup> Borland, John. (31)

<sup>74</sup> Macworld staff (36)

<sup>75</sup> Aughton, Simon. <http://www.macuser.co.uk/macuser/news/80980/japan-abandons-ipod-tax.html>

<sup>76</sup> <http://www.mwe.com/info/news/euroip0505-copyright.htm>

good solution for the U.S. recording industry. Instead of suing specific people for uploading music on peer-to-peer networks, the industry could recoup money lost from illegal burning and downloading if there were a tax on media. Such a tax has been instituted before in the Audio Home Recording Act of 1992, which could be amended to include other types of media.

Harvard Law School professor William Fisher has laid out a planned solution for implementing the special tax that would align U.S. copyright policies to those of other countries. Under his plan, the creator of a recording would register his or her works with the U.S. Copyright Office and receive a unique file name that could be used to track transmission of the work around the Internet. The government would then tax devices and services used to access digital entertainment, especially Internet service providers. In Fisher's scheme, CD burners, blank CDs, and MP3 players also would be taxed. Fisher also endorses techniques, pioneered by American and European performing-rights organizations, in which government agencies estimate the frequency with which each song is downloaded and then have the song's creators compensated in proportion to its popularity."<sup>77</sup>

**The bottom line is technology can be music to our ears, but only if it makes sense for all parties involved.**

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<sup>77</sup> Harrison, Ann. *Network World*. July 27, 2003.

#### #4: Commit to Artist Development

Over the past few decades, the music industry and technology have evolved in a direction that supports singles over full albums. An artist's livelihood often depends on the success of one song, or, if he or she is lucky, a handful of songs. Generally, a label will put more money into the production of a single, and the other songs on the album serve as "fillers" – songs that increase the number of album tracks. As illegal downloads of singles have persisted, consumers have shown that they are not willing to pay the price of a full album for only a couple of decent songs. Hip-Hop producer/rapper and WTDIAB Honorary Member Common notes that "[I]t's unfair to a listener to get an album and there are only one or two [good] songs on it and the rest is garbage. People listen to music online to check it out; when they hear something that they like, they go out and get the album. The songs have to prove to be worthy of them getting the whole album." (*WTDLAB "Rap Session," February 2006*)

The industry is embracing a single song-driven market by making songs available via legal digital music services, but at the same time, consumers would like to see more than a few decent songs from their favorite artists. Artists have worked to fight the drift toward a single-driven industry. Reggae rapper Sean Paul notes, "I think that great artists are out there and, of course, there will be great singles. But albums are important things because it is a body of work that artists have been working on with producers for a long time." Similarly, British hip-hop artists Floetry note, "I think in this day and age artists don't put as much passion into their albums. An artist might only put passion into one single or two singles – people are getting sick of paying 20 bucks for one song." (*48th Annual GRAMMY Awards, February 2006*) WTDIAB Honorary Member Verdine White of Earth Wind & Fire summed it up best: "[I]here have been records, \$16 for albums or CDs, with two songs on them. That hasn't been the fault of the consumer. The consumer wants 10 songs that are great." (*WTDLAB Roundtable Discussion, February 2005*)

The music industry is inherently concerned with the profitability of artists, but it has taken this model to an extreme in recent years by reproducing hit music and simply varying the artists performing it. This trend has led directly to a homogenization of popular music, which in turn has led to a sharp decline in artist development. Artists are forced into recording "hit" music rather than their own style. Latin alternative rock singer/songwriter and WTDIAB Honorary Member JD Natasha comments, "Artists are coming out that are fabricated and who are not themselves. At the end of the day, you want to pay for something that's real and that you can relate to." (*WTDLAB Roundtable Discussion, February 2005*)

### ***Beyond the First Record***

Major labels put pressure on artists to produce a hit record on their first albums, or they risk being released from the label. Major labels will engage in artist development if the first record or album scores as a hit. The problem, of course, is that most artists' first albums or records are not necessarily the best that they can produce as they are new to the production process. Earth, Wind & Fire's Verdine White commented on the change in record industry tactics with regard to new artists:

So out of merging to get bigger, what happened was that they were so big they didn't have the opportunity or the time to have hands-on with artists. In the beginning of our career, they were more hands-on...you had three or four albums to get it together. We've done 23 albums. Probably the first five you don't know about, but in today's market, we would never be able to survive. We'd have to come out smoking with our 'That's the Way of the World' - the first record. And because of the mega-mergers...in record companies, what happened was that...the middle was gouged out of the label so there was really no hands-on for people like yourself to listen to artists, per se. So, record companies were forced to deal with the bottom line as well as all of the industries and the adjustment from an industrial economy to a global economy. (*WTDLAB Roundtable Discussion, February 2005*)

It is also important to note how the industry depicts artists. Engineer, producer, and songwriter John Poppo believes that the industry is "making celebrities not musicians anymore." (*Discussion with WTDLAB, December 2005*). In fact, most major labels now see their artists as commodities—or even brands—rather than musicians. A fan may enjoy a particular "brand," but will not necessarily develop the connection with this piece of music as he or she might with a true artist. Liquid Digital Media's Michael Abbattista has said:

I've heard so many people at labels in the last several years refer to their artists as brands, so Britney Spears is a brand, Russell Simmons, Def Jam is a brand, Jay-Z is a brand. You know what happens to brands: people forget about them and they move on to the next thing. It's sort of an antiquated notion, but people don't believe in brands. They don't believe in celebrities. They believe in artists...maybe those artists have a harder time selling records but you know that those fans are probably worth more than—a fan of \_\_\_\_\_ is probably a bigger fan of that artist than a Lindsay Lohan fan is to her and they're going to be around longer." (*WTDLAB Roundtable with NARM, December 2005*)

Fan devotion to an artist is a direct by-product of the devotion a label has for an artist. Smaller independent labels have consistently shown a commitment to nurturing the talent of their artists by providing them with a support team. The motto at Wind-Up Records, home to rock artists such as Evanescence and

Finger Eleven, is “developing career artists.”<sup>78</sup> Alan Meltzer, the company’s chairman, has said, “Our commitment is in developing real artists.... We’re not looking for an artist who has a really great song and then going in for the quick buck; we’re not into pipeline.”<sup>79</sup> Artists on Wind-Up are given insurance and other services that aren’t available on most labels. This allows the artist to focus on making music, and earns a fierce loyalty to the label. Fans in turn recognize the support given to the artist, and not only recognize a label, but appreciate its commendable business practices with the artists they love.

Some of the artists on independent labels go on to major labels, where they have encountered support from the label and commercial success, but this is due in large part to their development as artists while on a smaller label. Big name artists such as GRAMMY-winning rock band Green Day and Fall Out Boy started on independent labels, where they found and perfected their sound over the course of years instead of months. The major-label debuts for both of these bands were their third full-length albums.

The move towards the Internet as a source for new artists, combined with the downturn in sales, has pushed many independent acts and their labels into the foreground of experimental music. Independent labels that are less concerned with a bottom line and quarterly financial targets allow artists to build their fan bases slowly, over the course of a few albums. In an article on the recent upswing of independent music, Steve Gottlieb, chief executive officer of independent label TVT Records, noted, “They’re all terribly under the gun to justify every investment and tie it to an immediate return .... That type of discipline doesn’t allow for the extra time or the extra album it took to break a U2 or a Bruce Springsteen. The majors focus on platinum artists and no longer have an appetite for artist development except in the rarest of instances.”<sup>80</sup>

The music fan can support artist development by downloading music legally. Developing an artist costs money; as GRAMMY winner John Legend notes, “[Legal digital downloading] is easy, and it supports an industry that’s making the music that you’re buying or listening to. Without that, new artists can’t be developed.” (*48th Annual GRAMMY Awards Nominations Press Conference, December 2005*) Despite this apparent Catch-22, major record labels recently have advertised their dedication to profits over artists.

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<sup>78</sup> Wind-Up Records. <http://www.wind-uprecords.com>. February 21, 2006

<sup>79</sup> Conniff, Tamara. “Indie Wind-Up treats its artists like family.” *The Hollywood Reporter*. November 6, 2003. Accessed on [TheHollywoodReporter.com](http://www.hollywoodreporter.com) on February 21, 2006. <[http://www.hollywoodreporter.com/thr/columns/music\\_reporter\\_display.jsp?vnu\\_content\\_id=2018133](http://www.hollywoodreporter.com/thr/columns/music_reporter_display.jsp?vnu_content_id=2018133)>

<sup>80</sup> Leeds, Jeff. “The Net Is a Boon for Indie Labels.” *New York Times*. December 27, 2005.

In his Rock and Roll Hall of Fame induction speech, GRAMMY winner Bono of U2 reprimanded the music industry: "I would like to ask the music business to look at itself and ask itself some hard questions. Because there would be no U2 the way things are right now." Earlier in the speech, he noted that U2's success was due only to their producers' unwavering dedication to the band's development.

**The bottom line is the music industry needs to commit to artist development and the fan needs to commit to supporting artists financially. If the industry wants to win back that financial loyalty of fans lost to illegal means of obtaining music, major labels should work with an artist to cultivate his or her talent, rather than casting an artist aside after a commercially unsuccessful release, if for no other reason than the loss of a potentially legendary artist.**

### **#5: Embrace New Music Avenues**

In the wake of all the issues that commercial radio is facing, as well with the technological groundswell of the past decade, many consumers are looking toward other venues for exposure to new music. With the deregulation of radio and subsequent homogenization of popular music, some consumers feel cheated by the music industry and have devised ways to bypass conventional means of acquiring music. Piracy aside, the Internet has become crucial in the spread of new music. The regionalism associated with underground music in the latter half of the 20th century disappears with Web sites and networks that allow even the smallest of independent acts the national exposure usually only reserved for major label artists.

A fan base now can be generated for smaller acts that may not have the financial support to place them in the homes of communities detached from large cities. According to GRAMMY-winning heavy metal act Slipknot, digital music has done nothing but help the industry: "A kid that lives in a small town doesn't have access to a big chain store, and he deserves to see the show and hear the music just as much as a kid in New York City or L.A." (*48th Annual GRAMMY Awards, February 2006*)

The power of promotion has begun to shift hands, as consumers can regulate exactly what they listen to; they have the ability to market for themselves and search for music that they desire. The Internet, particularly sites such as MySpace and Pure Volume, play host to thousands of artists, which are readily available to millions of fans. These Web sites let fans get close to artists and put tangibility back into a typically faceless music industry. This garners a trust between the fan and the artist, and develops a sense of community that has been missing in the music industry since the consolidation of radio.

In September, MySpace announced that it would begin selling songs from millions of aspiring bands that use the site to promote themselves with special band profiles. Digital licensing company Snocap, started by Napster founder Shawn Fanning, will handle the online sales efforts. All music will be sold in MP3 format, which allows downloaders to transfer tracks to portable devices, including Apple's iPods, and CD discs. Unlike the 99-cent-per-track mentality of iTunes, MySpace will allow labels to set their own prices. For now, no major label has agreed to sell tracks on the Web site, but EMI is in talks with the company (*New York Times*, September 2006). For many small, unsigned bands, this MySpace store allows them the chance to sell their music and promote themselves without the large costs associated with major labels.

The do-it-yourself attitude strips commercial radio of its power and allows word of mouth to dominate as a means of learning about new music. Fans will more readily accept musical suggestions from friends than from nationally owned radio conglomerates, and regardless of whether or not they receive an illegally burned CD, a file over the Internet, or a legitimate album, a new fan has been created, and this fan will more likely support the artist in the future.

Recently, word-of-mouth techniques like blogs and online message boards have allowed independent bands to gain national recognition that was previously unavailable to them, due to the generally small budgets of independent labels. For example, the indie rock band Clap Your Hands Say Yeah sold 25,000 copies of its first release through word-of-mouth and the Internet, and the band boasted thousands of fans before it ever had a record deal.<sup>81</sup> The indie/hip-hop fusion group Gym Class Heroes ("The Queen and I") and R&B singer Cassie ("Me & U") also were discovered on MySpace before landing major record deals. Fans are able to seek out full albums, at a time when the music industry has become entirely single-driven.

Satellite radio is another important venue in the search for music. The cable-like subscription services allow listeners to experience radio shows that cater to all of their musical desires. Since satellite radio is a subscription service, the programmers are allowed to play whatever they want without the pressure to play Top 40 hits, as in commercial radio. This freedom, along with talented radio personalities, ensures quality control and the diversity of music played on these stations. Through many avenues, consumers now have the power to expose themselves to new music.

### ***Online Music Community***

With the consolidation of radio, record labels, and retailers in the last decade, as well as the homogenization of popular music, music scenes as fans

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<sup>81</sup> Number of fans count taken from number of "friends" the band has on its MySpace profile, which as of February 21, 2006, totaled 18,043.

knew them had all but disappeared by the end of the 20th century. Gone were the days of local music communities built around a style of music by the bands and fans of the area. In the late 1980s in particular, underground, non-commercial music scenes dominated the independent market, and the members of these club-like communities showed fierce loyalty to the acts they had watched grow artistically for years. Due to the regional nature of these communities, fans could interact with artists, particularly because all bands were fans themselves of other artists in the scene. Fans that yearned for music beyond the scope of commercial radio enjoyed the feeling that they were experts; they had discovered bands first, and they had been fans since the beginning. Most importantly, a relationship was forged between the artist and the fan.

In the early 1990s, however, these communities were exploited and thrown into the spotlight in the music industry's attempt to capitalize on these "scenes." In his book *Nothing Feels Good*, Andy Greenwald discusses the transition from scene to market that occurred with the break of bands such as Nirvana and Green Day: "The underground was dragged blinking, kicking, and screaming into daylight. Like it or not, subculture was now big business and regional and independent acts gained access to the national stage."<sup>82</sup> Once-familiar acts were separated from their fan bases as more artists began to sign contracts with major labels in the interest of profiting from the boom in popular rock music. A market of music that appealed to fans through its locality had now become a part of the faceless pop industry.

Today, these regional musical communities are much fewer in number. But a new kind of musical community has taken their place—on the Internet. Fans have shown that they want to talk to each other about music, whether it is face-to-face with artists or online. Fan-driven message boards have emerged as a means for fans to discuss the music they love and learn about new artists that they may not have heard of in the regional pre-Internet music communities; word-of-mouth has taken a completely different form. Greenwald notes: "The age-old pattern of seeing a flyer, sneaking out to a show, writing to a post office box, waiting to get a hand-scribbled note with a 7-inch, and whispering to your friends about it is long gone. One click of the mouse and an entire band's oeuvre is available on MP3, anytime, anywhere."

Most recently, these online communities have begun to replace the regional musical communities lost in the late 20th century. In the past few years, musical communities have cropped up in droves, and have attracted millions of members. Musically-based sites like [makeoutclub.com](http://makeoutclub.com) and MySpace, as well as Web logs such as Live Journal and networking sites such as Facebook have created a new way for young people to build a sense of

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<sup>82</sup> Greenwald, Andy. *Nothing Feels Good: Punk Rock, Teenagers, and Emo*. St. Martin's Griffin Publishing: New York, 2003.

community among their peers. Membership is free, members can list their interests as well as their favorite artists, and can easily search for and interact with others who have the same interests. According to Death Cab for Cutie's Ben Gibbard, "With MySpace so many people have access to music. People are able to hear [music] that they wouldn't otherwise be able to hear." (*48th Annual GRAMMY Awards, February 2006*)

These online communities allow participants to identify with and create relationships with their peers. Online communities allow a degree of security in identity formation and expression of ideas which appeals to music fans, particularly teens, by allowing them to show their true selves in interactions without fear of derision from their peers.

If the music industry hopes to survive, it must embrace the new face of musical community to reach out to potentially dedicated fans. Artists such as GRAMMY-winning rock band Linkin Park do so, and this serves to earn them a very dedicated fan base:

"We try and stay very open to the fans. We always have. At each one of our shows we do meet-and-greets. We try and meet fans every chance we get. When we go on our message board it's really us and we're there talking to people and having conversations. We're going to have a new Linkin Park record out this year and as that starts to come out you'll be able to look for us on the Internet and, like it always is, we'll be there. We'll be on MySpace talking to fans. We'll be on linkinpark.com talking to fans." (*48th Annual GRAMMY Awards, February 2006*)

Eric Garland, WTDIAB Honorary Member and CEO/Founder of BigChampagne Online Media Measurement, notes: "Music and community are becoming inextricably intertwined, as never before. This is a natural, probably necessary, evolution of the music marketplace. But let's not sugarcoat it too much: communities are powerful, mercurial, opinionated and skeptical. It is much harder to sell popular music today than it was five years ago."

In October 2006, video-sharing Web site YouTube got in the ring by striking content deals with Universal Music Group and Sony BMG. UMG agreed to give YouTube viewers access to thousands of music videos. They said it and its artists would be compensated not just for videos, but for user-generated content that includes UMG's music. That same day, Google revealed it secured partnership with Sony BMG and Warner Music. "YouTube is committed to balancing the needs of the fan community with those of copyright holders," said Chad Hurley, chief executive of YouTube.<sup>83</sup>

**The bottom line is, we need to embrace new music avenues. Labels as well as artists should take the time to interact online with their fans in the interest of developing an artist-fan relationship that will**

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<sup>83</sup> Reuters. October, 9, 2006.

entice fans to support artists monetarily. If major labels are looking to generate artist loyalty, they should ensure that artists make attempts to let the fans into their lives via written or video Web logs or live online chats; or by encouraging membership in fan clubs and street teams, offering incentives such as special track releases or advanced ticket sales. The music industry should use the technological advances of the Internet to create a sense of locality, and the feeling of membership in a musical community despite the national or even international scope of the music.

## **#6: Offer What Piracy Doesn't**

Napster and the illegal peer-to-peer (P2P) sites that followed it taught the music industry many things. Most important, they have shown that people are hungry for music, they still love music more than ever, and they want a lot of it: all sorts of genres, artists, eras, rare cuts, live concerts, etc. As mentioned earlier, the IFPI reported, "The number of infringing music files available on the Internet (in 2005) at any one time is estimated at 885 million." This is an important advantage that illegal P2P sites have over legitimate downloading services. The vast content available on illegal P2P sites dwarfs the more than 2 million licensed tracks available on the major legal services, and this is a major factor why people choose to download music illegally. (Of course, they also are free.)

### ***Live Concerts, B-Sides, and Unreleased Material***

Illegal P2P sites offer studio albums but they also offer live concerts, b-sides, remixes, rare, and unreleased material. Much of the music shared on illegal P2P sites cannot be purchased in retail stores nor is the music sold online. If record labels, artists, and legal downloading services want to compete with illegal P2P sites, they must expand their catalogs drastically. They need to offer what illegal sites offer and much more.

Probably the biggest impact technology and the Internet have had on the music industry is the way music is distributed. With high-speed and broadband connections steadily on the rise across the globe, music is being transferred almost instantaneously and in a much greater volume than ever before. Neither record labels nor music consumers are limited by the physical shelf space of local retail stores. There is no reason why every recorded piece of music should not be made available for listening and purchase online.

Record labels initially ignored the new form of distribution but finally have acknowledged the fact that digital music is here to stay and that it can be profitable if distributed properly. Record labels' deals with companies like Snocap prove that they are now accepting of digital media. Artists, however,

seem to have been more aware of the great possibilities the Internet provided from its inception, and many have achieved great success in the digital realm.

One of the many artists that have embraced the advances of technology and the Internet is the rock/jam band Phish. Throughout its career, Phish has been known to encourage fans to record and trade live shows among fellow fans. In January 2006, Phish became the first rock band to deliver video clips directly to its fans via its Web site. The videos are not encoded with any Digital Rights Management (DRM) software and are available in the widely supported MPEG4 format. Along with videos, the band also offers high quality soundboard recordings from numerous live performances for purchase and downloading. Another band that has embraced the Internet is The Dave Matthews Band, which offers unreleased, soundboard-quality live recordings for purchase on its Web site.

The extra potential revenue for artists and record labels that make live concerts, b-sides, and unreleased material available for download could be enormous. There are little if any manufacturing and distribution costs involved with running a digital music store or licensing songs to third-party vendors. The overhead costs are maintaining and updating computer servers and any marketing and promotion campaigns.

In the digital realm, record labels can afford to offer and sell the less “popular” recordings that in the past may have not been “worth” stocking in traditional retail stores because of the valuable shelf space. A digital sale results in maximum profit. If a song does not get downloaded one month, there is no revenue loss if it sits on a server, but maybe the next month it could get 10 hits, a hundred, a thousand, or even more. The tremendous amount of music that has been recorded far surpasses what is available in the average music retailer. Chris Anderson, editor-in-chief of WIRED magazine, has discussed these issues in great detail in various WIRED articles and through his personal blog. He has since written a book on the subject, *The Long Tail: Why the Future is Selling Less of More*.

Some musicians are finally putting a new spin on their CDs to offer what piracy doesn't, and they should see the rewards from fans with a boost in CD sales. For example, Beck's newly released 15-track *The Information*, includes a DVD with videos for each song plus stickers designed by U.S. and European artists that permit fans to customize the album. The videos were rotated on Beck.com, his MySpace page and even circulated on YouTube. “Making the cover art a do-it-yourself experience is a clever attempt to engage fans and give them something they can't get if a buddy burns a CD. Beck is always looking forward,” said Geoff Mayfield, *Billboard* director of charts.<sup>84</sup>

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<sup>84</sup> Gunderson, Edna. “Musicians put new spin on the CD to boost sales.” *USA Today*. October 10, 2006.

Another great example is the multi-platform release of The Barenaked Ladies' *The Barenaked Ladies Are Me*, made available as a conventional 13-song CD or download with two bonus tracks, a 27-song deluxe edition digital set, and a USB flash memory stick with 29 new songs and bonus content. If that wasn't enough, BNL is inviting fans to download multi-tracks for five songs from its Web site, allowing fans to remix and re-edit into new versions. The band will then select the best mixes for the next album due later this year. This type of "multiple-choice product" presents itself to be a great starting point and satisfies the types of things that fans want from their artists: engagement and interaction.<sup>85</sup>

One band that is getting ahead of piracy as it relates to the bootleg issue is British alternative rock band Keane. The band recently agreed to have recordings of its upcoming tour performances released on CD within 10 minutes after the gig has concluded. These "official bootleg" CDs will be limited to 1,000 units each night. Prices were not disclosed, but the initiative—proclaimed as the first such partnership in Britain— involves Keane's label Island Records and Concert Live in partnership with Tunetrive.com.<sup>86</sup>

**The bottom line is that people are hungry for music, and they are eating it up from many different sources. If retailers and artists do not offer music consumers what they want, when they want it, they will turn to other resources, whether it is illegal P2P sites or a friend's computer burner. In order to compete with copyright infringing P2P sites, record labels, artists, and publishers need to make every sound and video recording available and easily accessible for purchase. In return, technology companies must resolve the issues surrounding compatibility and interoperability among portable devices and downloading services. Over time, consumers will like the security of downloading or streaming music off a legal site, receiving quality recordings and product, and having the instant gratification that they want and must have. If consumers are offered all these things and much more, they will move reject the harmful and unstable illegal P2P sites and once again support the artists they love.**

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<sup>85</sup> "The Rebirth of Music." *WTRED Magazine*. September 2006.

<sup>86</sup> Brandle, Lars. "Keane to Sell 'Official' Bootlegs." *Billboard.com*. October 13, 2006.

## #7: Make Music a Priority

Believe it or not, traditional media companies are moving forward, and bravely. Instead of trying to sue anyone and everyone, some content makers are actually starting to make nice. Universal Music Group (UMG), Warner Music, Sony BMG and EMI Group have forged deals with content providers like Google, YouTube and Spiral Frog in which the online video site, the provider, and the consumer all benefit.

Two big labels are starting on the right path of confronting piracy by partnering with an ad-supported online music company called Spiral Frog in a bid to regain market share from illegal download networks that are still popular. In September, UMG, the largest of the four major labels, announced that it would offer free music downloads from an extensive catalogue. EMI is another label that will make its music catalogue—the largest in the world with more than 1 million copyrights—available once Spiral Frog launches in December. The new service is great in that it is free, and tracks can be played on any digital music player. The downside is that tracks will not play on the iPod, and every song, regardless of length or file size, takes 90 seconds to download, maximizing exposure to the ads on the site. Despite iTunes' top spot as far as legal options, piracy on the Web still far outweighs that of digital music sales. Regardless of the “cons,” the gesture being made to “make nice” is a start.

“It is a very exciting concept which fuses advertising with music downloads and other services to recapture consumer demand, which has been hijacked by online piracy,” says Roger Faxon, co-chief executive of EMI Music Publishing.

If there is enough buzz ahead of the launch and more labels sign on, perhaps music fans will dump LimeWire and eDonkey in favor of legal services that will give them what they want for free. All this comes on the heels of another deal insiders are waiting for from Kazaa, a popular music-sharing network, which also plans to announce an ad-supported music downloading service.

Piracy is not just relegated to the music industry. We are starting to see major crackdowns in the movie and television industries. Television, in particular, is trying to make nice too. Anne Sweeney, president of Disney's ABC Television Group, implied that it might be more productive to try to understand companies that operate peer-to-peer networks or distribute file sharing software rather than to sue them for copyright infringement. “So we understand piracy now as a business model,” Sweeney said, calling it “a key competitor going forward.”

In response, ABC last spring began offering free episodes of “Lost” and “Desperate Housewives” (with ads viewers couldn't skip) on its own media player. The trial was an instant hit, so ABC decided to offer the service

permanently. “We’ve created a strategy to address this threat with attractive, easy-to-use ways to for viewers to get the content they want from us legally,” said Sweeney. It may be hard to compete with free, but ABC proves that it isn’t impossible.

The majority of people don’t want to break the law, but they also don’t like paying for something they could get for free. Unless it’s for their iPod: ABC has also managed to sell more than 8 million of its shows on iTunes at \$2 a pop without damaging its TV ratings.<sup>87</sup>

This is all very positive news as we begin to see digital sales surge, up 73 percent compared to the same period last year, according to Nielsen SoundScan (although 99-cent online singles are far less profitable than \$18.99 CDs). In addition, illegal downloading has decreased 17 percent since 2004 (Harris Interactive, 2006). “You’ve got great artists delivering really good records, and ultimately that’s the biggest draw of all,” said Greg Linn, vice president of marketing for Columbia Records, the label behind Bob Dylan’s strong-selling *Modern Times*, as well as John Mayer’s *Continuum* and Beyonce’s *B’Day* albums. “There’s all flavors coming out now, and hopefully that’s enough to get people out [buying records]. That’s the good news.”<sup>88</sup>

**The bottom line is there are many people in the music industry that are making music a priority. If we continue on this path, music will survive to benefit both the music maker and the music fan.**

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<sup>87</sup> “ABC: The Age of Piracy as a Business Model.” *Ars Technica*. October 12, 2006.

<sup>88</sup> Knopper, Steve. “Music Sales Bounce Back.” *Rolling Stone*. October 19, 2006.