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Voluntary Collective Licensing: The Solution to the Music Industry's File Sharing Crisis?

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VOLUNTARY COLLECTIVE LICENSING: THE SOLUTION TO THE MUSIC INDUSTRY'S FILE SHARING CRISIS?

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I. INTRODUCTION

Peer-to-peer file sharing presents one of the most difficult problems facing the music industry today. Downloading songs from a friend's collection instead of buying the album is not only easy but free. It also exemplifies classic copyright infringement, but most file sharers do not seem to mind the risk of being sued. File sharing may simply offer too many benefits for even the very real specter of prosecution to deter sharers.

But alarmists "fear that [peer-to-peer] file swapping poses a mortal threat to the copyright system that sustains authors, artists, and a multi-billion-dollar-a-year industry in the production and dissemination of creative expression."[1] In the last few years, the recording industry has waged war against copyright infringers, filing actions against everyone from enablers like Napster[2] and Grokster[3] to thousands of individuals, including recent actions against college students at seventeen college campuses.[4] The success of these suits, however, has been mixed at best.[5] Although the recent Grokster decision reaffirms that file sharing services enable illegal copyright infringement,[6] such litigation fails to provide a real solution to the problem. Despite the lawsuits, billions of songs are still traded every month.[7] Furthermore, the Recording Industry Association of America (RIAA) has given itself a black eye by pursuing actions against the deceased,[8] a forty-two year-old

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[1] Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 2 (2003-2004).

[2] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020-22 (9th Cir. 2001) (holding that Napster may be held liable for operating a file sharing program enabling copyright infringement).

[3] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2770 (2005) (holding that file sharing services that enable users to infringe on copyrights, despite the fact that the service itself does not engage in copyright infringement, may also be held liable for such infringement).

[4] Press Release, Recording Indus. Ass'n of Am., Latest Round of Music Industry Lawsuits Targets Internet Theft at 17 College Campuses (Sept. 29, 2005), *available at* http://www.riaa.com/news/newsletter/092905.asp.

[5] *See generally* Netanel, *supra* note 1, at 8 (discussing the music industry's strategy for enforcing copyrights and the "significant public relations and marketing risks" involved).

[6] *Grokster*, 125 S. Ct. at 2770.

[7] *See* Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635, 641 (2004) (estimating the number of file sharers in the hundreds of millions globally and up to sixty million in the United States alone).

[8] Andrew Orlowski, *RIAA Sues the Dead*, THE REG., Feb. 5, 2005, *available at* http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/.

disabled single mother accused of downloading gangster rap,[9] and a twelve-year-old honor student from Manhattan.[10]

Despite its panic, the music industry has neither eradicated the copyright infringement that results from peer-to-peer file sharing by suing individual sharers nor found any other realistic solution. The ubiquity of file sharing clearly indicates that, short of turning off the Internet, it will be practically impossible to end infringement. It is equally obvious that filing millions of lawsuits against each individual file sharer fail to provide a viable solution.

The recording industry has also failed to recognize the value file sharing offers. Not only can users access music for free, but writers and publishers have access to free promotion.[11] Making a song available for downloading to generate hype about a new release takes seconds, and relying on peer-to-peer sharing to disseminate the song costs the music industry very little. This promotion strategy is particularly promising for breaking new bands into the market, an undertaking that, using traditional promotional mechanisms, requires record companies to take huge financial risks.[12]

Further, file sharing has made a great contribution to creative expression—a closely held value in our society.[13] File sharing is a "vehicle for finding works that are otherwise not available, discovering new genres, making personalized compilations, and posting creative remixes, sequels, and modifications of popular works."[14] It is a tool for the general population to use for self-expression, and to "share their interests, creativity and active enjoyment with others."[15]

The music industry now faces the task of designing a system in which writers and publishers are compensated without losing the promotional value of file sharing, while consumers are free to download and trade songs without the fear

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[9] Posting of Ray Beckerman to Recording Industry v. The People: A Blog Devoted to the RIAA's Lawsuits of Intimidation Brought Against Ordinary Working People, http://recordingindustryvspeople.blogspot.com/2005/10/oregon-riaa-victim-fights-back-sues.html (Oct. 3, 2005, 9:50 EST).

[10] *Download Suit Targets 12 Year Old* (CBS television broadcast Sept. 9, 2003), *available at* http://www.cbsnews.com/stories/2003/09/09/tech/main572426.shtml.

[11] DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 371-79 (Free Press 2003) (1991).

[12] *See id.* (noting that although low-cost promotion allows unsigned artists to promote their own work without assistance from a record label, it allows *all* unsigned bands to do so and may end up flooding the Internet with too much poor quality music to make such promotion a useful tool).

[13] *See* Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 2 (2004) (stating that the "purpose of copyright is to encourage the creation and mass dissemination of a wide variety of works").

[14] Netanel, *supra* note 1, at 3.

[15] *Id.*

of being sued for copyright infringement or having their efforts at self-expression dampened.

Scholars and music industry players have presented numerous proposals for solving this problem. The ideas run the gamut from compulsory licensing and non-commercial use levies[16] to digital abandon.[17] This Note, however, will focus on the viability of voluntary collective licensing. Under a voluntary collective licensing scheme, all members would make a nominal contribution, perhaps five dollars,[18] in exchange for immunity from copyright infringement suits and the right to trade music freely.[19] In return, writers and publishers would receive royalties for their participation in the scheme from the fund of member contributions.[20]

All parties get what they want: writers and publishers get the promotional value of file sharing and consumers get to trade music. And everyone gets what they need: writers and publishers get paid and consumers get a guarantee that they will not be sued.

But can any solution to a problem that has plagued the music industry for the last decade really be *that* simple?

Voluntary collective licensing is not a new concept, but its application to file sharing is virtually unprecedented.[21] Broadcasters, however, use voluntary collective licensing almost exclusively to license music played on the radio, and in restaurants, clubs and other public places. This Note will analyze the way collective licensing functions for broadcasting music as a potential model for applying the concept to file sharing.

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[16] *Id.* at 4.

[17] *Id.* Digital abandon is the concept that "noncommercial personal uses should be free from both copyright holder control and government imposed levies to compensate copyright owners." *Id.*

[18] ELECTRONIC FRONTIER FOUNDATION, A BETTER WAY FORWARD: VOLUNTARY COLLECTIVE LICENSING OF MUSIC FILE SHARING "LET THE MUSIC PLAY" WHITE PAPER (Feb. 2004), http://www.eff.org/share/collective_lic_wp.pdf.

[19] *Id.*

[20] *Id.*

[21] One example of a very limited application is a recent attempt by an Internet Service Provider (ISP) in the United Kingdom to allow members of the ISP to freely trade any song in the Sony BMG catalog. Press Release, World's Only Music ISP Signs Landmark UK Deal with Sony BMG (Aug. 22, 2005), *available at* http://www.playloudermsp.com/pressrelease_22aug05.html. Members of PLAYLOUDER MSP (PLMSP) "purchase their broadband access directly from PLMSP for an all-in fee of £26.99 per month." *Id.* "As well as receiving all the standard facilities and services (such as fast internet access and email), PLMSP customers are also able to enjoy unlimited legal downloading of music and can freely share licensed music with other PLMSP subscribers using P2P file-sharing for no extra cost." *Id.*

Part II will address the rights at issue in broadcasting, discuss the necessity of licensing, and explain the models broadcasters currently use to manage the required licenses and the challenges those models have faced. For manageability, this Note is restricted to the broadcast radio licensing practices of the three main licensing organizations in the United States.[22] Part III will discuss the nuances of the voluntary collective licensing plan and specifically consider the proposal in the Electronic Frontier Foundation's (EFF) recently published white paper.[23] Part IV will look critically at the proposal and analyze both the challenges—inherent in the broadcast model and the unique challenges presented by its proposed application to peer-to-peer file sharing. Finally, Part V will argue that despite the attractiveness of the voluntary collective licensing model, its adoption poses practical problems that may prove insurmountable.

II. PERFORMANCE RIGHTS AND PERFORMANCE RIGHTS ORGANIZATIONS

A. WHAT ARE PERFORMANCE RIGHTS?

Copyright law grants the writer or publisher of any given song or album a bundle of rights including rights to record, to publish, and to play the music.[24] With few exceptions, a radio station, restaurant, or club that wants to play a song must get permission to do so.[25]

The right to play or broadcast music is a public performance right, a right which was first recognized in 1897 by the Copyright Act.[26] Under the Act, "to 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process . . . ."[27] This definition is interpreted to encompass broadcasting music.[28] The Act further provides that copyright holders have the exclusive right to approve public performance of a copyrighted work.[29] Therefore, in order for a radio station to play a song consistent with this right, the

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[22] The three main licensing organizations in the United States are American Society of Composers, Authors, and Publishers; Broadcast Music Incorporated; and Society of European State Authors and Composers. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 871 (Aspen Law and Business 1996) (1992). The logistics of these organizations are explained below.

[23] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18.

[24] *See* 17 U.S.C.A. §§ 106, 114 (West 2005).

[25] General exceptions are made for non-profit performances, "mom and pop" stores, record stores, and state fairs, among others. KOHN & KOHN, *supra* note 22, at 869-70. See 17 U.S.C. § 114 (2000) for a list of exceptions to exclusive performance rights.

[26] SIDNEY SHEMEL & M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 182 (Billboard Publ'ns, Inc. 1985) (1964).

[27] 17 U.S.C.A. § 101 (West 2005).

[28] SHEMEL & KRASILOVSKY, *supra* note 26, at 182.

[29] 17 U.S.C.A. § 106(4) (West 2005).

performance of the music must be authorized by the exclusive copyright holder. In other words, the performance must be licensed.

The broad definition of public performance in the Copyright Act means that most instances of playing music in public require licensing. The daunting prospect of obtaining an individual license for each song a radio station intends to broadcast inspired the development of organizations that specialize in obtaining those licenses.[30]

B. THE HISTORY OF ASCAP, BMI, AND SESAC

The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Media Incorporated (BMI), and the Society of European State Authors and Composers (SESAC)[31] are performance rights organizations that control virtually all licensing of music in the United States.[32] These organizations are so integral to the management of performance rights that Congress specifically named ASCAP, BMI, and SESAC as examples when it defined "performing rights society" as "an association, corporation or other entity that licenses the public performance of nondramatic musical works on behalf of the copyright owners of such works."[33]

ASCAP is the oldest of the three organizations. A group of songwriters and publishers (among them Victor Herbert and John Phillip Sousa) who were frustrated with hearing their compositions played in clubs without receiving any royalties from the performance founded ASCAP in 1914.[34] Because this group realized that the task of enforcing exclusive performance rights in each club and restaurant would be impossible for each individual songwriter or publisher, they formed ASCAP to serve as the central body for enforcing those rights and collecting royalties on behalf of the artists.[35] Within twelve years of its inception, ASCAP had won several lawsuits and overcome resistance to its control from venue owners and radio broadcasters.[36]

In response to ASCAP's monopoly of performance rights licensing, a group of about five hundred broadcasters banded together and founded BMI in 1940.[37]

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[30] KOHN & KOHN, *supra* note 22, at 864.

[31] The organization is now known only as SESAC, which is no longer used as an acronym since its presence in the United States has grown. SESAC - Who We Are and What We Do, https://www.sesac.com/writerpublisher/whatissesac.aspx (last visited Feb. 6, 2006).

[32] KOHN & KOHN, *supra* note 22, at 871.

[33] 17 U.S.C. § 101 (2000).

[34] KOHN & KOHN, *supra* note 22, at 863-64.

[35] *Id.* at 864-65.

[36] *Id.* at 865-66.

[37] *Id.* at 866.

Just one year later, after quickly building a catalog of their own songwriters and publishers, BMI began competing with ASCAP. BMI survived and became the "new self-proclaimed 'automatic performance royalty earning machine' for songwriters and publishers."[38]

Finally, in 1931, a single European music publisher named Paul Heineke established SESAC,[39] the smallest of the three performance rights organizations.[40] When SESAC began, it specialized in country and gospel music and therefore did not threaten ASCAP's dominant market position.[41] But in 1973, the organization expanded its catalog, which now includes virtually all genres of music.[42] SESAC's highest profile songwriters are Neil Diamond and Bob Dylan.[43]

C. THE RELATIONSHIP BETWEEN WRITERS AND PUBLISHERS AND THE PERFORMANCE RIGHTS ORGANIZATIONS

Performance rights organizations serve two basic functions on behalf of writers and publishers[44]: copyright clearance and copyright enforcement.[45] Due primarily to the difficulty of enforcing performance rights, virtually all songwriters and publishers now join organizations that specialize in such enforcement.[46] When they join an organization, "songwriters and copyright owners grant to performance rights societies a license to sublicense the rendition of public performances of their musical works."[47] These contracts between the copyright holder and the organization are governed by consent decrees in which a court authorizes the arrangement, provided the license is nonexclusive.[48] In exchange,

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[38] *Id.* at 867.

[39] SHEMEL & KRASILOVSKY, *supra* note 26, at 184.

[40] KOHN & KOHN, *supra* note 22, at 867.

[41] In exchange, the organization pays royalties: half to the publisher as a group, and half to the songwriters.

[42] *Id.*

[43] *Id.*

[44] Performance rights organizations offer membership only to writers and publishers, not to persons who record or perform works written and published by others. *See, e.g.*, About ASCAP: How You Join, http://www.ascap.com/about/howjoin.html (last visited Feb. 9, 2006); *see also* Join BMI, https://applications.bmi.com/affiliation/joinen.aspx ("You can join as a writer, a publisher, or both.") (last visited Feb. 9, 2006); SESAC - How to Affiliate, http://www.sesac.com/writerpublisher/howtoaffiliate.aspx ("SESAC only collects royalties on behalf of songwriters and composers.") (last visited Feb. 9, 2006).

[45] Lionel S. Sobel, *The Music Business and the Sherman Act: An Analysis of the "Economic Realities" of Blanket Licensing*, 3 LOY. L.A. ENT. L.J. 1, 3-4 (1983).

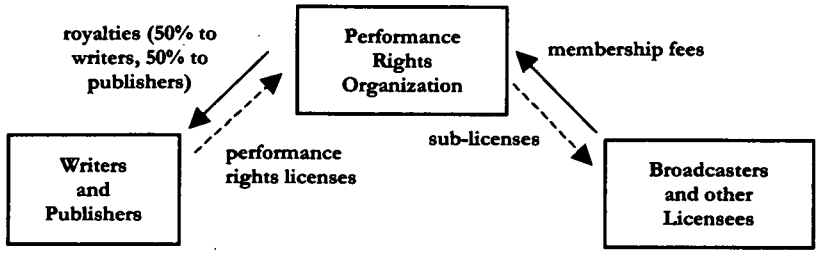
[46] KOHN & KOHN, *supra* note 22, at 876.

[47] *Id.*

[48] *Id.*

the organization pays royalties: half to the publishers as a group, and half to the songwriters.[49] See illustration 1 below.

Illustration 1.



Although ASCAP, BMI and SESAC all allocate royalties evenly between songwriters as a group and publishers as a group, each organization has a unique method of distributing royalties within each group.

1. ASCAP. In determining the royalties due to each of its members, ASCAP first calculates the number of performances of each work in its catalog.[50] Because each year "there are billions of performances" from the ASCAP catalog, the organization uses consensus surveys, tracking every performance only when possible.[51] Particularly for radio performances, ASCAP more often uses sample surveys that track performances statistically, relying on "advanced digital tracking technology . . . , station logs (lists of works performed) provided to [ASCAP] by the radio stations, and by recorded tapes of actual broadcasts."[52]

Each performance accounted for by either consensus or sample surveys is then assigned a specific number of credits.[53] When calculating credits due for each performance, ASCAP considers several factors, including 'HOW the music is used . . . WHERE the music is performed . . . HOW much the licensee pays

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[49] *Id.*; *see also* About ASCAP: Turning Performances into Dollars, http://www.ascap.com/about/payment/dollars.html (last visited Jan. 14, 2006).

[50] About ASCAP: Keeping Track of Performances, http://www.ascap.com/about/payment/keepingtrack.html (last visited Jan. 14, 2006).

[51] *Id.*

[52] ASCAP Payment System: Identifying Performances, http://www.ascap.com/about/payment/identifying.html (last visited Jan. 14, 2006).

[53] ASCAP, *supra* note 49.

[ASCAP], [t]he time of day of the performance, . . . [and t]he general licensing allocation applied to radio and television performances."[54]

The number of credits earned by each performance according to this formula is then multiplied by the value of one credit.[55] For example, if a given songwriter's work earned one hundred credits within a pay period, and a songwriter's credit was calculated at five dollars, the songwriter would receive five hundred dollars in royalty payments.[56]

2. BMI. The BMI and ASCAP models are similar in several respects. Under both models, artists receive credit for performances determined through sampling as a basis for payment. In determining numbers of performances, both organizations use digital tracking information and both use information provided by radio stations.[57] However, BMI's model differs in three significant ways: in the method of collecting performance information from radio stations, in the formula for determining the value of a performance, and in calculating the royalty payment.[58]

First, although ASCAP uses radio station logs to help calculate performances,[59] BMI uses a unique system whereby it requires each member station to provide detailed logs of performances for three days a year.[60] The organization assigns different three-day periods to each radio station to ensure that every day of the year is logged by at least one member, and then compiles the information as a "statistically reliable projection" of performances on all commercial radio stations.[61]

Also, BMI's valuation of performances is more straightforward than ASCAP's system. Instead of using a credit system that weights a complex set of factors to determine the value of one performance,[62] BMI assigns each performance the value of one.[63] The royalty calculation is simply based on the number of performances of each work.[64]

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[54] *Id.*

[55] *Id.*

[56] The value of one credit for either a songwriter or a publisher "is determined annually, taking into account the estimated total number of ASCAP credits being processed for writers or publishers and the total number of dollars available for distribution." *Id.*

[57] *See supra* notes 50-52 and accompanying text. BMI looks at surveys by MediaBase and Nielsen BDS in addition to its own survey. BMI, Royalty Information: U.S. Radio Royalties, http://www.bmi.com/songwriter/resources/pubs/royaltyradio.asp (last visited Jan. 14, 2006).

[58] BMI, *supra* note 57.

[59] ASCAP, *supra* note 52.

[60] BMI, *supra* note 57.

[61] *Id.*

[62] *See* ASCAP, *supra* note 49 (discussing ASCAP's credit system).

[63] BMI, *supra* note 57.

[64] *Id.*

Finally, BMI's royalty calculation differs slightly from ASCAP's formula. Instead of considering the number of performance credits earned by each work overall and allocating royalties according to the "total number of dollars available for distribution,"[65] BMI's model is station specific. BMI "calculates a unique royalty rate for each work, which is based upon the license fees collected from stations that performed that work in combination with the number of times each work aired on those stations."[66]

3. SESAC. SESAC, the smallest of the organizations (controlling only about 1% of all performance rights),[67] serves basically the same function as ASCAP and BMI. However, its business model differs significantly from both of the other performance rights organizations.

Most notably, the organization is a private company that operates for profit, dividing proceeds between itself and its writer and publisher members.[68] Also, SESAC has not traditionally tracked performances to calculate royalty payments, but instead has relied on chart position as an indicator of the popularity of a song and therefore a rough indicator of how often that song is broadcast.[69] However, the organization appears to be moving in the direction of the more extensive logging practices of ASCAP and BMI. The method used to calculate royalties is now "based on many factors, including state-of-the-art monitoring, computer database information and broadcast logs."[70]

D. THE RELATIONSHIP BETWEEN PERFORMANCE RIGHTS ORGANIZATIONS AND LICENSEES

Because performance rights organizations handle virtually all licensing for writers and publishers, broadcasters and other licensees consistently join these organizations to obtain proper permission for performances.[71] Broadcasters receive blanket licenses,[72] licenses that enable radio stations and other licensees to "render an unlimited number of nondramatic performances of one or more of any of the hundreds of thousands of songs in their respective catalogs," in

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[65] ASCAP, *supra* note 49.

[66] Royalty Information, *supra* note 57.

[67] PASSMAN, *supra* note 11, at 219.

[68] SHEMEL & KRASILOVSKY, *supra* note 26, at 184.

[69] *Id.*

[70] SESAC, *supra* note 31.

[71] KOHN & KOHN, *supra* note 22, at 877.

[72] *Id.* at 878-81. Although blanket licenses are by far the most common, additional types of licenses are available. *Id.* For example broadcasters, writers and publishers may deal with one another directly to arrange source or direct licenses. *Id.* Also, radio and television stations may negotiate per program licenses with performance rights organization. *Id.*

exchange for membership fees.[73] Performance rights organizations, through blanket licenses, also indemnify radio stations against copyright infringement claims.[74]

Both ASCAP's fees and BMI's fees are negotiated between organization representatives and the Radio Music License Committee, a committee comprised of prominent and diverse members of the music industry.[75] Membership fees are calculated for each radio station (according to level of income) and amount to approximately two percent of each station's gross annual receipts.[76] For example, between 1996 and 2000, ASCAP's fees were calculated between 1% (for stations earning less than $150,000 per year) and 1.615% (for stations earning $150,000 or more per year) of a station's annual income.[77] SESAC, however, does not calculate fees based on annual income. It bases blanket license fees on the size of the radio station's market and the station's rate schedule,[78] making each station's fees entirely unique.

E. CONSENT DECREES

Court-sanctioned consent decrees govern the basic licensing practices of ASCAP and BMI.[79] In 1941, the Justice Department sued both ASCAP and BMI "alleging that the blanket licenses used by both illegally restrained trade in violation of the antitrust laws."[80] The initial consent decrees establishing the rules under which ASCAP[81] and BMI[82] could legally operate were entered in response to these lawsuits. Both consent decrees have been amended several times, but the organizations continue to operate under the basic terms established in the original 1941 decrees.[83] Key terms of these agreements include provisions that require

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[73] *Id.* at 878.

[74] Customer Licensees: Radio Licensing FAQs, http://www.ascap.com/licensing/radio/radiofaq.html (last visited Jan. 14, 2006).

[75] *Id.*; *see also* Radio: Frequently Asked Questions, http://www.bmi.com/licensing/broadcaster/radio/faq03.asp (last visited Jan. 14, 2006).

[76] KOHN & KOHN, *supra* note 22, at 878.

[77] *Id.*

[78] SESAC: Frequently Asked Questions By Broadcasters, http://sesac.com/licensing/broadcast_licensing_faq.aspx#sesac (last visited Jan. 14, 2006).

[79] SESAC is not subject to a consent decree, so the organization's established regulations govern its actions. SHEMEL & KRASILOVSKY, *supra* note 26, at 188-89.

[80] Sobel, *supra* note 45, at 5-6.

[81] *See* United States v. Am. Soc'y of Composers, Authors and Publishers, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

[82] *See* United States v. Broad. Music, Inc., 1940-1943 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941).

[83] ASCAP's consent decree was amended by United States v. Am. Soc'y of Composers, Authors

non-exclusive licensing.[84] This means that each writer or publisher who is affiliated with a performance rights organization is also free to enter into direct licensing agreements with a radio station or other entity and per-program licensing in addition to traditional blanket licensing.[85] The decrees also provide details such as court sanctioned definitions of terms involved in the agreements, limitations on the actions of performance rights organizations, and rules governing specific activities like the allocation of royalties and performance tracking requirements.[86]

F. GRIEVANCE PROCEDURES

When licensing disputes arise between the performing rights organization and either a writer or publisher or licensees, ASCAP and BMI have established grievance procedures by which the aggrieved party can file a formal complaint with the organization.[87]

ASCAP's Articles of Association create a Board of Review that receives complaints and is bound to issue a decision in writing to address any member concerns.[88] The Articles outline an appeals process, but protesting members are bound by the decision of the Board.[89]

BMI submits disputes to an arbitrator who settles the disagreement according to the rules of the American Arbitration Association.[90]

As a result of these procedures, the disputes between ASCAP or BMI and their respective members and licensees are taken off the dockets of the federal courts.[91] SESAC however, is not subject to a consent decree and has no published grievance procedures.[92]

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and Publishers, 1950-1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) and again by United States v. Am. Soc'y of Composers, Authors and Publishers, 2001-2 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. 2001). BMI's consent decree was amended by United States v. Broad. Music, Inc., 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966) and again by United States v. Broad. Music, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. 1994).

[84] Sobel, *supra* note 45, at 6.

[85] *Id.*

[86] *See supra* notes 71-72 and accompanying text.

[87] KOHN & KOHN, *supra* note 22, at 884.

[88] AM. SOC'Y OF COMPOSERS, AUTHORS, AND PUBLISHERS, ARTICLES OF ASSOCIATION OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, 15-16 (May 2002) [hereinafter ARTICLES OF ASSOCIATION], *available at* http://www.ascap.com/reference/articles.pdf.

[89] *Id.* at 16.

[90] United States v. Broad. Music, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. 1994).

[91] ARTICLES OF ASSOCIATION, *supra* note 88, at 16.

[92] SHEMEL & KRASILOVSKY, *supra* note 26, at 198.

G. CHALLENGES TO THE PERFORMANCE RIGHTS ORGANIZATION MODELS

The primary challenges to the performance rights organizations' models have come in the form of opposition to the blanket licensing provisions in the consent decrees.[93] The consent decrees did not eradicate allegations of antitrust violations that began in the 1930s—such allegations have "haunt[ed] ASCAP [and BMI] ever since."[94]

Licensees challenging ASCAP or BMI claim that the performance rights organizations violate antitrust laws through price fixing and monopolizing or otherwise illegally restraining trade through the use of blanket licenses.[95] However, courts have repeatedly rebuffed attempts to challenge consent decrees, finding that the licensing practices did not violate antitrust laws because agreements between the organizations and writers and publishers are non-exclusive and because under the consent decrees licensees are free to apply to the court to review rates.[96]

ASCAP, BMI, and SESAC also appear in court as plaintiffs to enforce copyrights. All three organizations actively pursue infringers who fail to pay membership fees or otherwise obtain proper licensing for the songs they perform.[97] But in one way particularly pertinent to this Note, courts have limited the reach of performance rights organizations.

Prior to the 1976 revision of the Copyright Act, ASCAP and BMI asserted that when small businesses played the radio in their establishments those businesses infringed the copyrights of performance rights organization members. For example, in *Twentieth Century Music Corp. v. Aiken*, the performance rights organizations sued a restaurant owner who was not a member of ASCAP or BMI for infringement after learning that he played the radio in his dining area.[98] The Court held the restaurant owner was not liable for copyright infringement.[99] In its opinion, the Court remarked that a law purporting to hold all small business

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[93] Sobel, *supra* note 45, at 7.

[94] *Id.* at 5.

[95] *Id.* at 7-9.

[96] *See* Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors and Publishers, 744 F.2d 917 (2d Cir. 1984) (reversing the lower court's decision and finding no violation of antitrust laws); *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) (holding that blanket licenses do not constitute per se price fixing under antitrust law); Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors and Publishers, 620 F.2d 930 (2d Cir. 1980) (holding that because the affiliate agreements were non-exclusive, consent decrees did not violate antitrust laws); Broad. Music, Inc. v. Moor-Law, Inc., 527 F. Supp. 758 (D. Del. 1981), *aff'd*, 691 F.2d 490 (3d Cir. 1982) (holding that blanket licenses did not violate antitrust laws).

[97] *See supra* notes 2-10 and accompanying text.

[98] 422 U.S. 151 (1975).

[99] *Id.* at 164.

owners who play radios in their establishments liable for copyright infringement would not only be "wholly unenforceable" but also "highly inequitable."[100] The court rested its holding on a narrow construction of the word "perform" under the 1909 version of the Copyright Act to justify finding that Aiken's actions did not constitute performance under the code, and therefore concluded that Aiken was not liable for copyright infringement.[101]

In response to cases like *Aiken*, Congress included new exceptions in the 1976 revision of the Copyright Act.[102] Congress agreed with the *Aiken* court's opinion that holding all small businesses liable would be unduly oppressive,[103] but rather than leave courts to rely on the narrow construction of "perform" in order to avoid imposing liability, Congress enacted 17 U.S.C. § 110(5) to ensure that sufficiently small businesses are exempt from infringement claims for playing the radio in their establishments.[104] The legislative history accompanying the code section specifically addresses *Aiken* and explains that

> the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.[105]

This new section effectively limited ASCAP's and BMI's ability to reach small businesses on infringement claims, however courts have been strict in applying the standard for permissible equipment in 17 U.S.C. § 110(5) and have commonly found commercial establishments to have exceeded the bounds of the exception.[106]

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[100] *Id.* at 162-63.

[101] *Id.* at 157-64.

[102] H.R. REP. NO. 94-1476, at 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701.

[103] *Aiken*, 422 U.S. at 164.

[104] 17 U.S.C. § 110(5) (1976). In 1998 Congress, as part of the Copyright Term Extension Act, amended 17 U.S.C. § 110(5), broadening the performances that do not require licensing in small commercial establishments.

[105] H.R. REP. NO. 94-1476, at 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701.

[106] *See* Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763 (W.D. Tex. 1990) (holding that the exception did not apply because the restaurant exceeded the permissible number of speakers); *see also* Broad. Music, Inc. v. U.S. Shoe Corp., 678 F.2d 816 (9th Cir. 1982) (holding that the small business exception did not apply because the defendant used a sound system not intended for a home). *But see* Broad. Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482, 1495-96 (7th Cir.

III. APPLYING THE PERFORMANCE RIGHTS MODEL TO FILE SHARING

As the music industry struggles to find a solution to the file sharing dilemma,[107] the successful performance rights organization model presents a potential answer. In February 2004,[108] the Electronic Frontier Foundation (EFF), "a group of passionate people—lawyers, technologists, volunteers, and visionaries—working in the trenches, battling to protect your rights and the rights of web surfers everywhere,"[109] released a white paper entitled "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing 'Let the Music Play' White Paper."[110] In the paper, the EFF authors assert that voluntary collective licensing offers the best solution to the music industry's file sharing predicament.[111] As the EFF authors observe, "[t]he current battles surrounding peer-to-peer file sharing are a losing proposition for everyone. The record labels continue to face lackluster sales, while the tens of millions of American file sharers—American music fans—are made to feel like criminals."[112]

Implementing a voluntary current licensing scheme may be the most promising path out of our current rut in which privacy is at risk, "innovation [is] stymied, economic growth suppressed, and a few unlucky individuals [are] singled out for legal action by the recording industry."[113] But many daunting questions must be addressed: How will the scheme work practically? How will the money be collected and divided? What are the implications of doing business with millions of individual users as opposed to thousands of relatively sophisticated broadcast organizations? Will the same antitrust violation allegations haunt a collective licensing scheme for file sharing?[114]

1991) (holding that a chain store did qualify for an exemption because each individual store used home-type stereo equipment reasoning that Congress provided an exception based on the "quantity and quality of the receiving equipment," not whether a company could afford the license).

[107] *See supra* notes 2-10 and accompanying text.

[108] Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 712 (2005).

[109] Electronic Frontier Foundation: Our Mission, http://www.eff.org/mission.php (last visited Jan. 14, 2006).

[110] Electronic Frontier Foundation: A Better Way Forward: Voluntary Collective Licensing of Music File Sharing, http://www.eff.org/share/collective_lic_wp.php (last visited Jan. 14, 2006).

[111] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 1.

[112] *Id.*

[113] *Id.*

[114] Reaching any of these questions depends on the determination that file sharing implicates digital performance rights as opposed to mechanical rights.

While the Copyright Act provides protection for both copies and digital performances of sound recordings, in order for a file sharing model to effectively operate parallel to the broadcast model of voluntary collective licensing, sharing files must qualify as performances of the music. The Act provides that copyright holders of sound recordings have exclusive rights

> to do and to authorize . . . [reproduction of] the copyrighted work in copies or

> phonorecords; [preparation of] derivative works based upon the copyrighted work; [distribution of] copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; . . . [or] in the case of sound recordings, [performance of] the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106(1)-(3), (6) (2000).

Scholars and copyright experts are currently engaged in a heated debate about whether these rights are performance rights. PASSMAN, *supra* note 11, at 286. While performance rights organizations insist that digital transmissions are performances, and thereby subject only to the control of the copyright holder, the mechanical rights camp insist that digital transmissions amount to distribution of copies and thus require mechanical licenses. *Id.* at 208, 286. The code defines "to perform" a work as "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101 (2000). Also, the code defines copies as

> material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

Id. The dispute remains unresolved.

> Now it's true that a transmission isn't a "performance" in the traditional sense, because it isn't being played in a form to which you could listen. (Actually, you could listen, but it sounds like a parakeet in a blender.) On the other hand, it's obviously not the sale of a tangible record either, so it's not clear the distribution triggers a mechanical royalty (other than transmissions that really are sales of records in the form of downloads, which were specifically covered in the [Digital Performance Rights in Sound Recordings Act of 1995]).

PASSMAN, *supra* note 11, at 286. Resolving the disagreement between the competing interest groups is beyond the scope of this Note.

This Note will assume that file sharing constitutes a performance of the musical work and therefore the copyright holder retains exclusive control over digital performance rights under the Digital Millennium Copyright Act (DMCA). Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2680 (codified as amended in scattered sections of 17 U.S.C.).

Although the code does provide for some specific limitations on digital performance rights, none apply directly to file sharing. *See* 17 U.S.C. § 114 (2000). File sharing would be considered an "interactive service" that is generally within the exclusive right outlined in the code section. 17 U.S.C. § 106(6) (2000). *But see* 17 U.S.C. § 114(d)(3) (2000) for exceptions. The code defines "interactive service" as a service that "enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." 17 U.S.C. § 114(j)(7) (2000).

The reader should be aware that this issue may arise when actually implementing a voluntary collective licensing scheme.

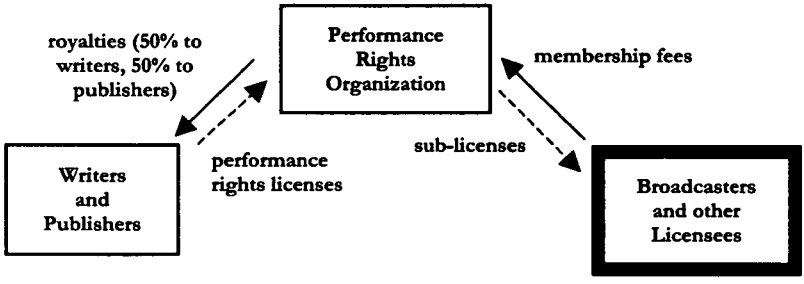
A. THE PLAN

The goals of the EFF's proposal are: 1) to ensure fair compensation for copyright holders, while accepting that file sharing continues to grow in popularity despite the fact that the recording industry "kill[ed] Napster,"[115] 2) to recognize that file sharers make more music available than online music stores like iTunes,[116] and 3) to make government intervention unnecessary by relying on the market.[117]

In order to accomplish these goals, the EFF authors envision a scheme in which the music industry forms a collecting organization, specifically naming the performance rights organizations that control broadcast radio as its precedent.[118] The new scheme would simply replace the broadcasters who acquire licenses from performance rights organizations under the traditional model with individual users.[119] This new digital performance rights organization would bear the responsibility, like its broadcast radio predecessor, of both enforcing copyrights and granting performance licenses. See illustration 2 below.

Illustration 2.

Voluntary Collective Licensing Traditional Broadcast Model



[115] The Ninth Circuit held that the Napster file sharing service illegally enabled users to infringe on copyrights. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). A revised version of Napster's website now allows users to download songs but abandons the old peer-to-peer model. Napster website, http://www.napster.com/more_about_napster.html (last visited Apr. 6, 2006).

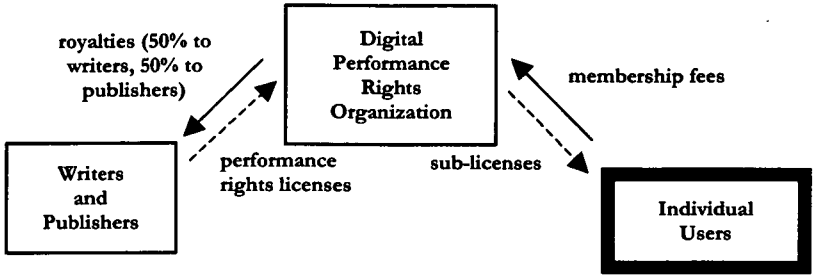
[116] iTunes allows users to purchase individual songs or entire albums online. Apple-iTunes: Overview, http://www.apple.com/itunes/overview/ (last visited Jan. 16, 2005).

[117] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 1.

[118] *Id.* at 2.

[119] *Id.* at 1.

Voluntary Collective Licensing Model for File sharing



1. The Relationship Between Digital Performance Rights Organizations and Writers and Publishers. The EFF authors suggest that digital performance rights organizations should be non-profit entities,[120] give rights-holders a say in its operation, and divide revenue generated by member contributions between "artists and rights-holders based on the relative popularity of their music."[121] The proposal envisions popularity ratings based partially on information collected through anonymous monitoring of file sharing activity by services like Big Champagne[122] and partially on a Nielsen-like sampling system.[123]

Although the EFF proposal provides no further detail regarding the relationship between the digital performance rights organization and rights-holders, the broadcast radio model offers workable mechanisms of a voluntary collective licensing scheme for file sharing. First, the non-exclusive nature of licensing agreements must be preserved,[124] allowing rights holders to simultaneously contract with performance rights organizations for radio and for file sharing. In order for this scheme to work, digital performance rights

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[120] *Id.* at 4.

[121] *Id.* at 2.

[122] Big Champagne Online Media Measurement tracks downloads of digital music files and releases the information as online music charts. Big Champagne Online Media Measurement, http://www.bigchampagne.com (follow "about us" hyperlink) (last visited Jan. 14, 2006).

[123] Nielsen Media Research is a service that monitors the popularity of television shows through "Nielsen People Meters," that are attached to television sets in a random selection of homes that are used to measure what shows are being watched and who is watching them. Nielsen Media Research, http://www.nielsenmedia.com (follow "Inside TV Ratings" hyperlink; then follow "Meters and Diaries" hyperlink; then follow "Our Measurement Techniques" hyperlink) (last visited Apr 18, 2006).

[124] *See supra* notes 48, 84 and accompanying text (discussing consent decrees of ASCAP and BMI entered by courts to resolve antitrust concerns); *infra* part IV.A.

organizations must not force rights holders to choose file sharing licensing over radio licensing.

Also, the success of digital performance rights organizations will depend on the adequacy of a more detailed plan for royalty distribution. The EFF authors refer to "artists and rights-holders" as those entitled to payment from the fund of member contributions. In contrast, under the broadcast radio model only writers and publishers are eligible for royalties, not performers. Perhaps the EFF authors intended only to include writers and publishers and not performers in the term "artists," but any attempt to include performers who have no part of writing or publishing a song would require a substantial overhaul of the broadcast radio model and possibly copyright law.[125]

After identifying the parties eligible to receive royalty distributions, several methods for distribution are available.[126] All performance rights organizations treat writers and publishers equally, dividing available funds between the two groups.[127] Within each group, the most logical way to divide the money would be to assign a value to each shared file, perhaps based on total available funds divided by the total number of shared files, and then multiply that value by the number of files tracked for each song. Presumably, this is the method advocated by the EFF authors since a higher number of shared files would indicate a song's popularity.[128]

2. The Relationship Between Digital Performance Rights Organizations and Individual Users. In the same way that performance rights organizations offer blanket licenses to radio stations allowing for unlimited performances from the organization's catalog and indemnification against copyright infringement claims

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[125] Although an artist cannot assert copyright protection for a song she only performs but did not write or publish, she may be able to assert a right in her persona. *See* Midler v. Ford Motor Co., 849 F.2d 460, 462-63 (holding that although "[a] voice is not copywritable," Bette Midler stated a valid cause of action for violation of a common law property right when Ford Motor Co. hired a singer to imitate Ms. Midler's voice for a commercial advertising campaign. The court stated that "to impersonate her voice is to pirate her identity"). Further discussion of this topic, however, is beyond the scope of this Note.

[126] *See supra* notes 50-70 and accompanying text.

[127] *See supra* note 49 and accompanying text. Also, should a digital performance rights organization choose to include performers, performers would also presumably be treated equally and the available funds would be divided into three groups. However, the organization should carefully consider this decision because the result may be two shares going to one person since many performers also write their own songs.

[128] The EFF authors may also have intended to use a method more like SESAC's chart-position calculation in which the value of a song correlates to its popularity on the music charts. However, this method undermines a fundamental advantage of file sharing—allowing lesser-known musicians who may never register on the charts to benefit from the distribution of their work. *See* discussion *infra* Part III.B.

in exchange for membership fees,[129] digital performance rights organizations would offer individual users unlimited access to file sharing with indemnification from liability for infringement in exchange for a "reasonable regular payment."[130] Rather than mirror ASCAP and BMI's fee calculations based on level of income, or SESAC's user-specific fee calculation, EFF's model would require all individual file sharers to pay the same flat fee.[131]

The EFF authors assert that equal, minimal contributions from individuals will be enough to satisfy writers and publishers.[132] Based on an estimated sixty million Americans currently downloading music, multiplied by a five dollar membership fee, the authors calculate a net profit of three billion dollars each year to be divided among the copyright holders.[133] Compared to the recording industry's eleven billion dollar gross profits, minus the manufacturing and shipping costs of CDs, the payola[134] to radio stations, and other costs associated with marketing physical CD sales, the plan's three billion dollar figure merits consideration.[135]

Moreover, this system of file sharing has the added benefit for individual users that as the popularity of the service grows, so will its value: "The more people share, the more money goes to rights-holders. The more competition in applications, the more rapid the innovation and improvement. The more freedom to fans to publish what they care about, the deeper the catalog."[136]

3. Consent Decrees and Grievance Procedures. Logically, the operation of a digital performance rights organization could be governed by a consent decree modeled after those entered into by ASCAP and BMI. The ASCAP and BMI decrees have achieved remarkable success in regulating the licensing market over time.[137] Similar decrees could establish who is entitled to royalties, the method of royalty calculation, and distribution and performance tracking requirements.

Successful grievance procedures established by ASCAP (creating a Board of Review and appeals process for member complaints) and BMI (resolving disputes according to the rules of the American Arbitration Association) may also be useful in designing a digital performance rights organization.[138] Given the

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[129] *See supra* notes 72-74 and accompanying text.

[130] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 1.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 2.

[134] Payola is the practice of "employees of broadcast stations, program producers, program suppliers and others [accepting] payments, services, or other valuable consideration for airing material...." The FCC's Payola Rules, http://www.fcc.gov/cgb/consumerfacts/PayolaRules.html (last visited Jan. 14, 2006).

[135] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 2.

[136] *Id.* at 1.

[137] *See supra* notes 79-86 and accompanying text.

[138] *See supra* notes 87-92 and accompanying text (discussing ASCAP and BMI's grievance

anticipated volume of members, disputes will inevitably arise, and avoiding litigation by establishing alternative dispute resolution procedures is essential to preserving the funds available for rights holders.[139] However, grievance procedures will not prevent the more serious and costly threat of infringement litigation against non-members.[140]

B. ADVANTAGES OF THE PLAN

Designing a voluntary collective licensing scheme for file sharing presents significant opportunities to resolve the music industry's current file sharing dilemma. First, and most obviously, rights holders would not only receive compensation from the membership fund, but also enjoy the benefit of more affordable promotion outlets. In particular, independent musicians working without the benefit of a record company's marketing machine stand to benefit from the ease of Internet distribution.[141]

Legitimizing file sharing would not only ensure rights holders royalties to which they are entitled and save the music industry money, it would also generate additional revenue. Legally operated file sharing services would create competition and other market forces that encourage investment in the newly legitimate business:

> Investment dollars pour into the now-legitimized market for digital music filesharing software and services. Rather than being limited to a handful of "authorized services" like Apple's iTunes and Napster 2.0, you'll see a marketplace filled with competing file-sharing applications and ancillary services. So long as the individual

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procedures).

[139] Websites with many users often employ such techniques. *See, e.g.*, Amazon.com Conditions of Use, http://www.amazon.com/exec/obidos/tg/browse/-/508088/103-1791368-9937429 ("Any dispute . . . shall be submitted to confidential arbitration . . . .").

[140] Litigation against nonmembers who continue to share files would be a necessary enforcement mechanism to protect the integrity of the system. Absent such enforcement, the model would offer few advantages over the current system because individual users would have little incentive to join.

[141] Yu, *supra* note 108, at 672 n.108. The story of the band Wilco is the best illustration of this possibility. Professor Yu quotes Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir.), *cert. granted* 125 S. Ct. 686 (2004):

> One striking example . . . is the popular band Wilco, whose record company had declined to release one of its albums [*Yankee Hotel Foxtrot*] on the basis that it had no commercial potential. Wilco repurchased the work from the record company and made the album available for free downloading . . . . The result sparked widespread interest and, as a result, Wilco received another recording contract.

Id.

> fans are licensed, technology companies can stop worrying about the impossible maze of licensing and instead focus on providing fans with the most attractive products and services in a competitive marketplace.[142]

Considering the popularity of file sharing, the potential economic effects of opening up an entirely new market for investment and technological advancement would be difficult to overstate.

Furthermore, file sharers themselves will benefit as the activity will no longer be illegal and the fear of copyright infringement lawsuits will disappear. Also, the consumers who trade songs will pay for the system whenever they wish to be involved; it is completely voluntary.[143]

IV. CHALLENGES

Despite the promise of the voluntary collective licensing proposal for file sharing, any such scheme will undoubtedly face thorny challenges. Those challenges may in fact prove insurmountable, and if that is the case, such a scheme will fail. However, the prospect of solving the file sharing puzzle with such a simple, common-sense solution is so attractive that the problems that arise are well worth struggling to overcome. Moreover, voluntary collective licensing may simply be a superior choice to digital abandon or non-commercial use levies[144] in a world where file sharing is inevitable.[145]

A. ANTITRUST CLAIMS RESOLVED, SEE BROADCAST RADIO

The EFF authors correctly anticipate the threat of antitrust issues with respect to the file sharing model, particularly in that their proposal relies on one single collecting organization to act as a clearinghouse for most, if not all, digital performance rights. However, the authors are also correct to argue that a performing rights organization consent decree-styled regulation scheme is quite likely to be as successful for file sharing as it has been for broadcast radio.[146]

Since ASCAP was formed almost a century ago, performing rights organizations have been fending off allegations of antitrust violations.[147] Despite

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[142] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 6.

[143] *Id.* at 3-4.

[144] *See supra* notes 15-16 and accompanying text.

[145] Netanel, *supra* note 1, at 10.

[146] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 4.

[147] *See supra* notes 80-93 and accompanying text.

the frequency of challenges to the performance rights model, the original consent decrees binding ASCAP and BMI issued by the courts in 1941, impressively, still stand (even though they have been amended on several occasions).[148] These agreements have survived for more than six decades because of the courts' wisdom in alternatively enforcing and revising the decrees as the music industry grows and changes and because of a basic understanding within the music industry that the arrangement benefits all parties.[149]

Consent decrees will likely provide the same workable solution to digital performance rights organizations as they have to the existing performance rights organizations in avoiding and defending against antitrust allegations.

B. NEW OBSTACLES INTRODUCED TO VOLUNTARY COLLECTIVE LICENSING BY FILE SHARING

Voluntary collective licensing as applied to file sharing presents a variety of unique and troubling problems. While such a scheme is attractive in its simplicity, the EFF authors fail to consider all of the difficulties with the model. Beyond antitrust concerns, the music industry will face issues including: the necessity of dealing with millions of amateur users rather than thousands of relatively sophisticated radio stations; the phenomenon in which laypersons do not consider file sharing a serious crime; and the task of deciding whose music is included in the scheme.

Also "voluntary collective licenses may suffer from the many weaknesses associated with compulsory licenses. These include the difficulty in dividing the royalty pool; the lack of sufficient funds to compensate artists, songwriters, and copyright holders; the requirement that low-volume users subsidize copyright holders and high-volume users," and free riding.[150]

1. Participation. Even before reaching any of these problems, the music industry and a sufficient number of individual users must first agree to participate in the scheme. Securing participation is essential because by its very nature file sharing requires reliable cooperation. However, because the voluntary collective licensing scheme ensures royalty payments and low-cost promotion to rights

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[148] *See supra* notes 69-75 and accompanying text.

[149] ASCAP and BMI have done so well that perhaps those organizations should consider expanding and integrating a digital performance rights component into the existing performance rights model. Although no practical reason excludes SESAC, the EFF authors are likely correct in asserting that non-profit models run by the copyright holders are preferable to SESAC's for-profit model to serve the interest of fairly compensating writers and publishers for use of their work. *See* ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 4. In fact, both performance rights organizations, along with SESAC, support the proposal. *See* Yu, *supra* note 108, at 714.

[150] Yu, *supra* note 108, at 715.

holders and the freedom to share files without fear of infringement to individual users, the proposal is likely to attract both rights holders and file sharers.

Although "[t]he music industry is still a long way from admitting that its existing business models are obsolete," the EFF authors predict that slumping sales and failing lawsuits will soon convince the industry to consider the proposed approach.[151] Artists and copyright holders are likely to join and "covenant not to sue those who pay the blanket license fee," given the lack of alternatives and the danger of remaining in their current rut.[152]

2. Dealing Directly with Millions of Users. The prospect of dealing with sixty million individual users in the United States alone is daunting.[153] ASCAP and BMI combined currently have only about five hundred thousand members, plus radio stations.[154] The logistical problems in managing more than one hundred times the number of members are obvious. However, file sharing services like Napster may be able to diffuse the effect of such a massive influx of members by acting as intermediaries. ASCAP and BMI or similarly structured collecting organizations could issue blanket licenses to the file sharing services that in turn would handle individual memberships. This solution would also have the benefit of preserving competition between file sharing services, allowing consumers to choose whichever service works best for them.

3. Jaywalkers. One of the most troubling obstacles to the success of the voluntary collective licensing scheme in file sharing is the jaywalking problem: even moral, otherwise law-abiding citizens cross streets in the middle of the block.[155] Unfortunately, many people view file sharing with the same lack of concern as jaywalking. File sharers fail to recognize the damage they inflict on the writers and publishers—breaking the law seems insignificant in comparison to the personal benefits.[156] This attitude is so prevalent that in an informal survey the

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[151] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 4.

[152] *Id.* at 5.

[153] *See* von Lohman, *supra* note 7, at 641 (estimating that in 2004 there were sixty million individual users in the United States); *see also* ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 2 (using sixty million users to calculate the total funds available to support a voluntary collective licensing scheme).

[154] *See* About ASCAP, http://www.ascap.com/about/ (last visited Jan. 14, 2006) (stating that ASCAP has a membership of "over 230,000 composers, songwriters, lyricists and music publishers"); About BMI, http://www.bmi.com/about/ (last visited on Jan. 14, 2006) (stating that BMI "represents more than 300,000 songwriters, composers and music publishers").

[155] Interview with Bertis Edwin Downs IV, Adjunct Professor of Law, Univ. of Ga., Gen. Counsel for R.E.M., in Athens, Ga. (Sept. 22, 2005).

[156] *See* Litman, *supra* note 13, at 23-25 (stating that most people do not recognize the seriousness of copyright infringement because there is no logical reason to think that sharing music constitutes copyright infringement when sharing information is a perfectly acceptable and even encouraged use of the Internet).

author conducted, not one person interviewed said he or she would join a voluntary collective licensing scheme, even for only five dollars a month.

The EFF authors are too quick to assume that looming lawsuits will inspire file sharers to pay a membership fee to avoid liability even if those payments are minimal and conveniently packaged with internet service fees or made directly through websites for easy access.[157] They claim that "[t]he vast majority of file sharers are willing to pay a reasonable fee for the freedom to download whatever they like, using whatever software suits them."[158] In truth, if sixty million file sharers are active in the United States, and about fifteen thousand individuals have been sued,[159] the odds of being pursued by the music industry are about one in four thousand. This probability may be low enough that most people will ignore the threat of a copyright infringement suit. Without further incentives, relying on the fear of lawsuits to encourage membership in a file sharing licensing scheme may have the unintended effect of causing the proliferation of lawsuits in order to intimidate infringers more effectively.

4. Which Songs Count? Unpublished or otherwise commercially unavailable songs draw many individuals to file sharing.[160] But those same "[o]ut-of-print songs, many of which are currently available in P2P networks, present especially difficult copyright clearance problems for record companies. It may be unclear who, if anyone, has the right to reissue the song."[161] Perhaps concern about songs with unidentifiable copyright holders is unwarranted, but unauthorized remixes and mash-ups,[162] in which identifiable songs are combined with other identifiable songs, pose a particular threat to the voluntary collective licensing scheme.

Because such arrangements often are created using compositions that are subject to copyrights, deciding how or whether to include them in the scheme is problematic. On one hand, if the song is included giving credit to the writer or writers of the component compositions, the music industry ignores the creative input of the remixer. On the other hand, if the voluntary collective licensing

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[157] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 2.

[158] *Id.* at 5.

[159] Press Release, Cindy Cohn & Fred von Lohmann, RIAA v. The People: Two Years Later (Nov. 3, 2005), *available at* http://www.eff.org (follow "Press Room" hyperlink; then follow "Breaking News Archive" hyperlink; then follow "November 2005, File-sharing Lawsuits Fail to Deter P2P Downloaders" hyperlink) (stating that as of November 2005, the music industry has sued about 15,000 individual users for file sharing, although they expect more to come).

[160] Yu, *supra* note 108, at 701.

[161] *Id.*

[162] A "mash-up" is a remix that combines two or more incongruous songs in a creative or expressive way. *See generally* Roberta Cruger, *The Mash-up Revolution*, SALON, Aug. 9, 2003, http://dir.salon.com/story/ent/music/feature/2003/08/09/mashups_croger/index_np.html (discussing the mash-up phenomenon).

scheme does not include the song, the industry risks perpetuating underground file sharing services on which such remixes can be traded.

5. Who Gets the Money and How Is It Divided? Although both Professor Yu[163] and Professor Netanel[164] worry over insufficient funds, paying rights holders something for shared songs will be a clear improvement over the current situation. As the services grow in popularity and membership, more money will go into the pot. The real issue with the division of royalties collected from file-sharing is deciding who gets paid.

The EFF authors fail to carefully discuss this issue indicating only that the "money collected would then be divided between *artists and rights-holders* based on the relative popularity of their music."[165] But under the ASCAP and BMI models, only the writers and publishers get royalties, *not* the artists who perform the music.

In the file sharing debate, however, performers have been very vocal about stopping infringement.[166] For example,

> [a]s the rapper Eminem said candidly in his usual provocative style: "Whoever put my s-t on the Internet, I want to meet that motherf-ker and beat the s-t out of him . . . I'm sorry; when I worked 9 to 5, I expected to get a f-king paycheck every week. It's the same with music . . . ."

Artists who perform cover songs or buy songs from songwriters are completely excluded under the current model. It is ultimately unsatisfying to design a system that may fail to protect performers.[167]

6. Cross-subsidization. Professors Yu and Netanel also both discuss the danger of cross-subsidization.[168] Cross-subsidization, or "the requirement that low-volume users subsidize copyright holders and high-volume users," is an undeniable reality of any blanket licensing scheme.[169] When everyone pays five dollars per month, users who download one song inevitably end up because they will pay more per song than users who download one hundred songs. This however, is only of marginal concern.

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[163] *Id.* at 709.

[164] Yu, *supra* note 108, at 709.

[165] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 2 (emphasis added).

[166] *Id.* Although Eminem happens to write most of his own songs and would be covered under the current model, his quote is indicative of the frustration artists have expressed with having their music shared.

[167] *See* discussion *supra* note 125.

[168] Yu, *supra* note 108, at 715; Netanel, *supra* note 1, at 67-68.

[169] Yu, *supra* note 108, at 715.

Of course, a system that requires everyone to pay for only what she uses would be more fair, but part of the attraction of this model is that no user has to make a commitment to a certain number of songs, and all users get the convenience of a flat fee rather than having to pay per song. Also, we must remember that the system is entirely voluntary. If a user finds that he only shares one song per month, and that one song with the possibility of sharing more is not worth his five dollars, he is always free to opt out. The danger, of course, is that too many low-volume users decide to opt out thereby reducing the pool of available files and consequently the value of the service to the remaining users and decreasing the membership funds distributed as royalties.[170]

7. Free Riders. And finally, the industry should legitimately be concerned about free riders. A voluntary collective licensing scheme will not only allow free riding, but will make free riding relatively easy to do and virtually impossible to trace. A group of five friends could easily purchase one membership but share all of the songs of interest to each of the five. Because each membership includes the right to share unlimited songs, the industry would have no good way to distinguish groups of users taking advantage of the system from one prolific file sharer.

The EFF authors believe that free riding will be kept to a minimum: "So long as the fee is reasonable, effectively invisible to fans, and does not restrict their freedom, the vast majority of file sharers will opt to pay rather than engage in complex evasion efforts."[171] As noted above, however, free riding would not be complex but actually relatively easy under this model. Professor Yu predicts that the voluntary nature of the scheme will ultimately lead to its demise:

> Being voluntary, such a system will also encourage free riding. Many end-users may choose to stay outside of the system, "borrowing" songs from their friends and from strangers they meet on the Internet. Eventually, the system will break down. Thus, it remains questionable whether voluntary collective licenses will provide effective compensation to artists and songwriters injured by widespread unauthorized copying on the Internet.[172]

If too many users become free riders, reduced royalty collections will discourage rights holders from joining. If fewer rights holders join, fewer individual users will join and the system will eventually collapse. As with the concern for

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[170] *See supra* note 134 and accompanying text.

[171] ELECTRONIC FRONTIER FOUNDATION, *supra* note 18, at 5.

[172] Yu, *supra* note 108, at 715.

insufficient funds, however, getting any payment will improve the current situation, even if rights-holders are not compensated fairly.

V. CONCLUSION

Voluntary collective licensing is unquestionably an attractive solution to the file sharing dilemma the music industry must now confront. Voluntary collective licensing strives to treat all parties fairly, and its success in broadcast radio proves that it can work. Therefore, the only question that remains is whether the unique problems facing such a scheme as applied to file sharing are surmountable.

Ultimately, voluntary collectively licensing can succeed in the world of file sharing, but it will require so much cooperation that its prospects are uncertain. The writers and publishers must have incentives to join; the collecting organization must resolve daunting logistical problems; and most importantly, file sharers must understand the gravity of copyright infringement if they are to agree to pay for something they now get for free.

Perhaps the expectation of free music can be discouraged through education. After all, the generation currently fueling the file sharing boom is still relatively young.

> Children and teenagers cannot be expected to understand the economic plight of artists and songwriters. Before the advent of the Internet, their indifference did not matter to the recording industry, because their only connection to music products was retail purchases and consumption . . . . As they grow older and start working full-time, their perspective on copyright may change. They may come to empathize with artists and songwriters as they experience the pain of not getting paid for a hard day's work.[173]

But waiting another decade for the members of Generation Y to figure out the value of an honest day's work seems like an unreasonable delay for the rights holders on whose copyrights file sharers are infringing right now.

In the final analysis, a voluntary collective licensing scheme has a reasonable hope for success in file sharing given the history and experience of broadcast radio. Because rights holders would sign non-exclusive agreements and individual users would pay only five dollars, neither party would risk much, particularly considering the potential benefits. But at the most basic level, the success of such a scheme hinges on the number of individual users who agree to participate. No

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[173] *Id.* at 756.

amount of statistical projection can guarantee success, but the music industry's current business model guarantees failure.

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