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The Times They are A-Changin': A Legal Perspective on How the Internet is Changing the Way We Buy, Sell, and Steal Music

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THE TIMES THEY ARE A-CHANGIN': A LEGAL PERSPECTIVE ON HOW THE INTERNET IS CHANGING THE WAY WE BUY, SELL, AND STEAL MUSIC

I. INTRODUCTION

Until April of 1999, the most common search term on the Internet was “sex.” Now, the undisputed champion is the term “MP3.” In 1994 the band Aerosmith participated in a promotion in which they allowed a new single to be downloaded via personal computer (PC). The song, appropriately entitled Head First, was approximately one and a half minutes in length and took anywhere from forty-five minutes to two hours to download, depending on modem speed. And the sound quality, as heard over one-inch computer speakers, was less than awe-inspiring. While this promotion certainly must have caught the eye of the music industry and aroused the suspicions of those in copyright, it seems unlikely that many industry watchers could imagine that the day when Internet music was more popular than “sex” was just around the corner.

The current audio technology available on the Internet (MP3 being the most popular of several competing formats with similar capabilities) heralds a new age in digital music. While the music is not yet CD quality, a rich,
full sound that had not previously been heard over the Internet can now be achieved. Combine this high sound quality with the fact that MP3 files can be downloaded very quickly and are easily portable, and it is easy to see how the technology may revolutionize the very way we look at music.

But what will these developments mean? Where will the new technology take the music industry, consumers, and copyright law? Some fear the story of Internet music will be a shady one, simply becoming a pirate’s paradise as pirates, bootleggers, and counterfeiters can hardly imagine a better medium to exploit. However, it seems more likely that piracy can be controlled by a combination of legal, technological, and business-oriented solutions. Yet there is more to Internet music than piracy and, after the details of piracy suppression are worked out, Internet music will proceed to affect the music industry in other ways. Digital dissemination and the purchase of tangible music over the Internet are fundamentally changing the way music is bought and sold. Furthermore, the Internet is beginning to change the way artists sell their work—whether to record labels or directly to consumers. Through all of these changes, it will be a careful cooperation of the music industry, the courts, statutory law, and technological advances that will allow everyone to benefit from the new technologies. This Note will attempt to address these issues.

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8 Bedell, supra note 2.

9 The “music industry,” for the purposes of this Note will include record labels, musicians, songwriters, publishers, and distributors. Though these groups often have different interests they will be referred to collectively in the interest of convenience.

10 The term “pirate” can be used to refer to any unauthorized duplication of a musical work, but the more precise terms of “pirate,” “counterfeit,” and “bootleg” are available and will be used in this Note. They shall be used as follows: “Pirated” will describe an unauthorized copy of a musical work. “Counterfeit” will be used when the musical work is illegally duplicated along with accompanying cover art, liner notes, and other protectable packaging material. Generally, someone receiving a pirated work will be well aware that the copy they have obtained is illegal. This is not so often the case with counterfeit works, the consumers of which often believe they are obtaining a legitimate copy of an album or single. Finally, “bootleg” will be used to describe the unauthorized recording of a musical broadcast or live concert. Probably the most common scenario for bootlegging a musical performance is when a fan secretly records an artist in concert and then offers copies of the show for sale, trade, or other transfer of ownership. While counterfeiting and bootlegging will be mentioned in this Note, most of the discussion of illegal music will pertain to pirated music. See RIAA, TOP TEN FACTS (1998).

11 See PASSMAN, supra note 3, at 371. Mr. Passman’s book is widely recognized as one of the “bibles” of the music industry. This Note arises from unanswered questions he raised in a chapter of that book entitled “Music in Multi-Media, On-Line, and Other Adventures in Cyberspace.” Having been intrigued by this chapter, I will attempt to address some of the questions Mr. Passman was insightful enough to raise in 1997.
II. THE THREAT OF PIRACY

Before 1972, United States Copyright Law offered no protection for recordings of musical works. Before that time, there was no copyright for the sound recording captured in a phonorecord. Only the underlying musical composition was protected. Therefore, if you wanted to make and sell your own copy of a popular recording, you needed only to pay a nominal compulsory license fee to the publisher of the underlying musical work. For example, prior to the 1972 Act, you could make and distribute copies of Jimi Hendrix performing “Purple Haze” and only owe a royalty to the publisher of the underlying musical composition. You would not have to pay Mr. Hendrix a fee for the use of his performance, as he had no rights in that performance. Of course, pirate record companies who paid only a small compulsory license fee to the publisher could always undersell the legitimate record companies and record piracy grew into a multi-million dollar industry.

The 1972 Copyright Act made the first effort to patch this hole in music law. Section 114 of the Act prohibited the unauthorized duplication of the sound recording in addition to the protection already given to the musical composition. The fee paid for the compulsory license is set by law and called the “statutory rate.” The owner of the copyright in the sound recording is not under similar obligation to automatically license the use of his copyright.; see also PASSMAN, supra note 3, at 211 (the current statutory rate is 7.5¢ per recording or 1.30¢ cents per minute for songs exceeding five minutes in length).

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13 See 17 U.S.C. § 101 (1999) (defining phonorecords as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device”).
14 Understanding the difference between the “sound recording” and the “underlying musical composition” can be tricky, but need not be. It may help the reader to distinguish them this way: The “underlying musical composition” can be represented by sheet music. The “sound recording” is the captured expression of the underlying musical composition. For example, when Janis Joplin sang the Gershwin classic “Summertime,” Mr. Gershwin’s work was captured in the underlying musical composition while Ms. Joplin’s work was captured along with it in the sound recording.
15 See 17 U.S.C. § 115 (1999) (establishing a compulsory license for non-dramatic musical works. This means that once a song has been recorded and distributed to the public, the owner of the copyright in the underlying composition must issue a license to anyone else that wants to make their own recording of it. The fee paid for the compulsory license is set by law and called the “statutory rate.” The owner of the copyright in the sound recording is not under similar obligation to automatically license the use of his copyright.; see also PASSMAN, supra note 3, at 211 (the current statutory rate is 7.5¢ per recording or 1.30¢ cents per minute for songs exceeding five minutes in length).
17 See PASSMAN, supra note 3, at 298 (stating that the music publisher cannot turn down these pirates who get a compulsory copyright license).
composition. Thus Mr. Hendrix (or, more likely, his record company) would have a right to his performance just as the publisher had a right in the underlying musical composition. This put an end to legal music piracy in tangible media.

Even the 1972 Copyright Act, however, proved insufficient. In 1995, Congress added The Digital Performance Right in Sound Recordings Act to existing copyright law. First, this Act added the protections of section 106(6), which makes it clear that copyright includes the right to perform the copyrighted work publicly by means of digital audio transmission. This means that companies selling records by transmission over the Internet must pay a compulsory license fee for the right to use the songs. Second, this Act amended section 115 to clarify that unauthorized “digital phonorecord deliveries” constitute copyright infringement. This means that when music is digitally delivered in a form that is intended to be copied by the consumer (such as in an MP3 file) the digital transmission requires payment of a mechanical royalty just as if the song had been sold on a CD or cassette.

Now that the Digital Performance Right in Sound Recordings Act is in place, all the protections of the Copyright Act are available to copyright holders whose works are pirated over the Internet. However, these protections alone are proving insufficient in the digital age. Loopholes continue to pop up in the Copyright Act and new laws have been passed as copyright races to keep up with new technology. Furthermore, the music industry is deeply concerned that as new technologies are making piracy easier and more attractive than ever, after-the-fact prosecutions of largely hobbyist infringers will be of little value. Some of the new laws intended to supplant these prosecutions simply add to existing copyright protections and will force the use of technology that erects technological barriers to copyright infringement in the first place. Finally, the music industry has

21 See 17 U.S.C. § 106 (1995) (outlining all the rights available to copyright holders. Four of these rights are potentially implicated by the dissemination of music over the Internet. These rights are: (1) to reproduce the copyrighted work in copies or phonorecords, (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending, (4) in the case of... musical... works..., to perform the copyrighted work publicly, and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission).
taken the initiative to work within its own ranks to fill gaps left by these legal solutions. This plan will require careful cooperation between statutory law, the music industry, technology, and consumers—whose dollars will cast the final vote for the system eventually implemented. Whether this cooperation will be possible remains to be seen.

A. THE SCALE AND SCOPE OF MUSIC PIRACY ON THE INTERNET

With the current music technology, almost anyone with access to a computer has the choice of millions of illegal intellectual property works. At present, it is estimated that one million of those illegal works are music files. While the music industry is no stranger to profit loss through theft of its intellectual property, as one in three CDs worldwide is already pirated or counterfeited, the capability to produce near-perfect sound on a large scale that can be carried with the user to different locations does pose a new and far-reaching threat. Furthermore, the technology now available through the Internet makes piracy even easier than in the usual “tape trading” form of piracy.

Since music piracy is necessarily an “underground phenomenon,” measuring the scale and scope of pirating activity can be very difficult. Web pages and FTP sites hosting illegal music files move and even disappear with great regularity. Many sites cannot even be found by traditional Internet

\[ \text{Christopher Jones, } \text{Attack on MP3 Piracy Escalates} \text{ (visited Feb. 2000) } \text{<http://www.wired.com/news/mp3/0,1285,32203.html>}. \]
\[ \text{See Christopher Jones, Battling the Free Music Movement} \text{ (visited Feb. 2000) } \text{<http://www/wired.com/news/mp3/0,1285,32919,00.html>}. \]
\[ \text{See, Barak D. Jolish, Scuttling the Music Pirate, 17 ENT. SPORTS L. 9 (1999).} \]
\[ \text{At this point, the reader may call to mind the decidedly non-underground phenomenon of trading MP3 files via the Internet service Napster. Napster, however, is dramatically different from the sites described here. No files are actually stored on Napster. Rather, it is an online forum that allows users to trade MP3 files directly from their PCs. In January 2000, the Recording Industry Association of American (RIAA) filed suit against Napster claiming not that the website contained infringing files, but rather that the service facilitated their exchange. See Recording Indus. Ass’n of Am. v. Napster (N.D. Cal., filed Jan. 8, 2000) (charging the service with contributory and vicarious copyright infringement). See also, Courtney Macavinta, Recording Industry Sues Music Start-Up, Cites Black Market} \text{ (visited Mar. 22, 2000) } \text{<http://www.news.cnet.com/category/10-1005-200-1485841.html>}. \]
\[ \text{See Jolish, supra note 26.} \]
search methods. Instead, their semi-secret locations are often divulged to fellow music enthusiasts in chat rooms and Usenet news groups. Despite the difficulties in finding illegal sites, the number that have been found proves that there is much to choose from in the world of illegal Internet music. In 1998, a small anti-piracy team with the Recording Industry Association of America (RIAA) was able to locate eighty websites housing some 200,000 illegal music files in a single afternoon. It is estimated that there are currently one million illegal music files on the Web. Given that intellectual property piracy is such a profitable business for pirates and so costly for the copyright holders—costing the industry an estimated ten billion dollars in 1998 alone—the stakes are very high.

B. THE ROLE OF MP3

The technology known as MP3 has made widespread infringement possible and is the format most often used by Internet pirates. MP3 enables users to duplicate audio files from CDs or other sources and post them on the Internet, e-mail them to others, or store them on computer hard-drives or other playback devices. MP3 shrinks digital audio files to less than one tenth of their original size by removing parts of the sound file that
are not audible to the human ear. Therefore, a file that took up to 1,000 megabytes (MB) of space in .WAV format, the previous standard for digital audio recording, will take up only 100 MB in the MP3 format. Yet, the two files would be of virtually identical sound quality. In short, MP3 delivers near CD-quality music files in a format that current computers and computer networks can easily handle.

Unlike previous Internet music formats, MP3 also allows for downloads fast enough to be practical. Obviously, the smaller MP3 files can be downloaded in much less time than the older, bulkier .WAV files. As of this writing, the average download time for a two-minute song in MP3 format is only ten minutes via modem. This time is shrinking rapidly, and soon music downloads will require less time than the actual play length of the selection.

In addition to its technological superiority over its predecessors, MP3 is a perfect format for music piracy for other reasons. First, it is widely available. Ripper, encoder, and player software is available for download on many Internet sites for little or no cost. Furthermore, an MP3 player was included as a standard feature on Microsoft's Windows 98 operating system, which places the software on millions of desktops worldwide. Such wide access to the necessary software brings MP3 technology within the reach of most computer users.

Second, MP3s can be downloaded to a portable player, meaning that unlike the pioneers that downloaded Aerosmith's single in 1994, the MP3 enthusiast is freed from the confines of his or her computer. Already, a consumer has the choice of a number of reasonably priced portable MP3 players that will allow music fans to pair this easy access to music files with

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40 Bedell, supra note 2.
41 PASSMAN, supra note 3, at 378.
42 Ripper software copies tracks from commercial audio CDs on to a computer. Encoders transfer audio files into MP3 format. Players allow a user to play an MP3 file on his computer or other MP3 playback device. See MP3 Place FAQ: CO-Rippers (visited Mar. 2000) <http://mp3place.com>.
43 Jolish, supra note 26.
the mobility to which the Sony Walkman first made us accustomed.44 Even major department store retailer JCPenney, arguably a fair measure of the average American consumer’s consciousness, offers an MP3 player in its 2000 Spring/Summer catalog.45 Finally, unlike most of its competitors, MP3 is an open format meaning that files recorded in MP3 format generally contain no copyright control measures.46

All of these factors make MP3 very dangerous for the music industry. The danger lies not in the fact that MP3 makes the unlicensed copying of digital music files possible, as that has been a reality for years. The problem is that MP3’s availability and ease of use makes the piracy of near-CD quality sound in a portable form a practical reality for the average user, not just the technologically sophisticated “hacker.”47

C. THE CHANGING PSYCHOLOGY OF THE PIRATE—FROM HACKERS AND CRIMINALS TO YOUR TYPICAL COLLEGE KID

One of the biggest concerns the music industry has regarding the recent wave of Internet piracy is the way it is changing how people fundamentally think about music. At the moment, most people think of music as something you must buy in order to own. People expect that if they would like to have a personal copy of a song or album of CD quality to be played whenever they wish, they will have to purchase the CD. However, as Internet piracy becomes more commonplace, people may cease to think of music this way and music itself will become devalued. Jim Griffin, CEO of the new media consulting firm One House and former director of technology at Geffen Records, fears that digital distribution of music—pirated or licensed—inherently devalues music.48 The industry fears that people will begin to expect music for free and lose their willingness to

46 Stucky, supra note 6.
47 See Rosen, supra note 31, at 58 (stating “it’s possible for anyone to mass distribute intellectual property to those 100 million Internet users at very little, if any, cost”).
48 See Griffin, supra note 4, at 65 (stating that “[music] should include cover art, graphics, lyrics, liner notes and associated material packaged nicely to reflect the artist. Stripped of its context, no wonder music can be seen as devalued”).
pay for it. Furthermore, Hilary B. Rosen, President and CEO of the RIAA, explains that "most of these [MP3] cites [sic] are designed and managed by college students who are a generation of young people growing up expecting music for free." This attitude is reflected in numerous campus interviews on the MP3 phenomena. One typical comment was made by a student at the University of California at Berkeley who said, "[i]n the dorms we share MP3s . . . I assume that it's illegal to have [them], but I don't really know."

D. EFFECTS OF PIRACY BEYOND LOSS OF INTELLECTUAL PROPERTY REVENUE

The RIAA estimates that the music industry lost as much as ten billion dollars to Internet pirates in 1998. However, when music piracy is on such a large scale, it hurts the artists in more ways than the simple loss of profits from royalties. This point is well demonstrated by examining the effect that piracy has had on the techno band the Crystal Method. Dozens of Internet sites offered full-length downloads of the Crystal Method's debut album and tens of thousands of copies were illegally disseminated over the Internet. Jim Griffin explains: "Aside from the financial issues involved, there was a very real loss to the band in airplay, tours, and other support that are generated through movement on the sales charts that was denied Crystal Method through piracy."

49 Most MP3 sites are located on university servers. In addition to student enthusiasm for music, universities are among the few institutions that currently have the bandwidth and storage capacity necessary to maintain an MP3 exchange site.

50 Rosen, supra note 31, at 59. One may be tempted to point out that bootlegging of musical performances has been a mainstay on college campuses since the invention of recording devices small enough to be smuggled into a rock concert. However, piracy is a far more frightening proposition than bootlegging. When a bootleg is distributed, the artist and his or her record company expected no further profit from the performance. Its value to them was extinguished at the end of the performance. Furthermore, people who trade bootlegs are the same people buying the artist's albums and concert tickets. It is doubtful that a U2 fan, for example, ever decided to not buy a U2 album simply because she already had a bootleg of the band playing the same songs in concert. Fans generally see bootlegs as a supplement to their album collection—as a different interpretation or version of songs they have already purchased on albums. This is not the case with MP3 piracy. When a would-be music consumer obtains a near-perfect pirated copy of an entire album or desired single, he has little or no incentive to then buy a virtually identical legal copy.

51 See Jones, supra note 25.

52 Griffin, supra note 4, at 64, 65.
Despite the increasing success of independent, or "indie," record labels in the past few years, the music industry is currently dominated by a small group of large record labels, namely Warner Music, EMI, Sony Music, BMG Entertainment, and Universal Music Group. These companies, collectively known as the Big Five, control about eighty percent of the popular music industry. Given that these companies control such a large percentage of an industry that lost as much as ten billion dollars to Internet piracy in 1998, it is easy to see why they are eager to defend their empire against the threat posed by MP3 pirates. In cooperation with the RIAA—the music industry's leading lobby organization—the Big Five have embarked upon a crusade to end or at least curb Internet music piracy. Through careful use of copyright law, technology, and inter-industry cooperation, the music industry hopes to protect their intellectual property rights as we move further into the digital era.

A. ADVENTURES IN COPYRIGHT

Existing copyright law is being tested in new ways by new music technologies, and various strategies are being attempted to repair failings as they are found. These repair tools warrant careful watch because they are likely to set precedent for future technologies. As the law is tested, sometimes it proves surprisingly flexible and offers protection in the digital age. In other cases, copyright law cannot stop Internet piracy and it is
necessary to implement new laws to offer protection to digitally disseminated music.

1. Why We Look at Music Law Individually. Music law should be viewed independently of other forms of intellectual property in a discussion of new statutory changes inspired by the Internet for two reasons. The first is that music is a pioneer on the Internet and most of the laws being written are in response to weaknesses discovered by the digital dissemination of music. The second reason to consider music separately is that since new music is a single expression embodying two separate copyrightable works, it has long been treated as a special case in copyright law.

a. The Importance of Getting It Right. In looking at the developments in copyright law attributed to the goal of preventing music piracy, it is important to note that their significance extends far beyond the music industry. The fact is that music is a pioneer on the Internet. Most of the laws now being drafted as a result of incidents involving Internet music either include other forms of intellectual property or will likely be used as precedent when other intellectual property works begin mass distribution over the Internet. At the moment, the piracy described in the last section occurs mostly in the context of music and computer software; it will probably be another five years before technology will make it reasonably convenient to download bulkier files, such as video. However, precedent being set now—whether by law or by custom—will likely be applied to other intellectual property well into the future. It is important that the law and the music industry get this right the first time or the entire intellectual property community could find itself tangled up in bad law for a very long time. Bad custom is also a danger—especially since so many defendants are opting to settle out of court rather than to assert their rights.

Pamela Koslyn, a Los Angeles media and Internet attorney, expresses the concern that “every time a company voluntarily [complies with complaints about] infringement, it’s going to create a chilling effect on any other site operator who’s got [sic] material that could be targeted as offensive, infringing or bothersome.” There is a danger that custom will cause rights to disappear before anyone has the opportunity to assert them in a court of law. For these reasons, it is important to keep a vigilant eye on evolving law and custom on the Internet.

57 See Rafter, supra note 53, at 611.
58 Haring, supra note 29.
b. Music Law Is Special. In addition to the likelihood of current music law and custom setting precedent for other technologies down the line, there is at least one other reason why it is appropriate to consider music separately. This reason is that music has been treated as a special case under copyright law for some time now. Unlike other copyrighted works, it is recognized in the Copyright Act that the typical song on a commercial audio CD embodies two separate works of copyrighted authorship: the underlying musical composition and the sound recording itself. The rights to these copyrights are complicated and often belong to multiple parties. For example, the proceeds earned from the underlying musical composition are generally split between the songwriter (or songwriters) and the songwriter's publisher. The sound recording copyright typically belongs to the performer's record company, which may or may not owe a percentage to the recording artist. With so many interests embodied in one work, it is easy to see why music is given special treatment under copyright law.

For this discussion, we will assume the simplest case—that the copyright in the underlying musical composition is held exclusively by the publisher and the copyright in the sound recording is held exclusively by the record company. In this scenario, the posting of a song on the Internet may potentially violate three exclusive rights of both of these copyright holders.

As noted earlier, the exclusive rights of copyright holders are listed in section 106 of the Copyright Act. In 1995, The Digital Performance Right in Sound Recordings Act was adopted to make it clear that unauthorized "digital phonorecord deliveries" constitutes infringement under the Copyright Act. It is from these rights that all others involving digital music are derived. Under these Acts, posting a song on the Internet for others to download or listen to potentially violates copyright protections in several ways. First, the creation of the digital file violates the exclusive rights of

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59 Assuming, of course, that neither the underlying musical composition nor the sound recording has passed into the public domain.


61 See PASSMAN, supra note 3, at 303 (stating that record companies typically retain ownership of master recordings).


63 Id.

the copyright holders to reproduce the work. Second, these rights are also violated by posting the infringing file to an Internet site. An example of this infringement occurs when one uses a ripper to convert files from a commercial audio CD into MP3 or another digital format and then posts it to a website. Third, when someone accesses this file over the Internet, several exclusive rights may be infringed upon. The music publisher's rights to make and distribute reproductions of the underlying work and to perform the underlying work publicly may be violated. Likewise, the record company's exclusive rights to make and distribute phonorecords and to publicly perform the sound recording by digital transmission are also potentially violated. Finally, the user downloading the music may make additional reproductions or further violate the copyright laws. In fact, in a high-tech version of familiar campus bootlegging traditions, many sites offering MP3 downloads request or even require that users upload their own MP3 files before downloading from the site.

2. Playing a Song Requires a License—Even in Cyberspace. For a site operator to post a legal, non-pirated copy she must first obtain the proper licenses. ASCAP and BMI, the major performing rights societies in the United States, have both developed blanket licenses specifically for the use of website operators. Meanwhile, the Harry Fox Agency has begun seeking royalties for the online creation and distribution of digital phonorecords. In tangible medium, the ASCAP and BMI licenses would protect someone who wanted to perform a given work. The Harry Fox Agency's license would protect someone who wanted to make a phonorecord of that work. However, under current copyright law it appears that a website operator may have to acquire a license from both types of

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66 See id. (explaining that under the Audio Home Recording Act of 1992, it is perfectly legal for a consumer to re-record music they have purchased for private, non-commercial use, but illegal if they post these new MP3 files on the Internet for others to access or otherwise distribute these files).
67 See 17 U.S.C. § 101 (1995) (for purposes of copyright law, a person "performs" a song not only when she sings it, but also when she plays it on her CD player).
69 PASSMAN, supra note 3, at 231.
70 See id. A "blanket license" is a license that grants the holder the right to perform all the songs or performances administered by that organization. These licenses are obtained by radio and television stations as well as restaurants, bars, and others who perform music publicly.
71 See Celende, supra note 64.
72 The Harry Fox Agency issues mechanical licenses for publishers. PASSMAN, supra note 3, at 220.
agencies. This is because the digital dissemination of a work qualifies as both a performance and the creation or distribution of a phonorecord. It can certainly be argued that a website operator would be forced to have both licenses in order to legitimately offer music on her site. However, at this time, it is unclear whether this double protection is necessary. Until such a determination is made, the best course of action is probably to obtain both licenses.4

When proper licenses are not obtained, all the traditional remedies for copyright infringement are available to the copyright holder. A party who finds an infringing copy of his copyrighted work can request that the infringer obtain proper licenses or sue the infringer for damages and/or an injunction.5 However, these basic protections, dating back to 1972 and updated to include digital recordings in 1995, are merely a starting point for the law of digital music.

3. The Thrill of Victory and the Agony of Defeat. New digital technologies are testing the Copyright Act in new ways. While the Copyright Act is often adaptable to the digital age, this is not always the case.

a. A Case Where the Copyright Act Was Proven Sufficient. Of course the Copyright Act has not been insufficient in every instance of Internet use of music. In January 2000, the (RIAA) filed suit against Internet music provider MP3.com.6 This website had just begun a new service that allowed users to play digitally disseminated copyrighted music files in MP3 format over the company’s website upon proof that the user had already purchased a licensed copy of the album. They paid no royalty or license fee to the owners of the copyrighted works and provided their services for free. The RIAA filed suit accusing MP3.com of violating the exclusive rights of copyright holders to make reproductions of copyrighted sound recordings under the 1976 Copyright Act.7 In response, MP3.com claimed that their service was in compliance with the Act and constituted fair use time shifting, as permitted by copyright law.8 A federal court nevertheless held that the
MP3.com service violated the Copyright Act. At the time of this writing, MP3.com was attempting to reach settlements with the major record labels involved in the suit in order to avoid court-determined damages. In this case at least, it seems existing copyright law was sufficient to protect the rights of all involved.

b. An Example of the Failure of the Copyright Act. An excellent example of the failings of the Copyright Act is found in the case of United States v. LaMacchia. While this case involves pirated computer software, not music, it is very important in the evolution of music law. LaMacchia was a 21-year old student at the Massachusetts Institute of Technology (MIT) and a skilled computer hacker who used the university’s computer network to distribute pirated copies of computer software, including such popular titles as Excel, WordPerfect, and SimCity 2000. The site was shut down a mere six weeks after its debut. In that small amount of time, the copyright holders claimed to have collectively lost one million dollars as a result of LaMacchia’s activities. Despite the extraordinary losses incurred and LaMacchia’s apparent disregard for the law, a federal grand jury was unable to make its indictment stick. Under the criminal copyright statute, there could be no conviction for piracy unless there was a financial motive to profit from the trafficking of the thieved intellectual property. Since LaMacchia’s site was apparently only for his own enjoyment, it was impossible to file criminal charges. The ruling basically declared open season on musical copyright holders. As previously noted, most pirate music sites are operated for hobby only, and the site operators make absolutely no profit and often running their sites at a loss. Had the “LaMacchia Loophole,” as it came to be known, not been closed, most music piracy on the Internet would be untouchable under criminal copyright statutes.

4. New Laws to Cope with New Realities. Despite Congress’ repeated statements that it intends to make the Copyright Act flexible enough to

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80 Id.
82 Id. at 536.
84 LaMacchia, 871 F. Supp. at 545.
85 Id. at 543.
adapt to new technologies, it has failed in this effort so far. In fact, since the last major revision in 1978, the Copyright Act has been amended twenty-eight times. Even with this constant amending, the Act has proven inadequate to properly protect music in the digital age, and over the last decade, a host of new statutes have been passed to try to stop rampant copyright infringement. Most of these are basically a finger in the piracy dam, and new laws will continue to pop up to cover new technologies and situations.

a. World Intellectual Property Organization Treaties and the Digital Millennium Copyright Act. The World Intellectual Property Organization (WIPO) Treaties of 1996 secure copyright protections in Cyberspace and offer greater protection for copyright on a global scale. The treaties represent the efforts of 160 nations to offer the music, motion picture, publishing, and software industries of the member nations greater protection by prohibiting unauthorized copying and circumvention of copyright encryption information. They also offer copyright infringement protection on the Internet. The treaties are not self-executing, however, and have to be ratified by individual countries in order for them to take effect.

For its part, the United States ratified the WIPO treaties in 1998 as the Digital Millennium Copyright Act (DMCA). The main provision of the DMCA states that it will be illegal to intentionally evade copyright protections built into software. Not all provisions of the DMCA are necessarily friendly to the music industry, however. Section 512 of the DMCA limits the liability of Internet Service Providers (ISPs) for copyright infringement in certain circumstances. ISPs are exempted from liability for copyright infringement if the charge of infringement is based solely on the provider's "transmitting, routing, or providing connections for material through a system or network controlled" by the ISP. ISPs are also exempted if infringement is based solely on their temporary storage of material in the course of transmitting it if certain conditions are met by the

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86 See generally American Bar Association, supra note 56.
87 Id.
88 Id.
90 Id.
91 Id.
93 Id.
94 Id.
ISP. The Act further limits the ISP’s liability for contributory infringement based solely on access to online material over the ISP’s system or network if the provider is not aware the material is infringing, quickly removes the material upon notice, and receives no financial benefit from the infringing material. This makes it difficult for copyright holders to sue ISPs for infringement and forces them to go after many small, individual users instead of taking on many sites at one time by suing the ISP that hosts them.

Further, the Act provides that an ISP’s liability may be limited where there is a claim of infringement solely because the ISP “referred” or linked users to a site containing infringing materials by way of a directory, index, or hypertext link. This makes it tough for copyright holders to stop ISPs and possibly even search engines from offering links to infringing sites as long as the ISP or search engine is unaware that the site they are referring a user to contains pirated material.

The most significant controversy involving the exempted liability of ISPs has been the dispute between Lycos and the RIAA. The RIAA warned Lycos that they were considering legal action against the Internet search engine to prevent Lycos from allowing their users to find unauthorized MP3s using its search capabilities. Lycos quickly expressed interest in cooperating with the RIAA despite the fact that it was highly unclear whether or not Lycos had any legal obligations. While Lycos’ compliance appears to be a victory for the recording industry, the question remains untested in court.

Artists have also taken action under the DMCA. Most notably, Lycos was threatened with legal action by the estate of rap artist Tupac Shakur. Shakur’s estate demanded that Lycos remove five sites from its member-created subsidiary, Tripod. Tripod allows users to create their own websites, but by its own Terms of Service (TOS) prohibits the posting of any material that violates copyright law. However, several sites did contain pirated music files infringing upon copyrights held by the estate of Shakur. Despite the fact that the posting of the material violated Lycos’ own TOS, Lycos claimed they had no liability in the matter. Lycos reasoned that under the DMCA...
they were under no obligation to police the sites and ensure compliance with their TOS. Lycos further claimed that the demands of the estate violated Lycos’ right to free expression and described the estate’s interpretation of intellectual property law as being “fundamentally incompatible with the First Amendment.” However, a court will not have the opportunity to decide these issues as Lycos again voluntarily removed the sites and the estate withdrew its threat of legal action. Thus, the ISP non-liability arm of the DMCA remains untested.

b. The No Electronic Theft Act. The No Electronic Theft (NET) Act was specifically created to close the so-called LaMacchia Loophole. The NET Act allows criminal prosecution of intellectual property pirates who willfully copy, distribute, and traffic in copyrighted material on the Internet, whether or not there is a financial motive behind the infringement. A pirate need only make or possess one or more illegal digital copies of software, film clips, music, or literature with a total retail value of over one thousand dollars to be charged with a felony. This makes it possible to prosecute a vast number of Internet music pirates who had previously slipped easily through the LaMacchia Loophole.

The NET Act has successfully served its purpose so far. In November of 1999, Jeffrey Levy, a University of Oregon student, earned the distinction of becoming the first person convicted under the NET Act. Levy had posted an estimated $70,000 worth of infringing music, film clips, and software on his University’s server. These pirated works included one thousand mostly-pirated MP3 files. While he could not have been prosecuted under the Copyright Act, under the NET Act Levy faced up to three years in prison, a fine of up to $250,000, or both. Levy, who claims to have been shocked to find he could be prosecuted, plead guilty to

99 Id. (quoting Lycos’ attorney, Mark Robins).
100 The No Electronic Theft Act, 17 U.S.C. § 506(a) (Supp. 1996). At this time, a bill is pending that would further enhance enforceability of the NET Act by increasing statutory damages for criminal copyright infringement. The bill, H.R. 1761, 106th Cong. (1999), The Copyright Damages Improvement Act of 1999, also clarifies that the “retail value” upon which sentencing is based must be calculated according to the retail value of the infringed-upon material, rather than the retail value of the infringing material.
distributing pirated intellectual property in excess of $5,000 and was sentenced to two years of probation, periodic urine tests, and a limit on his access to the Internet. Levy has stated "I thought everyone who got in trouble got in trouble because they were making money off it and profiting." The intellectual property industry has expressed great satisfaction with the conviction and warns that it is the beginning of a crackdown on Internet pirates. Indeed, a crackdown seems to be underway. Seventy-one students at Carnegie Mellon University were disciplined after posting illegal MP3s to the University server and at the University of South Carolina a student was caught distributing pirated MP3 files.

B. TECHNOLOGY-BASED SOLUTIONS TO COPYRIGHT PROBLEMS

In addition to pursuing legislation, the music industry is fighting piracy with increasingly sophisticated copyright protection technology. In the long run, technological barriers to copyright infringement may prove much more valuable than statutory copyright protection. While statutory protection is generally only effective in punishing pirates after the fact, technological barriers can be erected to prevent piracy in the first place—or at least put it back in the realm of the technologically sophisticated hacker. Probably, the most effective strategy will be a marriage of technology and law in which statutes are used to require the use of the technological copyright barriers.

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104 Sullivan, supra note 102.
105 Rankin File, Levy, supra note 103.
106 Sullivan, supra note 102.
107 Id.
108 In addition to stopping the loss in intellectual property theft, such highly publicized crackdowns are having the effect of encouraging MP3 enthusiasts to educate themselves about copyright issues. Many MP3 users are not anxious to find themselves in the same position as Jeffrey Levy, being convicted for something they did not even know was a prosecutable offense. The FAQ at MP3 download site MP3 Place offers a few layman’s guidelines to its users, such as:

The MP3 format itself is perfectly legal—but the compression method can be used both legally and illegally...[i]f you are visiting on MP3 page and see music by artists like Madonna, Pearl Jam, or any other big artist, the songs are most likely illegal to download... Another thing to remember is that just because you don’t do something for profit its still illegal, but doing it for profit is even WORSE and MORE illegal.

Are MP3s legal? (visited Feb. 2000) <http://www.mp3place.com>. Also, the RIAA has launched an educational campaign called “Soundbyting” to inform college students that making copies is not only illegal but also “simply unfair.” Rosen, supra note 31, at 59.
1. **The Available Technology.** Several technologies are available to prevent piracy in the dissemination of digital music. Password protection, micropayment systems, and firewalls have all been suggested as means of protecting intellectual property on the Internet.\(^{109}\) However, at this time, the two most viable methods seem to be digital watermarking and encryption. Digital watermarking allows copyright owners to mark their music files with an invisible “watermark” containing the file’s copyright information. While watermarking itself cannot prevent the duplication of files, music playing devices can be equipped to read these watermarks and react to them, preventing a user from reading a file, making second generation copies of a file, or even limiting the number of times a file can be accessed. Watermarks can also be used simply to indicate the origin of a specific file, making after-the-fact infringement investigations much easier.\(^{110}\) Another possibility for a technological control on piracy is a system of encryption. While watermarks are read and reacted to by the playing device, encryption encodes the music file itself. In encryption, the code of the compression software is programmed to prevent copies from being made of downloaded files.\(^{111}\) Cooperation between the law, the music industry, and hardware and software manufacturers could ultimately mean that these technologies will be successfully used to prevent large-scale Internet piracy.

2. **Statutory Attempts at Cooperation.** A first attempt at statutory cooperation was the Audio Home Recording Act of 1992 (AHRA).\(^{112}\) The Act was intended to be a compromise between the recording industry and home electronics manufacturers. Under the terms of the Act, the manufacturers of digital audio recorders (DARs) are shielded from copyright infringement actions based upon their “manufacture, importation, or distribution of a [DAR] device [or] a DAR medium.”\(^{113}\) They are also immune to suit based on the non-commercial use by a consumer of such a device for making digital musical recordings. In exchange for this immunity, the manufacturers agreed to equip all such devices with serial copyright management systems (SCMS) that send, receive, and act upon information about the generation and copyright status of the files they play. It also

\(^{109}\) See Jolish, supra note 26, at 10.

\(^{110}\) American Bar Association, supra note 56.


\(^{113}\) Id.
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requires the manufacturers to pay the recording industry a royalty equal to 2% of the price of digital audio recording equipment or 3% of the price of digital audio recording media to partly recoup the inevitable loss and displacement of record sales due to digital home recording. 114

Also, there is the Digital Millennium Copyright Act (DMCA) discussed previously. 115 Title I of the DMCA provides criminal and civil penalties for the circumvention of technological protection measures that control access to protected works. The Act also imposes liability for manufacturing or trafficking in technology designed to facilitate the circumvention of copyright control measures. Furthermore, the Act protects the integrity of copyright management information, banning the distribution of false copyright management information with the intent to facilitate or hide infringement. Under this section, one is also prohibited from intentionally removing or altering copyright management information or distributing phonorecords with the knowledge that such information has been removed. 116

3. A Major Failure of These Efforts. Despite the best intentions of the Acts above, it seems that implementing initiatives and statues based on SCMS will be more complicated than foreseen. The actual value of such Acts has seriously been called into question by the result in Recording Industry Association of America v. Diamond Multimedia Systems, Inc. 117 In that case, the protections offered under the Audio Home Recording Act proved insufficient to protect the music industry. Diamond produces a small, Walkman-like device called “the Rio.” The player allows users to listen to MP3 files anywhere, freeing them from their computers and making MP3 files far more attractive to music enthusiasts. Fearing a great increase in Internet music piracy as a result of the capabilities of the Rio, the RIAA and the Alliance of Artists and Recording Companies filed suit against Diamond Multimedia in October of 1998. The plaintiffs claimed that the Rio, which contained no SCMS, was a digital audio recorder and, therefore, was in violation of the Audio Home Recording Act. They sought to enjoin production and sale of the Rio. 118

114 Id.
116 Id.
118 Id.
The Rio, however, can only download files from the hard drive of a properly equipped personal computer via a connecting cable. It cannot download files directly from the Internet nor can it transfer files to other computers or MP3 players. As such, the Rio was able to escape the AHRA by virtue of the Act’s narrow language. The Ninth Circuit found that recording directly from a computer’s hard drive by means of a cable does not constitute recording from another digital musical recorder or from a transmission. Strictly construed, the Rio is not a DAR. And, since the Rio is not a DAR, it cannot be required to be equipped with SCMS. The RIAA’s cause of action was rejected\(^\text{119}\) and the door was opened for other companies to begin manufacturing and selling portable MP3 players. Thus, in its first major test, a statute attempting to prevent internet music piracy by means of technological barriers failed.\(^\text{120}\)

4. DMCA Enforcement Made Difficult By the Very Nature of MP3. Furthermore, even if the statutory language were to be made broad enough to cover devices such as the Rio, the change may be for naught if MP3 remains the standard for Internet music. While MP3 can be equipped with copyright protection devices,\(^\text{121}\) it has proliferated the Internet as an open format with no such standards. In the words of Judge Audrey B. Collins of the Central District of California, whose opinion in *RIAA v. Diamond* was affirmed in the Ninth Circuit opinion outlined above, forcing an MP3 player such as the Rio to use SCMS “accomplishes nothing. The Rio could not ‘act upon . . . copyright and generation status information’ [as required by the

\(^{119}\) *Id.*

\(^{120}\) While the first attempt to use the DMCA to protect copyright may have failed, another case currently brewing in the courts may prove more successful. In that case, the Motion Picture Association of America (MPAA) is in litigation with the distributors of DeCSS, a program that allows its users to circumvent the copyright measures in DVDs and make pirate copies of the movie disks. The MPAA claims a violation of the DMCA. Federal District Judge Lewis Kaplan granted a preliminary injunction against DeCSS. See Universal City Studios, Inc. et al. v. Reimerdes et al., 82 F. Supp. 2d 211, 53 U.S.P.Q.2d (BNA) 1780 (S.D.N.Y. 2000) (order granting preliminary injunction). “I think this serves as a wake-up call to anyone who contemplates stealing intellectual property,” MPAA president and CEO Jack Valenti said. “This ruling also means that when Congress passed the Digital Millennium Copyright Act in 1998, it gave the creative community a powerful tool to defend our rights.” *DVD Hackers Spanked* (visited Feb. 2000) [http://www.mp3.com/news/531.html?hpartide2]. While observers may be waiting a long while for the final ruling in this case, it may prove that under the right circumstances the DMCA does, in fact, have teeth.

\(^{121}\) See *Lyra Plays Secured MP3s* (visited Feb. 2000) [http://www.wired.com/news/technology/0,1282,31758,00.html] (explaining that a new MP3 player on the market is capable of reacting to SCMS protections if the MP3 file contains them).
MP3 piracy will continue as long as MP3 rippers, encoders, and players are available. This being the case, it seems there are only two possible ways to achieve the protection of copyright through technological copyright control measures. One solution would be the passage of legislation requiring all compression formats to be encryption-enabled. This would be analogous to the AHRA's requirement that all DARs be equipped with SCMS. Making the open format itself a violation would end the problem to which Judge Collins referred. Such legislation may enable courts to find that the MP3 standard itself is in violation of the Copyright Act's provisions protecting distribution and public performance. Then, music industry groups such as the RIAA would be able to bring action against developers and distributors of the MP3 format.

A second solution would be for the music industry to successfully promote a competing standard for Internet music, thus replacing MP3 with a more copyright-friendly compression standard. Several formats are already being used which do support watermark and encryption technology. RealNetworks, Liquid Audio, and a2b all support encryption and are being used by record labels in some of the first efforts to sell legitimate music over the Internet.

C. BUSINESS SOLUTIONS TO THE PIRACY PROBLEM

In addition to statutory and technological solutions, the music industry is looking within its own ranks to find answers to piracy problems. Several suggestions have been considered, but the main industry initiative to stop piracy at present revolves around the Secure Digital Music Initiative. With a combination of industry agreements and changes in their methods of business, the industry is attempting to protect its intellectual property from every angle.

1. The Secure Digital Music Initiative. In 1998, 150 music industry companies worldwide (including technology companies, consumer

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123 This would be similar to the Plaintiff's argument in the Napster suit, where the RIAA is attempting to call the very software of Napster a violation.

124 This issue is discussed further infra Part III.C, and Part IV.
electronics companies, and content providers) banded together to form the Secure Digital Music Initiative (SDMI). The SDMI is not a legislative fix, but rather a treaty of sorts representing the intent of the industry—indeed of legislation—to create a uniform standard for the technological securing of the Internet. The RIAA feels the initiative is necessary to ensure that the entire industry is following one uniform set of security guidelines. However, not everyone is convinced the SDMI is the best way to protect music. Robert Kohn, chairman of legitimate MP3 distributor emusic.com is concerned that technological copyright controls are “too easy to circumvent and... won’t work commercially.” He also worries that such controls will make digital music cumbersome and difficult to use. “There’s no consumer demand for something that inconveniences you.”

a. The Mechanics of the SDMI. Despite these fears, the recording industry has begun putting together the first critical pieces of the SDMI. The SDMI will be implemented in phases, the first of which will include a digital rights management (DRM) system. The DRM consists of three parts. First, a properly equipped personal computer will contain software for connecting to a digital “clearinghouse.” Second, the clearinghouse will distribute files, process transactions, issue copyrights, manage royalties, and handle the interaction between distributors and retailers. Finally, the DRM will provide software to read the encrypted, secured files downloaded from the clearinghouse. Rosen insists that this complex system of copyright management, when properly implemented, will be instantaneous and cause no inconvenience to music consumers. Others are skeptical. Jeremy Silver, Vice President of New Media at EMI, worries not only about consumer inconvenience but also about increased cost. He says that while many have hyped digital dissemination as a way of lowering music costs, the

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125 Holland, supra note 88.
128 Id.
129 Id.
130 Id. A number of companies, including Microsoft, InterTrust, Reciprocal, and NatWest’s Magex are offering software and services for the DRM, and several companies are also prepared to offer clearinghouse services.
131 Music Battle Takes to the Hill, supra note 127.
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SDMI actually puts more people between the artist and the consumers and "the more hands, the higher the cost." 132

b. Compatibility Concerns. Another concern about the SDMI is that various different products that meet the group's security requirements may not be compatible with each other. 133 Indeed, one problem with so many industries participating in one initiative is that each industry has its own definition of compatibility. 134 Another concern is that companies that did not participate in the SDMI remain free to develop their own security standards. And, while it is unlikely, if such a competing standard seems preferable to the SDMI, some member companies may abandon the initiative in its favor. 135 The threat of such splintering is a major concern. Chris Smith, the portable audio program manager at Creative Labs, explains "its not going to be that good of a user experience if Creative and Diamond and Thomson and Matsushita all choose different DRMs and different [audio compression formats] to implement . . . . And its not going to be a good experience if Universal, Warner, Sony, EMI and BMG all decide on different DRM systems and [audio compression formats]. It will be bedlam." 136 Leonardo Chiariglione, the executive director of the SDMI explains, "you may think that the record companies are a united front, but that's not true, because they are in competition among themselves . . . . So the first record company that understands the right way to do business out of this specification is going to have an advantage over its competitors." 137

2. Other Alternatives. Not everyone is convinced the SDMI is the best way to prevent piracy. "The SDMI was an attempt to take an existing business model and build traffic around it . . . . That never works," says industry attorney Ken Hertz, speaking of the initiative as though it were already dead. 138 Jim Griffin believes the best way to prevent piracy is to set up a system which takes the existing MP3 technology and finds a way to charge for downloads while making music "feel free." Griffin envisions a subscription model which would work a lot like network and cable

132 Gartner, supra note 24.
133 Jones, supra note 111.
134 Id.
135 Id.
136 Id.
137 Id.
television, where you turn on your TV at home and the shows "feel free" even though they are paid for by advertising or cable subscription fees.\textsuperscript{139} Whether by SDMI or one of these methods, it seems some sort of inter-industry cooperation will be necessary to combat piracy in the long run.

IV. IT'S THE END OF THE WORLD AS WE KNOW IT (AND THE RECORDING INDUSTRY FEELS APPREHENSIVE)

Even if the music industry wins the piracy war in the end, the Internet will still fundamentally change the business of music. An oft-quoted statement by Al Teller, founder of Internet music label Atomic Pop as well as the former Chairman of MCA Music and former President of Columbia Records, expresses the sentiments of many in the music industry.

I'll say it flatly. The current music industry paradigm, which has been in place a generation or so, is over. The forces are now at play that when you look at them, you know it's a model that is over. Whether it's over in a year or two, I can't predict, but the center can't hold. All the capabilities that the web has now provided and the technologies that utilize the web, such as MP3, have just made that model an impossible one to sustain from this point.\textsuperscript{140}

Despite the general acknowledgment that the Internet does herald a new age in the music industry, the industry is anxious to insist it is up to the challenge. "The record industry is not afraid of the Internet," insists Rosen. "We are not afraid of piracy. And I don't think the MP3 phenomenon has been a terrible thing."\textsuperscript{141} And, while the general atmosphere surrounding the Internet genuinely does not seem to be one of fear and loathing, the industry does not appear to welcome the coming changes with open arms, either.

\textsuperscript{139} Id.
\textsuperscript{141} Music Battle Takes to the Hill, supra note 127.
A. MERGERS AND ACQUISITIONS

A recent wave of corporate activity shows an industry bracing for incredible change in the near future. One extraordinary example is found in the recent merger of media giants Time Warner and America Online.142 Peter Dekom, a prominent entertainment attorney, states that “this merger is all about Warner Brothers throwing up its hands and recognizing that it has to change the way it sells music.”143 Indeed, Time Warner chairman Gerald Levin acknowledged that music was top on the list of reasons for the merger and entertainment analysts predict the merger indicates the intention of Time Warner to sell music en mass over the Internet in the very near future.144 Aram Sinnreich of Jupiter Communications says he expects to see Time Warner exploiting AOL’s direct connection to its 20 million consumers to market its albums online in much the same way AOL already sells other items.145 Other companies are bracing themselves for music e-commerce as well. A planned merger between Warner and EMI would reduce the Big Five to the Big Four.146 Furthermore, EMI has signed Liquid Audio to encode its massive catalog with an eye toward making it available for download in the future.147 Mail-order record club mainstay Columbia House and online music retailer CDNow are also planning a merger soon.148

B. CHANGES IN THE WAY THEY SELL MUSIC

The Internet is already changing the way music is sold. While mass digital dissemination sales are still in the future,149 the sale of music in tangible media is already changing. The success of online retailers such as CDNow and Amazon.com demonstrate the willingness of the public to purchase music online.150 Record labels are also setting up shop, potentially

143 Id.
144 Id.
145 Id.
146 David Segal, Big Record Labels Start to Like the Sound of Online Music, WASHINGTON POST, Jan. 30, 2000, at H1.
147 See Macavinta, supra note 54.
148 Id.
149 Craig Anderston, Musical Distribution: Caught in the Net, 8 No. 2 NARAS J. 67, 67 (1999).
150 Segal, supra note 146.
eliminating middlemen in music and lowering its cost to consumers. Finally, when digital dissemination sales do become commonplace, the result could radically revolutionize the music industry.

1. **Tangible Media.** While mass purchasing of hit songs through digital dissemination is likely still a few years away, the Internet is already having a huge impact on the way music is sold in tangible media. In addition to the phenomenal success of online retailers, the major record labels are selling albums on their websites, avoiding middlemen and acting as retailers themselves. Warner Music Group was the first of the major labels to do this, debuting its Web store in 1996 to sell CDs directly to consumers over the Internet. Since the debut of the Warner store on the Web several other major music companies have opened their own Web shops or expressed strong intent to do so in the near future. However, the labels sell directly to customers at the risk of potentially upsetting the traditional brick-and-mortar retail outlets—likely to remain the main source of revenue for the labels for quite some time. Already, the National Association of Recording Merchandisers (NARM) has filed suit against Sony Music Entertainment alleging unfair competition. The group claims that Sony is using unfair competition and price discrimination to force traditional retailers to stock Sony CDs that contain Web links to Sony’s e-commerce sites. NARM President Pamela Horovitz explains, “In the case of the most recent Ricky Martin CD, for example, the retailers were never told that it has a link to a Ricky Martin website that allows the consumer to buy products from that site, but when you go to that site, it’s Sony Music’s store.” The complaint also claims that Sony plans to use its market position to push consumers towards buying CDs and digital downloads from the company to be formed by the Columbia House/CDNow merger—a company in which Sony and Time Warner will each own a 37% stake—and that Sony is charging other

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152 See id. at 19 (the suggested business model for digitally disseminating the music files of the major labels calls for digitizing and disseminating short clips of current singles and full length b-sides first, as a test case, and then digitizing hit songs at some point in the future after the effects of digital dissemination are clearer).

153 Id. at 20.

154 Id.

155 Macavinta, *supra* note 54.

156 Id.
Internet music retailers higher wholesale prices than it charges CDNow. Horovitz says, "[w]e don't object to a supplier wanting to be a competitor but to the practices it uses to get into the market-place." Certainly the record labels will want to handle this situation delicately and, for the time being, protect their relationship with retailers.

2. Digital Dissemination. In shifting towards digital dissemination of music over the Internet, record labels will encounter many of the same problems encountered in the direct sell of tangible media music. Beyond piracy, the first, and perhaps foremost concern is that of keeping traditional retailers as happy as possible. In 1997 Capitol Records performed one of the first major experiments in direct digital dissemination over the Internet. They sold an Internet-only re-mix of Duran Duran's single "Electric Barbarella" by means of Liquid Audio technology. The traditional retailers were not amused and many refused to stock the Duran Duran album in protest. Despite this, several major labels, including MCA, Polygram, Atlantic, and Virgin, have already experimented with selling singles over the Internet. Yet, at the moment, digital dissemination is mostly in the realm of Internet indie labels.

The major labels are intent on pushing the idea that digital downloading will actually be good for traditional retailers. While selling whole albums over the Internet is likely still a while away, the labels hope that they can sell digital downloads of singles soon, as a largely profitless promotional tool. Industry observer Anderton explains, "[i]n the past, AM radio . . . and the 45RPM single both allowed people to find out what kind of music they liked . . . When listeners wanted 'the real thing,' they went out and bought an LP." He believes that with changes in radio format and the extinction of 45s, the Internet may be the best way for people to explore music. The hope is that once the digitally disseminated single impresses a consumer, he will then want to buy the entire album.

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157 Id.
158 Id.
159 Atwood, supra note 151, at 27.
160 See id. at 25.
161 See id. at 22 (Singles have long been a profitless promotional tool—usually sold at a loss in the hopes of promoting an album. At the moment, the price of an Internet single generally ranges from $0.99 to $2.00).
162 Anderton, supra note 149, at 68.
163 Id. at 68-69.
Others do not share the view that the digital download of a single will be an effective promotional tool and, instead, see such downloads as a major industry paradigm shift. Dekom says, "[w]e're going back to the 1950s, when songs were sold individually on 45s." Microsoft chairman and computer-industry visionary Bill Gates shares this view. Gates predicts that within five years we will begin to see the death of albums as consumers cease to build record collections and instead purchase and download only the singles they want. While such a proposition obviously frightens traditional retailers, some consumers like the idea and already use this philosophy to justify piracy activities. One MP3 enthusiast explains, "I don't think it's worth buying a CD with 12 songs just to hear the one that you like."

However, the shift from album sales to single sales could be very harmful to artists in several ways. First, the artist makes far less from the sale of a single than from the sale of an album. "The difference between selling albums and singles," Griffin says, "can be the difference between working as an artist, or tending tables as a waiter." Furthermore, such a shift in focus could be very damaging to serious artists who view their albums not as a mere collection of independent songs but as a singular artistic work. For example, one can only imagine how different popular music would be today if The Beatles’ groundbreaking classic *Sgt. Pepper’s Lonely Hearts Club Band* had been released as a collection of individual singles rather than as an album. Certainly, the work’s impact would have been very different and presumably much less significant.

Finally, labels will have to answer the question of whether or not consumers even want digital dissemination. Like so much else in the Internet music debate, the answer depends on who you ask. Paul Vidich of Warner Music insists, "[c]omputers crash, and, based on our research, consumers have a fundamental need to know they own something more permanent." However, other research suggests that people—especially young people—don't care much whether they own tangible copies of the music they enjoy.

164 A Music Industry Death Knell?, supra note 142.
165 See Larry King Weekend (CNN television broadcast, Jan. 1, 2000) (Bill Gates, guest).
166 Jones, supra note 25.
167 Griffin, supra note 4, at 65.
168 Segal, supra note 146.
169 See Atwood, supra note 151, at 28, 29 (discussing the future of CDs and cassette tapes.).
C. CHANGES IN THE MARKETING OF MUSIC

Whether or not the digital dissemination of music is used as a promotional tool, the Internet will undoubtedly change the way music is promoted. Prior to the advent of the Internet, labels had no cost efficient way to directly communicate with music consumers. Now, however, there are many new ways to increase communication with fans. For example, a fan can register her email address with the official website of her favorite band. The band’s label can then email her updates about the band’s latest projects or invite her to participate in online focus group discussions designed to track consumer tastes and trends. Another new promotional tool is the Internet chat with artists. In these chats, fans are given the opportunity to submit questions directly to their favorite artist. These events have proven very popular and a video chat with rock artist Marilyn Manson broke an all-time record for simultaneous Internet viewers, with over 10,000 fans tuning in for the event.

D. NEW PATHS TO STARDOM

In addition to changing the way labels promote their artists, the Internet is making a major change in the way artists promote themselves and get their music to the public.

1. The Emergence of the Internet Label. The Internet may very well mean an artist who could not get a record company’s attention can now establish a presence in the marketplace. Several Internet indie labels have enjoyed a good deal of success. Artist Ani DiFranco, for example, established her own record label, promoted her album on the Internet, and went to number twenty-two on a Billboard chart without the backing of a major label. Another artist, Jonatha Brooke, established an Internet indie label after she was dropped by MCA. Marketing strictly over the Internet, she shipped 30,000 copies of her album to fans that logged onto her website, liked the samples she posted there, and purchased the album. Major artists,
including Prince, have also experimented with—and experienced great success with—Web promotion and distribution.175

2. Direct to the Audience by Digital Dissemination. The new technologies are being used in other ways, too. Most notable is the activity taking place at unsigned band hubs, such as MP3.com. At that site, unsigned bands post sample tracks in MP3 format that music enthusiasts can download for free.176 The site also boasts an online record label which makes and markets physical CDs.177 Ideally, fans will listen to the free samples and then buy a CD of the artist's songs manufactured by MP3.com. At the time of this writing, such a CD costs $10 and the proceeds are split 50/50 between the artist and MP3.com.178 While the profit per CD is far greater than in a traditional artist contract, the volume of sale is notoriously low. One band featured at MP3.com had its single downloaded as many as 500 times daily, yet sold only 15 CDs.179 “Prince may have sold 2 million albums on-line,” Dave Del Beccaro, CEO of Music Choice notes, “but he had to do it releasing albums the traditional way first.”180

However, it should also be realized that most bands see the MP3.com distribution model as a means to an end rather than the answer to their ambitions. “[W]e saw this as a promotional tool,” says Steven Baca, a member of the band Red Delicious.181 Their success at MP3.com has led to calls from several major labels and the honor of playing their first-ever show as the opening act for rock legend Tom Petty.182 Success at MP3.com gives artists the opportunity to demonstrate to labels that they have a ready-made following and the ability to generate buzz. Thus, MP3.com is looking less like a way to avoid the hassles of finding label support and more like a major-label farm team.

175 Anderson, supra note 149, at 71.
177 Id.
178 Segal, supra note 146.
179 Sullivan, supra note 176; It should also be noted that such dismal sales resulting from rather impressive downloads may very well confirm the fears of many that singles posted by major labels will not inspire fans to then buy the entire album.
181 Segal, supra note 146.
182 Sullivan, supra note 176.
3. The Continuing Value of Label Affiliation. Not everyone is as enthusiastic about the ability of MP3.com to draw attention to their efforts because MP3.com does little to promote its artists. One such artist, Glen Rubenstein, complains “[i]t’s like being on a label with 10,000 labelmates, and all vying for the attention of the label.” Indeed, this is exactly one of the reasons labels will continue to be the desired path for artists in the digital age. “Just because you can distribute your music online doesn’t mean people will want to hear it,” explained David Goldberg, CEO of Launch.com. Indeed, one of the major functions of the labels is to serve as a “value-adder” and “taste-maker.” The labels deploy armies of talent scouts to sift through the flood of available music, saving consumers from the task of wading through the 56,000 songs from 11,000 artists featured on MP3.com to find the handful they like. “Dying for a song by MaD DoLL or Stuck on Amber or SofaWide?” the Washington Post asks. “Unless you’ve got plenty of spare time, how would you know?” Del Beccaro states, “MP3 hasn’t broken an act yet, and I don’t think it ever will.” At present, only the major labels have the capability to launch a major promotional campaign or offer other support such as funding videos or sending a band on tour. Because these are the things that make up rock n’ roll fantasies, the end goal of most artists is still and will continue to be to sign with a major label.

E. CHANGES IN ARTIST’S CONTRACTS

And, if the goal remains to be signed with a major label, the artists may find themselves signing contracts far different from those signed by their pre-Internet counterparts. The new technologies may mean drastic differences in artist contracts, including different royalty calculations, shorter contract duration, and changing artist control over their work. Liz Heller, a former Capitol Records Executive Vice President, says “artists have started to change the nature of [contract] renegotiations.” This is undoubtedly necessary since the language of form contracts of the past could leave artists in a very unfavorable position in the digital age. For example, at present, a typical
recording agreement only gives artists the top-line royalty rate for “sales through normal retail channels of the United States.” If such language is interpreted so that Internet sales do not constitute sales “through normal retail channels,” an artist could receive a royalty that is between 50% and 85% of the royalty that would have been received if the same CD had been purchased in a brick-and-mortar record store. However, such an unfortunate result for artists is not likely to prevail. Hilary Rosen predicts that in the digital age “the artist will have more leverage. There will be more places to go.” Of course, the verdict is still out on who will benefit from new contract terms. Heller adds, “the fear of what they [artists] might be giving away is huge—because they just don’t know.”

V. CONCLUSION

Without doubt, the Internet is changing the music industry. A new wave of piracy is the first and most visible way in which the industry is being transformed, though a thoughtful combination of statutory law, new technological controls for copyright, and cooperation within the industry will likely beat out Cyberpirates in the end. And, even if piracy is held back, the Internet will change the way music is sold and promoted as well as the way artists promote themselves. Yet, as we keep our gaze focused on an uncertain future, anticipating and bracing for some of the greatest changes the music industry and our society have ever faced, it is important to keep one’s perspective. In the words of a record executive who wished to remain anonymous, “I’m f—ing sick of talking about it. A strong hook and catchy lyrics mean more than any of this, and they always will.”

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189 See generally Bobby Rosenbloum, Sorting Through the Confusion, 21 No. 6 ENT. L. REP. 4 (1999) (an excellent study of the contractual problems faced by artists and labels in navigating the new digital age).
190 Gillen & Jeffrey, supra note 188.
191 Id.