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Steven Masur

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COLLECTIVE RIGHTS LICENSING FOR INTERNET  
DOWNLOADS AND STREAMS: WOULD IT  
PROPERLY COMPENSATE RIGHTS  
HOLDERS?

STEVEN MASUR\*

I. INTRODUCTION

The law and business of media distribution in the United States (“U.S.”) developed in a world in which media was distributed using technologies tightly controlled by a value chain of rights’ holders and distributors.<sup>1</sup> Advances in digital distribution technologies and widespread use of the Internet have moved media distribution technology directly into the hands of consumers and made it inexpensive and nearly instantaneous for creative members of the general public.<sup>2</sup> This sea of change calls for an examination of how U.S. copyright law applies to new business models in a new era. Empirically, threatening infringers with the stick of civil and criminal sanctions has not significantly reduced the illegal downloading or use of media from the Internet.<sup>3</sup> Neither have digital rights management systems, nor the wide variety of offerings that encourage consumers to access content legally. Perhaps the carrot that will wean people off illegal downloads is something that “feels free,” with the cost worked into the costs of other goods and services, like the performance right that allows customers of bars and

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\* Steven Masur is a Senior Partner at MasurLaw, a business and entertainment law firm best known for its pioneering work with new technologies. More information about MasurLaw can be found at [www.masurlaw.com](http://www.masurlaw.com). Steve would like to thank Cynthia Katz, Tyler Mazey, Chris Lieber, Ema Takeda, Michelle Quinn and Jonathan Lutzky for their valuable contributions to this piece.

1. See generally *Roles of Today's Media Value-Chain Players* (The Digital Media Project, Working Paper No. 0074r02/Los Angeles, 2004), available at [open.dmpf.org/dmp0074.doc](http://open.dmpf.org/dmp0074.doc) (delineating some key players and their functions in media value chain).

2. See, e.g., *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUND (Apr. 2008), <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing> [hereinafter *A Better Way*] (discussing problem of peer-to-peer file sharing, benefits stemming from that technological revolution and possible solution to fact that artists and copyright holders need to be compensated for their work).

3. See David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, WIRED (Sept. 2008, 2:55 PM), <http://www.wired.com/threatlevel/2008/09/proving-file-sh/> (discussing failed attempts to reduce file sharing of pirated music despite tactics of RIAA to make costs extremely high for getting caught with file sharing account).

restaurants to listen to music for free. One proposed solution that has garnered a significant amount of attention in the U.S. is collective rights licensing at the Internet service provider (“ISP”) level.<sup>4</sup> In short, a fee for using and sharing media accessed on the Internet could be applied at the point of access, the ISP.<sup>5</sup> Could ISP licensing be the solution to Internet “piracy”?

Since the early days of media distribution on the Internet, a wide variety of individuals and industry groups have suggested collective compensation schemes to compensate rights holders for content accessed on the Internet.<sup>6</sup> The Electronic Frontier Foundation (“EFF”) has been a proponent as early as 2003.<sup>7</sup> Groups such as Choruss are currently attempting to get the idea rolling by working with U.S. universities and building a small music-royalty fee into tuition payments in order to legalize music swapping through file sharing.<sup>8</sup> Around the world, other countries are experimenting with “three strikes you’re out” laws, and other compulsory rights licensing systems, to stem the tide of illegal downloads within their borders.<sup>9</sup> For example, under HADOPI 2, France’s controversial new three strikes law, an internet user caught downloading illegal content three times would lose the right to access internet services

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4. See Sam Gustin, *Music Outlaws, There’s a New Sheriff in Town*, WIRED (Mar. 27, 2008), [http://www.wired.com/entertainment/music/news/2008/03/portfolio\\_0327](http://www.wired.com/entertainment/music/news/2008/03/portfolio_0327) (delineating proposal in which users would pay monthly fee as part of their internet service bill to have access to music database thereby giving people access to music while simultaneously paying money due to artists and copyright holders).

5. See *id.* (“Consumers will pay a monthly fee, bundled into an internet service bill in exchange for unfettered access to a database of all known music.”).

6. See, e.g., *Electronic Frontier Foundation Releases File Sharing Recommendations*, ELECTRONIC FRONTIER FOUND (Feb. 24, 2004), [http://w2.eff.org/share/20040224\\_eff\\_pr.php](http://w2.eff.org/share/20040224_eff_pr.php) (portraying Electronic Frontier Foundation favours voluntary collective licensing as solution to “music file-sharing controversy”).

7. See *A Better Way*, *supra* note 2 (delineating specifics of voluntary collective licensing proposal whereby listeners would pay subscription fee to gain access to music database and artists and copyright holders would therefore be fairly compensated).

8. See Eliot Van Burskirk, *Three Major Record Labels Join the ‘Choruss’*, WIRED (Dec. 8, 2008, 8:55 AM), <http://www.wired.com/epicenter/2008/12/warner-music-gr/> (describing Choruss’ file-sharing plan whereby universities would use some tuition money to subscribe to Choruss’ database which gives students ability to “continue downloading [music] as they have been. . .without fear of legal reprisal”); see also Fred von Lohmann, *More on Choruss, Pro and Con*, ELECTRONIC FRONTIER FOUND (Mar. 20, 2009), <http://eff.org/deeplinks/2009/03/more-choruss-pro-and-con> (entailing overview of Choruss).

9. See MASURLAW, STEVE MASUR, *COLLECTIVE LICENSING AT THE ISP LEVEL* 124-220 (IAEL International Entertainment Law Series) (2010) (discussing the “three strikes laws” of various countries or areas including Korea, Singapore, European Union, France, Sweden and United Kingdom).

from home, subject only to French due process requirements.<sup>10</sup> Furthermore, the idea of ISP Licensing is starting to gain traction even in the recording industry, with Warner Music Group leading the way as well as EMI Music and Universal Music Group open to the concept, if properly executed.<sup>11</sup>

While there have been many proposals for collective rights licensing schemes, most proposals fall into two camps: a new legislatively introduced public right; or a privately implemented opt-in arrangement.<sup>12</sup> Under the former, the government-mandated public right is collected as a payment on a user's ISP or mobile phone bill and distributed through a third party organization to rights holders.<sup>13</sup> Under the latter, rights holders sign a covenant not to sue any user who opts-in to pay licensing fees for content which is accessed by that user.<sup>14</sup>

Many people in the media business have given their opinion about whether either of these proposals is a good idea.<sup>15</sup> Very few, however, have discussed how the proposal would actually work under United States law. This article reviews the historical underpinnings of collective and mandatory collective rights licensing schemes, and discusses the legal and practical problems associated with implementing any collective licensing scheme at the ISP level in the United States.

## II. CURRENT US LAW AND PRACTICE

Article I, Section 8, Clause 8 of the U.S. Constitution, known as the Intellectual Property Clause, provides the basis for U.S. copyright law in the U.S.<sup>16</sup> This provision gives Congress the power to

10. See *id.* at 154-210 (discussing France's three strikes law, HADOPI 2).

11. See *A Better Way*, *supra* note 2 (discussing growing popularity of ISP licensing).

12. See Steven Masur, *Collective Rights Licensing at the ISP Level: A Worldwide Survey of the Law of Collective Rights Licensing*, INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, <http://collectiverights.org/> (last visited Oct. 26, 2010) (discussing two proposals for collective rights licensing schemes).

13. See *id.* ("The first approach is a government-mandated public right to collect money at the ISP level to be distributed to rights holders to compensate for free internet media consumption."). For a further discussion of this approach, see *infra* notes 36-42 and accompanying text.

14. See *id.* ("The second approach is a voluntary system in which rights holders would sign a covenant not to sue for copyright infringement for file or stream sharing any individual user who opts-in to pay licensing fees for content they access on the internet."). For a further discussion of this approach, see *infra* notes 118-149 and accompanying text.

15. See, e.g., Lohmann, *supra* note 8 (providing opinion on Chorus).

16. See U.S. Const. art. I, § 8, cl. 8 [hereinafter *Intellectual Property Clause*] ("To promote the Progress of Science and useful Arts, by securing for limited Times to

grant creators of original works exclusive rights in relation to their works for a limited period of time.<sup>17</sup> In 1788, in *The Federalist Papers*, James Madison wrote that the utility of Congress's copyright authority will "scarcely be questioned."<sup>18</sup> U.S. copyright law seeks to incentivize artists, authors, musicians, artisans and other creators by granting them this limited monopoly.<sup>19</sup> The Copyright Act of 1976, Title 17 of the U.S. Code, is the current federal statute governing U.S. copyright law.<sup>20</sup> The Act protects original works of authorship fixed in tangible media of expression and affords copyright owners a distinctive bundle of rights to control and financially benefit from the exploitation of their works.<sup>21</sup> In particular, Section 106 of the Act imparts on all copyright proprietors the exclusive right to reproduce and adapt their works; "in the case of literary, musical, dramatic and choreographic works, pantomimes and motion pictures and other audiovisual works, to perform and display their works;" and "in the case of sound recordings, to perform their works publicly by means of a digital audio transmission."<sup>22</sup> When Internet users stream, download, upload and otherwise share copyrighted content over the Internet without permission from the rights holders, these users are reproducing, displaying and/or publicly performing others' works. Under Section 501 of the Act, this constitutes copyright infringement.<sup>23</sup>

Even though this qualifies as copyright infringement, millions of users have seized the opportunities that digital technology provides to obtain and share creative works without permission.<sup>24</sup>

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Authors and Inventors the *exclusive Right to their respective Writings and Discoveries*") (emphasis added).

17. *See id.* (granting exclusive rights to authors and inventors over their works).

18. THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

19. *See Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RESEARCH LIBRARIES, <http://www.arl.org/pp/ppcopyright/copyresources/copy-timeline.shtml> (last visited Oct. 26, 2010) (providing timeline of U.S. copyright protection, including goal of each copyright act).

20. Copyright Act, 17 U.S.C.A. §§ 101-1332 (West 1976) (detailing current law regarding copyright protection).

21. *See* 17 U.S.C.A. § 102 (West 1976) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

22. 17 U.S.C.A. §106(5)-(6) (West 2002).

23. 17 U.S.C.A. §501 (West 2002) (delineating violations which shall constitute copyright infringement).

24. *See* David Kravets, *RIAA Thomas Appeal Denied; Retrial Likely to Set New Copyright Infringement Course*, WIRED (Dec. 28, 2008, 10:36 PM) <http://www.wired.com/>

Sharing copyrighted material that has not been paid for on the internet has become a mainstream pursuit.<sup>25</sup> The vast majority, ninety percent (90%) or more, of peer-to-peer (P2P) file transfers are in violation of copyright laws and threaten the viability of U.S. businesses with business models that depend upon copyright protection.<sup>26</sup> The collateral damage from digital piracy includes: the suppression of overall economic growth, the thwarting of innovation, an onslaught of litigation and a dramatic reduction in sales for record and motion picture companies that many believe is the direct result of file sharing.<sup>27</sup> For example, the movie, *Batman: The Dark Knight*, was reportedly illegally downloaded more than seven million times within a couple months of its release, despite Warner Brothers' aggressive anti-piracy campaign.<sup>28</sup> While debatable whether the downloads are the result of file sharing alone, there is no doubt that recent losses in the entertainment industry have caused significant harm to the overall U.S. economy.<sup>29</sup> U.S. industries that rely heavily on copyright protection to generate revenue are among "the most important growth drivers of the U.S. economy, contributing nearly 40% of the growth achieved by all U.S. private industry and nearly 60% of the growth of [the total US] U.S. exportable products."<sup>30</sup> Thus, "it has been reported that roughly 40% of U.S. Gross Domestic Product ("GDP") is affected by the in-

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threatle-vel/20-08/12/judge-denies-ri/ (noting thirty million people sued for sharing copyrighted media online).

25. See *Piracy: Online and on the Street*, RECORDING INDUS. ASS'N OF AMERICA, <http://ww-w.riaa.com/physicalpiracy.php> (last visited Oct. 12, 2010) (delineating consequences of music theft or piracy).

26. See Richard Cotton & Margaret L. Tobey, *Reply Comments of NBC Universal, Inc. In the Matter of re Broadband Industry Practices*, at 1 (WC Docket No. 07-52 (FCC Feb. 28, 2008)), available at [www.ncta.com/DocumentBinary.aspx?id=713](http://www.ncta.com/DocumentBinary.aspx?id=713) [hereinafter *Broadband Industry Matter*] ("The record compiled in this proceeding confirms that fewer than five percent of Internet users consume at least 60 to 70 percent of broadband network capacity through peer-to-peer file-sharing and that some 90 percent of this traffic consists of illegal, pirated content.").

27. See *id.* (describing some consequences of illegal peer-to-peer file sharing).

28. See Brian Stelter & Brad Stone, *Digital Pirates Winning Battle with Major Hollywood Studios*, N.Y. TIMES, Feb. 5, 2009, at A1 (stating Warner Brothers' anti-piracy campaign failed as evidenced by fact that illegal copies of movie had been downloaded more than seven million times by year end).

29. See *Broadband Industry Matter*, *supra* note 26 (noting effect on US economy is staggering).

30. Stephen E. Siwek, *The True Cost of Motion Picture Piracy to the U.S. Economy*, INST. FOR POLICY INNOVATION, 4 (Sept. 20, 2006), <http://www.ipi.org> (follow "Publications" hyperlink; then follow "by Date" hyperlink; then follow "2006" hyperlink; then follow "The True Cost of Motion Picture Piracy to the U.S. Economy" hyperlink; then follow "Full Text PDF" hyperlink).

adequate protection of intellectual property, and U.S. losses due to piracy are staggering.”<sup>31</sup>

Documenting the mass and volume of infringement taking place on the Internet and seeking legal recourse against culpable individuals has proven overwhelmingly costly and time consuming.<sup>32</sup> For example, the Recording Industry Association of America (RIAA) has sued more than 30,000 individuals in the past five years.<sup>33</sup> Most of these cases have resulted in settlements, and this strategy has done nothing to stem the tide of uncompensated use of copyrighted works on the Internet.<sup>34</sup> Further, efforts towards pursuing infringers have led to a backlash and consumer criticism, while still not making a significant dent in the amount of piracy.<sup>35</sup> In the digital era, the ubiquity and worldwide scope of electronic distribution networks, the ease and speed of technologically assisted reproduction, and the overall financial stakes involved have increased both the complexity of and the necessity for effective management of copyrights in sound recordings and other forms of intellectual property.

### III. GOVERNMENT-MANDATED PUBLIC RIGHT

#### A. Overview

As a possible solution to the problems associated with digital piracy, government-mandated collective rights licensing is being espoused by a wide range of proponents.<sup>36</sup> It is difficult to lump the

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31. Press Release, *Record Industry Association of America, RIAA Comments on U.S. Trade Rep's Special 301 Report Highlighting Piracy Issues in Key International Markets*, INDUS. ASS'N OF AMERICA (Apr. 5, 2008), [http://www.riaa.com/news\\_room.php?news\\_m-onth\\_filter=4&ne-ws\\_year\\_filter=2008](http://www.riaa.com/news_room.php?news_m-onth_filter=4&ne-ws_year_filter=2008) [hereinafter *RIAA Comments*] (follow “RIAA Comments on U.S. Trade Rep’s Special 301 Report Highlighting Piracy Issues in Key International Markets” hyperlink).

32. See, e.g., Debra Cassens Weiss, *\$17M for Legal Fees Is Money Well Spent*, *RIAA Says*, ABA JOURNAL (July 29, 2010), [http://www.abajournal.com/news/article/17m\\_for\\_le-gal\\_fees\\_is\\_money\\_well\\_spent\\_riaa\\_says/](http://www.abajournal.com/news/article/17m_for_le-gal_fees_is_money_well_spent_riaa_says/) (stating Recording Industry Association of America spent more than \$17 million in legal fees in 2008 for suits against copyright infringers).

33. See Kravets, *supra* note 24 (stating Recording Industry Association of America has sued more than 30,000 people for making copyrighted material available online).

34. See Gustin, *supra* note 4 (“In the last year, the Recording Association of America, the industry group that represents the major labels, has sent 5,400 threatening letters to students at more than 150 schools, and reached settlements with more than 2,300 them.”).

35. See, e.g., *Piracy: Online and on the Street*, *supra* note 25 (providing statistics regarding huge economic effect of copyright infringement despite RIAA’s aggressive litigation against such infringers).

36. See Masur, *supra* note 12 (“Although there have been many proposals for how to implement a collective licensing system, most people gravitate to two basic

various proposals into one set of arguments, but generally speaking, the proponents of a government-mandated right contend that the market cannot solve this problem on its own, and the government needs to step in.<sup>37</sup> They argue further that Congress should amend the copyright laws to create a right to collect reasonable fees from all Internet users at their point of access, in exchange for the ability to consume music and other copyrighted intellectual property on the Internet.<sup>38</sup> The most publicized model would require all U.S. ISPs and university networks to add a fee (figures around five U.S. dollars are being proposed) to their usual charges and funnel the money collected to one or more existing or newly-formed Collective Rights Organizations (CROs).<sup>39</sup> In order to collect their portion of the fee, artists and other rights holders would be required to join a CRO, and each CRO would be responsible for distributing the proceeds received from the ISPs among its members based upon a formula reflecting the value of the works or the number of times the works are exploited by Internet users.<sup>40</sup> The ISP's role in collecting fees would be to warrant retention of a small percentage of the fees collected to be used for investment in network capacity and to pay for up-to-date content identification and monitoring technologies.<sup>41</sup> According to some, the fees collected would "cre-

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approaches. The first approach is a government-mandated public right to collect money at the ISP level to be distributed to rights holders to compensate for free internet media consumption.”).

37. See *RIAA Comments*, *supra* note 31 (stating that both U.S. and foreign governments need to become involved in regulating copyright infringement and piracy).

38. See Gustin, *supra* note 4 (describing Warner Music Group's proposal in which users would pay monthly fee as part of their internet service bill to have access to music database).

39. See *id.* (“Warner’s plan would have consumers pay an additional fee – maybe \$5 a month – bundled into their monthly Internet access bill in exchange for the right to freely download, upload, copy, and share music without restrictions.”).

40. See Frank Rose, *Music Industry Proposes a Piracy Surcharge on ISPs* (Mar. 13, 2008), [http://www.wired.com/entertainment/music/news/2008/03/music\\_levy](http://www.wired.com/entertainment/music/news/2008/03/music_levy) (stating monthly fees would create pool from which artists and copyright holders whose music is part of database would be paid); see also Masur, *supra* note 12.

The basic idea is that a fee for use and sharing of media accessed on the internet should be applied at the point of access, the mobile or internet service provider, or ISP. The money collected would be distributed to the rights holders who own and have the right to license the media accessed on the internet.

*Id.*

41. See *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776, 780 (D.N.J. 1923), noted in Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations* 17-18 (UC Berkeley Pub. Law Research Paper No. 1266870, 2008), [http://papers.ssr-n.com/sol3/papers.cfm?abstract\\_id=1266870](http://papers.ssr-n.com/sol3/papers.cfm?abstract_id=1266870) (follow “One-Click



ate a pool as large as \$20 billion annually to pay artists and copyright holders.”<sup>42</sup>

### B. Previously Established Collective Rights Licensing Regimes

In evaluating how a new mandatory collective right might work, it is useful to look at where previous mandatory rights licensing has been applied, and why.<sup>43</sup> According to Warner Music Group executive, Jim Griffin, “[c]ollective licensing is what people do when they lose control, or when control is no longer practical or efficient.”<sup>44</sup> Music composition copyright holders and songwriters faced a similar loss of control over exploitation of their works in the early 1900s, which prompted Congress to institute a mandatory collective rights licensing regime to protect their works.<sup>45</sup> Implementation of a government-mandated public right related to use of music on the internet is similar to collective licensing of musical compositions and the administrative functions of the performance rights organizations (PROs) that currently collect and distribute performance royalties. In 1897 an exclusive right of public performance was established for songwriters through the U.S. Copyright Act.<sup>46</sup> Despite this revision, songwriters and composers did not have the resources or an efficient method to enforce and protect their right of public performance.<sup>47</sup> Although licensing agreements were obtainable, it was impractical and almost impossible for the owners of bars, restaurants, hotels and other enterprises to seek out the rights holders of every musical composition played on any

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Download” hyperlink) (using small percentage of fees use for investment payments).

42. Gustin, *supra* note 4.

43. *See id.* (discussing collective licensing)

44. *Id.*

45. *See* MEG HARGREAVES, THE DIGITAL MILLENIUM COPYRIGHT ACT 17-19 (Supp. 2005) (demonstrating loss of control copyright holders suffered in early 1990s). For example, in the early 1990s, innovative technological advances enabled copying, sharing and storing digital music files to become inexpensive and accessible. *See id.* at 17 (explaining how copyright holders began losing control as coping, sharing and storing music files became easier). With the advent of peer-to-peer sharing networks, as well as, increased computer processing power and storage capacity, song-writers and copyright holders were unable to effectively police unauthorized use of their intellectual property. *See id.* at 17-18 (noting technological advances that enabled greater unauthorized use of music).

46. *See* Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 408, 415 (2008) (establishing public performance right for songwriters through 17 U.S.C. §106).

47. *See* Conley, *supra* note 46 at 414 (discussing limited resources or lack of efficient methods to enforce and protect their rights of public performance).

given night or day.<sup>48</sup> PROs were needed for efficiency and practicality.<sup>49</sup> The American Society of Composers, Authors and Publishers (ASCAP) was the first PRO in the U.S.<sup>50</sup> Through the ASCAP, blanket licenses were granted to establishments and services operating for profit and playing music under authorization of the ASCAP's member songwriters and publishers.<sup>51</sup>

In 1923, a landmark decision for performance rights was handed down by the District Court of New Jersey; the court held "that songs played during radio broadcasts were played for profit and required a license from the rights holder of the song."<sup>52</sup> According to Neil Conley, "[i]n 1926, the advent of coast-to-coast radio networks created an incredible source of revenue for songwriters" and music publishers.<sup>53</sup> "However, negotiations between radio broadcasters and ASCAP regarding licensing rates became more and more difficult as the years passed."<sup>54</sup> In 1940, to combat these difficulties in negotiations with ASCAP, a number of broadcasters of major radio networks and about 500 independent radio stations created a second PRO, Broadcast Music Inc. (BMI).<sup>55</sup> Paul Heineke, a European music publisher, established in 1931 the third PRO in the US, Society of European Stage Authors and Composers (SESAC).<sup>56</sup> Currently, ASCAP and BMI represent most

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48. *See id.* (pointing out difficulty and impracticability of obtaining licensing agreements at every public venue).

49. *See id.* at 414-15 (mentioning PROs).

50. *See id.* at 416 (discussing American Society of Composers, Authors, and Publishers (ASCAP) as first PRO in United States).

51. *See id.* (discussing ASCAP).

52. *Id.* (citing *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776, 780 (D.N.J. 1923)). *M. Witmark & Sons* was landmark case for performance rights since radios were now required to get licenses from rights holders in order to play songs during broadcasts. *See M. Witmark & Sons*, 291 F. 776 at 780 (noting influence of radios in performance rights).

53. Conley, *supra* note 46 at 416.

54. *Id.*

55. *See id.* at 416-17 (detailing reasons for formation of Broadcast Music, Inc.); *see also Tradition, BROADCAST MUSIC, INC.*, <http://www.bmi.com/about/entry/533105> (last visited Oct. 25, 2010) ("BMI was founded by radio executives to provide competition in the field of performing rights, to assure royalty payments to writers and publishers of music not represented by the existing performing right organization and to provide an alternative source of licensing for all music users.").

56. *See* Conley, *supra* note 46 at 417 (discussing SESAC); *see also About SESAC, SESAC.COM*, <http://www.sesac.com/About/History.aspx> (last visited Oct. 25, 2010) [hereinafter *About SESAC*] (explaining origin and history of SESAC).

songwriters and music publishers while SESAC licenses around one percent (1%) of all performance rights in the U.S.<sup>57</sup>

Conley explains that “[m]usic publishers, through an agreement, grant to the [PRO] the right to license all of the songs controlled by the music publisher.”<sup>58</sup> “A [PRO]’s repertoire is the [PRO]’s entire collection of songs from the thousands of songwriters and music publishers that have entered into agreements with the [PRO].”<sup>59</sup> As a result, in the U.S., any user of publicly performed music— be it a theatre, hotel, restaurant, club, bar or a radio station— must pay to the PROs an annual fee for a blanket license for the unlimited public performance of any or all of the songs in each PRO’s repertoire.<sup>60</sup> After calculating how frequently each song is played, the PROs collect royalties from these licenses accordingly and pay out to publishers and songwriters their shares.<sup>61</sup> The PRO pays the publisher’s share (50%) directly to the publisher and the songwriter’s share (50%) directly to the songwriter.<sup>62</sup> The most recently created compulsory right is the performance right in sound recordings in some kinds of digital media created by the Digital Performance in Sound Recordings Act of 1995<sup>63</sup> and the Digital Millennium Copyright Act of 1998.<sup>64</sup> This right requires hosts of radio style online music programming to pay a royalty set by the Copyright Royalty Board to artists and copyright owners.<sup>65</sup> The U.S. Copyright Office designated SoundExchange as the sole entity entitled to administer these royalties.<sup>66</sup> Any artists

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57. See Conley, *supra* note 46 at 422 (stating breakdown of licenses between ASCAP, BMI and SESAC); see also *About SESAC*, *supra* note 56 (discussing SESAC’s role in licensing); *ASCAP Licensing: Frequently Asked Questions*, ASCP, <http://www.ascap.com/licensing/licensingfaq.html> (last visited Oct. 25, 2010) [hereinafter *ASCAP FAQs*] (describing ASCAP as “worldwide leader in performance royalties, service, and advocacy for songwriters, composers, and music publishers”); *About BMI*, BMI.COM, <http://www.bmi.com/about/?link=navbar> (last visited Oct. 25, 2010) [hereinafter *About BMI*] (providing that BMI represents more than 475,000 songwriters, composers and publishers with more than 6.5 million works).

58. Conley, *supra* note 46 at 422.

59. *Id.*

60. See *id.* (noting methodology of PROs).

61. See *id.* at 422-23 (discussing function of PROs).

62. See *id.* at 423 (describing payout by PROs).

63. Digital Performance Right in Sound Recordings Act of 1995, 109 Stat. 336 (1995).

64. Digital Millennium Copyright Act, 17 U.S.C. § 512 (1999).

65. See Copyright Royalty and Distribution Reform Act of 2004, P118 Stat 2341 (2005) (requiring royalty payment by radio style online music programming to artists and copyright owners).

66. See Copyright Office regulation 270.5(c), 37 C.F.R. § 270.5(c) (dictating designation of SoundExchange).

whose work is played on a recording can collect royalties from on-line performance by registering with SoundExchange.<sup>67</sup>

Proponents of a new digital right argue that just as radio networks created an incredible source of revenue for songwriters and PROs allowed songwriters and music publishers to reap the financial rewards of widespread exploitation of their works, government-mandated collective rights licensing of media files distributed using the Internet represents a way for copyright holders to reap the financial rewards of this new means of widespread exploitation.<sup>68</sup> Even with its limited application, SoundExchange has already distributed \$417 million since 2003.<sup>69</sup> Proponents also argue for a compulsory license fee to avoid the difficulty of sorting out and renegotiating contractual claims since most files are shared on the Internet for free.<sup>70</sup> They propose that society at large would benefit from lower transaction costs and less litigation, because the sharing of content on the Internet would be legitimized and compensated.<sup>71</sup> Thus, advocating that a marketplace of competing file sharing, streaming applications and ancillary services could develop in a legal, rather than an illegal, setting.<sup>72</sup>

### C. Consumer Behaviour in an Age of Free Access

Many supporters of collective licensing argue that free access to unlimited media on the Internet is a public good. Simultaneously and conversely, an increasing number of countries are introducing “three strikes you’re out” legislation, in which a user who is repeatedly found downloading copyrighted material will lose access to the Internet at home.<sup>73</sup> Questions remain as to whether these

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67. *Get Paid When You Get Played*, SOUNDEXCHANGE, <http://soundexchange.com/performer-owner/performer-srco-home/> (last visited Oct. 26, 2010) (providing service paying royalties).

68. See Record Industry Association of America, Press Release, RIAA Comments on U.S. Trade Rep’s Special 301 Report Highlighting Piracy Issues in Key International Markets (Apr. 5, 2008), [http://www.riaa.com/news\\_room.php?news\\_month\\_filter=4&news\\_year\\_filter=2008](http://www.riaa.com/news_room.php?news_month_filter=4&news_year_filter=2008) (follow “RIAA Comments on U.S. Trade Rep’s Special 301 Report Highlighting Piracy Issues in Key International Markets” hyperlink) (discussing argument of proponent of new digital rights).

69. See The Numbers, SOUNDEXCHANGE, <http://soundexchange.com/about/the-numbers/> (last visited Oct. 26, 2010) (listing distribution my SoundExchange).

70. See *Collective Management of Copyright and Related Right*, WIPO, [http://www.wipo.int/about-ip/en/about\\_collective\\_mngt.html#P118\\_15843](http://www.wipo.int/about-ip/en/about_collective_mngt.html#P118_15843) [hereinafter *Collective Management*] (discussing licensing fees to be charged).

71. See *id.* (discussing benefit of lower transactional costs).

72. See *id.* (describing idea of marketplace of competing file sharing).

73. See Matthew Ingram, *RIAA Drops Lawsuit Strategy for “Three Strikes” Plan*, GIGAOM.COM (Dec. 19, 2008, 9:35 AM, PDT) <http://gigaom.com/2008/12/19/riaa-drops-lawsuit-strategy-for-three-strikes-plan/> (giving France as example of

measures will really serve to keep prosecuted file sharers off the Internet, or whether this is, in fact, good.<sup>74</sup> France, which enacted its three strikes law in September of 2009, has yet to issue a warning as of this article. Even though P2P infringement is down in France, the amount of total infringement has actually increased.<sup>75</sup> Because there is a possibility that the U.S. could adopt similar legislation, one should understand how free access to a nearly unlimited repertoire of music, film, pictures and text has affected U.S. society.

The numbers show that the desire of consumers to experience music, motion pictures and other forms of multimedia products and the yearning to express themselves through music and video continues to increase.<sup>76</sup> For example, in 2006, websites featuring user-generated media content attracted sixty-nine million users in the U.S. alone, and they are projected to attract 101 million U.S. users by 2011.<sup>77</sup> According to research firm, Parks Associates, the number of U.S. households with broadband access watching full-length movies and TV shows online doubled in the past year.<sup>78</sup> Even in just the month of June, more than 10.2 billion videos were streamed in the U.S.<sup>79</sup> According to BigChampagne, an online media measurement company, the average simultaneous P2P population grew from over five million users in December of 2002 to over seven million by December of 2004, and this increase in P2P popu-

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country which is trying to enforce system where after three illegal downloading attempts, internet service will be cut off by internet service provider).

74. See *id.* (questioning how accurate process would be and effect process would have on public).

75. See Nate Anderson, *Piracy up in France after tough three-strikes law passed*, ARS TECHNICA (last visited Oct. 26, 2010) <http://arstechnica.com/tech-policy/news/2010/03/piracy-up-in-france-after-tough-three-strikes-law-passed.ars> (discussing P2P infringement numbers versus total infringement numbers).

76. See *IAB Platform Status Report: User Generated Content, Social Media, and Advertising—An Overview 1*, INTERACTIVE ADVERTISING BUREAU (April 2008), available at [http://www.iab.net/iab\\_products\\_and\\_industry\\_services/508676/1488/ugc-platform](http://www.iab.net/iab_products_and_industry_services/508676/1488/ugc-platform) (follow “Download User-Generated Content and Social Media Advertising Overview” hyperlink) [hereinafter *IAB Platform Status Report*] (explaining user generated content growing rapidly because of better technology and faster internet).

77. See *id.* (defining force of User Generated Content growth and projections for future growth).

78. See Greg Sandoval, *Hulu’s backers bicker as Web video soars*, TECHNOLOGY NEWS – CNET NEWS (Nov. 16, 2009, 10:45 AM, PST), [http://news.cnet.com/8301-31001\\_3-10398698-261.html?tag=mncol;1n](http://news.cnet.com/8301-31001_3-10398698-261.html?tag=mncol;1n) (“The number of US households with broadband access that watched full-length movies and TV shows online doubled in the past year, according to research firm, Parks Associates.”).

79. See *June 2010: More than 10B Videos Streamed in U.S.*, NIELSENWIRE (July 16, 2010), [http://blog.nielsen.com/nielsenwire/online\\_mobile/june-2010-more-than-10b-videos-streamed-in-u-s/](http://blog.nielsen.com/nielsenwire/online_mobile/june-2010-more-than-10b-videos-streamed-in-u-s/) (discussing amount of videos streamed in United States in June 2010).

lations is continuing year after year.<sup>80</sup> The proliferation of music, video and photographic editing software coupled with the distribution power offered by P2P networks has fuelled a new generation of creative expression. Rather than being limited to a handful of authorized services like Apple's iTunes or Rhapsody, access to unlimited media from any source has increased the number of cultural reference points from which artists draw to create new works. As a result, the argument that free access to media on the Internet has contributed to a better-educated public, and that both the volume and quality of artistic output have increased as a result is well-founded.<sup>81</sup> Sections of the population who could not previously afford access to certain artistic works, cultural reference points or research materials can now enjoy free access through a \$300 net book computer and an Internet connection.<sup>82</sup> Thus, this may serve to decrease the "digital divide."<sup>83</sup> As Professor Seymour Papert of the Massachusetts Institute of Technology stated:

Getting information online saves the cost of printing textbooks, and this is a case where what is cheaper is also better . . . The computer can serve as a library, a laboratory and an art studio, saving the cost of these or making those that exist far more effective.<sup>84</sup>

Furthermore, we have already seen with services like Flickr, Twitter and YouTube, that dissemination of news, picture and video collection to millions of consumers has increased the number of data points from which our news is collected, theoretically improving how much we learn about happenings in the world. Similarly, millions of consumers with unlimited access to the world's media

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80. See Adam Toll, BigChampagne LLC, Peer-to-Peer Filesharing Technology: Consumer Protection and Competition Issues 3, Presentation at the FTC Workshop: Peer-to-Peer File Sharing (Dec. 15, 2004), <http://www.ftc.gov/bcp/workshops/filesharing/presentations/toll.pdf> (showing graphical data of P2P population growth).

81. See *IAB Platform Status Report*, *supra* note 76 at 4-8 (showing expression through personal blogs, social media and acquiring news from blog sites of New York Times and Newsweek are significant advantages to social media advances).

82. See Clint Witchalls, *Bridging the Digital Divide*, THE GUARDIAN (Feb. 17, 2005) available at [www.guardian.co.uk/technology/2005/feb/17/olpc.onlinesupplement](http://www.guardian.co.uk/technology/2005/feb/17/olpc.onlinesupplement) (explaining MIT students' plan to build laptops as cheaply as one hundred dollars, thus making Internet resources available to even more people).

83. See *id.* (describing plan to reach poor with laptops around world will break down barrier between benefits of rich and allow poor to access Internet and computers).

84. *Id.* (quoting Seymour Papert, Professor, Massachusetts Institute of Technology).

collection will both preserve and foster its growth.<sup>85</sup> Fans sharing media may be the best distributors, decision makers and preservers of media, which were previously costly roles for media companies to fulfil. For example, MediaBranz, a user-maintained community music metadatabase, has already compiled information covering 9,605,951 tracks and 813,659 album releases.<sup>86</sup> If these activities were made legal, this could aid in the claiming of “orphan works” and automated submission process services might evolve for copyright owners to register their works with the appropriate databases, for collection and payment of rights licences.<sup>87</sup> For all of these reasons, we should not dismiss the possibility that free access to media on the Internet could be in fact, good, and that what is missing are evolved business models establishing payment mechanisms.

#### D. Issues with Implementation

Implementation of a mandatory collective rights licensing system, would require a revisions to the copyright provisions in Section 17 of the U.S. Code.<sup>88</sup> For this to occur, a bill setting forth the revisions would need to be introduced and lobbied through Congress.<sup>89</sup> If our experience with the DMCA is any guide, this would involve months of negotiations in congressional committees, and might take years before the resulting language is brought to a vote.<sup>90</sup>

Specific revisions that would be required include a licensing scheme that authorizes ISP customers to copy, display and publicly perform works downloaded from and uploaded to computers on the Internet. Such rights were previously reserved exclusively for owners of the copyrighted material in question, suggesting that they will want a say in deciding how the licensing scheme would work.

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85. See *IAB Platform Status Report*, *supra* note 76 at 1: (detailing how user generated content is shaping content sharing and distribution by public instead of through companies).

86. See *Database Statistics*, MUSICBRAINZ, <http://musicbrainz.org/show/stats/> (last visited Oct. 26, 2010) (establishing data for consumer downloads in various categories such as artist, track and album).

87. See Joseph Merante, *Role in the Remedy: Finding a Place for ISPs in the Digital Music World*, 29 LOY. L.A. ENT. L. REV. 387, 388 (2009) (describing benefits to “orphan works”).

88. See Brian R. Day, *Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse*, 18 TEX. INTELL. PROP. L.J. 195, 213-15 (2010) (advocating specifically for revisions of either section106 or section115).

89. See *id.* at 199-209 (providing how Congress has dealt with copyright issues previous to this problem).

90. See *id.* at 203-08 (reviewing legislative history of DMCA in act’s enactment and amendment).

The legislation also would need to describe in some detail the entity responsible for accounting to the rights holders, and possibly provide guidelines for measuring how much to pay particular rights holders.<sup>91</sup> While SoundExchange was not created by statute, the organization only covers a very limited right. Furthermore, there is a presumption that rights holders would retain their rights to sue Internet users for direct infringement if they fail to pay the fees or otherwise circumvent the system. Similarly, ISPs would probably remain secondarily liable for copyright infringement if they failed to properly account to the CROs for all of the fees collected from their customers.

Proponents of government-mandated collective rights licensing have yet to address whether or not rights holders would retain the exclusive right to create and authorize derivatives of their works or otherwise retain control over how users manipulate their works.<sup>92</sup> Furthermore, ongoing heated debate continues as to what constitutes fair use.<sup>93</sup> Fair use, codified in 17 U.S.C. section 107, permits the reproduction of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship or research without the authorization of the copyright holder.<sup>94</sup> Copyright holders must recognize and assess the merits of such an affirmative defense before bringing a claim of copyright infringement.<sup>95</sup> Given the various interpretations found by courts in recent cases on the topic, this has become a complex judgment to make.<sup>96</sup> As Cardozo law professor, Justin Hughes, states, “[t]he notion of

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91. See *Licensing – General FAQ*, HFA, <http://harryfox.com/public/Licensing-GeneralFAQ.jsp> (last visited Oct. 26, 2010) (offering information about one of world’s leading mechanical licensing organizations, Harry Fox Company). In the past, for example with the performance right collection societies, and in regard to collection of mechanical rights by Harry Fox, an actual existing organization was not designated. See *id.* (noting lack of existing organization for collection of mechanical rights). Rather, the attributes required for such an organization, or the requirements for proper payment of compulsory licensing fees or collection of blanket licensing fees were described in the statute in question. See 17 U.S.C. § 106.

92. See Sarah McBride and Adam Thompson, *Google, Others Contest Copyright Warnings*, WALL ST. J., Aug. 1, 2007. [hereinafter *Google, Other Contest Copyright Warnings*] (discussing Computer and Commission Industry Association’s claim challenging legality of Major League Baseball’s exclusive right to dissemination of their broadcasts).

93. See *id.* (introducing fair use debates involving Google’s proposed plan to digitize books and make them available on demand).

94. See 17 U.S.C. § 107 (1992) (defining fair use).

95. See *Google, Other Contest Copyright Warnings*, *supra* note 92 (describing CCIA’s claim against MLB).

96. See *id.* (detailing these judgments).



fair use is expanding in the digital age.”<sup>97</sup> Perhaps the legislative implementation process would provide an opportunity to clarify more precisely what constitutes fair use, since at least some of the material being downloaded could arguably fall into this definition.<sup>98</sup> No matter how this is finally decided, users who claim their exploitation of copyrighted works on the Internet constitutes fair use will likely rebel against mandatory fees for the usage of copyrighted works. Finally, given the consent decree under which both ASCAP and BMI currently operate, Congress would need to remain alert to anti-trust concerns presented by one or more new or existing CROs assigned the task of collecting fees.<sup>99</sup>

Opponents of compulsory collective licensing claim that this amounts to a tax for consumption of intellectual property on the Internet where the cost is allocated to all users equally, regardless of their individual consumption level.<sup>100</sup> They point to the inequity in forcing some users to subsidize the activities of others.<sup>101</sup> Furthermore, consumers with strong moral and ethical positions would be financially supporting content to which they are morally or ethically opposed. Finally, data collection and use practices would need to conform to the requirements of the Electronic Communications Privacy Act (ECPA), so that users’ private information, including personal media consumption data, would not be sold without users’ consent to marketing firms and other unauthorized parties.<sup>102</sup>

A variety of problems need to be solved with respect to data collection, use and measurement. There is an entire market of Internet media tracking, security, usage measurement, cyber investigation and royalty collection firms.<sup>103</sup> For example, by matching partial IP addresses to zip codes, a technology-driven, media mea-

97. See *id.* (quoting Professor Hughes).

98. See *id.* (noting potential effects on fair use).

99. See Day, *supra* note 88 at 213-15 (stating that both ASCAP and BMI are under court ordered consent decrees).

100. See Neil Desai, *Copyright and Culture (Voluntary Collective Licensing—Innovation or Extortion?) Annotated Bibliography*, UNIVERSITY OF PENNSYLVANIA LIBRARY (Apr. 15, 2009) <http://tags.library.upenn.edu/project/40857> [hereinafter *Copyright and Culture*] (opining that enacting this kind of legislation would be strategic move requiring each household to pay approximately twenty seven dollars per year but could possibly create problems of usage amounts).

101. See *id.* (describing unfair results occurring when users must subsidize activities of others).

102. See Electronic Communications Act, 18 U.S.C.A. § 2510 (2008) (setting out laws of Electronic Communications Privacy Act).

103. See Jeff Howe, *BigChampagne is Watching You*, WIRED (Oct. 2003), available at <http://www.wired.com/wired/archive/11.10/fileshare.html> (discussing individuals involved in California based company, BigChampagne, engaged in internet media tracking).

surement company, known as BigChampagne, uses its software to create a real-time map of music downloading.<sup>104</sup> But who is to say which has the most reliable system and best data? Without empirical proof of whose technology is best for measuring media consumption, many argue that ISPs and CROs would merely be providing “good guesses” on how the collected fees should be distributed.<sup>105</sup> Without doubt additional volume would greatly affect the fast-paced business of music and media royalty accounting firms, not to mention the negotiation and litigation involved in working out royalty payment disputes. Furthermore, ISPs might be subject to additional duties, thereby potentially increasing vulnerable to secondary liability for participating as middle-men in fraudulent or otherwise unauthorized transactions, whether voluntarily or involuntarily. ISPs would certainly not want to sacrifice any of their existing immunity under section 512 of the Code by participating in data collection or enforcement at the direction of third parties.<sup>106</sup> Explicit statutory immunities would be necessary to reduce transaction costs and ensure participation by ISPs.

In short, questions remain concerning the determination of the basis and frequency of collecting fees.<sup>107</sup> Uniformity of units, methods for measuring usage, as well as, rates applied are necessary elements to implement any collective rights licensing scheme to be considered “fair” by rights holders. Whatever mechanism is chosen to determine an online use fee would also need to take into account the rights of reproduction, distribution and public performance, a consideration that is often ignored by proponents of collective licensing.<sup>108</sup>

Lastly, one needs to address market disruption concerns. Introduction of a new mandatory collective rights licensing system could unnecessarily accelerate the reduction in sales of physical media products, which represent a substantial percentage of the world’s media sales market.<sup>109</sup> Industry experts argue for a more gradual transition away from physical distribution technology,

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104. *See id.* (describing BigChampagne’s system of tracking downloads).

105. *See Desai, supra* note 100 (explaining skepticism surrounding technology used in tracking downloads and other types of media consumption on internet).

106. *See* 17 U.S.C. §501 (2002) (elucidating what constitutes infringement of copyright).

107. *See Merante, supra* note 87 (mentioning concerns on basis and frequency of collection fees).

108. *See Merante, supra* note 87 (highlighting considerations to take into account when setting an online use fee).

109. *See Desai, supra* note 100 (discussing several criticisms of voluntary collective licensing).

which will allow media companies to successfully cross the chasm and develop over time a more robust and variegated digital distribution market.<sup>110</sup> Furthermore, new media services like Hulu, iTunes and Netflix are starting to post positive results and experience successful growth in new markets for high quality digital content which many believe will grow to represent many billions of dollars.<sup>111</sup> A new mandatory collective rights system might cut this growth off at the knees, superseding completely or otherwise disrupting the business of existing or future legal downloading services.

Viewed in its best light, a compulsory collective licensing scheme would be difficult to implement, requiring a departure from market-based economics in a society defined by its strict adherence to capitalism. Even if implemented, difficulty arises as to whether the system can address the concerns of rights holders and new businesses attempting to create innovative new products to benefit consumers.

#### IV. OPT-IN IN EXCHANGE FOR COVENANT NOT TO SUE

The alternative most often proposed to a government-mandated collective licensing scheme is a voluntary collective rights licensing scheme implemented through a private agreement between rights holders and users.<sup>112</sup> Rights holders would sign a covenant not to sue any users who 'opt-in' to pay licensing fees for media they consume.<sup>113</sup> Any user opting into the agreement would receive an unlimited ability to stream and download copyrighted content with impunity from legal prosecution.<sup>114</sup> As part of the agreement, the user would agree not to share copyrighted content with anyone who had not opted in, if violated the user would face

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110. See Peter DiCola, *The Economics of Recorded Music: From Free Market to Just Plain Free*, FUTURE OF MUSIC COAL. (July 16, 2000), <http://futureofmusic.org/article/economics-recorded-music> (arguing the value of music should not be measured in dollars or left to the free market).

111. See Desai, *supra* note 100 (stressing importance of not disregarding growth of media service businesses in informing debate about collective licensing agreements).

112. See Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUNDATION, 1 (Apr. 30, 2008), available at <http://www.eff.org/files/eff-a-better-way-forward.pdf> (proposing voluntary licensing as alternative to government-mandated licensing schemes).

113. See *id.* at 5 (providing fans with ability to download music without threat of being sued and providing artists with compensation for their work).

114. See *id.* at 1, 5 (arguing fans would be able to get music they want through legitimate and appropriate means).

monetary penalties.<sup>115</sup> Those opting-out of paying the fees would remain liable for copyright infringement.<sup>116</sup> Creators and rights holders would also be able to opt-out of this licensing scheme.<sup>117</sup> ISPs would receive an administrative fee in connection with the opt-in arrangement. Newly-created CROs would be responsible for tracking media consumption by those opting-in and distributing royalties to rights holders. Supporters of voluntary collective rights licensing contend that any solution to digital piracy should be centered on market forces because the market drives innovation better than the government.<sup>118</sup> For example, proponents argue that with the cloud of litigation eliminated, file-sharing networks would rapidly improve.<sup>119</sup> Additionally, they believe that an opt-in system would also be more respectful of subscriber preferences.<sup>120</sup> Payment would come only from those who are interested in downloading or otherwise sharing entertainment on the Internet, and limited to the period for which they are interested in such sharing and downloading activities.<sup>121</sup> As with the government-mandated system, opt-in users would have completely legal access to the virtually unlimited selection of media available on file sharing networks.<sup>122</sup> Unlike the mandatory public right option, users would not be forced to pay for media content if they do not choose to access it.<sup>123</sup> Giving users the choice to pay the fee voluntarily could also help to repair the general bad perception many consumers now have regarding copyright owners.<sup>124</sup> In addition, this system might clarify to the general public the degree to which artists and

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115. *See id.* at 1 (stating as long as fans pay for music, they will not fear legal reprisal).

116. *See id.* at 5 (asserting artists would still be able to sue fans that illegally downloaded music and offering alternative means for dealing with problem that focus on joining collective licensing than dealing with issue in court).

117. *See id.* (explaining artists still have options and are not forced to join collective society).

118. *See id.* at 1 (“any solution should minimize government intervention in favor of market forces. Markets-driven solutions are likely to work faster, and more efficiently, than top-down government regimes.”).

119. *See id.* (arguing legalizing downloading music through collective licensing will improve file sharing systems and benefit fans).

120. *See id.* at 3 (explaining companies would be able to focus on meeting consumer needs and wants instead of focusing on licensing issues).

121. *See id.* (explaining there is no tax involved, only those wanting to participate have to pay).

122. *See id.* (discussing advantages of voluntary licensing system).

123. *See id.* (explaining payment will be conditioned on use).

124. *See id.* at 5 (suggesting voluntary licensing scheme as alternative to “threatening [consumers] with ruinous damages”).

the creative industries as a whole rely on clearly defined rights and responsibilities for copyright owners, intermediaries and users.<sup>125</sup>

The most striking benefit of a voluntary collective licensing system is that no amendments to the copyright law need to be made.<sup>126</sup> Also, instead of relying on a government or collective industry board to set rates, as with mechanical licenses or ringtone rates, CROs would set their own prices, which would be dictated by the market.<sup>127</sup> Rights holders' income could potentially increase with a lower price and a larger base of subscribers, than with the current system of high prices and expensive, ultimately ineffective, enforcement efforts.<sup>128</sup> In addition, commercial services could develop, boiling the user opt-in agreement into the terms and conditions of the service, and then provide free, basic and premium services at different price points, including free advertising supported services.<sup>129</sup> Proponents of opt-in licensing schemes argue that so long as the fee is reasonable, effectively invisible to fans and does not restrict participant's freedom, the vast majority of file sharers will opt to pay rather than engage in complex evasion efforts.<sup>130</sup> Proponents contend that the vast majority of file sharers would be willing to pay a reasonable fee for the freedom and peace of mind to download whatever they like using whatever software suits them.<sup>131</sup> They further assert that a compulsory license is not necessary; artists will be incentivized to join a CRO by the prospect of receiving some compensation for their works, while those choosing to remain outside the system will have no practical way of receiving compensation for the file sharing that will inevitably continue.<sup>132</sup> Assuming a critical mass of major copyright owners joins a CRO, the vast majority of smaller copyright owners will have a strong in-

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125. *See id.* at 4 ("Transparency will be critical-the collecting societies must hold their books open for artists, copyright holders, and the public to examine.").

126. *See id.* at 3 (listing advantages of voluntary licensing scheme).

127. *See id.* (discussing economic implementation of voluntary licensing scheme).

128. *See id.* (listing advantages of voluntary licensing scheme)

129. *See id.* at 2-3 (explaining companies could make free music downloading part of package for cable or universities would make music downloading part of their network services costs).

130. *See id.* at 5 ("Proponents contend that the vast majority of file sharers would be willing to pay a reasonable fee for the freedom and peace of mind to download whatever they like using whatever software suits them.").

131. *See id.* (discussing willingness of file sharers to pay a reasonable fee for the freedom and peace of mind to download whatever they like, on whatever software they like).

132. *See id.* at 5 (discussing incentives to independent artists, particularly for smaller copyright owners).

centive to join in order to collect their portion of the fees, just as virtually all professional songwriters and music publishers opt to join ASCAP, BMI, SESAC or Sound Exchange.<sup>133</sup>

Fred von Lohmann presents further arguments in favor of a voluntary licensing system.<sup>134</sup> He stresses that the distribution bottleneck which has limited the opportunities of independent artists would be eliminated.<sup>135</sup> Furthermore, artists would be able to choose any road to online popularity—including, but no longer limited to, a major label contract.<sup>136</sup> Legal, compensated digital distribution would be equally available to all artists.<sup>137</sup> In promoting their music, artists would be able to use any mechanism they like, rather than having to rely on major labels to push radio play.<sup>138</sup> With more options from which artists may choose, recording contracts would become more balanced than the one-sided deals artists have complained about in the past.<sup>139</sup> Furthermore, von Lohmann argues that the complexity of individual music industry contracts and the propensity of successful artists to sign many different contracts over time create difficulty for record labels, music publishers and even the artists themselves to be sure what rights they control.<sup>140</sup> So, the proponents' argument suggests that by joining a CRO, copyright owners would not be asked to itemize rights, but would instead simply covenant not to sue those who pay the blanket license fee.<sup>141</sup> Accordingly, music fans and innovators would not be held back by the internal contractual squabbles that plague the music industry, and artists would be paid their fair share.<sup>142</sup>

Many of the same concerns that were identified above in reference to a government-mandated collective rights licensing scheme will, however, also plague a voluntary one. These concerns include

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133. See Day, *supra* note 88 at 213-15 (discussing small copyright owners' incentives to join CRO).

134. See Lohmann, *supra* note 112 at 3 (arguing distribution limitations on independent artists will be eliminated upon implementation of voluntary collective licensing scheme).

135. See *id.* at 3 (stressing the ability to eliminate the distribution bottleneck limiting the opportunities of independent artists).

136. See *id.* at 3 (listing advantages of voluntary licensing scheme).

137. See *id.* at 4 (explaining the benefits to artists).

138. See *id.* (discussing promotion mechanisms of artists).

139. See *id.* (expressing that recording contracts will be more balanced).

140. See *id.* at 5 (noting incentives to artists to join voluntary licensing scheme).

141. See *id.* at 5 (detailing covenant not to sue contracts).

142. See *id.* (advocating voluntary licensing scheme would resolve internal quarrels).

privacy issues, data collection difficulties, derivative rights, trouble maintaining ISP immunity, file quality issues and complexities making sure that artist and other rights holders are actually paid their fair share.<sup>143</sup> Also, like a compulsory license, the opt-in license tends to flatten the market for sales of music and other media, which could in turn stifle innovation because there would be no incentive to produce new media products. In addition, there is the problem of “free-riding,” whereby those who opt-out of paying the fee can still get free content from those who opt-in, either by somehow re-routing their Internet connections or simply by having someone who opts-in burn the content onto CDs or DVDs and then share the content with someone who opts-out.<sup>144</sup> Uncertainty also exists as to how far these covenants not to sue will extend.<sup>145</sup> Will copyright holders retain the right to sue an ISP for secondary liability if the scheme allows, even unwittingly, a user to re-route his connection? Consumers may also be at serious risk in a world where authorized and unauthorized works are at their fingertips with no clear ability to distinguish between the two.<sup>146</sup> Would a green “OK” tag pop up on media you could use? Would you only be able to use “opt-in approved” services that bear the equivalent of a *Good Housekeeping* seal of approval, making the choices of opt-in users no different than the choices they have today with the legal services? Furthermore, what is to force ISPs to cooperate and take on the additional burdens of tracking and recording who is accessing what content for a reasonable fee? What is to keep them from demanding a larger and larger portion of the fees being collected from users? Already in the mobile content arena, retailers and promoters of mobile content must make a business from fifty percent or less of their product prices, with the mobile service providers collecting fifty percent for delivering such mobile data services.<sup>147</sup> Given that a substantial segment of the population is currently ac-

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143. See Brandon Evenson, *IP Osgoode Speaks: Chris Castle on Voluntary Collective Licensing*, IP OSGOODE (Oct. 27 2009), [www.iposgoode.ca/2009/10/ip-osgoode-speaks-chris-castle-on-voluntary-collective-licensing](http://www.iposgoode.ca/2009/10/ip-osgoode-speaks-chris-castle-on-voluntary-collective-licensing) (discussing potential problems with voluntary licensing schemes).

144. See Desai *supra* note 100 (arguing that new scheme will have no impact on current amount of infringement taking place by consumers).

145. See *id.* (explaining risk of confusion to users).

146. See *id.* (warning that potential issue of consumers not being able to differentiate between authorized and unauthorized work, thus opening themselves up to risk of unintentional participation in illegal activity).

147. See Edward R. Hearn, *Digital Downloads and Streaming: Copyright and Distribution Issues*, 978 PLI/PAT 477, 493 (discussing ratio of profits earned by retailers after delivery fee is taken out by service providers)

cessing content free of charge, how can content holders be sure that enough people opt-in that it will make the system worthwhile?

Opponents of voluntary opt-in services cite a wide variety of reasons why they believe proponents to be, in the main, myopic about the incentives present in human nature and capitalist societies.<sup>148</sup> “Proponents of the generic proposal and its offshoots seem to have given insufficient consideration to the many, many details involved in ISP licensing. The devil is, of course, in the details, and even considering a music-only licensing method creates a devilish predicament indeed.”<sup>149</sup> Hence, the main problem that an opt-in collective rights licensing system faces is the same problem faced by any new product introduced into a new market: getting users to try something new, where the benefits are unclear and—further—enticing users to allow their names to be put on a list that may someday include people who are prosecuted for witting or unwitting copyright infringement.

## V. CONCLUSION

This article describes the historical underpinnings of collective rights licensing in the United States and attempts to fairly present the two primary proposals for collective rights licensing at the ISP level for internet media uses. In addition, the article discusses the issues and impediments that would have to be overcome in order to implement any ISP licensing scheme here. The article purposely does not state an opinion about whether either of the proposals is a good idea. Either proposal would be difficult to implement, and could face opposition from a wide variety of interested parties. Furthermore, there are many market-based approaches, which have not had the opportunity to evolve because of difficulty obtaining licenses and rapidly changing technology and market conditions. Our current copyright regime, developed over hundreds of years of trial and error, has adapted to a great many new technologies and business models. Past collective licensing systems, including compulsory licensing schemes, have been adopted when the market for a particular right was seen as “broken” and in need of being fixed. In the United States, collective licensing has been successfully applied to public performances, radio and mechanical licenses for af-

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148. See Evenson, *supra* note 143 (discussing issues with voluntary licensing).

149. Christian L. Castle and Amy E. Mitchell, *What’s Wrong With ISP Music Licensing?*, 26 ENT. & SPORTS LAW. J., 4, 7 (2008).



fixing copyrighted works to a tangible medium.<sup>150</sup> The ability to instantaneously distribute media using the Internet is not a problem to be fixed, this is rather a set of opportunities which have not yet been fully understood or exploited. The Internet is a far more exciting technology than the past technologies of recordings or radio because the Internet is worldwide and allows for interaction and commerce. A panoply of new businesses can develop, which take advantage of these attributes. In fact, they are rapidly developing, whether we choose to accept it or not. There will not be any one solution to illegal downloading of media on the Internet. As in the past, a wide variety of new markets will form and innovations that benefit consumers, rights holders and business people will develop. Collective rights licensing schemes may become part of this ecosystem. Thus, as long as they “promote the Progress of Science and useful Arts,” and are not implemented at the expense of new markets that could develop in their absence these schemes will have an influential role in the future.<sup>151</sup>

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150. See *Collective Management*, *supra* note 70 (discussing successful application of collective licensing in United States).

151. U.S. CONST. art. I, § 8, cl. 8.