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# Future of Online Music: Labels and Artists

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# Future of Online Music: Labels and Artists*

*Scott Hervey***

## I. INTRODUCTION

The United States District Court's ruling in *A & M Records v. Napster*,[1] which required Napster to block the swapping of copyrighted songs, did not put an end to the labels' battle with online music. While Napster's outlaw spirit and cutting edge was dulled by its new focus on a partnership with Bertersmann (one of the "Big Five" major record labels),[2] new and more technologically savvy music swapping services have already taken Napster's place.[3]

The record industry's post-Napster battle with copyright scofflaws offering free online music heated up on many fronts. While the industry continues to wage war in the courtroom against a number of music services such as Aimster (now Madster), the industry is also just beginning to battle on the technology front.

The labels are partly to blame for their own misfortune. While copyright infringement and the theft of intellectual property is not acceptable conduct, the labels failed to take adequate technological measures to protect the content of their Compact Discs (CDs) when they were originally released. Unlike DVDs, which were encrypted from the start, no measures were taken to protect the digital content of CDs. Only now are the labels beginning to take serious efforts to protect CD content through technological measures.

Although the record labels were late in insulating their music from copyright piracy, they are currently waging an assault on several fronts: the labels are using litigation, technological, and business tactics to protect their creative product from theft and unauthorized copying.[4] On the other hand, artists are greatly affected by the uncharted territory of online music business and piracy, but after

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1. 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000) [hereinafter *Napster District Court Decision*].

2. *See* Jefferson Graham, *There's Still Hope for Napster Despite Stream of Troubles*, USA TODAY, May 23, 2001, at 3D.

3. *See* Richard Menta, *Napster Clones Crush Napster: Take 6 Out of the Tope 10 Downloads on CNet*, MP3 NEWSWIRE.NET, July 20, 2001, *at* http://www.mp3newswire.net/stories/2001/topclones.html (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*).

4. *See infra* Part II (analyzing the options available to the music industry).

signing with records labels they retain even less control. Through exploring the issues that face music labels and artists in the post-Napster era, the need for labels and artists to work together to keep making music profitable will be clearly evident.

## II. PROTECTING MUSIC POST-NAPSTER IN THE UNITED STATES AND ABROAD

### *A. The Litigation Approach*

Over the last few years, the record industry has been extremely busy suing websites that act as facilitators of the online transfer of music. For example, Universal Music Group (UMG) was successful in a lawsuit against MP3.com,[5] and the Recording Industry Association of America (RIAA) successfully shut down former outlaw Napster.[6] Now, the big labels are after other "Napsteresq" companies operating peer-to-peer (P2P) networks. However, as the online music-sharing model moves away from a centralized closed repository or server and towards open P2P networks, the record industry will have a much harder time shutting off the tap through litigation.[7]

Consequently, litigation must be paired with technology so that the record industry can track illegal music swapping and force Internet service providers to shut down the infringers.[8] On an international basis, record labels have already been successful in this regard. For example, America Online Germany was held liable for copyright violations in April 2001 when AOL subscribers traded copies of pirated music despite AOL's claims that it blocked access to the copyrighted files as soon as it learned of their existence on its system.[9]

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5. *See, e.g.*, Denis Kelleher, *The Bandwagon Plays On: Litigation Shows Online Music Providers Won't Be Replacing the Record Companies Just Yet*, IRISH TIMES, July 17, 2000, at 8.

6. *See Napster District Court Decision*, *supra* note 1 and accompanying text; *see also* A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) [hereinafter *Napster Appellate Decision*].

7. A closed peer-to-peer network requires users to register and log on to a centralized server. Open word networks (such as Gnutella), which operate without a centralized server, can form an open network and anyone with the IP address of either computer can expand the network. No single computer or group of computers is necessary to keep an open peer-to-peer network alive. *See* Jay Kumar, *MusicNet Leads the Gated P2P Parade*, WEBNOIZE.COM, May 23, 2001, *at* http://www.peergenius.com/news/webnoize05_23_01.html (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*).

8. *See, e.g.*, Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified in 17 U.S.C. §§512, 1201-1205, 1301-1332, 4001) (1998) [hereinafter DMCA] (requiring the service provider to take certain measures to remove the infringing content or otherwise risk losing statutory immunity for contributory copyright infringement when an Internet service provider is informed of the existence of material on its server which infringes the copyright of a third party).

9. *See* Lori Enos, *Yahoo! Forced to Bar French From Nazi Auctions*, E-COMMERCE TIMES, May 23, 2000, *at* http://www.ecommercetimes.com/perl/printer/3387/ (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*).

In fighting the piracy battle, the labels are making use of a law that was enacted to give ISPs a safe harbor from liability for contributory copyright infringement.[10] This law, Title II of the Digital Millennium Copyright Act (DMCA), the Online Copyright Infringement Liability Limitation section, immunizes service providers from third party liability for damages, costs or attorney's fees due to claims of copyright infringement.[11] The limitations, or safe harbors, are based on four categories of conduct by a service provider: (1) transitory communications; (2) system caching; (3) storage of information on systems or networks at direction of users; and (4) information location tools.[12]

The immunity provided to the service providers is predicated on the service provider's compliance with certain requirements set forth in the Title II.[13] If the service provider fails to comply with these requirements, it may be held contributorily liable for copyright infringement.[14] To be eligible for any of the safe harbor provisions, a service provider must adopt and reasonably implement a policy of terminating the accounts of subscribers who are repeat infringers, in appropriate circumstances.[15] In addition, the service provider must accommodate and not interfere with measures used by a copyright owner to identify or protect copyrighted works that: have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, and voluntary multi-industry process; are available to anyone on reasonable nondiscriminatory terms; and do not impose substantial costs or burdens on service providers.[16]

Title II also sets out procedures for third party notification to the service provider of infringement and counter notification to the service provider's subscribers.[17] When a notification that complies with the requirements of Title II is received, a service provider must promptly remove or block access to the allegedly infringing content.[18] In a case where the content is posted by a subscriber of the service provider, it must take "reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material."[19]

Under Title II, a service provider is not liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, a material or activity claimed to be infringing based on facts and circumstances in which an infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.[20] This exception does not apply

10. *See* Religious Tech. Ctr. v. Netcom On-Line Commun. Servs., 907 F. Supp. 1361 (N.D. Cal. 1995).
11. *See* DMCA, *supra* note 8, §512(j).
12. *See id.* §512(a)-(d).
13. *See id.* §512(i).
14. *See id.*
15. *See id.* §512(i)(1)(A).
16. *See id.* §§512(i)(1)(B), (i)(2).
17. *See id.* §512(c)(3).
18. *See id.* §512(c)(1)(A).
19. *Id.* §512(g)(2)(A).
20. *See id.* §512(g)(1).

where the allegedly infringing material is moved based on receipt by the service provider's agent of a notification, unless the service provider notifies the subscriber that it has removed or disabled access to the material.[21]

Where the service provider receives a counter notification from the subscriber, the service provider must promptly provide the original complaining party with a copy of the counter notification.[22] The service provider must then replace or restore access to the disputed content between the eleventh and fourteenth business day after the date on which it received the counter notification, unless, within the first ten business days, it receives notice from the original complainant that the complainant has filed suit to restrain the subscriber from engaging in copyright infringement.[23] Where the service provider receives notification that a suit has been filed, the service provider must take no further action pending a ruling by the court.[24]

While Title II of the DMCA may provide some immunity from copyright infringement for the acts of third parties, website owners may still be subject to direct liability.[25] Contributory liability for copyright infringement also still exists for persons and entities that do not fall under the definition of a service provider under Title II.[26] In addition, contributory liability may exist where an entity is a service provider under Title II, but fails to meet certain other requirements.[27]

Foreign nations have likewise drafted copyright laws similar to the provisions of the DMCA. For example, Australia recently adopted the Digital Agenda Act,[28] which modifies its copyright laws in ways similar to how the DMCA modified United States law.[29] Like the DMCA, Australia's law forbids circumventing technological measures used by copyright owners to protect their works from piracy.[30] However, in spite of the extensive protection afford by these legislative approaches, the record labels cannot rely on litigation alone to protect them from music pirates.

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21. *See id.* §512(g)(2).

22. *See id.* §512(g)(2)(B).

23. *See id.* §§512(g)(2)(B), 512(g)(2)(C).

24. *See id.* §512(g).

25. *See, e.g.*, Michaels v. Internet Entertainment Group, 5 F. Supp. 2d 823, 843 (C.D. Cal. 1998) (granting plaintiffs Bret Michaels and Pamela Lee a temporary restraining order against defendant adult entertainment corporation's distribution of a videotape of plaintiffs having sexual intercourse, and stating that plaintiffs had a strong likelihood of prevailing on a copyright infringement claim). Napster's claim of immunity under the DMCA was dismissed because Napster was not found to be a service provider. *See Napster District Court Decision*, *supra* note 1, at 919.

26. *See* DMCA, *supra* note 8, §512(k)(1)(A) (defining what constitutes a "service provider").

27. *See id.* §512(i).

28. Digital Agenda Act (Austl.), Sept. 4, 2000, *available at* http://scaletext.law.gov.au/html/comact/10/6223/top.htm (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*).

29. *See* Andrew Handelsmann, *Australia's Digital Agenda Act and the Internet*, GIGALAW.COM, Mar. 2002, *at* http://www.gigalaw.com/articles/2002-all/handelsmann-2002-03-all.html (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*) (discussing the Digital Agenda Act's similarities to the DMCA).

30. *See id.*

### *B. The Technology Approach: Digital Fingerprinting and Watermarking*

There are a few technological approaches that labels can take to prevent online infringement, all of which involve digital rights management. Digital fingerprinting[31] and digital watermarking[32] are both approaches that are available to the labels. Digital fingerprinting and digital watermarking encode the contents of digital material (i.e. the content of a CD) with information such as the author, the copyright date, and the permitted use of the material.[33] When used in conjunction with tracking tools, right holders would be able to follow their copyrighted works over the Internet and identify infringers. Once identified, the labels can notify the appropriate service provider, who is obligated under the DMCA to take affirmative steps to remove the infringing content or otherwise risk losing its immunity from liability for copyright infringement.[34]

When looking at the types of music most frequently downloaded, technological measures could take the industry a long way towards where it wants to be. Worldwide, "paid for" music downloads earned only $1,000,000 in the U.S. and U.K. in 2001.[35] At the same time, eight billion songs were swapped illegally through online music services.[36] Naturally, what is being downloaded follows the trends in music. More than 200,000 copies of Britney Spears' single "I'm a Slave For You" were downloaded before the record's official release in October 2001.[37] In fact, "[a]lmost one-quarter (23 percent) of the U.S. population over the age of 12 has downloaded a music or mp3 file off the Internet."[38] Consequently, online piracy mainly affects the most popular artists and their record labels, who usually make the most profits from chart-topping recordings.

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31. *See* Michael Singer, *Napster to Use Audio Fingerprinting*, SILICONVALLEY.INTERNET.COM, Apr. 20, 2001, *at* http://siliconvalley.internet.com/news/article/0,2198,3531_749151,00.html (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*) (defining "digital fingerprinting").

32. *See* Ryan Schutt, *Digital Watermarking*, *at* http://ei.cs.vt.edu/~h3004fox/f97/class/dw.html (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*) (defining "digital watermarking").

33. *See supra* notes 31 and 32 and accompanying text.

34. *See supra* note 18 and accompanying text.

35. *See Music Industry's Digital Plans 'Fail'*, *at* http://news.bbc.co.uk/hi/english/entertainment/new_media/newsid_1809000/1809391.stm (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*).

36. *See id.*

37. *See* Stuart Miller, *Music Firms Losing Digital Piracy Fight: New Internet Services Feed Demand for Free Downloads*, THE GUARDIAN, Feb. 8, 2002, at 11.

38. *See Online Music Expands its Audience*, CYBERATLAS, *at* http://cyberatlas.internet.com/article/0,,5901_966981,00.html (last visited May 13, 2002) (copy on file with *The Transnational Lawyer*).

Technological developments require an ongoing effort on behalf of the music industry to stay ahead of the curve. No sooner will the industry adopt effective encryption technology that a number of enterprising computer techno-files will create technology to break through the barriers.[39] Some professionals believe that software-based solutions alone will not stop digital piracy, and that only a totally secured infrastructure has a chance to eliminate the problem.[40] Yet, experience shows that the lengthy and deliberative legislative process cannot keep up with innovation in technology and new forms of media. Therefore, advances in technology and marketing strategies are more of a necessity than a luxury for the music labels.

*C. The Business Approach: Music Subscription Services*

With those concerns in mind, technological solutions were combined with a business model to come up with the online music subscription service. Through this model, record companies can control the rights granted to the user and potentially derive a profit. For example, some of the options a music subscription service can control are whether to grant the user a short period of time to listen to the music, to give the user as many times as he or she wishes to listen to the music, or to allow the user to purchase a copy of the content which he can record on a CD or leave on his computer's hard drive.

Everyone involved in the online music issue—the record companies, the savvy computer users, and copyright lawyers—understands that there will always be online pilfering of music. However, the goal of the major labels is most likely to reduce the amount of infringement to acceptable levels of loss. Litigation and technology alone will not reduce illegal file-swapping to acceptable levels. The demand for online music is too great to leave the void unfilled. It did not take long for the major labels to figure out that they had to join the ranks of online music providers and satisfy the demand for online music content.

Through the recording industry's litigation, labels have gained access to technology and existing users, allowing them to roll out their online music subscription plans. Vivendi Universal invested a sizable sum in MP3.com[41] and then joined forces with Sony to form Pressplay, an online subscription music

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39. *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (deciding the appeal from the District Court's entry of an injunction pursuant to the anticircumvention provisions of the DMCA prohibiting defendants from establishing links from their sites to locations that offered DeCSS, which is a software application which circumvents DVD encryption).

40. *See, e.g.*, Robert Lemos, *Does it Take Hardware to Repel Pirates*, ZDNET NEWS, Mar. 22, 2002, *at* http://zdnet.com.com/2100-1106-867333.html (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*).

41. *See Big Music Fights Back*, THE ECONOMIST, June 16, 2001, available *at* http://www.geocities.com/timlewis79/tims_404_6.htm (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*).

service targeting Microsoft and Yahoo users.[42] On the other hand, Bertelsmann, EMI, and Warner have resurrected Napster and formed MusicNet, targeting their services towards AOL users.[43] From a consumer's perspective, the subscription model can be a rather attractive option. For example, MP3.com's subscription model offers users unlimited downloads and CD burning for just under ten dollars per month.[44]

## III. ARTISTS' ISSUES

How will the subscription model affect music artists? Online music will not replace CD sales, but over time, it may become a substantial portion of total sales. If the industry were to convert only half of the users of the outlaw file swapping services to legitimate subscription services, online music services would account for a substantial part of worldwide music sales.

The subscription model could have a profound affect on artist earnings. In order to understand how, one must understand certain basic concepts which are standard in most recording deals. The three basic concepts affecting an artist's earnings under a record label deal are advances, royalties, and recoupments.

### A. *Advances*

The advance is a sum of money that the record label gives to the artist as an advance against future royalties. A portion of that money may or may not go towards producing the album. The larger the star, the larger the advance. But no matter to whom the check is written, an advance must be "recouped" out of royalties payable to the artist from album sales.

### B. *Royalties*

Usually, an artist receives royalties based on the sale of his record. Royalties are computed according to a "Standard Retail List Price" (SRLP) for royalty bearing units sold.[45] Standard royalty rates vary from nine to fifteen percent. If the record is distributed internationally, the royalties payable to the artist may be reduced anywhere from two-thirds to half of the domestic royalty rate.

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42. *See* Erick Schonfeld, *Future Boy: The Napster Legacy*, Sept. 2001, *at* http://www.business2.com/articles/mag/print/0,1643,16971,00.html (last visited Apr. 27, 2002) (copy on file with *The Transnational Lawyer*).

43. *See id.*

44. *See* MP3.com, *Unlimited MP3's—One Low Monthly Price*, *at* http://www.emusic.com/promo/mp3com/index.html?fref=147042 (last visited May 13, 2002) (copy on file with *The Transnational Lawyer*).

45. All rates hereinafter quoted with respect to recording contracts are based on the author's experience with industry standards. However, for a more detailed discussion of the topics covered in this section, see generally DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (3d ed. 1997).

There are a number of different elements that impact the royalty payment the artist actually receives in hand. First, packaging deductions are usually taken from the gross single unit rate. A standard packaging deduction can be as high as twenty-five percent. Another standard industry practice is to reduce royalties for the sale of units comprised of "new technology"—and believe it or not, CDs are still considered "new technology." This deduction has its roots back to the time when CDs were brand new and expensive to reproduce.

Another cost which is charged against the artist's royalty is the producer's royalty. A producer's royalty is charged against the artists "all in" rate and reduces the net royalty to which the artist is entitled. If the producer has strong commercial appeal, the producer can negotiate to have royalties paid retroactively from the first album sold, and even separate the payment of his royalties from when royalties are payable to the artists.

After the unit rate is determined, the number of royalty-bearing units is then calculated. This does not always equate to the number of units the label ships. "Free goods" is the reason. There are two types of free goods: promotional copies given away to consumers and record stations (also called "real free goods") and additional free copies given to the record stores ("standard free goods"). Whichever the type, royalties are not paid on free goods.

### *C. Recoupable Expenses*

Finally, after the unit rate and the number of royalty bearing units are all computed and the artist's net royalty rate is determined, that amount may be subject to further reduction by recoupable expenses. Recoupable expenses are certain amounts the record label has advanced on the artist's behalf to commercialize the record, which the label is contractually entitled to recover. Production costs are recoupable, as is the artist's "advance." Also standard is the label's right to recoup fifty percent of video costs. Further, there is usually a standard clause in a record contract which allows the label to recoup "any and all sums advanced on the artist's behalf." When the amounts that are recoupable are all added up, it can significantly reduce the royalty payment that the artist is to receive.

*D. Calculating Payments to Artists*

In order to keep the production of music recordings profitable, record labels have developed an intricate system of royalties and recoupments to spread the risk of loss out among all of the artists signed with them. While understandable, this system creates several hurdles an artist must jump before actually seeing any profit. What follows is a hypothetical showing exactly what an artist would receive from domestic and international sales of one million units, using the foregoing assumptions:[46]

1. ARTIST ROYALTIES COMPUTED ON SRLP ($15.98 FOR CD, $10.98 FOR TAPE)
2. ARTIST'S "ALL IN" DOMESTIC ROYALTY RATE IS 13%. ARTIST PAYS PRODUCER ROYALTY OF 3%
3. CD ROYALTY CALCULATED ON 80% OF APPLICABLE BASE PRICE
4. FOREIGN RATE = 2/3 OF DOMESTIC AT = SRLP
5. ARTIST ADVANCE = $25,000; RECORDING COSTS ARE $200,000 (100%)
6. VIDEO PRODUCTION COST (50%)= $300,000
7. INDEPENDENT PROMOTION EXPENSE (50%) = $200,000
8. PACKAGING DEDUCTION = 25%
9. STANDARD "FREE GOOD" DEDUCTION = 15%
10. SPECIAL "FREE GOODS" DEDUCTION = 5%

46. *See generally id.*

| Costs per unit | CD | TAPE |
|---|---|---|
| SRLP | $15.98 | $10.98 |
| LESS PACKAGING DEDUCTION (25%) | -$ 4.00<br>$11.98 | -$ 2.20<br>$8.78 |
| LESS 20% REDUCTION | *-$ 2.40* | |
| RETAIL CD ROYALTY BASE | $ 9.58 | |
| ARTIST "ALL IN" ROYALTY RATE (13%) | $1.25 | $1.14 |
| LESS PRODUCER'S ROYALTY (3%) | $0.287 | $0.263 |
| Artist's net royalty per unit | $0.962 | $0.877 |

| **CALCULATING TOTAL PAYMENTS TO ARTIST** | (CD & tape combined) |
|---|---|
| Average Domestic royalty per album | (.962 + .877) /2 = $0.918 |
| Average Foreign royalty per album | (2/3 of .918) = $0.612 |
| Records sold in the United States | 500,000 units |
| Less standard 15% free goods | -(75,000 units) |
| Less special 5% free goods | *-(25,000 units)* |
| Net royalty bearing units sold | 400,00 units |
| Multiply by artist's average royalty rate | *x $0.918* |
| Gross artist domestic royalty | $367.20 |
| Less 35% reserves for returns | *-($128,520)* |
| Net artist domestic royalties | $238,680 |
| Net artist foreign royalties | *$153,000* |
| **TOTAL ARTIST ROYALTIES** | **$391,680** |
| Less artist advance | *-(25,000)*<br>366,680 |
| Less recording costs | *-(200,000)*<br>166,680 |
| Less 50% of video | *-(75,000)*<br>91,680 |
| Less 50% of independent promo | *-(100,000)* |
| **NET FUNDS UNRECOUPED FROM ARTIST** | **($8,320)** |

For artists not entitled to mechanical royalties, royalties from the sale of albums may be their primary source of income. Most commercially successful artists sell more than one million units in the foreign and domestic markets, but the above hypothetical *does* reflect a fair degree of demand for the artist's record

(500,000 U.S. units sold is considered a gold album). It is important to keep these figures in mind when considering how the on-line subscription model will affect artist compensation in the future.

*E. Mechanical Royalties*

Another type of royalty, and one that recoupable expenses are not charged against, is the "mechanical royalty." Mechanical royalties are royalties paid to songwriters and their publishers for the right to use a song in a record. Mechanical royalties got their name because they were a method for compensating the composer and songwriter from the sale of piano rolls which would mechanically trigger player pianos.

The United States Copyright Office sets the benchmark for mechanical royalty rates. This rate is referred to as the "statutory rate." For the period from January 1, 2002 to December 31, 2003, the statutory mechanical royalty rate is eight cents for songs that are five minutes or less, or 1.55 cents per minute or fraction thereof for all songs over five minutes.[47] However, most record contracts pay mechanical royalties on only seventy-five percent of the statutory rate. Furthermore, recording labels have enough bargaining power to limit the number of tracks on which mechanical royalties will be paid to be between ten and twelve. This limitation is made through the "controlled composition" clause of a recording contract.

The controlled composition clause contractually reduces the mechanical royalty rate the label is required to pay on songs written or otherwise controlled by the artist. Essentially, every song appearing on an album qualifies as a controlled composition. The controlled composition clause will have a detrimental effect on the artist's mechanical royalties if the artist is receiving less than full rate, is using outside compositions on the album, and has agreed to pay a mechanical royalty to that outside composer at full statutory rate.

For example, assume you have a twelve-track album with six of the tracks composed by the artist and the other six composed by outsiders, which is not subject to the three-fourths rate. Also assume the recording contract is generous and caps the number of payable songs at twelve. Due to the fact that the outside composers are entitled to full rate, they will receive forty-eight cents per album (six tracks multiplied by eight cents). Had the artist written all twelve songs, he would have been entitled to seventy-two cents per album. However, under our scenario, the artist is only entitled to receive mechanical royalties of twenty-four cents for six tracks.

47. *See* National Music Publishers Association, *New Statutory Mechanical Royalty Rate, at* http://www.nmpa.org/nmpa/nv-fw9900/newrate.html (last visited May 5, 2002) (copy on file with *The Transnational Lawyer*). For example: 5:01 to 6:00 = $.093 (6 X $.0155 = $.093); 6:01 to 7:00 = $.1085 (7 X $.0155 = $.1085)7:01 to 8:00 = $.124 (8 X $.0155 = $.124).

*F. The Artist in the Online Space*

As music distribution moves into the online world, the question remains how will the artist be paid? To the extent that the online sales figures reflect a sale of whole albums, the artist compensation arrangement would not change. However, online music models are not based sales of whole albums. Rather, the online music environment is a haven for the lover of compilations. Variety is king and the standard online user wants the ability to pick and choose the best songs from his favorite artist. So, when an online user downloads her favorite song, what compensation is the artist entitled to? How will MP3 split up that user's ten dollars a month fee? Thankfully, it appears that the industry has recognized that artists need to be compensated when their music is included in an online subscription plan.

Recently, the National Music Publishers Association, The Harry Fox Agency, Inc., and the Recording Industry Association of America (RIAA) have come to an agreement on the licensing of musical works for new subscription services.[48] Under the terms of this new agreement, the RIAA and all of its member labels and their licensees will have access to all musical works authorized to be licensed by The Harry Fox Agency, who will issue licenses for subscription services offering on-demand streaming and limited downloads.[49] Although the license rates are not yet set, royalties will be payable retroactively from the commencement of services.[50]

Although it is clear that artists who are entitled to mechanical and/or performance royalties stand to enjoy royalties from these new online subscription models, it is not clear whether artists who are only entitled to royalties based on the sale of albums stand to receive anything.

## IV. CONCLUSION

Even though technology may have gotten the jump on the major labels, their mad dash to shore up their flanks has been mostly successful. The RIAA has managed to shut down the more popular music swapping services, and the major labels are taking steps to launch their new subscription services. Still, there are issues that need to be worked out. How artists are paid is one such issue, which hopefully will receive immediate attention. To this author, it seems unfair to offer a subscription model which allows full downloading capability without paying some type of modified sales royalties in addition to the mechanical and/or performance type royalty.

48. *See Songwriters and Music Publishers Reach Landmark Accord With RIAA to License Music Subscription Services on the Internet*, RIAA.COM, Oct. 9, 2001, *at* http://www.riaa.com/PR_Story.cfm?id=459 (last visited May 6, 2002) (copy on file with *The Transnational Lawyer*).

49. *See id.*

50. *See id.*

If labels claim that online piracy has a negative affect on overall album sales, then the label that created an online subscription plan to combat online piracy should not be heard to argue that the downloading of a song through such a plan is not a "sale" for purposes of royalty calculations.