The IMPACT of Digital Distribution on the Duration of Recording Contracts

- By Revella Cook*

The digital distribution of music over the Internet, through its reduction of album distribution and promotion costs, stands to trump major record company business practices that dupe recording artists into signing long-term recording contracts. [1] A long-term recording contract is a contract in which the duration for an agreement between a major record company and a recording artist is measured according to album deliveries, and not according to a designated period of time. Digital distribution and new business models incorporating this technology, however, may forge alternative methods that facilitate the adoption of shorter recording contracts. The industry wide acceptance of digital distribution and its potential future dominance within the music market are influenced by forces inside and outside the music industry – forces which could significantly forestall or eliminate the ability of digitial distribution to revolutionize recording contracts. It is likely that recording artists will witness an interim period where recording companies understand that digital distribution is the future and experiment with different business models before new, shorter recording contracts emerge.

Digital distribution is a revolution in music formats because the dynamics of digital transmission over the Internet allows for the elimination of both manufacturing and distribution costs.[2] Digital music is "'sampled' audio that can be stored, transmitted and copied without further degradation,[3] and digital distribution allows for the transfer of these compressed digital music files over the Internet. [4] MP3 files are one popular type of file or compressed audio format offered online.[5] MP3 files, or motion picture Experts Group Audio Layer 3 files, reduce the size of a sound recording to one-twelfth its original size, [6] making the file easier to transmit without compromising its sound quality. [7]

Over the next several years, different business models will emerge within the music industry as major recording companies strive to benefit from digital distribution. Experimentation with business models is already apparent in recent efforts of major record companies to launch and sponsor websites that sell their music. For example, Vivendi Universal and Sony have worked together to create Pressplay, an equally held joint venture that allows visitors to download music from major record company catalogs. Similarly, AOL Time Warner, BMG, EMI and RealNetworks have launched MusicNet, an online subscription service that is comparable to Pressplay. [8] These businesses have witnessed moderate success with a conservative amount of consumer subscriptions. [9] Future business models are likely to reflect the increased popularity of downloading and the unprecedented opportunity for recording artists to self-distribute their music.[10]

For recording artists trying to avoid a long-term contract, new business models are meaningless unless they translate into better contractual terms. This article will explore artists' unhappiness concerning the current costs of distribution and promoting records, as well as the duration of recording contracts. Following an examination of artist's concerns, this article will demonstrate how digital distribution of music, although not universally endorsed, alleviates artists' concerns regarding distribution and marketing, and may pave the way toward shorter recording contracts.

The success of digital distribution depends on various factors that shape today's music industry. Part I will examine the traditional method of releasing an album and its impact on the duration of recording agreements. This section will focus on the recent legislative debate within California and will illuminate problems regarding the duration of a standard recording contract. Part II investigates modern methods of distribution and whether digital distribution is a viable alternative for the retail of music. Part III discusses innovative marketing models that could reduce costs associated with an album's release. Part IV examines barriers that the music industry must overcome before digital distribution will impact recording contracts. The article ultimately concludes with a prediction that digital distribution will ultimately not only alter the duration of recording contracts but also initiate gradual changes throughout the music industry.

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I. Long Term Recording Contracts and Artists' Frustrations

Album promotion is a complicated process that creates a precarious financial situation for artists. The fame and notoriety of an artist is often a direct result of high promotion by the record company, where the artist often becomes indebted to the company and obligated to create more albums to absolve this situation. Recording artists frustrated with this process are struggling to forge a new standard for contract provisions. The arguments set forth by advocates for recording artists offer incite into the problems produced by the industry's current business methods.

A. The True Cost of an Album

Major record companies traditionally create a hit song or album through large-scale distribution and national marketing campaigns. When a commercial song is released, record company executives usually market the product through television and radio stations throughout the nation.[11] Marketing for an album may cost anywhere from one million to two million dollars depending upon the success of the album released.[12] Common marketing costs include expenditures for advertising, independent promotion, video, manufacturing costs, radio tours, and other expenses. Advertisements within trade publications may cost upwards of $50,000 each,[13] and record company expenditures often include $300,000 for independent radio promotion, $200,000 in tour support and another $100,000 for a radio station tour. Additionally, producing a music video often costs between $600,000 and $1,000,000, especially when multiple singles and videos are released.[14] This promotion does not, however, come free-of-cost to the performer. Instead, record companies actually deduct a significant percentage of their promotional costs from the recording artist's fund.[15]

Funds, also known as advances, are a universal element of recording contracts and are issued to cover the recording costs for an album, as well as an artist's living expenses.[16] A new artist typically receives funds of $175,000 to $300,000, whereas mid-level recording artists receive funds of up to $600,000. Top-selling artists' funds may rise to more than $1.5 million.[17] Although funds may appear substantial, they are quickly consumed by the costs necessary to release an album. Further, an artist usually receives a small portion of the total fund because most of an artist's promotional, and often all of his recording costs, are deducted from this amount.[18]

Consider the following hypothetical to illustrate the financial obligations that an album release imposes upon recording artists. Assume that a four-member band receives a million dollar advance, and assume also that it will take $500,000 to record the album. The band must pay a 20% commission or $100,000 to their manager, and $25,000 to their lawyers and business managers.[19] The band is thus left with $350,000, which is then subject to taxes. Finally, the band's net income is divided amongst the four members and provides each of them with an income below $50,000.[20]

In addition to these expenses, the record company can still charge the band 50% of video costs and 100% of independent radio promotion costs.[21] These costs can be charged against the band's album royalties and cross-collateralized against the band's other royalty streams. If the band is unable to fully repay the record company from the royalties from one album, any outstanding charges can then be assessed against the royalties from subsequent albums. Therefore, the financial data indicates that, forcing artists to remain in recording contracts often imposes additional debt with each album release.22

The above example serves to show how the traditional methods of album promotion can leave an artist broke and dependent upon the record company. This is an aspect of the music industry that a new recording artist may not understand until it is too late and he is already in debt. This phenomenon is also a catalyst behind the actions of artist rights' advocates whom have often challenged the duration of recording contracts.

B. Illustrating Problems Behind Recording Contract Duration: The Debate Surrounding California Labor Code § 2855

Section 2855 and its Legislative History

Recent activities within the California Legislature illustrate that the duration of a standard recording contract, due to high expenditures for album distribution and promotion, has created dissention between recording artists and record companies.[23] During the 2001-2002 California legislative session, Senator Bill Murray introduced California Senate Bill 1246 to repeal a 1987 amendment to California Labor Code §2855.[24] Section 2855(a) states that a contract "to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it."[25] A 1987 amendment to this statute, however, requires "any employee who is party to a contract to render personal services in the production of phonorecords" to give notice to his employer that he shall no longer render his services.[26] The artist's notification, in turn, entitles the record company to damages for breach of contract, as well as damages for any albums anticipated, and not yet delivered.[27] While a literal interpretation of the statute does not prohibit artists from breaking a recording contract, because section 2855 permits damages, its language is tantamount to an explicit prohibition. California Senate Bill 1246 proposed to remove the 1987 amendment to section 2855 to prevent record companies from collecting damages from artist's who terminated their contracts after seven years.[28]

During a hearing before the California State Senate Judiciary Committee, Senator Murray noted that "artists fundamentally believe that [the debate surrounding duration] is about fairness."[29] Murray questioned the basis for exempting the music industry from the seven-year limit on personal service contracts when section 2855 had a one hundred year history and is meant to protect against indentured servitude.[30] Murray's testimony suggested that the statute's legislative history and subsequent legal interpretation demanded that the record companies offer a strong justification for the exemption.[31] His remarks elicit a conclusion that the 1987 amendment undermines the primary purpose of section 2855 because it sanctions a business practice that intentionally locks artists into 15 to 20 year contracts.[32]

Options and the Duration of Recording Contracts

The utilization of options to structure a recording contract reflects the intent of recording companies to procure a recording artist's services on a long-term basis. A contract with an option clause allows the optionor to obtain the services of the optionee at his discretion. The option operates as a mere proposal to make a future offer. It is not binding on the optionor, nor does it guarantee any rights to the optionee.[33] The optionor does incur an obligation to perform and render services once he decides to activate the option, assuming the option is accepted.[34] Within the music industry, options allow the record company to reduce its obligation to release records from an unsuccessful artist, while permitting the company to experience a stream of product from a successful artist.[35] Record companies also use options because section 2855 and similar laws sufficiently threaten artists with damages and reinforce their power to demand album delivery. This reality means options effectively remove an artist's ability to leave a record company until the company decides to release the artist or all albums are delivered.

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One reason why options exacerbate disagreements between artists and record companies regarding contract duration is that they have a very different impact on each of these two groups. A standard recording contract demands delivery of one album plus six optional albums.[36] Recording artists find the "one firm plus six" arrangement oppressive because the recording contract is measured in terms of releases, not years. The negative effect of options is intensified once an artist realizes that current record promotion, in its demand for tours, appearances, and marketing, makes an annual album delivery implausible.[37]

On the other hand, record companies believe the "one firm plus six" arrangement is justified because of the high expenditures they incur. Options do not guarantee that the company will make a return on its investment. In fact, profits are often not realized until the company releases the third album from the act, with the first and second albums operating as investments that introduce the public to the artist.[38] "It's like a tournament for a basketball game and we will pay the money to get it, making the risks higher. And if we succeed, we're entitled to having a long term relationship to be able to recoup those kinds of investments," testified Jeff Ayeroff, before the California Senate.[39] Ayeroff, who serves as the creative director at Warner Brother Records, emphasized that the company funds the beginning of the artist's career and that it does cost a million dollars. Recording artists' attorney Jay Cooper, however, likened the promotional costs behind recording contracts to those witnessed within the television industry.[40] Television studios invest "millions upon millions of dollars trying to develop [new] shows." [41] Just like the major record companies, television studios have few successes, but lack power to lock actors into long term employment contracts.[42] The testimony offered by Ayeroff and Cooper demonstrate that, under the current methods of album promotion, formulating a contract that satisfies both the record company and artist is unlikely. Record companies cognizant of this problem have formulated methods to dissuade artists from pursuing litigation.

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Neutralizing the Threat of Section 2855

Even though the language of section 2855(b) empowers record companies, these entities fear a successful legal challenge to the statute.[43] It would be disastrous for a company to lose the millions it invested in mid-level or top-selling artists, if a court found the amendment unlawful. Abolishing the 1987 amendment would introduce free agency into the recording industry and empower artists to obtain a new contract from the recording company every seven years.[44] Free agency would also induce artists to sign with a different record company once their initial contracts terminated. A record company could no longer dictate a recording artist's career beyond seven years without the artist's acquiescence.

Record companies circumvent the threat of free agency by permitting a successful recording artist to renegotiate his contract during the course of the recording agreement. The renegotiated contract often steps up the royalty rate. The artist also gains more creative control over the production, recording, and promotional decisions that were once made exclusively by the record company. The record company thereby pacifies the artist by enticing him with better contractual terms. Renegotiations, however, often raise questions regarding tacking or the company's ability to start a new seven-year contract with the artist. From the artist's perspective, renegotiation continues the original agreement, because the non-renegotiated terms import the unequal bargaining power between the parties.[45] The record company will contend that the renegotiated contract creates a new agreement between the parties because the payment terms are different. In situations in which renegotiation is impossible, the artist can face the prospect of paying damages.

Damage calculations present another uncertainty under section 2855. California law imposes a burden on the defendant to demonstrate either a "reasonable certainty" of financial gain under the contract or a "reasonable approximate estimation" of the damages. These two standards are hard to reach given the uncertain nature of the music industry and the inability of the record company to predict the success of an album.

Recording companies preempt the operation of section 2855 by including alternatives for a "reasonable measure of the damages" within the terms of the contract. The contract may also stipulate that another state's laws apply in the event of a lawsuit.[46] Such contractual terms clearly favor record companies as they unilaterally create the damage formula. The recording contract also produces a result similar to section 2855 without a judicial ruling. To avoid litigation, it is plausible that artists may opt to pay damages. However, such payments will likely only contribute to artists' frustration over standard practices within the industry.

Section 2855 perpetuates industry practices that are oppressive to recording artists and demonstrates the problems that result from current business models. The statute imposes damages that effectively prevent artists from leaving record companies, while recording contracts usurp the litigation of damage claims. The hearing regarding section 2855 evidences the need for a new business model that empowers recording artists and reduces the cost of album promotion and distribution. To the extent digital distribution opens the door to such business models, better recording contracts could emerge.

II. Traditional Distribution and Digital Distribution

While record companies and recording artists are diametrically opposed in the debate over contract duration, both groups will face risks from a shift in business models. Digital distribution is likely to rapidly become a strong competitor with the current paradigm for music dissemination and consumption within the U.S. An abrupt break from traditional distribution methods could be overwhelming to record companies. A staggered implementation of new distribution methods that incorporate digital distribution could facilitate the transition process. Recording artists do, however, inherit risks in that attracting attention to online music files could involve the same expenditures digital distribution is meant to eliminate. This predicament could influence some artists to self-distribute their works instead of signing with a major record company.

A. The Traditional Distribution of Music

Major record companies utilize business models that exploit their infrastructure and generate sales. The five major record companies offer recording artists significant exposure from their affiliation with the six major music distributors: CEMA, BMG, Sony, PGD, UNI, and WEA. [47] Communication between the record company and its distributor means that an album is disseminated according to an organized plan that is monitored on the national, regional, and local level. [48] The big five distributors operate out of large headquarters and satellite offices. Many satellite offices are located in New York, Chicago, Los Angeles, Atlanta, and Dallas. (Satellite offices are also found in other cities but the locations listed are mainstays in the industry.[49]) Once contacted regarding an album, wholesale distributors will work to secure a market position for the album that is likely to generate high sales. After the company expends significant income on promotion and distribution, excessive sales are needed to break even. Net sales often must exceed 100,000 units before the company receives any profit.[50] The record company often does not reap a significant income from album sales unless a product reaches platinum status. As a result, the album's distribution must be on a grand scale.

The music industry commonly employs two procedures to distribute CDs: wholesale distribution and distribution through sub-distributors. Wholesale distribution will move the product directly from the warehouse, to the chain store buyer and eventually the store's retail outlet. Wholesale distribution to chain stores, such as Best Buy, Circuit City, and For Your Entertainment (FYE), constitutes a major method of music distribution. Chain stores often bombard patrons with artist posters, cardboard displays, and other paraphernalia that promote album sales. Having an account with a chain store allows the wholesale distributor to ship large quantities of new releases because, unlike smaller stores, mass product returns are uncommon with these outlets given their ability to store units over an extended period.

Distribution through sub-distributors results in the products being moved from the warehouse to the sub-distributor before final delivery is made to a retail outlet. There are two common types of sub-distributors: one-stops and rack jobbers. One-stops are companies that cater to retail outlets that cannot afford the minimum ordering and credit requirements imposed by large wholesale distributors, while rack jobbers service mass merchandisers, discount stores, and chain operations where music products are only part of the inventory carried by the store.[51]

A one-stop distributor is a good alternative to the big retail stores that cannot experiment with new releases.[52] "Mom-and-pop" stores or small, local record chains are the most common types of accounts served by one-stops. Certain one-stops will operate in conjunction with the major distributors to prepare special cassettes and CDs of new material for retailers to play "in store" to create interest among customers. A major problem with these companies, however, is that their account base may dissolve quickly due to financial instability. Small mom-and-pop stores have constraints on their credit, minimum orders, shipping, distances, returns, and coverage, and, often, these smaller stores have a single owner that holds the entire financial stake in the business. Consequently, the store cannot buy products too far in advance, which means that selling to these businesses requires the manufacturer to closely regulate album production to prevent product accumulation in the warehouse.

Rack jobbers are the second type of sub-distributor. These entities usually disperse specific music genres, like country or bluegrass, as well as low-budget or lower priced products. Rack jobbers are essential for music distribution in small towns or areas where stores such as Wal-Mart are the only place to purchase recorded music. Rack jobbers operate with huge staffs, large warehouses, and an extensive inventory, and a large percentage of products they distribute are placed within a small number of stores. Stores targeted by rack jobbers often stock music that appeals to the impulse buyer who purchase CDs on a whim because such stores often feature limited department space that reduces the room available for displays. Thus, distribution through rack jobbers is not likely to benefit new artists unable to capture a buyer's attention without aid from marketing materials.

Knowing the ideal retail placement for a record is one hallmark of a major record company's expertise in album distribution. It is common for a record company to strategically position its satellite office in a particular market and foster relationships with local retail outlets to maximize album sales. The financial investments that record companies have made in traditional distribution methods means that it is not likely that they will immediately embrace digital distribution.

The need for risk management also makes it unlikely that record companies will sever their business relationships with wholesale distributors and sub-distributors in favor of an abrupt shift to modern business models utilizing digital distribution. In fact, recording companies may cling to relationships offering financial stability to counterbalance risks involved with financial experimentation. Based upon this, a staggered implementation of modern business models is one possible option to further reduce the risk of digital distribution. While phasing in newer business models will likely annoy recording artists, this situation is preferable to a record company filing for bankruptcy from negligent management.

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B. Digital Distribution of Music

The advent of digital distribution could eliminate costs associated with the physical delivery of music through CDs and cassettes. [53] When downloading music from the Internet, there is no need for middlemen to physically transfer the item from the artist to the buyer. The consumer selects a CD single that has been posted on the website. The customer may then have the option of previewing the single before it is purchased. "If the customer chooses, he or she can download the entire single straight to a computer hard drive – in a matter of seconds."[54] The downloaded version of the song can then be burned onto a CD and used at the consumer's discretion.

Financial risks from under and over production are nonexistent with Internet downloading.[55] The marginal cost of making duplicate digital copies is virtually nonexistent, and the file is transmitted in a digital format.[56] Manufacturing costs for an album are normally one dollar per CD and 50 cents per cassette. These costs accumulate when the record company must distribute the album to retailers and radio stations across the nation. The removal of manufacturing costs from the distribution process means sales revenues behind the CD can decrease but that the overall revenue from a single will remain the same.[57]

Securing stable revenues from business models incorporating digital distribution is paramount for record companies. One can anticipate a comparison between CD revenues and digital revenues by company executives. It is likely that a certain amount of downloads would be necessary to generate revenues equal to that witnessed from CD purchases. If this situation is true, then some recording artists are still in a precarious position. While people do experiment in their musical selections, customers often purchase items from familiar artists.[58] This fact means that a newer artist would need to draw attention to their works. As record companies often create a buzz surrounding an artist through major marketing campaigns, it is possible that the marketing costs to generate downloads would equal or exceed the cost of manufacturing. A newer recording artist would therefore be in the same position as if he were under a traditional method of distribution. A related problem is that digital distribution does not totally eliminate the need to manufacture CDs. Record companies are still likely to offer free promotional copies to consumers, and CDs may still be delivered to radio stations throughout the country.

The potential disadvantages of digital distribution through a record company may influence some artists to pursue self-distribution. Self-distribution is an option for recording artists attempting to avoid a long-term recording contract or for artists who are unwilling to subject themselves to an experimental program. Digital distribution can allow artists to reach numerous potential buyers without ever signing a recording contract with a major record company.[59] Self-distribution may work best for new artists without contractual obligations to a record company and top-selling artists that have completed their contract and wish to terminate their business relationship with a record company. Mid-level artists, and even some top-selling artists, who are in financial debt and under contract to deliver albums are likely barred from self-distributing their recordings online. Top-selling artists, however, might have a slight advantage over mid-level artists, since top-selling artists have enough notoriety to generate income by marketing paraphernalia and similar items online. It should be remembered, though, that self-distribution is a means to avoid, not cure, the problems facing the music industry. Artists unable to pursue self-distribution will still await a revolution in recording contracts.

A comparison of traditional distribution to digital distribution suggests that a radical change in recording contracts is unlikely. Record companies can, and likely will, stall the implementation of digital distribution for their financial security. Additionally, it is possible that digital distribution could simply duplicate the same problems artists already endure under current business models. If this prediction is true, then artists seeking an abrupt alteration in recording contracts must utilize legal actions.

III. Traditional Marketing and Marketing Under Digital Distribution

To the extent established business relationships are important to album distribution, they play an even greater role in album marketing. Record companies may shun new marketing models because artists often sign contracts based on a company's marketing expertise. With this expertise in mind, issues surrounding album marketing are likely to present further barriers to the advent of shorter recording contracts.

A. Traditional Marketing of Albums

Major record companies have highly organized marketing departments that are skilled at selling albums to the general public and which can spend millions to carve a niche in the music market for an artist. Company executives coordinate plans among their marketing, promotion, and publicity departments to generate sales. Various promotion strategies are used by record companies, including brochures, merchandise tie-ins, tours, promotional records, and listening sessions. Artists are often drawn to a record company purely for the company's skills in marketing and promotion. As Jeff Ayerhoff, explains: "[t]hey, [recording artists], come to us because we are, in the case of Warner Brothers, 300 people who have expertise. . . . There are people in our company who are sales people. There are people who are promotion people, who go to radio stations, who have long-term relationships with the radio stations. There are people who have long-term relationships with retailers."[60]

Although several promotional techniques are employed, radio airplay and music videos remain the two most popular methods. Securing airplay on Top 40 radio stations is crucial for successful album sales.[61] In deciding whether or not to air songs from a certain album, as a station's survival depends upon its ratings, radio stations must first analyze the music to determine if it suits the needs of its listening audience. Knowing this, record company representatives will prepare a presentation package for a station's programming director to convince him that the audience of that station wants to hear a particular album. The presentation package will offer an analysis of the record being promoted, the pros and cons for the station playing the record, and a plan to close that record to radio. Additionally, a record company representative may offer information tracking the album's sales from week to week and may consult *Billboard* or Radio/Record to provide a station director with information about the record's airplay at similar stations in other cities. The programming director can also get statistics on the record's sales from polling local stores.[62]

Promotional expenses contribute to financial problems for artists because these expenditures usually exceed the artist's advance. For example, a top-selling artist's pre-composition video budget alone can cost between $400,000 and $750,000.[63] This cost covers the production crew, concept development, script, storyboard, the composition being recorded, choreography, director, producer, production personnel, and other creative and business aspects of the video. Music video expenses are usually treated as advances against an artist's album royalties. Some companies recoup video expenses solely from the income generated by the video. Most companies, however, allow recoupment through monies received from other accounts. For example, the contract can allow the transference of 50% to 100% of the video account to the artist's audio account, permitting monies due to the artist from CD sales to reimburse video production costs.[64]

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Artists pay for the expertise offered by the record company. Promotion expenses operate as additional advances against the recording artist's record royalties. These costs are often 100% recoupable from newer artists and 50% recoupable from mid-level and top-selling acts. While the company may consult with the artist about promotion plans, the record company normally retains the right to make the final decisions.[65] For example, contracts often entitle the label to decide the number of videos for a particular album and the budget for each video. [66] Contract negotiations can secure certain commitments from the recording company regarding video production. For instance, the terms of a contract may stipulate that the production budget cannot be less than $75,000, and a minimum number of videos must be made for each album. The contract also could include triggering clauses, i.e., the company adds $50,000 to the next video's budget if the first single reaches the Top 25. While a top-selling artist can produce a video on a mutual approval basis, where both the company and the artist approve the concept, planning and production of the video,[67] only select top-selling artists with the most bargaining power can approve everything involved in the video's production, including the concept, planning, story line, script, shooting dates, and location.

Digital distribution theoretically resolves problems surrounding marketing budgets for recording artists. Market forces, however, hinder the promotion and marketing of albums only through digital technology. Given that record companies often construct major marketing campaigns to increase sales, it is possible that the marketing necessary to generate downloads may equal or exceed the cost of traditional marketing. Additional expenses would occur from any internet marketing that operated in conjunction with traditional marketing methods. Online pop-up ads, hyperlinks, and screen savers would only increase the expenses artists already endure from music videos and other high budget items.

B. Marketing and Digital Distribution

A marketing plan that contemplates digital distribution is impacted by other trends within the music industry. The consolidation of different companies within the communication and media industries make album marketing more difficult.[68] With this in mind, established business relationships play an important role in album promotion. The radio broadcasting industry illustrates this point. Currently Clear Channel Communications and Viacom control about 42% of listeners and 45% of radio industry revenues.[69] Traditionally, radio playlists are based on popular music that the large labels disperse.[70] A station plays a single because the programming director believes the song will increase ratings. Record company representatives around the nation have the power and relationships needed to walk into a radio station and can get the single on the air. To convince the programming director to play a single, record company representatives could rely upon their business relationship with the station, but this may not solve the problem. Some radio stations believe record companies should not expect them to sacrifice ratings in order to support a company's marketing plan.[71]

Distributing a single only over the Internet may present problems in securing radio airplay. It will become more difficult for record company representatives to provide programming directors the information commonly used in the determination to play a record because programming directors often look to units sold per week within that station's market before they agree to place a song in rotation.[72] Offering a record only through downloading, however, could mean that the record, while appearing to be popular based on number of downloads, will either be low on or even completely off the *Billboard* charts, which are based on sales. This low ranking could result in the refusal of programming directors to play a certain song, since they are lacking this major indicator upon which they often rely.

Though digital distribution does give new artists the option to self-distribute, marketing related problems may mean that this is not a realistic avenue for an act that wants a major hit nationwide.[73] Major record companies offer skills in editing, marketing, promotion, and production services that could remain indispensable in a digital market. For instance, it is difficult to imagine creating a hit record without the use of radio or video.

Artists seeking shorter recording contracts or those considering the option of digital distribution must bear in mind that there are but a few entities which control the marketing of music. There is the possibility that, even in a digital market, a record company will still utilize its connections within radio, television, and print media to promote an album. However, if this situation occurs, then digital distribution may not eliminate costs associated with traditional music marketing and promotion and, as a result, might not offer any real solace to recording artists.

IV. Obstacles to Greater Contractual Freedom

Beyond the financial aspects of distribution and marketing, there are other significant obstacles to digital distribution and, ultimately, to an artist's ability to obtain a shorter recording contract. Assuming an artist could successfully distribute and market his record without a million dollar budget, digital distribution could remain imprudent due to copyright issues. While copyright laws passed in recent years have attempted to protect artists and recording companies from illegal reproduction and mass distribution of musical works over the Internet, modern technology still offers opportunities for infringement and piracy that could delay a total industry shift towards digital distribution.

A. Protection Against Piracy Under Copyright Law

"Even though computer technology became a reality more than half a century ago, it is only in the past decade that it has begun to disrupt the foundations of [the music industry]."[74] The music industry must settle numerous intellectual property issues before universal acceptance of digital distribution becomes a reality.[75] In 2002 alone, album sales dropped by 8.2%.[76] Record companies have attributed this sales slump to Internet piracy, which occurs when sound recordings are sold on a pirate's label or under no label at all.[77] "[The music industry] has watched the value of copyright, the very essence of [its] business, erode in the recent past."[78]

Four major copyright laws control the legality of music distribution over the Internet: the 1976 Copyright Act, the Audio Home Recording Act, the Digital Performance Right in Sound Recordings Act, and the Digital Millennium Copyright Act.[79] Copyright protection for musical works is based on Article I of the Constitution which states "Congress shall have power … to promote the Progress of Science and the useful Arts, by securing for a limited Time to Authors and Inventors the exclusive right to their respective Writings and Discoveries."[80] Under copyright law, the copyright owner has the exclusive right to reproduce, distribute, display, perform, and license a work.

Sound recordings, defined as "works that result from the fixation of a series of musical, spoken, or other sounds . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords in which they are embodied,"[81] initially received copyright protection through a 1971 amendment to Title 17 of the United States Code.[82] However, in recent years, the advent and subsequent rise in popularity of the Internet has greatly increased the complexity of copyright protection of sound recordings. For example, traditional copyright rules, such as the first sale doctrine, can no longer receive a literal interpretation when the Internet allows infringers to make multiple copies of a work." Generally, in initial transfers of works embodied on CD, the original remains in its original location. In secondary transfers, however, the actual embodiment of the work, the CD itself, is transferred. If artists lose control after the first sale, they cannot force removal of any resulting copies."[83]

Copyright laws passed within recent years have attempted to reconcile the need for artists to protect their works with the desire of consumers to hear music online. The Audio Home Recording Act (AHRA) restricts persons from making multiple copies from a digital copy of a song.[84] In particular, the AHRA targets digital audio recording devices. Under the Act, a digital audio recording device is a tool designed and marketed to make numerous or serial digital copies of a sound recording.[85] Serial copying is defined as "duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording."[86] The Act further requires that digital audio recording devices are operated with serial digital technology that inhibits the serial production of digital sound recordings.[87] Manufacturers and importers of digital audio recordings now pay a percentage of their transfer prices into a royalty pool that is distributed amongst musical composition and sound recording owners.[88]

The Digital Performance Right in Sound Recording Act (DPRSRA) of 1995 created a public performance right in sound recordings over the Internet.[89] The Act gives an artist the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[90] A digital audio transmission is a digital transferal that embodies the conveyance of a sound recording.[91] The Act requires an individual to obtain a license from the copyright owner in order to perform the sound recording publicly through digital audio transmission. The DPRSRA creates three licensing categories: voluntary licenses, compulsory licensing, and exemption from licensing.[92] A voluntary license can be issued at the discretion of the copyright owner. This category of licensing encompasses interactive digital downloads of phonorecords, including subscription to digital services based on satellite and cable transmissions. This category targets services that disburse information on programming that would facilitate the duplication of sound recordings. A compulsory license, in contrast, is offered for services where consumers cannot predict the music programmed within a digital transmission.[93] This license would be required for subscription digital transmissions like webcasts because consumers do not receive advance notice of program information and the programming format discourages duplication.[94] A license is not required for non-subscription broadcasts, or similar services, where sound recordings are streamed onto the Internet.[95]

The Digital Millennium Copyright Act (DMCA) of 1998 reflects the need of copyright owners, including record companies and recording artists, to protect their works from technological developments that usurp their rights. This Act also addresses issues surrounding webcasting that were not considered within prior copyright legislation. The DMCA guards against infringement through a prohibition that outlaws any new technology specifically designed or marketed to circumvent copyright protections.[96] The Act also clarifies an artist's right to protect his work through encryption and licensing.[97] The DMCA creates a new license for sound recordings that are digitally transmitted and offers a new statutory license for webcasters that do not provide on-demand services. This statutory license is offered for subscription digital audio transmissions, eligible non-subscription transmissions, and preexisting satellite digital audio radio service.[98] The Act stipulates specific requirements that must be satisfied before an entity can obtain a statutory license.[99] There is also a licensing exemption for ephemeral recordings when the webcaster making the recording is already licensed to transmit the recording and the webcaster satisfies the conditions listed within the statute.[100]

Beyond lobbying for greater legal protection for sound recordings, the music industry has been proactive in developing mechanisms that counteract piracy. Protective measures developed include encryption, watermarks, and copy protection. Encryption ensures that only a person who is authorized to download a file can play that file. To discourage duplication, the name of the subscriber and the relevant account information can be embedded within the transmission. Watermarks are similar to encryption in that information is embedded within the transmission. Watermarks transmit a file with a code that lists information about the transmitter, the copyright owner, the performer, and the songwriter. Copy protection mechanisms prevent unauthorized copying over the Internet and automatically erase an authorized download from a computer once the customer ends his subscription to a particular service.

ANOTHER challenge to eliminating piracy is the average consumer's attitude towards downloading music over the Internet. American consumers are not extremely sympathetic to the plight of the music industry.

A serious issue currently facing record companies is whether the music industry can ever fully eradicate piracy.[101] Although Bertelsmann has acquired Napster, similar peer-to-peer websites such as KaZaA have emerged. "Thus, even after prevailing in the Napster case, the record [companies find] themselves back where they started."[102] Record companies have fostered legislative and technological methods to prevent copyright infringement, but some have proven unsuccessful because these companies fear loss of revenue and market position.[103] For example, the Secured Digital Music Initiative ("SDMI") was organized to bring together the music and technology industries in the development of an encrypted digital format to accompany MP3 files. The organization promised that artists could distribute their works in an encrypted format, when the customer utilized a SDMI compatible player.[104] The program may have failed because major record companies were overly concerned about retaining their control over music distribution through encryption and watermarking.[105] Leonard Chiariglione, former SDMI Executive Director, resigned from his position claiming no consensus between the organization's members was possible. Representatives from the electronics manufacturers, PC manufacturers, and record companies each held enough power to stall the entire process.[106] Even if SDMI's members had achieved their goals, it is possible that some consumers would have disregarded these measures. SDMI's objectives required customers to purchase or download SDMI compatible software to play an encrypted song.[107] Downloading software is a minuscule inconvenience but the music industry must compete against the consumer's ability to access free music. An extra step in the purchasing process could be the difference between getting a customer to pay for a song instead of merely stealing that same song.

Recording artists are well advised to monitor the type of protection devices implemented for digital distribution. The cost associated with protections such as encoding, encryption, payment systems, and website maintenance may consume any profits the record company would witness from moving to an online distribution model.[108] Major record companies could also utilize protective measures to gain market control. These businesses have coalition and lobbying resources necessary to develop and promulgate technological walls that favor measures developed within their own companies.[109] If this technology became necessary for sufficient copyright protection, then artists would still need to enter a traditional recording contract.

B. Piracy and the Average Consumer

Another challenge to eliminating piracy is the average consumer's attitude towards downloading music over the Internet. American consumers are not extremely sympathetic to the plight of the music industry. There is high pressure on music companies to make their products more affordable. In an email survey conducted by *Time*, downloaders were asked why they steal music online. "Many resented buying an [entire] album when all they wanted was one song."[110] For years, record companies have been releasing albums that have only a few potential hits and numerous filler cuts for $18.99.[111] It is unlikely that companies can continue to charge this amount for CDs.[112]

A reoccurring issue is how much consumers are willing to pay for a download. Emusic.com offered downloads for 99 cents but were not able to compete against Napster and other peer-to-peer file sharing websites. In fact, with the advent of digital distribution, major record labels have been occupied with litigation geared towards shutting down peer-to-peer sites. Only recently have these companies begun to launch their own websites and license out their catalogs.[113] Listen.com allows customers to download any song for 99 cents. Research conducted by the website indicated that sales would increase by about 400 percent if songs were sold at 50 or 25 cents per download.[114] Tim Quirk, Listen.com's director of editorial/music programming, predicted that customers are going to see the prices come down within the next year.[115] "[A] fan might be willing to support a performer for 75 cents a song, but not for $1.50."[116] It is possible that consumers became frustrated with record companies after they reneged on their promise to offer their music online if peer-to-peer networks were dismantled.[117]

Consumer attitudes will directly impact the type of business models record companies will use to distribute music online. Individuals may be unwilling to pay a flat monthly rate for downloads if they want only one song. Similarly, persons who download music frequently will find a flat rate more practical. As a result, some industry insiders advocate a subscription model while others believe an "à la carte" method is more effective. With the launch of iTunes, an online music store created by Steve Jobs, CEO of Apple Computers, an à la carte method seems to currently be more appealing.[118] iTunes has been touted as the most successful online music site to date, especially when Pressplay, the joint venture between Sony and Universal, has allegedly cost its founding companies $60 million.[119]

The iTunes music store allows visitors to browse songs by artist, song, title, and genre. Songs are encoded through a new format called AAC that offers superior sound to an MP3 file and occupies less disk space. This format lets the listener get more, better quality music on their computer and iPod. To prevent duplication, each song is encrypted with a digital key so that it can only be played on three authorized computers. The system is customer friendly because people can still burn individual songs onto a limited number of CDs. The songs can be downloaded onto numerous iPods. Pirates are blocked because you can only burn a specific playlist onto a CD ten times. The playlist must be changed manually before the user may burn subsequent CDs.

Ironically, even though illegal downloading has infringed upon artists' copyrights, consumer demand for cheaper music could be the ultimate force behind record companies' changing their business models. Consumer access to free music online means record companies cannot delay a material transition to digital distribution forever. The issue facing the music industry is whether newer business models will be adopted soon enough to quell recording artists' disappointments from traditional business practices.

V. Conclusion

Future decisions made by record companies will determine if business models contemplating digital distribution can rescue recording artists from long-term contracts. Companies are already pondering an alteration in their products. One possibility is a product shift from albums to singles. A singles-based business could revive sales even though singles are currently distributed in minimum quantities or used as free goods. [120] Another option is to shorten the average length of an album from ten to five or six tracks.[121] These measures should be considered starting points in curing the rift between recording artists and record companies. A true reconciliation is unlikely until record companies balance their need for profit with recording artists' needs for contractual freedom.

Achieving such a balance could present the greatest obstacle to shorter recording contracts. Record companies, not artists, will implement business strategies to eradicate barriers to digital distribution. To the extent a record company must generate profits in a competitive and changing music market, offering shorter contracts to recording artists is not a top priority. As a business entity, a record company must distinguish itself in the market. If several smaller firms can offer digital distribution services, then a major record company must offer its artists something more – namely, better distribution and promotion. A greater emphasis on these attributes means recording artists will see gradual changes in contract duration.

A delay in the emergence of shorter recording contracts will also occur because record companies lack guidance in formulating new business models.[122] The myriad of issues facing the music industry means any new business model adopted by record companies must be flexible enough to encompass new strategies, yet static enough to reinforce viable business traditions. Only then can the needs of both record companies and recording artists be satisfied.

ENDNOTES

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1 The term "major record companies" or "record company" refers to the big five record companies within the music industry: BMG, EMI, Sony, Vivendi Universal, and Warner Brothers.

2 Devin Leonard, *Songs in the Key of Steve*, FORTUNE, May 12, 2003, at 52.

3 Vocabulary, Future of Music Coalition, *at* http://www.futureofmusic.org/vocab.cfm (last visited Oct. 9, 2003).

4 *Id.*

[5] Jon Pareles, *With a Click, A New Era of Music Dawns*, N.Y. Times, Nov. 15, 1998, § 2, at 1.

[6] Stephanie Brauner, *Preparing Your Music Client for Web Distribution*, 22 Hastings Comm. & Ent. L.J. 1, 3 (1999).

[7] Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolutions for Artists*, 114 Harv. L. Rev. 2438, 2447 (2001).

[8] Record companies initially feared that access to free music would eradicate their ability to sell CDs. Although CD sales have dropped, the advent of digital distribution has placed more pressure on major record companies to make their music more affordable. *See* Pareles, *supra* note 5; *see also* Brad King, *Music Labels: Streaming is Swell*, Wired News, *available at* http://www.wired.com/news/digiwood/0,1412,56419,00.html (last visited Oct. 9, 2003).

[9] As of May 12, 2003, Pressplay had 225,000 subscribers. Leonard, *supra* note 2.

[10] Note, *supra* note 7, at 2452.

[11] Dana Hall, *Play the Single or an Album Cut? R&B Radio, Labels Don't Always See Eye to Eye on Issue*, Billboard, June 12, 1999.

[12] Phyllis Stark, *Labels Tally The True Price of Airplay; Country's Soaring Radio Promo Costs Prompt Mixed Reviews*, Billboard, Nov. 6, 1999. Courtney Love estimates that it costs approximately $2.2 million for a record company to promote an album. Love admits, "That's mostly retail advertising, but marketing also pays for those huge posters of Marilyn Manson in Times Square and the street scouts who drive around in vans handing out black Korn T-shirts and backwards baseball caps." *See* Courtney Love, *Courtney Love Does the Math*, Salon.com *at* http://dir.salon.com/tech/feature/2000/06/14/love/index.html?sid=836331 (last visited Oct. 8, 2003).

[13] Hall, *supra* note 11.

[14] Love, *supra* note 12.

[15] For example, labels may charge the artist 50% of music video costs and 100% of independent radio promotion costs. *See id*. The record company may also cross-collateralize recording costs against royalties from all the albums released during the recording agreement. *See* Jeffrey Brabec, Music, Money & Success: the Insider's Guide to Making Money in the Music Industry 88-89 (2d ed. 2000).

[16] Donald S. Passman, All You Need to Know About the Music Business 110 (2000).

[17] *Id*. at 110-11. A mid-level artist is someone who's last album sold 750,000 to 1,500,000 units. A superstar recording artist has sales from 2,500,000 units and higher.

[18] Don Henley explained the reality of advances within his testimony before the California State Senate. *Recording Artist Contracts and the Seven-Year Rule: Hearings on S.B. 1246 Before the Cal. S. Select Comm. on the Entm't Indus*. 2001-02 Sess. 96 (2001) [hereinafter *Hearings*] (testimony of Don Henley).

[19] Love, *supra* note 12.

[20] *Id.*

[21] *Id.*

[22] Risa C. Letowsky, *Broke or Exploited*, 20 Cardozo Arts & Ent. L.J. 644, 644-45 (2002).

[23] The debate over the duration of recording contracts within California is important to the interpretation of recording contracts throughout the country because if an artist were to sue his recording company within California, section 2855 would apply because that is the state's public policy. Section 2855 would apply even if the contract was signed in another state and the contract explains another state's law is applicable. *See Hearings*, *supra* note 18, at 120.

[24] Murray, however, withdrew Senate Bill 1246 in August 2002 and was expected to reintroduce this legislation during a later congressional session. *See* Jonathan Cohen, *Senator Withdraws Bill to Repeal 'Seven Year Statute,* Daily Music News, *at* www.billboard.com/billboard/daily/article (Aug. 16, 2002).

[25] Cal. Lab. Code § 2855(a) (2003).

[26] § 2855(b)(1).

[27] § 2855(b)(2),(3).

[28] Cohen, *supra* note 24.

[29] *Hearings, supra* note 18, at 20.

[30] *Id.* at 18-20.

[31] *Id.* at 18.

[32] Courtney Love's legal battle with Vivendi Universal is illustrative of contract disputes surrounding duration. Love's suit focused on the 1987 amendment to California Labor Code section 2855. Love sought to terminate her recording contract citing what she argued where unconscionable and unlawful standard industry contract terms. She alleged the

average recording contract permitted labels to "cheat recording artists out of due royalties, claim ownership over original music, and lock [artists] into long term contracts" that are equivalent to indentured servitude. *See* Connie Change, *Can't Record Labels and Recording Artists All Just Get Along? The Debate over California Labor Code § 2855 and its Impact on the Music Industry*, 22 J. Art & Ent. L. 13 (2002); *see also Hearings*, *supra* note 18, at 72.

[33] Thomas v. Birch, 173 P. 1102, 1104 (Cal. 1918) (stating "an agreement for an option not based upon consideration is simply a continuing offer which may be revoked at any time"); *see also* Kelley v. Upshaw, 246 P.2d 23 (Cal. 1952); Torlai v. Lee, 270 Cal. App. 2d 854 (Cal. Ct. App. 1969); Henry v. Lake Mill Lumber Co., 293 P.2d 909 (Cal. Ct. App. 1956).

[34] Warner Bros. Pictures, Inc. v. Brodel, 192 P.2d 949 (Cal. 1948).

[35] Samuel J. Fox, *Record Companies and Their Search for New Artists — And Artists and the Pursuit of Recording Agreements*, *in* Entertainment Industry Contracts: Negotiation and Drafting Guide 159 (Donald C. Farber ed., 2002).

[36] *Hearings*, *supra* note 18, at 81.

[37] Attorney Jay Cooper explains that the industry has changed and that demands upon artists make delivery of one album per year impossible. *See Hearings*, *supra* note 18, at 66-67.

[38] Fox, *supra* note 35, at 159.

[39] *Hearings*, *supra* note 18, at 53-54.

[40] *Id.* at 63-64.

[41] *Id.* at 63.

[42] *Id.* at 63 –64.

[43] Nullifying the 1987 amendment would have ramifications on the entire recording industry nationwide. *See* Change, *supra* note 32, at 15.

[44] In fact, Love's suit against Vivendi Universal is often compared to Olivia de Havilland's suit against Warner Brothers Studio that eradicated the Hollywood studio system that once locked actors into long-term exclusive contracts with movie companies. *See* De Havilland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225 (Cal. Ct. App. 1944).

[45] Artists should procure a guarantee from the label that the renegotiation does not equal an "open market break." This situation is where the company fully releases the artist from the initial contract and then starts a new seven-year period based on a different contract that distributes higher royalties. *See* Kia Kamran, *California "Seven Year Law" Affects Bargaining Power, Little Else*, in Entertainment, Publishing, & the Arts Handbook 357, 366-67 (John David Viera and Robert Thorne eds., 1999).

[46] Notwithstanding, California law may still apply if an inadequate relationship exists between the parties and the chosen forum; or if applying the other jurisdiction's law would be contrary to California Law. *See id.* at 366-67.

[47] The big five distributors are WEA, UMG, BMG, EMD, and Sony. The big five handle approximately 80% of the music distributed in today's market, with the independent distributors accounting the remaining 20% in distribution accounts. *See* Charles Hall & Frederick Taylor, Marketing in the Music Industry 29 (1996).

[48] The distribution plan will operate in conjunction with the marketing and promotion anticipated for the record to maximize sales.

[49] Hall & Taylor, *supra* note 47, at 33.

[50] *Id.* at 135.

[51] *Id.* at 72.

[52] *Id.* at 62.

[53] Digital distribution may also reduce the packaging deductions from album royalties. Packaging charges may have some affiliation with the large manufacturing plants, warehouses, and trucks record companies utilize to deliver albums to retail outlets. Jon Pareles, *Records and CD's? How Quaint; Digital Distribution of Music is Spreading*, N.Y. Times, July 16, 1998, at E1.

[54] Tad Lanthrop & Jim Pettigrew, Jr., This Business of Music Marketing and Promotion: A Practical Guide to Planning and Producing a Complete Marketing Campaign for Selling Music to the Listening Public 261 (1999).

[55] Note, *supra* note 7, at 2450.

[56] *Id.* at 2446-47.

[57] Pareles, *supra* note 53.

[58] Pareles, *supra* note 5.

[59] Brauner, *supra* note 2, at 4.

[60] *Hearings*, *supra* note 18, at 37.

[61] Hall & Taylor, *supra* note 47, at 165.

[62] *Id*. at 166-67.

[63] Brabec, *supra* note 15, at 86.

[64] *Id*. If the recording agreement does not address video production, the high cost for videos means that negotiations surrounding how the company will get its money back are intense. Large line items like video production can eliminate the company's profit margin or the artist's entire royalty account.

[65] *Id*. at 87.

[66] *See generally* Fox, *supra* note 35, at 163.

[67] Brabec, *supra* note 15, at 85.

[68] *Hearings*, *supra* note 18, at 33-34.

[69] Jenny Toomey, *Empire of the Air,* The Nation, Jan. 13, 2003, at 28, *available at* http://www.thenation.com/doc.mhtml?i=20030113&s=toomey&c=1 (Dec. 23, 2002). After the passage of the 1996 Telecommunications Act, Clear Channel has grown from 40 stations to 1,240 stations. *Id.*

[70] Michael Grebb, *Radio: Where's The Diversity?, at* http://www.wired.com/news/digiwood/0,1412,57121,00.html (Jan. 8, 2003).

[71] Hall, *supra* note 11.

[72] Brian Farrish, *Music Business: Radio Airplay 101 —Commercial Radio Ratings*, *at* http://www.indie-music.com/article.php?sid=1997 (last visited Oct. 9, 2003).

[73] Pareles, *supra* note 5.

[74] Peter S. Menell, *Can our Current Conception of Copyright Law Survive the Internet Age? Envisioning Copyright Law's Digital Future*, 46 N.Y.L. Sch. L. Rev. 63, 98 (2003).

[75] Amy Harmon, *Copyright Hurdles Confront Selling of Music on the Internet*, N.Y. Times, Sept. 23, 2002, at C1.

[76] Leonard, *supra* note 2.

[77] Brauner, *supra* note 6, at 8.

[78] *Hearings*, *supra* note 18, at 34 (statement from Glenn Barros, President, Concord Records).

[79] The scope of this article is not meant to offer an exhaustive analysis of copyright law, but only a superficial treatment of the legal issues record companies will consider within their business plans.

[80] U.S. Const. art. I, § 8, cl. 8.

[81] 17 U.S.C. §101 (2003). Another term relevant to digital distribution is phonorecord or "material objects in which sounds … are fixed by any method known or later developed, and from which those sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *See id.*

[82] Sound Recording Amendment of 1971, P.L. 92-140; 85 Stat. 391; *see also* Brauner, *supra* note 6, at 8.

[83] Brauner, *supra* note 6, at 10.

[84] 17 U.S.C. § 1002(a) (2003).

[85] 17 U.S.C. § 1001(3); *see also* Brauner, *supra* note 6, at 12.

[86] 17 U.S.C. § 1001(11).

[87] 17 U.S.C. § 1002.

[88] 17 U.S.C. §§ 1003, 1004; *see also* Menell, *supra* note 74, at 131.

[89] 17 U.S.C. § 114.

[90] 17 U.S.C. § 106(6).

[91] 17 U.S.C. § 114(j)(5).

[92] 17 U.S.C. §§ 114(d), (f), (h); *see also* Corey Field, *New Uses and New Percentages: Music Contracts, Royalties And Distribution Models in the Digital Millennium*, 7 UCLA Ent & Sports L. Rev. 289, 295-97 (2000).

[93] 17 USC § 114(d)(2).

[94] Field, *supra* note 92, at 297.

[95] 17 U.S.C. § 114(d)(1); *see also* Field, *supra* note 92, at 297.

[96] 17 U.S.C. § 1201; *see also* Brauner, *supra* note 6, at 18.

[97] 17 U.S.C. § 1201; *see also* Field, *supra* note 92, at 293.

[98] Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313 (2002).

[99] 17 U.S.C. § 114(f).

[100] *Id*. These conditions include that only the webcaster use the copy of the recording and the copy transmitted only within the webcaster's local service area. *Id*; *see also* Rose, *supra* note 98, at n.121.

[101] Note, *supra* note 7, at 2455-56.

[102] Menell, *supra* note 74, at 150.

[103] For example, the No Electronic Theft (NET) Act of 1997 imposes up to one-year imprisonment for an individual who downloads more than $1000 of copyrighted material within a 180 day period. *See* 17 U.S.C. § 506(a)(2) (2003).

[104] Note, *supra* note 7, at 2456-57.

[105] Future of Music Coalition, *The Future of Music Manifesto: The History of the Music Industry vs. The Future of Music*, *available at* http://www.futureofmusic.org/manifesto (June 1, 2000).

[106] Sam Costello, *Why the Secure Digital Initiative is Falling Apart*, IDG News Service, Feb. 6, 2001 (on file with author).

[107] LiquidAudio similarly requires consumers to download or purchase LiquidAudio Player to hear music offered through its website.

[108] Field, *supra* note 92, at 16.

[109] Note, *supra* note 7, at 2439.

[110] Josh Quittner, *Why I Steal Music*, Time, May 5, 2003, at 66.

[111] Leonard, *supra* note 2.

[112] Jon Pareles, *Trying to Get in Tune with the Digital Age; Recording Industry Seeks a Standard for Distributing Music on the Web*, N.Y. Times, Feb. 1, 1999 at C1.

[113] Menell, *supra* note 74, at 120-21.

[114] Michael Grebb, *Music Biz: Compromise is Key*, Wired News, *available at* http://www.wired.com/news/digiwood/0,1412,57104,00.html (Jan. 7, 2003).

[115] *Id.*

[116] Pareles, *supra* note 5.

[117] Leonard, *supra* note 2.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Articles*, Billboard, June 8, 2002, at 83.

[122] Amy Harmon, *Grudgingly, Music Labels Sell Their Songs Online*, N.Y. Times, July 1, 2002, at C1.