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**LAW & ECONOMICS OF THE ADULT ENTERTAINMENT INDUSTRY TODAY:
AN INSIDE VIEW FROM THE INDUSTRY’S LEADING TRADE PUBLISHER**

By Clay Calvert[◇] and Robert D. Richards[⊗]

INTRODUCTION

2007 was not, to say the least, a very good year for the American adult entertainment industry, headquartered in southern California’s San Fernando Valley.¹ In brief, a combustible combination of legal fights,² economic downturns³ and content

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¹ See generally Joshua Chaffin, *Porn Industry Points the Way for Struggling Hollywood*, FINANCIAL TIMES (London), Mar. 9, 2007, at World News 6 (describing the San Fernando Valley as “home to the ‘other Hollywood’” where “the pornographic film industry is already suffering through a home entertainment meltdown”); Sharon Mitchell, *How to Put Condoms in the Picture*, N.Y. TIMES, May 2, 2004, at Sect. 4, 11 (describing “the San Fernando Valley – or ‘Porn Valley’ – where much of the sex-film industry is based”).

² See *infra* notes 7-10 (identifying four different federal obscenity prosecutions that were pending or took place in 2007); See also, David Sullivan, *John Stagliano Arraigned on Obscenity Charges*, AVN Website,

piracy⁴ dealt the industry a severe one-two-three punch. The legal battles, in the name of defending the First Amendment⁵ right of free expression, included federal obscenity⁶

available at <http://www.avn.com/video/articles/29739.html> (last visited Apr. 27, 2008) (reporting a 2008 obscenity indictment by the Justice Department against longtime adult producer John Stagliano).

³ See generally Matt Richtel, *For Producers of Pornography, Internet's Virtues Turn to Vices*, N.Y. TIMES, June 2, 2007, at A1 (asserting that “the established pornography business is in decline” and contending that “online availability of free or low-cost photos and videos has begun to take a fierce toll on sales of X-rated DVDs”).

⁴ See generally Mark R. Madler, *Adult Entertainment Industry Leaders Move to Combat Piracy*, SAN FERNANDO VALLEY BUS. J., Sept. 17, 2007, at 1 (describing how piracy of content is a growing problem for the adult entertainment industry, and reporting that the industry’s “loss in 2007 is estimated at \$2 billion, according to the Global Anti-Piracy Agency, a not-for-profit formed in June to tackle porn piracy and based in North Hollywood. The loss is figured at about 25 percent of the industry’s overall revenues of \$8.5 million.”).

⁵ The First Amendment to the United States Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁶ Obscene speech falls outside the ambit of First Amendment protection and thus may be regulated without raising the same constitutional concerns and questions. As the United States Supreme Court put it a half-century ago, obscene expression is “not within the area of constitutionally protected speech or press.” *Roth v. United States*, 354 U.S. 476, 485 (1957).

The current test for obscenity, which was established by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), focuses on whether the material at issue: 1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the

cases in Arizona,⁷ Florida,⁸ Pennsylvania⁹ and Utah.¹⁰ The economic woes and misery, caused by an assortment of factors ranging from the proliferation of free amateur sites like YouPorn.com¹¹ – the so-called “YouTube of Porn”¹² – to a glut of professional adult

perspective of the average person; 2) is patently offensive, as defined by state law; and 3) lacks serious literary, artistic, political or scientific value. *Miller* at 24.

⁷ *Federal Grand Jury Charges Arizona and California Companies and Their Owners with Obscenity Violations*, PR NEWSWIRE, June 1, 2006 (reporting that “[a] Chatsworth, California film production company and a Tempe, Arizona video distributor and retailer, along with three owners of the businesses, have been charged by a federal grand jury in Phoenix, Arizona with operating an obscenity distribution business and related offenses”).

⁸ *See Billy House, Adult Filmmaker Charged with Obscenity*, TAMPA TRIB., June 1, 2007, at 5 (describing the indictment of Paul Little, owner of Maxworld Entertainment, of Altadena, Calif., on ten counts of obscenity – “five counts of transmitting obscene matter by Internet and five counts of sending obscene matter through the U.S. mail to Florida addresses”).

⁹ *See Neil A. Lewis, A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27 (discussing the federal government’s obscenity prosecution of Karen Fletcher, “a 56-year-old recluse living on disability payments,” who faces trial “for writings distributed on the Internet to about two dozen subscribers”); *see also*, Paula Reed Ward, *Appeals Court Reinstates Porn Case*, PITT. POST-GAZETTE, Dec. 9, 2005, at A-1 (discussing the Third Circuit U.S. Court of Appeals decision that the trial judge “erred in dismissing the indictment against Extreme Associates, Inc., and its owners, Robert Zicari, and his wife, Janet Romano”).

¹⁰ *See Pamela Manson, Pair Charged with Porno Sales*, SALT LAKE TRIB., June 15, 2007 (noting “the U.S. Attorney’s Office in Salt Lake City has accused two brothers of selling obscene materials through their Internet business, claiming the Ohio enterprise shipped hard-core pornographic movies to Utah”).

¹¹ A *USA Today* article summed up the situation regarding the economic woes for the adult industry caused by such amateur sites:

content, were captured well by a June 2007 *Los Angeles Daily News* article that observed that “the Internet that built the industry into the multibillion-dollar economic engine it is today threatens to drive it off course. The gate has been cast wide open – and that’s letting too many people in the door.”¹³

Perhaps the most knowledgeable person about both the legal and economic issues facing the adult business today is Paul Fishbein, president of Adult Video News.¹⁴ A frequent commentator in the mainstream news media about issues confronting the adult industry,¹⁵ Fishbein has chronicled this business from his prime perch at AVN headquarters in Chatsworth, California¹⁶ for more than a quarter century.

Overall sales and rentals of X-rated DVDs have plunged 15% in the last year and up to 30% over the past two years because video and photos on the Internet – much of it created by amateurs – are available at a fraction of the cost or for free. PornoTube.com and YouPorn.com are piping user-generated naughty content straight to the PCs, cellphones and Internet-connected TVs of consumers.

Jon Swartz, *Purveyors of Porn Scramble to Keep Up with Internet*, USA TODAY, June 6, 2007, at 4B.

¹² *Predictions 2008*, NAT’L REV., Dec. 27, 2007, available at

<http://article.nationalreview.com/?q=ZTdkMDA5YTdiZTBhYzUwNjI0NjM4OTg1NWU3MmFmMTc=> (last visited Apr. 27, 2008).

¹³ Brent Hopkins, *The Adult-Movie Business Has Come a Long Way from Stag Films and ‘Deep Throat,’* L.A. DAILY NEWS, June 3, 2007, at N1.

¹⁴ See generally *Faces of AVN Media Network: Paul Fishbein*, available at

http://www.avnmedianetwork.com/index.php?content=faces_paul (last visited Jan. 10, 2008) (providing brief biographical information about Fishbein).

¹⁵ See, e.g., Matt Richtel, *A Thaw in Investment Prospects for Sex-Related Businesses? Maybe*, N.Y. TIMES, July 27, 2007, at C7 (suggesting that “[i]nvestor reticence about the sex industry is changing notably”); Scott Hettrick & Dana Harris, *Vid Revs Generate Stream for Porn Biz*, DAILY VARIETY, Dec. 13, 2005

During his tenure at AVN, Fishbein has watched the adult business collide with the government in numerous protracted legal battles – including ones that tested the outer boundaries of First Amendment protection.¹⁷ For a time, Fishbein even published a magazine – *Free Speech* – devoted exclusively to the legal issues adult content producers face daily.¹⁸ Though short lived, the publication nonetheless was evidence of how critical First Amendment law is for an industry that never strays far from the scornful sight of law enforcement authorities.

Today, the government is squeezing the adult entertainment business from multiple directions. The prosecutions referenced above are only part of recent efforts to regulate the operations of an industry struggling to redefine itself in light of technological advancements and amateur entrants into the marketplace. In summer 2006, the FBI began conducting unannounced inspections to confirm that adult content producers keep

(noting that “adult content dominates the sales of in-hotel movie purchases”); Bill Keveney, *Hollywood Gets in Bed with Porn*, USA TODAY, Oct. 17, 2003, at 1E (suggesting that mainstream entertainment producers are creating shows that highlight the adult industry and enable viewers “to peep into the neon glow of a culture that has long operated on the edges of entertainment”); Bill Marvel, *As Profits Explode, Stigma Persists*, DALLAS MORNING NEWS, Apr. 24, 2002 (noting that the number of daily visits to Internet porn sites “is easily in the tens of millions”); and Erik Baard, *You’ve Got Porn*, VILLAGE VOICE (New York, NY), Oct. 24, 2000, at 40 (describing the proliferation of online pornography).

¹⁶ See AVN Media Network Website, available at <http://www.avnmedianetwork.com/index.php?content=contact> (last visited Jan. 31, 2008) (providing the address as 9414 Eton Avenue, Chatsworth, Cal.).

¹⁷ *Supra* notes 7-10.

¹⁸ *Infra* Part II, Section C.

the age-verification records for performers as required under federal law – 18 U.S.C. §2257¹⁹ – and causing further woes for the already beleaguered industry.²⁰

Although ostensibly designed to keep underage performers out of adult materials, the stringent record-keeping requirements arguably go well beyond what is necessary to ensure that no minors find their way on to an adult set.²¹

¹⁹ 18 U.S.C. § 2257 Record keeping requirements, which provides in relevant part:

(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter which--

(1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce; shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

²⁰ Beth Barrett, *Crackdown by FBI Tests Adult Limits*, L.A. DAILY NEWS, June 7, 2007, at N10 (noting that “the FBI has stepped up its inspection of production company documents verifying that all performers are 18 or over”); *See also*, Robert D. Richards & Clay Calvert, *The Legacy of Lords: The New Federal Crackdown On the Adult Entertainment Industry's Age-Verification and Record-Keeping Requirements*, 14 UCLA ENT. L. REV. 155 (2007) (interviewing eight individuals, including a top adult industry attorney, about the current spate of regulatory inspections).

²¹ 18 U.S.C. §2257 (b) (2008), which provides, in relevant part:

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct--

(1) ascertain, by examination of an identification document containing such information, the performer’s name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

Fishbein has witnessed other broad-based law enforcement sweeps of the adult industry in the past – a prosecutorial wave took place in the late 1980s²² and the early

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d) (1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

²² See Caryle Murphy, *FBI Seizes Allegedly Obscene Tapes From 8 Shops; Raids Called Second Phase in Probe of Interstate Transportation of Pornographic Materials*, WASH. POST, Mar. 12, 1987, at C4 (describing the seizure of business records and videotapes at eight video rental stores in three different counties near Washington, D.C., “in what the FBI called the second phase of a continuing investigation into interstate transportation of allegedly obscene materials,” and adding that “[t]he probe is buoyed by a national effort that was begun by Attorney General Edwin Meese III to combat what he called ‘an explosion of obscenity’”); Caryle Murphy, *Federal Pornography Probe Launched; U.S. Grand Jury in Alexandria Subpoenas Records of 11 Firms*, WASH. POST, Nov. 29, 1986, at B1 (writing that “[a] federal grand jury in Alexandria has launched an extensive probe into interstate transportation of allegedly obscene materials, buoyed by Attorney General Edwin Meese III’s promise to combat ‘an explosion of obscenity’”).

1990s²³ – but somehow, for the veteran publisher, this time it is different. As he noted during the interview that is the centerpiece of this article, newcomers to the business have more of a “scorched-earth policy.”²⁴ That translates into retreating and disassociation when the government descends upon a fellow adult producer – a marked change from the past. He explained:

The people I came into the business with, as well as the people who were already established in the business, were much more of a community because they were under fire. They were the outcasts of society. They were pooh-poohed because they were pornographers, so they had this us-against-the-world mentality and they stuck together. Of course, they

²³ See Karen Cusolito, *Federal Porn Sweep Suffers Setback in Oklahoma Mistrial*, HOLLYWOOD REP., Aug. 5, 1991 (describing a mistrial in an obscenity prosecution in Oklahoma against two executives of a Los Angeles adult video production company called Cal-Vista as “the latest development in a U.S. Justice Department crackdown on adult entertainment stemming from raids last year on 30 Los Angeles businesses”); Earl Paige, *Mixed Outcome In Two X-Rated Vid Trials; Anti-Censors: Cal Vista ‘Victory,’ Dallas Defeat*, BILLBOARD, Aug. 17, 1991, at 4 (describing the outcome in two cases that stemmed “from widespread Justice Department actions against adult video suppliers” and that began when “the FBI conducted its sting operation” in 1990 at the Video Software Dealer’s Association [VSDA] convention and that “grew out of an investigation by the Child Exploitation and Obscenity Section of the U.S. Justice Department that has resulted in 30 raids on producers and distributors in the Los Angeles area over the past year and a half”); *Video Pauses on Censorship Issues*, HOLLYWOOD REP., July 19, 1991 (describing the 1990 sting operation that began at the VSDA convention when “agents undertook a sting operation under which they set up phony businesses or took post office boxes in the nation’s more conservative jurisdictions. When product ordered at the VSDA was delivered by mail, the agents initiated federal action against the manufacturers for delivering pornographic goods across state lines”).

²⁴ *Infra* Part II, Section D.

would fight with each other, but the worst enemies would give each other money if they were busted. It meant something.²⁵

Ironically, this may be the most important time in the history of the adult industry when the players should stay aligned, given the government's multi-dimensional attack. At the same time, however, the fractured nature of a business that has embraced technology and grown so rapidly that it lacks gatekeepers makes it all but impossible to recognize a cohesive group that now can be defined as the core of the business.²⁶ Opponents of the adult industry now can lump amateur and professional content providers together under one tent, much in the same way they have long associated child pornographers with legitimate adult producers.²⁷

Fishbein knows well that the government often uses the adult industry as a scapegoat when the real culprits – child predators and child pornographers – elude capture. He explained,

²⁵ *Id.*

²⁶ See generally, Rachel Davis & Konrad Marshall, *WARNING; Sexually Explicit Material is More Accessible, Made Next Door and Can Destroy Lives*, FLA. TIMES-UNION (Jacksonville), Dec. 2, 2007, at E-1 (noting that “with technological advances in online networking and file-sharing, porn has reached a point where the production is all around us, too, from professional production companies to amateur dabblers”).

²⁷ See, e.g., Peter Melchione, *No Exit; We Can't Bar Porno Outlets, But We Can Contain Them*, RECORD (Bergen County, N.J.), July 11, 2007, at L11 (arguing that “[w]ith the explosion of vile pornography on the Internet, and with the ever increasing exploitation of children and women, I find it mind-boggling that governments are being handcuffed in their efforts to limit either pornographic distribution points or access to pornography in the name of the First Amendment” – thus linking together adult materials and child pornography).

it's hard to get a hold of them, while it's easy to get a hold of commercial pornographers. So they do and then say, 'We're protecting our children.' That's the politics. The average person is going to say, 'They went after the pornographer to protect the children.' It doesn't register as a speech issue, and the news media aren't going to come out against it.²⁸

Indeed, painting the mainstream adult entertainment business with the broad brush of child pornography only further adds credence to government efforts to rein in this unseemly mob.

This article focuses on an exclusive interview with Paul Fishbein, president of Adult Video News, a trade publication that has charted and chronicled the evolution and growth of adult entertainment in the United States. Part I of the article briefly describes the methodology used for conducting the interview. Part II then turns to the interview with Fishbein that is the centerpiece of this article, initially providing in Section A, in question-and-answer format, his comments about the government's legal attacks on the adult entertainment industry, specifically the current FBI age-verification inspections.²⁹ Section B turns to Fishbein's observations about the federal government's ongoing obscenity prosecutions.³⁰ Section C examines the rationale for protecting adult expression under the First Amendment.³¹ In Section D, Fishbein discusses the current

²⁸ *Infra* Part II, Section B.

²⁹ *Infra* notes 33-38 and accompanying text.

³⁰ *Infra* notes 40-89 and accompanying text.

³¹ *Infra* notes 90-95 and accompanying text.

economic state of the adult entertainment business.³² Finally, the article analyzes and synthesizes the interview in Part III.³³

I.

METHODOLOGY AND PROCEDURES

The interview with Paul Fishbein was conducted in person on October 5, 2007, at AVN offices, located at 9414 Eton Avenue, Chatsworth, California by the authors of this article. Fishbein's comments were recorded with Marantz, broadcast-quality recording equipment on audiotape using a tabletop microphone. The tape was then transcribed by the authors and reviewed for accuracy.

The authors made a few very minor changes for syntax in some places but did not alter the substantive content or material meaning of any of Fishbein's responses. Some responses were reordered and reorganized to reflect the various themes of this article set forth below in Part II, and other portions of the interview were omitted as extraneous, redundant or simply beyond the scope or the purpose of this article. The authors retain possession of the original audio recording of the interview, as well as the printed transcript of the interview.

Mr. Fishbein had no advance opportunity to review or preview any of the questions he was asked, thus allowing for greater spontaneity and immediacy of responses. In addition, Mr. Fishbein reviewed neither the raw transcripts of the interviews nor any of the drafts of this article before it was submitted for publication.

³² *Infra* notes 96-114 and accompanying text.

³³ *Infra* notes 115-130 and accompanying text.

Furthermore, he was neither paid nor otherwise compensated by the authors for his time and comments.

II.

THE INTERVIEW

A. *Current Legal Issues Facing the Adult Entertainment Industry: Age-Verification and the Current Crackdown*

In this section, Paul Fishbein discusses the current government attacks on the adult entertainment industry. He differentiates between the record-keeping inspections conducted by the FBI and the obscenity prosecutions undertaken by the Justice Department and speculates on the potential impact for the industry.

QUESTION: What are some of the legal issues that *AVN* faces? Are you subject to the same 2257 requirements³⁴ as other publications?

³⁴ *Supra* notes 19-20.

FISHBEIN: We're a secondary producer.³⁵ We don't produce any explicit content, so we feel like we're not a target. Most of our ads are soft. We don't have any hardcore ads in the magazines. We have no nudity on the website.³⁶ I'm sure if you dig deep enough, you'll find something – a nipple or whatever. I just think that we are fairly clean. We do the best job we can to make sure that we don't accept anything that will get us into trouble. Some of the ads have sex that's sort of blurred or whatever so, as a secondary producer, we have to be careful. We're not in the same boat as the people who are putting out the movies or any hardcore content.

QUESTION: Can it be said that the current crackdown³⁷ to enforce the Section 2257 requirements is public relations packaging, on the part of the Bush Administration? If the records designed to keep underage performers out of the industry are not in order, then can't the government claim they're trying to protect children from these pornographers?

³⁵ See Free Speech Coalition website, *available at* <http://www.freespeechcoalition.com/FSCView.asp?coid=655#two> (last visited Dec. 13, 2007) (defining secondary producer as one who republishes an "image of actual sexually explicit conduct" and noting that "[t]ypical secondary producers include companies that manufacture compilation movies from other companies' catalogs, magazines publishing photos from movies, or companies that purchase content recorded by someone else and publish it for the first time, whether in magazines, DVDs or product covers. Most websites are secondary producers").

³⁶ See AVN Website, *available at* <http://www.avn.com> (last visited Jan. 24, 2008).

³⁷ See Barrett, *supra* note 20, at N10.

FISHBEIN: And they're not going to find underage performers. On the one hand, from a strictly intellectual point of view, you say, "OK, we'll accept this."

On the other hand, I think the rules are onerous. They're ridiculous and the record-keeping requirements are insane.

Listen, you should have on file proper identification – real identification – and a model release for every person who performed in every scene. In one sense, I'm OK with it because, at least, it's an area where people know in advance what the rules are. Whether you like them or not, you can make a choice if you want to follow the rules to be in this business.

Although being horrendously onerous, difficult, stupid and illogical, at least the 2257 rules are there. With obscenity law, nobody knows the rules.³⁸

They're not going to find underage girls. The amount of money they're spending to carry out this process seems ridiculous – the time, the man-hours, the FBI hours and Special Agent Joyner's³⁹ time – all to find people who might be in violation of the record-keeping requirements but who are not using underage girls.

³⁸ For a discussion of how the Miller test for obscenity is outdated and difficult to apply to modern technology, see Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L. J. 507 (2001); See also, Carole Tanzer Miller, *Legal Action Hinges on Defining Obscenity*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 28, 2007, at A25 (interviewing Duke University Law Professor Erwin Chemerinsky who said "[i]t seems too impossible to try to define what the contemporary community standard is").

³⁹ See Robert D. Richards & Clay Calvert, *FBI Agent Joyner: 2257 Record-Keeping 'Very Poor' But Improving*, AVN.COM, available at <http://www.avn.com/index.cfm?objectID=6DE5C9C6-188B-39E4-BC6E8B69D386357E&slid=364550> (last visited Jan. 24, 2008) (noting that Charles Joyner is "the FBI supervisory special agent in charge of the ongoing Section 2257 inspections in southern California").

It's a level playing field, at least. If I want to open up a company today that produces explicit material, then I know going in what I have to do on that particular area. I don't know, however, what obscenity is.

While the record-keeping is ridiculous, the concept is fine. I'm all about consenting adults. I'm not about underage and not about anybody not consenting.

B. *Obscenity Prosecutions and the Bush Administration*

In this section, Fishbein discusses how the Bush Administration has handled its relationship with the adult entertainment industry. He notes that it is far easier for the government to target commercial adult producers than underground child pornographers, which, in his estimation, should be the focus of the government's efforts. Finally, he talks about the mainstreaming of the adult business and the intersection of morality and the law.

QUESTION: Let's talk about some of the obscenity prosecutions going on right now.⁴⁰ Obviously, the Bush Administration in the last year or so has really pushed ahead on obscenity prosecutions, as promised to the constituency.⁴¹ Is this just politics as usual for the Bush Administration? Is this a big push now, but then it will die off?

⁴⁰ *Supra* notes 7-10.

⁴¹ See Mark Sherman, *Bush Administration Stepping Up Obscenity Prosecutions*, ASSOC. PRESS, May 4, 2005, at BC Cycle (noting that then-“Attorney General Alberto Gonzales, like his immediate predecessor, John Ashcroft, has pledged to make obscenity prosecutions a priority”).

FISHBEIN: Who knows who is going to be elected President? It always seems to be part of the agenda of the right. There's a big push against LodgeNet⁴² right now. They're under a lot of pressure.

It's that vocal minority – the right wing always seems to push this.⁴³ I think the Bush Administration was slow getting to it, but I guess we had a few other issues going on in this country.⁴⁴ They're going to plow forward with these few. The prosecutions are more targeted to the extreme material⁴⁵ rather than trying to put specific people out of business like Larry Flynt⁴⁶ or taking a shot at a high-profile pornographer. They are looking more to get wins.

⁴² See LodgeNet website, available at <http://www.lodgenet.com/whoweare/corpprofile.php> (last visited Dec. 13, 2007) (describing the company as “the leading provider of media and connectivity services designed to meet the unique needs of hospitality, healthcare and other visitor and guest-based businesses”).

⁴³ See Joe Mozingo, *Obscenity Task Force's Aim Disputed; Anti-Porn Groups Say Targeting Only Extreme Content is Not Enough, and Many Prosecutors Say It's a Waste of Time*, L.A. TIMES, Oct. 9, 2007, at B1 (observing that “[a]nti-porn groups had been lobbying the Bush administration from its early days to go after the adult entertainment business as Ronald Reagan did. The groups view almost any explicit depiction of sex as obscene, including pay-per-view movies in top hotel chains and the type of video clips that have flooded the Internet”) (emphasis added).

⁴⁴ *Id.* (noting that anti-porn groups “thought they would find a sympathetic in Atty. General John Ashcroft, a social conservative, but 9/11 derailed any progress”).

⁴⁵ See, e.g., Robert Gehrke, *Nation's Porn Prosecutor Fronts War Against Obscenity*, SALT LAKE TRIB., Feb. 26, 2007 (quoting Brent Ward, head of the Justice Department's obscenity prosecution task force, as saying “most obscenity cases today are Internet-related, and the content is more extreme” than in the past).

⁴⁶ See generally, Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM'LAW CONSPECTUS 159 (2001) (exploring Flynt's many battles with law enforcement and his deep commitment to First Amendment principles).

Maybe they didn't expect that these guys would be feisty and fight back. Extreme Associates,⁴⁷ JM⁴⁸ and Max Hardcore⁴⁹ are fighting back. They're not going to go down lightly. In the case of Extreme Associates and Max Hardcore, it's pretty aberrant material. I don't want to see obscenity convictions, by any stretch of the imagination. It's bad shit, but the remedy shouldn't be censorship. The remedy should be, "Hey, this stuff sucks." The marketplace and bad reviews should decide.

I think it's politics as usual. I remember the transition from Bush I to Clinton. At that time, they disbanded the obscenity unit in the Justice Department,⁵⁰ and Janet Reno was much more interested in serious issues.⁵¹ I may just have liked Clinton and that administration because it was better for my business, so I'm speaking from a completely prejudiced point of view. But it seems to me that they concentrated on real crime. If Mitt

⁴⁷ See Reed, *supra* note 9, at A-1.

⁴⁸ See *Federal Grand Jury Charges Arizona and California Companies and Their Owners with Obscenity Violations*, *supra* note 7.

⁴⁹ See House, *supra* note 8, at 5.

⁵⁰ Cf. *Despite U.S. Campaign, a Boom in Pornography*, N.Y. TIMES, July 4, 1993, at Sec. 1, 20 (noting that, in the early days of the Clinton Administration, "[m]any lawyers say there is little political support for the obscenity unit these days" and quoting law professor G. Robert Blakey as saying, "I believe that the obscenity unit will slowly slip away....They won't announce its disbanding, but natural attrition will eliminate it.").

⁵¹ *Id.* (quoting Miami defense attorney Jeffrey S. Weiner who described Reno's non-prioritization of adult obscenity prosecutions this way: "When it involves the exploitation of children, these types of prosecutions are high on her list. There are other issues, like drug offenders, which are more pressing.").

Romney⁵² or Rudy Giuliani⁵³ is elected President, then I think it could be insane. But then again, if we get hit with another terrorist attack, who knows? It's all politics – every little bit of it – like Bush vetoing a completely logical bill that would have provided more money for underprivileged children for healthcare⁵⁴ simply because the tobacco lobby is so large. The tobacco lobby put a lot of money in Bush's pocket. He's now going to stand up for the tobacco lobby to the detriment of children who don't have healthcare.

There's no logic to any of it. So who knows what Romney or Giuliani or anybody will do. I can't tell you that I know what Hillary Clinton⁵⁵ is going to do, although I have an idea. Or Barack Obama,⁵⁶ who I would love to see win. Actually, I would love to see Ron Paul⁵⁷ win, but there's no chance in hell.

⁵²See Mitt Romney for President 2008 Website, *available at* <http://www.mittromney.com> (last visited Jan. 23, 2008).

⁵³ See Rudy Giuliani for President Website, *available at* <http://www.joinrudy2008.com> (last visited Jan. 23, 2008).

⁵⁴ Sasha Issenberg and Susan Milligan, *Bush Vetoes Children's Health Insurance Bill; Democrats Push for Override to Expand Coverage*, BOSTON GLOBE, Oct. 4, 2007 (saying Bush portrayed “the State Children's Health Insurance Program as a costly entitlement program that has increasingly come to benefit middle-class families”).

⁵⁵ Hillary Clinton for President Website, *available at* <http://www.hillaryclinton.com> (last visited Jan. 23, 2008).

⁵⁶ Barack Obama for President Website, *available at* <http://www.barackobama.com> (last visited Jan. 23, 2008).

⁵⁷ Ron Paul for President Website, *available at* <http://www.ronpaul2008.com> (last visited Jan. 23, 2008).

I'm a libertarian, for the most part. I'm passionate about the bill that would have given the kids healthcare, and yet I'm a libertarian, so I'm sort of a half-ass libertarian – I'm an animal-rights activist who eats meat!

QUESTION: You mentioned LodgeNet, what is going on there?

FISHBEIN: They're under immense pressure from right-wing groups to drop pornography.⁵⁸ Again, if I go into a hotel room, and I'm an adult over the age of eighteen – if kids are in the room, you can lock it – you have to turn on the TV, go to the menu, find the movies, find the adult segment, look at the descriptions and then push a button. There are twenty-two steps you have to go through! If you're an adult and you don't want kids to see, just lock it. If you're an adult and you can't control your children, you shouldn't have children.

I don't think there should be hardcore Internet sites without a barrier of entry for kids. Unfortunately, there are many, and I think it's wrong. In a hotel, however, there are so many clicks before you get to the movie. Kids aren't checking into hotels by themselves. But it's a bunch of vocal minorities – religious-right fanatics – wanting to tell everybody else what they can and can't enjoy in the privacy of their own home or hotel room.

QUESTION: All of these prosecutions are not going to be wrapped up by the time the administrations change. Even if Hillary Clinton or another Democrat were elected President, don't you think there still would be pressure to go after the industry?

⁵⁸ See Mozingo, *supra* note 43 at B1.

FISHBEIN: I don't know. It's hard for any politician to get up there and say, "Yeah, pornography is OK." Instead, they don't come out and say anything or they'll say, "It's bad and we want to protect our children." How many of these bills get passed under the guise of protecting children? What they were really going after, however, was presumably protected material. Nobody is going to get up there and say, "No. We shouldn't protect our children."

I don't see certain candidates going after the industry. They know it's an accepted part of American subculture. It's part of entertainment, and it's a big business.⁵⁹ They get that. They also know how silly it is to prosecute speech, but they are not going to come out and say that. Bill Clinton just didn't have an agenda to do it,⁶⁰ and nothing happened, by the way – we didn't have an increase in rapes and people didn't kill children. Nothing changed.

They are scared of the Internet. There are sexual predators on the Internet going after children. I have a sixteen-month-old daughter, so whatever you can do to go after

⁵⁹ See Swartz, *supra* note 11, at 4B (noting that adult entertainment is "a \$13 billion industry"); see also, Mariel Garza, *Porn Panelists Dish Dirt, Raise Temperatures*, L.A. DAILY NEWS, Dec. 2, 2007, at V1 (observing that "[d]epending on whom you talk to, adult entertainment business – porn – is anywhere from a \$1 billion to \$50 billion-a-year industry").

⁶⁰ See Clay Calvert & Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 *Cardozo Arts & Ent. L.J.* 247, 284 (2004) (quoting adult industry attorney Jeffrey Douglas on the lack of obscenity prosecutions during the Clinton Administration: "The last federal prosecution began in 1990 and it ended in 1992 or 1993. It was pre-Clinton really, so we were seeing it grind to a halt.").

these underground people who participate in child pornography, sell child pornography and trade child pornography – these pedophiles and sexual predators – do it. That’s the issue. The Internet has made it impossible for law enforcement to go after them.

But don’t mix that up with adult speech that is protected. Just separate it and say, “You know what? We don’t have time for this because the real issues here are protecting children and going after real criminals.”

But it’s hard to get a hold of them, while it’s easy to get a hold of commercial pornographers. So they do and then say, “We’re protecting our children.” That’s the politics. The average person is going to say, “They went after the pornographer to protect the children.” It doesn’t register as a speech issue, and the news media aren’t going to come out against it.

It’s the typical PR of the Bush Administration, the way they sell things and the way they bullshit the entire country. And the country buys, eats and swallows it, instead of looking at it and saying, “This is fucked up.” They package and PR this shit. So we get this indictment on JM Productions, and it’s like, “Oh, my God, this is just the worst kind of horrible pornography. Thankfully, we are going to keep it out of children’s hands. This horrible pornographer is going to go to jail.”

Dude, that’s not the criminal. The criminal is the pedophile out there hurting children, but the government can’t get to that guy. He doesn’t have an office in Chatsworth. If they really want to go after the criminals and if they have an agenda to do the right thing, then that’s where the work is.

QUESTION: In terms of obscenity, is it possible to create a coherent, clear definition that can be applied?

FISHBEIN: Well, yes. I've got it. Ready? Do you want to save the world a lot of money and time?

Here it is: If the material is performed by consenting adults over the age of eighteen – if you want to change that age, go ahead – but over the age of eighteen, and they are people – not animals – who are able to consent, have consented and no crime was committed, then it's protected speech.

Anything involving underage kids – child pornography – go after it. Anything involving coercion, go after the crime.

It's as simple as that. If you want to outlaw the conduct of the crime for commercial use – this girl was raped against her will and you cannot sell it – fine. I'm OK with that. You cannot commercially sell material that did not involve consenting people. That's the way you do it. There's no gray area.

QUESTION: How do you respond to the feminist argument about the exploitation of women,⁶¹ when they suggest that these girls really aren't consenting because they have come from such abused backgrounds?

⁶¹ See, e.g., Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U.L. REV. 793, 796-97 (1991) (observing that pornography "is done because someone who has more power than they do, someone who matters, someone with rights, a full human being and a full citizen, gets pleasure from seeing it, or doing it, or seeing it as a form of doing it"); See also, CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 300 (2005) Cambridge, MA. The Belknap Press of Harv. Univ. Press.

FISHBEIN: There are issues there. I get it. I know there are girls in this business that should not be in the business. I can tell you for an absolute fact of girls who have come into this office through connections – people I know – who want to get into the business, and I have tried to talk them out of it. A couple of times I did, but a couple of times I couldn't talk them out of it. A couple of girls found out the hard way, and a couple of girls got into it and were just fine. Unfortunately, a lot of abused, parentless, fucked-up kids get into the business, and the agents don't care.

But that's not a speech issue and it's not a call for censorship. It's an issue with the agents and with the girls. It's an issue about having proper counseling for abused kids.

I know that it's a career choice right now for girls turning eighteen,⁶² and I think it's a bad career choice for a lot of girls because I don't know if they're emotionally ready for what they are getting themselves into. There are producers who take advantage and they bait and switch. For instance, a girl gets to the set, and they say, "You get \$800 if you do this, but you've got to do anal." She says, "I didn't agree to do anal." And the producer says, "We'll give you a thousand dollars." She does anal and gets ripped up.

(suggesting that women who perform in adult entertainment media "are also made to look as if they are enjoying themselves").

⁶² See generally, Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. 255, 277 (2006) (quoting former porn star Sharon Mitchell, who now holds a Ph.D. in human sexuality and runs the Adult Industry Medical Healthcare Foundation, as saying, "your son or daughter may grow up to be a porn star because it is a legitimate job...").

She doesn't know what she's getting into, signs away all of her rights and is in pain.

Those are issues that have to be dealt with. In some ways, I think those things are crimes.

The government ought to spend time going after the conduct, not the speech.
Separate the conduct from the speech.

The other part of it is, and I've had arguments with feminists about it, and I agree that there should be help for girls who are of that age and don't have anywhere else to turn. They're uneducated and don't want to work in a grocery store because the money is no good. Then, they get on drugs. Those are societal issues that need to be dealt with everyday. They may be moral issues, but they're not speech issues.

I would love to see counseling. AIM⁶³ does a good job and, if girls get into AIM first before they get into the business, then they get a lot of good information really quickly so that they can make a better decision. Unfortunately, for a number of girls, that's not their first stop.

QUESTION: Where is their first stop typically?

⁶³ Adult Industry Medical Healthcare Foundation, About AIM, *available* at <http://www.aim-med.org/about> (last visited Dec. 14, 2007) (noting that “[t]he Adult Industry Medical (AIM) Health Care Foundation is a non-profit corporation formed to care for the physical and emotional needs of sex workers and people who work in the adult entertainment industry through our HIV and STD testing and treatment, our counseling services and our support group programs”).

FISHBEIN: An agent is their first stop. They don't have to go to AIM to get their HIV test. They can go to a doctor or a clinic to get the HIV test. Some of the agents are great, and some are unscrupulous in some ways.⁶⁴

The biggest thing in the market is new girls, new girls, new girls. Get them as quickly as you can. They might go to the wrong producers. You try to tell a girl, "Don't go to Max Hardcore⁶⁵ first. You shouldn't go to Max Hardcore because he's not a good guy. Go to Vivid,⁶⁶ Wicked,⁶⁷ Evil Angel,⁶⁸ Digital Playground⁶⁹ or one of the more reputable companies." Now, I'll give Max this: I don't like his material, but he does tell the girl what she is getting into beforehand. As sickening as his material can be, the girls

⁶⁴ See Calvert & Richards, *supra* note 62, at 287 (quoting Sharon Mitchell discussing the role of agents: "Agents now kind of rule the industry. Agents are now recruiting people from, literally, the middle of the country that are eighteen years old who haven't remotely had any type of sex, let alone the type of sex they're probably going to have tomorrow.").

⁶⁵ See Max Hardcore Website, *available at* http://cowboybucks.com/hosted_tours/max_tours/Max_tour1_nopops.html?s=1&p=&w=100038&t=1&c=3&cs=0 (last visited Jan. 24, 2008).

⁶⁶ See Vivid Video Website, Welcome to Vivid.com, *available at* <http://vc4.vivid.com/indexmain.php?x=d61c0acd7a487eda6adf3f1f3872c86f> (last visited Jan. 24, 2008).

⁶⁷ See Wicked Pictures Website, Wicked Pictures.com, *available at* <http://www.wickedpictures.com/?nats=ODI1NToxMDox,0,0,0,0> (last visited Jan. 24, 2008).

⁶⁸ See Evil Angel Website, The Evil Empire, *available at* <http://www.evilangel.com> (last visited Jan. 24, 2008).

⁶⁹ See Digital Playground Website, *available at* <http://www.digitalplayground.com> (last visited Jan. 24, 2008).

do consent. I don't believe there's any non-consensual stuff there. It's unwatchable, but that's a taste matter.

Some girls want to do this stuff. There are fetishes and there are people who really do like to get beaten up, tied up or really like hard sex. There are girls who really want that. It's not me or my life – I don't want to be slapped or punched.

QUESTION: Earlier you mentioned that adult entertainment was an accepted part of American subculture. Why do you think it is acceptable? Also, what do you mean by subculture?

FISHBEIN: It's sort of like a double-edged sword. On the one hand, all of the mainstreaming that we talked about over the past ten years and how it sifted into the culture, through television, other media, newspapers, magazines, the Internet and girls like Jenna Jameson⁷⁰ and Tera Patrick⁷¹ becoming stars, makes sense. You read articles about the mainstreaming of porn⁷² and you get it.

⁷⁰ See Jenna Jameson Website, available at

http://www.jennajameson.com/index_warning.php?site=tour.jennajameson.com/track/MTk2MTI6MjM6NTg (last visited Dec. 17, 2007).

⁷¹ See Tera Patrick Website, available at <http://clubtera.com> (last visited Dec. 17, 2007).

⁷² See, e.g., Brent Hopkins, *The Adult-Movie Business Has Come a Long Way From Stag Films and 'Deep Throat,'* DAILY NEWS (L.A.), June 3, 2007, at N1 (noting the adult entertainment business “has evolved from its adult-theater roots to a commodity available online in homes worldwide”).

When pornography came into the home through the VCR,⁷³ it changed it by making it acceptable there. As it became more accessible, it became a generational thing. It was completely natural for an entire generation of kids who grew up with a VCR to watch porn when they turned eighteen, if not sooner.

I grew up with television, but kids today grow up with computers and the Internet. It's accessible and acceptable. It's all the same. For girls who turn eighteen, it's now a career choice to act in porn movies. It's mainstream and an acceptable part of the subculture.

But when you boil it down, there's still something naughty about it, something sleazy about it. We're still this puritanical, Judeo-Christian society that still thinks something is wrong with sex – something dirty. We have not evolved in this country enough that it's part of the culture.

So when I say subculture, yes it's mainstream, accepted, and you can see it on the E! Channel and HBO. Even on those channels, though, it's kind of wink-wink, dump it in late at night. They don't really market it or promote it. "Don't ask us about it, but we make money on it." The hotels make a fortune – Marriott and Hilton – but they would say they're not in the pornography business. Time Warner makes all of this money on Pay-Per-View and DirecTV. It makes all of this money on hardcore Pay-Per-View, but it's not even in their business plan. You can't find it on their website.

⁷³ *Id.* (calling the VCR "the simultaneous salvation and bane of the industry" because video made adult materials more accessible, but also "lowered the bar to get into the business").

The money is good, it's cool to know who Jenna Jameson is and it's interesting to see Stormy Daniels⁷⁴ on Entourage but, "No, it's not part of my everyday life." That's why I say subculture. Now, kids today don't have the hang-ups because it's a natural extension of growing up. For the performers, it's gone from "I want to be a model, but I can't make it in modeling, so I'll do some scenes" to "I want to be a porn star. As soon as I turn eighteen, I'm going to L.A. to be a porn star." It's real, it's out there and the role model is Jenna Jameson.

QUESTION: If adult entertainment has mainstreamed to the extent you suggest, then do you think there will be a point down the line – perhaps in ten years or twenty years – when the model for the law will move away from the current form of trying to define what's obscene to more of a privacy model?

FISHBEIN: That is the main defense in the Extreme Associates case⁷⁵ and the main reason those charges were thrown out by the district court judge in Pittsburgh.⁷⁶ The government managed to get them reinstated.⁷⁷

⁷⁴ For an interview with Stormy Daniels that includes her views of the mainstreaming of adult entertainment, see Clay Calvert & Robert D. Richards, *Porn in their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture, and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 272 (2006).

⁷⁵ United States v. Extreme Associates, 352 F. Supp. 2d 578, 587 (W.D. Pa. 2005) (granting defendants' motion to dismiss on the grounds that "the government can no longer rely on the advancement of a moral code i.e., preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest").

Again, it's logical and makes sense. If you look at the three-prong *Miller* definition of obscenity,⁷⁸ what is one of the prongs? Community standards. Let me ask a question: If you're sitting in your home in Centre County, Pennsylvania, which I presume is somewhat conservative, and there is nothing publicly exhibited – no porn theaters or anything like that – and you buy a DVD from Adam & Eve,⁷⁹ it's mailed to your house, and you sit in your home and you watch it with your wife or whatever you do with it, then what business is that of the community?

⁷⁶ For a discussion of the U.S. District Court's decision abandoning the federal obscenity statutes in favor of a privacy analysis, see Clay Calvert & Robert D. Richards, *Vulgarians at the Gate: Privacy, Pornography & the End of Obscenity Law As We Know It*, 34 Sw. U.L. REV. 427, 428 (2005) (noting that the case was "[q]uickly lambasted as the height of judicial activism run amok" by lawmakers pushing the agenda of obscenity prosecutions).

⁷⁷ *United States v. Extreme Associates*, 431 F.3d 150, 162 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006) (concluding "that directly applicable Supreme Court precedent, upholding the constitutionality of the federal statutes regulating the distribution of obscenity under First Amendment and substantive due process privacy rights, governs this case").

⁷⁸ The current test for obscenity, which was established by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), focuses on whether the material at issue: 1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; 2) is patently offensive, as defined by state law; and 3) lacks serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24.

⁷⁹ Adam & Eve Website, available at http://www.adameve.com/t-company_info.aspx (last visited Dec. 18, 2007) (describing the company as "the nation's largest marketer of adult products with millions of satisfied customers in the United States and all over the world").

QUESTION: The Supreme Court just declined to hear the Alabama sex-toy case.⁸⁰ What are your thoughts on that decision?

FISHBEIN: See what I mean about logic? In the state of Alabama, I cannot buy a masturbation toy – a dildo, a fake penis – because I’m a woman or a gay man and I want to masturbate myself. How can that possibly be legal in 2007 in the United States? Tell me what logic there is. It’s fucking frightening, and it’s the most ridiculous, stupid thing I have ever heard in my life. How can that be? How can that possibly be constitutional? Yet, I told you what I believe about this Supreme Court. It’s a scary court because Samuel Alito⁸¹ says it’s disgusting.

QUESTION: Can we separate out morals from the law in this country?

FISHBEIN: You can legalize morality only to the point where, if I murder someone, that’s immoral and should be illegal. You can separate legality and morality. Obviously, shooting you and killing you is illegal, and I should go to jail for that. Of course, it’s also morally wrong. But you can’t legislate morality, and that’s what they try to do. Somebody is upset that somebody else is having a good time. Everything is stemmed in the rooted belief that there is something dirty about sex. That’s how we’ve been brought up in this country. Even I, in this business, am so conservative and believe in

⁸⁰ Williams v. Morgan, 478 F. 3d 1316 (11th Cir. 2007), *cert. denied*, Williams v. King 128 S. Ct. 77 (2007).

⁸¹ See generally, Supreme Court of the United States Website, Biographies of Current Justices, *available at* <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Jan. 24, 2008).

conservative values when I think about bringing up my own daughter. I'm part of that problem because, somehow, I am going to have to train my daughter that sex is wrong before a certain age. The evolution has to evolve generationally and over time. I won't be around to see that evolution.

In 1973 when *Miller* was adopted, there were porn theaters and publicly exhibited materials, so you can sort of understand the community-standard issue. I don't like it or agree with it, but at least there was a little bit of logic to it. Now, thirty-four years later, you get this stuff over the Internet or through the mail. You can't see it without electronically doing something. Are you going to get twelve jurors in Centre County, Pennsylvania to rule on whether you can watch that in the privacy of your own home? It's completely logical that privacy is the overriding issue here. The obscenity definition from *Miller* is completely antiquated. Maybe it made a modicum of sense in 1973, which it didn't, but how can you make the argument today when nobody is watching this stuff in the public world?

QUESTION: Do you think the law will change, then, so that Judge Lancaster's opinion in *Extreme Associates* will prevail?

FISHBEIN: I hope so. Again, you are asking a country whose entire political system, government and laws are not based on logic to be logical. Why not place a sixty-cent tax on tobacco, which causes cancer anyway, that would provide billions of dollars for underprivileged children to have healthcare? Because the tobacco lobby is so strong, Bush vetoes it.

You're asking for logic. You're asking why a President who faked the information for a fake war⁸² is sitting in office running this country and making decisions that affect our lives everyday and setting this country back fifty years or more in the international world. There's no logic. How can he be in office?

If you and I sat down and looked at a thousand laws, we could probably boil them down and get them logical. But we would put all these politicians out of business!

I'm never going to predict that this country will be logical. Plus, with the way this Supreme Court is constituted, I think we are stuck with a bad ratio for the rest of my life. I think it's a shame. In spite of the fact that a lot of current justices prior to Bush II were appointed by Republican presidents,⁸³ they have turned out to be fair jurists, with the exception of Clarence Thomas.⁸⁴ Anthony Kennedy⁸⁵ and David Souter⁸⁶ are very fair and objective. Prior to Bush II, Antonin Scalia⁸⁷ and Thomas were the bad guys

⁸² See, e.g., *WAR UPDATE: A compilation of 'false pretenses'; White House issued hundreds of statements to justify Iraq war, according to groups' database*, *NEWSDAY* (N.Y.), Jan. 24, 2008, at A26 (discussing a study by two independent research groups that examined remarks made by President George W. Bush and his administration and concluded "the statements 'were part of an orchestrated campaign that effectively galvanized public opinion and, in the process, led the nation to war under decidedly false pretenses'").

⁸³ The following current Supreme Court justices were appointed by Republican presidents, prior to the administration of President George W. Bush: John Paul Stevens (Gerald Ford, 1975); Antonin Scalia (Ronald Reagan, 1986); Anthony M. Kennedy (Ronald Reagan, 1988); David H. Souter (George H.W. Bush, 1990); and Clarence Thomas (George H.W. Bush, 1991).

⁸⁴ See *supra* note 81.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

because they're not logical, they're zealots. But at least it was balanced. Now, John Roberts⁸⁸ and Samuel Alito⁸⁹ are really so far to the right that I don't think we are going to find a decision where we can say, "OK, they're being objective." The makeup of the Court is not going to allow laws to change in what an objective, libertarian, smart citizen will think is logical. We're not living in a logical country in any way, shape or form – legal, political or moral.

It's based in Christian values that have to do with Jesus Christ and believing in a fake deity. If people who were religious kept it to themselves and didn't try to force it on society, and it wasn't part of all these politicians out there talking about Christian society, then I'd be cool with it. But if you're making decisions that affect 300-million people and that are based on believing in Jesus Christ, then that's a problem. To me, that's a personal thing that you can live your own life by, but it shouldn't be what dictates the rest of the country. It isn't going to change in my lifetime.

All of the wars in the history of the world and all of the strife that the world is now facing are mostly because of organized religion and because of different beliefs. We are as guilty of it here as anywhere else in the world.

C. *First Amendment and the Value of Protecting Adult Materials*

In this section, Fishbein gives his views on the reasons why we have and need a First Amendment in this country. He also discusses why the First Amendment should protect adult entertainment.

⁸⁸ *Id.*

⁸⁹ *Id.*

QUESTION: What do you think the primary purpose of free speech is, as protected by the First Amendment?⁹⁰ Why do we need it?

FISHBEIN: I think it's one of the building blocks of our country. It's what separated us from – when the country was formed – the oppressive environment that settlers came over from. It also separates us from horrendous, autocratic societies in the world today. In Iran, if you're caught with pornography, you get the death penalty.

It's a free society, and a free society means free. We know it's not truly a free society, but the idea that free-thinking adults could not have the voice to oppose, endorse, argue and to otherwise put out speech that may not be accepted – the thought that that wouldn't exist in my world – is an aberrant thought. I can't imagine living in a society where a newspaper can't give an opinion. It's the very basis of why we live in the United States.

Even with all of the problems we're having, based upon this [Bush] administration, and with all of the issues with our image overseas, it's still the best country in the world to live in. The reasons are capitalism, free speech and all of the principles that make us different. Freedom of speech is the very basis of America.

⁹⁰ The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law...abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

QUESTION: But there are some people out there that would say the First Amendment is not designed to protect adult content – the framers of the Constitution didn't have that in mind. How do you respond to that argument?

FISHBEIN: I don't think the framers of the Constitution had a lot of things in mind that they could have imagined would happen as life progresses. It doesn't matter. The reality of it is that the principle of free speech and the First Amendment makes sense.

Unfortunately – and this is just me – this is a country, from the top office down to most of the citizens, that bases everything on religion, God and Christianity. They're not rooted in any sort of reality, in my opinion. My life is rooted in reality. I believe in science and what I can see, feel and touch. That's what I'm comfortable with.

Unfortunately, people are not comfortable with that. If you look at it, the reality is that speech has never hurt anybody. There's nothing hurtful about it. It's not like a gun you can shoot or a drug you can inject. It's just speech – it's just pictures and film. It's very simple: If all of that is protected by the First Amendment – it's for adults and consumed by adults, consenting adults, mind you – then there is nothing, no matter how disgusting, that is not protected because it's just a film.

If a crime was committed during the making of the film – if someone was raped or any disgusting behavior took place in which a crime was committed – then prosecute to the full extent of the law. But the speech is the speech.

You can watch the news at night and see someone shot in the head, and that's considered news. Or you can go to a horror movie and see a girl's breast chopped off, and it's a film. You see a rape in a Jodie Foster movie, "The Accused," and she wins an

Academy Award.⁹¹ I don't get the concept of why adult entertainment is different. It's just sex. Some of it is pretty bad pornography, or it's brutal or violent, but if the actors consented, it doesn't matter how disgusting it is. The remedy for bad speech is good speech, not censorship.⁹²

QUESTION: You certainly have thought a great deal about these issues. When you started this business some twenty-five years ago, did you know a lot about the First Amendment?

FISHBEIN: No. Interestingly enough, I went to school for journalism. I was not a great student. I was at Temple University and it took me five years to finish four years of school to get a journalism degree. I was done with math and history and all that stuff. I didn't do well. I dropped a bunch of courses that had too much work. I took film, and I did great. I only got "A"s in my writing courses and film courses. I published magazines. I accidentally knew what I wanted to do.

⁹¹ See *And the Winners Are...*, WASH. POST, Mar. 30, 1989, at B2 (noting that Jodie Foster won the Oscar for Best Actress for her performance in "The Accused").

⁹² Fishbein is paraphrasing a popular legal aphorism that describes the doctrine of counterspeech, brought to light by Justice Louis Brandeis in *Whitney v. California*, 274 U.S. 357, 377 (1927) (suggesting "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). For a discussion of the modern application of the counterspeech doctrine, see Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. REV. 553 (2000).

I didn't really understand about the First Amendment. I took a law and ethics of mass communications course, and I slept through it. I didn't really care. I didn't know I was going to be in this business. It was an accident.

When I got into the business, got to know the people and then we started to write about legal matters, I kind of learned on the job. It was those busts of 1989. I shouldn't say that because I did the Larry King Show in 1988 and I was pretty well versed already on First Amendment issues. But it was those busts of 1989 and 1990⁹³ that really got me to the forefront of knowing, understanding, thinking and talking about censorship and obscenity. All of my friends and customers were being visited by the FBI in these massive busts,⁹⁴ all to be hung out to dry in conservative communities in Mississippi, Oklahoma and Alabama. Some of them went to jail. You learn on the job. Then, you get friendly with all the First Amendment attorneys. We have Mark Kernes writing about all of this stuff, along with columns from attorneys. You just learn.

Plus, in the eighties and into the nineties, we published something called *Free Speech*, which was a paid newsletter with no advertising, before the Free Speech

⁹³ *Supra* notes 23-24 and accompanying text.

⁹⁴ *See also*, ERIC SCHLOSSER, REEFER MADNESS 189 (2003) (referring to this crackdown as "Project Postporn" and noting that it "was aimed at mail-order companies that sold sexually explicit material"); Robert F. Howe, U.S. Accused of 'Censorship by Intimidation' in Pornography Cases, WASH. POST, Mar. 26, 1990, A4 (describing "Project PostPorn" as "a nationwide investigation geared specifically toward mail-order distributors of sexually oriented films and publications" that "was launched by the Justice Department's National Obscenity Enforcement Unit, formed in 1986 by then-U.S. Attorney General Edwin Meese III shortly after the Attorney General's Commission on Pornography delivered its final report").

Coalition⁹⁵ was formed. It was a subscription newsletter available to all the people in the business. It was very gray and before the Internet. I did it as long as I could – losing money. People didn't want to pay for it. We asked for \$150 – half an hour of their attorney's time – for a one-year subscription. That was our campaign: For less than one hour of an attorney's time, here are twenty-six issues a year of solid information that will keep you out of jail. It was nothing but information every two weeks. I did it for a little more than a year, and then I was like, "What the fuck am I doing?" People wouldn't pay for it.

D. *The Business of Adult Entertainment*

In this section, Fishbein talks about the future of the adult entertainment industry and the economic forces that will likely control the direction it takes. He discusses the possible compression of companies and the role new technology plays in the changes that lie ahead.

QUESTION: You're doing some planning, at this point, for the future of the magazine. How does that process work in the adult entertainment world?

⁹⁵ Free Speech Coalition Website, *available at* <http://www.freespeechcoalition.com/> (last visited Dec. 18, 2007) (describing its mission "to: [l]ead, protect and support the growth and wellbeing of the adult entertainment community. As the trade association for the adult entertainment we do this by: Being the legislative watchdog for the industry; Lobbying; Public education and communication; Member education and communication; As a last resort, litigation").

FISHBEIN: We are getting ready for our strategy meetings, and you need to look at the market and what's happening. We notice that DVD sales are probably down for everybody thirty to forty percent. I think our ad pages are down thirty percent. I think that the business has flattened out. It's a combination of people going digital and online. A lot of revenue is not being replaced online.

There's also a glut of product and a glut of companies. There are the laws of economics. As robust and as big of a business as it is, there's just so much product. The laws of supply and demand apply, and when the supply has outlasted the demand, something's got to give. We've seen a few companies no longer producing DVDs. Instead, they're going online and trying to go video on demand only. Whether or not they'll be successful, the jury is out. A lot of the old-time producers who haven't moved online successfully are finding themselves with nowhere to go. They're changing their business model.

At AVN, we have to look at where it's going. Is the DVD market going to continue to dive? Obviously, people will want hard goods. Will things go more online? How are the delivery systems of pornography changing? What are our customers going to do? Are they still going to want us? What is it that we can provide our customers that will keep them engaged? Who are our readers going to be five years down the road? If retailers continue to dwindle, are we going consumer oriented? How much do we put into print and how much online? All of those big issues get discussed everyday, but once a year we try to plan and project.

QUESTION: In terms of the readership of *AVN*, do you view it as a trade publication? Does it attract people who are not in the industry?

FISHBEIN: With *AVN*, the magazine, we have very limited circulation outside the industry. We used to sell a lot more to newsstands, but it was kind of a loss leader. We didn't see any residual effect on the ad side. So, now we only sell it COD to people with no returns. That brought the number way back down. We cut out a lot of that distribution. Now, ninety-nine percent of our readership is the industry. There are those people who are fanatics and want to read the magazine, but most of those fanatics would then go to *AVN.com*. There would be no reason for them to read the magazine because they will get everything they need from the site. So, in terms of the print book, it's only the industry; in terms of the website, obviously, the traffic is much more than just the industry.

QUESTION: You were discussing the loss of print revenue and not yet being able to translate it into gained revenue through advertising online. The newspaper industry is experiencing a similar problem.⁹⁶ Are there any solutions?

FISHBEIN: And it applies for the traditional movie producers whose DVD sales have dipped, but who have not been able to translate to an online presence. They're selling

⁹⁶ Cf. Simon Montlake, *Newspapers Thriving? Yes, in Asia*, CHRISTIAN SCI. MONITOR, Jan. 24, 2008, at 6 (noting that while "the ailing US newspaper industry gasps for air, its counterparts in Asia are breathing in the exhilarating oxygen of success").

their movies for VOD, but getting a very small percentage. There are some who don't have a membership site or haven't figured out a way to monetize their content correctly. They're feeling it, too.

The more successful group is comprised of the guys who were doing Internet content and who had all their money in the web. Now, they've started DVD lines based upon content that already had made them profit. Now, it's pure profit. That's the reverse side and it seems to be working.

QUESTION: Can you please talk a little about the job itself? What's been the best part of the job for you these past twenty-five years?

FISHBEIN: We generally piss off a lot of people and we lose some advertisers, but the AVN Awards⁹⁷ have always been the one area where it feels like we've really done something here. It's fun because it has mainstream acceptance and we get mainstream press⁹⁸ – it's sort of what we are known for outside of the industry. It's the most satisfaction I get.

Because it's such a high-maintenance industry, and I take on a lot of the customer-service bashing, nothing else is as much fun. It used to be fun to come to work everyday and to revel in what we were doing.

⁹⁷ See generally, 2008 AVN Adult Movie Awards, available at <http://www.avnawards.com> (last visited Jan. 24, 2008).

⁹⁸ See, e.g., *Jenna Leg-Lock*, N.Y. POST, Jan. 15, 2008, at 10 (noting that famed porn star Jenna Jameson announced at the AVN Awards that she will no longer perform in front of the camera in adult entertainment).

Today, then, I would have to say the awards. It's the one night a year when I feel like we've really achieved something. Otherwise, it just seems like work.

QUESTION: You do get that mainstream news coverage every year. Does that help?

FISHBEIN: Yeah, we still get a kick out of that. I just think that the industry has changed. It no longer feels like a community but more like a vast, disjointed business.

QUESTION: To what do you attribute that change?

FISHBEIN: It's just technology and new people coming into the business. The new people have a certain attitude and mentality – the younger mentality is much more of a scorched-earth policy. The people I came into the business with, as well as the people who were already established in the business, were much more of a community because they were under fire. They were the outcasts of society. They were pooh-poohed because they were pornographers, so they had this us-against-the-world mentality and they stuck together. Of course, they would fight with each other, but the worst enemies would give each other money if they were busted. It meant something.

As a new generation – my generation – came in, we sort of adapted that community feeling and merged with the original guys and continued that dysfunctional adult family.

As the industry became more mainstream and accepted, and as the Internet and other technology took over, a whole new slew of people jumped into the business from

that side. It spread it out and thinned it out. It created new markets and new ways that people could do business. The two sides really didn't know each other. They're now just starting to really merge.

The new people are younger and don't have a history of even understanding what the First Amendment is. They don't understand what people had to go through and how many times people like Al Goldstein⁹⁹ or Larry Flynt¹⁰⁰ went to jail. Larry got shot. They don't know what it meant to really fight for the First Amendment and to be arrested and sent to jail. I haven't been to jail, but I was friends with all those people who did go to jail. I felt it and I visited them in jail.

The new generation has no history attached to it. Some of the guys from the Internet business who are really successful or those who are new in the video business and are successful are nice people, but when you start to mention Reuben Sturman,¹⁰¹

⁹⁹ See generally, *Al Goldstein Announces Candidacy for 2008 Presidential Election*, PR NEWSWIRE, Apr. 2, 2007 (reporting that "Goldstein received his degree in English from PACE University, and bounced around as photographer and tabloid journalist until he founded *Screw Magazine* in the summer of 1968. Within two years, Goldstein had accumulated seventeen arrests for obscenity, establishing his reputation as a champion of the first amendment.").

¹⁰⁰ See generally, LARRY FLYNT, AN UNSEEMLY MAN; MY LIFE AS PORNOGRAPHER, PUNDIT, AND SOCIAL OUTCAST (1996) (chronicling Flynt's life from his childhood in Magoffin County, Kentucky through his rise to the top of the adult entertainment publishing business).

¹⁰¹ See LEGS MCNEIL & JENNIFER OSBORNE, THE OTHER HOLLYWOOD: THE UNCENSORED ORAL HISTORY OF THE PORN FILM INDUSTRY 104 (2005) (calling Sturman "by far the most important pornographer in the history of the world").

Sidney Niekerk,¹⁰² Norman Arno¹⁰³ of VCX – the founders of the business – they have no idea who these people were. There’s no sense of history and no sense of what it is like to be busted. The material today is so hard, edgy and over the top – there’s no self-restraint. It flattened the industry out. The playing field got leveled. There was no barrier of entry.

There’s no sense of community anymore. For instance, a girl died last week. I saw it on my website. She did like 300 movies, but there was no feeling in the community that something had happened. We did one article. I don’t even think we followed up on it. It’s like, “Oh, it’s just another girl.”

The girls come in and the agents send them out. Everybody is trying to shoot the new girls. There is no marketing and no establishing them. The girls are just out for the money. There are no personalities, it’s generic and it just feels different.

QUESTION: Do you ever sense how that could change? Do you feel it will ever change?

FISHBEIN: Yes. As soon as they start busting everybody, it will change, and I don’t want that to happen.

¹⁰² See *Major L.A. Producer Indicted for Distributing Obscene Material*, BUS. WIRE, Oct. 4, 1990 (describing the U.S. Justice Department’s indictment of Niekerk, et al. on charges of “interstate transportation of obscene material and conspiracy”).

¹⁰³ See Dennis Anderson, *AP News Features*, ASSOCIATED PRESS, June 1, 1986 (discussing the prosecution in Miami of 29 Californians, including Arno, on charges of conspiracy and transportation of obscene films across state lines).

We always hoped and felt that the AVN Awards were a unifying force. It's the one night a year that everyone is in the same room. But so many people are bitter and think, "We're never going to ever win, we're never going to get nominated." There still is all of that bitterness out there, so you don't get everybody coming together. When we started the awards show, I think we got everybody or mostly everybody. I kind of hoped that would happen with the Adult Entertainment Expo in January. At least it's an area where everybody can see each other, but it's competitive and prices are cheap. People are trying to survive. Unless some catastrophic thing happens that brings people together, I don't know how it will change. It's just another business that evolved.

I'll bet you that if you talked to someone in the music business or somebody in the movie business who's been around twenty-five years, you would hear the same thing. It may just be me and my feelings – maybe it's just burnout or age – but I think you get that in these industries.

I've always had a good business. It's been good for a long time and, no matter what happens from this point forward, we're a success. I long for fewer crappy companies, people who are more engaged in the business, people who understand the legal stuff and people who pay their bills. I also long for some of the more principled people that I used to know – who have either died, retired or went off into the sunset.

QUESTION: Your business has responded really well to technology. Your web site looks great.¹⁰⁴ You now have a podcast on it.¹⁰⁵ Newspapers haven't been able to make that

¹⁰⁴ See AVN Home Page, <http://www.avn.com> (last visited Jan. 24, 2008).

¹⁰⁵ *Id.*

transition and draw an audience. Your audience, it would seem, would be more likely to go online because they are more technologically savvy. Is that the case?

FISHBEIN: A newspaper audience is a newspaper audience. I am a newspaper reader. I read the *L.A. Times*. I get the *Wall Street Journal* and never have time to read it. I read *The New York Times* on Sunday. I have a baby, so I can't get the time to read things anymore, but I love newspapers.

I don't get my news from the web. I'll get it from radio, particularly NPR. I'll get it from CNN. And I get it from the newspaper. I don't go online to get news. The CNN breaking news report online is that Britney Spears has to go back to court, and that's a CNN breaking news report! Another 200 people die in Iraq, but I get a report that Britney Spears is headed back to court. That's my CNN alert. If they do send me an alert that I'm interested in, I may click and read it.

The mainstream newspaper audience is a different world than a specialty product. Our world is made up of people – the consumers, the online people, the webmasters and the people who have retail sites – that live in an online world. We have to have a website. It took us a year to get this new site up and the bells and whistles have been removed. Over the next six months, I think it will become the site it was intended to be. You have to do that in our business. A big chunk of my future is online. As the video companies who put out DVDs see their sales slump and want to reach consumers through VOD or pay sites – whatever it is – we are going to transition them from print to a combination of print and online and then, eventually, to online.

I hope that *AVN* exists as a print magazine for a long time to come, but we have to prepare for the possibility that print won't be worth doing anymore. We have no choice, if we want to exist, but to live in the online world and to have a great site or multiple sites. I think we're doing that. Nobody touches what we do. *XBiz*¹⁰⁶ does a good job, but I don't think they do nearly as well as we do. I could be wrong, but I think I'm right. I think there's a strong number one and a strong number two, then there's everybody else – that's my opinion. From the news point of view, we're already there. In terms of providing the information that people will need for pornography – assuming they need information or marketing – we'll be there. If not, I'll do something else.

QUESTION: Was it difficult to get your advertisers – your clients – to buy into advertising on your website?

FISHBEIN: No. We don't have a lot of trouble selling banners. One of the problems we have is that we cannot sell too many because we don't want to dilute the traffic to the site. We don't have enough space for everything we would like to sell. We have to start to create other opportunities and other things, which we're doing. It's part of what we're working on company-wide next week: What are phases two, three and four, and what are we going to be doing in January and March of next year? We're going to need spaces to put people if, in fact, their DVD sales flatten out and they want to start reaching

¹⁰⁶ See generally *XBiz.com*, <http://www.xbiz.com> (last visited Jan. 24, 2008) (describing itself as “The Industry Source”).

consumers or have another model. We need to be able to provide them marketing opportunities.

QUESTION: How far can you really speculate, given the technology shifts down the line?

FISHBEIN: You just guess. It's a guess, and I would never have guessed that we would see that people's business would be off thirty to forty percent this year. We thought ten percent, maybe. It was huge. Our page number was down that much and we thought we could be profitable by putting out twenty-eight pages, but it was a bit of a shock and kick to the stomach. We had to start coming up with some new, creative ways to get the revenue up – just like the video companies do.

QUESTION: Are companies falling by the wayside or are they consolidating and merging?

FISHBEIN: I think we're seeing consolidation. I think we see people buying other people. A couple of companies seemed to have folded, but they've really not. They're just selling their catalog. They're going online and producing content for the Internet. They're doing websites. Everything is going on.

I think you're going to see some mergers, acquisitions and bankruptcies. Not to get too crazy, but I've been talking about a glut of product for fifteen years. Every time I say "glut of product," the true capitalists say, "No, no, no. There's no such thing. Consumers just have more choices."

I don't know how these companies survive. How do they put out a thousand movies and survive? You realize they sold cable or sold foreign. I never understood it. I think we're finally seeing the end of that, and the people are hitting the wall. They can no longer live off the cash flow. That's just economics. It's catastrophic within the business, but if you look at it objectively from the outside, you would say: "It's a \$12 billion-a-year business and the video segment is \$3 billion and that's a big business." There are, however, too many players and the pie is split up in to too many little, small slices.

It's still a big business, so quality, marketing, deep pockets and good ideas will win out. Maybe the day when a guy could simply open his doors, have a video camera, shoot a movie, sell it and be successful is over. As all these little guys go away – some of them are my customers, it's bad and I may get beat for some money – from a business point of view, it's probably a good consolidation. It's ultimately a good thing.

There are too many companies, too many movies and too many titles.

QUESTION: If the AVN Awards are the best part of the job, what's the worst part of the job today?

FISHBEIN: Customers – the companies advertising with us – banging on me and complaining. They say things like, "How come I'm not higher on the charts? I know I sell more than this guy and I'm tired of you guys giving us bad reviews. I sent in a press release and it didn't get up on your site. You guys suck. I never win any awards, so I'm not advertising anymore – it's too expensive and I can't afford to advertise."

I'd love to get a phone call that says "what a great article you guys did" or "boy, that issue was really cool." If they like it, I don't hear from them, but if their ad prints a little bit badly, then I hear from them. It just sort of sucks because my friends in the business don't even say, "Hey, good issue," because they've read 320 AVNs in their life and they view it as just another AVN – nothing special. Our twenty-fifth anniversary is coming up and we're getting excited to do something really spectacular. But I don't know – I'm just sort of exhausted from it. It's an exhausting business.

QUESTION: You mentioned the fact that adult entertainment is an almost \$13 billion business, and that means there are an awful lot of consumers buying this material. Have you ever put out a consumer product or would consider doing so?

FISHBEIN: We've put out consumer versions of AVN, which failed at the newsstand miserably. I put out something called *Fetish* and something called *Sexposé*. I've taken my shot. I was underfinanced. The magazine distribution business has always been corrupt at the core, even when it was good. Now, the magazine business generally – not just adult, but all magazines – is way down. It's very difficult to get shelf space. The retailers of magazines pay their bills with magazines they haven't even had out for a week. It's not worth launching a newsstand issue now. AVN had its opportunity and probably should have done it in a more serious way, but we didn't. Remember, we weren't providing spreads and we weren't providing sex. We were providing information. I think that our way to get the consumer is via the web. I think that will be our place. The newsstand business is corrupt.

Condé Nast, when it launched *Portfolio* recently, said this is its last big newsstand launch. That's Condé Nast, and it's a beautiful magazine. They spend millions to launch a magazine.

QUESTION: How about magazines like *GayVN*?¹⁰⁷ How is that segment doing in the market?

FISHBEIN: We've always covered gay. We felt that by breaking gay into its own division – its own magazine, with cheaper ad rates because there's less circulation and fewer stores carry gay product – that it would be good. It's kind of a break-even business for us right now. We're trying to expand, servicing all of the retailers who carry gay. Now, we're servicing the webmasters and giving a gay webmaster show. I think the potential to pick up is there. It's slightly profitable, maybe slightly above break-even, but we have to do it.

QUESTION: Didn't you have a *GayVN Awards* show in San Francisco?¹⁰⁸

FISHBEIN: That was a big hit. We had Kathy Griffin host it, and it was great.

QUESTION: Are there other segments that work well?

¹⁰⁷ See GAYVN Home Page, <http://www.avn.com/gay/> (last visited Dec. 19, 2007).

¹⁰⁸ Wyatt Buchanan, *Plenty of Love to Spare at S.F.'s Gay Porn Awards Industry Pioneers Honored at Porn Awards*, S.F. CHRON., Feb. 26, 2007, at D1 (noting that host Kathy Griffin “earned her fee for the night by moving the often-repetitive ceremony along with her take-no-prisoners humor”).

FISHBEIN: Our novelties magazine is doing great, and that's definitely a growth business. It doesn't get affected by people going on line digitally. If you want to buy a novelty, you have to buy the novelty. That business is real good. Our *AVN Online* magazine is doing fine. We're doing well in that world. We've refocused that magazine quite a few times to change with the marketplace, and it's doing well. *AVN* is doing OK. We're not doing badly. It is our flagship book, and it was the big cash cow at one time. Now, it's just a regular business and it has to be run like a regular business. Dan [Miller] will do his budgets for 2008, and if he has to let one or two people go, he will. If they come up with some new revenue ideas, so that they don't have to let those people go, that's great. That's part of what he's learning to do.

QUESTION: In many ways, you're like any other publishing business, is that right?

FISHBEIN: Yeah, but we didn't run it like a real publishing business for the first twenty years. We ran it like a porn business. You can make up for a lot of business errors by having a product that is different and outside the norm. Living by different rules, you can get away with stuff. Today, however, you can't. You have to run it like a business.

QUESTION: You mentioned *XBiz* and the competition between the two companies. Is the adult business big enough to support two trade publications?

FISHBEIN: I think so. There are more, too. In the online world, there's another magazine called *Clicks*. In the video world, there's one called *Adult Store Buyer*.¹⁰⁹ Neither of those compare to either of the other products that either we or *XBiz* puts out. I still put us as one and two, and then there's everybody else.

Then, there's the competition for the ad dollars everywhere – online, consumer magazines, everywhere.

XBiz doesn't have real circulation. In other words, if *AVN* hits 20,000, they maybe hit 5000. They don't have qualified circulation – they don't go out and qualify to find out who their readers are. They'll dump a lot of copies in video companies' lobbies and call that circulation. It's a lot of flash and a lot of marketing, but there's not a lot of context or content that's unique. I don't see it. But I think they do a good job of marketing so that people think it's new, fresh and exciting. Their online magazine is much more competitive with what we do online. I still think we're better. I think our writing is better, our features are better and our depth is better.

Again, theirs looks good. It's a tabloid and it's easy to read, so people like that. They like the short, little bites of regurgitated press releases. We both run a lot of pictures of personalities and schmooze and kiss our customers' asses because you have to do it.

Listen, there's competition for the ad dollar, and they come in with these really cheap prices. People want us to match them, and we say, "We can't. We can't give it to

¹⁰⁹ See *Adult Store Buyer Magazine, About Us*, available at <http://www.asbmagazine.com/content/view/15/26> (last visited Dec. 19, 2007) (describing the publication "as a niche publication geared toward 'the buyers' at adult retail stores. ASB is more about what happens within the four walls of an adult retail store than what happens within the entire adult entertainment industry.").

you at a loss. We'll work with you, but they're not giving you the circulation." Some people have left to advertise with *XBiz*, but then they come back and say, "I don't want to do that anymore." Some people advertise with both. Very few do them and not us; a couple do, but I'm not going to match the price. I can't do thousand-dollar pages. They want to get everyone in there cheap, cheap, cheap, so that people will think they have to be in there. They're counting on that. They're banking on that.

QUESTION: Did you say that *AVN's* circulation is about 20,000?

FISHBEIN: Yes. Maybe it's 18,700, but it's qualified. Qualified circulation means something, but people in this business don't get that.

QUESTION: What do you mean by qualified circulation?

FISHBEIN: It means that we know who are readers are. We're sending them to real buyers: They fill out a form and we know they exist. We're not just sending them out blindly. We used to send some that way. We used to have 30,000 – a lot of them blind.

QUESTION: Can you please talk about the difficulty in estimating the amount of revenue the adult industry generates?

FISHBEIN: It's really difficult. You have Playboy,¹¹⁰ Private Media Group¹¹¹ and New Frontier Media¹¹² – that's it for public companies. Nobody else is putting their numbers out, so you're guessing. You're trying to cobble your information from research firms and people who have done research, like *The New York Times* came up with some numbers. You throw all their research together and you have to just guess – logical guesses. That's why we say it's an estimate. Every interview I do where they ask me about the numbers, I say, "I just want to qualify this by telling you that this is a guess, and I am not going to say that it's absolute fact. If you want to say it's absolute fact, don't attribute it to me." *The New York Times* did its own figure. Hotels don't tell you and novelty companies don't want their competitors to know. With magazines and newsstands, you can do a logical guess. The video companies aren't public, so how are you going to figure that out? They'll all inflate their numbers. You can go to retailers, get some idea and multiply it out by the number of retailers. But there are so many online retailers and direct-to-consumer sales in which no one even knows the transaction is even taking place. You've got strip clubs, video on demand, cable television, satellite television, pay-adult segments and on and on. So we're guessing, but we think we're close.

QUESTION: We understand that October is one of the busiest times of the year for you. Why is that?

¹¹⁰ See generally Playboy Enterprises, Inc., <http://www.playboyenterprises.com> (last visited Apr. 20, 2008).

¹¹¹ See generally Private Media Group, Inc., <http://www.prvt.com/company.php> (last visited Apr. 20, 2008).

¹¹² See generally Hoover's Profile: New Frontier Media, Inc., <http://premium.hoovers.com/subscribe/co/factsheet.xhtml?ID=55983> (last visited Apr. 20, 2008).

FISHBEIN: Last Friday was the last release date for a movie to be eligible for the AVN Awards. Over the next couple of weeks, people are finishing up making their submissions for the nominations. Then, we're going to spend the better part of six weeks – a group of eight editors and myself – plowing through thousands and thousands of videos in order to come up with the nominations, which should be announced just before Thanksgiving. Once the nominations are out, then everybody votes through the end of the year – it's a larger voting body, including all of the freelancers. The eight of us in the office do the actual nominating, along with the outside opinions of these other people. Then, there's about a six-week voting period where the whole voting body at large gets to vote. Between now and the next three months, it's voting for the awards, and it's a monster job.

QUESTION: How much time do you spend watching all the videos?

FISHBEIN: I would guess that, just in this upcoming six-week period, the average person in this office will watch 200 hours of video. They'll just be fast-forwarding through so many. A lot of times they'll be watching one particular sex scene or they'll be listening to music for the music nominations. We'll put in thousands of DVDs.

QUESTION: How many categories of awards are there?

FISHBEIN: There are as many categories as the Grammy Awards – something like 100. When you look at the volume of product – 12,000 new releases in a year – and the many genres, sub-genres and specialties, you’re trying to make sure you don’t just concentrate on the big movies. You want to let the people who do foot fetish have their category. You want people who do spanking or squirting to have their categories. You want to give opportunities to all of the little genres that people have created because they’re not going to compete with the big Vivid and Evil Angel movies. Regardless of whether they’re putting out amateur video, gonzo, anal specialty or ethnic specialty, you have to give them their categories because that makes everybody feel part of it.

QUESTION: Other than the fact that it is nice to win an award, what advantage is there for a film producer to win an AVN Award?

FISHBEIN: It varies. If Vivid wins for best film, not much. If Wicked wins, same thing. I mean, it’s great for their marketing and it’s good for their ancillary sales – their business at large – because the publicity is really good.

For a company like, for example, Sex Z Pictures, which was the big winner for best video feature last year for “Corruption,” it’s big. They were just a nothing company. A guy who owns retail stores decided to get into the business and he sort of floundered for a few years. Then he decided to dump a quarter of a million dollars into a movie – I don’t know if he ever made his money back, but people stood up and took notice. All of a sudden, people from overseas and cable operators were calling him. For a guy who hadn’t won before, he went, “Oh my God.”

It's an ego thing – they can put the awards up on their mantles. It's also a marketing tool; if the company understands marketing, it can use it and it will help the company image.

If Rocco Siffredi¹¹³ wins another award or if Lexington Steele¹¹⁴ wins his fourth Male Performer of the Year, well, he's already the best male performer. If he didn't win last year, so what? He's already won three. It's like winning three batting titles. OK, this year, you hit .322 and you were fourth in the league in hitting. It doesn't matter because you're consistent.

It really depends on the people. Any time somebody new wins, you kind of notice. Any time someone who doesn't advertise with us wins, they notice. They say, "We thought you actually had to advertise to win." No, they just had to have the best movie in that category. It really depends on the category and the company.

QUESTION: Some people might think that this is the best job in the world – to sit here and watch all of these adult movies all the time. Is that the case?

FISHBEIN: If this were 1984 and we had 200 movies eligible, it would be great and a blast. But when you have 12,000 movies eligible, and everybody thinks every movie deserves a nomination, it's beyond work – it's drudgery.

That's only because, to feel like you've done the best job possible, if there are 300 pre-noms in the anal sex scene category, your tendency is to go with the big names and

¹¹³ See Rocco Siffredi Official Website, <http://www.roccosiffredi.com>(last visited Apr. 20, 2008).

¹¹⁴ See Lexington Steele Official Website, <http://www.lexsteele.com>(last visited Apr. 20, 2008).

big companies, so I force everybody to watch all 300 scenes. We'll send a committee off to narrow it down to thirty. So it's like, "You two guys take these 100 or 200 movies home tonight and narrow it down to thirty. Then, we'll watch the thirty and vote." It's brutal.

The other part of it is that people in this office are passionate about the things they like. Whether they think it's really good, like a certain girl or think that somebody really deserves something, that all comes into play. I think it's no different from any other awards show. You don't know what's in the mind of some of these Academy Awards voters.

When you get into some of the arguments here, it's funny if you can step back and look at what we're arguing about. On the other hand, I love the passion of the people who work here. They take it seriously and it's drudgery. At the start of the first day, you're all raring to go, but by the end of the first day, you're just beaten down. We look at this list, and we've done five sheets out of 500. We say, "How are we going to ever get this done?" We have forty-five days to do it.

At one point, it's an exhilarating time of the year. At another point, it's just brutal.

QUESTION: Does it ever come to blows at any of these meetings?

FISHBEIN: Nah. Well, it's come to serious arguments, with people holding their ground. If we're down to sixteen nominees and we can't have more than fifteen in a category, then it's brutal. They're making deals, saying "if we do this, then I want this. If I let go

of this scene, then I want this scene in this category. This company never gets anything, so can we at least nominate them here.” Deals like that? Constantly. No one’s gotten into a fistfight, but there are people who are passionate.

QUESTION: This is the Oscars of the adult entertainment industry, is that right?

FISHBEIN: Well, you can say it. I can’t. Oscar has technical service mark.

QUESTION: People from the outside might think that the AVN Awards is like in the movie “Boogie Nights,” when they have the awards show and the character Dirk Diggler, in getting his award, says something like, “I’m going to keep on rockin’ in this industry.” Is that what it’s like?

FISHBEIN: Yeah. Girls will get up there, cry and thank their moms. Sometimes guys will go, “Hey, I was just trying to get laid.” That’s his acceptance speech! But when a girl says, “I can’t believe I worked so hard. I want to thank my agent and all the companies I’ve worked for, and I want to thank AVN” – and then they cry – that’s great. Tears are great. When they say, “I want to thank my mom for standing by me” – all good. It’s weird. It’s like bizarro world.

QUESTION: Tell us a bit about the trade show that leads up to it.

FISHBEIN: Well, the Adult Entertainment Expo is the largest in the world. It's a combination trade show and consumer show. We'll have 350 exhibitors and 20,000 people come through. It's a pretty big trade show.

It's starting to morph or change because a lot of people can't afford the big booths anymore. You have a combination of booths and business suites now. There's a lot to see from the trade point of view. It's a big trade show.

QUESTION: If you could wish one thing for the adult entertainment industry, what would it be?

FISHBEIN: That people would act morally in business and do the right things: Treat and pay the talent correctly, not scam other people, protect the First Amendment, support people who are under indictment, act morally and be good citizens rather than like fuckers trying for the quick buck.

III.

ANALYSIS & CONCLUSION

In many respects, the adult entertainment business is no different from any other industry. It employs thousands of workers,¹¹⁵ caters to its marketplace, generates tax

¹¹⁵ See Garza, *supra* note 59, at V1 (describing how the adult entertainment industry "employs about 6,000 people directly, such as actors and production workers, and countless others indirectly, such as vendors

revenue and responds to changes in the economy. It also embraces – albeit sometimes reluctantly – rapidly changing technology. It experiences periods of tremendous growth, but sometimes suffers setbacks and losses. Yet, the adult entertainment industry differs from other American enterprises in one stark respect: It is an enterprise that the federal government would like to put out of business.

One of the weapons in the government’s arsenal against the adult entertainment industry is federal obscenity law.¹¹⁶ Of late, those provisions have gotten some use,

who sell items for use in production to those employed in plastic surgery and other body-part enhancement”).

¹¹⁶ See 18 U.S.C. § 1465 (2007). Production and transportation of obscene matters for sale or distribution, which provides, in pertinent part:

Whoever knowingly produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934 [47 USCS § 230(e)(2)] in or affecting such commerce, for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both;

and 18 U.S.C. § 1466. Engaging in the business of selling or transferring obscene matter, which provides, in pertinent part:

(a) Whoever is engaged in the business of producing with intent to distribute or sell, or selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign

particularly during the second term of President George W. Bush.¹¹⁷ The Bush Administration had been promising to go after the adult industry since taking office, but as Paul Fishbein, president of Adult Video News, wryly noted during the interview, “I think the Bush Administration was slow getting to it, but I guess we had a few other issues going on in this country.”¹¹⁸

The healthy dose of sarcasm that seeps through his comments has been well honed – understandably – during his quarter of a century as a witness and scribe to the evolution of pornography in America. His magazine calls itself the “Industry Standard,” but it is much more. *AVN*, in essence, is the publication of record for an industry that continues to experience growing pains, as well as dogged pursuit by law enforcement. Fishbein has seen both – many times, it turns out – during his long kinship with the business that began shortly after he graduated from Temple University and headed west to California’s San Fernando Valley.

While his confident posture is that of a seasoned veteran who has seen it all, the latest wave of federal prosecutions presents somewhat of a different feel for him than in the past. This is due, in part, to the fractured adult industry that Fishbein and his staff now chronicle. The doors to the adult entertainment have been thrown wide open, thanks, in large part, to inexpensive and accessible technology. Entrepreneurs, amateurs and opportunists of all stripes, in turn, are pouring in, and the camaraderie of the once maverick-grounded enterprise has dissipated. The resulting detachment of the players

commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.

¹¹⁷ See *supra* notes 7-10 and accompanying text.

¹¹⁸ See *supra* note 44 and accompanying text.

makes it particularly difficult when federal law enforcement turns up the heat hoping, if not to eradicate porn in this country, at least to cripple some of its long-time producers.

Fishbein recognizes that serious times lie ahead for the industry. The government appears to be targeting for prosecution material that gives them the very best chance of securing convictions, although as he observed during the interview:

Maybe they didn't expect that these guys would be feisty and fight back.

Extreme Associates, JM and Max Hardcore are fighting back. They're not going to go down lightly. In the case of Extreme Associates and Max Hardcore, it's pretty aberrant material. I don't want to see obscenity convictions, by any stretch of the imagination. It's bad shit, but the remedy shouldn't be censorship.¹¹⁹

While he makes clear that he does not want to see convictions of adult producers – he abhors the idea of prosecuting individuals for creating speech products – he thinks the newer generation of content producers might take notice and recognize the need to coalesce as an industry when they witness colleagues going to jail. Fishbein gives the impression that he has grown weary of people who enter the adult business solely to squeeze as much profit as possible out of it without paying any attention to the constitutional battles hard fought by the pioneers in the industry. As he observed,

The new people are younger and don't have a history of even understanding what the First Amendment is. They don't understand what people had to go through and how many times people like Al Goldstein or Larry Flynt went to jail. Larry got shot. They don't know what it meant

¹¹⁹ See *supra* notes 47-49 and accompanying text (internal footnotes omitted).

to really fight for the First Amendment and to be arrested and sent to jail.

I haven't been to jail, but I was friends with all those people who did go to jail. I felt it and I visited them in jail.¹²⁰

Asked whether he ever thought that situation would change, his answer was characteristically to the point: "Yes. As soon as they start busting everybody, it will change, and I don't want that to happen."¹²¹

Fishbein clearly is troubled by the government's continued insistence upon finding ways to hinder the adult enterprise. In his view, the *Miller* test¹²² is unworkable; he would craft a better law to save time, money and effort. It would read as follows:

If the material is performed by consenting adults over the age of eighteen – if you want to change that age, go ahead – but over the age of eighteen, and they are people – not animals – who are able to consent, have consented and no crime was committed, then it's protected speech. Anything involving underage kids – child pornography – go after it. Anything involving coercion, go after the crime. It's as simple as that. If you want to outlaw the conduct of the crime for commercial use – this girl was raped against her will and you cannot sell it – fine. I'm OK with that. You cannot commercially sell material that did not involve consenting people. That's the way you do it. There's no gray area.¹²³

¹²⁰ See *supra* notes 99-100 and accompanying text (internal footnotes omitted).

¹²¹ See *supra* Part II, Section D.

¹²² *Supra* note 6.

¹²³ *Supra* Part II, Section B.

Fishbein has a refined knack for making thoughtful and common-sense distillations of law and procedure. A common theme of his remarks throughout the interview was that government and its application of the law in this area is completely illogical. The current age-verification inspections being carried out by the FBI provided another example for Fishbein of the government's squandering taxpayer dollars when the results will not unveil any minors performing in adult materials – the purported rationale for the Bureau's efforts. As for the 2257 regulations that underlie the inspections, he added, "I think the rules are onerous. They're ridiculous and the record-keeping requirements are insane."¹²⁴

For Fishbein, logic can be found in the recognition and protection of Americans' privacy interests. He thought Judge Gary Lancaster's opinion in the *Extreme Associate's* case¹²⁵ made sense because it was premised on privacy. To illustrate the point, Fishbein asked the authors of this article:

If you're sitting in your home in Centre County, Pennsylvania, which I presume is somewhat conservative, and there is nothing publicly exhibited – no porn theaters or anything like that – and you buy a DVD from Adam & Eve, it's mailed to your house, and you sit in your home and you watch it with your wife or whatever you do with it, then what business is that of the community?¹²⁶

¹²⁴ *Supra* note 37 and accompanying text.

¹²⁵ *Supra* note 75 and accompanying text.

¹²⁶ *Supra* note 79 and accompanying text (internal citation omitted).

Fishbein's subscribes to a libertarian philosophy – he labels himself a “half-ass libertarian,”¹²⁷ given his belief that the government should provide children healthcare protection – and urges the courts to keep the government out of people's bedrooms.

While the law continues to cause headaches for adult producers, the industry is struggling to reposition itself to remain competitive in the marketplace. The proliferation of entrepreneurial entrants into the adult industry – particularly Web-based businesses – coupled with a glut of product that retains a long shelf life threaten to render some mainstream adult producers obsolete. He cannot see the business operating at its current pace, noting during the interview, “There are, however, too many players and the pie is split up in to too many little, small slices.”¹²⁸ He foresees some mergers, acquisitions and even bankruptcies as the market sorts this out.

While the industry experiences an economic downturn, so too do Fishbein's trade publications that cover it. At the time of the interview, the AVN staff was putting together its future business plan. As Fishbein described the process:

We are getting ready for our strategy meetings, and you need to look at the market and what's happening. We notice that DVD sales are probably down for everybody thirty to forty percent. I think our ad pages are down thirty percent. I think that the business has flattened out. It's a combination of people going digital and online. A lot of revenue is not being replaced online.¹²⁹

¹²⁷ See *supra* Part II, Section B.

¹²⁸ See *supra* Part II, Section D.

¹²⁹ *Id.*

The uncertainty of the direction of the adult business, the outcome of the current spate of prosecutions, as well as any future indictments, and the potential introduction of new technology provides more questions than answers. For Fishbein, those questions are on his mind every day, as he asked: “Is the DVD market going to continue to dive? Obviously, people will want hard goods. Will things go more online? How are the delivery systems of pornography changing? What are our customers going to do? Are they still going to want us?”¹³⁰

Although the answers to those questions are now unknown, what is clear today is that the public’s appetite for adult content has not waned. Despite the best efforts of the federal government, adult entertainment continues to mainstream into society. While the stigma associated with pornography has not been erased completely – Fishbein suggested “there’s still something naughty about it, something sleazy about it” – Americans unquestionably are more comfortable with it, albeit silently so. The vocal minority still grabs the headlines and controls an agenda that relishes pouring taxpayer dollars into insidious inspections and pointless prosecutions.

¹³⁰ *Id.*

IS THE ARTISTS' NEWLY-FOUND INDEPENDENCE AN OPPORTUNITY FOR LAW TO PROTECT ARTISTIC CREATIVITY AND DIVERSITY?

By Aïssatou Sylla

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INTRODUCTION

Before internet access became generalized in the late 1990s, a large number of recording artists, especially those born after the 1970s when multinational record companies started consolidating, could not conceive success without a contract with a major record company. Because the recording artists known to have such deals enjoy or have enjoyed international fame, many could not imagine success without traditional mass media, i.e., television and terrestrial radio.

Similarly, the phrase “music industry” has only just started to echo the existence of actors outside of the “big four” major record companies.¹ The amalgam in referring to the “majors” as equating “music industry,” and opposing them to “artists,” “independent record labels” and lately, “internet music providers,” is a clear indicator of the majors’ domination of the recording market on the one hand, and of a certain disregard of musical initiatives taking place outside the structures created or adjusted in order to suit the majors’ activities.

In the 1990s, artists started gaining more independence as they gained access to recording and mastering tools, relieving them from exorbitant studio costs.² With affordable computer software and recording instruments, they could produce masters of good quality from their home or with the help of someone else who possessed those tools.³

However, the ability for artists to promote and distribute their work themselves, through increasingly popular internet websites, has changed the face of the recording industry. This turn follows a period in which the lack of musical diversity in the mass media had reached its peak.⁴ As regards consumers, many criticize songs’ over-repeated formulas, the lack of choice and the

¹ Also referred to as “major labels”, “majors” or the “the Big Four.” Those corporations are today Sony BMG Music Entertainment, Universal Music Group, Warner Music Group and EMI Group. *See infra* note 9 for their market share.

² Adam Webb, *Technology: Is Garageband Top of the Pops?: Apple's Free Software is Credited with Getting Many Bands Started, but is the Inclusion of the Program on Macs Pure Generosity or Clever Marketing, Wonders*, The Guardian (London), 18 October 2007.

³ *Id.*

⁴ *Practicing the Blues*, Planning, 10 December 2004.

decreased quality in available music.⁵

Networking websites such as the leader MySpace⁶ are now blooming and becoming more organized and structured in their objective to facilitate music discovery, through “Do-it-yourself” (DIY) promotion and distribution.

The latest changes in terms of music access and independent music marketability seem to be more fortuitous than anything else. They result from an unanticipated combination of technological innovation, business ideas and public enthusiasm in using new formulas. Since the music industry cannot guarantee a long-term promotion of musical creativity and plurality, isn't it time for the US government and courts to take positive actions for this purpose? Many answer yes.⁷

This question is an opportunity to examine the broader issue of the promotion and protection of artistic diversity. Indeed state and federal legislators have occasionally endeavored to promote creativity. Congress, for instance, has created the National Endowment for the Arts,⁸ whereas some states have set up tax-credit schemes to locally boost (or create) their cinema or recording industry.⁹ Moreover, in line with its constitutional powers, Congress has created copyright laws, which are supposed to promote artistic creativity. However, no matter how well-drafted these laws may be, in the present era of mass media concentration, they would not efficiently serve this goal.¹⁰

In order to find out whether the government ought to promote artistic diversity and creativity, we will, in the first part (Part 1), come back to the precariousness of musical diversity. In a second part (Part 2), we will see that Congress generally does not promote or protect artistic creativity. The third part (Part 3) will propose means of achieving these goals.

Part 1. Precariousness of musical diversity and need for legal protection

Today with the internet, artists have tremendously more opportunities to be heard than five,

⁵ In a survey, consumers have estimated that there were 25 “great albums” released each year between 1969 and 1972, compared to 3 for the year 2003. *Music's Brighter Future*. THE ECONOMIST, 28 October 2004, www.economist.com/business/printerfriendly.cfm?story_id=3329169, last visited on 19 December 2006.

⁶ www.myspace.com, last visited on 23 March 2007.

⁷ See The Future of Music Coalition for example, www.futureofmusic.org, and countless independent labels and artists, last visited on 23 March 2007.

⁸ *Infra* note 24.

⁹ This is the case for Alabama, Florida, Georgia, Louisiana, Mississippi, Oklahoma, North Carolina, South Carolina, Tennessee, Virginia, Arizona, Hawaii.

¹⁰ Panel discussion: *Few Gate Keepers, Many Views: Will the New Rules Compromise the Representation of Marginalized Voices?* 53 Am. U.L. Rev. 547 (2004).

10 or 20 years ago,¹¹ even though this may not guarantee the success they seek.¹² Such opportunities are unprecedented, as this overthrows major record labels' monopoly as middlemen artists and the public.¹³ On the other hand, the public has for the first time had access to the gigantic pool of artists that flourish on the internet. As a result, a diversity of musical content and sources has emerged and a relative independence from the major record labels has taken place.

However these recent changes were not prompted by the Government's will and the stability of the present situation is uncertain.¹⁴

In order to appreciate the fragility of musical diversity, it is necessary to explain the independence artists have acquired (A). Then, the future industry evolutions that could jeopardize this diversity and send artists back underground shall also be discussed (B).

A. *Today's situation: Relative independence from large media and entertainment groups*

Artists and the public have just started to enjoy independence in circulating music and accessing it even though it is insufficient for many (1). Yet, this independence is unlikely to last without legal protection (2).

1. Newly-found, yet relative independence

In order to grasp the present situation, we shall quickly go back in time and observe the process of music democratization (a), then look at the more skeptical view on access to music and DIY music (b). Finally, we shall look at the legal consequences resulting from the recent changes (c).

a. Road to the democratization of music making and music listening

Compared to the time when it was unthinkable for an artist to make his music available to the public without having gained the interest of record company willing to invest for the production, release and distribution of his recording, it can be said that in 2007, artists have gained a

¹¹ *Music's Brighter Future*, The Economist, 28 October 2004, http://www.economist.com/business/PrinterFriendly.cfm?story_id=3329169, last visited on 19 December 2006.

¹² Adam Walton, *Independent of the Rock Myth; Ear Buzz*, Liverpool Daily Post, 6 August 2004.

¹³ Bobbie Johnson, *Threat to Music Labels as Website Offers Bands a Shortcut to Big Time*, The Guardian, 5 September 2006.

¹⁴ *Infra* part I (A).

considerable independence from record labels.¹

Indeed, since the early 20th century, music has had different phases of democratization² resulting from technological innovations which have often been unwelcome by media and entertainment organizations¹. For example, in the late 19th century, the use of player pianos,² which made music accessible to a larger number of listeners because the presence of a musician was no longer required, was widely resented by music publishers whose business was based on the sale of sheet music.³

Later, in the 1920s, broadcast radio and phonographs brought music to the home of listeners, making record companies and radio stations unavoidable in order to reach the public.⁴ These technologies were the source of what is commonly called “popular music” – music that can be heard at home by the public nationwide or worldwide and that often contributes to a popular culture.⁵ Conversely, more artists, on top of or instead of recognition, could acquire financial wealth and stardom comparable to the success of Hollywood celebrities.

Until the mid 1990s, the task of most unsigned artists was to hunt for a deal in order to have someone financing and providing for record production and promotion.⁶ As a consequence, most of those unsigned artists could not even clear the record production hurdle and create a quality sound recording to circulate.⁷ Artists remained tied to recording studios’ goodwill until cheap music recording software appeared on the market⁸ and freed them from

¹ *Supra* note 8.

² Alana Semuels, *More Bands Finding Venues on the Web*, Los Angeles Times, 10 December 2006.

¹ For example, home videocassette tape recorders introduced in 1975 and rendered famous with Sony’s Betamax brand, faced vivid hostility from the cinema and television broadcast industry. *See* the “Betamax Case” *Universal City Studios, Inc. et al. v. Sony Corporation of America Inc. et al* 464 U.S. 417 (1984).

² Player-pianos play music automatically without a pianist. They were initially programmed mechanically.

³ *See* *White-Smith Music Publishing Co. v. Appollo Co.*, 209 U.S. 1 (1908). In this case, a publishing company claimed that the use of piano rolls infringed the copyright vested in sheet music. The Supreme Court held that there was no violation. After continuous pressure from publishers, Congress introduced a compulsory licensing scheme allowing the use of the copyrighted work for piano rolls and automatically granting copyright owners a royalty. *See* 43 Cong Rec. 3831-32 (1909).

⁴ *History of Recorded Music*, <http://www.soc.duke.edu/~s142tm01/history4.html>, last visited on 23 March 2007.

⁵ Opposed to “folk music.”

⁶ Production here must be understood as making the arrangements necessary for the recording of music.

⁷ *Supra* note 2.

⁸ *Id.* and *supra* note 11.

expensive studio costs.⁹

Generalized access to the internet in industrialized countries developed at the same time, giving artists the opportunity to introduce themselves and their self-produced music online, by means of their own website. However the public had little means of discovering the existence of such websites in the absence of advertising, hearsay or networking.

The year 2005 saw the blooming of internet platforms allowing social networking, or other platforms inviting artists to sell and promote their recordings directly to the public. MySpace, which is currently the most popular and lucrative website with over 100 million users,¹⁰ allows people, including artists of all kind,¹¹ to present themselves and their work on a user-friendly and “customizable” webpage and connect with other people. Recording artists can thus upload their music, photographs, videos, tour schedule and any other information for free and endlessly get worldwide exposure. MySpace, which has been acquired by the media giant News Corporation, has just developed a very user friendly online sales system.¹² Other networking websites are exclusively dedicated to music and also allow online purchase¹³. As a consequence, today, most artists can 1) create their own sound recordings, 2) distribute their recordings, and 3) promote their recordings.

b. Real freedom?

The freedom to discover diverse music and the degree of artists’ independence brought about by the latest technological innovations has been questioned.¹⁴ Indeed, even if there have been success stories of artists using internet DIY promotion,¹⁵ they remain an exception

⁹ *Id.*

¹⁰ *MySpace Future is Golden*, iMedia Connection. <http://www.imediaconnection.com/content/11027.asp>, last visited on 21 March 2007.

¹¹ For example, painters, writers, poet, dancers, filmmakers etc.

¹² *MySpace, SnoCap Strikes Music Sales Partnership*, Digital Music News, May 9 2006.

¹³ See for example www.mysongstore.com www.brodjam.com www.musicane.com www.cdbaby.com, last visited on 23 March 2007.

¹⁴ *Supra* note 12.

¹⁵ For success stories, see the example of *Arctic Monkeys* who gained popularity by distributing their music on the internet and performing live. They won two Brit Awards in 2007. See also the US band *Clap Your Hands Say Yeah* who achieved fame and commercial success via the internet. For “overnight” internet successes, see also the example of French artist *Kamini* whose web link showing his video, filmed by a student, had, in 2006 circulated by email and generated over four million page views in less than one month. He was immediately noticed by the national press and offered deals by major labels. He has, since then, signed a record deal with RCA Records (part of Sony BMG Music Entertainment). In early 2007, his video became the lowest-budget

to the general trend.

It is often argued that DIY promotion cannot replace promotion by record companies as the latter are the gatekeepers of radio and television marketing.¹⁶ It is true that television and terrestrial radio are still largely the main means of music discovery, but for how long?¹⁷ Television is slowly being incorporated into the online world and the number of people watching TV programs on the internet is constantly growing¹⁸. Therefore, it would not be unreasonable to imagine a computer becoming the primary multimedia tool, narrowing the cohabitation between established and non-established artists. Besides, it is yet to be demonstrated that all of the online artists' ambition is to achieve the stardom that major labels have accustomed us to. Undeniably, a significant part aspires to that,¹⁹ but many are content with a loyal fan base, the opportunity to perform live, and to earn a decent income as long as they are independent.

In relation to the public's access to music, doubts about the usefulness of the internet are cast because of the absence of a compulsory licensing scheme that would coerce record companies to allow the online use of their copyrighted work by anyone in exchange for a fixed fee.²⁰ The advocates of compulsory licensing have been armwrestling record companies, which have been decrying the unauthorized listening, copying and sharing of their material. This conflict has garnered a lot of ink and has resulted in lawsuits²¹ and

video ever (€200) to be awarded the prestigious best French music video of the year prize. www.kamini.fr also www.arcticmonkeys.com and www.clapyourhandssayyeah.com, last visited on 23 March 2007.

¹⁶ *Supra* note 12.

¹⁷ *Terrestrial Radio Still Primary New Music Discovery Destination*, 21 July 2006, http://www.bridgeratings.com/press_07.21.06.New_percent20Music.htm, and *Jupiter Research Finds That MySpace Music Community Activity Far Outpaces Online Music Sites*, last visited on 23 March 2007. http://www.jupiterresearch.com/bin/item.pl/press:press_release/2006/id=06.05.31myspace_music_community.html/, last visited on 19 December 2006.

¹⁸ *Id.*

¹⁹ This is the case of one-hit wonder Band Koopa who topped the charts for one month and disappeared for lack of promotion. <http://newmusicstrategies.com/2007/02/27/the-real-storyof-koopa/>, last visited on 5 March 2007.

²⁰ Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 *Touro L.Rev.* 375.

²¹ See for example Lime Wire's action against the Big Four and some of their labels. Nancy Gohring, *Lime Wire Turns Tables, Sues Record Companies*, IDG News Service www.macworld.com/news/2006/09/26/limewire/index.php, last visited on December 19th 2006. See also FTC inquiry on price-fixing, where it was found that there were reasons to believe that Sony, Time Warner, BMG, Universal and EMI used MAP policies in order to inflate retail record prices. To this finding followed settlements whereby the majors agreed to cease the use of these policies and to pay \$143,075,000 as an estimated \$480 million have been unduly paid by record consumers. Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, and Thomas B. Leary, In the Matter of Sony Music Entertainment, Inc.; In the Matter of Time Warner, Inc.; In the Matter of BMG Music, d.b.a.

government lobbying.²² The proliferation of doubtful talents on the internet who decide to become artists overnight just because they have the tools to record and promote themselves, has also been criticized for turning discovery of “good music” into a treasure hunt.²³

However, for the purpose of this paper, which focuses on the availability to the public of diverse music coming from a plurality of sources and encouraging artistic creativity, an objective view shall be taken: even though music is not promoted on terrestrial radio and television, it is the first time that the music of any independent recording artist has been available to the public worldwide. It is important, again for the purpose of the present paper, to look from the listeners’ angle and to draw a distinction between *unguided access* to a jungle of unknown artists and *no access at all* to independent music. Here, the conclusion still is that the public is *free* to access music of all kind and sources as long as it has access to the internet.

Furthermore, concerning the artistic creativity issue, it can be said that despite the purported proliferation of artists, independent online promotion has opened doors to innovation by offering creative freedom, which is no longer available amongst large record labels concerned about recouping their marketing costs.²⁴

c. Legal consequences

The early part of the 21st century has so far been part of a transition between old and new music business models.²⁵ The immediate legal implications of the changes are nonetheless considerable. Many of them are linked to contractual practices and to copyright clearances.

First of all, the fact that an artist no longer *has to* sign a recording agreement with a record company means that he can now reasonably promote his work while retaining all of his copyrights instead of transferring or licensing them, which had been the common practice. As

"BMG Entertainment"; In the Matter of Universal Music & Video Distribution Corp. and UMG Recordings, Inc.; and In the Matter of Capitol Records, Inc., d.b.a. "EMI Music Distribution" et al., Docket Nos. C-3971, C-3972, C-3973, C-3974, and C-3975, <http://www.ftc.gov/os/2000/09/musicstatement.htm>, last visited on 19 December 2006.

²² Recording Industry Association of America (RIAA), representing the U.S. recording industry has been by far the strongest lobby group. Phil Gallo, *RIAA's Got Burning Desire*, Daily Variety, 15 August 2005.

²³ *Supra* note 19.

²⁴ *Supra* note 11.

²⁵ For the business models and contractual practices of the late 1990s, see Corey Field, *New Uses and New Percentages: Music Contracts, Royalties, and Distribution Models in the Digital Millennium*, 7 UCLA, Ent. L. Rev. 289 (2000).

a consequence, unless charged a percentage for online sales, an artist can potentially earn the totality of the sales income.

In the event that he wishes to work with, for example, an independent record company that would undertake all the recording and marketing, his increased bargaining power could allow him to only agree for the license of certain rights, as opposed to the assignment of his copyright in the sound recording and/or in the composition. Besides, should he take the assignment route, the artist could still negotiate for a limited duration of the assignment rather than irreversibly give his rights away.²⁶

In addition, an artist wishing to sign a recording contract with an independent label could negotiate a higher royalty rate reflecting the label's decreased distribution and promotional investment. For example, instead of the common 50/50 split, an artist would have grounds to claim a 70/30 or an 80/20 split in his favor and labels would have to show obligations and commitments justifying higher royalty rates.

If labels' distribution and promotion costs are anticipated to be low, royalty rates could be based on net receipts instead of retail price or published price to dealer.²⁷ This would ensure that the label pays the artist only when it has effectively made a profit from the recordings exploitations, and that the costs to be deducted from the gross income are not high to the point of leaving nothing left to the artist as a royalty.

Furthermore, artists would still need a manager, but not to the same extent and certainly not for the same purposes.²⁸ As regards unsigned artists, managers' role has started shifting from artist promotion towards major record companies in order to get a deal to artist promotion exclusively towards the public, engaging artists in regular live performances, and promoting them through traditional media and the internet. The decrease of the traditional record deal shopping obligation could equally result in a decrease or in an increase of a manager's responsibility, depending on the manager's contractual commitments.²⁹ Either

²⁶ *Id.*

²⁷ Retail Price stands for the price charged to store customers whereas Published Price to Dealer (PPD) is the equivalent of wholesale price.

²⁸ See the usual roles and duties of a manager at <http://www.musicmanagersforum.co.uk/findamanager>, last visited on 27 October 2007.

²⁹ In the absence of record companies, some managers' work and risk has increased as they have decided to financially invest on the artist's promotion. Other managers have started turning to venture capital firms interested in investing in promising online artists (deal or not deal).

way, this change should be taken in consideration in establishing his commission.³⁰

Consequently, in this transition period, artists and their lawyers must be aware of the shifting industry practices while dealing and negotiating with other parties and contractual practices should generally be reviewed.

Another consequence of the newly acquired freedom is the necessity for everyone wishing to stream or sell music online to seek at least a license from the copyright owner, in accordance with the Copyright Act,³¹ as mentioned above.³² Some mid-size independent labels embracing those opportunities have thus started licensing their catalogue to websites such as MySpace.³³ Artists who have assigned their copyrights (in sound recordings or in compositions) will need to obtain a license from the copyright owner of the material he performs in order to make their full discography available online. Many artists, who overlooked (or had forgotten) this restriction, were asked to remove all their recordings or videos, for which they owned no rights.³⁴ This means that, in such a case, they need to obtain a license, for which they usually must pay for, to upload some of their work.³⁵

Overall the new face of the music industry is advantageous, not only for creators and small organizations, but also for the public that can benefit from a vaster choice in music listening. In the past few years, music had been used more like a homogenized commercial commodity than a way to promote the arts, creativity or social culture.³⁶ What the public could hear was almost entirely controlled by a few multinationals needing to generate enough income to cover all their costs.³⁷

However, what guarantees this situation will last? So far, majors and other media and telecommunication giants³⁸ still have the heaviest financial weight and have not yet had their

³⁰ Commission is usually around 20 percent of the artist's gross income.

³¹ 17 U.S.C. §§ 101-810.

³² *Supra* note 20.

³³ Brian Garrity, *Indie Labels Rethinking Strategies For Web Exposure*, Billboard, 30 June 2007.

³⁴ *See* for example, singer Maxwell who had to remove all the videos and music he had made available, because they belonged to Columbia Records (SONY BMG).

³⁵ For the proposal of compulsory licensing in because of the prohibitive licensing fees, *see* Patrick Bukart, *Loose Integration in the Popular Music Industry*, Popular Music and Society, 1 October 2005.

³⁶ Anthony Maul, *Are the Major Labels Sandbagging Online Music? An Antitrust Analysis of Strategic Licensing Practices*, 7 N.Y.U.J. Legis. & Pub. Pol'y 365 (2003/2004).

³⁷ *Id.*

³⁸ Sony BMG has started following the trend in October 2007. *See* the Sony BMG press release: "SONY BMG will license music videos, select audio material, and other content from its extensive artist roster and will make

slice of the online music market pie.

2. Short-lived freedom in the absence of effective legal protection

The present situation has little chance to last and has been evolving in different directions. The traditional players in the media, telecommunications and entertainment industries have not yet taken a clear and definite stance apart from showing discontentment towards the use of their copyrighted work.³⁹ Today, two tendencies, which could hinder the promotion of music diversity and artistic creativity, can be observed. The first one is the media and entertainment giants' move towards the internet market (a). The second one is the telecommunications companies' attempts to eliminate internet neutrality through the exercise of their pipe control (b).

a. Domination through market entry

DIY music websites are growing. In terms of quantity, they are increasing in number and, in terms of quality, they are becoming more structured, user-friendlier, music-focused and are expanding their partnerships worldwide. Regarding the large entertainment groups' response, three general long-term scenarios can be envisaged.

The least likely scenario would be the existence of two parallel, developed and sophisticated markets within the music industry, one having the financial means to guarantee a certain amount of hits through the heavy use of television and terrestrial radio. This situation could somehow be conceived given the hostility expressed by media groups towards competing online music providers. The latest strike was Viacom's \$1 billion lawsuit against YouTube for allowing the streaming of their copyrighted material without a license.⁴⁰ However, nothing shows that the public's attraction to traditional media will be long lasting, judging by the rapid development of internet services.

the content available on its artists' MySpace profile pages. MySpace and Sony BMG will share in sponsorship and advertising revenues generated from the music videos and profile pages. Additionally, MySpace will work with SONY BMG to promote the music company's artists throughout the site." MySpace and Sony BMG Music Entertainment Sign New Licensing Pact, <http://www.sonybmg.com/press/101607.html>, last visited on 27 October 2007. Also, *see infra* Part 1 (B).

³⁹ *See infra* note 40.

⁴⁰ Brian Deagon, *Viacom Suit vs YouTube Could Set the Legal Standard*, INVESTOR'S BUSINESS DAILY, 17 March 2007.

The second scenario, which is taking shape today, is the media and entertainment groups' entry into the online music market in order to compete directly with internet-only corporations.⁴¹ One way to proceed would be for a media or entertainment empire to make available their whole catalogue online while continuing to refuse to authorize the use of their work. This would result in bringing TV and radio into the internet. A catalogue which is, in the case of major record companies, more than 50 years old and which contains famous artists would attract the public eye, especially if they can consume music and videos without the fear of violating the law. There would thus be a shift from independent online music providers, which can legally play mainly unknown acts. This shift of public attention would very probably pull independent music labels and independent artists towards those new platforms, as their chances to be noticed would be higher. Media giants, taking back a big part of the bargaining power they had lost, could possibly require an exclusive license in order to admit an unsigned artist on their platform. The future of the primary internet music providers would then be unsure. Their financial gain would be drastically reduced and they would be at risk of spending a lot more in litigation should a user upload unauthorized material on their website.

If, in this situation, contracts between large groups and artists or unsigned labels are negotiated in such a way that the latter retain full use of their rights and can have their music available in any other venue, artistic diversity would be enhanced rather than hindered by the presence of media and entertainment giants in the online music market. This would indeed create a one-stop shop containing record labels' repertoire as well as new material by unsigned artists and independent labels. However, the imbalanced bargaining power between both parties would render such a negotiation difficult. NBC Universal and News Corporation's announcement of its plan to create an internet venue competing with YouTube is an example of this second scenario.⁴² The two empires are planning to grant free online access to most of their current and old television shows.⁴³

The third scenario, which is the most likely on a long-term basis, is the large entertainment and media groups' direct or indirect control over the most popular internet

⁴¹ See Stefanie Balogh, *Media Giants Battle YouTube*, THE ADVERTISER (Australia) 24 March 2007; Todd Spangler, *Pumping Up a New Tube*; NBCU, *News Corp. Web Venture to Take on You Tube*, Multichannel News, 26 March 2007, or Emily Bell, *The Big Guys Decide it's Gang Up on Google Time*, 26 March 2007.

⁴² *Supra* note 41.

⁴³ *Id.*

companies. This is what happened to MySpace, that News Corporation acquired in 2005.⁴⁴ Moreover, history shows that media and entertainment corporations, like most businesses, do not hesitate to learn from their competitors' practices in order to increase their assets.⁴⁵

Large media and entertainment groups' potential behavior are not the only threat to music diversity and artistic creativity. Telecommunications companies are indeed attempting to control internet access.

b. Attempts to eliminate net neutrality

The largest telecommunications companies, namely AT&T, Verizon, Comcast and Time Warner have been lobbying Congress in order to have the right to charge customers for pipe use¹ and prioritize internet content by allowing higher-speed information delivery for higher paying customers, in the name of free competition rather than regulation.² Those companies have formed a coalition in order to push Congress to enact a now buried bill named the Communications Opportunity Promotion and Enhancement Act (COPE)³ in order to provide for their wishes.

Allowing such control over internet access can have disastrous consequences when it comes to, among many other things, innovation and artistic diversity. The direct result is that internet content would not be treated equally.⁴ It is indeed increasingly common to have one service provider in charge of TV, telephone and internet for a household.⁵ Those providers already control the content available on digital television and intend to have a similar influence on the internet in order to make online organizations pay them to have a bigger

⁴⁴ See News Corporation Annual Report 2006, p. 5, <http://www.newscorp.com/Report2006/AR2006.pdf>, last visited on 27 October 2007.

⁴⁵ *Supra* note **Error! Bookmark not defined.**

¹ See the statement of Ed Whitacre of AT&T: "Now, what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. So why should they be allowed to use my pipes?" *Content Creators, Online Music Fans Support Net Neutrality, Conference Hears*, Washington Internet Daily, 3 May 2007.

² *Net Neutrality Proponents Claim Victory, Prepare for the Next Battle*, CMP Media LLC, 11 December 2006.

³ H.R. 5252, 109th Cong.

⁴ This is what is claimed in the Save the Internet website www.savetheinternet.com, last visited on 23 March 2007. See also Christopher S. Yoo, *Beyond Network Neutrality*, 19 Harv. J. Law & Tec 1 (2005), Ryan Blethen, *Much Work to be Done to Preserve Net Neutrality*, The Seattle Times, 2 February 2007 and *Hope for an Open, Free-Flowing Internet*, The Seattle Times, 11 January 2007.

⁵ *Id.*

online presence (like an advertiser would do) and have the consumers pay too to have a fast connection.¹ The non-payers would experience slow connection or unavailability. Further, telecommunications companies would have the right to favor their own services and therefore limit the use of other providers. Some instances of this type of control have been alleged. For example, in 2004, internet users were blocked by their carrier from using a competing web-based phone service.² Another illustration is the case in which a Canadian cable, internet, and telephone carrier intentionally downgraded the “quality and reliability” of competing services that their customers might have chosen.³

After a long battle between the telecommunications companies’ coalition, “Hands Off the Internet,” and another lobbyist, “Save the Internet”, campaigning for net neutrality, the COPE bill, which the House of Representatives passed in June 2006, was dropped.⁴ Three Senators, Olympia Snow, Byron Dorgan and Ron Wyden had been resisting the passage of the bill, advocating network neutrality.⁵ Later, the new House of Representatives brought more support to the cause.⁶

Yet the risk of having internet gatekeepers taxing users at will has not disappeared and the battle may well resurface in 2009 as no legislation or regulation requires internet neutrality.⁷ All that was done was for the Federal Communications Commission (FCC) to condition AT&T’s acquisition of BellSouth⁸ upon AT&T’s promise to respect neutrality for two years, whereas the other pipe owners are not concerned with this agreement.

This section has showed that today’s music industry setting, which is ideal for musical creativity, diversity, and free access,⁹ basically results from technology, good ideas and entrepreneurial flair.¹⁰ The public interest in diversity is here served by a combination of circumstances in a transition period. Consequently, this freedom and diversity, without

¹ *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See Ryan Blethen at *supra* note 4.

⁸ Making AT&T the leader in 22 states, see Seattle Times at *supra* note 4.

⁹ *Supra* note 8.

¹⁰ *YouTube - an online success story*, <http://www.tamingthebeast.net/articles6/youtubesuccess.htm>, last visited on 20 March 2007.

effective legal protection is not viable, even though the resistance to large media, entertainment and telecommunications companies has proved to be stronger than expected.

It is now necessary to explore how such a situation of precariousness has been brought about.

B. Evolution to the peak of lack of artistic diversity and creativity

One of the main reasons for the lack of musical and general artistic diversity, through access to a plurality of artists, is a lack of market regulation leading to a consolidation of the music, media and telecommunications industries through an oligopolistic domination by the few gatekeepers of public access.¹

Those three industries are closely-linked, which makes diagonal, horizontal and especially vertical integration easier and potentially dangerous, not only for artistic creativity and diversity, but also for democracy, as the expression of ideas and opinions falls into the hands of the telecommunications and media industries.²

Here, the evolution of the music business through record companies' concentrations shall be looked at (1) separately from the evolution of the media and telecommunication industry (2), as the latter is extremely dependent on the policy changes of its regulatory body, the Federal Communications Commission (FCC), whereas the former has been less affected by the merger regulatory organizations such as the Federal Trade Commission (FTC).

1. Consolidation of the music industry

The music industry has never solely been made of record companies. Yet, since the advent of recorded music, large labels have steered the business and have had a privileged place amongst mass media.³

The companies which today form the Big Four have a merger and acquisition history which is not unusual in the business world (car industry, for example); however, the oligopoly characterizing the end of the 20th century is singular.⁴

¹ Patrick Burkart, *Loose Integration in the Popular Music Industry*, *Popular Music and Society*, Volume 28, Issue 4, October 2005.

² *Id.*

³ *Id.*

⁴ *Infra* note 85.

Warner Music Group and Universal Music Group were created as divisions of their respective motion pictures studios, Universal Pictures and Warner Bros. in order to produce film soundtracks.⁵ Those groups later acquired independent music labels.⁶ EMI is the fruit of a merger in 1991 between two gramophone companies.⁷ The company grew larger, then merged with Thorn Electrical Industries in 1979, until the 1996 de-merger, and acquired Virgin Records in 1992.

In the early 1980s, the Japanese conglomerate Sony Corp. entered the music business by purchasing Columbia Broadcasting System (CBS),⁸ a leading record company, thus forming Sony Music Entertainment, which later purchased a number of other large labels.¹

Finally, Bertelsmann,² originally a publisher, created a music division³ in 1958 and subsequently bought out other successful record labels, while developing its media and entertainment businesses mainly through the acquisition of stakes in radio and newspaper groups.⁴ In 2004, the conglomerate set up Sony BMG, a joint venture with Sony Music.⁵

In the same year, AOL-Time Warner divested Warner Music Group.⁶ Today, the Big Four consist of two companies' fully-integrated media conglomerates (Sony BMG and Universal Music) and of two companies which operate separately from such empires.⁷

⁵ See Keith Suter, *When Movies Turned into Sound Business*, The Daily Telegraph (Australia), 5 October 2007 and see Jack Bishop, *Building International Empires of Sound: Concentration of Power and Property in the "Global" Music Market*, Popular Music and Society, No. 4, Vol. 28; p. 443, 1 October 2005.

⁶ Warner Music Group notably acquired Atlantic Records in 1967, Elektra Records in 1970, whereas, Universal (then MCA Entertainment) acquired PolyGram, Island Records, Motown Records.

⁷ The Columbia Graphophone Company and the Gramophone Company.

⁸ Columbia Records was founded in 1888 and later co-founded Columbia Broadcasting System. Columbia and CBS became music industry leaders in the United States in the 1960s with acquisitions and numerous partnerships, such as Epic Recordings.

¹ *Supra* note 5.

² Bertelsmann Aktiengesellschaft.

³ It was named Ariola.

⁴ Bertelsmann purchased the Gruner und Jahr publishing house in 1969, thus obtaining stakes in newspapers and magazines. The group also acquired Arista Records in 1979, RCA Victor in 1986 and Windham Hill Records in 1992. It also teamed up with internet provider AOL for services in Europe. Bertelsmann now owns RTL group, Europe's top television, radio and production group.

⁵ www.sonybmgmasterworks.com, last visited on 23 March 2007.

⁶ See Warner Music Group's Investors Relation webpage <http://investors.wmg.com/phoenix.zhtml?c=182480&p=irol-irhome>, last visited on 10 February 2007.

⁷ *Supra* note 71.

For over 40 years, those majors have increasingly been gatekeepers to music discovery due to their close links with radio and television broadcasters and to their tremendous investment capacity in artist development and marketing.⁸ Even though 18 percent of market shares lay in the hands of independent initiatives,⁹ the music business consolidation has made it harder for smaller labels to penetrate the market and gain public exposure. This affects plurality of artists and music diversity.¹⁰ Of course, it can be argued that before the emergence of the internet, diversity remained because most successful independent labels had not disappeared;¹¹ they had only been bought and had kept their traditions. However, on a corporate level, those labels had to follow non-music related guidelines.¹² Besides, their concerns about covering the losses of subsidiaries has resulted in intensive promotion of a small number of artists whose songs and “image” had to please radio stations, which themselves had to please advertisers.¹³ The direct result is the uniformity of sounds, best illustrated by the boom of manufactured bands and one-hit wonders in the 1990s.¹⁴

2. (De)regulation of media ownership.

The United States has known an unprecedented media ownership deregulation¹⁵ (b) in direct contradiction with the former regulatory policy (a), but allegedly for the same purpose: the public interest.¹⁶

⁸ *Id.*

⁹ According to Nielsen SoundScan, 81.87 percent of the 2005 market share is owned by the Big Four. Universal Music Group’s part amounted to 31.71 percent; Sony BMG had 25.61 percent; Warner Music had 15 percent and EMI’s part was 9.55 percent, http://www.undercover.com.au/news/2006/jan06/20060105_universal.html, last visited on 19 December 2006.

¹⁰ *Supra* note 1.

¹¹ *Supra* note 85 for the independent labels market share.

¹² *Supra* note 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The primary sources of information in this Section are Ben Scott, *The Politics and Policy of Media Ownership*, 53 Am. U. L. Rev. (2004) and Rachel M. Stilwell, *Which Public? Whose Interest? How the FCC’s Deregulation of Radio Station Ownership Has Harmed the Public Interest, and How We Can Escape from the Swamp*. 26 Loy. L.A. Ent. L. Rev. 369 (2006).

¹⁶ *Id.*

a. Regulation of media ownership for the public interest – the marketplace of ideas doctrine: 1912-1981

Media ownership regulation started with the regulation of radio stations. In radio's early days, legislators were concerned about the fact that broadcasters did not hesitate to step on another broadcaster's airwaves, creating nothing less than a mess for the listeners and potentially creating a monopoly.¹⁷ Therefore, in 1912 the Radio Act was passed and instituted a compulsory licensing system on a first-come-first-served basis.¹⁸ This act proved to be insufficient in preventing oligopolistic domination of radio frequencies by patent owners in radio manufacture,¹⁹ so, following ex-president Hoover and President Coolidge's request, the 1927 Radio Act was passed and created the Federal Radio Commission (FRC).²⁰ With the 1927 Act, broadcasters could no longer own radio frequencies.²¹ They could only be granted the right to occupy them as long as they acted for the "public interest".²² For the first time, broadcasters acted as trustees of the public interest.²³ The latter, though undefined, made its first appearance in the Commission's charter, which required it to support "public interest, convenience and necessity".²⁴

In 1934, the Federal Communications Commission (FCC) came into existence with the Communications Act.²⁵ The Commission was vested the authority to regulate radio stations for the public interest by controlling ownership, through the grant and renewal broadcast licenses, and broadcast content.²⁶ Music industry leaders immediately objected to the FCC's authority, claiming that content regulation by a governmental agency violated the First Amendment.²⁷ The Supreme Court found that the public interest, linked to the needs of democracy, outweighs broadcasters' interests and it held that the FCC's regulations were necessary to ensure fluid circulation of ideas and information due to the scarcity of

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Notably the Radio Corporations of America.

²⁰ *Supra* note 15.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ 47 U.S.C. § 151 et seq.

²⁶ *Supra* note 15.

²⁷ Mary V. Sooter, *To Convergence and Beyond: First Amendment Law to Withstand FastPaced Change in the Telecommunications Industry*, 74 U. Colo. L. Rev. 281.

expression tools and channels.²⁸ In addition, in *FCC v. Pottsville Broad Co.*²⁹, the Supreme Court reused the phrase “public interest, convenience and necessity” when confirming that those values were inherent to the FCC’s existence.³⁰

For years, the FCC considered, like the Supreme Court, that the public interest would be best served “with diversity, competition and localism” in broadcasting.³¹

The FCC, therefore, endeavored to promote these objectives by setting limits to broadcast ownership in order to prevent monopolies. The agency adopted the following a set of ownership rules:

1. The Rule of Sevens, limiting frequency ownership to seven AM, seven FM and seven TV stations;
2. The Local TV Multiple Ownership Rule, prohibiting TV broadcasters from owning more than one of the top four stations in a single market;
3. Local Radio Ownership Rules, limiting the number of radio stations that can be owned in a single market;
4. The Radio Duopoly rule, creating minimum geographic distances between stations offering the same service;
5. The National TV Multiple ownership rule, limiting multiple ownership of local TV stations to a percentage of the national TV audience;
6. The One-to-a-Market rule, which banned cross-ownership of radio and television stations in the same market;
7. The Dual Network Rule, according to which no one can own more than one major television network.³²

²⁸ *National Broadcasting Co. v. U. S.*, 319 U.S. 190 (1943).

²⁹ *FCC v. Pottsville Broadcasting Co.* 309 US 134, 138 (1940).

³⁰ Phrase also incorporated in the 1934 Communications Act, which required the commission to “encourage larger and more effective use of radio in the public interest”. *See* Communications Act of 1934, Ch 652, 303(f), 48 Stat/ 1064, 1082 (codified as amended at 47 U.S.C. 303(f) (2000).

³¹ The FCC had “long regulated media ownership as a means of promoting diversity, competition, and localism in the media without regulating the content of broadcast speech”. 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order on Notice of Proposed Rule Making, 17 F.C.C.R 18503, 18504 (adopted Sep. 12, 2002).

³² *Supra* note 15.

Those regulations were naturally highly unpopular amongst large broadcasters, who were increasingly powerful and who vehemently and successfully lobbied the government.³³

b. Deregulation of media ownership “for the public interest” – the marketplace doctrine: 1981 to present

Waves of ownership deregulation started in 1981 with the arrival of President Reagan, who had positively responded to powerful broadcasters’ demand for a free market during his campaign for the White House.³⁴ The policy change started with Reagan’s appointment of new commissioners willing to go in his direction.³⁵ They justified this move by invoking the broadcasters’ argument that regulation, as practiced until then, violated free speech and that such regulation was no longer needed since technological innovation has multiplied information sources, and has thus rendered media platforms less and less scarce by multiplying information sources. More importantly, the FCC announced that the way to pursue its public interest mission was to let competition in the marketplace serve as a regulator instead of being restricted in their ability to grow and serve their customer base.³⁶

Thus, past rules started being relaxed – such as the Duopoly Rule or the One-To-A-Market Rule – or eliminated – such as programming requirements or formal ascertainment of community needs.³⁷ During this time, the agency legitimized its actions with reports showing that large media groups provided more varied television and radio programs and of a higher quality. However, the independence of those studies has been challenged.³⁸

³³ *Id.*

³⁴ He notably proclaimed that “excessive and needless federal regulations were overburdening the nation’s economy”. Address before a Joint Session of the Congress on the Program for Economic Recovery, 1981 Pub. Papers 108 (18 February 1981).

³⁵ Mark Fowler, appointed as the FCC Chairman in 1982, voiced his intention to depart from the past regulatory policies pushing forward importance of the business aspect of commercial broadcasting. *See* Mark S. Fowler, *The Public’s Interest* 56 Fla. B.J. 213 (1982).

³⁶ Federal Communications Commission, *In the Matter of Deregulation of Radio* (Part 1 of 2), BC Docket No. 79-219; RM-3099; RM-3273, 84 F.C.C.2d 968.

³⁷ *See* Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 Fed. Comm. L.J. 605, 608 (1998).

³⁸ One report was the result of studies solely led by NBC, which has an obvious interest in stating that its acquisitions enhanced quality and diversity. Another study consisted in collecting and analyzing the points of view of the directors of top broadcasting companies on the fulfillment of their public interest mission.

The loosening of regulatory rules moved up a gear (rather two gears) with the 1996 Telecommunications Act,³⁹ unenthusiastically signed by President Clinton.⁴⁰ The act removed all restrictions on national radio ownership,⁴¹ and relaxed the Multiple Station Ownership Rule, granting the right for one company to own up to eight commercial radio stations in one market. In 2001, the One-To-A-Market Rule was again loosened so as to allow one organization to own up to six radio stations and two TV stations in the same market.⁴² This move allowed Clear Channel's empire to rocket from 40 stations to 1240.⁴³

In 2002, knowing that the FCC was to open its Biennial Review, the White House pressed for an immediate increase for market freedom from governmental interference. Both Congress and the FCC were divided on the matter. FCC Commissioners Michael Copps and Johnathan Adelstein confronted FCC Chairman Michael Powell, and campaigned against deregulation, arguing, among other things, that the public interest was far from being served and that Congress should reconsider its media policy to find ways to better serve the public interest.⁴⁴

In June 2003, the FCC, despite unprecedented public opposition,⁴⁵ decided to speed up the deregulation process by flattening the last main barriers to free media market.⁴⁶ The Senate rejected this decision. In *Prometheus Radio Project v. FCC*,⁴⁷ the Third Circuit Court of Appeals eventually put a halt to the FCC's projects, stating that the FCC had used a diversity index to weigh cross-ownership, which contained "irrational assumptions and

³⁹ 47 U.S.C et seq.

⁴⁰ Clinton had threatened to veto the bill in order to avoid mass consolidation, but he changed his mind after Congress made some compromises. See Mike Mills & Paul Fahri, *This is a Free Market? The Telecommunications Act So Far: Higher Prices, Few Benefits*, Washington Post, 19 January 1997.

⁴¹ *Supra* note 39.

⁴² *Id.*

⁴³ Peter DiCola, *Falses Premises, False Promises, a Quantitative History of Ownership Consolidation in the Radio Industry*, Future of Music Coalition (2006).

⁴⁴ See Thane Peterson, *Why the FCC Needs a New Chief*, Business Week Online, American University Law Review, September 2004.

⁴⁵ Hundreds of organizations and millions of citizens filed comments in the media ownership proceedings, with 97 percent of citizen comments disapproving further deregulation. *Supra* note 120.

⁴⁶ What was proposed was that one organization could own local TV stations that reach an audience of up to 45 percent. Corporations can own a TV station and a newspaper in any market with four or more TV stations (i.e., the majority of the US market). Besides, corporations may own any combination of newspapers, TV and radio stations in markets with over eight stations. *Changes in FCC's Media Ownership Rules* http://www.usatoday.com/money/media/2003-06-01-ownership-rule-changes_x.htm, last visited on 20 February 2007.

⁴⁷ 373 F.3d 372.

inconsistencies.” The Supreme Court denied the petition a writ of certiorari⁴⁸ and, as a consequence, the FCC still has to provide valid justification for deregulation. In 2007, the FCC, with its new chairman Kevin Martin, is to deliver a review of ownership rules. As usual, giant media corporations have been lobbying for less control and notably want to raise the cap on radio ownership in a market to 12 stations, instead of eight.⁴⁹ Now, less than 12 conglomerates control most of the media in the United States. Five companies control 80 percent of the TV viewing audience. The airwaves are controlled by four companies, which also share two-thirds of the listeners of news radio stations. TV networks are controlled by two large radio groups.⁵⁰

As will be seen below, the consolidation of the recording industry on the one hand, and of the media industry on the other hand has done little for the promotion or protection of artistic creativity and diversity.

c. Direct consequences of music and media market consolidation

This part will briefly state the logical consequences on music creativity and diversity of such a consolidation. An important asset for of big corporations controlling and wishing to further control the media and music industry is the difficulty in measuring diversity and the absence of thorough and independent research in this regard.⁵¹ However, since the 1996 Telecommunications Act and even more after the 2003 deregulation efforts, public interest groups, such as consumer groups, have joined forces, supported by politicians opposing deregulation and have initiated and financed more objective and thorough research projects, despite the lack of cooperation of the giants, who disclose much less data than the average US listed company. The data used below on diversity derives from different studies instigated by the Future of Music Coalition (FMC), a not-for-profit group gathering members of the music, technology, public policy and intellectual property law communities. The work was carried out mainly by university researchers. As said earlier, television and radio have so far consistently been the main music discovery tools. Therefore, the consequences of

⁴⁸ FCC v. Prometheus Radio Project, 545 U.S. 1123 (U.S. 2005).

⁴⁹ Andrew L. Shapiro, *Aiding the Final Push of the Digital Transition*, 5 Cardozo Pub. L. Pol'y & Ethics J. 339 (2006).

⁵⁰ *Supra* note 15.

⁵¹ See for example the very opaque websites of major record labels www.sonybmg.com, www.umusic.com, www.emigroup.com, and for the most generous website, www.wmg.com, last visited on 23 March 2007.

deregulation on music diversity will be looked at from this end.

First, music and media market consolidation has caused TV and radio music to be more homogenous. Radio stations have multiplied and diversified the branding of music genres. However, an observation of radio and TV broadcast based on songs rather than format shows increased similarities of genres with different names and a decreased number of songs played within those formats. In 2006, 15 formats constituted 76 percent of commercial programming. Small and marginal radio stations offer other music genres, such as jazz, americana, bluegrass, new rock folk, whereas sports, talk, and classic rock have grown solidly amongst large groups since the 1996 Act.⁵²

Secondly, music localism is being pushed away by the growing media conglomerates. This is especially true when it comes to radio groups, which found the opportunity, with concentration, to cut programming costs by drastically reducing the number of programming directors. This affects the exposure of local artists who need to be discovered by a programming director located in the radio group's head office. Today, it is not uncommon to have one programming director in charge of 40 radio stations. Nor is it uncommon to have the studios of former local radios, which have been acquired by a big group, relocated to a larger studio gathering different radio stations, with hosts speaking with a "local accent," misleading listeners who still believe that their radio is local.⁵³

Third, music discovery on television and the radio is limited to music provided by the Big Four record companies which occupy 80 to 100 percent of their playlists, depending on the music genre.⁵⁴ With the shrinkage of programming directors amongst large media groups,

⁵² The Yale Daily News reported in 2002 that radio consolidation after passage of the 1996 Act had resulted in "less diversity, shorter playlists, and a staggering amount of repetition" in the community of New Haven, Connecticut. The article pointed out that Clear Channel controlled "more than half of all popular music stations" and "almost two-thirds of rock stations across the country", and that "ten Clear Channel stations can be received in New Haven alone." The paper compared the playlists of three of those New Haven stations, finding that the three stations shared seven of the same songs in their respective top ten most frequently played singles, David Grimm, *Clear Channel Killed the Radio Star*, Yale Daily News, Sept. 16, 2002, at <http://www.yaledailynews.com/article.asp?AID=19664>, last visited on 23 March 2007.

⁵³ See Stilwell at *Supra* note 15. See Clear Channel's practices of voice tracking: "Via a practice called 'voice-tracking', Clear Channel pipes popular out-of-town personalities from bigger markets to smaller ones, customizing their programs to make it sound as if the DJs are actually local residents." Anna Wilde Mathews, *Clear Channel Uses High-Tech Gear to Perfect the Art of Sounding Local*, The Wall Street Journal, 25 February 2002.

⁵⁴ Releases from major record labels had an overwhelming presence on radio charts over the last decade. Major labels enjoyed 87 percent to 100 percent share on country and Contemporary Hit Radio. The share in rock music varies from 80 percent to 99 percent. *A Report on the Effects of Radio Ownership Consolidation following the 1996 Telecommunications Act*, published by the Future of Music Coalition 18 November 2002.

it is practically impossible for anyone not signed with a major label to be discovered or promoted by a programming director managing approximately 40 radio stations. Even major labels cannot ensure that all the recordings they want to promote will make it through this bottleneck. This is why majors have been using very expensive “independent promoters” in order to have music on air.⁵⁵ Therefore, having four media groups occupying over 70 percent of the market, and exclusively broadcasting music from four record companies, casts a serious doubt upon access to diversity and artistic creativity.

This concern seems to have reached listeners who decry the fact that commercial radio stations increasingly tend to repeatedly play a limited number of songs. Indeed, according an FMC survey, a majority of listeners have expressed the wish to have longer playlists with more artists to discover and less repetition of tracks.⁵⁶ A majority of surveyed listeners also oppose further deregulation and support the preservation or increase of locally-owned independent stations.⁵⁷

The decline of musical diversity and creativity is not surprising given the lack of governmental protection. So far, only a federal court has slowed down the deregulation process. Even though Congress is by definition an institution meant to serve the public interest, notably via the House of Representatives, artistic diversity and creativity has very rarely been protected, and *a fortiori*, promoted.

Part 2: How market regulation does not protect artistic diversity and creativity

Artistic diversity and creativity has occasionally been considered to be paramount to the “public good” by courts and by Congress.⁵⁸ Moreover, the Constitution encourages Congress to “Promote... the Progress of... useful Arts.”⁵⁹ However, those interests have hardly been the object of laws regulating trade and are, therefore, seldom the object of legal disputes and court holdings. Congress has not gone any further than granting exclusive rights to authors⁶⁰

⁵⁵ See Part 2 (A).

⁵⁶ *Number of Stations Owned by the Top 50 Owners, 1975-2005* Media Access Pro (Radio Version), BIA Financial Networks, November 2005 data.

⁵⁷ *Supra* note 49.

⁵⁸ *Infra* note 24.

⁵⁹ U.S. CONST. Art. 1, § 8.

⁶⁰ *Supra* note 31.

and inventors,⁶¹ as prescribed by the Constitution, in order to promote creation. The first part of the paper has shown that the existence of copyright law was not enough to successfully promote artistic creativity and diversity and that Congress' diversity and plurality concerns of the 1934 Communications Act belonged to history.

Apart from invoking copyright law, plaintiffs have based their suits on legislation and regulations that pursue other objectives than the promotion of those interests. When those interests happen to be protected, it is incidentally, through the protection of other interests by Congress, federal agencies, and courts.

An exhaustive analysis of the entire United States legal framework in order to see the extent to which artistic diversity and creativity is protected would lead to redundant and superfluous findings. Therefore, the approach taken in this second part is to first observe a situation in which Congress, confronted by a dilemma, clearly made the choice to privilege economic interests over artists' rights with its rejection of the Berne Convention's moral rights (A).⁶² The approach is to then look at the purposes of laws regulating trade, as they are the ones which are the most closely related to the protection of artistic creativity and diversity and have a potential, though limited, to indirectly serve this interest (B). Finally, we will see that one of the reasons why trade regulations do not reach their potential is that they sometimes do not even meet their initial objectives. This is the case with anti-payola laws (C).

A. Rejection of the Berne Convention's protection of moral rights

With Congress' refusal to add moral rights to its law (1), artists can only awkwardly turn to other legal rules in order to remedy alleged violation of moral rights (2).

1. Decision not implement the moral right provision

The 1886 Berne Convention is the most fundamental and inclusive international agreement on intellectual property when it comes to the rights granted and the number of signatory countries. Initiated by France, it has a civil law approach that some common law

⁶¹ *Id.*

⁶² *Id.*

countries have had problems accepting or integrating.⁶³

The Convention expressly intends to guarantee the protection of moral rights, which is a French notion widely accepted by European civil law countries. Article 6 bis provides that

(1) independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation

(2) the rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed.⁶⁴

The Convention grants fewer rights than the French *droit moral*.⁶⁵ It nevertheless provides important safeguards for creators of artistic and literary works by recognizing the right to be identified as the author (paternity right), the right not to have the work derogatorily treated (integrity right), and by affirming that those rights are personal and attached to the author's personality as opposed to copyright, which is regarded as a patrimonial (pecuniary) right. If it is difficult to prove that such safeguards have the actual effect of promoting artistic creativity by acknowledging artists' creation as part of their own personality, it is undeniable that those safeguards, at least, had this purpose.⁶⁶

Whereas England has reluctantly and partially accepted Article 6 bis,⁶⁷ the United States refused to sign the Convention for over 100 years. In 1989, Congress finally decided to join the 74 contracting countries, mainly because of its desire to bring the United States to the forefront of international intellectual property policy- and law-making. However, the Berne Convention Implementation Act (BCIA),⁶⁸ preceding the United States' Convention,

⁶³ *Infra* note 67.

⁶⁴ The Berne Convention, art. 6 bis

⁶⁵ *Droit moral* (literally translated as *Moral right*) in French law also includes the right for an author to divulge his work to the public and the right to withdraw his work from the public and the market even when he had previously divulged it. *See* articles 121-2 and 121-4 of the Code de la Propriété Intellectuelle.

⁶⁶ Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 *Ind. Int'l & Comp. L. Rev.* 423, 426 (1999).

⁶⁷ England has made those rights waivable, as opposed to inalienable, and authorship has to be asserted for moral rights to exist. Copyright, Designs and Patent Act 1988 Sections 77, 78 and 79.

⁶⁸ Pub. L. No. 100-568, 102 Stat. 2853-54 (1988).

unmistakably excluded the grant of moral rights as set out in Article 6 bis.⁶⁹ Congress argued that no such law was to be added to the copyright legislation because common law,⁷⁰ state law, and federal law⁷¹ already provided the necessary protection.⁷²

Later, with the Visual Artists Rights Act of 1990,⁷³ Congress made a timid move towards moral rights by expressly recognizing a paternity right and an integrity right to a limited number of authors of “works of visual art.”⁷⁴ In addition to the narrowness of the material scope of the protection,⁷⁵ the rights granted do not have the inalienable feature of the Berne Convention’s moral rights. The rights granted by Congress are indeed waivable and are extinguished at the death of the creator.⁷⁶ It has also been argued that the Visual Artists Rights Act could even eliminate more favorable rights enjoyed by artists in certain states by

⁶⁹ See BCIA (3)(b), “Certain Rights Not Affected: The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations, do not expand or reduce any right of an author of a work, whether claimed under Federal, State or the common law (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to the work, that would prejudice the author's honor or reputation.”

⁷⁰ According to Congress, common law regarding “publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy” corresponds to some moral rights. See H.R. Rep. No. 609, *supra* note 2, at 32-34.

⁷¹ Congress considered that the Copyright Act provisions relating to derivative works, to the prohibitions on distortions of musical works and to the compulsory license attached to performing rights (in section 106, 115 and 203) guaranteed the same protections as the moral rights article of the Berne Convention. It also found safeguards in the 1946 Lanham Act proscribing false description and false designations regarding origin. See H.R. Rep. No. 609.

⁷² Congress notably stated: “The committee believes that U.S. adherence to the Berne Convention should not change current law on moral rights. Therefore, S. 1301 will not, and should not, change the current balance of rights between American authors and proprietors, modify current copyright rules and relationships, or alter the precedential effect of prior decisions. The committee also does not intend to change, reduce, or expand existing U.S. law with respect to the author's right to claim authorship or his or her right to object to distortion”. Joint Explanatory Statement on House-Senate Compromise Incorporated in Senate Amendment to H.R. 4262

⁷³ Visual Artists Rights Act of 1990, title VI of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128, enacted 1 December 1990.

⁷⁴ Visual Artists Rights Act of 1990 603, 17 U.S.C. 106A. See sub-section (c) for exceptions: “(c) Exceptions. (1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A). (2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence. (3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section 101 [17 USC 101], and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).”

⁷⁵ *Id.*

⁷⁶ 17 U.S.C. 106A(e).

preempting state laws⁷⁷.

2. Attempts to claim moral rights through existing common law and statutory law.

Moral rights claims under state and federal statutes (a) and under common law (b) will be examined in this section.

a. Statutory law

While refusing to amend its copyright laws, Congress has listed different statutory and jurisprudential legal rights and duties that, allegedly, largely encompass moral rights guarantees.⁷⁸ Although some cases do indeed assert some rights found in the Berne Convention, other cases illustrate the inaccuracy of Congress' statement.

In relation to the paternity right, trademark law has been relied on. Indeed, in *Smith v. Montoro*,⁷⁹ an actor brought a suit under the Lanham Act against a distributor who had failed to give him the agreed acting credit. The court found that such action constituted a violation of § 43(a) of the Lanham Act and its prohibition of false designations or representations⁸⁰ and it considered that "there is a vital interest of actors in receiving accurate credit for their work."⁸¹ However, the court limited its key statement to actors leaving out a rule concerning other artists. Additionally, this decision was rendered in a breach of contract context.⁸²

The 1976 Monty Python case, *Gilliam v. American Broadcasting Co.*, directly addressed the integrity right. Gilliam involved the unauthorized editing and broadcasting of a television comedy program by a licensee.⁸³ The British comedy group known as the Monty Python had an agreement with the British Broadcasting Corporation (BBC) for the creation of television series over which Monty Python retained strict creative control as writers and performers except for minor alterations. The BBC licensed broadcasting rights to the American

⁷⁷ Patrick G. Zabatta, *Moral Rights and Musical Works: Are Composers Getting Berned?* 43 Syracuse L. Rev. 1095, 1136 1992 at 1112.

⁷⁸ *Supra* note 70 and 71.

⁷⁹ 648 F.2d 602 (9th Cir. 1981).

⁸⁰ Trademark (Lanham) Act 1946 15 USC, Section 43 (a) (1): "Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact."

⁸¹ *Supra* note 79 at 608.

⁸² *Id.* at 603.

⁸³ 538 F.2d 14 (2d Cir. 1976).

Broadcasting Company (ABC), which edited and broadcast three comedy programs. The court held that this “impaired the integrity” of the plaintiff’s work and amounted to a misrepresentation under § 43(a) of the Lanham Act. But once more, the court heavily relied on the agreement between the troupe and the BBC to reach its decision. Moreover, the concurring Circuit Judge Murray I. Gurfein clearly declared that there “are no such [moral] rights recognized in copyright law in the United States” and that the “the Lanham Act [...] is not a substitute for droit moral which authors in Europe enjoy [...] and does not deal with artistic integrity. It only goes to misdescription of origin and the like.”⁸⁴

In another case,⁸⁵ the court considered that the false attribution of products to an artist did not violate a New York privacy statute because the legislative protection did not extend to pseudonyms and the copyright assignment in the work creates an "implied license" to use the name to sell the artistic production.⁸⁶ We can see here that an artist could turn to federal trademark law, but apparently only in the context of the existence of a contract. As to laws protecting privacy, they do not guarantee remedy against false attribution of paternity to artists who have transferred their copyright. This does not correspond to the idea and the explicit language of Article 6 bis.

b. Common law

Congress also pointed the law of contract, unfair competition and defamation for remedies against moral rights infringement.⁸⁷ In *Geisel v. Poynter Prods., Inc.*,⁸⁸ the children’s books author Dr. Seuss sued a company for manufacturing and commercializing dolls derived from a cartoon that he had sold to a magazine. Dr. Seuss considered the dolls “tasteless, unattractive and of inferior quality.”⁸⁹ The court held that the defendants violated his trade name, under the Lanham Act, but it rejected his claims of false designation of origin, right to privacy, defamation, and conspiracy.⁹⁰

First, concerning the unfair competition claim, the court considered that any action on this

⁸⁴ 538 F.2d 14 at 25.

⁸⁵ *Infra* note 8886.

⁸⁶ *Id.* at 356.

⁸⁷ *Supra* note 69.

⁸⁸ *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (1968).

⁸⁹ *Id.* at 333.

⁹⁰ *Id.* at 351 - 58

count was extinguished with the copyright transfer to the magazine. This holding contradicted the perpetual and non-pecuniary characteristic of moral rights.

Then, in relation to the defamation claim, the court found that the dolls had been manufactured with “great care, skill and judgment by a designer and manufacturer”⁹¹ and that the dolls were “attractive and of good quality.”⁹² Such reasoning, overlooking the adequacy between the work of which paternity was falsely attributed to the artist and the personality of the artist, is also in contradiction with moral rights. The court indeed acknowledged the fact that common law and statutory law only partially complied with the moral rights doctrine⁹³. In *Shostakovich v. Twentieth Century Fox Film Corp.*,⁹⁴ the court held that Soviet composers, who protested against the use of their compositions and the against credit they received in an anti-communist film, did not have a valid defamation claim because there was no willful injury or invasion of a moral right. However, the same action was successful before a French appellate court.⁹⁵

In conclusion, in the view of the statutory and common law, the contractual expectations of the plaintiff seem to determine whether he will be entitled to a remedy comparable to a moral rights protection. Generally, a plaintiff’s conveyance of his copyright will be detrimental to his moral rights unless he contractually asserts his control over the use of his work and his name in relation to his work. Moreover, an artist who no longer owns the copyright to his work and has no contractual relationship with the copyright holder (for example the second or third assignee) is very unlikely to have any remedy for what would constitute a violation of moral rights under the Berne Convention. Therefore the Berne Convention’s desire to promote artists’ creativity has not outweighed the economical interests deriving from the exploitation of creations.

⁹¹ *Id.* at 357.

⁹² *Id.*

⁹³ *Id.* at 339 ‘The doctrine of “moral right” recognized by the civil law of many European and Latin American countries encompasses the right of an author or artist “* * to object to any distortion, mutilation or alteration * * *” of his work even after the transfer of the copyright in his work (...) However, the doctrine of moral right is not part of the law in the United States, except insofar as parts of that doctrine exist in our law as specific rights -- such as copyright, libel, privacy and unfair competition.’

⁹⁴ 196 Misc. 67 (N.Y. Misc. 1948).

⁹⁵ *Société Le Chant du Monde v. Société Fox Europe et Société Fox American Twentieth Century Fox*, 80 Cour d'appel Paris, 13 janv 1953, 1 G.P. 191 (1953), 1953 J.C.P. II, No. 7667.

B. The protection of artistic diversity and creativity is not the direct purpose of trade regulation

Trade regulation has been present in common law (1). It is also the object of law on unfair competition, which is linked to trademark law and antitrust law (2). Consumer law deals with individuals in their transactions with merchants (3).

1. Trade regulation in common law

Common law provides rules against unfair competition. Those rules are part of torts law and they grant remedies to parties injured as a result of unfair trade practices. Courts originally sought to ensure physical security of persons and property.⁹⁶ Then they extended the protection to nonphysical harm to the “advantageous trade relations” by providing remedies for actions such as nuisance, injurious speech, breach of confidentiality, deception, and falsehood. From there also derived the tort of palming off, which developed parallel to statutory trademark law⁹⁷ and the tort of misappropriation condemning the appropriation of the fruits of another party’s intellectual efforts and investment in time and money.⁹⁸ All this formed a concept of malicious competition even though there were instances in which the wrong-doer was not the direct competitor but was another party who had other interests.⁹⁹ Even though courts have sometimes mentioned the existence of a public interest, common law trade regulation has, from the beginning, aimed at protecting market players from prejudicial conducts. Here, there is obviously little room for promotion and protection of artistic diversity and creativity.

2. Unfair competition law: trademark and antitrust law

Through federal and state laws, governments and agencies have significantly added to the

⁹⁶ See the “Schoolmaster’s case” Y.B. Hilary, 4, f. 47, pl. 10 (1410).

⁹⁷ Also known as “passing-off”. Palming off takes place “where there is a prospect of confusion of identity through the unauthorized use of similar marks or get up, and such use damages, or is likely to damage the goodwill and reputation of a business”. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fourth Edition, Houghton Mifflin Company, 2006.

⁹⁸ International News Service v. Associated Press 248 U.S. 215 (1918).

⁹⁹ For manufacturers causing a nuisance to retailers. See *Unfair Competition. Retailer's Bait and Switch Selling Technique a Tort Enjoinable by Manufacturer of Advertised Product*, Virginia Law Review, Vol. 46, No. 2. (1960), pp. 358-361.

incomplete protection awarded by common law. Trademark¹⁰⁰ and antitrust law are not exclusively federal.¹⁰¹ However, congressional legislation is crucial to trade relations.

The 1946 Lanham Act's provisions, without expressly stating their objectives (in a preamble for example), further shield merchants by listing all the practices amounting to a trademark infringement. The notions of "consumers"¹⁰² and "public interest"¹⁰³ appear but are not defined. Most of the listed practices seem to be more injurious to business than to consumers. Trademark law initially targets commodities and nothing artistic. So, on the one hand, consumer protection is not the primary purpose of trademark law and, on the other hand, the promotion and protection of artistic diversity is in no way an objective of trademark law. However, the control of trade practices, when it comes to the arts, can benefit, to a certain extent, consumers of these types of products.

Antitrust law is another way by which artistic creativity and diversity could be protected.¹⁰⁴ It is generally defined as the "law intended to promote free competition in the market place by outlawing monopolies."¹⁰⁵ As stated in *Northern Pacific Railway Co. v. United States*,¹⁰⁶ antitrust law aims to preserve "free and unfettered competition"¹⁰⁷ as the rule of trade in order to best allocate "economic resources, lowest prices, the highest quality and the greatest material progress"¹⁰⁸ while "providing an environment conducive to the preservation of [...] democratic political and social institutions,"¹⁰⁹

Like for trademark law, federal legislators have not articulated the purpose of antitrust laws. Again, of course, no legislative statement related to antitrust refers to the promotion and protection of artistic diversity. The closest one can get to that is the Supreme Court's onetime

¹⁰⁰ See the Supreme Court decision in the Trademark Cases of 1879 in which it was held that trademark does not "depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation". 100 U.S. 82 (1879).

¹⁰¹ *California v. ARC America Corp.*, 490 U.S. 93 (1989), at 101-02.

¹⁰² Trademark (Lanham) Act 1946 15 USC. Section 43 (c) (3) (A) (i), for example.

¹⁰³ *Id.* at Section 10.154 (a) (1) for example.

¹⁰⁴ See for example Lime Wire's action against the big four and some of their labels. Nancy Gohring *Lime Wire turns tables, sues record companies*, IDG News Service www.macworld.com/news/2006/09/26/limewire/index.php, last visited on 19 December 2006.

¹⁰⁵ *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

position in favor of a public interest approach of antitrust law.¹¹⁰ This view comes from a movement, which has been referred to as “the Consumer Protection School,” that considers antitrust law’s objective is to limit consumers’ transfer of wealth to organizations exercising monopolistic power, to the excesses of monopolistic behavior, such as the power to fix exorbitant prices.¹¹¹

The Supreme Court has found that antitrust law has a social and political goal (rather than economic),¹¹² and, in 1984, it held that the primary aim of the Sherman Act was to serve consumers.¹¹³

However, without providing additional details, the Court later came back to its dominant position and espoused the now very influential view of the Chicago School according to which the main purpose of the Sherman Act is the optimization of economic efficiency.¹¹⁴ This brings antitrust law further away from consumers’ interest. Further, consumer law shows that there is also a long distance between consumer protection and the intention to promote artistic creativity and diversity.

3. Consumer Law

Consumer law departs from unfair competition and antitrust law by clearly taking a position to protect consumers, i.e., the public. Yet consumer law limits its scope to pecuniary transactions between consumers who have little bargaining power and merchants. There are a number of statutes serving this purpose. For example, the Fair Credit Reporting Act¹¹⁵ and the Fair Debt Collection Practices Act¹¹⁶ deal with consumer credit and aim to prevent abusive practices in relation to grant of credit, debt collection and use of consumer credit information.

¹¹⁰ *Infra* note 112.

¹¹¹ Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 Calif. L. Rev. 243 (1993).

¹¹² See *Reiter v. Sonoco Corp.*, 442 U.S. 330 at 343 (1979) looking at the legislators’ intent and finding that the debates “suggest that Congress designed the Sherman Act as a ‘consumer welfare prescription’”. See also *Jefferson Parish Hospital Dist. No. 2 v. Hyde* 466 U.S. 2 (1984) at 16, in which the Supreme Court stated: “And from the standpoint of the consumer -- whose interests the statute was especially intended to serve -- the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package”.

¹¹³ *Id.*

¹¹⁴ See *National Collegiate Athletic Association v. Board of Regents* 468 U.S. 85 (1984).

¹¹⁵ 15 U.S.C. 1681.

¹¹⁶ 15 U.S.C. 1692.

The Equal Credit Opportunity Act,¹¹⁷ the Truth in Lending Act¹¹⁸ and the Fair Credit Billing Act¹¹⁹ also seek to shield consumers from the credit industry's unfair and predatory practices. Consumers rights to artistic diversity or at least viewpoint diversity is evoked nowhere.

The legal safeguards seen above, especially antitrust law and unfair competition law, have indirectly served artistic diversity and creativity, while targeting other goals. Yet the benefits have logically been insufficient as such legal frameworks rarely have the perfect domino effect that would make them incidentally protect other interests which are barely identified. This explains why plaintiffs hesitate to put forward the diversity and creativity argument in court and prefer relying on the interference with more obviously protected interests. However, in the music industry, it is also to be noted that, many times, such plaintiffs happen to be professionals of the industry who desire to remedy their pecuniary harm. The increasingly powerful internet music providers and lobby groups campaigning for artistic creativity and diversity¹²⁰ are very likely to bring the "public interest" argument back to the courtrooms on a more regular basis.

C. A failed measure that could have protected artistic diversity and creativity: anti-payola Laws

The neologism "payola" is an amalgamation of the words "pay" and "Victrola," a brand of vinyl record player.¹²¹ This term designates the practice of offering consideration, such as money, to a radio broadcaster in order to have a record played.¹²² Given the scarcity of the airwaves, their concentration in only a few hands, the consolidation of record companies and the use of radio as a primary source of music discovery, as described in Part 1, it is easy to envisage the harm that such a practice can cause to musical diversity. The response to payola has so far been very mild (1) and therefore has had little effect (2). The inefficiency of anti-payola laws has become even more blatant since the massive broadcast industry consolidation following the 1996 Telecommunications Act (3).

¹¹⁷ 15 U.S.C. 1691.

¹¹⁸ 15 U.S.C. 1601.

¹¹⁹ 15 U.S.C. 1666.

¹²⁰ See for example: Future of Music Coalition.

¹²¹ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fourth Edition, Houghton Mifflin Company, 2006.

¹²² *Id.*

1. Lenient anti-payola laws

Radio stations started accepting money to play records in the 1930s. Since then, the practice has become increasingly organized, sophisticated and institutionalized.¹²³ In the beginning, radio broadcasters, who then were fairly open about payola, justified it with supply and demand logic, according to which it was normal to pay for the use of the scarce resource they provided.¹²⁴ It is interesting to note that this argument resembles the one used today by the telecommunications groups seeking to charge the use of internet pipes, as seen in Part 1.

Congress responded to a 1950 public scandal following an investigation which revealed the wide extent of pay-for-play. The then-popular disc-jockeys Dick Clark and Alan Freed were involved and Freed pleaded guilty for commercial bribery.¹²⁵

In 1960, Congress decided to tackle the payola issue by adding to the 1934 Communications Act the obligation to inform listeners of the acceptance of consideration in exchange of the airplay of a recording.¹²⁶ Section 317¹²⁷ provides that

all matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.¹²⁸

Section 508¹²⁹ condemns payola practices and bribery when they are deceptive. This joins the disclosure requirement of § 317. Section 507¹³⁰ requires radio station employees to inform the management of any consideration received for airplay.

First, what is striking is that the anti-payola laws actually do not prohibit payola practices. They just submit them to some conditions. Therefore, the phrase “anti-payola” is a misnomer.

¹²³ See Kristen Lee Repyneck, *The Ghost of Alan Freed: An Analysis of the Merit and Purpose of Anti-Payola Laws in Today's Music Industry*, 51 VILL. L. REV. 695 (2006) and see Stilwell *supra* note 15.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 47 U.S.C. 317.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 47 U.S.C. 508.

¹³⁰ 47 U.S.C. 507.

But since those payola rules have been thus baptized by the academic world, the entertainment industry, and the public in general, we will carry on referring to them as “anti-payola laws.”

Second, the FCC has created a “friendly exception” which allows gifts (even valuable) to be received when they constitute “social exchanges between friends.”¹³¹ This exception is in effect an invitation (planned or not) for broadcasters to open their hearts and arms to record labels who in return open their wallet.

Finally, not only are the laws mild to address the issue, but their enforcement is mainly triggered by journalists’ controversial documentaries and reports, by lone FCC commissioners battling against the grain for diversity in the media,¹³² or by zealous prosecutors.¹³³

2. Early loopholes and violations of anti-payola laws.

The main way by which radio stations and record companies have managed to get around the law is by having recourse to independent promoters (individuals or corporations) as middlemen. Those promoters were initially inoffensive people hired by record companies that wanted to shield themselves from any prosecution relating to bribery, especially since the enactment of the Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970.¹³⁴ Those promoters were supposed to look like experts that could evaluate the potential success of a record and, therefore, influence radio stations’ choice of what records to play.¹³⁵ As before, money determined this choice. As the practice spread, record labels became dependent on those promoters who were the *sine qua non* for airplay.¹³⁶ Similarly, radio stations, which needed to attract advertisers and were accustomed to the extra money (millions) generated by pay-for-play, were keen to rely on promoters.¹³⁷ The latter naturally became increasingly powerful and charged record labels astronomical amounts in order to put their recordings in the playlist that promoters submitted to radio stations.

¹³¹ See Kaye-Smith Enter, 71 F.C.C.2d 1402, 1408 (1979).

¹³² Referring to Commissioner Adelstein, see *infra* Part 2 (C) (3).

¹³³ Referring to Eliot Spitzer, see *infra* Part 2.C.3.

¹³⁴ Pub. L. No. 91-452, 84 Stat. 922 (1970), codified at 18 U.S.C. 1961-1968 (2005).

¹³⁵ *Supra* note 123.

¹³⁶ *Id.*

¹³⁷ *Id.*

This practice reached its peak in the 1980s with the emergence of “The Network,” a powerful collective of approximately 30 promoters. This group effectively demonstrated its force by having radio broadcasters suddenly cease the airplay of records belonging to labels that had announced their intention to boycott the use of promoters. Those high costs are still generally regarded as part of promotion costs recoupable from artists’ royalties. As a consequence, many artists who are signed with a major label have little to no chance of ever receiving any royalty payment if they do not exclude promotion costs from recoupment in their contract.¹³⁸

The excesses of the 1980s were ignored by the government until 1989 when a television program unveiled to the public the music industry practices of the time. After the broadcast of this documentary, The Network’s mastermind, Joseph Isgro, was arrested and charged for RICO and payola violations, among others. Evidence that The Network offered drugs for airplay was also brought by the prosecution.¹³⁹

The principal consequence of this affair is that record labels, promoters and radio stations have become craftier in their payola practices.

3. Payola practices since the 1996 Telecommunications Act.

After seeing the “payola power” shifting from record labels to promoters, the 1996 Telecommunications Act’s deregulation transferred this power to concentrated radio stations, even if promoters still have a favorable place.¹⁴⁰ Broadcasters had indeed not waited in order to merge and consolidate the market. The resulting oligopoly has permitted them to set the rules.¹⁴¹

At the same time, the 1996 deregulation faced vehement opposition by the advocates of plurality and diversity. One of them is FCC Commissioner Jonathan Adelstein, who has played a crucial role in the FCC’s recent inquiries. Another key character in the enforcement of anti-payola laws is Eliot Spitzer, who had energetically prosecuted white-collar crimes when he was the New York State Attorney General.

The latest loopholes that were revealed after the enactment of the 1996 Act consisted of

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See* Stilwell, *supra* note 15.

¹⁴¹ *Id.*

record labels “buying” airplay by financing with money and all sorts of expensive perks all the aspects of record promotion that a broadcaster engages in.¹⁴² It also consisted of radio conglomerates having an exclusive promoter acting as a gatekeeper for all the radio stations that they owned.¹⁴³

For example, in 2000, the Los Angeles Times reported that A&M Records had purchased from the Chancellor Media radio group a \$237,000 marketing package involving intensive advertising and a number contests for the promotion of a Bryan Adams single. Concerts of the artist were also given for free at several radio stations of the conglomerate.¹⁴⁴ The FCC’s inquiry immediately followed the publication of the news article, whereas the facts took place in 1998.¹⁴⁵ Chancellor Media was eventually fined \$8,000 for the willful and repeated violation of anti-payola laws after the FCC concluded that out of the 10 stations investigated, two made the single’s airplay depend on the consideration received.¹⁴⁶

In 2002, with the presence of Commissioners Copps and Adelstein at the FCC, the behavior of the broadcast and recording industry became the object of closer scrutiny by the federal agency. In addition, Spitzer, who became the New York State Attorney General in 1998, also had a suspicious eye on the industry. Consequently, some broadcasting groups publicly affirmed their desire to eradicate unlawful practices by their stations. They terminated their exclusive promotional agreements and even went as far as organizing well-publicized dismissals of radio staff suspected of dealing with promoters.¹⁴⁷ In 2004, Spitzer launched an investigation involving the Big Four record companies and the largest radio groups. He concluded that Sony BMG’s label Epic Records had been making payments and making “expensive gifts” such as paying Infinity Broadcasting for listeners to attend a Céline Dion show in Las Vegas. Spitzer and Sony BMG settled for \$10 million.¹⁴⁸

There have been many faint appeals to Congress in order to promote or at least not impair artistic creativity and diversity¹⁴⁹. Before the massive deregulation of 1996 and the FCC’s

¹⁴² *Id.*

¹⁴³ For example, Jeff McClusky Promotions were Cumulus Media’s exclusive middleman. The radio group then owned 210 stations. Frank Saxe, *CC Sees Labels as Revenue Source*, BILLBOARD, March 24 2001.

¹⁴⁴ See Stilwell, *supra* note 15.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Supra* note 43.

latest attempt to raise ownership caps, the protesting voices predominantly required Congress to stop passing laws damaging diversity and creativity and to outlaw industry behaviors having the same effect.¹⁵⁰ Since 1996, the appeals to Congress have become louder and more widespread. The idea that Congress had to not only promote but also protect diversity and creativity has become well articulated.

Part 3: Possible ways of ensuring protection of artistic creativity and diversity

Many proposals have urged Congress to enact or repeal laws so as to ensure or restore plurality, diversity and innovation.¹ However, two important points must be stressed.

First, many of the problems faced in the past 10 years and many of the potential issues, such as network neutrality, derive from technological changes that Congress was not ready for. Because technology evolves and rules and practices attached to technology become obsolete, the laws proposed have to adapt to those changes, which is very difficult. Thus, it is not uncommon to see whole sets of proposals becoming outdated before they can even be subject to a debate. Making sustainable laws is therefore essential.²

Second, a question that does not appear much in discussion is whether Congress has the duty to promote and protect artistic diversity and creativity. This question is crucial because if Congress has no such duty, it will take on this responsibility only if its majority feels it must, or under pressure from lobbyists. From a legal standpoint, advocates of diversity and innovations will have not much to rely on apart from the laws referred to in Part 2 and copyright law. However, if there is a duty to promote and protect artistic creativity and diversity, then there should be a focus on invoking the law that Congress is subject to, i.e. constitutional law, before the jurisdiction that can say “what law is,”³ i.e. the Supreme Court.

Different propositions from the author and other people concerning the issues discussed above shall be exposed (A). Then, the question of the constitutional duty to promote and protect artistic diversity and creativity shall be discussed (B).

¹⁵⁰ *Id.*

¹ See Stilwell for example, *supra* note 15.

² Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA Ent. L. Rev. 57 (1999).

³ *Marbury v. Madison* 5 U.S. 137, 177 (1803).

A. Proposed solutions

As seen in Part 1, today's situation is one in which artists have gained a relative independence in terms of creating, promoting and selling their music and, in which the public has gained, with the internet, unprecedented access to music worldwide. The main concern in this logic is to ensure that this situation, which creates diversity and encourages creativity, does not change to what it used to be just a few years ago (1). Because of the precariousness of this state of affairs, the ideas proposed to solve the problems described earlier must not be neglected and should be looked at (2).¹

1. Keeping the status quo

In order to push away the threats that the online market entry by entertainment giants and the elimination of network neutrality represent to diversity and creativity, Congress could ban assignments or exclusive licenses of rights to online distributors (a); it could put a limit on the royalty rate allocated to those distributors (b); it could limit the online purchase price of recordings (c); and it *ought to* impose net neutrality (d).

a. Interdiction of copyright assignments and exclusive licenses²

One way for the major record labels to abuse their strong bargaining position would be to require copyright assignments or exclusive licenses from artists wishing to promote and sell their recordings on high-traffic websites. For instance, a major could offer, among other things, packages enhancing promotion, web presence and other similar services, in exchange for an exclusive license to use the work, reproduce it, issue it to the public, in exchange for a transfer of the copyright in the sound recording.

Such a practice would undoubtedly be challenged by smaller competitors and decried by the whole artistic community and it could be prevented through legislation banning any copyright assignment or exclusive licensing of rights to online distributors.

It could be argued that when a company endeavors to make promotional efforts it should

¹ In Part 1 and Part 2.

² Proposition by the author.

be granted exclusivity so as to better exploit the recording and generate optimum income. However, the economic argument traditionally used by record companies would not be valid concerning online distribution because digital technology, applied to the internet, drastically reduces promotion costs and distribution costs. Moreover, the survival of such websites does not depend on recording sales and on flat distribution fees, but on online traffic, directly linked to advertising.¹

b. Limits on fees and royalty rates

Royalty rates should reflect the promotional and distribution efforts made by a record company. Whereas store retail involves, for example, manufacturing costs, packaging costs, store markups, store discounts, such expenses do not exist for online distribution, which is, therefore, much cheaper.

At present, the online sales portal, CD Baby,² takes a 9 percent of sales revenue for distribution on CDbaby.net and on all the main online distribution websites like iTunes or MSN.³ This is fair because of CD Baby's contracts with other distributors. Then again, if CD Baby were to be acquired by a bigger corporation or by a major, most of the circulation and advertising income would be directed at and divided between a few hands. Thus, the distribution costs would most likely be reduced and this should be echoed in the royalty rates.

It is not advisable to restrict royalties to a fixed rate. This measure would be overbroad. Distributors could indeed argue that this would put a restraint on their trade. For example, if they wished to offer much more valuable services which would guarantee the increased exposure of a recording, a royalty payment could be proportional to the service offered. Furthermore, distributors could argue that artists have the freedom to turn to less visited websites in order to distribute their music. It would, therefore, be more appropriate to fix a ceiling on royalty rates that would be revisable every five years. Today, a maximum of 12

¹ See for example, MySpace statement on its website: "Every feature and function you currently see on the site is FREE. MySpace is supported solely by advertising. In the future, MySpace may add paid Premium Services, but all the features and functions you have currently been enjoying on the MySpace site will always remain FREE!", <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=9&Question=33>, last visited on 27 October 2007.

² <http://www.cdbaby.net>, last visited on 23 March 2007.

³ CD Baby <http://cdbaby.net/submit>, last visited on 23 March 2007.

percent for distributors seems fair.

c. Limits on purchase price⁴

In the same logic as the limits on royalty rates and in order to make online music affordable to the widest number people in the world, purchase prices should be justified by distribution costs. In the retail store context, those costs are high, which explains the average retail price. Online distribution being relatively cheap, Congress should be able to estimate a maximum purchase price and require distributors to fix prices proportional to the costs incurred.

d. Interdiction to hamper net neutrality

Congress could enumerate a list of forbidden behaviors and practices that hinder network neutrality. This is, in fact, what it does when it is pushed to make compromises as a result of strong opposition to its proposed laws.⁵ The reason for this is that preparing an exhaustive list gives room for loopholes. For instance, Congress could prohibit telecommunications companies from requiring payment for the use of their pipes. It could also forbid telecommunications companies from discriminatorily downgrading the quality of internet services. In return, internet service providers could bypass those prohibitions by, for example, agreeing to generalized (hence nondiscriminatory) slower internet connections and then offering to upgrade the services of only those clients who also use their cable television and telephone network or they could delegate. Therefore, what Congress should do is to proscribe any action that would damage net neutrality rather than trying to guess the form that those actions may take.

2. Solving the issues created or aggravated by market deregulations.

Suggestions regarding media concentration (a) and payola practices (b) have been made by a number of authors. The main ones shall be examined.

⁵ It also uses vagueness so as to give room to wide interpretations. See Gillian K. Hadfield, Symposium: Void For Vagueness: Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law, 82 Calif. L. Rev. 541 (1994).

a. Propositions regarding media concentration

One idea put forward is that Congress should put a halt to deregulation and no longer raise ownership caps, especially the caps on radio ownership. A measure of this kind took place in 2004 when Congress legislated to freeze the Local TV Multiple Ownership cap to 35 percent on a permanent basis.⁶

Another proposal, dear to the opponents of deregulation, is to deconsolidate the media industry. In 2005, Democrat Representative Maurice Hinchey introduced a bill to this effect. Entitled the Media Ownership Reform Act (MORA),⁷ the text was blocked in committee.⁸ With the new majority in the House, Hinchey plans to re-introduce the bill.⁹ MORA intends to annul the FCC's 2003 reform attempts and to strengthen viewpoint diversity.

Among other measures, MORA plans to bring back the cap on local radio ownership back to 35 stations, instead of 45, and to limit the ownership of the total FM and AM stations in the US to 5 percent.

MORA also re-establishes the "Fairness Doctrine" of the 1934 Communications Act. This doctrine, eradicated by the FCC in 1987, requires broadcasters to cover controversial issues, such as the Iraq War, in a balanced and fair manner.¹⁰ Finally, the bill imposes stricter reviews of broadcast licenses when they are due to be renewed.¹¹

b. Propositions regarding payola practices

This may sound like a simplistic reasoning, but if payola practices are frowned upon by legislators and the public opinion¹² and if, despite the fact that those practices are prohibited, radio stations fail to disclose (and hence validate) them, then there must be a real social and legal problem inherent in the pay-per-play principle. Congress must redefine its objectives as

⁶ See Stilwell, *supra* note 15.

⁷ Then HR 3302.

⁸ Jon Gingerich, *Bill targets U.S. Media Monopolies*, O'Dwyer's PR Report, April 2007.

⁹ Myles Duffy Washington, *Media Reform*, New York Times, 19 December 2007.

¹⁰ *Sen. Sanders, FCC Commissioner Stump For Independent Media*, US Fed News, 14 February 2007.

¹¹ *Id.*

¹² See Survey 5.

regards payola. It should break the taboo surrounding this subject, ban payola practices, and make the broadcast and recording industry much more transparent in their transactions.¹³

Moreover, it has been suggested that Congress imposes severe punishment to broadcasters who sanction – by holding back airplay, for example – recordings for which no consideration is given.¹⁴ Those punishments could take the form of onerous fines and license revocations.¹⁵

B. Constitutional duty to promote and protect artistic diversity and creativity

The purpose of this section is to assess the possibility of using a different approach relating to the protection of artistic diversity and creativity. The question we will try to answer is “can a government rule or action be invalidated because it fails to protect or promote artistic creativity and diversity?” Two constitutional provisions, the Copyright Clause (1) and the Freedom of Speech Clause (2), will be considered.

1. The Copyright Clause

In its Article 1, Section 8, the Constitution expressly provides that Congress has the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”.¹⁶

It is highly debatable that the Copyright Clause gives Congress an implied obligation to promote artistic creativity (a). However, the argument according to which the promotion of artistic creativity has a constitutional value that should not be impaired could have more standing (b).

a. Obligation to promote artistic creativity

The Supreme Court has repeatedly held that Congress’ copyright legislation should be

¹³ See Stilwell, *supra* note 15.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Supra* note 59.

limited to what is necessary for the “public good”¹⁷ and that creative work had to be encouraged and rewarded.¹⁸ For example, in *Century Corp v. Aiken*,¹⁹ it stated that “the immediate aim of...copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”²⁰ The Supreme Court thus clarified that the application of the latter part of the Copyright Clause (“by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”) could not be read without the preamble part (“to promote the Progress of Science and Useful Arts”).²¹

However, the Supreme Court has not been this eloquent as to whether the preamble can be read on its own independently from the second part, i.e., as to whether Article 1 allows the Congress to promote and protect artistic creativity outside copyright legislation.

While the Copyright Act²² says little about the issue, Congress, as it established the National Endowment for the Arts (NEA), declared that

the arts and humanities belong to all the people of the United States[, they] reflect the high place accorded by the American People to the nation’s rich cultural heritage[, and] an advanced civilization must not limit its efforts to science and technology alone, but must give value and support to other great branches of scholarly and cultural activity.²³

Congress also declared that “it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination and inquiry, but also the material conditions facilitating the release of this creative talent”.²⁴ The constitutionality of the federal legislature’s power to promote the arts through organizations such as the NEA has not been directly challenged, perhaps because of a general consensus on

¹⁷ *Infra* note 19.

¹⁸ *See, e.g., Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

¹⁹ *Id. See Twentieth Century Music Corp.*, at 156.

²⁰ *Id.*

²¹ *Id.*

²² *Supra* note 31.

²³ *See the NEA Declaration of Findings and Purposes*, 20 U.S.C. § 951

²⁴ *Id.*

the matter, as long as there are no limitations on trade. Yet the Supreme Court has had the opportunity to confirm Congress' right to financially support artistic creations in freedom of speech cases.²⁵

However, returning to the Copyright Clause itself, it must be noted that it is an enabling clause, just like the entire section to which it belongs. One could proceed to a strict and textual analysis by first remarking that Article 1 Section 8 states "The Congress shall have the Power". Then an analogy could be made with Article 1 Section 8 Clause 11 which grants Congress the power "to declare War, grant Letter of Marque and Reprisal, and make Rules concerning the Captures on Land and water."²⁶ The conclusion, in this case would be that the Constitution certainly does not oblige Congress to declare war. Why, therefore, would it oblige Congress to "promote the Progress...of useful Arts"?

On the other hand, a much broader reading of the Constitution could first point out that the Copyright Clause is the only one in Article 1 Section 8 that contains a preamble. This preamble enounces interests that justify the rest of the Clause – the right to make copyright and patent laws. Then, a comparison could be made with the enabling clause of the 13th Amendment Section 2 which provides that "Congress shall have power to enforce this article by appropriate legislation."²⁷ This enabling clause follows the Section 1 prohibition on anyone to impose slavery or involuntary servitude anywhere in the United States.²⁸ Since the Thirteenth Amendment's enabling clause follows the undeniable constitutional objective of the preceding clause and since Congress' power to enact copyright and patent law also follows the objective of its preamble, then the preamble's objective is constitutional and, therefore, it must be complied with. This would mean that the promotion of useful arts is an obligation.

History shows that the Supreme Court is capable of more twisted reasoning.²⁹ However, since *Marbury v. Madison* the Supreme Court's tendency to depart from the letter of the Constitution has especially served individuals' rights against government power.

²⁵ National Endowment for the Arts, et al., Petitioners v. Karen Finley, et al. Supreme Court of the United States. 524 U.S. 569 (1998).

²⁶ U.S. CONST. Art. 1, § 8 Clause 11.

²⁷ U.S. CONST. Amend. 13.

²⁸ *Id.*

²⁹ For example, *Marbury v. Madison supra* note 3, or *Griswold v. Connecticut* 381 U.S. 479 (1965).

Notwithstanding the New Deal episode and the regulations granting minimum protection to individuals, the government has been hostile to too much paternalism.³⁰ Additionally, the Copyright Clause dates back to 1787, a time where not much place was given to paternalism. The protections of the Bill of Rights only came four year later and none went as far as obliging Congress to promote anything.

However, arguing that the clauses of Article 1 Section 8 exist to merely allow the protection of interests which have constitutional value should have a greater chance of success.

b. The constitutional value of the protection of artistic creativity.

The Supreme Court has held that the protection of artistic creativity served a public interest,¹ but it has not said whether this interest was constitutional because this specific question has not yet been dealt with by the Court.

What would the Court hold if the Congress suddenly decided that because of the change in American culture, the protection of artistic creativity was no longer in the public interest and was to be proscribed? Would the Supreme Court defer to the congressional point of view and accept such a measure or would it reply that the text of the Constitution gives implied protection to artistic creation and innovation?

The second answer seems to be the most likely because if the Copyright Clause's preamble does not impose a duty to promote the arts, it clearly expresses the Framers' intent. As a consequence, it is possible that the Supreme Court could declare that artistic creativity is a constitutional interest which cannot be hindered without a good reason. This interest would not have the force of an individual's fundamental right, so the restrictions would have to be submitted to the rational basis test, i.e. justified by a legitimate governmental interest.²

The fact that the promotion of artistic innovation is mentioned in the text of the Constitution should be taken into consideration when looking at the First Amendment

³⁰ See for example *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

¹ *Supra* note 18.

² *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

because art is speech.³

2. Artistic diversity and Freedom of Speech

This section will address the constitutionality, under the First Amendment, of government actions injuring artistic diversity. This issue has also drawn little attention from the Supreme Court. As a matter of fact, the Court has denied a number of petitions for a writ of certiorari that could have led to such a debate. First, it is interesting to note that apart from disputes on content-based speech restrictions,⁴ most of the freedom of speech litigation that has taken place has challenged the FCC's regulatory power. None have dealt with artistic diversity. Those cases are nevertheless useful in order to solve this issue. Second, the FCC has previously justified its regulations by claiming a protection of diversity for the public interest. With deregulation, the FCC has insisted more on public interest and has watered down the diversity justification by blurring the very notion of diversity.⁵

The Supreme Court's position on diversity (a) and the latent return to the philosophy of *Lochner v. New York* (b) will be examined.

a. Viewpoint diversity

According to the First Amendment, "Congress shall make no law...abridging the freedom of speech, or of the press."⁶ Broadcasters have not hesitated to invoke this provision to counter the FCC's regulations. The latter were traditionally subject to the rational basis standard of scrutiny and upheld. For example, in *FCC v. National Citizens Commission for Broadcasters*, the Supreme Court maintained that limits on ownership were constitutional because they were necessary to further "viewpoint diversity."⁷

In *Associated Press v. United States*, the Court also said, that diversity was a goal of the First Amendment, stating "the 'public interest' standard necessarily invites reference to...the

³ *Supra* note 25.

⁴ *Id.*

⁵ *Infra* note 18.

⁶ U.S. CONST. Amend. 1.

⁷ 436 U.S. 775, 796 (1978).

First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources”.⁸

Although the Court has subsequently stopped assimilating plurality to diversity, it has not come back to the principle according to which the First Amendment protects diversity of speech.

After *Associated Press*, the Court started deferring the definition of “diversity” to the FCC.⁹ The DC Circuit Court held in *National Citizens Committee for Broadcasting v. FCC* that

notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints (...) diversity and its effects are (...) elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.¹⁰

While regulating ownership, the FCC thus had to demonstrate how it would further the diversity goal of the First Amendment. Likewise, the FCC is not exempt from this responsibility when it seeks to deregulate. The Third Circuit Court of Appeals indeed found that the FCC failed to do so in its 2003 deregulation attempt.¹¹

Artistic diversity has not been the object of court holdings regarding the entertainment industry consolidation. Nevertheless, even if art is traditionally characterized by its aesthetic aspect, some artistic creations have also been regarded as speech expressing viewpoint.¹² In this case, artistic diversity would be protected by the First Amendment. Yet, art does not always express viewpoint. This is the case for instrumental music, for instance. The First Amendment could then be read in light of the Copyright Clause, which recognizes the promotion of artistic creativity. The link between creativity and diversity should therefore be made by, for example, claiming that diversity boosts creativity and vice-versa. This approach

⁸ 326 U.S. 1 (1945).

⁹ *FCC v. Nat'l Citizens Commission for Broadcasters* 436 U.S. 775, 796 (1978).

¹⁰ *Id.*

¹¹ *See* *Prometheus*, *supra* note 48.

¹² *Supra* note 25.

would, however, face a new hurdle – the Supreme Court’s recently expressed hostility towards regulations protecting diversity.

b. Hostility towards regulations protecting diversity

Since the mid 1990s, the Supreme Court’s tolerance to speech restrictions in favor of individuals’ protection in relation to their transactions with businesses has diminished. In *44 Liquor Mart v. Rhode Island*, the Rhode Island legislature had prohibited all price advertising of alcoholic beverages by local news media in order to promote “temperance.”¹³ While declaring this measure in violation of the First Amendment, Justice Stevens held that “[u]nder the rational of *Virginia Pharmacy Board v. Virginia Consumer Council*, a State’s paternalistic assumption that the public will use truthful, non-misleading commercial information unwisely cannot justify a decision to suppress it.”¹⁴ Justice Thomas, who is a strong opponent of paternalism, concurred.¹⁵

As to FCC ownership regulations, they have been more strictly scrutinized since the 1994 decision in *Turner Broadcasting System v. FCC*.¹⁶ The Court indeed abandoned the rational basis scrutiny for content-neutral speech restriction and applied intermediate scrutiny, which requires the restriction to be substantially related to an important governmental objective. This was a 5-4 decision in which the dissenters – Justices Thomas, Scalia, Ginsburg and O’Connor – demanded strict scrutiny, which requires narrowly drawn restrictions justified by the furtherance of a compelling governmental interest.¹⁷

This shift of position has been labeled Lochnerism¹⁸ in reference to the doctrine followed in the landmark case *Lochner v. New York* making freedom of contract a fundamental right which could not be interfered with by imposing minimum work hours.¹⁹ Despite the higher

¹³ 517 U.S. 484 (1996).

¹⁴ *Id.* citing *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976).

¹⁵ *Id.*

¹⁶ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (Turner I), followed by *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (Turner II).

¹⁷ *Id.*

¹⁸ Adam Candebub, *The First Amendment and Measuring Diversity: Constitutional Principles and Regulatory Challenges*, 33 N. Ky. L. Rev. 373, 399 (2006).

¹⁹ *Id.* See also *Adair v. United States*, 208 U.S. 161 (1908) and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

level of scrutiny, the Supreme Court still finds that the First Amendment demands diversity. However, the deference to the FCC's definition of diversity creates a problem of clarity and reliability. To examine the concept of "diversity," it would be preferable to rely on more neutral and rigorous scientific expertise carried out by independent organizations and taking into consideration social, political, and economic data.²⁰

Conclusion:

The Constitution seems to provide dormant safeguards for the protection of artistic diversity and creativity that still remain to be invoked before the Supreme Court. The idea of protection of diversity and creativity of the arts has been gaining more attention in the public debate in the past 10 years. However, it seems unlikely the Supreme Court will ever impose a duty on Congress to promote artistic innovation. It is nevertheless conceivable that the Supreme Court hears and rules on claims brought by growing independent organizations, holding that a government action hindering artistic diversity is unconstitutional under the Copyright Clause and the First Amendment or a government action hindering artistic creativity is unconstitutional under the Copyright Clause alone.

²⁰ *Supra* note 18.

Baseball, Antitrust and the Rise of the Players' Association

By Gregory Boucher

INTRODUCTION

Today, the Major League Baseball (“MLB”) Players Association provides players with an outlet to combat the MLB Owners’ control over the fiscal aspects of the game of baseball. This has not always been the case; the Players Association did not become a formidable labor organization until 1966 when Marvin Miller took over as executive director.¹ Having only \$5,400 to its name when he took over, Miller raised \$66,000 for the Players Association by signing an agreement with Coca-Cola to put players’ pictures under bottle caps.² Miller’s presence as executive director of the Players Association gave hope to ballplayers that their union could eventually become strong enough to eliminate MLB’s reserve clause, the owners’ greatest weapon to maintain complete control over the players’ salaries.

Major League Baseball’s reserve clause prevented players from switching teams without their owner’s approval. From the inception of MLB in the late 1870s, the reserve clause ensured that once a player signed a contract with his team, at the end of every season, an owner could place his name on a “reserve list” that prevented other owners from signing the player to a contract. Therefore, if a player wished to play the following year, the player was forced to either sign the contract offered by the owner or sit out the season hoping for a better contract.³ Under Miller’s leadership, the Players Association established itself as a formidable labor organization

¹ Roger I. Abrams, *Legal Bases: Baseball and the Law*, TEMPLE UNIVERSITY PRESS, Philadelphia, 1998, p. 74. Prior to taking over as Executive Director, Marvin Miller had 16 years of experience as a chief economist for the Steelworkers Union

² *Id.*

³ *Id.* at 45.

by eliminating the “reserve clause” in 1976 and enforcing its labor organizational rights in response to the owners’ unfair labor practices during the 1980s and 1990s.

This paper will track the evolution of MLB’s fiscal control from the owners’ dominance during the late 19th century and majority of the 20th century to the equalized playing field that benefits players today. First, the Supreme Court cases that established baseball’s anti-trust exemption will be explored. Next, an overview of how the Players Association was first recognized and how it defeated the reserve clause. Finally, the Players Association’s assertion of power in the late 20th century will be discussed, demonstrating how MLB players achieved their labor organizational rights that they had been denied for so many years.

I. The Supreme Court Grants Baseball an Antitrust exemption

Baseball is the only sport for which the Supreme Court has granted an exception to federal antitrust laws.⁴ The Sherman Antitrust Act of 1890 states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal,” while the Clayton Antitrust Act of 1914 enabled private parties to “sue to recover for damages caused by anticompetitive conduct.”⁵ These antitrust laws were enacted to promote the free trade of commerce between the states. When applied to baseball, one might be led to believe that a reserve clause, which restrained the trade and free flow of players from team to team, would be illegal under these federal antitrust laws.

The applicability of federal antitrust laws to Major League Baseball was first discussed by the Supreme Court in 1922.⁶ The *Federal Baseball* Court encountered a situation where MLB

⁴ *Radovich v. Nat’l Football League*, 352 U.S. 445, 451 (1957).

⁵ 15 U.S.C. § 1; 15 U.S.C. §§ 12-27; Roger I. Abrams, *Legal Bases: Baseball and the Law*, TEMPLE UNIVERSITY PRESS, Philadelphia, 1998, p 49.

⁶ *Federal Baseball Club of Baltimore v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922).

destroyed a rival baseball league “by buying up some of the constituent clubs in one way or another inducing [most clubs] to leave their League.”⁷ The Court held that MLB is not within the Sherman Antitrust Act because baseball games “are purely state affairs.”⁸ By reasoning that baseball games across state lines was merely incidental to the game, not essential, the Court held that playing games across state lines was not an activity that fell within the Commerce Clause.⁹ The Court compared MLB and the playing of games across state lines to other forms of businesses that are not considered to be a part of commerce: “a firm of lawyers sending out a member to argue a case, or the Chautauquial lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.”¹⁰

The second case to come before the Supreme Court concerning federal antitrust laws and MLB was decided in 1953.¹¹ In *Toolson v. New York Yankees*, the Supreme Court affirmed its decision in *Federal Baseball* by simply concluding that because Congress had not passed legislation to include baseball under antitrust laws, the Court would not overrule its *Federal*

⁷ *Id.* at 207.

⁸ *Id.* at 208; by ruling that baseball games were “purely state affairs,” the Court concluded that the Sherman Act did not apply to Major League Baseball because the Sherman Act only applies to those activities that fall under Congress’s power to make laws under the Commerce Clause of the Constitution. The Commerce clause is found under Article 1, Section 8, Clause 3 of the Constitution and states that “Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

⁹ *Id.* at 209 (holding that the Commerce Clause reasoning has long since been abandoned. When *Federal Baseball* was decided in 1922 the Court adhered to Commerce Clause jurisprudence that stemmed from cases such as *Hammer v. Dagenhart*, which limited the federal government’s ability to enact laws under the Commerce Clause. 247 U.S. 251 (1918). The federal government’s ability to pass laws concerning commerce has expanded greatly though the Supreme Court’s expanded jurisprudence arising from the New Deal and the Civil Rights era of the 1960’s. Some of the important cases that expanded Congress’ reach under the Commerce Clause from the New Deal include: *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942). Cases that demonstrate the Court’s expansion of the Commerce Clause during the Civil Rights Era include: *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Thus, if the Supreme Court was first faced with the same set of facts as *Federal Baseball* at some point after 1937, it would have likely found that baseball was engaged in Interstate Commerce.).

¹⁰ *Federal Baseball Club of Baltimore*, 259 U.S. at 209.

¹¹ *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

Baseball decision.¹² The Court believed that MLB had relied on its exemption from antitrust laws and overruling its past decision would disrupt the business of baseball.¹³ The Court ruled that any change in the application of antitrust laws to baseball should be completed through congressional legislation. The opinion was only a paragraph in length and cited no prior case law.¹⁴

Justice Burton, with Justice Reed concurring, wrote a lengthy dissenting opinion arguing that baseball is clearly engaged in interstate commerce. In support of his argument, Burton pointed to evidence of MLB's

well-known and widely distributed capital investments used in conducting competitions transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand[ed] its audiences beyond state lines, [and] its sponsorship of interstate advertising.¹⁵

Concluding that baseball was clearly engaged in interstate commerce, and therefore the Sherman and Wagner Acts applied to baseball, Burton argued that organizations such as MLB can only be granted an exemption from antitrust laws if Congress grants an express exemption.¹⁶ Without a Congressionally mandated exemption, Burton argued that the Supreme Court did not have the power to create an exemption through congressional inaction.

Flood v. Kuhn, decided in 1972, completed the Supreme Court's trilogy of cases that addressed MLB's exemption from antitrust laws.¹⁷ *Flood* involved an outfielder named Curtis Flood who played baseball for 12 years before he was traded from the St. Louis Cardinals to the Philadelphia Phillies in 1969. Upset about the trade, Flood wished to become a free agent.

¹² *Id.* at 357.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 357-58.

¹⁶ *Id.* at 364-65; Footnote 11 on page 364 of the opinion points out that Congress has expressly exempted some organizations from Antitrust Laws. Justice Burton gives examples of Federal Statutes that have been exempted: some labor organizations, farm cooperatives and insurance agencies.

¹⁷ *Flood v. Kuhn*, 407 U.S. 258 (1972).

Despite his knowledge of the *Federal Baseball* and *Toolson* decisions, Flood filed an antitrust lawsuit against the owners, once again challenging the validity of the reserve clause. Both the district court and circuit court of appeals found for the owners by relying on the past two Supreme Court decisions.¹⁸

The Supreme Court's majority opinion in *Flood v. Kuhn* concluded that MLB was engaged in interstate commerce.¹⁹ Although the Court admitted that MLB was engaged in interstate commerce, the Court stated that MLB had an exemption from federal antitrust laws.²⁰ Relying on the *Toolson* decision, Justice Blackmun stated, "[i]f there is any inconsistency or illogic in all of this, it is an inconsistency and illogic of long standing that is to be remedied by Congress and not this Court."²¹ The opinion argued that Congress had implicitly approved the *Federal Baseball* and *Toolson* line of decisions by "positive inaction" because Congress had introduced more than 50 bills concerning baseball's antitrust exemption and none were passed to eliminate it.²² The *Flood* decision also admitted that its trilogy of cases was an anomaly because antitrust laws were applied differently to all other major sports.²³

¹⁸ *Id.* at 265-68.

¹⁹ *Id.* at 282.

²⁰ *Id.* at 283.

²¹ *Id.* at 284.

²² *Id.* at 283, 281; unfortunately the Supreme Court has been unclear on how much congressional inaction creates "positive inaction." The Court has contradictory opinions leading up to the *Flood* decision on the role that congressional inaction should have on the Court's rulings. *Boys Markets, Inc. v. Retail Clerk's Union* stated that "in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance ... the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision." 398 U.S. 235, 242 (1970). *Boys Markets* does not provide much guidance because it does not detail how much congressional silence is needed for "positive inaction." Cases that support the view that "positive inaction" by Congress gives the Court the ability to leave a prior ruling alone include: *Joint Indus. Bd. v. United States*, 391 U.S. 224, 228-29 (1967); *United States v. South Buffalo Ry. Co.*, 333 U.S. 771, 774-75, 784-85 (1948). Cases that support the view that "positive inaction" by Congress is not a good reason for the Court to leave a prior ruling alone include: *Blonder-Tongue Labs v. Univ. Found.*, 402 U.S. 313, 327 n. 17 (1971); *Giroud v. United States*, 328 U.S. 61, 69 (1946) (stating that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.").

²³ *Id.* at 282-283.

Despite allowing MLB an exemption to federal antitrust laws due to Congress' "positive inaction", the Supreme Court failed to create exemptions for other sports where Congress had also displayed "positive inaction."²⁴ In 1957, the Supreme Court in *Radovich v. National Football League* did not allow the National Football League the same antitrust exemption given to baseball.²⁵ The *Radovich* decision foreshadowed the Court's declaration 15 years later in *Flood*, which denied the application of baseball's antitrust exemption to all other major sports.²⁶ Looking to congressional action, the *Toolson* court supported its ruling by pointing out that Congress did not extend the baseball exemption to football or other sports because four different bills that would apply baseball's antitrust exemption to all sports were introduced and not passed by Congress in 1951.²⁷ The *Radovich* Court claimed that it only upheld baseball's exemption in *Toolson*, just five years earlier, because "it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity."²⁸ Using this reasoning, the *Radovich* Court admitted that baseball should not have had its exemption, but the cost of overruling the exemption outweighed the benefits.

The *Radovich* decision highlights the problems contained within the Supreme Court's flawed logic used in the *Toolson* decision that continued baseball's antitrust exemption. Under the Court's "positive inaction" argument, football should also have received an exemption because Congress never passed a bill preventing football from receiving an antitrust exemption similar to baseball's exemption. Football can, and most likely did, rely on the *Federal Baseball* decision during its startup and everyday operations, thus, football was likely disrupted and hurt by the

²⁴ *Radovich*, 352 U.S. 445; see also *United States v. Shubert*, 348 U.S. 222 (1955); *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955).

²⁵ *Id.*

²⁶ *Radovich*, 352 U.S. at 447-48; *Flood*, 407 U.S. at 282-83.

²⁷ *Radovich*, 352 U.S. at 450 n.7.

²⁸ *Id.* at 450. Italics added.

³¹ *The Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. 190 (1969).

Radovich decision. Because of football's reliance on the *Federal Baseball* and *Toolson* decisions, under the Court's analysis in *Toolson*, football should also be exempt from federal antitrust laws.

II. How the Players Association was Created and Recognized

The National Labor Relations Board ("NLRB" or "Board") first took MLB under its jurisdiction in 1969 when its umpires sought recognition as a union.³¹ The NLRB's, *The American League of Professional Baseball Clubs*'s decision ruled that baseball was involved in interstate commerce, a conclusion that the Supreme Court had yet to come to as of 1969.³² The NLRB concluded that baseball was involved in interstate commerce based upon: the substantial amounts of money exchanging hands between teams of different states, team travel across state lines for games, the Supreme Court's recognition of boxing and football as sports that are engaged in interstate commerce, a recognition of an assumption by Congress that all other sports are subject to regulation under the Commerce Clause and because neither party participating in the lawsuit disputed that professional sports affected interstate commerce.³³

Even when the NLRB finds that a business or industry is subject to the Board's jurisdiction, the Board may decline jurisdiction over a labor dispute.³⁴ The owners argued that the Board should decline jurisdiction because the owners' internal self-regulation prevented their business from having a substantial effect on interstate commerce.³⁵ The Board did not agree with this

³² *Id.* at 190-91.

³³ *Id.*

³⁴ National Labor Relations Act, section 14(c)(1); *Id.* at 191; Section 14(c)(1) of the National Labor Relations Act ("NLRA") states "[t]he Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction"

³⁵ *The Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. at 191.

argument because of baseball's poor internal self-regulation at the time and because of the large effect MLB had on many aspects of interstate commerce.³⁶ MLB's internal self regulation was an inadequate system because the commissioner was the arbitrator of disputes; he was not unbiased (the owners' paid the commissioner's salary).³⁷ Even if there was an adequate self-regulation system set up between the owners and umpires, the Board asserted jurisdiction over baseball because of the lack of self-regulation between MLB and all other employees of MLB, including the players.³⁸

In addition to arguing that the NLRB should decline jurisdiction over MLB as a whole, the owners tried to avoid the NLRB's involvement in baseball by attempting to classify umpires as supervisors, exempting them from the NLRA.⁴⁰ Anyone deemed a supervisor under § 2(11) of the NLRA is not considered an employee, and §14(a) states that employers do not have to consider supervisors "as employees for the purpose of any law, either national or local, relating to collective bargaining." The Board dismissed the owners' argument by concluding that umpires were not supervisors, "the umpire merely sees to it that the game is played in compliance with the rules. It is the manager and not the umpire who directs the employees in their pursuit of victory."⁴¹ As a result of the NLRB's decision, the umpires unified and were certified as a union through a secret ballot election supervised by the NLRB according to § 9(b) of the NLRA.⁴²

³⁶ *Id.* at 190-91.

³⁷ *Id.* at 191.

³⁸ *Id.*

⁴⁰ U.S.C. §§ 151-169.

⁴¹ *The Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. at 193; the Board's decision also gave notice to baseball managers that they would not be recognized by the owners as part of the Players Association if they desired to join the players.

⁴² *Abrams, supra*, at 79.

The NLRB's *American League of Professional Baseball Clubs* gave the Players Association's bargaining power in future negotiations with the owners. Before the decision, the owners voluntarily recognized the Players Association. However, after the decision, the Players Association knew it would be recognized by the Board as a labor organization, one afforded all protections of the NLRA.

Although there was some form of a Players Association in place throughout the 20th century, the Players Association first asserted itself in 1966 when Marvin Miller took over as Executive Director. In anticipation of the 1969 NLRB ruling, Miller convinced the owners to agree to the first Collective Bargaining Agreement ("CBA") between the Players Association and the owners in 1968.⁴³ Included in the agreement was a formal grievance procedure that, like the umpires' agreement in 1969, gave the commissioner final say on each arbitration issue.⁴⁴ A year later the CBA replaced the commissioner with a third party arbitrator to ensure that the commissioner would not be biased in favor of the owners.⁴⁵

The reserve clause, which contained a list of all players from each baseball club, ensured that no player was free to join another team once their contract ran out. Once a player signed with a team at a young age, the reserve clause prevented the player from becoming a free agent; he was forced to re-sign a contract with his current club at the end of each season. His only other option was to hold out and not play the season, a player could only switch teams was if he was traded or released. The owners argued that baseball needed the reserve clause so that teams could stay on an even playing field with each other to ensure a competition balance between the teams. Without the reserve clause, owners feared that players' salaries would become too high and the

⁴³ See generally *Abrams, supra*, at 79.

⁴⁴ *Id.* at 82.

⁴⁵ *Id.* at 83.

larger market teams would offer free-agents higher salaries, altering the competitive balance of the league.⁴⁶

Before the start of the 1972 season the players went on strike for a short period, resulting in the cancellation of 86 games and a new CBA which was formally agreed upon in February of 1973. The new CBA did not erase the reserve system, but it established a method for improving players' salaries. Under the new agreement, a player unhappy with the owner's contract proposal could bring his salary dispute to arbitration.⁴⁷ Even with this new arbitration power, the Players Association made another effort to eliminate the reserve clause through the arbitration of John Alexander "Andy" Messersmith's contract in 1975.⁴⁸

The Players Association took a different approach in Andy Messersmith's arbitration than their previously failed arguments before the Supreme Court. The owners took the position that the "reserve clause" was not arbitrable because of a clause in the 1973 bargaining agreement that stated the agreement "does not deal with the reserve system."⁴⁹ The arbitrator disagreed, and concluded that the issue of the reserve clause was arbitrable due to the numerous references to the reserve system in the bargaining agreement. According to the 1973 bargaining agreement, the reserve clause stated that if the owner and player could not agree to the terms of a contract for the upcoming year, the team shall have the right "to renew this contract for the period of one year on the same terms."⁵⁰ The Players Association interpreted the reserve clause as only forcing the player to be bound to their current team for the period of one year; the team could renew a

⁴⁶ See generally *Abrams, supra*, at 79.

⁴⁷ In what has now become known as baseball arbitration, both the player and owner submit different contract proposals to the arbitrator. The arbitrator must choose either the owner's proposed or the player's proposal, the arbitrator cannot award the player with a salary in the middle of the two proposals.

⁴⁸ *Kansas City Royals Baseball Corp. v. Major League Baseball Players Assoc.*, 409 F. Supp. 233 (W.D. Mo. 1976).

⁴⁹ *Kansas City Royals Baseball Corp.*, 409 F. Supp. at 241; Article XV of the 1973 Bargaining Agreement.

⁵⁰ *Id.* at 235.

player's original contract for only one year after the terms of the original contract ended.⁵¹ Countering the players' argument, the owners claimed that "each renewal of 'this contract' also renewed the one-year option clause, which the club could then renew again and again."⁵² The impartial arbitrator agreed with the Players Association's interpretation and declared Andy Messersmith a free agent.⁵³

The owners appealed the arbitrator's decision to the Western District Court of Missouri.⁵⁴ The court first recognized that arbitration is the preferred method of solving labor disputes.⁵⁵ The district court then looked to the Supreme Court's *Steelworkers* trilogy: "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."⁵⁶ Following this lead, the district court concluded that the arbitrator could logically conclude that the Messersmith issue was arbitrative, and that the arbitrator's decision should not be overturned because the arbitrator's reading of the contract was reasonable.⁵⁷

The owners again appealed, this time to the Eighth Circuit Court of Appeals.⁵⁸ After looking at evidence demonstrating both the owners and the players' understanding of the reserve system,

⁵¹ *Id.* at 236, n. 1.

⁵² Abrams, *supra*, at 79.

⁵³ *Kansas City Royals Baseball Corp.*, 409 F. Supp. at 237.

⁵⁴ *Id.* at 233.

⁵⁵ 29 U.S.C. §§ 141-67; § 203(d) of the Labor Management Relations Act, states in part: "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

⁵⁶ *Kansas City Royals Baseball Corp.*, 409 F. Supp. at 247 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)) ; see also *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

⁵⁷ *Id.* at 254.

⁵⁸ *Kansas City Royals Baseball Corp. v. Major League Baseball Players Assoc.*, 532 F.2d 616 (8th Cir. 1976).

⁶⁰ *Id.* at 631.

the court concluded there was no consensus of what the reserve clause stood for, and because the language was unclear, the arbitrator merely interpreted the meaning of “reserve system.”⁶⁰ Again, the arbitrator’s decision was upheld because it was found to be reasonable.⁶¹ Despite its victory, the Players Association decided a compromise with the owners would be their best course of action. The Players Association reasoned that if all of the players simultaneously became free agents, player salaries may actually decrease because of the large supply of players competing with each other for contracts. The Players Association agreed to a system that allows for players to be reserved by their team for the first six years in the Major Leagues.⁶² Players in the first few years of service have their salaries strictly tied to a ladder system with maximum salaries, and those in the latter stages of the six-year commitment are to take salary disputes to arbitration.⁶³

III. The Players Association Asserts its Power

After the elimination of the reserve system, the owners’ made several failed attempts to regain their lost power. During the late 1980s, the owners colluded against the players during three different off-seasons in an effort to keep player salaries down by agreeing to give low contract offers to free agents. On all three occasions, the Players Association filed grievances under the CBA claiming a violation of Article 18 of their CBA that barred players and owners from engaging in collusion. The owners were found guilty on all three grievances and paid the players close to \$400 million in damages related to lost salaries.⁶⁴

⁶¹ *Id.*

⁶² *See generally* Abrams, *supra* note 79, at 132-33.

⁶³ *Id.*

⁶⁴ *Id.* at 138-147.

Finally, in 1994, when the CBA expired, the owners tried to install a salary cap so they could keep costs down and maintain or increase profits. The players started the 1994 season without a CBA, and set an August 12, 1994 deadline to strike if the owners would not back down from their demands to reduce players' salaries by means of a salary cap. As threatened, the players enforced their § 7 rights under the NLRA and began a strike. The owners fought back by canceling the rest of the season (including the World Series) on September 14 while the players remained on strike. Unable to reach a new deal over the winter, the owners decided in March, 1995 to abandon talks with the players and use replacement players for the ensuing season.⁶⁵ In response, the Players Association sought a preliminary injunction under § 10(j) of the NLRA in federal district court to stop the owners from leaving the bargaining table and starting the season with replacement players.⁶⁶

The district court reaffirmed the power of the Players Association by enforcing the Players Association's rights as a labor organization under the NLRB.⁶⁷ Before bringing the matter to District Court under section 10(j) of the NLRA, the Players Association first filed an action with the NLRB where an Administrative Law Judge ("ALJ") decided that the owners had violated the NLRA.⁶⁸ Once the ALJ concluded that the Players Association would likely win, the Association sought to enforce the decision by enacting their right to an injunction under § 10(j) of the NLRA.⁶⁹

The ALJ and the District Court relied on three different subsections of § 8 of the NLRA for its decisions in favor of the Players Association. Section 8(d) of the NLRA mandates a duty to bargain collectively in good faith. Section 8(a)(1) declares it an unfair labor practice for

⁶⁵ *NLRB v. Major League Baseball*, 880 F.Supp. 246, 252 (S.D.N.Y. 1995).

⁶⁶ *Id.*

⁶⁷ *Id.* at 261.

⁶⁸ *Id.* at 250.

⁶⁹ *Id.* at 261.

employers to prevent employees from exercising their rights given to them under § 7 of the NLRA. Section 8(a)(5) proclaims that it is an unfair labor practice for employers to refuse to bargain collectively with employees. The Players Association asserted, and the ALJ agreed, that the owners' decision to stop negotiations and insert replacement players violated §§ 8(a)(1) and (5) of the NLRA.⁷⁰

By deciding in favor of the Players, the district court ruled that players' salaries were a "mandatory" subject of bargaining, and thus the owners did not bargain in good faith.⁷¹ When the owners unilaterally decided their next CBA needed to include a salary cap, the court found that the owners violated the duty to bargain collectively in good faith by stopping negotiations and walking away from the bargaining table. The district court issued an injunction to prevent the owners from resuming baseball with replacement players and to order both sides back to the bargaining table to bargain in good faith.⁷⁴

Although not addressed in the court's opinion, by forcing both sides back to the bargaining table, the court decided that an impasse in negotiations had not occurred.⁷⁵ By not addressing this issue, it can only be concluded that the court decided an impasse was not possible.⁷⁶ If an "impasse" in negotiations was reached, the owners would have been free to initiate unilateral

⁷⁰ *Id.* at 250.

⁷¹ *Id.* at 257; the District Court concluded that "[a] unilateral change of an expired provision of a mandatory topic, such as one involving wages, is an unfair labor practice, as it violates the duty to bargain collectively in good faith."

⁷⁴ *Id.* at 261.

⁷⁵ The "impasse" doctrine cannot be found in the NLRA, however, courts have read the NLRA to grant the "impasse" exception because the NLRA does not force employers and unions to come to agreements, the NLRA merely forces both sides to bargain in good faith. For a more detailed analysis of the role impasses play in collective bargaining, look to: Ellen J. Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?*, 15 HOFSTRA LAB. & EMP. L.J. 11, 26 (1997).

⁷⁶ In order to have an impasse, the parties must both bargain in good faith. *Id.*

changes, such as inserting replacement players.⁷⁷ Because the owners failed to bargain in good faith by unilaterally changing a mandatory subject of the bargaining agreement (players salaries/salary cap), an impasse was impossible. This struck a final blow against the owners' attempt to take back the control they lost when the reserve clause was eliminated and demonstrated the strength the Players Association had gained as a labor organization by enforcing its rights under the NLRA.

CONCLUSION

The business relationship between players and owners in MLB changed drastically during the 20th century. Although MLB still maintains its antitrust exemption, the NLRA gave the Players Association the right to organize and oppose the owners' prior control over players' salaries. Through their right to organize, the players established a formidable union, completed many successful bargaining agreements, eliminated the reserve clause, and enforced their § 7 and § 8 rights under the NLRA by forcing the owners to bargain in good faith.⁷⁸

Despite three flawed Supreme Court decisions, the NLRA gave the Players Association leverage for current and future Collective Bargaining agreements. Using the Supreme Court's "positive inaction" rationale behind its decisions, which grants MLB an exemption from federal antitrust laws, the Players Association can be assured that their current bargaining position should not dissipate in the future. If the owners attempt to challenge the NLRB's conclusion (finding MLB under the purview of the NLRA), the players can argue to the Supreme Court that Congress' inaction, by failing to pass a bill to exempt MLB from the NLRA, is "positive inaction" ratifying the NLRB's decision that MLB's labor negotiations must abide by the NLRA.

⁷⁷ If an impasse is declared and an employer implements unilateral changes, the changes cannot be more favorable than the proposals which were made to the union. *Id.*

⁷⁸ *Supra* note 65, at 261.

MUSIC 2.0 – THE FUTURE OF DELIVERING MUSIC DIGITALLY

By David Ratner - University of Denver, J.D. 2008

INTRODUCTION

No discussion of the current state of the music industry is complete without noting the prolific file-sharing, downloading, and streaming that continues to replace hard-copy music sales.¹ Major record labels are entrenched in combat against illegal downloading and, while the labels have won a number of major battles,² they are losing the war.³ The long-term viability of the modern music industry requires adaptation to a revised business model that encourages legal behavior by establishing a new norm.

A new system for delivering music to end users must embrace developing technology and adapt to the law instead of relying on the law to combat change. A variety of proposals suggest changing the law or permitting infringement as viable solutions to illegal music consumption.⁴ The most successful model for the future of digital music delivery is a subscription service offering legal access to music online in a format tailored to the desires of consumers.

Part I of this article explains the history of copyright law and application of the law to the duplication of copyrighted works. Part II recounts litigation that applied

¹ Geoff Duncan, *U.S. CD Sales Down 20 Percent*, DIGITAL TRENDS, March 22, 2007, http://news.digitaltrends.com/news/story/12526/us_cd_sales_down_20_percent (documenting recent sales data that digital music downloads are resulting in a decrease in revenue traditionally generated by CD sales).

² See discussion of copyright rulings in the digital age *infra* Part II.

³ The number of downloads continues to increase despite the industry's efforts to stem illegal activity. See Hiawatha Bray, *Record firms crack down on campuses*, THE BOSTON GLOBE, March 8, 2007, http://www.boston.com/business/technology/articles/2007/03/08/record_firms_crack_down_on_campuses/ (The music industry concedes that illegal downloading remains rampant despite widespread legal action against music piracy.).

⁴ See comparisons to other proposals *infra* Part V.E.

copyright law to digital rights in the 21st century. Part III clarifies the basics of music copyright and relates the law to online use and the legislation that attempts to control that use. Part IV delves into the current state of online music delivery and sets the stage for development of a successful system for the future. In Part V, this article explains what a successful music delivery system will look like, offers a rationale for implementing this system, and compares the system to other proposals. The implicit conclusion is that the music industry must adapt to the changing habits of its audience and embrace a new model that accepts these realities.

I. COPYRIGHT HISTORY

Copyright is constitutionally created and dates back to the founding of the nation. The United States Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵ The founding fathers could never have envisioned the winding path copyright would take in the ensuing years and the increasing difficulty of adapting copyright law to twenty-first century technology.

Although the “Authors” the Constitution referred to were likely authors of literary works, copyright easily applies to musical compositions as well. Unlike the written word, the delivery and enjoyment of music has undergone vast changes. While most people still consume literary works by reading a printed page, the delivery of music has rapidly gone from strictly live performance to phonograph recordings to digital recordings to internet

⁵ U.S. CONST., art. I, § 8, cl. 8.

distribution. This continuum of constantly transforming mediums makes music copyright one of the complex areas of copyright law.⁶

A. Copyrighted Music

Congress first added musical compositions to the list of copyrightable works in 1831, protecting only printed or “sheet” music.⁷ This change was relatively effective until the creation of the player piano at the end of the 19th century. The player piano was the first device that could produce the sounds of music, threatening the rights of copyright holders. Congress responded to the player piano with the Copyright Act of 1909.⁸ The 1909 Act protected the physical reproduction of music as an embodiment of the music, therefore providing protection under copyright law.⁹

The 1909 Act created strict parameters for protecting a work, only protecting works that were published and had a notice of copyright included on the publication.¹⁰ In the ensuing years advancing technology allowed music to be recorded (and played back), leading to new questions about the scope of copyright. The creation of phonographic recordings made music infinitely more accessible to the average consumer. The creation of the cassette tape allowed a consumer to make copies of those recordings. The law had to change.

B. The 1976 Changes

⁶ Lydia Pallas Loren, *Copyright in the Digital Age: Reflections on Tasini and Beyond: Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 679 (2003).

⁷ *Id.* (citing Act of Mar. 3, 1897, ch. 392, 29 Stat. 694).

⁸ See Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CALIF. L. REV. 2187, 2192 (2000) (recounting how Congress stepped in when the Supreme Court refused to interpret a piano roll as a musical composition).

⁹ *Id.*

¹⁰ See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.10 (2007), for a discussion of blah, blah, blah RULE 1.2(e)

Throughout these advancements the bulk of copyright law remained largely static. Congress executed minor alterations and updates but did not fully overhaul the code until the Copyright Act of 1976. Most significantly, the 1976 Act protected “all works of authorship fixed in any tangible medium of expression.”¹¹ This encompassed all “musical works, including any accompanying words.”¹² The sweeping language of this Act extended protection to virtually all authors and composers, whether their work was “fixed” on paper, in a sound recording, or any other medium.

Furthermore, the Act granted to the copyright holder the exclusive right to make copies¹³ and to distribute copies to the public.¹⁴ This development presented vast implications for music copyrights, outlawing the copying of musical recordings. It coincided with the explosion of popularity of cassette tapes, an alternative to vinyl records that could be recorded and copied with a common home player. Suddenly, musical recordings were easily duplicable but it was ostensibly illegal to do so.

The legality of copying a recording was tested in a case about copying in a comparable medium: video. Just as the cassette tape had allowed users to copy music, the video cassette recorder (VCR) allowed copying of television and movies.¹⁵

C. Sony v. Universal

In *Sony v. Universal*, television and motion picture rights holders sued Sony, the maker of the Betamax VCR, for contributing to the infringement of Universal’s television

¹¹ 17 U.S.C.A. § 102(a) (2007).

¹² 17 U.S.C.A. § 102(a)(2) (2007).

¹³ 17 U.S.C.A. § 106(1) (2007).

¹⁴ 17 U.S.C.A. § 106(3) (2007).

¹⁵ Brett J. Miller, *The War Against Free Music: How the RIAA Should Stop Worrying and Learn to Love the MP3*, 82 U. DET. MERCY L. REV. 303, 307 (2005).

shows and movies.¹⁶ Although users could make copies of copyright-protected shows and movies with the Betamax, the United States Supreme Court did not find Sony liable for contributory infringement.¹⁷ The Court found that “time-shifting” – recording a program in order to watch it at a later time – was fair use of the content and therefore not an infringement of copyright.¹⁸

The *Sony* ruling extended the fair use doctrine to new technology and set the stage for litigating future battles between the purveyors of technological advancement and the rights holders who claim the technology infringes their copyrights.¹⁹ It is noteworthy that Universal and the other video entertainment companies should be grateful that the Court ruled against them. The resulting market for videos and, subsequently, DVDs allowed these companies to earn immense profits from a previously nonexistent market (and a market they brought suit to prevent from ever developing).

Sony created a complete defense to contributory infringement by minting the staple article of commerce doctrine.²⁰ This doctrine maintains that if an article is capable of substantial non-infringing use its manufacturer or distributor is not liable for infringement executed with the device.²¹ Henceforth, litigants repeatedly referenced *Sony* when defending new technology’s uses as they relate to the rights of copyright holders.²²

¹⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 419-20 (1984).

¹⁷ *Id.* at 434.

¹⁸ *Id.* at 446, 449.

¹⁹ Merges, *supra* note 8, at 2204.

²⁰ Kelly M. Maxwell, *Software doesn't Infringe, Users do? A Critical Look at MGM v. Grokster and the Recommendation of Appropriate P2P Copyright Infringement Standards*, 13 COMMLAW CONSPECTUS 335, 343-44 (2005) (citing *Sony*, 464 U.S. at 440-42).

²¹ *Sony*, 464 U.S. at 440-42.

²² See *A&M Records v. Napster, Inc. and MGM Studios, Inc. v. Grokster Ltd.* *infra* Part II.A.,C., for a discussion of blah, blah RULE 1.2(e)

Technology continued to advance and offer new and previously untested ways to infringe copyrights. Specifically, digital encoding and transfer allowed average users to make identical copies of musical works and distribute those copies via the Internet at a minimal cost. These new uses gave rise to a new generation of legal battles.

II. COPYRIGHT RULINGS IN THE DIGITAL AGE

By the end of the twentieth century most consumers purchased their music on compact discs (CDs) which store music as digital data. The proliferation of the personal computer presented the opportunity for the average user to transfer music from CD to computer hard drive. This allowed an individual to store his music as digital files on his computer. Peer-to-Peer (P2P) technology emerged as a fast and convenient way to share these files, facilitating the copying and distribution of copyrighted musical works.²³

A. Napster

Napster was a free software application that allowed users to share their music files with other Napster users.²⁴ With the Napster program, users could search and find music files on any other connected Napster user's computer and freely download those files.²⁵ This permitted the transfer of exact copies of music files to countless users. In essence, one person could legally purchase a piece of music (for example, on CD), transfer it to his computer, make it available through Napster, and millions of other Napster users could acquire the music at no cost. Not surprisingly, this enraged the owners of music copyrights and they soon brought suit in federal court.

²³ Maxwell, *supra* note 20, at 344.

²⁴ A&M Records v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

²⁵ *Id.*

A coalition of record companies sought an injunction against Napster for contributorily and vicariously infringing their copyrights.²⁶ The companies maintained that Napster was specifically intended for infringing use and that Napster users' rampant copying left Napster with dirty hands.²⁷ More significantly, they claimed Napster was encouraging and assisting this infringement.²⁸

Napster countered that its users were engaged in fair use²⁹ and that Napster was used for sampling and space-shifting, two permissible fair uses.³⁰ Napster relied on *Sony* to assert that it could not be found liable for contributory infringement. Specifically, Napster cited *Sony's* staple article of commerce doctrine.³¹

The Ninth Circuit Court of Appeals found that Napster's conduct met both prongs of the test for contributory infringement: knowledge and material contribution.³² First, Napster had sufficient knowledge of the infringing uses of its software. Next, Napster provided the "site and facilities" which allowed users to locate and download copyrighted music files.³³ Napster was unable to succeed on the *Sony* defense and the court enjoined Napster, spelling its demise.³⁴

B. Aimster

Although the record companies successfully killed Napster, its popularity and notoriety spawned a number of subsequent applications anxious to capture the Napster

²⁶ *Id.* at 1019.

²⁷ *Id.* at 1013.

²⁸ *Id.* at 1019.

²⁹ *Id.* at 1014.

³⁰ *Id.* at 1017.

³¹ *Id.* at 1020.

³² *Id.* at 1022.

³³ *Id.*

³⁴ *Id.* at 1029.

audience. Napster's liability hinged on its servers' involvement with the transfer of copyrighted files. Therefore, post-Napster programs attempted to facilitate file transfers without centralized servers.³⁵ This "direct P2P" allowed users to trade files directly and ostensibly did not contribute to any infringing activity by its users.

Aimster was built around instant messaging, allowing users to exchange files when linked by an instant messenger service.³⁶ Aimster collected and organized user information on its server but it did not host copies of files exchanged by its users.³⁷ Nonetheless, record companies sued Aimster for contributing to the infringement of their copyrighted works.³⁸

The Seventh Circuit Court of Appeals found that Aimster could not successfully claim it did not have knowledge of the infringing acts of its users.³⁹ Furthermore, the court held that Aimster materially contributed to these infringing acts because the software did not have sufficient non-infringing uses.⁴⁰ Finding that Aimster satisfied the test for contributory infringement, the Seventh Circuit upheld the district court's injunction and put Aimster out of business.⁴¹

C. Grokster

After two successful challenges by the record companies, the next generation of P2P software was built around the previous court decisions. Aware that a legal application would have to avoid knowledge of infringing use and not contribute to the

³⁵ Miller, *supra* note 15, at 311.

³⁶ *In re Aimster Copyright Litig.*, 334 F.3d 643, 646 (7th Cir. 2003).

³⁷ *Id.*

³⁸ *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 639 (N.D. Ill. 2002).

³⁹ *Aimster*, 334 F.3d at 650.

⁴⁰ *Id.* at 653.

⁴¹ *Id.* at 655.

infringing acts of its users, the Grokster system operated with no central server exchanging information or files among users.⁴² A Grokster user's computer communicated directly with other Grokster users' computers via indexing "supernodes."⁴³

Although Grokster pled that it did not have knowledge of infringing use of its software, the United States Supreme Court found that 90 percent of the files available for download were protected by copyright.⁴⁴ Grokster was significantly disadvantaged by the advertising and promotion of its infringing use, including the unabashed pursuit of former Napster customers who could not access free downloads because of Napster's demise at the hands of the Ninth Circuit.⁴⁵ The Supreme Court held that the *Sony* defense could not be used where the defendant's statements or actions were directed towards promoting infringement.⁴⁶

More significantly, the *Grokster* Court found that "evidence of 'active steps . . . taken to encourage infringement' . . . overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use."⁴⁷ Regardless of contributory infringement, the Court held Grokster liable for inducing its users to infringe copyrights.⁴⁸ This blow to the defendants was a significant victory for content owners. By upholding inducement liability, the Court made clear that "the

⁴² *MGM Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 920 (2005).

⁴³ *Id.* at 921.

⁴⁴ *Id.* at 922.

⁴⁵ *Id.* at 925.

⁴⁶ *Id.* at 935.

⁴⁷ *Id.* at 936 (citing *Oak Industries, Inc. v. Zenith Electronics Corp.*, 697 F. Supp. 988, 992 (ND Ill. 1988)).

⁴⁸ *Id.* at 937 (adopting the inducement rule (need cite here?) for copyright to find liability for the infringing acts of third parties).

distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe.”⁴⁹

The *Grokster* decision was the knockout punch in the initial round of litigation over P2P software. Although some, like Napster, have been reinvented as fee services that legally compensate copyright owners, the record industry continues to stymie the success of subsequent P2P programs in the shadow of *Grokster*.

D. RIAA Litigation

Although record companies successfully struck down many of the more commercially successful P2P systems, consumers continue to share files and infringe copyrighted works through P2P networks.⁵⁰ Therefore, the Recording Industry Association of America (RIAA) began a campaign of suing individual infringers.

On September 8, 2003 the RIAA sued 261 of its own customers for sharing songs on P2P networks and has since filed, threatened, or settled legal action against more than 20,000 users.⁵¹ Many of the lawsuits demanded tens or hundreds of thousands of dollars in damages and virtually all the accused settled with the RIAA, usually for about \$4,000.⁵²

The first of these cases to actually go to trial was heard in the United States District Court for the District of Minnesota in October 2007.⁵³ Jammie Thomas was accused of downloading and distributing 25 songs via the KaZaA network, which

⁴⁹ *Id.* at 940 n.13.

⁵⁰ Maxwell, *supra* note 20, at 336 n.8 (citing congressional hearings (same as “possible” congressional hearings? Please verify source) testifying to the pervasiveness of infringement through downloading and its detrimental effects on the music industry).

⁵¹ ELECTRONIC FRONTIER FOUNDATION, RIAA v. THE PEOPLE: FOUR YEARS LATER (2007), http://w2.eff.org/IP/P2P/riaa_at_four.pdf.

⁵² *See id.*

⁵³ *Capitol Records v. Thomas*, No. 06-1497 (D. Minn. Oct. 5, 2007).

Thomas denied.⁵⁴ After the parties presented their cases, Judge Michael Davis instructed the jury that simply making a file available for electronic distribution violated the copyright owner's rights.⁵⁵ The jury could therefore find Thomas guilty of infringement in the absence of any proof that any other users shared Thomas' copyrighted works. This was a significant blow to Thomas' case and ultimately led to the guilty verdict against her.

Judge Davis' jury instruction essentially allowed the jury to convict Thomas without requiring the plaintiff to show the copying, transfer, or distribution of any copyrighted material. This victory for the RIAA set an intimidating precedent for others accused of file-sharing but the ruling may not stand for long. A number of other trials were set to address this issue in the months following the *Thomas* decision.⁵⁶

III. MUSIC RIGHTS IN THE DIGITAL WORLD

One cannot conduct an accurate examination of the future of music delivery without examining the legal structure that content providers and users are operating within. Although a complete analysis of copyright law is beyond the scope of this article,⁵⁷ understanding some recent developments in digital copyright is crucial to a comprehensive examination.

⁵⁴ Eric Bangeman, *First RIAA trial gets underway*, ARS TECHNICA, Oct. 2, 2007, <http://arstechnica.com/news.ars/post/20071002-first-riaa-trial-gets-under-way-with-jury-selection.html>.

⁵⁵ Eric Bangeman, *Debate over "making available" jury instruction*, ARS TECHNICA, Oct. 4, 2007, <http://arstechnica.com/news.ars/post/20071004-debate-over-making-available-jury-instruction-as-capitol-v-thomas-wraps-up.html>.

⁵⁶ Greg Piper, *RIAA Wins First P2P Jury Trial*, WASHINGTON INTERNET DAILY, Oct. 5, 2007.

⁵⁷ This article will not delve into theories of copyright law or proposals for amending the code, instead focusing on systematic changes to the music industry business model to bring digital music delivery within the current law.

A. Basics of Music Copyright

A brief overview of basic music copyrights will inform this conversation moving forward. A music copyright is divided into two separate and distinct works. The first, the “original work” defined in the Copyright Act, is the musical composition: the underlying music, such as the chord progression, instrumentation, and lyrics.⁵⁸ The individual or entity who owns this right retains the license to perform it publicly. This is commonly referred to as a “publishing right” and was traditionally assigned to a publishing company for administration.

The second, the sound recording right, results from the “fixation of a series of musical, spoken, or other sounds”⁵⁹ and is separate from the music composition or performance of the work. The owner of the sound recording right can distribute copies of the work. The sound recording right is commonly referred to as the “master” and was traditionally owned by the record company that produced the work.

Congress created a compulsory license for performing a copyrighted work and subsequently distributing it.⁶⁰ Once a work has been released or “distributed to the public” any other person may make and distribute recordings of the work.⁶¹ One who obtains such a “mechanical license” must simply pay a statutory licensing fee for this right.⁶²

⁵⁸ See 17 U.S.C.A. § 102(a)(2) (2007).

⁵⁹ 17 U.S.C. A. § 101 (2007).

⁶⁰ See 17 U.S.C.A. § 115(a)(1) (2007).

⁶¹ 17 U.S.C.A. § 115(a)(1) (2007).

⁶² See generally HFA Online, Harry Fox Agency, <http://www.harryfox.com> (The Harry Fox Agency is the primary provider of mechanical licenses and the website provides information on obtaining a license and paying the statutory fee.).

While these rights seem straightforward, they were conceived and defined in the pre-digital age and do not easily adapt to the electronic transmission of music that is commonplace today.

B. Digital Rights & Licenses

Although Congress has attempted to update copyright law in concert with advancing technology, the results inadequately address current issues. A “digital phonorecord delivery” (DPD) is defined as the digital transmission of a sound recording resulting in a specifically identifiable reproduction.⁶³ So downloading a piece of music or obtaining it through a P2P file-sharing network results in a DPD.

To legally offer a download of a copyrighted musical work, the download service must secure at least four licenses: (1) the publishing right holder’s right to reproduce and distribute the composition; (2) the sound recording right holder’s right to reproduce and distribute the recording; (3) the publishing right holder’s right to authorize public performances of the composition; and (4) the sound recording right holder’s right to authorize public performances of the digitally transmitted sound recording.⁶⁴ A download service should also secure licenses for performance rights, although it is presently unclear whether this is mandatory.⁶⁵

In contrast, streaming music does not result in a DPD because a permanent copy of the work is not transmitted to the recipient. Streaming is real-time distribution of

⁶³ 17 U.S.C.A. § 115(d) (2007).

⁶⁴ Carlos Ruiz de la Torre, *Towards the Digital Music Distribution Age: Business Model Adjustments and Legislative Proposals to Improve Legal Downloading Services and Counter Piracy*, 3 VAND. J. ENT. & TECH. L. 503, 506 (2006).

⁶⁵ *Id.* at 507. Rights holders maintain that a DPD is a public performance and therefore requires licensing but the Copyright Office holds that a DPD does not implicate performance rights and that it is an exercise of the reproduction right. *Id.* at 507 n.11.

media through the simultaneous transfer of data over the Internet.⁶⁶ Streamed media is transmitted by a server and received in real-time by the end-user.⁶⁷

Streaming differs from downloading in two important respects: (1) the music “performance” occurs during the file transfer and (2) once the transfer/performance is complete, no copy of the file remains on the user's hard drive.⁶⁸ Therefore, a person or entity streaming a copyrighted musical work must obtain the performance licenses but not necessarily the reproduction licenses.⁶⁹ Nonetheless, licensing bodies that stand to profit from online streaming argue that streaming does result in a copy, however temporary, and therefore must be appropriately licensed.⁷⁰

C. The Digital Millennium Copyright Act

A number of events towards the end of the 20th century led Congress to pass multi-faceted legislation addressing a variety of digital copyright issues. The Digital Millennium Copyright Act (DMCA) included two key provisions that directly implicate liability and rights for online music. First, internet service providers (ISPs) were granted a safe harbor against copyright liability for complicity in online infringement.⁷¹ The Act laid out specific procedures for ISPs to receive information about allegedly infringing

⁶⁶ StreaminMedia.com, Streaming Media Explained, <http://www..streamingmedia.com/whatisstreaming.asp>

⁶⁷ *Id.*

⁶⁸ Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 450 (2003).

⁶⁹ AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 1332-33 (3rd ed. 2002).

⁷⁰ *Id.* at 1328-32.

⁷¹ *See* 17 U.S.C.A. § 512 (2007).

material and block access for its users.⁷² The Act also provided for subpoenas, requiring ISPs to divulge the identity of the alleged infringers.⁷³

Second, the DMCA included a wide-reaching provision banning circumvention of digital rights management (DRM).⁷⁴ Digital rights management describes a system created to protect copyrights of digital media by “enabling secure distribution and/or disabling illegal distribution of that media.”⁷⁵ Typically, a DRM system either encrypts data so as to limit access to only authorized users or marks the content so it cannot be freely distributed.⁷⁶ The DMCA bans acts circumventing DRM⁷⁷ as well as the distribution of any tools or technologies used for circumvention.⁷⁸

The DMCA has garnered criticism since its passage and has undoubtedly affected the progression of technology and the present state of content delivery. Copyright scholar Jessica Litman describes the Act as the result of interest group negotiation which benefits major stakeholders at the expense of the general public.⁷⁹ It grants copyright holders sweeping new rights while imposing liability on ordinary citizens for noncommercial and noninfringing behavior on the theory that it will help to prevent piracy.⁸⁰

The Electronic Frontier Foundation (EFF), a nonprofit organization addressing free speech, privacy, and innovation in the digital arena, similarly lambastes the DMCA for falling short in its implementation. The EFF claims that the DMCA chills free

⁷² *See id.* § 512(g).

⁷³ *See id.* § 512(h)(1).

⁷⁴ *See* 17 U.S.C.A. § 1201 (2007).

⁷⁵ DRM Watch, <http://drmwatch.webopedia.com/TERM/D/DRM.html> (defining DRM).

⁷⁶ *Id.*

⁷⁷ 17 U.S.C.A. § 1201(a)(1) (2007).

⁷⁸ *See id.* § 1201(a)(2), (b).

⁷⁹ JESSICA LITMAN, DIGITAL COPYRIGHT 144-45 (2001).

⁸⁰ *Id.* at 145.

expression by implying that ISPs should block potentially infringing online content and censor discussions of DRM.⁸¹ The EFF further asserts that the DMCA has been used to deter legitimate innovation and competition under the guise of stopping piracy.⁸²

Innovation has nonetheless persisted as internet users continue to access online music for personal use. In spite of court decisions finding online music providers guilty of copyright violations and Congressional legislation favoring music rights holders, developers continue to roll out technological advancements for internet music delivery. Although legal models have emerged, no system successfully satisfies the music industry's needs and consumers' desires.

IV. MUSIC 2.0 – THE STATE OF ONLINE MUSIC DELIVERY

No one can dispute the pervasiveness of the Internet in the modern world and its influence on everyday life, from information gathering to consumerism to communication. The term “Web 2.0” has taken hold to describe the next stage of internet

⁸¹ ELECTRONIC FRONTIER FOUNDATION, UNINTENDED CONSEQUENCES: SEVEN YEARS UNDER THE DMCA (2006), <http://www.eff.org/wp/unintended-consequences-seven-years-under-dmca>

([The DMCA] has been used by a number of copyright owners to stifle free speech and legitimate scientific research. . . . Bowing to DMCA liability fears, online service providers and bulletin board operators have begun to censor discussions of copy-protection systems, programmers have removed computer security programs from their websites, and students, scientists and security experts have stopped publishing details of their research.)

Id.

⁸² *Id.* Examples include hardware maker StorageTek suing an independent service operator (ISO) that repaired StorageTek hardware, *Storage Technology v. Custom Hardware Engineering*, 421 F.3d 1307, 1309-10 (Fed. Cir. 2005), and printer maker Lexmark banning Static Control Components from reverse engineering Lexmark efforts to hinder aftermarket toner vendors, *Lexmark v. Static Control Components*, 387 F.3d 522, 529 (6th Cir. 2004).

technologies and utilization.⁸³ One of the people claiming responsibility for coining this term asserts that Web 2.0 describes applications that harness collective intelligence, treat users as co-developers, support lightweight programming models, and offer a rich user experience.⁸⁴

In the wake of *Grokster* and the DMCA, online music technology is taking on all of these “2.0” characteristics. Many music applications now function as part of online communities where users share their likes and dislikes and collaborate to spread the word about artists, harnessing their collective tastes and knowledge.⁸⁵ Some of these same social networking sites allow open source development of music applications⁸⁶ and successful businesses are creating music applications for other sites that allow musicians to sell their music and fans to collect it.⁸⁷ These applications tend to be straightforward and user-friendly, suggesting a transformation towards Music 2.0.

The larger powers within the music industry, including the major record labels and the RIAA, must embrace this transformation towards a Music 2.0 business model and offer legal avenues for purchasing music, encouraging a norm of paying for music instead

⁸³ Tim O’Reilly, *What is Web 2.0*, O’REILLY NETWORK, Sept. 30, 2005, <http://www.oreillynet.com/lpt/a/6228>.

⁸⁴ *Id.* (covering the meaning of “2.0” and the creation of an annual conference (Web 2.0 Summit, <http://www.web2con.com>) to discuss the topic).

⁸⁵ A primary example is MySpace, a social networking website that connects individuals, almost always includes music content as part of the application, and has become a major marketing medium for musicians and bands. See <http://myspace.com>.

⁸⁶ Facebook allows any interested party to code “widgets” to mesh with its application and Google recently announced an open source toolkit for building social networking applications. Bryan Gardner, *Google’s Latest Efforts Test the Open Waters*, WIRED, Nov. 9, 2007, http://www.wired.com/techbiz/it/news/2007/11/google_open.

⁸⁷ Snocap partners with record labels and social networks to offer widget-based music stores embedded in independent social networking sites. Pete Cashmore, *Snocap’s MySpace Music Player*, MASHABLE, July 26, 2006, <http://mashable.com/2006/07/26/snocap-napster-founder-selling-unprotected-mp3s-on-myspace/>.

of stealing it. Presenting an overview of the current state of digital music delivery informs a discussion of a business model that will spell success for the music industry in the future.

A. The Ever-Increasing Pace of Technological Development

Technology seems to develop at an exponentially increasing rate, offering new inventions long before the old ones have out-lived their usefulness. Traditional mail gave way to the facsimile which was then replaced by email. Never satisfied with the speed of delivery, many emailers utilize instant messaging systems to get an immediate response when email takes too long. Similarly, text messaging has become a ubiquitous use of cell phone technology when leaving a voice mail seems too tedious.

The breakneck speed of technology is especially evident in the development of digital music delivery. There is a seemingly endless supply of applications offering users access to online music through a variety of systems and schemes. One source highlights almost 100 of the most popular music websites, grouped into categories such as music sharing applications, social networks, music discovery tools, music marketplaces, and music search engines.⁸⁸

The pace of technological innovation explains why legislation has so far failed to address pertinent issues involving recent technology. The legislative process is a slow-moving behemoth that is consistently reactive and rarely proactive. It took Congress at least ten years to draft and pass the Copyright Act of 1976 and the Telecommunications

⁸⁸ Mashable.com, Online Music: 90+ Essential Music and Audio Websites, July 6, 2007, <http://mashable.com/2007/07/06/online-music/>.

Act of 1996 was obsolete soon after its implementation.⁸⁹ As noted above, the DMCA is widely reviled for its close-minded approach and lack of foresight.⁹⁰ Technology adapts to the law more often and more readily than the law is able to react to changing technology.⁹¹

B. Streaming

The cases described above all addressed music delivery systems that relied on downloading content via P2P systems.⁹² Streaming media has become a dominant format for listening to music because it does not make a copy of the musical work and therefore avoids infringing the right of reproduction.⁹³

Although a streamed song does not create a copy of the song on the recipient's computer, some users have the technology to make copies of streamed songs.⁹⁴ However, most consumers do not possess the software necessary to save streamed content and therefore cannot make digital copies.⁹⁵

Current delivery systems utilize streaming in various formats and functions to legally deliver content without infringing copyrights. The challenge in creating a successful application has been developing a device that offers all the features consumers demand without crossing the line into illegal content delivery.

⁸⁹ CNN.com, Legislation can't keep pace with technology, <http://www.cnn.com/2005/TECH/10/17/wireless.legislation/index.html>.

⁹⁰ See discussion of the DMCA *infra* Part III.C.

⁹¹ See *supra* Part II.C (Grokster was developed with an eye towards the *Napster* and *Aimster* decisions. Post-*Grokster* innovations are similarly created to not run afoul of the Supreme Court's 2005 *Grokster* decision.).

⁹² See *supra* Parts II.A-C. (*Napster*, *Aimster*, and *Grokster*).

⁹³ See *supra* Part III.B. for explanation and discussion of the licenses required for streaming.

⁹⁴ Jackson, *supra* note 68.

⁹⁵ Jackson, *supra* note 68 n.8..

C. Downloading

Legal download applications have proven to be some of the most successful entrants into the online music world. By obtaining licenses from the music rights holders and charging users to download the works, these services offer consumers a safe and legal way to obtain digital music.

The clear leader in retail music downloads is Apple's iTunes Store, with an almost 80 percent market share.⁹⁶ iTunes is a software application that allows users to find and download songs in Apple's .aac format.⁹⁷ Although iTunes previously only offered downloads with DRM, Apple has recently come to agreements with certain record labels to offer DRM-free music files.⁹⁸

iTunes and other services offer DRM-free downloads because of consumer backlash against technical control over a purchased product. Downloaders want the right to use their downloaded file in any way they choose if they have legally purchased it.⁹⁹ The anti-DRM movement received a huge boost of public support when Sony sold copy-protected CDs that surreptitiously installed DRM technology onto personal computers¹⁰⁰

⁹⁶ Top 10 Reviews, iTunes Review 2008, <http://music-download-review.toptenreviews.com/itunes-review.html>.

⁹⁷ Apple.com, Apple - iTunes - iTunes Store - Music, <http://www.apple.com/itunes/store/music.html> (last visited date).

⁹⁸ iTunes Review 2008, *supra* note 96.

⁹⁹ Paul Resnikoff, *Resnikoff's Parting Shot: The French Hammer*, DIGITAL MUSIC NEWS, Nov. 25, 2007, <http://www.digitalmusicnews.com/stories/112507parting> (asserting that consumers want to own their music, not rent it).

¹⁰⁰ Molly Wood, *DRM This, Sony!*, CNET.COM, Nov. 3, 2005, http://www.cnet.com/4520-6033_1-6376177-1.html (simply playing the CD installed the anti-priacy software, affecting all legal consumers instead of targeting infringers).

which was found to make users vulnerable to attack by hackers.¹⁰¹ DRM is most prevalent in files offered for downloadable purchase but DRM-free files are becoming increasingly available in the retail market.

Skeptics may assert that downloaders rally against DRM because they want to share their files illegally. Once a DRM-free file is legally downloaded it may be shared through direct digital transfer or P2P networks and the downloading service that sold the file is powerless to prevent these infringing acts. This situation strikes at the heart of the debate over how to make music available online. How can consumers obtain content easily and legally without threatening the viability of the music industry that seeks to profit from the transaction?

D. On-The-Go Services

As the popularity and feasibility of streaming and downloading have played out in the marketplace, some online music providers conceived a model that marries these two functionalities into a subscription service which allows the user to stream tracks and, for a flat fee, download songs to a PC or portable player. These “on-the-go” services have been praised for allowing users to sample music that interests them and own music that they like.¹⁰² These developments are a significant step towards establishing a successful model for Music 2.0.

¹⁰¹ BBC NEWS, *Anti-Piracy CD problems vex Sony*, <http://news.bbc.co.uk/2/hi/technology/4511042.stm> (the patch Sony included on the CDs to protect against infringement left users' computers open to attack).

¹⁰² Edward C. Baig, *Music Subscription Services Can Be a Good Deal*, USATODAY.COM, May 25, 2005, http://www.usatoday.com/tech/columnist/edwardbaig/2005-05-25-subscriptions_x.htm.

On-the-go services allow the user to download as many tracks as the user desires for a monthly subscription fee.¹⁰³ Downloaded music can then be transferred to a compatible device (although there are limitations on which devices are supported by which services).¹⁰⁴ Users can enjoy the music as long as they continue their subscription but as soon as the subscription is cancelled, the music is no longer playable.¹⁰⁵ Similarly, portable devices must be synced up with the user's PC at regular intervals or the music on the device will similarly become unplayable.¹⁰⁶ These "tethered" downloads generally cannot be burned to CD or otherwise transferred to other users.¹⁰⁷ All this functionality is accomplished through DRM.

While on-the-go services have enjoyed some success, their long-term viability and profitability are hamstrung by their limitations. Some artist catalogs are currently unavailable through on-the-go services and different services have deals with different record labels. More significantly, the DRM involved with offering these services is unattractive to consumers who want to truly "own" the music they pay for.¹⁰⁸

The successes and shortcomings of on-the-go services can help develop a music delivery model that will enjoy widespread acceptance, use, and profitability. By learning

¹⁰³ Jasmine French & Troy Dreier, *Understanding the on-the-go subscription services*, CNET.COM, June 20, 2005, http://reviews.cnet.com/4520-6450_7-6246843-1.html.

¹⁰⁴ CNET.com, Music Subscription Services Summary, [http://reviews.cnet.com/4520-6450_7-6246843-7.html?tag=nav\(last visited date\)](http://reviews.cnet.com/4520-6450_7-6246843-7.html?tag=nav(last%20visited%20date))..

¹⁰⁵ Xenii Jardin, *Napster-to-Go reviewed, math done*, BOING BOING, Feb. 13, 2005, <http://www.boingboing.net/2005/02/13/napstertogo-reviewed.html>..

¹⁰⁶ Steve Corn, *Streaming and Tethered Downloads: An Explanation*, ROYALTYWEEK, <http://www.royaltyweek.com/article/Streaming-and-Tethered-Downloads:--An-Explanation-46.html>.

¹⁰⁷ *Id.*

¹⁰⁸ Resnikoff, *supra* note 99. Our culture of consumerism establishes the notion that a consumer who pays for an item should own that item outright without any "strings attached" and this conception carries over into the world of online music resulting in widespread condemnation of DRM.

from industry desires and consumer reaction, a service can be created that will allow artists and labels to profit while offering end users attractive and easily accessible content.

V. A MODEL FOR THE FUTURE

The music industry acknowledges the challenges of digital distribution but has failed to find a viable solution.¹⁰⁹ As one prominent major label executive confessed: “[T]he world has changed. And the music industry has not.”¹¹⁰ We must first acknowledge that the model will have to change, that revenue streams will not mirror the era of cassettes and CDs, and that a new delivery system will alter the structure of the music business as we know it. The goal is to develop a business model that focuses on encouraging legal behavior instead of punishing illegal acts. While the largest entities may resist these changes, adjusting the model and embracing Music 2.0 is clearly preferable to disintegration of the entire system.

A. The Subscription Service

A new system for music delivery must be created with an eye towards the successes and failures of the past. The decades-long prosperity of selling cassettes and CDs teaches us that consumers want to own their music and they are willing to pay for it. Arguments made by now-defunct P2P systems asserted that digital music delivery allows

¹⁰⁹ See Meghan Dougherty, *Voluntary Collective Licensing: The Solution to the Music Industry's File-Sharing Crisis?*, 13 J. INTELL. PROP. L. 405, 408 (2006) (professing the value of file-sharing and stating that the challenge facing the music industry is to design a system that compensates artists while legally delivering the product to consumers – the challenge of creating Music 2.0).

¹¹⁰ Lynn Hirschberg, *The Music Man*, N.Y. TIMES, Sept. 2, 2007, available at http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1194719907-Zcad3ykMUzga1ay5kEuyIQ.

fans to sample a wide variety of music before deciding which works they want to keep.¹¹¹ The mediocre success of on-the-go services implies that users are not anxious to pay for content when it comes with DRM that renders it useless once they cease paying their monthly fees.¹¹²

A number of voices within the music industry establishment have floated the idea of a subscription model that will give users access to all the content that would traditionally be available in a bricks-and-mortar music store.¹¹³ For a flat fee, subscribers will have access to a virtually unlimited catalog of music and be able to utilize that catalog with any device: computer, television, car radio, cell phone.¹¹⁴ Subscription fees will be pooled and then paid out to rights holders on an equitable basis dependent on the popularity of each artist.¹¹⁵

This subscription model holds the greatest promise of success for a number of reasons, not the least of which is that it has support from some major label executives.¹¹⁶

¹¹¹ A&M Records v. Napster, Inc., 239 F.3d at 1013 (stating Napster's contention that its users are engaged in sampling, a fair use where users sample a piece of music before purchasing it).

¹¹² Resnikoff, *supra* note 99; see Alexandra Osorio, *Digital Progress Disappoints British Retailers, DRM-Free Demands Surface*, DIGITAL MUSIC NEWS, Nov. 20, 2007, <http://digitalmusicnews.com/stories/112007uk> (British music retailers advocate DRM-free formatted music).

¹¹³ Hirschberg, *supra* note 110 (citing Columbia co-chairman Rick Rubin's support for a subscription service); Seth Mnookin, *Universal's CEO Once Called iPod Users Thieves. Now He's Giving Songs Away*, WIRED, Nov. 27, 2007, http://www.wired.com/entertainment/music/magazine/15-12/mf_morris (explaining Universal CEO Doug Morris' "Total Music" project).

¹¹⁴ Hirschberg, *supra* note 110.

¹¹⁵ See generally Corn, *supra* note 106 (explaining royalty distribution systems for subscription services).

¹¹⁶ Hirschberg, *supra* note 110; Mnookin *supra* note 113. The Total Music plan from Doug Morris of Universal includes DRM and is attached to a player, *id.*, which is a significant detriment and not in agreement with the subscription service proposed in this article. The Total Music proposal is discussed *infra* Part V.E.

Major label support means that the service can include all the most popular acts and it may also spell the end of the RIAA lawsuits for file-sharing. Although the major labels have been most resistant to change,¹¹⁷ they also have the power to lead the industry into a new era. It is fair to say that if the majors lead, others will follow.

The ideal subscription model will resemble an on-the-go service without DRM. Users will be able to stream and download limitless amounts of music without fear that they will lose access to their music if they stop paying. This satisfies users' desires to own their music while maintaining a revenue stream for artists, labels, and publishers who depend on that income to keep the industry alive.

B. The Rationale

i. Decreased revenue is better than no revenue

A DRM-free subscription service may be tough for some members of the industry to accept because it could translate into a drop in revenue and decreased control over the product. Any Music 2.0 model for online music delivery is unlikely to surpass the profits generated by CD sales. The market for music CDs was “the biggest boon the music business has ever known” and one major label executive admitted that record companies will never again realize similar profit margins.¹¹⁸

¹¹⁷ In an interview, Universal's Doug Morris “rail[ed] against criminal-minded college students and low-life punks who steal [] music” and “admit[ed] to being fairly ignorant about technology,” Mnookin *supra* note 113, leading others to characterize Morris as “a tech-unfriendly . . . executive caught flat-footed at the beginning of a massive digital disruption,” Digital Music News, Tech-Unfriendly Morris Defends Early Digital Inaction, Nov. 26, 2007, <http://www.digitalmusicnews.com/stories/112607morris>. Such antiquated attitudes resist change in favor of maintaining the status quo.

¹¹⁸ Mnookin, *supra* note 113.

While there is still some debate about the true effect online distribution has on music sales,¹¹⁹ most accept that digital delivery is crippling CD sales. Recent figures show that CD sales continue to decline and that trend is not likely to reverse.¹²⁰ Instead of battling to save a sinking ship, the music industry should adopt a new revenue model and set its sights on the future. Content owners and providers will be much happier with a stable income stream that may be somewhat less profitable than no income from an extinct model.

Without brick-and-mortar stores and the traditional marketing mediums, the influence and spending power of the major players will also change. In the past, major labels wielded the power to make superstars, swaying the public taste and selling millions of albums.¹²¹ The end of these windfall profits may spell the demise of multi-million dollar record deals and juggernaut superstars.¹²² Nonetheless, artists will still find success

¹¹⁹ Ken Fisher, *Study: P2P effect on legal music sales "not statistically distinguishable from zero,"* ARS TECHNICA, Feb. 12, 2007, <http://arstechnica.com/news.ars/post/20070212-8813.html> (illegal music downloads have had no noticeable effects on the sale of music); Press Release, Forrester, *Downloads Did Not Cause The Music Slump, But They Can Cure It, Reports Forrester Research (August 13, 2002) available at* <http://www.forrester.com/ER/Press/Release/0,1769,741,FF.html> (piracy is not responsible for the drop in music sales).

¹²⁰ Michael Arrington, *Good News! CD Music Sales Down 20% from 2006,* TECHCRUNCH, March 21, 2007, <http://www.techcrunch.com/2007/03/21/good-news-cd-music-sales-down-20-from-2006/> (in one week in March 2007 CD sales were down 20% from the same week in 2006 and while legal music download sales may be increasing by 50% each year industry revenue is estimated to be down 25% overall); Duncan, *supra* note 1 (citing Nielsen SoundScan statistics that sales of music CDs in the first quarter of 2007 were down 20% from the same period in 2006).

¹²¹ This may still hold true in the digital future as new opportunities, such as ringtones, present labels with new revenue streams. Mnookin, *supra* note 113 (explaining that, in 2006, Universal Music Groups second-, third-, and fourth-biggest digital revenue generators were all cell phone companies).

¹²² See Paul Resnikoff, *Resnikoff's Parting Shot: Superstar Leftovers,* DIGITAL MUSIC NEWS, Nov. 14, 2007, <http://www.digitalmusicnews.com/stories/111407parting>

and stars will continue to emerge in the digital medium. Accepting an online subscription model for distribution is a matter of adjusting the scale of success. Interests in the music business will continue to make money but revenues may not reach the inflated levels seen in the CD era.

ii. Digital distribution costs less

The decreased income generated through a digital distribution model will be offset by decreased costs. A significant portion of the cost of a CD relates to the physical product so digital distribution will significantly reduce costs. On average, a CD that costs a consumer \$16.98 is marked up \$6.23 (37%) by the retailer so the actual cost is only \$10.75.¹²³ Of that wholesale cost, \$4.94 (46%) is attributed to production of the CD and packaging, shipping, and distribution of the physical item.¹²⁴ By producing music for online delivery instead of CD sale, labels will save almost half their upfront costs and can therefore afford to earn less through a subscription system.

No business looks to decrease revenues, but when upfront costs are diminished a decline in gross revenue can result in similar net profits. Record labels and rights holders can calculate the money they will save by not producing and selling a physical product (CDs) to help set the price for a subscription service that will continue to generate the necessary income.

iii. Consumers will pay for legal music

(explaining that the influence previously exerted by major labels made them indispensable to superstardom).

¹²³ CD Cost Breakdown, CNN.com,

<http://cgi.cnn.com/interactive/entertainment/0101/cd.price/frameset.exclude.html>.

¹²⁴ *Id.*

One reason P2P and illegal downloading has proliferated is because consumers lack options for obtaining the music they want in the format they want it in (DRM-free). Creating a legal outlet for obtaining DRM-free music will decrease illegal file-sharing simply by offering content on a broad scale and through legitimate means.¹²⁵

Many users who download illegally do so due to a lack of other options. Until recently, the majority of for-sale downloads were laced with DRM that consumers did not want to pay for. A small percentage of users will continue to trade music illegally but the majority will be willing to adopt a subscription model that is simple, legal, and safe.¹²⁶

Both cassettes and CDs can be copied with readily available consumer technology. Yet the record industry ultimately supported and Congress passed the Audio Home Recording Act of 1992 (AHRA) which placed a tax on devices capable of making copies of recorded music.¹²⁷ The profits of that tax are then paid to content owners and content owners therefore relinquish their right to file infringement suits.¹²⁸ Although some consumers continued to copy CDs, rampant copying never emerged to threaten rights holders' profits. Most consumers purchased CDs and supported the industry's market structure.

Similarly, a subscription service may not wipe out all illegal copying but offering a legal route will be attractive to most consumers. It is reasonable to expect that some users will continue to download music illegally even if most consumers adopt a legal streaming model. Wiping out all illegal copying is not a realistic goal but limiting file-

¹²⁵ Resnikoff, *supra* note 99 (explaining that other industries have successfully battled piracy by presenting legal, paid alternatives that make illegal avenues seem more costly).

¹²⁶ *Id.*

¹²⁷ Lewis Kurlantzick & Jacqueline Pennino, *The Audio Home Recording Act and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A., 497, 501 (1998).

¹²⁸ 17 U.S.C.A. §§ 1001-1010 (2007).

sharing by offering an attractive and legal way for users to access music is feasible and the best available solution for delivering digital music content. The objective is to adapt the music industry's business model to promote a legal way for consumers to access content.

C. Brass Tacks – How the Subscription Model Works

i. Everything for a price, DRM-free

The subscription model allows for multiple entities to offer competing subscription services. The keys to a successful model are a limitless catalog in a DRM-free format. A limitless catalog requires the involvement of all major and independent labels where all artists offer all their music. The underlying idea is to present a portal for consumers to find everything they want and need. If a service delivers every piece of music a consumer is searching for, he will have significantly less motivation to search it out and download it from an illegal (and less secure) source.¹²⁹

Similarly, all rights holders must be willing to offer their music in a DRM-free format. Again, this deters users from pursuing illegal paths to access music by presenting a legal way to obtain the same product for a reasonable price. This also addresses the main shortcoming of current on-the-go services. On-the-go services are gaining popularity and increasing revenue,¹³⁰ forging deals with major industry players, and expanding into new mediums.¹³¹ Their success is only thwarted by consumers' perception

¹²⁹ See Resnikoff, *supra* note 99 (maintaining that consumers want access to the full catalog of available music and that they are willing to pay for it).

¹³⁰ Alexandra Osorio, *RealNetworks Boosts Revenues Considerably, Ups Subscribers*, DIGITAL MUSIC NEWS, October 30, 2007, <http://www.digitalmusicnews.com/stories/103007real>.

¹³¹ Press Release, RealNetworks, MTV Networks, RealNetworks and Verizon Wireless Join Forces to Offer a New Integrated Digital Music Experience (Aug. 21, 2007),

that they are not getting what they pay for (because DRM tethers their music to the service). Once the greater powers within the music industry accept this Music 2.0 model for content delivery and allow consumers to own their digital music outright, the tide will shift towards decreased illegal file-sharing and increased revenue through legal means.

ii. Change the attitude: be open

The success of the subscription model also depends on changing attitudes. The music industry has suffered from the popularity of digital music delivery because it has been resistant to change and unwilling to accept a new model.¹³² The RIAA lawsuits evidence the industry's attitude that digital users have become the enemy and its plan to engage in combat with the changing format for music consumption. Members of the music industry must be open to change and should embrace the passion that users exhibit when they voraciously consume digital music content.

One way to manifest a more open attitude is for subscription services to welcome the increasingly popular trends in open software development. For example, Google's Android platform for mobile devices will be a prime avenue for music delivery. Android is an open Linux platform which invites developers to create applications to run on compatible mobile devices.¹³³ Software designers are invited to participate in the "open

available at

http://www.realnworks.com/company/press/releases/2007/rhap_announcement.html.

¹³² See Hirschberg, *supra* note 110. Columbia's Rick Rubin admits that major labels are "stuck in the dark ages," that the paradigm is shifting, and that the model of the music business that Columbia currently subscribes to "is done." *Id.*

¹³³ Erick Schonfeld, *Breaking: Google Announces Android and Open Handset Alliance*, TECHCRUNCH, Nov. 5, 2007, <http://www.techcrunch.com/2007/11/05/breaking-google-announces-android-and-open-handset-alliance/>.

handset alliance project”¹³⁴ and digital music delivery will benefit by working in concert with these projects and not with the traditional proprietary attitude.

iii. Royalties and revenue

Rights holders are understandably concerned with how they will be adequately compensated when music is accessed through a subscription service. There are a variety of potential methods for collecting royalties and calculating disbursements. A subscription service model could successfully allot amassed revenue through any one of the following possibilities.

Performance rights organizations (PROs) such as ASCAP, BMI, and SESAC currently exist to collect performance rights royalties on behalf of rights holders.¹³⁵ PROs are in the business of profiting from and paying artists and publishers for the use of music. Therefore, PROs should be capable of monitoring online music delivery through subscription services and compensating rights holders accordingly.

Some proposals suggest a system to measure online music use by counting the number of times a song is either streamed or downloaded.¹³⁶ Every song would be marked with a unique digital identification number and then a central registry would track usage based on the embedded ID.¹³⁷ The shortcoming of this structure is that it involves DRM (to embed the identification number), could be hacked or altered by users, and will lack support from consumers because, as noted above, consumers want their music files DRM-free.

¹³⁴ What is Android?, Google.com, <http://code.google.com/android/what-is-android.html>.

¹³⁵ Royalties, Music Boot Camp, [http://musicbootcamp.com/royalties-ascap-bmi-sesac-socan/\(last visited date\)](http://musicbootcamp.com/royalties-ascap-bmi-sesac-socan/(last%20visited%20date))..

¹³⁶ Katherine L. McDaniel, *Accounting for Taste: An Analysis of Tax-and-Reward Alternative Compensation Schemes*, 9 TUL. J. TECH. & INTELL. PROP. 235, 254 (2007).

¹³⁷ *Id.* at 255 (citing WILLIAM W. FISHER III, PROMISES TO KEEP 203 (2004)).

An alternative model for calculating royalties could institute a monitoring system that tracks representative users' music consumption and aggregates data to divvy up royalties. This model would be based on the Nielsen television ratings system which collects viewing information to determine what programs television viewers are watching.¹³⁸ Data collecting agencies would monitor the streaming and downloads of representative subscription service users to model what music consumers were accessing and subsequently assist in allotting royalty payments to the appropriate parties.

Another option for computing royalties would require all subscription services to report their customers' aggregated use for disbursement to the appropriate parties. This raises some privacy concerns and would have to be orchestrated with care to protect user information. It might also require monitoring and coordination by a central agency.

There are many ways to determine usage and allocate revenue generated by music subscription services. Different services may institute different models or the major players in the music industry may join forces to choose a preferred path. Subscription services have great potential to allow for the collection of adequate royalties by rights holders.

iv. Alternative revenue streams

Although the subscription service will generally replace traditional CD sales, artists and labels will still have potential income streams from alternative methods of delivery. Some consumers will still want to own a physical product and will be willing to pay for the artwork and liner notes that accompany a traditional album. Artists and labels

¹³⁸ Collecting & Processing Data, Nielsen Media Research, <http://www.nielsenmedia.com/nc/portal/site/Public> (click Inside TV Ratings, then Ratings & Data, then Collecting & Processing the Data).

can offer CDs, box sets, and other products and continue to generate revenue through this medium.

Other consumers recognize the sonic shortcomings of standard digital formats (such as .mp3 and .aac)¹³⁹ and will pay for uncompressed digital files to maintain high music quality standards. Artists are already taking advantage of this profit stream by offering high quality downloads directly to the consumer.¹⁴⁰ Artists also sell their music on memory sticks or USB flash drives, allowing consumers to purchase a physical item that contains a high quality digital version of the music they desire.¹⁴¹

These alternative Music 2.0 revenue streams will allow artists and labels to continue to generate income from sales outside of the subscription service, supplementing their subscription service royalties. The subscription service does not have to be the sole way for consumers to access music but must be embraced throughout the music industry to transform the model, decrease illegal file-sharing, and ensure the viability of artists and rights holders in the future.

D. The Legal Framework

¹³⁹ Joel Selvin, *MP3 music - it's better than it sounds*, SFGATE.COM, Aug. 8. 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/08/DDEJR7KN11.DTL> (explaining that the compression involved in creating an .mp3 file greatly reduces the quality of the recording).

¹⁴⁰ See RADIOHEAD, *In Rainbows*, <http://www.inrainbows.com/Store/index2.html> (hugely successful band Radiohead offered its new album only through its website, either via download or by purchasing a discbox for later delivery); Saul Williams album produced by Trent Reznor, Free Download, JIVE NEWS, <http://www.jivemagazine.com/forum/showthread.php?t=17187> (poet, artist, and musician Saul Williams released his most recent album solely via digital download).

¹⁴¹ BOING BOING, <http://www.boingboing.net/2005/11/16/barenaked-ladies-rel.html> (the band Barenaked Ladies released their 2005 album on a USB flash drive which included video and audio clips).

A subscription service with the full support of music rights holders is inherently legal because it relies on voluntary licensing of the reproduction and performance rights to the music. Artists, labels, and publishing companies will consent to the use of the music and will profit therefrom. This will shift the music industry's stance from confrontational (suing P2P systems and users, protecting music with increasingly aggressive DRM) to accommodating (supplying a desired product to willing consumers).

As noted above, some infringement can still be expected by subscribers who turn around and distribute downloaded music they legally obtained.¹⁴² In the unlikely event that a rights holder granting rights to a subscription service sued the subscription service for contributory infringement, the subscription service could find protection under the staple article of commerce doctrine.¹⁴³ Subscription services would argue that any infringing use of the service is a minimal use, therefore protecting the viability of the model.

Subscription services are further protected by the safe harbor provisions of the DMCA.¹⁴⁴ The DMCA provides a safe harbor for the subscription service and the internet service provider in the event that subscription service subscribers illegally distribute materials accessed through the service. As long as the subscription services have the support and involvement of the rights holders there should be no legal barriers to the implementation of the system.

E. Comparisons to other proposals

¹⁴² See *supra* Part V.B.iii.

¹⁴³ See *Sony v. Universal*, 464 U.S. 417, 440-42 (1984), for a review of this doctrine.

¹⁴⁴ 17 U.S.C.A. § 512 (2007).

The downward spiral of music industry profits and the increase in anti-infringement litigation has prompted a number of Music 2.0 proposals for the future of music content delivery. The subscription service builds on some of these suggestions and leaves room for others while offering the most direct and efficient way to stem the current crisis.

i. Universal's Total Music

Universal Music Group CEO Doug Morris is reportedly spearheading a major label subscription service to compete with the industry-leading iTunes-iPod combo.¹⁴⁵ Morris has successfully enlisted the involvement of three of the four major labels (Universal, Sony BMG, and Warner) but Total Music exhibits the old-world thinking that continues to prevent the major labels from succeeding in the digital marketplace.

Morris' Total Music will almost certainly require some form of DRM and, more significantly, will come pre-installed on a device.¹⁴⁶ Hardware makers would pay a monthly subscription fee for each device sold and pass that cost on to consumers.¹⁴⁷ Consumers would have access to the major labels' catalogs through these devices.¹⁴⁸

There are numerous problems with the Total Music proposal. While major labels own almost 90 percent of the music sold in the U.S.,¹⁴⁹ any subscription service must offer the entire universe of available music in order to deter illegal file-sharing. Furthermore, tying the service to the device means that consumers will have to pay for

¹⁴⁵ Ronald Grover & Peter Burrows, *Universal Music Takes on iTunes*, BUSINESSWEEK, Oct. 22, 2007, available at http://www.businessweek.com/magazine/content/07_43/b4055048.htm?chan=search.

¹⁴⁶ Mnookin, *supra* note 113 (based on the author's in-depth interview with Morris).

¹⁴⁷ Grover & Burrows, *supra* note 145.

¹⁴⁸ *Id.*

¹⁴⁹ Mnookin, *supra* note 113; Grover & Burrows, *supra* note 145.

the service with each device they buy (mp3 player, cell phone, gaming system, etc.) which disproportionately benefits the labels at the expense of consumers. Finally, and significantly, continuing to include DRM will prevent full adoption of the service because, as noted above, consumers want to own their music outright.¹⁵⁰

Total Music has the right idea: offer consumers unlimited access to a vast catalog for a set fee.¹⁵¹ But Total Music's central purpose is to regain control over music content, not to forge a new model for allowing users to access music.¹⁵² A successful model must allow for the inclusion of the entire catalog of available music in a DRM-free format directly to consumers.

ii. Legislative proposals

As noted above, the legislative process is ill-equipped to keep pace with the advancement of technology.¹⁵³ The development legislation can involve drawn out negotiations producing results that are quickly out of date. Furthermore, it is difficult to draft laws with imbedded flexibility to adapt to unforeseen and unpredictable future changes. Finally, the halls of legislatures are filled with lobby groups whose financial might can overwhelm less organized and influential parties.¹⁵⁴

¹⁵⁰ Resnikoff, *supra* note 99.

¹⁵¹ See Mnookin, *supra* note 113.

¹⁵² K.C. Jones, *Universal's 'Total Music' Plan To Challenge Apple's iTunes*, INFORMATIONWEEK, Oct. 15, 2007, <http://www.informationweek.com/news/showArticle.jhtml?articleID=202402961> (stating that Total Music is an effort to shore up profits and regain control lost in the transition to the downloading model).

¹⁵³ See *supra* Part IV.A.

¹⁵⁴ See Litman, *supra* note 79 (citing the strong industry influence in the drafting and passage of the DMCA).

Respected voices discussing the future of copyright law have proposed altering the entire copyright system.¹⁵⁵ Some of these suggestions advocate opening access to all copyrightable works¹⁵⁶ while others create a new scheme of licenses with varying degrees of protection.¹⁵⁷ These proposals are not feasible solutions. Such a drastic overhaul of an entire national legal framework would require years (and perhaps decades) of debate. The current predicament requires a more immediate resolution that functions within the existing framework.

Less sweeping recommendations generally fail to address all the issues or lack a comprehensive solution. One suggestion to develop a new copyright infringement standard for secondary liability offers a practical and adequate set of elements for evaluating alleged infringement¹⁵⁸ but would fail to actually prevent or deter infringing acts. The RIAA's unsuccessful attempts to discourage downloading by bringing suits for infringement prove that illegal downloaders are undeterred by the threat of prosecution.¹⁵⁹

¹⁵⁵ See generally Creative Commons, <http://creativecommons.org> (Creative Commons is a revolutionary system allowing authors, scientists, artists, and educators to mark their creative work with the freedoms they want it to carry, essentially altering one's copyright from "all rights reserved" to "some rights reserved"); see What is Copyleft?, GNU Project, Free Software Foundation, <http://www.gnu.org/copyleft/copyleft.html> (Copyleft is a method for making a software program (or other work) free and requiring all derivatives works of the software to be free).

¹⁵⁶ What is Copyleft?, *supra* note 155.

¹⁵⁷ Choose a License, Creative Commons, <http://creativecommons.org/license>.

¹⁵⁸ Maxwell, *supra* note 20.

¹⁵⁹ Richard Menta, *RIAA Suits May Actually Promote File Sharing*, MP3NEWSWIRE.NET, May 3, 2005, <http://www.mp3newswire.net/stories/5002/advertise.html>.

The law has generally proven ineffective in addressing rampant online infringement.¹⁶⁰ Solutions should focus on compensating artists and rights holders by delivering content that consumers can access legally. Instead of changing the law to uphold the old model, the model should shift towards offering a content delivery system that functions within the current legal framework.

iii. Licensing Schemes

A successful Music 2.0 model for the future of online music delivery requires content owners to license their works. It is unfeasible for individual copyright holders to personally deliver their music to consumers and they must therefore license their works to a system with a variety of offerings. The subscription service intrinsically relies on content owners (particularly the majors) to license their wares in exchange for adequate compensation. A variety of licensing schemes have been proposed.

One article suggested a mandatory licensing system relying on a congressional commission to determine the license and requiring copyright holders to petition for their royalties.¹⁶¹ While it is certainly reasonable to expect Congress to take this step, major rights holders are not likely to relinquish the power to set the price for their future profits. The industry currently operates with a statutory license for the use of copyrighted musical

¹⁶⁰ See Thomas Mennecke, *RIAA's Grand Total: 10,037 - What are Your Odds?*, SLYCK, May 2, 2005, <http://www.slyck.com/news.php?story=769> (finding that it is more likely for the average person to die of external injuries – such as car accident, motorcycle accident, plane crash, murder, etc. – than for an illegal downloader to be sued by the RIAA).

¹⁶¹ Julie Zankel, *A Little Help with Sharing: A Mandatory Licensing Proposal to Resolve the Unanswered Questions Surrounding Peer-to-Peer Liability for Contributory Copyright Infringement in the Wake of Grokster*, 80 S. CAL. L. REV. 189, 215-16 (2006).

compositions on CDs, records, tapes, and certain digital configurations,¹⁶² but the proposed mandatory license would be on a much larger scale and could potentially generate much greater revenues.

The mandatory licensing system proposal also requires the content owner to petition for the royalty.¹⁶³ Copyright holders may reject this burden as an unreasonable expense. However, this does raise the issue of PROs responsible for collecting royalties on behalf of content owners.

As mentioned above, a licensing scheme could give rise to PROs managing applicable royalties.¹⁶⁴ Voluntary collective licensing, not mandatory licensing, is more likely to comport with music industry goals and the PROs could easily adapt their business to collect royalties generated through a subscription system.¹⁶⁵

iv. Levies, tariffs, and taxes

Imposing a levy, tariff, or tax is a reasonable way to generate revenue based on consumer behavior. Some proposals suggest implementing a levy on the hardware used to access digital music¹⁶⁶ and the bandwidth necessary to obtain it.¹⁶⁷ The “noncommercial use levy” would apply to any consumer product or service whose value is substantially enhanced by P2P file-sharing and then allow unrestricted P2P file-sharing in return.¹⁶⁸

¹⁶² See *supra* Part III.A. (describing mechanical licenses); Mechanical Licensing, Harry Fox Agency, <http://www.harryfox.com/public/licenseMechanical.jsp>.

¹⁶³ Zankel, *supra* note 161, at 216.

¹⁶⁴ See *supra* Part V.C.iii.

¹⁶⁵ Miller, *supra* note 15, at 324.

¹⁶⁶ Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 4 (2003).

¹⁶⁷ *Id.*; Miller, *supra* note 15, at 327.

¹⁶⁸ Netanel, *supra* note 166.

One shortcoming of this proposal is its indiscriminate application to users regardless of their innocence or guilt of copyright infringement. While it would feasibly raise revenue significant enough to offset the industry's losses from illegal file-sharing,¹⁶⁹ it would extract these proceeds from purchasers and users of computers whether they downloaded music or not. This inequitable expense is unjust and also unlikely to generate support from those who would be unfairly assessed a fee for an activity in which they did not participate.

The solution is not to set up a system which permits illegal acts and simply pays the victims through tax-generated revenue. It is preferable to give consumers a safe and legal way to access music which compensates rights holders. Most users will choose this option, resulting in a decrease in illegal file-sharing, an increase in revenue, and a Music 2.0 model for the music industry to continue to prosper in concert with emerging technology.

VI. CONCLUSION

Decreasing revenue and evolving consumer habits require a revision of the music industry's current business model. The industry has adapted to technological developments in the past (the player piano, cassette tapes, CDs) and retained its stature by reworking delivery systems and altering the framework for distributing music content to consumers. The development of digital music consumption mirrors historical changes but the industry relentlessly continues to resist the welcoming attitude towards change that eventually proved successful in the past.

¹⁶⁹ *Id.*

The wild success of Napster evidenced the public's voracious appetite for online music, yet the industry responded by posturing against this new form of music consumption (and a potential revenue stream). Rights holders have continued to use the law to lash out against any digital music delivery that does not comport with the old model. Although major labels have succeeded at silencing some P2P file-sharing applications and extracting penalties from individual users, consumer habits continue to demand a new system for acquiring music.

A subscription service offers the best option for the music industry to maintain its stature and continue to profit from end users' appetites. The success of subscription services (and the continued viability of the music industry) requires an evolved attitude toward music consumption and acceptance of a revised model. The future of music depends on adapting to a new business model that offers an attractive and legal avenue for users to obtain music according to their desires: offering all available music in a DRM-free format.

Clinging to outdated conceptions of entitlements and enforcing an obsolete model will not ultimately result in the survival of the music industry. The industry must embrace a model that encourages legal behavior and offers an attractive product. These are the parameters of Music 2.0.

**EMERGING CONTRACT BUYOUT CONFLICTS BETWEEN THE NBA AND EUROPEAN TEAMS
OVER ELITE INTERNATIONAL PLAYERS**

By Brandi Bennett - University of Denver, J.D. 2008

In 1993, when Croatian Toni Kukoc joined the Chicago Bulls three years after they made him the 29th pick in the National Basketball Association (“NBA”) draft, he became one of just five international players in the NBA.¹ Kukoc would go on to become a key figure in the Bulls’ second run of three championships and average 12.2 points and 4.4 rebounds during his career² before retiring in 2006.³

Entering the 2006-07 season, 83 players from 37 different countries were on opening day rosters in the NBA.⁴ No less than 12 foreign born players (an entire active roster) appeared on the combined rosters of the San Antonio Spurs and the Phoenix Suns in the NBA Western Conference Finals, highlighted by two-time league Most Valuable Player (“MVP”) Steve Nash (Canada), 2007 Sixth Man of the Year Leandro Barbosa (Brazil), and all-star Tony Parker (France).⁵ In the same season, Dallas’ Dirk Nowitzki became the first European to win the league MVP.⁶ Two years before, Nowitzki also became the first player who did not attend an American high school or college to be named All-NBA First Team.⁷

¹ *Lifting the Torch: German leads the global revolution*, NBA, May 26, 2005, http://www.nba.com/firsts/dirk_firsts_050526.html.

² *Id.*

³ *Toni Kukoc*, NBA, http://www.nba.com/playerfile/toni_kukoc/career_stats.html (last visited May 9, 2008).

⁴ Elizabeth Merrill, *Suns-Spurs series highlights NBA’s international scope*, ESPN, May 15, 2007, <http://sports.espn.go.com/espn/print?id=2871543&type=story>

⁵ *Id.*

⁶ *Dirk Nowitzki Wins 2006-07 MVP Award*, NBA.com, May 15, 2007, http://www.nba.com/news/dirkmvp_2007.html.

⁷ *Lifting the Torch: German leads the global revolution*, *supra* note 1.

Many basketball pundits credit the rise of the international presence in the NBA with the success of the Dream Team during the 1992 Barcelona Olympics.⁸ “That forever will be the focal point of where the popularity in the sport just hit a springboard and really took off,” said Terry Lyons, the NBA’s former vice president of international communications. “We ended up with just a lot of very, very good athletes picking up a basketball for the first time and then nature takes its course.”⁹

The international barrier was first broken in 1970 when the Atlanta Hawks drafted Mexico’s Manuel Raga and Italy’s Dino Meneghin in the 10th and 11th rounds respectively.¹⁰ Neither ever signed with the team, as the Hawks did not have the \$35,000 to buy them out of their contracts overseas.¹¹ Meneghin, who was voted into the Naismith Basketball Hall of Fame in 2003, went on to play 28 years in Italy and was named the greatest player in the history of international basketball 15 years later.¹²

Drafting an international player often comes with a host of problems. Players must acclimate themselves to a new culture and a new language while being immediately thrown into competition where a new style of basketball is being taught. Moreover, the coach has his own lingo that is not only different from the language the athlete speaks, but is also different from nearly every other coach and system in the league. But, not every problem manifests after the player has arrived in United States and suited up for his team for the first time. For many international athletes, getting to the NBA is an arduous route that first requires him to extricate himself from what is usually a long-term contract binding his

⁸ Elizabeth Merrill, *Suns-Spurs series highlights NBA’s international scope*, *supra* note 4.

⁹ *Id.*

¹⁰ *Lifting the Torch: German leads the global revolution*, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

basketball services to a professional team in Europe — and those buyouts often run into the millions of dollars.

Section I of this paper will discuss the NBA's current system for dealing with international contract buyouts for incoming athletes and identify problems as a result of the inadequate regulations governing such buyouts. Sections II and III will detail how the National Hockey League ("NHL") and Major League Baseball ("MLB") have addressed similar buyout situations as a result of the influxes of international players in their leagues. Finally, Section IV will compare those systems to the current NBA system and recommend the adoption of a transfer agreement between the NBA, the International Basketball Federation ("FIBA"), and the European leagues similar to the current agreement between the NHL, its international governing body, and the corresponding European signatories.

I. The Current Player Transfer System in the NBA

Contract buyouts for professional athletes seeking to join the NBA have gained attention in recent years because several high profile international prospects have been prevented from joining the NBA as a result of multimillion dollar buyouts in their contracts with European teams.¹³ Spaniard Juan Carlos Navarro made his debut in the NBA this season for the Memphis Grizzlies after finally negotiating a buyout with his European club, Winterthur FC Barcelona.¹⁴ Navarro was originally drafted by the Washington Wizards in

¹³ Chris Ekstrand, *The best is yet to come: NBA teams increasingly stash talent overseas*, SPORTS ILLUSTRATED, May 19, 2006,

http://sportsillustrated.cnn.com/2006/writers/chris_ekstrand/05/19/draft/index.html

¹⁴ Navarro was the 40th overall pick in 2002. *Id.*

2002.¹⁵ Washington later traded Navarro to Memphis in July 2007 because the team had exceeded the salary cap and could not afford to bring him over from his European club.¹⁶ Barcelona agreed to lower Navarro's buyout to \$2 million because of his many years of service with the team, but threatened to raise his buyout to \$14 million in his next contract if his draft rights were not traded so he could join the NBA for the 2007-08 season.¹⁷ A \$14 million buyout would have effectively prevented the 27-year-old Navarro from ever playing in the NBA.¹⁸

Similarly, the San Antonio Spurs traded the draft rights to Argentinean forward Luis Scola to the Houston Rockets prior to the 2007-08 season after holding his rights since the 2002 draft when they made him the 56th pick.¹⁹ The Spurs wanted to bring Scola over from Spain, but could not negotiate a buyout with Tau Ceramica, the European club that held his rights, because Tau demanded nearly \$15 million in exchange for releasing Scola from his contract.²⁰ He made his debut after paying Tau a reported \$3 million.²¹

Large buyouts have become a significant problem facing the best international draftees when they attempt to jump from the top European leagues to the NBA. This is a

¹⁵ Ivan Carter, *Wizards Deal Navarro for Grizzlies' Pick*, WASHINGTON POST (August 4, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080301961.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ivan Carter, *Wizards Deal Navarro for Grizzlies' Pick*, WASHINGTON POST (August 4, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/03/AR2007080301961.html>.

¹⁹ Johnny Ludden, *Spurs-Mavs notebook: Scola makes progress on buyout from Spanish team*, SAN ANTONIO EXPRESS-NEWS (May 14, 2006), available at <http://www.mysanantonio.com/sports/basketball/nba/spurs/stories/MYSA051406.14C.BKNspurs.notebook.892e582.html>.

²⁰ *Id.*

²¹ Johnathan Feigan, *Rockets in Position to sign Spanish-league Star*, HOUSTON CHRONICLE (July 13, 2007), available at <http://www.chron.com/disp/story.mpl/sports/bk/bkn/4965031.html>.

problem that will no doubt multiply in the next few years as more teams use the second round of the NBA draft to select inexperienced international talent. By choosing young, unproven international athletes, NBA franchises can “park” a prospect overseas to let them develop without having to use a roster spot on a player who will only sit on the bench for a few years until he is ready to contribute.²² “Instead of immediately signing a drafted player who ends up being cut or languishes on the bench without any playing opportunity, NBA teams can wait for the player to develop while playing meaningful minutes in a high-level European league like those in Spain, Italy, Greece and France.”²³ It is a low-risk maneuver because few second round picks actually make an opening day roster.²⁴ The best case scenario is to bring a player over after his current contract expires. However, if a player develops rapidly or a team needs the player, he may wish to join the NBA team that owns his rights and must negotiate a buyout with his current team before he can move to the NBA.

With buyouts reaching into the millions of dollars for the best players, the burden of the buyout is almost solely on the athlete. Under the NBA Collective Bargaining Agreement, a team may contribute only \$500,000 toward the buyout.²⁵ That multimillion

²² Chris Ekstrand, *supra* note 13.

²³ *Id.*

²⁴ Jonathan Watters, *The NBA's New CBA, the DL, the IL, and what it all means for the NCAA*, DRAFT EXPRESS, Nov. 21, 2005, available at <http://www.draftexpress.com/article/The-NBA-s-new-CBA,-the-DL,-the-IL,-and-what-it-all-means-for-the-NCAA-1127/>. According to Watters, selection in the second round has often been considered a “death knell” for an aspiring basketball player’s NBA career. However, he points out that the 18 of 20 2005 2nd round draft picks made NBA rosters the following season.

²⁵ 1999 National Basketball Players Association Collective Bargaining Agreement, art. VII, § 3(e)(1). Any amount in excess of \$500,000 paid or to be paid by or at the direction of any NBA Team to (i) any basketball team other than an NBA Team, or (ii) any other entity, organization, representative or person, for the purpose of inducing an international

dollar burden is working to keep some of the best international talent out of the league, but for now, the NBA has refused to consider it an NBA problem.²⁶ Rather, the NBA has maintained that the solution must come from the sport's international governing body, FIBA.²⁷

There are two major problems that are spurring the growth of contract buyouts that stem from a lack of cohesive regulation by FIBA, the NBA, or the European Leagues. The first problem, which will be addressed in Section A, is that there is no limit on the length of contracts athletes are allowed to sign in the European Leagues. The second problem, addressed in Section B, is FIBA's refusal to create a minimum age limit for professional athletes to sign a contract.

A. No Limit on Contract Length

The first major problem with the increasing size of buyouts stems from the FIBA's refusal to limit the length of contracts member organizations can sign with athletes.²⁸ "The problem is not the buyout; it's the length of the contract," agent Marc Cornstein says. "If you have somebody signed for six more years, how do you figure out what the buyout is? At what point is it negotiation? At what point is it extortion?"²⁹ Nothing in the current FIBA rules and regulations regulates the length of contracts athletes can sign with their

player (as defined in Article X, Section 1(c)) to enter into a Player Contract or in connection with securing the right to enter into a Player Contract with an international player shall be deemed Salary (in the form of a signing bonus) to the player.

²⁶ Sean Deveney, *Imports come with a price*, SPORTING NEWS, Oct. 6, 2003, available at http://findarticles.com/p/articles/mi_m1208/is_40_227/ai_108649712.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

clubs, leaving each league to come up with its own regulations.³⁰ Forced to compete with the NBA for international talent, European clubs have little incentive to limit the length of contracts or lower contract buyouts, and, therefore, risk losing the best players in their leagues without recompense.

B. No Minimum Age Limit

The second major problem with current international contracts is FIBA's inaction regarding minimum age limits. While the NBA has moved to a 19-year-old minimum age limit before its players can be eligible for the NBA draft,³¹ FIBA has done nothing to prevent member organizations from signing players at much younger ages.³² Serbian Darko Milicic, a 2003 NBA draft pick, was forced to pay his European team Hemofarm an eight-figure buyout over the first four years of his NBA career in order to secure his freedom from a 10-year contract he signed in 1999 at age 15.³³ Denver Nuggets center Nene narrowly dodged a similar situation as a teenager in Brazil when he decided at the last second not to sign a seven-year contract with a Spanish club.³⁴ "Obviously there is a problem when a 14-year-old signs a contract for 10 years," said former NBA deputy commissioner Russ Granik, who stepped down in 2006. "But there is nothing we can do. Perhaps FIBA can, or perhaps it is something that should be handled as a European legal

³⁰ See generally FIBA Internal Regulations, available at <http://www.fiba.com/pages/eng/fc/FIBA/ruleRegu/p/openNodeIDs/916/selNodeID/916/fibaRegu.html>.

³¹ Chad Ford, *Age minimum, bigger cap, shorter contracts*, ESPN, June 21, 2005, <http://sports.espn.go.com/nba/news/story?id=2091116>.

³² See generally FIBA Internal Regulations, *supra* note 30.

³³ Sean Deveney, *supra* note 26.

³⁴ *Id.*

issue. But we can't get involved in a worldwide lawsuit."³⁵ Former NBA player Maciej Lampe's agent Keith Kreiter also criticized FIBA's refusal to institute an age limit, saying "[m]ost of these kids are from hard backgrounds. You put a piece of paper in front of them and tell them to sign it, they're going to. And it holds up as a contract? That's ridiculous."³⁶

Longtime NBA sports writer Sean Deveney, however, places much of the burden on the NBA to create change, calling FIBA an "unwieldy bureaucracy not much concerned with policing its teams."³⁷ According to Deveney, the NBA has the money and influence to make FIBA institute an age limit, limit the length of contracts, and create a "sane buyout system for contracts worldwide[] to prevent teams from exploiting teenagers."³⁸

Regardless of who is at fault for the current system, or who is responsible for changing the system, the growth of international players and the parallel growth of their buyouts from European contracts has become a significant problem for the NBA. "This is the next big issue. Players are getting hurt by this, and eventually the league will get hurt by this, too. The writing is on the wall," Cornstein said.³⁹

Both the NHL and MLB have already reached agreements with foreign leagues to eliminate contractual difficulties when importing international players to their respective leagues. The following two sections of this paper will address the agreements each league has instituted.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

II. The International Ice Hockey Federation-NHL Player Transfer System

The NHL has long been at the forefront of the international player movement stage. Approximately 30 percent of the NHL's players come from Europe, with the NHL signing on average 45-60 players each year.⁴⁰ The proliferation of European players in the NHL led them to negotiate a "Player Transfer Agreement" ("PTA") with the International Ice Hockey Federation ("IIHF") in 1995 that allowed European hockey players to transfer to the NHL in exchange for monetary concessions by the NHL.⁴¹ Under the current agreement, which runs from 2007-2011, players under contract may leave their European or NHL team and join a team in the other league.⁴² Six countries — the Czech Republic, Finland, Sweden, Germany, Slovakia, and Switzerland — signed the agreement with the NHL and the IIHF.⁴³

The following section will discuss the details of the current PTA. Section B will address the Russian Hockey Federation's ("RHF") challenges of the NHL's recruitment of several high-profile Russian hockey players, most notably Evgeni Malkin.

A. The 2007-2011 Player Transfer Agreement

The 2007-2011 PTA requires undrafted players be signed by June 15 and drafted players to be signed by June 1 each year.⁴⁴ A player that has been selected in the NHL draft

⁴⁰ *Russia refuses to sign transfer agreement with NHL*, USA TODAY, May 9, 2007, http://www.usatoday.com/sports/hockey/nhl/2007-05-09-russia-transfer-agreement_N.htm.

⁴¹ *Six countries ratify IIHF agreement*, TSN.CA, July 13, 2007, http://www.tsn.ca/news_story.asp?id=213424.

⁴² If a player is drafted in the opposite league, he must join the team that holds his rights. If he is not drafted in the other league, then he may sign with any team. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

may be signed until July 15 or August 15 in the year they are drafted.⁴⁵ Free agents may be signed by an NHL team at any time.⁴⁶ In return, the NHL pays a \$9 million development fee to IIHF, who distributes the fee to member organizations, for the first 45 players to leave Europe for the NHL.⁴⁷ If more than 45 IIHF players are signed, the NHL pays an additional \$200,000 for each player.⁴⁸ If an NHL draftee is signed after July 15 of the year he was drafted in, the NHL must also pay an additional \$100,000.⁴⁹ The NHL also compensates the IIHF (and, by extension, the European leagues) for players who are signed by NHL clubs but who are not on the team's roster for at least 30 games their first season.⁵⁰

The NHL loses little in signing the agreement, which contains a reciprocal offer for NHL players to transfer to IIHF leagues, because it is “considered the top hockey league in the world.”⁵¹ In exchange, NHL teams are granted an exclusive window in which they can sign their European draft picks away from their IIHF teams.⁵² Unfortunately for many players who elect to join the NHL, only 48 of 161 players that left Europe to play in North America in 2001-2003 made it to the NHL.⁵³ Many of those players “toil in the junior leagues” or return home, “[o]ften as lesser players.”⁵⁴

B. Russia's Challenge of NHL Recruitment of Russian Prospects

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jenny Wiedeke, *Many Slovaks and Czechs go west—for better and worse*, INTERNATIONAL ICE HOCKEY FEDERATION (2001), available at http://db2.iihf.com/cgi-bin/db2www.exe/news/news.d2w/archive_2001.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

The PTA between IIHF member teams and the NHL has been challenged by the RHF, which refused to sign the previous 2005-07 PTA or the current PTA.⁵⁵ The RHF has been critical of the NHL's efforts to sign Russian hockey players away from its own teams.⁵⁶ "They all like to talk about democracy, the American way, and then they shamelessly steal our best players," said Gennady Velichkin, the general director of Metallurg Magnitogorsk of the RHF.⁵⁷ Metallurg sued the NHL and the Pittsburgh Penguins in 2006 after Evgeni Malkin fled his contract with Metallurg and sought to join the Penguins.⁵⁸ Malkin was drafted by Pittsburgh in the first round of the 2004 NHL draft and remained with Metallurg for the following season, but when Malkin tried to leave to join the Penguins, the RHF demanded a substantial sum to allow him to transfer because they had not signed the transfer agreement.⁵⁹ The NHL refused, saying they didn't owe RHF anything because the Russian federation had not signed a transfer agreement.⁶⁰ Malkin subsequently signed a new one-year contract with Metallurg but left to join the Penguins a few days later after exercising a clause in Russian labor law that allowed employees to terminate their contracts with two weeks written notice.⁶¹ Malkin claimed that the new contract had been signed under duress.⁶²

⁵⁵ Jeff Klein and Karl-Eric Reif, *Malkin's talent is not in dispute, but his contract is*, NEW YORK TIMES (Nov. 12, 2006), available at <http://www.iht.com/articles/2006/11/12/sports/nhl.php>

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Jason Cato and Karen Price, *Arbitration committee rules against Malkin*, PITTSBURGH TRIBUNE-REVIEW (Sept. 16, 2006), available at http://www.pittsburghlive.com/x/pittsburghtrib/s_470833.html.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

A Russian tribunal later ruled against Malkin because professional athletes are subject to different labor laws in Russia. Under Russian Federal Sports Law No. 80-FZ, “athletes may only transfer to another team, either in Russia or abroad, ‘after the expiration of the term of the Sports Activities Contract and fulfillment of all obligations stipulated in such contract.’”⁶³ The U.S. District Court for the Southern District of New York, however, denied Metallurg’s request for an injunction to keep Malkin from playing in the NHL and later dismissed Metallurg’s suit for compensation, holding “the team had not established it had suffered ‘irreparable harm’ due to Malkin's departure.”⁶⁴

The NHL hopes that the Malkin decision, as well as similar holdings involving Washington Capitals star Alexander Ovechkin,⁶⁵ Edmonton’s Alexei Mikhonov, and Calgary’s Andrei Taratukhin, prompts the RHF to join other IIHF countries as signatories of the Player Transfer Agreement.⁶⁶ Said NHL Deputy Commissioner Bill Daly,

We are hopeful that today's decision will persuade the plaintiff Russian clubs to discontinue their strategy of litigation and to join with the Russian Ice Hockey Federation, through their representative, the International Ice Hockey Federation, in good faith negotiations intended to facilitate Russia's participation in the global agreement that governs European players' transfer to the NHL.⁶⁷

Like both the NBA and the NHL, MLB has also come under scrutiny for its methods of bringing international players into the fold. The following section addresses the

⁶³ *Id.*

⁶⁴ Metallurg had to sue in the U.S. District Courts to get jurisdiction because the Penguins operate in the U.S. *U.S. District Court throws out injunction against Malkin*, YAHOO! SPORTS, Feb. 1, 2007,

<http://sports.yahoo.com/nhl/news?slug=penguinsmalkin&prov=st&type=lgns>.

⁶⁵ *Moscow Dynamo v. Ovechkin*, 412 F.Supp. 2d 24 (D.D.C. Jan. 18, 2006).

⁶⁶ *Legal challenge against Malkin fails*, TSN.CA, Nov. 15, 2006,

http://www.tsn.ca/nhl/news_story/?ID=184456&hubname=nhl

⁶⁷ *Id.*

posting agreement between MLB and Japan's Nippon Professional Baseball League ("NPB").⁶⁸

III. Major League Baseball-Nippon Professional Baseball's Posting System

In 2006, the Boston Red Sox won the exclusive right to negotiate with Japanese star pitcher Daisuke Matsuzaka after offering \$51.1 million in a sealed bid via MLB and NPB's "posting system."⁶⁹ That bid only granted the Red Sox the right to negotiate with Matsuzaka; it took another \$52 million to earn Matsuzaka's services for six years.⁷⁰

The first part of this section will address how the current posting system operates. The second part will look at several of the problems with the posting system, including possible antitrust challenges.

A. How the Posting System Operates

In MLB, Japanese prospects are brought to the United States via NPB's posting system. The system, implemented to prevent Japanese teams from losing young star players to MLB without compensation, applies only to athletes currently under contract with a Japanese team (regardless of nationality).⁷¹ The posting system does not apply to free agents or players with 10 or more years of service in the Japanese professional leagues.⁷²

⁶⁸ This paper will not address any agreements between MLB and any other foreign leagues or associations.

⁶⁹ *Matsuzaka, Red Sox reach agreement on six-year deal*, ESPN, Feb. 23, 2007, <http://sports.espn.go.com/mlb/news/story?id=2696321>.

⁷⁰ Incentives could bring the total of Matsuzaka's contract to \$60 million over six years. *Id.*

⁷¹ Posting System, BASEBALL REFERENCE, http://www.baseball-reference.com/bullpen/Posting_System (last visited Oct. 23, 2007).

⁷² *Id.*

Unlike the NHL-IIHF Player Transfer Agreement, the posting system is not reciprocal – it does not allow for the transfer of players from MLB to Japan.⁷³ Before a player can be posted – made available – he and his Japanese team must come to a mutual agreement to post the player.⁷⁴ Once a player is posted — and he must be posted between November 1 and March 1 — his team notifies the league office, which then notifies the MLB Commissioners’ Office.⁷⁵ The Commissioner’s Office holds a four-day silent auction during which teams submit sealed bids for the exclusive rights to negotiate with the player for his services.⁷⁶ The Commissioner’s Office subsequently notifies the Japanese team of the highest bid, which may then choose whether to accept or decline it within four days.⁷⁷ If the bid is accepted, the MLB team and the player then have 30 days to come to terms on a contract.⁷⁸ Only if the player signs a contract with the MLB team does the Japanese team receive the bid amount as a transfer fee.⁷⁹ If the player and the MLB team are unable to agree on a contract, the MLB team retains the fee and the player returns to Japan, ineligible to re-enter the posting system until the following year.⁸⁰

Japan’s posting system was created in 1999 after extensive negotiation between MLB and NPB in response to former MLB pitcher Hideo Nomo’s defection from Japan in 1995.⁸¹ Following the 1994 season, Nomo and his Japanese club, the Kintetsu Buffaloes, engaged in a contract dispute when Nomo requested agent representation and a multi-year

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

contract.⁸² Instead of negotiating with the Buffaloes, Nomo “exploited a loophole agreement between Japanese baseball and the major leagues: if a player retired, he was free to play for whomever he wished.”⁸³ Nomo retired from Japanese baseball only to join MLB and win the 1995 National League Rookie of the Year award for the Los Angeles Dodgers.⁸⁴ MLB sportswriter Tom Singer called the posting agreement a “more equitable arrangement than in pre-posting days when, on the rare occasions Japanese talent did hit our shores, someone was sure to get burned.”⁸⁵

The posting system first gained attention in November 2000 when the Orix Blue Wave posted MLB all-star and 2001 American League Most Valuable Player Ichiro Suzuki.⁸⁶ The Seattle Mariners won the rights to negotiate with Suzuki by submitting a \$13.1 million bid.⁸⁷ Six years later, Matsuzaka’s bid was nearly four times that amount.

B. Problems with the Posting System

With the number of Japanese players in the major leagues increasing from 9 in 2006 to 13 on opening day rosters in 2007, the posting system has faced increased public attention and criticism.⁸⁸ Negotiations between the Red Sox and Matsuzaka went down to the wire with an accord being reached just hours before the expiration of the Red Sox’s 30-

⁸² S.L. Price, *The Ichiro Paradox*, TIME, July 8, 2008, available at <http://www.time.com/time/magazine/article/0,9171,300682-2,00.html>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Tom Singer, *Matsuzaka posting system’s latest gem: relationship between MLB, Japan League long and storied*, MLB.com, Nov. 14, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20061114&content_id=1740635&vkey=hotstove2006&fext=.jsp.

⁸⁶ S.L. Price, *supra* note 81.

⁸⁷ Posting System, *supra* note 71.

⁸⁸ Press Release, MLB, Record 246 players born outside the U.S. (April 3, 2007) (on file with author).

day negotiating window.⁸⁹ Matsuzaka's agent, Scott Boras, reportedly considered challenging the legality of the posting system in an American court if a deal could not be reached with the Red Sox.⁹⁰ Boras called the posting system "flawed," saying, "[t]he greater the player, the greater the penalty, because the more a club values the player, the more they pay for the post."⁹¹ Assuming Boras could find jurisdiction in American courts and enforce any decision in Japan, he could argue that the posting system violates federal antitrust laws as an unfair restraint of trade because it would inhibit an influx of Japanese talent to the major leagues.⁹² While baseball has traditionally enjoyed a federal antitrust exemption, "[i]n 1998, Congress did revoke the exemption to allow MLB players to sue over agreements 'directly relating to or affecting employment of major league baseball players.'"⁹³ That argument is unlikely to succeed, however, because it comes with a whole host of problems, not least of which is whether Matsuzaka is even a major league baseball player.

Antitrust questions are not the only problems with the Japanese posting system. First, because it is a blind bid, teams are bidding against themselves to earn the right to negotiate. Second, the system encourages Japanese clubs to collude with their players: a team may induce a player to accept a bid by a MLB team in exchange for a portion of the transfer fee. Finally, the system incentivizes MLB teams to offer exorbitant bids to outbid their opponents and then lowball the Japanese player as a means of keeping him away from

⁸⁹ *Matsuzaka, Red Sox reach agreement on six-year deal*, *supra* note 69.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Jeffrey Standen, *Is Posting of Japanese Baseball Players Legal?* THE SPORTS LAW PROFESSOR, Dec. 12, 2006, <http://thesportslawprofessor.blogspot.com/2006/12/is-posting-of-japanese-baseball.html>

⁹³ *Id.*

the competition. If the bid is accepted, the MLB team controls the exclusive rights to negotiate with that player for an entire year; if negotiations break down, the player is prohibited from entering the posting system again until the following year and the MLB team gets its bid back.⁹⁴ So, at worst, a team can keep a player from a hated rival for a year. “[B]ecause of the anonymous bidding system, clubs can offer over-large, non-serious bids each auction with apparent impunity.”⁹⁵

IV. The Solution to the Emerging NBA Buyout Conflict

The value of sports teams and their players are rapidly rising. On average, an NBA franchise was worth \$353 million in 2007, a nine percent increase from the previous year.⁹⁶ In 1983, the average player salary was \$275,000; since then, salaries have grown by 806 percent, reaching \$5.2 million in 2006-07.⁹⁷ Clearly, sports teams and their players are becoming more valuable assets each year. With NBA teams selecting foreign players more often in the second round and allowing them to remain overseas for a few years before bringing them over, European teams have an increasing incentive to lock up those same players to long-term contracts during their teens and attach huge buyout provisions; after all, the European teams are in the same business as the NBA – making money. European clubs have no reason, without pressure from FIBA or their own legal systems, to allow NBA teams to enter their primary market and snap up their best players. Further, the

⁹⁴ See *supra* note 80.

⁹⁵ Jeffrey Standen, *Posting, Japanese Style*, THE SPORTS LAW PROFESSOR, Nov. 12, 2006, <http://thesportslawprofessor.blogspot.com/2006/11/posting-japanese-style.html>.

⁹⁶ Kurt Badenhausen, *It's how you play the game*, FORBES (Feb. 12, 2007), available at <http://members.forbes.com/forbes/2007/0212/084.html>.

⁹⁷ Darren Rovell, *NBA refs: Pay Raise Might Help Integrity of Game*, CNBC, July 20, 2007, <http://www.cnbc.com/id/19876494>.

European courts have no reason whatsoever to act to protect NBA interests. Moreover, one can argue that the courts have no reason to adopt a minimum age for players to sign contracts because a teenager handed a multimillion dollar contract is not exactly being harmed. Conversely, one could argue that there is sufficient harm as a byproduct of the length of the contract to prompt the European courts to act.

Since the European courts are unlikely to act on behalf of the NBA, the better solution would be for the NBA to use its influence with FIBA to force the organization to adopt an age limit, a contract-length limit, a buyout ceiling, or some combination thereof. What could result from the current lack of FIBA legislation is a spiraling system of ever-growing buyout provisions similar to what appears to be the beginning of a period of exponential growth in posting fees in MLB.

The NBA should also exert its influence on FIBA to negotiate a player transfer agreement more akin to the NHL's agreement with the IIHF than MLB's Japanese posting system. If the NBA adopted a posting system like MLB's it would invite a host of problems whereby teams with more money than their rivals could outbid opponents for the top talent, seriously damaging the competitive balance among the teams. Moreover, the posting system, as it stands, has no checks to prevent the exponential growth of posting fees. In less than 10 years, posting fees have grown to \$50 million. In another 10 years, with deep pocket teams like the New York Yankees and Boston Red Sox, posting fees could reach \$100 million just for the right to *talk* to a player if MLB does not force some checks into the system.

On the other hand, the NBA would not hurt itself by entering into a player transfer agreement like the NHL's that restricts the number of players who can join the NBA from

European teams. In exchange for a few million dollars each year, players signed by a European team would be free to negotiate a contract with the team that owns their rights during a prescribed negotiation window each year. Likewise, during that time, European franchises would be free to negotiate with NBA players to join their leagues. Offering the European leagues reciprocity would likely cause no harm to the NBA as the NBA is acknowledged as the best basketball league in the world. Not only is the competition the best in the NBA, but the salaries are the highest. Only marginal players, players on a team who routinely record “DNP-CDs,” would be tempted to travel overseas for increased playing time, and even those players would be eager to return to the NBA, perhaps as better players for having received more playing time.⁹⁸ In exchange, the NBA would get the rights to negotiate and claim the top foreign talent each year without having to worry about complicated buyout provisions, long-term contracts, and their young draft picks being locked up in their teens as assets to use in a fundraising effort by European teams at the expense of the NBA team that owns the player’s rights.

⁹⁸ Did not play—coach’s decision.

MUSIC LAWYERS TAKING THE RAP¹: THE MUSICALIZATION² OF LEGAL ETHICS

By Ashley Hollan - University of Denver, J.D. 2008

"The music business is a cruel and shallow money trench, a long plastic hallway where thieves and pimps run free, and good men die like dogs. There's also a negative side."

♪ *Hunter S. Thompson, Rolling Stone*

I. Introduction

a. The Nature of the Business

"I wish there had been a music business 101 course I could have taken."

♪ *Kurt Cobain, Nirvana*

The music industry is a stage notorious for its glamour, impropriety and sensationalism—upon which key players follow rules which at times appear to apply only to the “fast-paced, highly competitive and intense” music business.³ “It is commonly described as ‘incestuous’ with a premium attached to ‘who you know’ as much as ‘what you know.’”⁴ Lawyers who dare enter the music realm often find themselves engaging in practices divergent from the traditional roles of attorneys⁵ and are faced with ethical dilemmas unlike those encountered by attorneys in more traditional practice areas. Music lawyers represent clients in a vast array of matters including drafting and negotiating recording contracts, music publishing agreements, endorsement and sponsorship deals, touring and live performances, agreements among members of bands, licensing

¹ The term “rap” is a slang term defined in this context as “legal responsibility for a criminal act.” BLACK’S LAW DICTIONARY 591 (3rd Pocket ed. 1996).

² The term “musicalization” means, “to set to music.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 767 (10th ed. 1995).

³ Kenneth J. Abdo & Jack. P. Sahl, *Entertainment Law Ethics*, Mar. 15, 2001, available at http://www.lommen.com/news_detail.asp?RecordNumber=125.

⁴ *Id.*

⁵ *Id.*

agreements, distribution agreements and agreements with agents and managers. Conflicts of interest lurk around every corner in this small community of actors where relationships and connections prove paramount.⁶ The intimate nature of the industry presents attorneys with ethical dilemmas at every impasse, particularly due to the prevalence of conflicts of interest among clients and potential clients.⁷ In a world where “most of the big deals closed in recent years have been negotiated by a small clique of law firms that frequently represent both artists and the companies that market their music—occasionally at the same time,”⁸ a music lawyer may be prized for his ability to create “package deals” by uniting his connections for success. An entertainment lawyer who represents a powerful producer and also represents a successful musician may create a package deal by bringing his clients together, thereby ensuring a successful and financially beneficial outcome for all involved.⁹ While package deals may entice clients and attorneys alike, serious conflicts of interest arise when an attorney represents adverse clients. This is merely one of the many ethical conflicts that plague the music business.¹⁰

b. Raising the Bar: Lawyers Under Scrutiny

“A lawyer should avoid even the appearance of professional impropriety.”
♪ MODEL CODE OF PROF’L RESPONSIBILITY Canon 9

Lawyers, unlike other players in the music business, are subjected to scrutiny ad infinitum regarding their qualifications, character and reputation. Requisite educational

⁶ SHERRI BURR & WILLIAM HENSLEE, ENTERTAINMENT LAW: CASES AND MATERIALS ON FILM, TELEVISION AND MUSIC 683 (Thomson/West 2004).

⁷ Edwin F. McPherson, *Conflicts in the Entertainment Industry?...Not!*, 10 ENT. & SPORTS L. 993, available at http://www.m-klaw.com/articles/article_esl93.html.

⁸ Chuck Philips, *Joel Lawsuit an ‘Alarm Bell’ for Music Industry Pop: The suit against attorney Allen Grubman highlights an ethical dilemma: Can a lawyer represent a pop client as well as the firm that markets the music?* L.A. TIMES, Oct. 14, 1992 at 1.

⁹ McPherson, *supra* note 7.

¹⁰ Burr, *supra* note 6, at 683.

standards which vary by state serve as the first hurdles in a lifelong steeplechase.

Attorneys are expected to first obtain undergraduate degrees followed by matriculation to law school to earn Juris Doctor degrees. Finally, prospective attorneys must pass a state-administered bar exam unique to each jurisdiction. Before state bar admission, an applicant's entire background is reviewed and his moral fitness evaluated to determine the applicant's character. For example, "in addition to passing the required examination, applicants seeking admission to practice law in California must file an Application for Determination of Moral Character."¹¹

Once an applicant is licensed by a particular state to practice law, the attorney's behavior will continue to face relentless scrutiny. Each state has adopted and codified ethical guidelines prescribing appropriate behavior for attorneys practicing within the jurisdiction. If an attorney fails to comply with the ethical guidelines, his conduct may subject him to review by the state bar in addition to liability incurred regarding civil claims. Mere compliance with the ethical provisions may not protect an attorney from state bar review; many state bars reserve the authority to subject attorneys to physical and mental health evaluations. In California, "a member of the State Bar is subject to a physical or mental examination if his or her physical or mental condition is at issue in an investigation or disciplinary proceeding."¹²

An attorney's reputation both in the legal community and among clients plays a determinant role regarding the attorney's continued success. Clients often select attorneys through referrals and recommendations from past clients. The music business

¹¹ The State Bar of California Moral Character Determination, <http://calbar.xap.com/applications/CalBar/info/moral.html>.

¹² California Senate Bill 479 (Burton), *Legislative Counsel's Digest*, (February 22, 2001).

epitomizes a field where reputation may serve as one's most valuable asset or most detrimental liability.

Legal malpractice claims have scourged both lawyers and legal insurers for decades.¹³ The perceived aggrandizement in legal malpractice claims may evidence an increase in attorney culpability for negligent conduct or a diminution in the reluctance of dissatisfied clients to file malpractice claims.¹⁴ The ramifications of attorney misconduct are felt throughout a profession which is often characterized by the general public in a negative light. Public policy concerns arise from the potential for serious harms to clients resulting from inappropriate conduct exhibited by attorneys entrusted with their representations. Due to the grave implications of attorney misconduct, "legal malpractice should not be viewed as simply a business risk to be allocated between the lawyer and his client or spread among a wider group by means of insurance. Malpractice has harmful effects on the legal system itself, and thus should be a subject of more general concern."¹⁵

Participants in the music industry interact on a public stage where media coverage ensures that gossip is rampant, controversies are spotlighted and indiscretions are celebrated. With such public focus on the industry, any attorney-client conflicts are certain to command the attention of the ravenous audience, poised to feed upon the failures of others while laudable acts of music lawyers rarely make headlines. The ramifications of attorney misconduct in the music industry threaten further detriment to the public perception of lawyers and foster mistrust of those sworn to uphold the law.

¹³ *Improving Information on Legal Malpractice*, 82 YALE L.J. 590 (1973).

¹⁴ *Id.*

¹⁵ *Id.*

II. Key Players in the Music Business—Lawyers, Agents & Managers

a. The Role of the Music Lawyer & Rules of Professional Conduct

“You’re a local band until you get a record contract, then all of a sudden Bruce Springsteen is your competition.”

♪ *Sammy Llana, The BoDeans*

Music lawyers serve their clients in myriad capacities, frequently extending beyond the legal context, into the assumption of multitudinous non-legal roles. Opportunities for legal employment in the music industry may arise in-house, representing record and music publishing companies for whom attorneys are hired to travail, often performing a variety of non-legal, business oriented roles in addition to legal duties.¹⁶ As “every band needs a music lawyer to help the band get the best record and music publishing deals possible,”¹⁷ attorneys who choose to forego in-house employment and instead represent musicians often procure and draft contracts for the artists. In addition to drafting and negotiating recording and publishing deals, music lawyers are also charged with the creation of endorsement and sponsorship deals, agreements pertaining to touring and live performances, contracts among musicians, licensing agreements, distribution agreements and agreements with agents or managers. Thus, the financial success as well as the dissemination of the musician’s material to the public often hinge upon the musician’s critical initial selection of a lawyer.¹⁸

In some situations, the music lawyer may serve roles resembling those of agents and managers, breeding serious complications for attorneys required to act within the confines of ethically permissible conduct for lawyers. This presents a significantly higher benchmark than the limited standards imposed upon businesspeople, agents,

¹⁶ Burr, *supra* note 6, at 691.

¹⁷ *Id.* at 682.

¹⁸ *Id.* at 683.

managers or fans. Even when acting in non-legal capacities, lawyers who act as agents or managers are still required to comply with the rules of professional conduct for attorneys. The state-specific ethical standards are patterned after model rules and codes promulgated by the American Bar Association.

Although agents and managers may have professional standards imposed by their respective jurisdictions, none are as stringent as those pertaining to attorney conduct. For example, a member of the California State bar is required by law “to comply with certain requirements and rules of professional conduct in order to avoid being subject to disciplinary action by the Board of Governors of the State Bar of California.”¹⁹ This duty exists regardless of which “hat” the attorney dons in a specific situation; he remains a representative of the bar and the legal community in all roles.

b. The Role of the Agent & Mandatory Licensing Requirements

"Being a manager or agent is similar to renting an apartment. Having a record company is like owning a home."

♪ *Rob Kahane, Trauma Records*

According to Black’s Law Dictionary, the term “agency” is defined as “a fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions.”²⁰ In the music business, agents serve the primary function of procuring employment or professional engagements for musicians. Agents are often charged with the marketing and promotion of musicians they represent. Essentially, agents are salespeople who sell their clients’ talents to the consuming public. While

¹⁹ *Supra* note 12.

²⁰ *Supra* note 1, at 26.

agents are not subject to a professional code of ethics akin to that imposed upon attorneys, agents are often required to comply with various procedural requirements which vary by jurisdiction. Any attorney who acts in the capacity of an agent may be subject to licensing requirements and potentially liable for failing to procure such licenses.

The California Labor Act states, “[N]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner.”²¹ According to the Act, the term “talent agency” includes the following:

*“a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists except that the activities of procuring, offering, or promising to procure contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.”*²²

To obtain a talent agency license in California, applicants must file a written application accompanied by fingerprints and affidavits from “reputable residents” to serve as references regarding the applicant’s good moral character and reputation for fair dealing.²³ Although these standards are considerably less stringent than the ethical guidelines for attorneys practicing in California, talent agents are granted licenses only if they exhibit upstanding moral character and a reputation for fair dealing. To ensure fair and honest practices once granted agencies acquire licenses, the California Labor Code requires that all talent agencies submit any standard contract forms that they plan to use

²¹ CAL. LAB. CODE § 1700.5 (2008).

²² CAL. LAB. CODE § 1700.4 (2008).

²³ CAL. LAB. CODE § 1700.6 (2008).

to the Labor Commissioner for review. Furthermore, talent agencies are required to file fee schedules and maintain detailed records of all funds received on behalf of their clients.²⁴

New York has similar requirements for agents codified in the New York General Business Law statutes which state, “no person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefore as provided in this article.”²⁵ The licensing provisions apply to employment agencies including:

“any person who, for a fee, renders vocational guidance or counseling services and who directly or indirectly: 1) procures or attempts to procure or represents that he can procure employment or engagements for persons seeking employment or engagements; 2) represents that he has access, or has the capacity to gain access, to jobs not otherwise available to those not purchasing his services; or 3) provides information or service of any kind purporting to promote, lead to or result in employment for the applicant with any employer other than himself.”²⁶

The New York statutes specifically address agents in the art and entertainment realms, defining a “theatrical employment agency” to include *“any person... who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions or performances.”²⁷* Managers are not subject to the New York licensing requirements

²⁴ CAL. LAB. CODE § 1700.23-§ 1700.25 (2008).

²⁵ N.Y. GEN. BUS. LAW § 172 (2008).

²⁶ N.Y. GEN. BUS. LAW § 171(2)(c) (2008).

²⁷ N.Y. GEN. BUS. LAW § 171(8) (2008).

which explicitly exempt “the business of managing such entertainments...where such business only incidentally involves the seeking of employment therefore.”²⁸ According to New York case law, without proof of a proper license, an agency cannot prevail in a suit seeking compensation for services rendered to an artist.²⁹

Punishment for failure to obtain a license differentiates the New York licensing standards from those in California. In New York, any person required to obtain a license who fails to do so “shall be guilty of a misdemeanor” and subsequently fined up to \$1,000, sentenced to imprisonment up to one year or both.³⁰ Furthermore, the inclusion of mere dicta in a management contract classifying acts to secure employment on behalf of an artist is incidental to the underlying agreement and is not conclusive to establish exemptions from licensing requirements. Courts will look to the specific facts in relation to a challenged document.³¹

c. The Role of the Manager and Permissible Acts Sans Licensure

“I think the most poetic way of putting it is that when I got them to where they wanted to be, the air became rarified, they became deified, and I became nullified.”

♪ *Jay Bernstein, Hollywood Manager*³²

There are few concrete requirements for managers who do not act as agents or attorneys. The roles of managers vary significantly according to the specific needs of the artists they manage.³³ While some artists are highly self-sufficient in business and self-

²⁸ *Id.*

²⁹ *Meyers v. Walton*, 135 N.Y.S. 574 (1912).

³⁰ N.Y. GEN. BUS. LAW § 190 (2008).

³¹ *Farnum v. O’Neill*, 252 N.Y.S. 900 (1931).

³² Hollywood producer, publicist and manager Jay Bernstein, commenting on his career as a celebrity representative. S.F. CHRON., Nov. 23, 1989, at A8, *reprinted in* ROBERT FREMLIN & MICHAEL LANDAU, ENTERTAINMENT LAW 1218 (Thomson West 1995) (2006).

³³ *Croce v. Kurnit*, 565 F.Supp. 884, 893 (1982).

promotion with minimal exigency for management contribution,³⁴ other musicians “seek to concentrate solely on their artistic efforts”³⁵ and demand significant management benefactions. In California, unlike talent agents who must apply for licenses, personal managers may work in conjunction with talent agencies to negotiate employment contracts for artists without obtaining licenses.³⁶ Furthermore, the California Labor Code exempts from the licensing requirements activities directed at procuring recording contracts.³⁷ This exemption signifies a legislative acknowledgement that “entertainment business artists usually hire personal managers to obtain recording contracts and not talent agents, who ordinarily handle booking tours, club dates and other personal appearance employment.”³⁸ Regardless, without additional checks and balances for managers, there is increased likelihood of unethical behaviors creeping into management practices. Attorneys who serve management roles must exercise diligence to support clients only through management practices consistent with the applicable standards of professional responsibility for attorneys.

III. The Attorney-Client Relationship

a. Fiduciary Nature of the Attorney-Client Relationship

The relationship between an attorney and his clients is that of a fiduciary. Largely a result of public policy concerns for the protection of legally uneducated clients reliant upon their attorneys, this fiduciary duty binds attorneys to act in the best interest of their

³⁴ *Id.*

³⁵ *Id.*

³⁶ Fremlin, *supra* note 32.

³⁷ *Id.* at 1220.

³⁸ *Id.*

clients. In *Croce v. Kurnit*, the court defines the fiduciary relationship implicit in the attorney-client relationship as follows:

*“Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another.”*³⁹

Controversy arose in *Croce v. Kurnit* when the widow of musician Jim Croce filed a complaint seeking damages for breach of contracts, contract rescission on the grounds of fraud and breach of fiduciary duty.⁴⁰ Early in Jim Croce’s career, the couple had entered into contracts including a recording contract, publishing contract and personal management contract with companies led by businessmen and an attorney, thereafter named as defendants in the complaint.⁴¹ At the initial contract signing which occurred early in Jim Croce’s career, Kurnit, the attorney who represented the business entities involved in the agreements, outlined for the unrepresented Croces the contractual provisions, meanings and legal ramifications of the contracts. Kurnit then signed the documents on behalf of the businesses, failing to advise the Croces to procure independent legal representation to protect their interests.⁴²

Despite facts evidencing the absence of a retainer agreement between the Croces and Kurnit, the lack of subsequent bills from Kurnit to the Croces for services rendered at

³⁹ Croce, *supra* note 33.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 887.

the contract signing, and the acknowledgement that the Croces understood Kurnit to be signing the contracts on behalf of the businesses he represented, the court ruled that Kurnit owed and subsequently breached his fiduciary duty to the Croces.⁴³ Kurnit's fiduciary duty to the couple arose from his introduction as "the lawyer," his explanations of the contractual provisions, his vested interest in the transactions, his failure to advise the Croces to obtain outside counsel, and the Croces' actual lack of independent representation at the signing.⁴⁴ Though Kurnit's breach was not so egregious as to elicit contract rescissions, the court nonetheless ordered Kurnit to pay Croce's attorneys fees.⁴⁵

b. Birth of the Attorney-Client Relationship—Beware!

Once a fiduciary relationship has been established, the responsibly party is "bound by a standard of fairness, good faith, and loyalty."⁴⁶ Often, the fiduciary relationship comes into existence without an express agreement between the attorney and the client. Lawyers must take cognizance of the potential for the emergence of fiduciary obligations in communications with potential clients; fiduciary obligations may be born sans formal attorney-client agreements.⁴⁷ "An attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice."⁴⁸ Thus, attorneys must exercise extreme caution when offering casual advice to potential clients, even in the context of initial interviews. The duty to protect client confidentiality, particularly

⁴³ *Id.* at 893.

⁴⁴ *Id.*

⁴⁵ *Id.* at 894.

⁴⁶ *Id.* at 892.

⁴⁷ *Id.* at 893.

⁴⁸ *Togstad, et. al. v. Vesely*, 291 N.W.2d 686 (1980).

regarding conflicts of interest, may preclude future representations of the potential clients' adversaries even in the absence of future representations of the potential client.⁴⁹

c. Protections on Paper: Follow-up Letters and Retainer Agreements

Attorneys may best ward themselves from liability by diligently documenting in writing all communications with potential clients and ensuring that both parties receive copies. The nature of the relationship between the parties must be explicitly detailed in the documents. If the parties agree to enter into a formal attorney-client relationship, retainer agreements should be employed to memorialize formation of the agreement and elucidate party expectations and responsibilities. This record-keeping procedure is in accordance with the requirements of the MODEL RULES OF PROF'L CONDUCT R. 1.5(b), which states "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."⁵⁰ Furthermore, it is the duty of the attorney to communicate to the client in writing any modifications or changes in expectations to protect the interests of all involved parties.⁵¹

IV. A Lawyer's Duty of Competence

"I want you to understand that this man at the wheel is my attorney. He's not just some dingbat I found on the strip, man."

♪ Raoul Duke, Fear and Loathing in Las Vegas

The MODEL RULES OF PROF'L CONDUCT impose on attorneys a general duty to provide clients with competent representation.⁵² According to Rule 1.1, "a lawyer shall provide competent representation" which requires that the lawyer possess "the legal

⁴⁹ DCA Food Indus., Inc. v. Tasty Foods, Inc., 626 F.Supp. 54 (1985).

⁵⁰ MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2002).

⁵¹ *Id.*

⁵² MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁵³ Factors relevant to determine if a lawyer is appropriately equipped with the requisite knowledge and skill to achieve competent client representation in a particular matter include the following:

*“the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.”*⁵⁴

While the knowledge and skill level expected of a general practitioner is often the standard for competency, some legal representations may require expertise in a specific field.⁵⁵ Practitioners in the music law realm must possess knowledge and skill of a different nature to attain the level of competency requisite for successful practice in the music industry:

“Knowing the law isn't enough. In order to be a competent lawyer, you must understand the music business and what the record companies are looking for in order to effectively represent music industry clients. You must study the contract forms and know what you can and can't negotiate. You need to understand the music business and the current industry standards...you have to be familiar with the past and present recording artists...You have to be able to give your client honest feedback on his or her prospects of getting a record deal. The only way to be able

⁵³ *Id.*

⁵⁴ MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (2002).

⁵⁵ *Id.*

to do that is to listen to music and be familiar with the vocalists who already have music deals.”⁵⁶

The duty to maintain competency both encompasses an attorney’s behaviors while actively engaged in client representations and extends beyond the realm of professional engagements. Lawyers are responsible for the acknowledgement and eradication of any personal habits such as substance abuse that may threaten professional performance or prove injurious to the attorney’s reputation. In 2001, the California State Bar’s Lawyer’s Assistance Program was established to aid attorneys suffering from substance abuse or mental health problems.⁵⁷ The program was enacted “to enhance public protection, maintain the integrity of the legal profession, and support recovering attorneys in their rehabilitation and competent practice of law.”⁵⁸

V. Conflicts of Interest

“We’ll take advantage of the changes going on in the music business because we’re lean and mean.”

♪ Miles Copeland, I.R.S. Records

Brian Wilson, a musician in the band The Beach Boys, sued his former publishing company and his attorney following a sale conducted by Wilson’s father of Wilson’s publishing and facilitated by Wilson’s attorney.⁵⁹ The purchaser at the sale was Wilson’s publisher who allegedly acquired the materials “for a ridiculously low amount, which

⁵⁶ Willian Henslee, *Evolving Role of the Lawyer in the Representation of Talent in the Music Business*, in Sherri Burr & William Henslee, *Entertainment Law: Cases and Materials on Film, Television and Music* 691, 695 (2004).

⁵⁷ The California State Bar’s Lawyer’s Assistance Program was established in 2001 by California Senate Bill 479. The resolutions were codified as amendments to CAL. BUS. & PROF. CODE § 6140.0 and § 6230 through §6238. *See supra* note 12.

⁵⁸ California Lawyer’s Assistance Program—“Prevention, Detection & Treatment of Substance Abuse” MCLE Quiz, http://www.netforlawyers.com/substance_abuse_mcle.htm.

⁵⁹ McPherson, *supra* note 7.

was then squandered by the father.”⁶⁰ In the suit, Wilson alleged that the sale was conducted without his knowledge or permission. Furthermore, Wilson claimed that his attorney had represented both Wilson and the publishing company at the sale.⁶¹ Though the case was reportedly settled prior to trial for a substantial sum of money,⁶² it typifies lawsuits asserted against lawyers in the music industry who juggle simultaneous representations of clients with serious conflicts of interest.

a. General Rules Regarding Concurrent Conflicts of Interest

Awareness of potential conflicts of interest is imperative for attorneys and the clients who may be adversely affected by the conflicting interests. Complete knowledge and disclosure to all involved parties is the sole mechanism through which attorneys may represent parties with conflicting interests without incurring substantial liability for ethical misconduct. Identification of all potential conflicts of interest and elucidation of the relationships at the outset of client representations is compulsory in order to “prevent ill will and litigation at the end of the relationship.”⁶³

The general rule regarding conflicts of interest involving current clients is articulated in MODEL RULES OF PROF’L CONDUCT R. 1.7(a) which instructs, “A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”⁶⁴ According to the Rule, a concurrent conflict of interest arises if “the representation of one client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Burr, *supra* note 6.

⁶⁴ MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2002).

personal interest of the lawyer.”⁶⁵ Representing clients who may present conflicts of interest is discouraged both by ethical standards for attorneys as well as general public policy to protect the public from lawyers who will not exhibit the appropriate loyalty and zealous advocacy for their clients due to commitments to other clients or personal interests.

In a recent case, the Supreme Court of Kentucky determined that a New York attorney was subject to personal jurisdiction in Kentucky resulting from his disregard for clear conflicts of interest in his representation of Betty Kern Miller, widow of songwriter Jerome Miller.⁶⁶ The attorney, Andrew Boose, served as a co-trustee of a trust created to manage the literary property owned by the widow including copyrights and royalties derived from Jerome Miller’s musical creations.⁶⁷ The widow, a Kentucky resident, agreed to trust provisions which granted the trustees significant powers including:

*“Power to deal with Literary Property...with the same freedom and to the full extent as if they were the sole and absolute owners...and without limitation, make any and all agreements, contracts or arrangements which they, in their discretion, shall determine, and employ and compensate any attorneys, managers and/or agents (including any person who is serving as Trustee), for or in connection with the sale, lease, licensing, exploitation, utilization, turning to account, or other disposition of, or dealing with, Literary Property.”*⁶⁸

⁶⁵ *Id.*

⁶⁶ Stan Soocher, *Counsel Concerns*, 23 ENT. LAW & FIN. 4 (Jan. 2008).

⁶⁷ *Id.*

⁶⁸ *Id.*

Furthermore, a codicil to Betty Kern Miller's will later bequeathed all of her "right, title and interest in and to any Literary Property" to the Trustees.⁶⁹ After Betty Kern Miller died, her daughter and trust beneficiary filed suit in Kentucky alleging that Boose exerted undue influence regarding the creation of the codicil, engaged in unauthorized practice of law, ignored clear conflicts of interest and violated his fiduciary duties.⁷⁰ Boose claimed that Kentucky lacked jurisdiction as his only Kentucky contact for jurisdictional purposes was his visit to the state for the signing. The Supreme Court disagreed, ruling that the facts established a course of conduct sufficient to establish minimum contacts "culminating in alleged conflicts of interest and claims of 'a scheme for acquisition of ownership' of the decedent's property."⁷¹ As a result, Boose faces the aforementioned charges in Kentucky.⁷²

b. Simultaneous Representations of Adverse Parties

MODEL RULES OF PROF'L CONDUCT R. 1.6(a) regarding client confidentiality states, "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."⁷³ This commitment to confidentiality underlies the prohibition against representing parties with conflicting interests. Although the general rule regarding conflicts of interest prohibits simultaneous representations of adverse parties, exceptions to the general rule are allowed if certain conditions are met. Although MODEL RULES OF PROF'L CONDUCT R.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002).

1.7(a) prohibits simultaneous representations involving concurrent conflicts of interest, part (b) offers an exception to the general rule:

“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

Through the creation of an effective waiver following full disclosure, an attorney may obtain consent from affected clients and may subsequently represent those clients whose simultaneous representation would otherwise be prohibited. Such a waiver in the context of music law “must be detailed and thorough and created for that particular client...Conflicts can appear subtle and insignificant, and so letters regarding waiver of conflicts must be detailed and comprehensive.”⁷⁴ Accordingly, form letters are insufficient protections in situations involving the slippery slope of conflicts of interest.⁷⁵

When drafting conflict of interest waivers, attorneys should consider and address in a detailed writing a variety of factors, including the scope of representation of the party first represented, whether or not such representation occurs on a regular or occasional basis, expectations regarding future representations of the original party, and the

⁷⁴ Richard J. Wallace, III, *Conflicts of Interest in the Entertainment Law Context*, Nov. 27, 2001, available at http://www.passmanjones.com/resources/PJArticles.aspx?contenttype=Article&Article_ID=29.

⁷⁵ *Id.*

implications of simultaneous representation for the former party.⁷⁶ Attorneys must identify any matters for which the initial client elicited legal aid which may be considered substantially related to matters arising in the latter representation.⁷⁷ Attorneys must consider past exchanges of confidential information to or from the former party that could relate to the work of the latter party as well as any confidential information exchanged with the latter party relating to the former party.⁷⁸ An attorney considering simultaneous representation must determine whether or not representation of the latter party could prove detrimental to the ability to represent the former party.⁷⁹ Discussions to make parties aware of the conflicting interests and obtaining informed consent prove pivotal in determining whether or not simultaneous representation will be permitted in a given situation.⁸⁰

Some conflicts of interest constitute prohibited representations and cannot be waived despite disclosure and informed consent by the parties. The Comments to the MODEL RULES OF PROF'L CONDUCT R. 1.7 address such conflicts, explaining, "some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."⁸¹ When such conflicts arise, the question of consentability must be determined on a per client basis.⁸²

Just as lawyers working in the music industry may incur professional liability by performing a variety of non-traditional roles such as acting in the capacity of an agent or

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

⁸² *Id.*

manager, they may also encounter professional liability when representing closely related parties. Conflicts of interest frequently arise when lawyers represent a musician as well as the musician's manager, agent or even a record label working with the musician. Both the advocates and critics of dual representation present persuasive arguments, though some dual representations may be prohibited regardless their profit potential. Critics of dual representation focus largely on the inability to effectively represent clients when representing adverse parties.

*“Because a lawyer is expected to exercise independent professional judgment on behalf of a client, he/she should not be engaged by the manager or agent, whom the lawyer may be called on to negotiate with or even litigate against on behalf of the performer, writer or artist. Such dual representation can provide the appearance of a conflict of interest and may serve as prima facie grounds for a legal malpractice action.”*⁸³

While critics of dual representation argue that attorneys are incapable of maintaining the required undivided loyalty to clients in simultaneous representations, proponents emphasize the benefits that parties may glean from such representations.⁸⁴ A lawyer's conflict of interest may prove beneficial in music industry negotiations where maintaining close relationships with key players in the industry leads to better results for clients.⁸⁵ In fact, some musicians actively seek representation by attorneys known for cross-representations.⁸⁶ Technically, the parties may not be truly adverse or against each other even though their interests diverge:

⁸³ Wallace, *supra* note 74.

⁸⁴ Philips, *supra* note 8.

⁸⁵ *Id.*

⁸⁶ McPherson, *supra* note 7.

“...The key word here is ‘against.’ In an entertainment context is the entertainment attorney (who, unlike a litigator, is acting much less as legal counsel and much more as a negotiator) really representing an actor ‘against’ a producer or recording artist ‘against’ a label? Is there really a conflict of interest in representing both?”⁸⁷

Although disclosing the existence or potential for a conflict and obtaining informed consent often decreases the likelihood of future malpractice claims, representing parties who may later engage in litigation as opponents places the attorney in an ethically dangerous realm.

In 1992, musician Billy Joel sued his attorney Allen Grubman, one of the most powerful figures in the music industry, in a \$90 million civil suit alleging fraud and breach of contract.⁸⁸ Joel accused Grubman and his firm, Grubman, Indursky, Schindler & Goldstein, of engaging in representations with undisclosed conflicts of interest.⁸⁹ Joel claimed that the attorney failed to inform Joel of his simultaneous representations of Joel, Joel’s record company, CBS, and Joel’s manager (and brother-in-law) between 1980 and 1989.⁹⁰ Grubman maintained that his firm was not employed by CBS at the time he negotiated Joel’s contract, though he acknowledged that his firm had represented the record company in the past.⁹¹ Eventually, Sony Records, an entity not named as a party to the suit, settled with Joel, allegedly enticing him to drop claims for a \$3 million settlement.⁹²

⁸⁷ *Id.*

⁸⁸ Philips, *supra* note 8.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Burr, *supra* note 6, at 691.

Though Joel's suit accused Grubman of "never fully revealing the extent of his allegiance to the singer's former manager or record company," Grubman openly represented other performers and their managers in situations presenting similar conflicts of interest. One such example was Grubman's simultaneous representation of both Madonna and her manager during negotiations with Time Warner following a retainer agreement between Grubman's firm and a subsidiary of Time Warner.⁹³

*"Many rock stars apparently view Grubman's flair for cross-representation as an attribute rather than an impediment during negotiations. His clients...are convinced that Grubman's long-standing relationships with the industry's most powerful executives actually help them obtain the best deals possible."*⁹⁴

While the benefits realized from cross-representation may be worth the gamble for some attorneys, the potential for malpractice suits and culpability for violations of the ethical guidelines imposed upon attorneys is not lessened by the possible financial gain as evidenced by Grubman's history of malpractice claims in an industry where conflicts of interest are "rampant."⁹⁵

c. Obligations to Former Clients: The Substantial Relationship Test

The ABA Model Rules of Professional Conduct address the duty owed to former clients in Rule 1.9(a):

"A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which

⁹³ Philips, *supra* note 8.

⁹⁴ *Id.*

⁹⁵ *Id.*

*that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”*⁹⁶

Furthermore, Rule 1.9(c) explicitly bars attorneys from revealing or using information acquired in past representations to the disadvantage of the past clients unless required by other ethical rules (such as for prevention of an imminent violent crime) or when the information has been disseminated into the public domain.⁹⁷

The “substantial relationship test” is the standard for judging when involvements with former clients prohibit representations of potential clients.⁹⁸ According to the substantial relationship test, developed in *T.C. Theater Corp. v. Warner Bros. Pictures, Inc.*,

*“To prohibit an attorney from disclosing matters revealed to him by reason of his former representation of a client, or from representing a new client adverse to the former client’s interests, the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. A court will assume that during the course of the representation confidences were disclosed to the attorney bearing on the subject matter of the representation.”*⁹⁹

⁹⁶ ABA Model Rules of Professional Conduct Rule 1.9(a).

⁹⁷ ABA Model Rules of Professional Conduct Rule 1.9(c).

⁹⁸ *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.* 113 F. Supp. 265 (1953).

⁹⁹ *Id.*

Therefore, before an attorney agrees to represent a new client with interests adverse to those of a former client, he must first determine whether or not the matters involved in the representations are substantially related.¹⁰⁰

In a recent California case, UMG Recordings filed a motion to disqualify O'Melveny & Myers (OMM) from representing MySpace, an online social networking website, in a copyright infringement suit due to OMM's previous representation of UMG in litigation involving the Napster file-sharing service.¹⁰¹ In consideration of UMG's motion to disqualify, the U.S. District Court for the Central District of California examined Rule 3-310 of the California Rules of Professional Conduct which provides that an attorney "shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment."¹⁰² Despite the fact that the attorneys employed by OMM in the previous representation differed from those involved in the MySpace representation and despite OMM's earlier procurement of a waiver by UMG of any future conflict of interest issues, the court ruled that the two representations were "substantially related."¹⁰³ Though the court did not disqualify OMM from the representation, an order requiring OMM to pay the fees incurred by UMG in pursuit of the disqualification was entered due to OMM's overriding "duty of loyalty to its former client" which supersedes the "flatly unreasonable and inconsistent" waiver.¹⁰⁴

¹⁰⁰ Soocher, *supra* note 66.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

d. Conflicts of Interest Due To Business Transactions and Attorney Compensation

The ABA Model Rules of Professional Conduct do not prohibit attorneys from engaging in business transactions with clients, though Rule 1.8 prescribes specific guidelines an attorney must follow to ensure fairness to the client in business dealings:

“(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction.”¹⁰⁵

In business transactions with clients, attorneys must exercise fair and reasonable business practices. The attorney has the duty to disclose all terms of the business transaction to the client in a written document composed to ensure the client’s full understanding. Furthermore, the attorney should alert the client to seek independent counsel regarding the transaction. The client must freely give his informed consent to the transaction in a signed writing in order for the business engagement to move forward.

¹⁰⁵ MODEL RULES OF PROF’L CONDUCT R. 1.8 (2002).

The heightened duties imposed on attorneys who engage in business transactions with clients address public policy concerns that arise from such transactions. As the Comments to Rule 1.8 explain, “A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client...”¹⁰⁶ It is in the best interest of both the client and the attorney to follow the prescribed procedures to ensure that both parties are in accord and there are no misunderstandings that may lead to future claims against the attorney.

According to Rule 1.8(f) of the MODEL RULES OF PROF'L CONDUCT, attorneys are barred from accepting monetary compensation for services rendered from third parties unless three conditions are met.¹⁰⁷ The client must give his informed consent regarding the transaction.¹⁰⁸ The lawyer must ensure that financial involvement of a third party does not affect the lawyer's “independence of professional judgment” or interfere with the relationship between the lawyer and the client.¹⁰⁹ Finally, the information relating to the representation (i.e. confidential information) must remain protected as confidential attorney-client communications.¹¹⁰

The attorney must never forget that the attorney-client relationship is not established by payments for services rendered, but it instead arises in the context of the fiduciary relationship, founded upon trust placed by one person in the integrity of another.¹¹¹ For example, if a parent pays the legal fees incurred by his child, the attorney

¹⁰⁶ MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. (2002).

¹⁰⁷ MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(1) (2002).

¹⁰⁸ *Id.*

¹⁰⁹ MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(2) (2002).

¹¹⁰ MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(3) (2002).

¹¹¹ Croce, *supra* note 33, at 893.

is in a fiduciary relationship with the child despite the payment of legal fees by the parent.

Though the MODEL RULES OF PROF'L CONDUCT do not prohibit attorneys from negotiating agreements which grant a lawyer literary or media rights arising from a representation, Rule 1.8(d) controls the timing of such negotiations. According to the Rule, "prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."¹¹² Limiting agreements for literary and media rights until the conclusion of representation ensures that the attorney's loyalty to the client and duty to maintain confidentiality are not breached due to the attorney's potential for personal financial gain. If attorneys were not hindered from exchanging literary or media rights for representations and then selling the acquired rights prior to the conclusions of the representations, the attorneys' personal financial gains could be influenced by the outcomes of the pending representations. Conflicts of interest would thereby arise between the attorneys and clients. As a result, negotiations regarding grants of literary or media rights are permitted only after the conclusion of representations, thus preventing such conflicts.

VI. Can I Prevaricate When I Negotiate? The Ethics of Negotiation

"The whole music business in the United States is based on numbers, based on unit sales and not on quality. It's not based on beauty, it's based on hype and it's based on cocaine. It's based on giving presents of large packages of dollars to play records on the air."

♪ Frank Zappa, Musician and Composer

¹¹² MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2002).

According to MODEL RULES OF PROF'L CONDUCT, "a lawyer shall abide by a client's decisions concerning the objectives of representation...and shall consult with the client as to the means by which they are to be pursued."¹¹³ According to this rule, when considering the objectives of a representation, a lawyer "shall abide," following the client's direction and represent the client with the goal of meeting the client's chosen objectives.¹¹⁴ In terms of the manner in which the objectives will be realized, an attorney "shall consult" the client but is not required to abide by the client's chosen means.¹¹⁵ Thus, attorneys who employ different styles of negotiation (i.e. cooperative, competitive, or somewhere in between) are free to negotiate in the manner they choose provided they first consult their clients. Furthermore, attorneys should be candid with their clients regarding the negotiation techniques they employ.¹¹⁶

Lawyers are required to maintain the confidentiality of their clients in the majority of situations.¹¹⁷ One exception to the confidentiality rules arises when the client has given informed consent for disclosure.¹¹⁸ Although Rule 1.2(a) grants attorneys permission to "take such action on behalf of the client as is impliedly authorized to carry out the representation," an attorney must be sentient in negotiations regarding the difference between taking action on a client's behalf with implied consent and revealing confidential information that attorneys are barred from disclosing under Rule 1.6.¹¹⁹ Thus, in negotiations, an attorney must convey information necessary for the realization of the client's objectives in the negotiation without revealing privileged information.

¹¹³ MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

¹¹⁸ *Id.*

¹¹⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

In addition to the informed client consent exception, attorneys are also granted permission to disclose confidential information in the limited circumstances enumerated in Rule 1.6(b) which states:

“(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services; (4) to secure legal advice about the lawyer’s compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or (6) to comply with other law or a court order.”¹²⁰

Although lawyers are permitted to disclose confidential information in the above-listed limited circumstances, they are not required to disclose any confidential information. This is true even if such disclosure would prevent “reasonably certain death or substantial bodily harm.”¹²¹ Thus, the formal rules do not mandate disclosure when

¹²⁰ MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2002).

¹²¹ *Id.*

third parties face imminent harm, but attorneys as humans may possess ethical and moral obligations to disclose. This dilemma must be resolved by each attorney individually and serves as an example where one's personal ethics may impose duties beyond those codified by state bars.

It is important to note the exceptions in Rule 1.6(b) which may prove vital to the preservation a lawyer's reputation should the need to establish a defense to a criminal charge or civil claim regarding the attorney's potential ethical liability arise from a representation.¹²² The Rule establishes exemptions for disclosures of confidential information in order for an attorney to secure legal advice regarding his compliance with the Rules.¹²³ Should a lawyer find himself in an ambiguous ethical situation or facing potential liability, the lawyer may hire independent counsel for representation regarding his compliance with the ethical guidelines. The attorney now assumes the role of the client whose confidentiality must be protected. Furthermore, Rule 1.6 grants an attorney permission to disclose confidential information when necessary for defense against charges instigated by a client or pertaining to the attorney's behavior regarding conduct in which the client was involved.¹²⁴ In the latter case, such disclosure may be the only mechanism available for attorneys to defend themselves against client charges to protect their reputations, careers, bank accounts or status as members of state bar associations.

When lawyers negotiate on behalf of clients in the music industry, they must follow the aforementioned Rules. These Rules do not always harmonize and often prescribe multifarious behaviors or offer cryptic guidance. Not only must an attorney strictly adhere to the client's objectives, consult with the client regarding the means to

¹²² MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) and (6) (2002).

¹²³ MODEL RULES OF PROF'L CONDUCT R 1.6(b)(5) (2002).

¹²⁴ MODEL RULES OF PROF'L CONDUCT R 1.6(b)(6) (2002).

employ,¹²⁵ and protect the client's confidentiality,¹²⁶ the attorney is also charged with discerning the client's implied authorization.¹²⁷ Rule 4.1 which addresses "Truthfulness in Statements to Others" further complicates the rules of negotiations for attorneys:

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."¹²⁸

Clients often expect their attorneys to negotiate competitively with steadfast resolve, demanding inflated requisitions while offering meaningless concessions, adducing false "bottom lines"¹²⁹ and proffering specious "best offers." Rule 4.1 prohibits attorneys from making false statements regarding "material fact or law" though safe harbor is found in the inclusion of the word "knowingly" as long as the attorney's lack of knowledge is paired with good faith.¹³⁰ Whether or not statements regard material fact or law is an inquiry dependent upon the circumstances.¹³¹

"Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intention as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an

¹²⁵ MODEL RULES OF PROF'L CONDUCT R 1.2(a) (2002).

¹²⁶ MODEL RULES OF PROF'L CONDUCT R 1.6 (2002).

¹²⁷ MODEL RULES OF PROF'L CONDUCT R 1.2 (2002).

¹²⁸ MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002).

¹²⁹ "The bottom line is the point below you simply won't accept any offers." Juuso Hietalahti, *The Most Important Guideline to Remember in Negotiations and Sales Meetings*, (July 8, 2007), available at <http://www.gameproducer.net/2007/07/08/the-most-important-guideline-to-remember-in-negotiations-and-sales-meetings/>.

¹³⁰ MODEL RULES OF PROF'L CONDUCT ADD CODE NUMBER.

¹³¹ MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt.

*undisclosed principal except where nondisclosure of the principal would constitute fraud.”*¹³²

Essentially, lawyers may lie in negotiations without violating the Rules if the lies are considered to constitute “puffing.”¹³³ This approbation for dishonesty in negotiations presents lawyers with a personal moral dilemma. A lawyer has three basic courses of action from which to choose when presented with similar situations in negotiations. He may tell the truth about his client’s position to avoid puffing or misrepresenting the facts to the adversary, but in so doing he will be violating his duty to maintain the client’s confidentiality¹³⁴ and sabotaging his client’s objectives.¹³⁵ The attorney may engage in the “puffing” which is considered ethically permissible according to the MODEL RULES OF PROF’L CONDUCT,¹³⁶ but in so doing may contravene his personal morals. Furthermore, if the materiality of facts is ambiguous, the attorney may subject himself to liability for criminal and tortious misrepresentations.¹³⁷ The attorney’s third option is to remain silent because “an attorney has no affirmative duty to inform an opposing party of relevant facts.”¹³⁸ Appropriate resolution of these moral conflicts is left to the attorney, but he must effectively manage his client’s expectations while elucidating the interdictions regarding false statements by lawyers pertaining to material facts.

¹³² *Id.*

¹³³ “Puffing” is defined as “the expression of an exaggerated opinion—as opposed to a factual misrepresentation—with the intent to sell a good or service. Puffing involves expressing opinions, not asserting something as fact. Although there is some leeway in puffing goods, a seller may not misrepresent them or say that they have attributes that they do not possess. *Supra*, note 1, at 582.

¹³⁴ MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).

¹³⁵ MODEL RULES OF PROF’L CONDUCT R. 1.2 (2002).

¹³⁶ MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. (2002).

¹³⁷ MODEL RULES OF PROF’L CONDUCT R. Rule 4.1 cmt. (2002).

¹³⁸ MODEL RULES OF PROF’L CONDUCT R. 4.1 (2002).

VII. Attorney Advertising and Compensation for Legal Services

Attorneys must exercise caution when advertising legal services. Unlike agents or managers who are free to identify and target potential clients, courting them to sign management contracts, attorneys are prohibited from such solicitations:

“a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.”¹³⁹

The forbiddance regarding targeted solicitations by lawyers renders the importance of an attorney's reputation even more consequential because the majority of music law clients seek legal representation based on word-of-mouth recommendations and proven results and relationships in the music industry.

Lawyers must charge “reasonable” fees for the legal services they render.¹⁴⁰ In fact, the MODEL RULES OF PROF'L CONDUCT not only prohibit lawyers from collecting unreasonable fees, but also forbid attorneys from entering agreements with clients that include unreasonable fee provisions.¹⁴¹ Attorneys should consider the following factors when gauging the reasonableness of legal representation fees:

“(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee

¹³⁹ MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2002).

¹⁴⁰ MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2002).

¹⁴¹ *Id.*

*customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.”*¹⁴²

When more than one lawyer is involved in the representation of a client in the music industry, the division of fees between lawyers not employed by the same firm is permitted by Rule 1.5(e).¹⁴³ Fees charged by a single billing to the client may be divided either based on the proportionality of services rendered by each attorney to the client’s representation as a whole. Alternately, the fees may be divided if all lawyers involved agree to assume full responsibility for the entirety of the representation.¹⁴⁴ “Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.”¹⁴⁵ In order to effectuate agreements involving the division of legal fees, the client involved in the representation must consent to the specific arrangement in writing and must countenance the division of shares between the attorneys retained.¹⁴⁶ Clients who agree to division of fee arrangements benefit from the collaboration of multiple lawyers, enhancing the quality of legal representation beyond that which could be achieved through representation by a sole practitioner.¹⁴⁷

¹⁴² MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2002).

¹⁴³ MODEL RULES OF PROF’L CONDUCT R. 1.5(e) (2002).

¹⁴⁴ MODEL RULES OF PROF’L CONDUCT R. 1.5(e) cmt. (2002).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

VIII. Lawsuits and Sanctions

*“Music is the real place where democracy lives. Every note is equal.”
-Vince Gill*

Each year, an increasing number of musicians challenge their initial music contracts, “seeking rescission and adjustment.”¹⁴⁸ Musicians embarking upon careers in the music industry who lack legal knowledge and business savvy fall prey to their “intense desire to obtain a recording contract.”¹⁴⁹ These nascent musicians, driven by desire but ill-equipped and lacking adequate representation in contract negotiation, often find themselves contractually bound in agreements which are neither “legally sound” nor “financially fair.”¹⁵⁰ Subsequently, “increased success leads to dissatisfaction over time.”¹⁵¹ One remedy to indemnify a music client harmed by his or her attorney’s breach of fiduciary duty is disgorgement, “such as the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interests.”¹⁵² In other suits, plaintiffs may seek to regain rights to their musical compositions or other non-monetary remedies.¹⁵³

In a suit alleging fraudulent behavior by an attorney, the father and sole heir of Jimi Hendrix sued Leo Branton, Jr., a prominent attorney for the estate responsible for “restructuring assets and settling legal claims against the estate.” Hendrix initiated the suit, accusing Branton of fraudulently selling the rights of Hendrix’s music to third parties without the father’s permission after “learning that MCA Music Entertainment

¹⁴⁸ Todd M. Murphy, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 817 (2002).

¹⁴⁹ *Id.* at 808.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Wallace, *supra* note 74.1.

¹⁵³ *Jimi Hendrix’s father wins control of the late rocker’s musical legacy*, JET, Aug. 14, 1995, available at <http://www.encyclopedia.com/doc/1G1-17210263.html>.

was planning to purchase publishing and recording copyrights from two companies that allegedly had ownership of the music.” The settlement agreement reached by Hendrix and the defendants provided Hendrix abandon the suit against Branton in exchange for reclamation of the rights to the music, thereby avoiding trial and allowing Hendrix to regain all of Jimi Hendrix’s possessions. In addition, the agreement provided that written consent for any deals relating to the deceased musician be granted by his father who would pay the former defendants to resolve the residual financial issues in the dispute.¹⁵⁴

“Misconduct” is defined as “a dereliction of duty; unlawful or improper behavior.” Attorney misconduct consists of “an attorney’s dishonesty or attempt to persuade a court or jury by using deceptive or reprehensible methods.”¹⁵⁵ In addition to charges brought in civil lawsuits against attorneys for legal malpractice, disciplinary action by individual state bar courts may be initiated against attorneys. State bar disciplinary action for egregious attorney misconduct includes various punishments of which disbarment constitutes the most severe.

In 1968, singer and actress Doris Day [Melcher] and her son filed a complaint against their former attorney with the California State Bar, alleging misconduct in the attorney’s representation of the Melcher family in personal matters as well as in their business matters. Simultaneously, the Melcher parties were engaged in a civil suit against the attorney arising from the same facts as those presented to the Bar.¹⁵⁶ The State Bar Court hearing panel determined that the attorney was guilty of misconduct on 13 separate accounts, recommended disbarment and the attorney appealed the decision.

¹⁵⁴ *Id.*

¹⁵⁵ *Supra* note 1, at 460.

¹⁵⁶ *Samet v. Day, aff’d Day v. Rosenthal*, 170 Cal. App. 3d 1125 (1985).

The Supreme Court, before whom the case was heard, also recommended disbarment and held that “the egregious nature of the misconduct and the need to protect the public from further injury warranted disbarment.” The attorney was found culpable of misconduct including representing parties with undisclosed conflicts of interest, practicing adverse to former clients, charging unreasonable, overstated fees, failing to return client property, failing to offer adequate legal advice, filing of fraudulent claims and false testimony, and harassing former clients. In addition, the attorney was determined to have intentionally delayed proceedings, obstructing justice and abusing the legal process which he was sworn to uphold.

IX. Conclusion

*“There is a road, no simple highway,
Between the dawn and the dark of night,
And if you go no one may follow,
That path is for your steps alone.”*

♪ Robert Hunter, Grateful Dead

The lack of ethical practices by attorneys in the music industry has led to the detriment of attorney-client relationships and negative implications for attorneys in the industry who strive to safeguard their integrity and good reputations. Inconsistency in court decisions serves only to exacerbate problems spotlighted in the public media.

“As the amount of revenue in the music industry increases, so does the need for the courts to become more consistent in their examination of these contracts and their formation. As artists increasingly oppose the unfairness and inequity in

music contract formation, there is a possibility that new artists will have more control over their artistic futures.”¹⁵⁷

A cataclysm inundating the music industry with standards for contractual fairness, implementation of alternative dispute resolution methods to resolve conflicts and an exigent commitment to uphold legal ethics must be administered to lustrate the music industry and restore integrity to the business of music.

¹⁵⁷ Todd M. Murphy, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 817 (2002).