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Why Music Should Be Socialized

*Matthew Reynolds**

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Setting aside commodities of necessity like food and clothing, perhaps no other product is as universal and popular as music. It is no surprise that millions of dollars are spent trying to package and harness it into a marketable form.[1] Perhaps it is that same quality of

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* J.D. Candidate, UCLA School of Law, 2009; B.A., English, Brigham Young University, 2006. Special thanks to Robert Reynolds, my brother and manager for The Killers, for teaching me the ropes of the industry and believing in this cause, to Gary Stiffelman for his amazing music law course, and to Curt Hessler for motivating me to write this article. Winner of The GRAMMY Foundation®'s 10th Annual Entertainment Law Initiative Writing Competition.

1. *See, e.g.*, Warner Music Group Corp., Annual Report (Form 10-K), at 53-54 (Nov. 29, 2007) (reporting cost of revenues in the amount of $1.8 billion and selling, general, and administrative expenses in the amount of $1.1 billion).

universality, its "primal nature," that makes music such an untamable and unruly beast these days. The question of how to sell music effectively (and for some, whether or not it should be sold in the first place) is one that has been hashed and rehashed by those inside and outside of the industry.[2] While the plausible solutions currently being employed or contemplated have not, as of yet, struck gold, or even silver (maybe iTunes deserves bronze credentials), they *have* told us some valuable things about the state of the American music consumer. Perhaps we have not recognized just how valuable this information really is.

Instead of jumping straight to an answer of "what model works," we need to recognize that this market, like any other, is controlled by the consumer, not the manufacturer. There are certain expectations that music-lovers have adopted, and they will not easily be divorced from them. What is required is not a top-down approach in which the industry sets the standard for what they will offer the customer and expect them to be satisfied, but rather a bottom-up approach where we consider what customer demands are and try to accommodate them in a fashion that is monetarily feasible. This may sound daunting, but winning back customers is exactly what the industry has to do if it wants to combat the losses to piracy.

By "surveying" some of the models tested or proposed for solving the industry's woes and gleaning from their successes and failures what they teach us about music consumers, we can begin to create a framework in which a new model should and *must* operate to succeed. As this framework emerges, this article will argue for what is currently the most feasible model for both meeting consumer demands and pumping money into a flailing industry: the socialization of music.

I. DIGITAL RIGHTS MANAGEMENT

The "unlocking" of the iPhone by teenager George Hotz was one more reminder that hackers will always be two steps ahead of technology.[3] For every new digital lock there are 1,000 nerds ready for their moment in the spotlight. From blacking out CDs with magic markers to using programs like "ourTunes" and "myTunes" to download songs from iTunes users, end-runs around Digital Rights

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2. *See generally* CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 27-40 (2006) (describing the evolution and decline of the hit record as a business model).

3. Brad Stone, *With Software and Soldering, AT&T's Lock on iPhone Is Undone*, N.Y. TIMES, Aug. 25, 2007, at C1.

Management (DRM) continue to sprout up. But there is a moral to this musical dilemma: people want to own their music. Consumers will not be satisfied with a model that does not allow them to listen to and use their music as they like. The recent surge in sales for AmazonMP3 demonstrates this principle. By offering music DRM-free (and for a slightly cheaper price), in a matter of months, Amazon has quickly risen to become one of the largest online music retailers.[4] Apparently noting the increasing demand for unprotected music, iTunes recently released a catalogue of DRM-free tracks from EMI and have likewise gained an up-tick in sales.[5] Thus, the failings of DRM give us the first piece of our new business model framework: (1) *People want uninhibited ownership of their music.*

II. RIAA LAWSUITS

An early attempt at stopping the wave of online file sharing took the form of a more proactive and "American" approach. Following the old mantra "if you can't beat them, sue them," in December 1999, the Recording Industry Association of America (RIAA) began an aggressive campaign to litigate infringers out of the picture.[6] With the continuing disaggregation of the world of piracy, lawsuits against Web sites that encourage piracy, and more recently the individual infringers themselves, have become more and more costly and difficult to win. The way in which the lawsuits have affected the attitudes of consumers is perhaps more frustrating for the industry. While some argue that lawsuits are turning the tide, convincing more and more people that stealing music really *is* "wrong," the surge in piracy over the last several years proves otherwise.[7]

This does not bode well for industry executives. It is not that they are not "in the right," it is just that being in the right does not mean anything in the world of marketing. It is all about doing what is best, and what is best is either making a lot of money off the lawsuits

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4. Posting of Jeff Reguilon & Alan Wiley to Amazon Earworm's Blog, http://www.amazon.com/gp/blog/post/PLNK1GR94T4PJ38D6 (Sept. 25, 2007, 15:04 PDT).

5. Max Brenn, *iTunes Is the Second Largest Music Retailer in U.S., NPD Says*, EFLUXMEDIA, Feb. 26, 2008, http://www.efluxmedia.com/news_iTunes_Is_The_Second_Largest_Music_Retailer_In_US_NPD_Says_14495.html

6. *See* ELECTRONIC FRONTIER FOUNDATION, *RIAA V. THE PEOPLE*: 4 YEARS LATER, http://w2.eff.org/IP/P2P/riaa_at_four.pdf (Aug. 2007).

7. *See, e.g.*, Adam Liptak, *In the Heated Fight Over Music Piracy, a Rare Stand for Privacy*, N.Y. TIMES, Dec. 31, 2007, at A11 ("In the past four years, record companies have sued tens of thousands of people for violating the copyright laws by sharing music on the Internet.").

(which we all know is not happening), or using the lawsuits effectively to persuade people to stop pirating. Currently, the suits are not widespread enough to scare many people. In fact, the percentage of people citing the risk of prosecution as a deterrent against illegal downloading has *dropped* a full nine percent in just the last year.[8] Furthermore, since the lawsuits are not profitable, it is impractical for the RIAA to try and expand their scope. But most importantly, the lawsuits still are not convincing people that copying music is morally equivalent to stealing. Until an alternative emerges that customers feel gives them a fair shake, this is unlikely to change. Perhaps there is a broader principle supporting this concept. In a democracy like America, law is created by the majority. If most Americans are sharing music or believe sharing music should be considered legal, then perhaps it *should* be legal. But for now, we have learned something else: (2) *A few lawsuits cannot change the widespread public perception of what the law should be.*

III. "360" RECORD DEALS

Some of the financial troubles in the music industry are reflected in a growing public perception that record labels are cheating their artists out of money.[9] Whether or not this is a correct observation, it is certainly an understandable one. As record sales fall, labels have been trying to find alternate ways to get more bang for the buck from their artists by pressuring them to give up more rights.[10] Traditional recording agreements are quickly being replaced by what are known as "360" deals.[11] The concept behind these deals is that in order to balance the increasingly unprofitable financial risk of investing in artists, the labels needs to have access to other more

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8. ENTERTAINMENT MEDIA RESEARCH, THE 2007 DIGITAL MUSIC SURVEY 77 (July 2007), http://www.entertainmentmediaresearch.com/reports/EMR_Digital_Music_Survey 2007.pdf.

9. *See* Edna Gundersen, *Bye, Bye, a Piece of the Pie*, USA TODAY, May 17, 2004, at 1D ("The record business abounds with tragic lore of music pioneers cheated out of earnings by predatory managers and labels.").

10. *See* Ben Cardew, *From a Stream to a River: The Rise of the Multi-Platform Deal*, MUSIC WK., June 16, 2007, at 4 (noting that, because "physical music sales are down," "labels are starting to experiment with deals that stretch beyond the traditional model of recorded music").

11. *See* Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES, Nov. 11, 2007, § 2, at 1.

lucrative aspects of their careers.[12] For artists, this means giving up some of their touring revenues—the major source of their income.[13]

Unanimous adoption of "360" deals will lead to catastrophic problems if it continues unabated. By shifting their focus to touring revenues, the labels essentially are conceding that they can no longer make money selling music. The inevitable result of such an admission is to begin signing artists *based* on their ability to make money touring. Artists who traditionally have sold tons of records (but who do not make much money touring) will be replaced by others who might produce terrible records but have a knack for entertaining crowds. On a broader scale, signing bands based on their touring revenues would mean giving up on entire genres of music that do not focus on live performances, but nonetheless are an important part of our musical landscape.

Instead of specifically compensating musicians for the music they create, "360" deals essentially take money from the artist's left pocket and move it to their right one. Money that an artist would otherwise make through touring is rerouted to their label and returned through advances that previously were based on music sales. This money shifting amounts to an eventual musical suicide, providing unhealthy incentives for songwriters and musicians that will lead to a creative deficit in the next generation of albums. As such, the "360" deal is not a solution—it is surrender. If the industry wants to keep selling records, it will have to refocus its efforts on helping artists earn money from the music they make—not just the way they perform it. This adds one more piece to our puzzle: (3) *The health of our creative landscape relies on directly rewarding artists for the music they create.*

IV. SUBSCRIPTION SERVICES

The subscription service business model is not new to the industry, but has lately been gathering steam as an option that holds greater potential.[14] The basic concept behind most variations of this model is that the consumers pay a monthly fee that grants them access to listen to (usually) unlimited music while they are

12. *See id.* (noting that a "360" deal is "one in which artists share not just revenue from their album sales but concert, merchandise and other earnings with their label in exchange for more comprehensive career support").

13. *See id.*

14. *See U.S. Teens Dropping Out of CD Market*, CBC NEWS, Feb. 27, 2008 ("Twenty-nine million Americans acquired digital music legally, via pay-to-download sites [in 2007], which is an increase of five million over [2006].").

subscribers.[15] The early test runs for this model have had less than remarkable success, but recent proposed alterations to it have pumped new life into the concept.[16]

Subscription models that allow users to "keep" the music they download are too costly to attract customers.[17] When users are granted unlimited downloads, there is nothing to stop them from enrolling for a month, loading up on music, and then canceling their subscription. Because of this, most companies that pursue this model stream their music instead of allowing permanent downloads[18]—and therein lies the root of this model's problems. The first consequence of stream-only downloads is a restriction on when and where people can listen to their music. Any subscription that does not permit customers to listen to their music at home, in the car, at work, or wherever they please, is destined to fail. There must be a way to access the music anywhere, or the service will be worthless to today's iPod-dependent consumer. Until wireless internet is available nationwide, there are no feasible ways to provide this access in a stream-only service. One more piece of the framework: (4) *People want their music to be portable.*

To sidestep this complication, one approach is to allow users to keep the music they download, but to also attach digital "tethers" to the files. These tethers allow the music to be transferred to a portable device and played anywhere the customer wants.[19] However, when the subscription is not renewed, the tethers are "pulled," which disables the music from all the devices where it has been stored.[20] This model ignores the fact that music-lovers are deeply attached to their music; the possibility of losing it is, for many, a deal-breaker. What happens if you are dissatisfied with your service and want to change to another company? What if the company goes belly-up? Will

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15. For example, RealNetworks offers access to over 4 million songs through Rhapsody for a monthly fee of $12.99. Rhapsody—Premium Subscription Music Service, http://www.real.com/rhapsody (last visited Mar. 12, 2008).

16. *See JupiterResearch Says Digital Transmission Well Underway, but Digital Sales not Enough To Save Music Industry*, BUS. WIRE, March 3, 2008.

17. *But see* Adam Benzine, *Comes With Music Comes of Age After Nokia Deal*, MUSIC WK., Dec. 15, 2007, at 2 (describing Universal's new music subscription service in which the customers can "keep all the music they have downloaded when the year-long subscription ends").

18. *See* Rhapsody—Premium Subscription Music Service, *supra* note 15.

19. *See* Rene A. Guzman, *The Owner's Manual, Internet Music File Limits Loosen*, SAN ANTONIO EXPRESS-NEWS, July 22, 2007, at 3J ("DRM restricts content usage according to the copyright holder with specially programmed limitations, such as the ability to play on certain devices.").

20. *See* Eric Gwinn, *Jury Still Out on Amazon's Challenge to iTunes*, CHI. TRIB., Oct. 2, 2007, at C4.

you lose everything and have to start from scratch? Some suggest that the company could keep your "playlist" on file in case you decide to discontinue the service, thus allowing you to regain access to your music should you decide to rejoin in the future. However, this introduces a host of other problems. As your playlist grows over time, the personal cost of stopping your subscription or switching to another service would get higher. Because leaving the service means losing all of your music, the company retains unethical leverage over the consumer and can inflate its prices. Music consumers will not stand in line to sign up for a subscription service that will bind them. (5) *People want their music to have permanence.*

V. RAISING THE PRICE OF MUSIC

Trying to charge more and more money for music will not compensate for the losses in the industry. It will drive more people to piracy. People have changed. They no longer connect to music and artists the way they used to.[21] They eat up music in gulps and handfuls, consuming it more than ever before. They want to buy in bulk, and that calls for lower prices. Keeping in mind that we are competing with "free" pirated music, cheaper will have to be the answer. Let us add two final parts to the framework: (6) *People want a lot of music;* and (7) *People are not willing to pay what they used to for music.*

VI. FINDING A WORKABLE SOLUTION

Even with this framework in place, there may still be questions as to whether there is anything the industry could provide that would draw people away from piracy and back to paying for music. And yet, there is still a market gap between what people get through piracy and what they could get for money. Here are some of the reasons that people will still turn to a viable music business model:

1. P2P services and pirate sites hold high risks of infecting your computer with a virus.

2. Many music consumers find non-commercial music sources confusing and difficult, choosing instead to have their more tech-savvy friends copy music for them. A simpler, iTunes-style alternative would have appeal.

3. Paid sites have more potential to offer features that appeal to music lovers, such as the iTunes "You might also like" feature. Music lovers like getting direction.

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21. *See* ANDERSON, supra note 2, at 33-35 (discussing the formation of "400 Top 40s" and the "micro-hit," both of which can be attributed to playlist sharing).

4. Despite what the RIAA and various labels may claim, people do, in fact, still have consciences. While the allure of free music currently overrides the fear and guilt of illegally downloading music for many Americans, it does not mean they would not look forward to an appealing legal alternative.

5. Fans want to see their favorite artists rewarded for their efforts.

So with this market gap in mind, and the framework set up in which we must operate, we must now determine a model that fits within the realities discussed above. If the new business model is to push consumers past the "tipping point," it will need to be a shove, not a prod. It will need to be grand and sweeping. Because the capitalistic model for music has imploded on itself, I believe music should be socialized. However, how would such a system work?

The first question to be addressed is: where will the money come from? The best way to accumulate a lot of money quickly without burdening anyone excessively is a blanket tax on all Americans. When put in context, a music tax is not a radical concept. In essence, it is like being a patron to the arts. New taxes often accompany technological changes that require government involvement. Some cities are already beginning to provide Wi-Fi coverage for their citizens through taxation,[22] and some nations, such as England, have a television tax.[23] In addition, Americans have always paid for things that they may or may not use in their lifetime (e.g., welfare). This would not be the first time the government has needed to step in and regulate the technological battlefield of digital music. From the enactment of the Copyright Act to the codification of the DMCA, there have been several pivotal moments in the life of our rapidly evolving techno-sphere in which government intervention was the best alternative to deal with new issues.

Music distribution will have to begin with an authorized DRM-free release of all albums by the labels to the government. Any labels that choose not to do so would be welcome to withhold, but they would lose out on the royalties that would be accrued by taxpayers (or subscribers) through the music tax. While music *could* be distributed and tracked through a government-legitimatized P2P site, policing it would be difficult. The government would have to track downloads in

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22. *See* Olga Kharif, *Why Wi-Fi Networks Are Floundering; Faced with Weak User Demand, AT&T and Other Telecoms Are Stepping Up Pressure on Cities To Foot More of the Bill for Muni Wi-Fi Projects*, BUS. WK. ONLINE, Aug. 16, 2007, http://www.businessweek.com/technology/content/aug2007/tc20070814_929868.htm; Paul Korzeniowski, *Municipal WiFi Networks Popping Up All Over*, TECHNEWSWORLD, Aug. 29, 2006, http://www.technewsworld.com/story/52561.html?welcome=1205080455.

23. *See* BBC, Key Facts: The TV Licence Fee, http://www.bbc.co.uk/pressoffice/keyfacts/stories/licencefee.shtml (last visited Mar. 12, 2008).

order to pay out correct royalty amounts to artists, and a P2P system could potentially be gamed by people to show higher royalties for an artist than he or she deserves by setting up computers that cycle the same download from different IP addresses.

A better model would be similar to an iTunes format. The government could either set up a central server to host the music or license the right to outside parties who could generate advertising revenues on their Web site to pay for it. This would encourage the greatest innovation in site organization. Determining royalties through random sampling or on a per-play basis would be too inaccurate and problematic to discuss here, but a per-download basis should work. If each taxpayer (or subscriber) were to log into the site with an account they created, the songs they download could be tracked. The incentive to download from anywhere else would be greatly diminished with the release of an authorized copy. The authorized copies could be watermarked so that any songs copied from one person to another would still be "tracked" and credited to the artist when the new owner logs onto his own account with the government-run service and it syncs with his computer.

Our survey of business models has churned out a laundry list of industry guidelines that is daunting by any standard. However, ignoring these points will inevitably fail to reverse the industry's decline. Because the labels will need to join forces in providing an attractive alternative to piracy, any approach that delivers these criteria is going to require some form of government intervention. While a jump to complete socialization may seem like a frightening one, it is the only idea that incorporates all of the consumer demands identified above and that would not rely on risky investments that could permanently cripple the already malnourished music business. In many ways, socializing the industry would be a return to the roots of music; perhaps music was always intended to be a completely communal experience.

By supporting our artists (and those who promote them) through a national music tax, our nation would be able to embrace emerging file sharing technologies fully and foster creativity universally. Music lovers would enjoy unfettered access to and enjoyment of their favorite songs, and the artists producing the best music would still be rewarded. No new "miracle" technology is required—just a shift in mindset. Most importantly, this is what the people want. If the industry can meet consumer demands while replenishing its falling sales revenues, everyone wins. As Cherry Lane

Digital CEO Jim Griffin so aptly stated, "Music well done is anarchy, and it is better we should monetize that anarchy than continue to vainly attempt to end it."[24]

24. *See* Posting of Bob to The Lefsetz Letter, http://lefsetz.com/wordpress/index.php /archives/2007/09/26/more-stiffelman/ (Sept. 26, 2007).