



A Better Way Forward:

Voluntary Collective Licensing of Music File Sharing

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The legal battles surrounding peer-to-peer (P2P) file sharing are a losing proposition for everyone. The record labels continue to face sliding sales, while the tens of millions of American file sharers—American music fans—are made to feel like criminals. Every day the collateral damage mounts—privacy at risk, innovation stymied, economic growth suppressed, and random unlucky individuals singled out for lawsuits by the recording industry. In the meantime, the lawsuits against music fans have not put a penny into the pockets of artists.

We need a better way forward.

The Premises

First, artists and copyright holders deserve to be fairly compensated.

Second, file sharing is here to stay. Despite all the lawsuits, P2P file sharing is more popular than ever. And new digital technologies are just going to make copying digital music easier and cheaper every year.

Third, the fans will always do a better job making music available than the music industry. The majority of the world's recorded music is "out-of-print." Yet the fans are making it available, every day, on P2P file sharing networks and the World Wide Web. In other words, if we want to build a Library of Alexandria for our global musical heritage, it's the file sharing fans that will build it for us.

Fourth, any solution should minimize government intervention in favor of market forces. Markets-driven solutions are likely to work faster, and more efficiently, than top-down government regimes.

The Proposal: Voluntary Collective Licensing

Since 2003, EFF has championed an alternative approach that gets artists paid while making file sharing legal: voluntary collective licensing.

The concept is simple: the music industry forms several "collecting societies," which then offer file-sharing music fans the opportunity to "get legit" in exchange for a reasonable regular payment, say a total of \$5-10 per month (after all, services like Rhapsody sell all-you-can-eat music for around \$10 per month, so we know the rate should be below that). So long as they pay, the fans are free to keep doing what they are going to do anyway—share the music they love using whatever software they like on whatever computer platform they prefer—without fear of lawsuits. The money collected gets divided among rights-holders based on the popularity of their music.

In exchange, file-sharing music fans will be free to download and share whatever they like, using whatever software works best for them. The more people share, the more money goes to rights-holders. The more competition in applications, the more rapid the innovation and improvement. The more freedom to fans to publish what they care about, the deeper the catalog.

The Precedent: Broadcast Radio

It has been done before.

By voluntarily creating collecting societies like ASCAP, BMI and SESAC, songwriters brought broadcast radio in from the copyright cold in the first half of the 20th century.

Songwriters originally viewed radio exactly the way the music industry today views file sharers—as pirates. Ultimately, however, the songwriters decided to use a collecting society that they had voluntarily formed—ASCAP—to grant blanket licenses to radio stations, just as they had for theaters, clubs and restaurants. ASCAP was later joined by BMI and SESAC, two other collecting societies for songwriters. Radio stations today pay a fee to these “performing rights organizations” (PROs), and in return are free to play whatever music they like, using whatever equipment works best for them. And the three PROs collect and pay out millions of dollars annually to their artists. Even though these collecting societies get a fair bit of criticism, there’s no question that the system that has evolved for radio is preferable to one based on each songwriter individually trying to sue radio out of existence one broadcaster at a time.

Copyright lawyers call this voluntary collective licensing. It’s voluntary for artists—the government doesn’t force them to join a collecting society, and even after they join a collecting society, they remain free to license their songs directly (that’s why it’s not a compulsory license). It’s also voluntary for the broadcasters—the government doesn’t force radio stations to take licenses from any PRO (that’s why its not a tax).

The same thing could happen today for file-sharing: Copyright holders could get together to offer their music in a “blanket license”—an easy-to-pay, all-you-can-eat, music buffet. We could get there without the need for changes to copyright law and with minimal government intervention.

The Money: Collecting It

Starting with just the 60 million Americans who have been using file-sharing software, a few dollars a month would net over \$3 billion in new revenue annually to the music industry (the total revenues of the music industry today are estimated at \$9 billion). And this should be a highly profitable revenue source—no CDs to ship, no online retailers to cut in on the deal, no payola to radio conglomerates, no percentage to Apple or anyone else. Best of all, it’s an ever-green revenue stream—money that just keeps coming, during good times and bad, so long as fans want digital music online. The pie grows with the growth of music sharing on the Internet, instead of shrinking.

How do we get file-sharers to pay up? That’s where the market comes in—those who today are under legal threat will have ample incentive to opt for a simple fee of a few dollars per month fee. There should be as many mechanisms for payment as the market will support. Some fans could buy it directly through a website (after all, this was what the RIAA had in mind with its 2004 “amnesty” program for file-sharers). ISPs could bundle the fee into the price of their broadband services for customers who are interested in music downloading. (And this would allow ISPs to advertise a broadband package that includes “free downloads of all the music you

want.”) Universities could make it part of the cost of providing network services to students. P2P file-sharing software vendors could bundle the fee into a subscription model for their software, which would neatly remove the cloud of legal uncertainty that has inhibited investment in the P2P software field.

The Money: Dividing It Up

The money collected would then be divided between artists and rights-holders based on the relative popularity of their music.

Figuring out what is popular can be accomplished through a mix of anonymously monitoring what people are sharing (something companies like Big Champagne and BayTSP are already doing) and recruiting volunteers to serve as the digital music equivalent of Nielsen families (something that Last.fm subscribers are already doing). Billions in television advertising dollars are divided up today using systems like this. In a digital environment, a mix of these approaches should strike the right balance between preserving privacy and accurately estimating popularity.

The Advantages

The advantages of this approach are clear:

Artists and rights holders get paid. What’s more, the more broadband grows, the more people will want “all-you-can-eat” music, and the more artists and copyright owners get paid, which means that the entertainment industry’s powerful lobby will be working *for* a big, open, and innovative Internet, instead of against it.

Government involvement is kept to a minimum. Copyright law need not be amended, and the collecting society sets its own prices. The market will keep the price reasonable—collecting societies make more money with a palatable price and a larger base of subscribers, than with a higher price and expensive enforcement efforts.

Broadband deployment gets a real boost. Music file sharing—already one of the de facto “killer apps” for residential broadband—will finally be made legitimate.

New investment in digital music technologies and services. So long as the fans are paying, technology companies can stop worrying about the impossible maze of licensing and instead focus on providing fans with the most attractive products and services in a competitive marketplace. Rather than being limited to a handful of “authorized services” like Apple’s iTunes or Rhapsody, fans will see a marketplace filled with competing file-sharing applications and ancillary services.

A Library of Alexandria for music. Music fans will finally have completely legal access to the virtually unlimited selection of music that the file-sharing networks have provided since the days of the original Napster. With the cloud of litigation and “spoofing” eliminated, these networks will rapidly improve.

Artists have options. The distribution bottleneck that has limited the opportunities of independent artists will be eliminated. Artists can choose any road to online popularity—including, but no longer limited to, a major label contract. So long as their songs are being shared among fans, they will be paid.

It’s not a tax. Payment will come only from those who are interested in downloading music, only so long as they are interested in downloading.

How does this help artists?

Artists benefit in at least three ways. First, artists will now be paid for the file sharing that has become a fact of digital life.

Second, independent artists no longer need a record deal with a major label to reach large numbers of potential fans—so long as you have any fans who are sharing your music online, others will be able to access your music on equal footing with major label content. In other words, digital distribution will be equally available to all artists.

Third, when it comes to promotion, artists will be able to use any mechanism they like, rather than having to rely on major labels to push radio play. Anything that makes your works popular among file sharers gets you paid. There would still be a role for the record industry – many artists will still want help with promotion, talent development, and other supportive services. With more options for artists to choose from, the contracts will be more balanced than the one-sided deals offered to most artists today.

What about antitrust?

Because a collective licensing solution will depend on a small number of collecting societies issuing blanket licenses covering all (or nearly all) music copyrights, there may need to be some antitrust regulation to ensure that they do not collude in abusive ways. Both ASCAP and BMI, for example, have been subject to a court-administered antitrust consent decree for many decades (SESAC, the smallest PRO, is not subject to the decree). In the alternative, Congress could grant these collecting societies an antitrust exception, if other mechanisms can be counted on to hold anticompetitive activity in check.

How do we ensure accurate division of the money?

Transparency will be critical—the collecting societies must hold their books open for artists, copyright holders, and the public to examine. There are examples of similar collecting societies in the music industry, such as ASCAP and SoundExchange. We should learn from, and improve upon, their example. Giving artists a bigger voice should help ensure that their concerns with the current collecting societies are addressed.

When it comes to actually figuring out relative popularity, we need to balance the desire for perfect “census-like” accuracy with the need to preserve privacy. A system based on sampling strikes a good balance between these goals. On the one hand, in a public P2P network, it is relatively easy to find out what people are sharing. Big Champagne already does this, compiling a “Top 10” for the P2P networks. This kind of monitoring does not compromise user privacy, since this monitoring does not tie songs shared to individually identifiable information. At the same time, this general network monitoring can be complemented by closer monitoring of volunteers who serve as the “Nielsen families” of P2P (Last.FM is an example of a large group of volunteers whose listening habits are recorded with their permission).

By combining these two methods, it should be possible to attain a high degree of accuracy, protect privacy, and prevent “cheating.”

What if the music industry won't do it?

The music industry has never been enthusiastic about a system that entails losing control over the distribution of music. But after a decade of fighting the future, the music industry is run-

ning out of other options. CD sales are in serious decline, and digital downloads are not offsetting the losses. Ringtone revenues are leveling off. And despite the industry's lawyers having targeted more than 30,000 college students, parents, and music fans for lawsuits, file sharing is more popular than ever.

There are signs that even record label executives realize that they need a "Plan B" if they want to prosper in the future. Warner Music, for example, has indicated a willingness to consider blanket collective licensing options through ISPs. Universal Music has expressed some interest in blanket licensing in order to create music players that offer "all you can eat" music to their owners. They are finally beginning to come around.

What about artists who won't join? How do we gather all the rights?

Artists and rights holders would have the choice to join a collecting society, and thereby collect their portion of the fees collected, or to remain outside the system. Those who choose not to join, however, may have no practical way to receive compensation for the file sharing that will inevitably continue. Assuming a critical mass of major music copyright owners joins a collecting society, the vast majority of smaller copyright owners will have a strong incentive to join, just as virtually all professional songwriters opt to join ASCAP, BMI or SESAC.

The complexity of music industry contracts and history make it very difficult for record labels and music publishers to be sure what rights they control. Accordingly, by joining the collecting society, copyright owners will not be asked to itemize rights, but will instead simply covenant not to sue those who pay the blanket license fee. In this way, music fans and innovators are not held back by the internal contractual squabbles that plague the music industry.

What about file sharers who won't pay?

The vast majority of file sharers would be willing to pay a reasonable fee for the freedom and peace of mind to download whatever they like, using whatever software suits them. In addition to those who would opt to take a license if given the opportunity, many more will likely have their license fees paid by intermediaries, like ISPs, universities, and software vendors.

So long as the fee is reasonable, effectively invisible to fans, and does not restrict their freedom, the vast majority of file sharers will opt to pay rather than engage in complex evasion efforts. So long as "free-riding" can be limited to a relatively small percentage of file sharers, it should not pose a serious risk to a collective licensing system. After all, today artists and copyright owners are paid nothing for file sharing—it should be easy to do much better than that with a collective licensing system.

Copyright holders (and perhaps the collecting society itself) would continue to be entitled to enforce their rights against "free-loaders." Instead of threatening them with ruinous damages, however, the collecting society can offer stragglers the opportunity to pay a fine and get legal. This is exactly what collecting societies like ASCAP do today.

What about other countries?

Non-U.S. rights holders would, of course, be welcome to join the collecting society for their fair share of the fees collected from American file sharers. As for file sharers in other countries, there is every reason to believe that if a collective licensing approach is successful in the U.S., it will receive a warm welcome and enthusiastic imitation abroad.

A relatively small number of countries today account for almost all of the revenues of the music industry. So establishing a collective licensing system in just a few countries could turn around the downward spiral in music industry revenues. The music industry already has an international “clearing” system for apportioning payments between countries.

What about the authorized music services?

The “authorized music services” like Apple’s iTunes and Napster 2.0 would be free to compete against the P2P services, just as they do today. In addition, they could themselves adopt elements of P2P architectures, thereby dramatically expanding the music inventories they could offer music fans.

What’s to stop the music industry from charging sky-high fees?

The enforcement costs faced by a collecting society for file sharing will keep prices in line. After all, if the society attempts to charge too much, intermediaries won’t be able to bundle the fees into the cost of their products (\$5/mo. license on a \$50/mo. broadband account makes sense; trying to tack \$100/mo. license, in contrast, won’t work) and file sharers will likely rebel in droves.

History teaches this lesson: when movie studios charged \$90 for a VHS movie, they faced widespread piracy. They learned that, by lowering prices, they made more money and eliminated much of the piracy problem. In other words, reasonable pricing makes the system work for everyone.

What about movies, software, video games, and other digital content?

The music industry is the only industry that appears to be unable to adjust their business models to take file sharing into account. And it is the music industry that has been leading the way in suing ISPs, software companies, and individual music fans.

The movie industry, in contrast, is having some of its most profitable years in history. The software and video game industries also continue to show strong growth and profitability. Each one of these industries has taken steps to adapt their business models to the realities of file sharing. Of course, if other industries want to form voluntary collecting societies and offer blanket licenses to file sharers, there is nothing to stop them from doing so. Individuals would then be free to purchase the license if they were interested in downloading these materials from the file-sharing networks.

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