

The Harvard Challenge to the RIAA: An Assessment

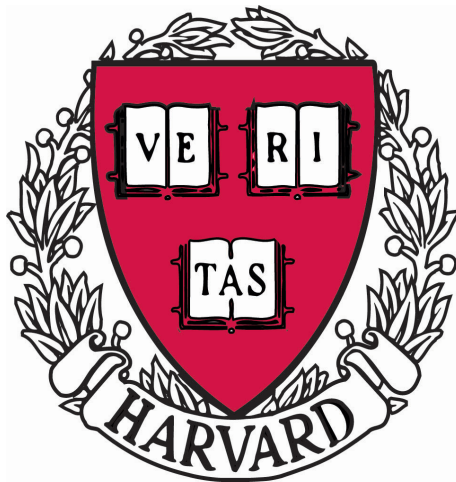
By Tiffany Peon

Since 2003 the RIAA has sued over 30,000 individuals for allegations of illegal file sharing on peer-to-peer (P2P) networks. Although most of the accused have faced charges ranging from \$750 to \$500,000, artists have yet to receive any royalties to make up for the losses caused by P2P networks. Many criticize the RIAA for not properly penalizing those involved in illegal P2P activity and claim that the group uses all its resources to run an elaborate witch-hunt, intimidating and extorting those accused instead of finding a viable means of curbing copyright infringement. Furthermore, some believe the awards the RIAA demands in its settlements are grossly over-inflated when compared with the damages incurred on the artists by the alleged infringers.

As of December 19, the organization has decided to take a new approach to stopping copyright infringement. Although it reserves the right to sue particularly heavy file sharers, the RIAA has made a new agreement with several internet-service providers. The RIAA will send the provider an email when it finds a provider's customer is making music available for download. The ISP will then send a warning email to the alleged infringer. If the customer does not remove the files, the ISP may slow or even shut off the customer's service. The most recent case, involving Boston University graduate student Joel Tenenbaum, may have been instrumental in ending almost six years of lawsuits.

Charles Nesson, a Harvard Law School professor and founder of Harvard's Berkman Center for Internet and Society, agreed to defend a BU graduate student with a case questioning the copyright law upon which the RIAA bases its war. Joel Tenenbaum is one of dozens of people who have appeared in court without representation to

contest the settlement letter he received. Joel has been mired in legal proceedings since he was first accused in 2004 of downloading at least seven songs and making available 816 files available for distribution on Kazaa. He went to court unrepresented in hopes of settling for \$500 but was offered a \$12,000 settlement.



the injured party may bring a civil action in Federal court and may request statutory damages. However, if the violation is proven willful the offense becomes criminal and the penalties range up to a \$500,000 fine or up to five years imprisonment. The court may reduce the damages for innocent violators, but willful violators will face harsh penalties, especially if they are violating the section for private financial gain or commercial advantage. Charles Nesson maintains that the RIAA uses this distinction as a means of scaring alleged infringers into paying the settlement fee.

Nesson has taken Tenenbaum on as his client in attempts to change several provisions of The Digital Theft Deterrence and Copyright Damages Improvement Act because he believes them to be unconstitutional. Nesson has structured his defense on the idea that Congress is allowing the RIAA to prosecute a criminal statute in a civil court and that the awards granted for 'statutory

The RIAA bases its fees off The Digital Theft Deterrence Act of 1999, which sets damages of \$750 to \$30,000 for each reported infringement and up to \$150,000 for willful violation. The other distinction associated with willful violation is that it is considered a criminal offense versus a civil offense. This provision comes from the DMCA in 1998. In the case of innocent viola-

MISSION STATEMENT

The Music Business Journal (of the Berklee College of Music) is a student publication that serves as a forum for intellectual discussion and research into the various aspects of the music business. The goal is to inform and educate aspiring music professionals, connect them with the industry, and raise the academic level and interest inside and outside the Berklee Community.

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EDITOR'S NOTE

Welcome back to the MBJ and our first issue of 2009. It is fitting that this edition is full of articles about new beginnings. On the cover, contributor Tiffany Peon details the RIAA's decision to shift strategies in its fight against piracy, moving away from lawsuits against individuals found with pirated material on their computer. Harvard Professor Charles Nesson has been fighting against the RIAA for some time, defending a BU student facing massive fines because he had a handful of mp3s on his computer. From now on, the RIAA's focus will be cutting off piracy with the help of ISPs, rather than making an example of individuals.

Apple, too, has turned a new leaf this year. As I write on page nine, there will no longer be any Digital Rights Management (DRM) on files purchased and downloaded via iTunes. Sure, there have been other services to do the same thing, but iTunes was the first major online music service, and its decision basically puts the last nail in the coffin of DRM. This, combined with the apparent end of RIAA lawsuits, has given consumer advocates and music lovers reason to cheer. Apple will also introduce a new variable system of pricing music in April, arguably better tailored for the needs of the marketplace and, especially, the record labels.

The proposed merger of Live Nation and Ticketmaster, however, has raised some eyebrows. Our previous issue featured an article discussing Irving Azoff's ascension as Ticketmaster's new CEO, with particular focus on how the company was gearing up for battle against Live Nation. It raised the possibility of Ticketmaster moving into the concert promotion arena and predicted that new developments could create some healthy competition in the live music business. Now, with hindsight, and as Jamie Anderson reports, our forecast is almost the exact opposite. The prospect of such a massive company running the fortunes of the live music trade is a concern to many, including outspoken artists like Bruce Springsteen and anti-trust legislators.

Finally, did I forget to mention that we have a new President? Check out Jack Goodall's look at the music of Barack Obama's Inauguration. Musicians came out in droves to support Mr. Obama throughout his historic campaign, and many converged on Washington DC to perform at events like the HBO's "We Are One" concert. You'll be surprised at how much like a rock concert a political rally really is.

Sincerely,
Mark Schafer

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RIAA (contd.)

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damages' are grossly excessive. The RIAA's rationalizes its high settlements by claiming statutory damages, as it is impossible to determine the actual amount of damages incurred on the plaintiff by piracy.

In Tenenbaum's defense Nesson compares file-sharing cases to speeding tickets. He urges the court to imagine a statute in the name of deterrence that presents a \$750 fine for each mile-per-hour that a driver exceeds the speed limit. The fines can extend up to \$150,000 if the driver knew he was speeding. The fines aren't publicized and most drivers don't realize they are being fined. Nesson continues; "Imagine that enforcement of the fines is put in the hands of a private, self-interested police force, that has no political accountability, that can pursue any defendant it chooses at its own whim, that can accept or reject payoffs in exchange for not prosecuting the tickets, and that pockets for itself all payoffs and fines. Imagine that a significant percentage of these fines were never contested, regardless of whether they had merit, because the individuals being fined have limited financial resources and little idea of whether they can prevail in front of an objective judicial body." Nesson believes that to the digital-born generation, file sharing is similar to driving sixty in a 55 mph zone.

Nesson's second argument is that the RIAA is requesting statutory damages in an inappropriate situation. Statutory damages are frequently granted in cases where there is "difficult or impossible proof of damages or discovery of profits." This precedent was set in a case where the defendant was infringing for commercial gain. The case, *Cass County Music Co v. C.H.L.R., Inc.*, awarded statutory damages because the comedy club in question would play music without a license before and after comedy shows, despite being advised by ASCAP to get a license. Because it was impossible for the court to determine the capital gained by this infringement, the court ruled in favor of the plaintiff, awarding them statutory damages and making an example of the defendant.

Nesson believes the statutory awards that the RIAA is receiving border on being punitive damages. He questions the RIAA's desired outcome for these cases. When the suits were first filed in 2003, RIAA president at the time, Cary Sherman, claimed that the suits were "simply to get peer-to-peer users to stop offering music that does not belong to them." The goal in targeting music fans was "not to be vindictive or punitive." The group has changed its tune a bit in the past few years: "Think about what the legal marketplace and industry would look like today had we sat on our hands and done nothing," explained Cara Duckworth, a RIAA spokeswoman. It is so important for Charles Nesson to show the jury that the settlement fees and statutory awards being asked are actually punitive damages because then he may challenge the basis for awarding those damages to the RIAA.

Nesson explains, "The Due Process Clause allows punitive awards which are reasonably necessary to vindicate legitimate interests in punishment and deterrence; however, a damage award that is grossly excessive in relation to those interests violates the Due Process Clause of the 14th Amendment." Nesson cites *BMW v. Gore* to explain further limitations on statutory damages. In *BMW v. Gore* the Supreme Court determined that the most common indicator of excessive damages award is the ratio of harm that the infringer caused the copyright holder. The other factor is degree of reprehensibility of the defendant's conduct. Certain wrongs are "more blameworthy than others." Blameworthy crimes include violence, trickery, deceit or crimes with any indication of malice. Crimes that are less blameworthy include claims of negligence. Nesson argues that Joel's actions are not so reprehensible that they would justify civil punitive damages.

Mr. Tenenbaum has also filed a counterclaim against the RIAA for abuse or process. His defense describes even the lowest potential amount that Joel will be fined (\$5,250) "a crippling amount to a defendant with limited financial resources." An increasing number of cases and reviews are recognizing that something is a bit off about the basis for the RIAA proceedings. "We're just barely scratching the surface of the legal issues," says Ray Beckerman, a New York lawyer and one of the nation's few who have taken an RIAA defendant's case. "They're extorting people -- and for what purpose?"

The few cases that have gone to trial did not do so because the alleged infringers actively wish to fight the RIAA's claims; but because the settlement that they were offered was too expensive to pay. In the same sense, many of those wanted to fight the RIAA's accusations did not because it was more expensive to hire a lawyer than to take the settlement.

Joel Tenenbaum's counterclaim is made under this question: "Is the law just the grind of a statutory machine to be carried out by judge and jury as cogs in the machine, or do judge and jury claim the right and duty and power of constitution and conscience to do justice?" Hopefully for Joel and thousands of other Americans who still face settlement fees the courts will disagree.



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CURRENT EVENTS

LiveNation & Ticketmaster: Summing the Parts, Making a Dangerous Whole

By Jamie Anderson

Early in February, Live Nation and Ticketmaster decided to merge into one company instead of renewing their previous commitments to working with one another. This decision was made after a \$123 million dollar investment by Ticketmaster to hire Irving Azoff as their new CEO back in December of 2008. Neither Live Nation nor Ticketmaster have commented on when or how they plan to merge, but it is known that the name of the combined company will be “Live Nation Entertainment” and include executive chairmen Barry Diller and Michael Rapino, both of Live Nation, and Irving Azoff, of Ticketmaster [Editor’s note: The merger has since been announced on February 10]. Minor details of the merger have been leaked to the media, including a no cash exchange between the two monster companies as well as a “tax-free and all stock” merge, totaling approximately 2.5 billion dollars.

The potential for antitrust violations is a serious concern, so the merger will most likely invite intense scrutiny by public authorities. From the government’s point of view, merging two of the biggest companies in the music business and entertainment industry is like creating a juggernaut, which if left free to roam without restrictions, could potentially crush competitors and smaller vendors. With Live Nation owning hundreds of large venues around the United States, as well as being the largest company for concert promotions and merchandising, combining with Ticketmaster would therefore mean that Live Nation Entertainment could control most aspects of promotion, primary and secondary ticket sales, marketing, booking, merchandising and in some cases album sales. Ticketmaster is no stranger when it comes to antitrust laws and regulations, as in the 90’s they caught the attention of the Federal Trade Commission (FTC) and Justice Department for a detailed monopoly investigation. The investigation was dismissed in 1999 for reasons including insufficient evidence of monopolization.

So what would this merger mean for consumers and competitors? First of all, it would make entering the ticket sales market harder for new vendors. These new vendors would be forced to change the way they market and sell their products to match the new ways of doing business presented by Live Nation Entertainment, meaning they would either be forced to drop ticket prices dramatically to penetrate the market, or create package deals for their customers. During a phone conference between Azoff and investors earlier this year, Azoff claimed the merger would not monopolize the industry nor would it cause trouble for new and existing ticket vendors. Though Azoff stands by his opinions strongly, a detailed investigation by the Obama administration and Justice Department is sure to follow post merger.

On the brighter side of things, after Live Nation Entertainment has been established, convenience fees notoriously synonymous with Ticketmaster will be abolished. Instead of paying a charge when purchasing tickets, Live Nation Entertainment will push the consumption of other products on the customer, meaning when a person goes to buy a ticket, instead of paying a fee they will be presented with an array of other products to buy, such as CD’s and merchandise of the artists they’re going to see live. The logic behind this new way of marketing is that a customer will be more likely to buy a cheaper CD through Live Nation Entertainment at the time of their ticket purchase, as opposed to pirating music or buying a higher priced album inside a retail store. For CEO’s, employees, and stockholders of Live Nation and Ticketmaster, the merger between companies would boost profit for all parties and set new standards for the ticket selling and entertainment industries. We can expect to see a thorough investigation and plenty of debate until that point.

BUZZWORD: MULTIPLE RIGHTS DEAL

By Kyle Shoemaker

Formerly known to many as the “360 Deal,” lawyers at this year’s MIDEM conference agreed that the “Multiple Rights” terminology is a more accurate representation of the plethora of different deal structures that are now appearing. Over the last ten years, profits on recordings have been severely diminished, and as a result, record companies have been forced to expand their interests. Though record company contracts now always cover a broad scope of rights, there are other agreements which artists may enter into that are less or even more involving.

In fact, multiple rights deals need not only be with record companies. Classic examples have been Live Nation’s signings with the likes of Madonna, Jay-Z, and Nickelback, including rights in recording, touring, merchandise, licensing, sponsorship, and even literary rights. There have been fewer reports of new artist’s signing multi-rights deals of this type outside of record companies, and such new-artist deals will almost certainly seek ownership or control over the artist’s website and Myspace page, in addition to the multiple revenue streams.

A more recent trend in multi-rights deals has been for artists to partner with popular brands outside of the music industry. Last March, the British act Groove Armada teamed up with Bacardi, which agreed to release the group’s recordings, and feature them at 25 Bacardi branded events across 5 continents. Though not all artists choose to release via a brand partnership, many view an artist-brand relationship as a vital component for increasing exposure.

In a multi-rights deal just announced this month, Snoop Dogg signed an agreement with MTV to distribute, market, and promote his latest album “Malice in Wonderland,” though questions still remain as to how MTV will get Snoop’s album into stores. Snoop’s Music will also be attainable through the EA’s “Rock Band” and MTV will be airing a new TV show featuring the rapper/actor called “Dogg After Dark,” premiering February 17th. Snoop had previously been signed to Jimmy Iovine’s Interscope/Geffen/A&M, for whom he had been recording since the early 90’s.

BUSINESS ARTICLES

The Promise of Digital Music: The IFPI Report 2009

By Kyle Shoemaker

The International Federation of the Phonographic Industry, which represents record labels worldwide, just released its Digital Music Report 2009. It is available for free at IFPI.org.

The Music Business Journal has reported on earlier annual versions of this document, which is the standard reference for an international perspective of the recorded music business and an account unlike any other of new developments in this promising arena of recorded music sales.

According to the IFPI, Digital music revenue saw continued growth in 2008, increasing by more than 25% to \$3.7 billion globally. Digital platforms now account for 20% of total recorded music sales, up from 15% percent in 2007. This is good news for the music industry, as physical album sales continue to experience double-digit declines. In the U.S. alone, sales of compact discs fell 20% from 450.5 million to 362.6 million. Though some believe that the CD market will eventually stabilize, the attention is currently directed towards monetizing digital music, in which there are several key areas in focus for 2009.

The digital download market is expected to see continued growth. Industry executives are hoping that a DRM-free iTunes will drive even more fans to the already largest digital music retailer. Labels have grown increasingly savvy in their sales strategies with iTunes, employing features such as “complete-my-album,” and offering value-added content such as music videos within the price of an album. Some labels are experimenting with “windowing strategies,” otherwise known as releasing specific content prior to an album’s release in order to generate hype and capitalize on single-song downloads. Other digital retailers expected to see growth include Amazon and Wal-Mart, though iTunes still holds a dominant market share.

Another area in which the music industry is hoping for significant growth is in the ad-supported services and social network realm. Sites like Myspace Music and Imeem allow users to stream songs for free, while compensating rightsholders through licensing deals and advertising revenue, with some labels reportedly requiring 1 cent per stream on their catalogs. Labels are also hoping for increased ad-revenue surrounding music videos from sites such as YouTube. In fact, half of the ‘most streamed videos’ on the site are music videos. Though most of these sites are still considered to be in their infancy, optimizing advertising revenue could become easier as their user interfaces are enhanced.

The explosion of music-themed video games has been exceptionally rewarding for those lucky enough to have their songs placed. According to the NPD Group, music-themed games represented 15% of all game sales during the first half of 2008, and 32% of the sector’s year-on year revenue growth. Copies of the Guitar Hero series have sold over 23 million copies and grossed over \$1 billion in North America alone. The

creators of Rock Band are expected to release a videogame themed around The Beatles later this year, with some speculating that The Beatles will also finally release their catalog simultaneously online.

The shift to “music access,” which some consider to be the future of the music business, first made its way onto the playing field in 2008, with Nokia’s Come With Music and Sony Ericsson’s PlayNow. In the case of Comes With Music, purchasers of certain Nokia phones are given unlimited access to music for a full year, and may download songs at no additional charge. PlayNow offers a similar deal to its customers, though users may only keep up to 300 songs after their subscription ends. Proponents of services such as Comes With Music and PlayNow believe that music access models can heed a competitive advantage to those who adopt them, which would likely compel others to bundle music with their product or service.



Despite the many positive strides in the digital economy, there is still the ever-rampant problem of digital piracy threatening music’s vitality. According to the IFPI, 95% of the music downloaded online is obtained illegally. The RIAA appears to be wrapping up its litigation campaign, with little to show after five years of suing the likes of college kids, single parents, and even a dead person. So you may ask, what’s next? The hope is that governments will take a more active approach in helping the music industry work towards solu-

tions. In France, lawmakers have drafted a bill, “Creation and Internet Law,” which would require Internet Service Providers (ISPs) to set up a system of graduated response, by which copyright abusers would receive warnings. If the abuse persisted, offending users would have their access terminated for a period of one to twelve months. A survey by the IPSOS in France showed that 90% of consumers would stop illegally sharing files after two warnings from their ISP.

In the UK, the government brokered a joint ‘Memorandum of Understanding’ between the recording and film industries and the country’s six largest ISPs, binding them to work together towards reducing copyright infringement. In October 2008, as part of a three-month trial period, ISPs began sending out letters to users warning them of illegal file sharing and promoting the use of legal music avenues. Talks of similar initiatives are emerging in the U.S., as New York Attorney General Andrew Cuomo has been urging greater cooperation between the recording industry and ISPs, and has been working to institute graduated response approaches similar to those in Europe. The RIAA has said it has made agreements in principle with several ISPs.

BUSINESS ARTICLES *(contd.)*

The State of the Music Products Industry in 2008

By Adam Owens

As the world met economic turmoil in October of 2008, no industry tat could hide from the effects of the downturn. Yet, the entertainment trade, of which music is a part, is generally thought to be more resilient to a recession. It is also easy to fall into the trap of characterizing 2008 by its last three months. Indeed, for the music industry, the first three quarters were rather uneventful. There were still as many illegal downloads as before in the recording side of things, and this affected record labels. However, as this article will suggest, sales of music products were much firmer, and many keyboards, guitars, drum sets, and accessories were purchased regardless.

Overall, the year had two very different phases. Earlier on, Guitar Hero surpassed the \$1.5 billion mark and attracted competitors to create Rock Band and even a new Wii music game. Even though playing these games does not involve use of real guitars or drum sets, more people are drawn into playing music and this could lead to an increase in musical instrument sales down the road. In the past few months, against a background of a declining economy, guitar sales have in fact been bringing in steady profits for retailers.

Companies like Amazon.com and Best Buy have seen the sales of musical instruments rise and are starting to hop on the train. Best Buy announced last year they would open between 75 and 80 music stores by the end of 2008. So far they have opened around 70 in 26 states. Amazon has also started selling musical instruments on their website. In the past they have mostly linked to other retail websites like Musician's Friends and Sam Ash Music, but this year they have started selling more music products directly. Due to these two mega-retailers entering the music product scene, Moody's Rating Agency has reduced the credit rating of Guitar Center bonds, whose paper used to monopolize the musical instrument market. To combat this, Guitar Center appears to have been concentrating on "lean manufacturing", i.e. improving performance of the already existing stores rather than opening new ones.

A number of acquisitions occurred in 2008, but it was by no means a dramatic year. Yamaha annexed the Bosendorfer Piano Company promising to keep the quality and integrity of Bosendorfer's products consistent but also "give discerning pianists additional choice in instruments". The Samick Company, mega manufacture of music instruments out of Korea, purchased the German company Seller Pianos when it had filed for bankruptcy protection. Roland is now in a majority position with Cakewalk Software, cultivating better integration between products. D&M Holdings, the audio company that already owns Marantz, Denon, and Boston Acoustics acquired the U.K. mixer manufacturer Allen & Heath. Fender, who was having difficulties obtaining vacuum-tubes for their amps purchased Groove Tubes. Steinway Music, known for it's concert grand pianos reached

Reed Smith Guitars unveiled a plan to build an 80,000 square foot plant addition. PRS will use the new space to branch out into acoustic guitar and amplifier production. D'Addario opened a new 36,000 square foot distribution center to more quickly retailer orders.

2008 was also a year of music industry milestones. The family business Martin Guitars marked their 175th year of continuous guitar production. The Zildjian family, possibly the world's most renowned cymbal makers, celebrated 385 years of operation that date back to the Ottoman Empire (modern day Turkey). Hamilton Stands, makers of the folding music stands turned 125 this year. Washburn Guitars also celebrated 125 years of production. J.J. Babbitt, the company who made famous hard rubber mouthpieces for woodwinds turned 90. The Japanese guitar company Takamine turned 45, jazz guitar maker Bob Benedetto celebrated 40 years of manufacturing, Regal tip, makers of drumsticks, marked it's 50th year and Dean Guitars made it to 30 years in business.

As far as product development goes, 2008 was more about polishing and improvement than new product development. Digital drums and percussion are nothing new, but Roland has released a new series of kits with an attractive price tag. Also, the number of digital handheld recorders sold doubled from 2007 to 2008.

Given the current economic circumstances, most entrepreneurs are running and hiding but there were a few notable start-ups and a giant revival this year. The founder of DOD and Digitech Electronics,

John Johnson, came back from his sabbatical entering XP Audio with Motion Sound concert speakers and Forge Amplifiers. At NAMM this year, Harmony Guitars was reborn and Ultimate Support stands were revived.

It is unlikely, of course, that music products will see substantial growth, but unless the recession takes an even more serious downturn, it is doubtful any of the huge music retailers will go bankrupt in 2009.

Sources: The Music Trades Magazine, January 2008 and NAMM.org



beyond instrument sales into audio recordings and bought online classical recordings retailer Arkiv.com. Earlier in the year, Gibson Guitars and TC Electronic announced they would merge, but in May the deal was cancelled.

Many companies beefed up their already running operations. Conn-Selmer expanded its Elkhart woodwind plant for improved production of its woodwind brands. Since Fender's acquisition of Kaman in 2007, production of Guitar Guitar moved to the Ovation plant in Connecticut. To reduce shipping times and costs, west coast based drum company Pearl opened a warehouse on the east coast. Paul

BUSINESS ARTICLES *(contd.)*

Copyright & Music: A Moving Target

By Allen Bargfrede

Since the initial emergence of recorded music, protecting artists and intellectual property from piracy has been a great concern. Music is currently protected under copyright law, which has developed over the past three hundred years, springing from British stationers' attempts to protect works against piracy. The result of those efforts was the first law to recognize the rights of authors and creators, dubbed the Statute of Anne and passed in Britain in 1710.

Currently, artistic works in the United States today are protected under the Copyright Act of 1976, with various amendments. Specifically, the law protects "works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (Copyright Act).

Copyright law in the United States provides a copyright owner with six exclusive rights:

- 1) "To reproduce the copyrighted work in copies or phonorecords;
- 2) To prepare derivative works based upon the copyrighted work;
- 3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- 4) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- 5) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- 6) In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission" (Copyright Act).

The law has, over time, evolved from its earlier renditions in response to changing intellectual property rights issues. For example, development of the radio brought concern to copyright owners that the provision of free music would provide them no gain, and instead diminish the value of their intellectual property. However, unlike the technologies of today, copyright owners found that then existing copyright law already protected their rights, and the new technology led to the development of new methods for collecting revenue (such as ASCAP).

While protections under the Copyright Act have served rights holders well for decades, new technologies, unanticipated at the time the Act was written, have raised questions of how to appropriately protect rights in the digital age, and new legislation is regularly considered to address these concerns. For example, the development of the digital audio tape (DAT) led to the Audio Home Recording Act of 1992, which put

charges on manufacturers whose products might promote infringement. The DAT was widely cited as the first technology to allow repeated copying without loss of quality, and for that reason, labels and musicians lobbied Congress for an amendment to the Copyright Act. "This law imposed a surcharge on digital audio tape (DAT) recorders and recording media, to be distributed among song writers and publishers, and performers and producers of sound recordings. The law also obliges manufacturers of DAT machines to include a 'serial copy management system,' to prevent recording subsequent-generation tapes from the original tape copy. The law does not, however, impose levies or other restrictions concerning analogue audio recording devices or media; indeed it explicitly exempts private analogue audio copying from liability for copyright infringement" (Gorman 11).

The Audio Home Recording Act provides for a two percent (2%) royalty to be imposed on the transfer price of digital audio recording devices, which were narrowly defined in the bill to mean literally DAT players. "The royalty payment due under section 1003 for each digital audio recording device imported into and shall be 2 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such device shall be required to pay the royalty with respect to such device. The royalty payments deposited pursuant to section 1005 shall, in accordance with the procedures specified in section 1007, be distributed to any interested copyright party--(1) whose musical work or sound recording has been--(A) embodied in a digital musical recording or an analog musical recording lawfully made under this title that has been distributed, and (B) distributed in the form of digital musical recordings or analog musical recordings or disseminated to the public in transmissions, during the period to which such payments pertain" (Copyright Act).

Interestingly enough, at least one major label in 2006 reportedly requested a royalty from Microsoft on the sales of the company's Zune portable music player as part of its licensing arrangement with Microsoft for its catalogue of music. This was the first known attempt to tax new hardware since the Audio Home Recording Act of 1992 was passed.

In 1995, Congress passed an amendment to the Copyright Act called the Digital Performance Right in Sound Recordings Act, which for the first time established a public performance royalty right for the holders of sound recording copyrights. (Music composition copyright holders have always been entitled to royalties, currently collected through performing rights organizations such as ASCAP, SESAC, and BMI.) Digital and online broadcasters are now required to pay royalties to recording artists for their works through an organization called Sound Exchange which serves a very similar purpose to ASCAP or BMI. (In early February of 2009, legislation was proposed in Congress to give sound recording copyright owners a performance right in "terrestrial" radio as well.)

The next response to copyright concerns came with the passage of the Digital Millennium Copyright Act (DMCA) in 1998. The law primarily served to protect rights management systems, rather than making wholehearted changes to copyright itself. "The DMCA, which brings U.S. law into line with World Intellectual

Property Organization treaties signed in 1996, doesn't actually tinker with the basic principles of copyright law. Instead, the law aims to safeguard the technologies, such as encryption or copy-protection systems that protect and manage digital content. Specifically, it outlaws attempts to circumvent or disable these systems, and it also bans devices whose primary purpose is to defeat copyright protection technology. The DMCA would make it illegal, for example, to tamper with the watermark on a digital image, or to remove encrypted digital 'wrappers' that control access to electronic documents and software" (Fisher).

Courts have developed a three prong test to determine if a device violates the DMCA: 1) Was the device designed primarily to enable infringement; 2) Is there a substantial commercial purpose for the device other than infringement; and 3) Is the device marketed as a tool to circumvent copyright law and protective technologies? In *RealNetworks vs. Streambox*, the DMCA was used to find that the Streambox VCR circumvented technology by pretending to be a Real Player and then selecting downloadable streams, which were taped to a medium allowing for on-demand playback at a later date. The court found that the Streambox VCR violated the DMCA because it failed all three factors of the DMCA test.

The DMCA also provides what is called a "safe-harbor" provision for Internet Service Providers (ISPs). The provision is meant to protect companies who merely serve as a conduit for the Internet from copyright infringement liability, and means that bandwidth providers, such as Comcast and AT&T who provide broadband access to the Internet, cannot be held liable for infringement by their customers. Napster, which was sued by record labels in 2001, tried to use the "service provider" safe harbor provision of the DMCA, claiming merely to be a conduit for the trading of music. The court promptly rejected that argument, again noting that the Napster product failed all three provisions of the DMCA test.

As we continue today in 2009, constructive argument continues about the best way to protect music and intellectual property. Given the ease of transfer of files online, and the outdated current copyright statutes, it is easy to conceive of ways to pirate materials and shortchange copyright holders. However, while many parties agree that changes to copyright law are necessary, political issues are often exposed as Congress continues to seek to refine digital copyright laws. Many laws are introduced each year to update the copyright code, and are never passed. Until the competing interests of radio broadcasters, record labels, technology companies, music publishers, and artists come together and develop a comprehensive system for reform, ambiguity in legal protections of intellectual property and music will continue indefinitely. In the end, we must merely seek to find a fair and balanced system of protection in cyberspace. Nothing will ever be perfect or absolute.

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BUSINESS ARTICLES *(contd.)*

BaROCK Obama's Inauguration

By Jack Goodall

The inauguration of our Nation's 44th president, Barack Obama, was met with a spectacle of music, the likes of which had never been seen before. Artists from across the musical spectrum of genres flocked to the Nation's capital to perform and take part in this truly historical event. Never before has a president stimulated artists on this level of magnitude. The experience for those artists and promoters involved rewarded them with a great sense of pride, as well as some major monetary boosts.

Barack Obama's Presidential Inauguration helped make a big splash for the many artists involved in the festivities. Viewership for the inauguration on U.S. television was about 37.8 million people, second only to Ronald Reagan's 41.8 million viewers in 1981. The inauguration itself, along with HBO's special concert event called "We Are One," helped to boost sales for digital tracks of songs performed by the artists at these events. The roster of performers at the "We Are One" concert included U2, Sheryl Crow, Bruce Springsteen, Stevie Wonder, will.i.am, Jay-Z, Beyoncé, Kanye West, James Taylor, Pete Seeger, and many more. The HBO special, which took place on the Sunday prior to the inauguration, had 4.1 million viewers on TV and another 700,000 viewers online.

Artists and songs that saw boosts in sales of digital tracks include Springsteen's "The Rising" (up 87% from the previous week), Woodie Guthrie's version of "This Land is Your Land" performed by Springsteen and Seeger (up 287%), Garth Brooks' "We Shall Be Free" (up 114%), U2's "City of Blinding Lights" (up 116%) and "(Pride) In The Name of Love" (up 75%), John Mellencamp's "Pink Houses" (up 28%), James Taylor's "Shower the People" (up 63%), and more. These numbers come from the week ending Sunday, the night the HBO special aired, so there were only several hours for viewers to make these purchases. Reports of these numbers are based on information that was published only several hours after the "We Are One" concert. In the following weeks, more data will be released, which will include numbers for songs like "At Last," performed by Beyoncé for Barack and Michelle Obama's first dance at the Neighborhood Ball on Inauguration Day.

Performers at many of the inaugural balls were not given as much airtime as those that were a part of the "We Are One" concert special on HBO. Other than a small portion of Kanye West's performance of "Heartless" at the "Be the Change" Youth Ball on CNN, most artists performing at the balls were not seen on television. Performers at the Neighborhood Ball in the Washington Convention Center had better luck. Broadcasted on ABC, it came second in the rankings that night with 12.5 million viewers. Artists including Mary J. Blige, Mariah Carey, Jay-Z, Shakira, Stevie Wonder, Alicia Keys, Faith Hill and Sting, were passed over by the 22.4 million people that chose to watch the amateurs of "Idol."

A large music event wouldn't be complete without a little drama, would it? Etta James stirred up some controversy with comments in regards to Beyoncé singing "At Last" at the Inaugural Ball. The legendary singer was quoted saying that she didn't appreciate Beyoncé taking her song and singing it during the event. She also made several remarks about the President himself. This comes after James had originally praised the performance, and is especially strange after Beyoncé recently portrayed James in the film "Cadillac Records." Etta James recently said that the comments were a joke and did not mean them literally.

C3 Presents was very proud to be the concert promoter for the inauguration of President Barack Obama this past January 20th. The promoter produced all of the events during Inauguration Day. The same producer of events like Austin City Limits and Lollapalooza originally worked with Obama during his campaign, producing some of his outdoor rallies in Texas for the state's primary. C3 also produced the November 4th election day rally at Grant Park in Chicago.

For inauguration day, C3 worked on the inauguration, the parade, the "We Are One" concert for HBO, as well as the many inaugural balls. They handled behind-the-scenes production services and support around the National Mall for the entire inauguration, parade, and swearing-in ceremony. They included the Kids Inaugural (with Miley Cyrus, the Jonas Brothers, and Demi Lovato), the Live Earth Green Inaugural Ball (with Melissa

Etheridge, John Legend, and Maroon 5), the Huffington Post Pre-Inaugural Ball (with Herbie Hancock, Josh Groban, and Sting), the Feeding America and RIAA Inauguration Charity Ball (with Rihanna), and MoveOn.org's Manifest Hope Inaugural Party (with De La Soul, Moby, and Santogold). After the concert at the Lincoln Memorial, C3 principals (Charlie Jones, Charlie Attal, and Charlie Walker) met the Obama family and presented them with a guitar signed by all of the artists.

Along with C3 Presents, the Stevens Co. and Don Mischer Productions, the producer of this year's Super Bowl halftime show with Bruce Springsteen also helped to produce the HBO concert special, "We Are One". Other promoters present in Washington included Kevin Wall, CEO of Live Earth, and I.M.P. Productions, who booked and promoted events at venues such as the 9:30 Club.

I.M.P. hosted two Rock The Vote Events: January 19th's Inaugural Celebration with the Beastie Boys and Sheryl Crow, and the January 20th Inauguration Party with Michael Franti & Spearhead, Talib Kweli, and more. According to I.M.P. president, Seth Hurwitz, the events were put together very quickly after the November 4th victory and many bands scrambled with trouble promoting and selling tickets during the rush.

A wide variety of venues and locations were used during the inauguration for all of the different concerts and events that took place. Venues that were used included the Warner Theatre, Verizon Center, the Kennedy Center, and 9:30 Club as well as more untraditional sites like the Lincoln Memorial, museums, hotels, and art galleries.

Obama's inauguration involved the music community more than any other had before. It was a reminder of the power of music and the ways it can break down barriers and symbolize change. Plus, seeing Colin Powell sing Bob Marley alongside Wyclef Jean is not something you see everyday. This inauguration saw people of different generations, races, and backgrounds unite together and it was a great thing that music could be at the forefront of this historical event.

BUSINESS ARTICLES *(contd.)*

Apple Abandons DRM and Embraces Variable Pricing

By Mark Schafer

At the annual Macworld conference last month, Apple announced multiple major changes to its iTunes music store. For music lovers, the most notable of these changes was the removal of DRM restrictions from its music catalog. Starting in April, Apple will also be offering tracks at three different price points: \$.69, \$.99, and \$1.29. In addition, iPhone users will now be able to preview and purchase music wirelessly via the 3G network.

The announcement came after Apple reached a deal with major record labels, who had resisted the removal of DRM protections from iTunes. Previously, only EMI and independent labels had offered tracks without Apple's FairPlay DRM. Now, every song purchased via the online store will not only allow copying to an unlimited number of computers, but also be compatible with mp3 players other than the iPod. Older tracks may be upgraded at the rate of \$.30 for single tracks, one third the original cost for albums, and \$.60 for music videos. Tracks without DRM are offered at 256 kpbs, in contrast to the lower fidelity 196 kpbs previously sold on iTunes.¹

A \$.30 hike in prices for a select number of popular tracks will not, on the face of it, have much impact on recorded music revenue. The real goal is to encourage customers to buy more albums or discounted "bundles" containing three or four songs. Because online music stores allow customers to pick and choose which tracks to buy, fewer people elect to purchase entire albums at a time. This trend has contributed to the ever-declining volume of music sales. The real aim of variable pricing, then, is to increase volume rather than to benefit from higher prices.

This announcement seems to demonstrate that the decline of Digital Rights Management is well under way, and will likely continue. Labels had previously defended copy protection for its music, but have now relented. Now that the biggest online music stores (as well as competitors like Amazon Mp3 and Walmart Mp3) can offer music without DRM, it would be hard to turn back the clock and re-instate FairPlay. Public opinion has long been largely against DRM, and music buyers would very resistant to give up the freedom they now have.

Both Apple and the three major labels

whose catalogues are affected by the deal relented on changes they had resisted. For its part, Apple had long been committed to the single \$.99 price point. The single price reflects the company's simple, one-size-fits-all approach to its business. But labels had protested the price as constraining, limiting the profitability of online music.

In return for allowing variable pricing on its store, Apple was able to get the labels to agree to the removal of DRM. The labels had already been providing restriction-free downloads to competitors like Amazon.com as a way to loosen Apple's stranglehold on digital music. Increasingly, FairPlay had seemed out of step with prevailing trends in the music business, so Apple wanted to avoid falling behind.



However, there is also speculation that there was another major negotiation point that may have even overshadowed DRM in terms of importance. Apple wanted to boost its iPhone by allowing 3G and EDGE wireless downloads. Apparently, the labels used this as a bargaining chip to get the variable pricing it had been holding out for. There is no clear reason that the majors would be averse to over-the-air downloads; it seems that they were simply able to withhold something Apple wanted and use it as leverage.²

So while Apple certainly got what it wanted, it appears that Sony, Warner, and Universal came out a bit ahead in this deal. In other words, it scored a victory by finally securing variable pricing, but did not give up anything of great value. Probably, the labels will only benefit by making its music available over-the-air

to iPhone users. And DRM has already been on the way out for some time.

Except for a brief time when Sony attempted to impose digital rights management on its CD releases, most music has been sold without any restrictions. So long as one single person is able to obtain a restriction-free music file, that track can easily be shared worldwide over the internet. Putting DRM on a large percentage of purchased tracks has done little to prevent piracy. That, combined with the fact that FairPlay targeted those actually paying for music and not the people stealing it, has proven that selling DRM-equipped music was actually of very little value to the record labels.

Another notable effect of this announcement is an end to Apple's legal troubles in certain countries, most notably Norway. That country had challenged FairPlay as an illegal impediment to competition because iTunes tracks were only compatible with Apple's proprietary music players. The legal challenge against Apple has now been dropped, as any action by Norway's Market Council would now be essentially moot. Norway probably only represented a fraction of Apple's business and the threat of action against the company had moved slowly, so it is hard to believe that this was a major consideration in the decision. Even so, Apple must be happy that the matter is finally settled, as one ruling against FairPlay could have led other countries to take similar action.

In the end, this is probably not a major game changer for digital music; it is just the culmination of something that has been a long time coming. After all, the most active pirates do not purchase music and so do not care if iTunes has DRM or not. And a whole lot of people have no interest in using anything but a computer and an iPod to use music. And owners of the Zune player and other music players have had DRM-free music services to purchase music for some time. But if Apple had not made this move, the iTunes music store would have seemed increasingly behind the times. That is something that the forward-thinking Apple could not allow.

1. <http://i.gizmodo.com/5124588/itunes-gets-drm-free-new-prices-purchase-over-3g>
2. <http://arstechnica.com/apple/news/2009/01/report-ota-itunes-downloads-the-tradeoff-for-variable-pricing.aspx>

BUSINESS ARTICLES *(contd.)*

The Psychology of Economic Choice: A Book Review

By Kevin Block-Schwenk

Richard Thaler and Cass Sunstein's book, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press, 2008), is ostensibly about "choice architecture," or how to encourage people to make good decisions. However, Nudge contains analyses of human behavior which will prove valuable for anybody in marketing, advertising, or other areas of business that deal with the public.

Imagine that you are in a cafeteria, perhaps the one in Berklee's dining hall. Take a moment to consider what determines which foods you purchase. Really. Take a moment to think about it. "Taste," "Price," and "Nutritional content" seen like obvious factors. Maybe you listed others factors, such as how long an item takes to prepare or consume, or whether you are in the mood to try something new

Did you list whether a given option was located front-and-center versus on a lower or further shelf? Probably not. Yet studies repeatedly show that moving a menu item from a back shelf to the front-and-center raises consumption of it by 25%. The book's authors suggest that, armed with this knowledge, school cafeterias should put their healthiest option front-and-center in order to "nudge" students to choose it. A shrewd businessperson would make sure to feature the item with the highest profit margin in this position.

In another study featured in the book, the Minnesota Department of Revenue wanted to increase the percentage of people who file their taxes honestly and on time. They tested four different messages, each on a separate group of Minnesotans, to see their effects. Consider these messages, and see if you can decide for yourself which one of them was effective (Three of them had no discernible effect on compliance with taxes.)

- One group of people was told that their taxes funded good things, such as education, police protection, and fire protection.
- Another group of people was told about the heavy punishments for cheating on taxes.
- A third group of people was given information on where to get free help filling out their tax forms.
- The final group was told that over 90% of Minnesotans paid their taxes honestly and on time.

Before deciding on a final answer, consider the assumptions made in conventional economics -- that people are rational, and act with enlightened self-interest at all times. Of course, we know in real life that these assumptions are false--witness the advertising budgets of Coca Cola (over \$150,000,000 per year) and Pepsi (close to \$1,000,000,000 per year), which promote products which the vast majority of people are already familiar with. In a perfectly rational universe, advertising would only be good for exposing people to new products, as reminding people of a familiar product would have no effect--people who desired it would already be purchasing it, and those who do not desire it would not.

The authors of Nudge have nicknames for this. "Econs" are the (nonexistent) perfectly rational beings in economics class, while the rest of us are referred to as "humans." The first third of the book examines various ways in which humans predictably differ from "econs." For example, Humans on their first wedding day will never admit that they have a 40% chance of ending up divorced, 94% of college professors consider themselves "above average," and college students are heavily influenced by the study habits of their roommates. Humans also value things we possess at a higher level than we would pay for them, are likely to answer a question in different ways based on how it is phrased, and indulge in activities which make us less happy in the long run.

Back to the question on taxation: if we were all "econs," the first message presented to Minnesotans would have little effect. The second message might have a large effect, assuming we thought there was a decent chance we would be caught. The third message could have a major or a negligible effect, depending on how many of us are confused by the tax forms. The fourth message might have a minor effect, since the probability of being caught is presumably a negative function of how many others are cheating.

However, what motivates human? It turns out only the fourth message had any effect, and it was a large one. Humans exhibit a large degree of "herding" behavior, in which people are influenced by what others do. This means

that if people's peers download music for free, they are likely to do so as well. It also means that people are more likely to check out a show or song of a band which is already popular.

The second part of the book focuses on constructing good public policies. The authors have created a philosophy they call "Libertarian Paternalism" in which everyone is allowed free choice, but the choices most likely to lead to long-term happiness for the greatest number of people are subtly encouraged. For example, currently many people suffer and die because they need an organ transplant, but there is a shortage of healthy organs.

Under current law, organ donation is "opt in," meaning one has actively indicate that one is an organ donor. Changing organ donation from "opt in" to "opt out," where everyone would be presumed to be an organ donor unless they indicated otherwise, roughly doubles the percentage of the population which donates their organs (from approximately 40% to 80%), which would save thousands of lives per year. Similar "nudges," some simply involving providing information in an easily-understandable format, can result in people saving more money, using less energy, eating healthier, paying less interest on loans, and even reducing pollution from both individuals and corporations.

From a policy point of view, obtaining a desired result through subtle "nudging" is both more economically efficient and more politically effective than other options. Distorting people's choices provides some degree of deadweight loss, but only if this distortion comes from direct financial incentives or outright ban. For example, it's probably a good idea not to listen to music at too loud a volume. People who genuinely enjoy super-high volume will be annoyed if high-power ear buds are banned or heavily taxed, but do not suffer at all if the high-volume ear buds are kept on a back shelf where they must be specifically requested (while the low-power ear buds are on prominent display). Politically, people are unlikely to be angry when they have free choice. While the authors admit that this approach is not up for solving every problem facing humanity (For example, it is difficult to imagine little nudges alone being sufficient to cut global carbon pollution by the 80% scientists are saying it must be reduced by. Though the authors have some good ideas on that problem which might get us 10% of the way there are almost no cost.), clearly it should be used when possible.

MODEL WORK

The Psychology of Economic Choice

Any strategy by bands, labels, or the industry itself, must take human behavior and biases into account in order to succeed. For example, subscription services for music, which people must actively choose to purchase, have historically not done well. But embedding a subscription directly in the cost of a music player, where the buyer does not have to make any effort to obtain the music, is likely to be more successful. Even packaging the device with a subscription, but allowing the customer to opt out, is likely to generate a much higher level of business.

A careful reading of the book also suggests that it may be hopeless to attempt to stop people from sharing music files while paying nothing—particularly people in high school today, for whom file-sharing has been the norm their entire lives.

The book also confirms that people's decisions are based on more than the objective merits of a product. As we know, success for a band involves not only producing good music and live shows, but finding a way for people who would enjoy these to find out about these, and creating a structure which encourages these fans to pay for the goods. The way in which people's musical choices are structured, and what we as a culture define as normal, will have a large effect on whether the industry creates more paying music fans over the long term—it will be easier to sell music (recorded and live) if people do not expect music to be free.

Along these lines, keep an eye on U2, some of the savviest people in the music industry: their new album (due out in March, 2009), is being released at 5 different levels, ranging from the plain CD at the usual price to the deluxe edition with photos, a mini-book, a concert DVD, and other goodies for \$99, with several intermediate options in between. This is a brilliant framing of choice, allowing people to get the music for the usual price (including for the piracy-inclined, \$0), but this "choice" almost guarantees that real fans will go to the store and pay far more money, lest they feel that they only have a fraction of the "real" product.

In a world populated with humans, understanding human behavior is a precondition to business success. Nudge, while focused on making society better, is also a good tool for your individual ambitions.

The Impact of Digital Technology on the Record Industry

By Ryan Driscoll

*Model Work features the best paper of a major assignment from an MB/M class. The candidates are chosen by the professor(s) of the course, then the MBJ editorial board chooses from blind submissions. The following piece was written for John Kellogg's Introduction to the Music Business class. *Note: all essays are edited specifically for placement in the MBJ.*

The introduction of digital technology has had an unprecedented impact on almost every aspect of the record industry. The very foundation on which labels have built themselves on has been slowly eroding due to the stream of new technologies available to the public. "Digital Democracy" has spread, putting more power into the hands of independent artists and consumers than ever before. The way in which records are made, distributed, consumed, and generate profits have all been affected by the new age of digital technology. Record companies are finding it harder to compete in the entertainment industry due to new technologies like the next generation gaming consoles. While all of this is very exciting for the average person, the record industry is having a tough time coming to terms with such advancements. All of the new alternatives and opportunities that digital technology has given the consumer have consequently chipped away at the power and profit the record industry has previously maintained.

At the forefront of all the problems the record industry is currently facing is the practice of downloading music, both legally and illegally. Digital technology has made music a mouse click away for the consumer and the record industry has not taken too well to this innovative possibility. In June 1999, Northeastern College student Shawn Fanning created the now infamous online file sharing service Napster. Prior to this, online file sharing was mostly used by college students who had figured out the possibilities of peer-to-peer networking. Napster fine-tuned the system previously in place and made it easier for people to search, copy and distribute MP3 files.

At its peak Napster had 26.4 million users worldwide. Eventually the free service was shut down by court order in February 2001. This is seen by some as a poor decision made by record companies and an opportunity that could have been used to their advantage. Rather than stopping file sharing, the court order led to the decentralization of distributed peer-to-peer files. Instead of having all of the music pirates on one service, illegal downloaders have spread out, relying on numerous services, making it much harder to control.

According to Apple's Quarterly Sales Statements, over 150,000,000 iPods have been sold worldwide as of April 2008. Studies conducted by the University of Hertfordshire have shown that, on average, 842 songs on a teenager's iPod have been downloaded and copied illegally. In response, the Recording Industry Association of America (R.I.A.A.) has been filing lawsuits against individuals who engage in peer-to-peer networking since September of 2003. The impact that illegal downloading has had on record sales is debatable. The truth is there are a number of other factors that can be attributed for the constant decline of CD sales. The main reason for this decline is record labels unwillingness and inability to adapt to the consumer's terms.

Regardless of whatever impacts the labels believe illegal downloading has had on sales, there is no denying that downloading (both legally and illegally) has changed the industry forever. An increasing amount of customers prefer to acquire their product digitally and have not stepped foot in a record store in years.

Initially the only way to download music at all was through illegal means. There was no system set up in which a customer could pay to purchase a song online. Apple created iTunes helping to fill this void and opened its digital doors on January 9, 2003. This was at least a step in the right direction and labels could now profit from downloading. Despite the earnings, record labels remain unhappy with the \$0.99 per song standard set in place by Apple.

In addition to its impact on the number of albums sold, digital downloading has altered the traditional business model labels have become accustomed to. With the ability to buy a single song on iTunes for \$0.99 there have been many less albums sold in their entirety. In the past, record labels were able to charge \$15- \$20 for an album and people had no choice but to buy the entire collection of songs. The reality was that people were only listening to two or three songs on each CD, but had no alternative to paying for the whole album. Labels included these "filler" songs despite their single potential for the purpose of being able to charge more for the product. Billboard has acknowledged the rise of the singles market and did away with the previous "physical release" requirement needed to be included in their "Hot 100" chart.

Artists and labels have argued that the shift to the singles market is ruining the way the artist intended the music to be heard. They consider the twelve songs to be a collection and the full artistic impact is lost when taken out of context. In reality there has been few attempts and even fewer successful attempts to make a truly utilized twelve-song concept album. These albums peaked in the 1960's and 70's with albums

MODEL WORK *(contd.)*

The Impact of Digital Technology on the Record Industry (contd.)

like Pink Floyd's "Dark Side of the Moon" and the Beatles' "Abbey Road". Since then the idea has been pretty much abandoned and untouched. While the singles market is not in the best interest of record labels, it is valuable to the music consumer as they are able to buy exactly what they choose.

Consumers aren't the only ones who are reaping the benefits of downloads. To the dismay of record companies, the possibility of distributing a record digitally has put great power in the hands of artists. In the past, labels had an unparalleled advantage over indie labels and artists with their broad distribution capabilities. Labels do an excellent job of getting product into stores nationwide and releasing physical albums simultaneously. This is an incredible feat and is made possible due to the fact they operate through national branches. However, in the day of digital downloading the correlation between success and having a physical product in the stores is becoming weaker.

This became uncomfortably obvious after the English rock band Radiohead released their latest album without the aid of a label. The band put the album up for free download on their website www.ateaseweb.com and asked for donations from the consumer. The album sold 1.2 million digital copies in the first week, exceeding the sales of the last three physically released albums combined. The band eventually released the official numbers to the public and estimated that the profit from the first week alone was around \$10 million dollars, with the average donation being about \$8 per album. In addition to cutting out the expenses of the middleman, Radiohead acquired the email addresses of everyone who downloaded the album. This acquisition is very valuable in its own right and wouldn't have been a possibility if it had only been released physically. Three months later, the album was released in a physical format and entered both US and UK charts at #1. Other artists, such as Girl Talk and Nine Inch Nails, have followed suit and posted their latest albums for free download as well through their website.

For independent artists who aren't wildly successful with a solid fan base, there are other options for distributing music digitally. Artists without a record contract are further empowered by distribution services like Tunecore. Tunecore is a digital distribution service available that places its members' music for sale on iTunes, Rhapsody, AmazonMP3, eMusic, and other online retailers. This method allows artists to keep all of the rights to their works and does not take any money out of their royalties. There is a relatively small fee to

be a member of Tunecore. Members must pay an annual storage and maintenance fee of \$19.98 per album. In addition, there is a one-time charge of \$0.99 for every track, and another \$0.99 for every store, the album is being distributed by. When all is said and done, this is only pennies compared to what would be deducted from an artist's royalties under a major label contract. To date Tunecore's members have collectively earned over \$10 million dollars.

One of the other primary benefits of being affiliated with a major label is having a powerful marketing team at your disposal. The marketing department is there to get as much product onto the floor as possible and help set each release apart from the thousands being released simultaneously. Prior to the Internet and Mp3s, artists' ability to promote themselves and get their music out to the public was fairly limited. Without the aid of a major label an artist had the odds stacked highly against them. Their audience was confined to whoever was in earshot of their music. The Internet serves as a valuable tool for independent artists and allows them to market themselves on a global scale.

A recent marketing success story is that of New Orleans rapper Lil' Wayne. Wayne is possibly the king of online buzz and is at the height of his career in part due to it. Wayne saturated the Internet with free mixtapes, encouraging people to download and share them. Many people were drawn to these mixtapes due to their widespread availability, quality, and price. As a result, he became a hot topic among music blogs and peer-to-peer networks. A number of leaks from his upcoming album "Tha Carter III" caused a powerful buzz accelerating at broadband speeds. Wayne and his label were clearly aware of the leaks as they had become widely available online and even getting airplay. However, instead of pre-maturely releasing the album which is a common response to this situation, Lil' Wayne let the hype stir. The official release date of Tha Carter III was pushed back a number of times, which continued to send fans up the wall. When the album was finally released on May 13, 2008 fans came out in droves, resulting in over one million copies sold in the first week of its release. This is a massive achievement in today's market and had not been accomplished since 2005 when 50 Cent released his album "The Massacre". Tha Carter III has been Lil' Wayne's most successful album to date, granting him eight Grammy nominations for 2008.

The possibilities of success on the Internet are not limited to major label acts and is a powerful marketing tool for lesser known musicians as well. Many independent artists have launched their careers into the mainstream by creating a strong presence online. It is now possible to sidestep the prior need of a label contract to gain access to fans across the globe. Indie rock

band Vampire Weekend is a prime example of the fact that in this day and age widespread success does not necessarily need to be backed by a juggernaut marketing team. They sent a number of CD-R's to various music blogs such as stereogum.com. Stereogum in particular saw the bands potential early on and featured them in the "watch list" section of their site. From here on out the website brought continuous coverage on the band, posting tour dates, and updates on the progress of their debut album. These different outlets gave the band continued access to a whole demographic from which more and more exposure stemmed from in other blogs and word of mouth. The result of this buzz landed the band a front-page cover shot on Spin magazine, a remarkable accomplishment considering they had yet to release their debut album. The self-titled LP entered Billboard's album chart at number seventeen, selling 27,000 copies the first week.

The possibilities of digital marketing are numerous and it is clear can be very lucrative. Digital marketing is much more cost efficient than other forms of marketing that labels have relied entirely on in the past. That is not to say it totally outweighs other means of reaching the consumer and is the only one that should be focused on. Labels continue to rely on radio, in-store displays, give aways, appearances, music videos, advertising, and publicity to back new releases. However, for the independent artists who do not have all of these tools at their disposal, reaching potential customers digitally is one of their most important tools.

Digital technology has not only completely changed the record industry, it has changed the way in which the records themselves are made. In this day and age, Digital Audio Workstations are commonplace in almost all studios. Instead of recording to tape, as was done in the past, the recording is done to a computer hard drive. A whole new set of tools such as auto-tune, beat detective, and digital signal processing units are now at the artist and producer's disposal. While it can be argued whether these tools are a blessing or a curse (yes, you Jonas Brothers) it is undeniable that they have changed the recording process and the sound of the records themselves. Engineers and producers now need to consider how the mix sounds on regular computer speakers, as that is how a large part of their audience will experience their work.

Digital Audio Workstations and digital software is very accessible to the public and gives the independent musician a greater chance at succeeding. The availability and affordability of computers with faster processors and bigger hard-drives is in part responsible for the surge in popularity of home recording over the last decade. These stronger platforms helped enabled the widespread use and success of digital software in the home setting. Digital mixers negate any need

MODEL WORK *(contd.)*

The Impact of Digital Technology on the Record Industry (contd.)

of giant consoles and permit a nearly unlimited number of tracks. Sequencing programs, such as Propellerhead's Reason, give artists access to libraries of samples and entire orchestras avoiding the cost of expensive studio musicians.

While the quality of these home recordings may not stand up against a professionally recorded album backed by a \$250,000 budget from a major label, it is still a valuable and empowering tool for the independent musician. It is no longer necessary for an artist to rely solely on the hopes of a major label budget to make their vision a reality. It is important to note that home studios are not popular solely among independent musicians. A lot of the major label artists are taking this route and recording their albums at home in order to dodge expensive studio costs. This is incredibly desirable if the artist has a recording fund agreement with the label and is entitled to the left over money from the project as an advance.

Over the last decade, the way in which consumers experience music has shifted as a result of digital technology. This has led to many new sources of income for labels and artists by licensing music out to other companies. The cell phone industry has simply exploded. According to BMI, ringtones have been profitable to labels over the last couple of years with profits peaking in 2006 with \$600 million dollars made in the U.S. alone. With that being said, sales have been declining due to the consumers' ability to use Mp3s on their phone as a ringtone. That is not to say that there is not still money to be made from cell phone carriers. "Ringback tones," which are songs that a person making a call would hear instead of the traditional ringing sound are expected to see a surge in popularity in the near future. According to research conducted by MultiMedia Intelligence \$4.7 billion in revenue will be made by 2012 in Ringback tones alone.

Video games are another popular medium in which consumers now experience music. According to the numbers acquired by NPD Group Inc., the US gaming industry surged up 43% in 2007 to \$17.9 billion from the \$12.53 billion made in 2006. Music plays an important role in these games and is a valuable source of income of record companies. The irony of this relationship is the fact that people have a limited amount of time and money that they can spend on entertainment. With the video game industry doing so well, that means less money is available for CD sales. Digital technology has made it very hard to compete in the entertainment industry.

The introduction of digital technology is responsible for putting more power into the hands of independent artists and consumers than ever before. To the record industries dismay, this technology is here to stay and the business models that have worked so well in the past need to be thrown away and rebuilt from the bottom up. The ways in which records are made, distributed, consumed, and generate revenue have all changed. The only logical response is the industry to follow suit and change as well. The good news is we live in a very exciting time and have seen incredible advancements only the last few decades. The record industry is now faced with the decision to get on board or be left behind. There is no going back to the days where a million CDs could be sold on the first day of its release. No matter how many fourteen-year-old kids they bring to court there is no turning back and the damage cannot be undone. The only option is looking forward and realizing the possibility of digital technology hasn't even begun to reach its full potential.

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BUSINESS ARTICLES

The Business of NAMM is a Winter Treat

By Todd Seitz

I am sure a lot of you have heard of the NAMM Show. Primarily, NAMM is held for retailers to make orders from manufacturers. That seems kind of boring right? Well, it definitely is not. Music business professionals from all over the world gather each year to unleash their newest products. These products can be anything from recording software to saxophones and electric guitars. Not only do we get to view and test the products. We also get to witness artist signings, demonstrations and even private performances. So what does NAMM even stand for? It took me a while to get it right: NAMM is the National Association of Music Merchants. The show happens twice a year. More prominent, the Winter NAMM Show is held in January at the Anaheim Convention Center. The Summer NAMM Show is held in Nashville.

After arriving at my hotel in Anaheim the day before the show, I soon took a short walk to the Hilton Hotel. The Hilton is right next to the convention center, about a minute walk. I met up with my friend Paul Wandtke, a fellow Berklee student endorsed by Trick Drums. Already a busy scene, many of the manufacturers were returning from setting up their booths. After waiting around, I met another friend, Carlos Zema,, who I had known from the last NAMM Show when he was performing with Rusty Cooley's Outworld. The show had not started, and I was already having a great time.

So lets get on to the good stuff. Right at the start of the show I visited one of my favorite manufactures ENGL Amps. ENGL is a Rock and Metal Amplifier company based in Germany. Tons of famous metal musicians play ENGL including Michael Romeo (Symphony X), Ritchie Blackmore (Deep Purple) and Vinnie Moore (UFO) among others. ENGL had some great products as usual. It was great talking to Amber and Mike who run the booth. After I checked out ENGL I went to visit another great company, ESP Guitars. The ESP booth is always set up in a very professional manner, and is a standout at NAMM. Other than ESP's intense custom shop models I immediately noticed their James Hetfield (Metallica) limited edition guitar. ESP never fails to deliver several new worthwhile products each year. After having a talk with a few of the ESP staff I went for a long walk. There are so many

booths that you can never really see everything in full detail. So of course, I did a lot more walking... Soon I came upon guitarist Doug Aldrich (Whitesnake, Dio). I was really excited since I was just watching his live Dio DVD 'Evil or Divine'. Later that evening I hunted down the Mesa Boogie Amplifier Company. I had a short chat with their artist relations manager who was very kind and professional. You'll find that most people are happy to have a short talk with you about their products, company and even a little bit about your own business objectives. Later that day I met up with Firewind keyboardist Bob Katsionis and guitarist Gus G. As we were walking around a corner something caught our eye. Sure enough it was Jordan Rudess of Dream Theater doing a product demonstration. Talk about cool stuff. After hanging out a while, I returned to the Hilton to met my friends. Was NAMM day



one over yet? Not in a long shot. Each night of the NAMM Show vendors set up public and private events for our entertainment. I actually went to check out a private gig a few miles away from the show. My friend Dave's band Deathriders was playing along with several other interesting bands. The night was already going great. I eventually returned to the Hilton to see what was going on. There I met up with my friends Bill Hudson (Ex. Cellador, Power Quest, Coldera) and John Slaughter (Coldera). After a couple of drinks I ran into an amazing drummer Casey Grillo (Kamelot). You really never know whom you're going to meet. As the night goes on it gets more and more crowded at the Hilton. Eventually you will recognize someone of high stature in the crowd. It was a huge honor for me to meet drummer Mikkey Dee (Motorhead). Mikkey drummed on the early King Diamond albums, which I still praise to this day. It surely topped off the first awesome day at the NAMM Show.

As the NAMM Show progresses it gets busier and even more extreme. Friday and Saturday are probably the most productive days at the show. You will notice that there are more private events and artist signings (among other things). Friday morning I went to observe several music products companies. I checked out the Fender and Gibson Guitars booths and also had a few words with some of their employees. Since these are large companies, it was a lot harder to speak with their representatives. It's recommended that you have short conversations, take care of business and walk away. Manufacturers are typically at the show to sell their products to retailers, so it's best to not get in the way of their business productivity. Between Friday and Saturday I got the chance to meet guitarist Craig Goldy (Dio) and Vinnie Moore (UFO). I also ran into Jeff Scott Soto (Journey, Yngwie Malmsteen), Uli Jon Roth (Scorpions), Jordan Rudess (Dream Theater), Kiko Loureiro (Angra), Shawn Drover (Megadeth), Jason Rullo (Symphony X) and Bobby Jarzombek (Sebastian Bach Band, Halford). Some concert events held at NAMM included performances by Alice Cooper and a Racer X Reunion Show. A Van Halen cover band played the Hilton Friday night along with several other acts. There really are so many events going on it is hard to choose one to go to.

Being that I'm a student about to graduate at Berklee, I took liberty of looking for several business opportunities. Not only is NAMM a place where you can network with the music products industry, but also with the performers and even some record labels. As you read earlier, there are tons of players that are willing to talk to you and see what you're all about. Performance experience can only amplify how you will work in the products industry. If you know how the product works in a real situation then you should be able to relate to its business needs in a more efficient manner. Being a Berklee music business student you are required to take many non-business music classes. These classes prepare you for that connection of player and product. Business and performance will always find a way to coincide with one another. I intend to work in the products industry, but still aim towards making a career with my own music. If either of these goals are yours, I suggest you check out the NAMM Show.

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UPCOMING TOPICS

Some of the topics we will tackle in next month's issue of the Music Business Journal:

- Live Nation Entertainment:
An Update
- Do the Grammys Still Matter?
- Avex & The Orchard in Japan

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