

The Recorded Music Industry and the Emergence of Online Music Distribution: Innovation in the Absence of Copyright (Reform)

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“To explore the nature and the strength of the economic case for copyrighting books we must ask what would happen if copyright protection were abolished. Would abolition seriously threaten book production?”¹

INTRODUCTION

This Essay owes its origins to an analysis of this counterfactual that is more than forty years old. At the time, Justice Breyer, then an associate professor at Harvard Law School, was attempting a social cost-benefit analysis of the abolition of copyright for books in order to determine “whether copyright protection seems sufficiently valuable to justify not only retaining it, but also extending its scope.”² He drew upon historical example, present practice, and insightful speculation to reach the tentative conclusion that the elimination of copyright would likely result in lower prices, wider distribution, elimination of substantial transaction costs, and a reduction in the market power of publishers.³

Regardless of how one views his conclusions, many would agree that the article was ahead of its time. In contrast to *The Uneasy Case for Copyright*, this Essay will have likely passed its shelf life even before publication. Nonetheless, it attempts to pay homage to Justice Breyer’s seminal article by exploring the effects of online music distri-

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¹ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291 (1970).

² *Id.* at 292.

³ See generally *id.*

bution, a phenomenon that may be seen as a relative approximation of a copyrightless environment, in order to gain valuable insight into the fundamental questions of copyright. To be sure, despite the benefit of recent experience and an abundance of scholarly research in this area, the task of determining the proper scope of copyright in the digital environment remains as daunting as in Justice Breyer's day at Harvard.

The widespread and ever-growing practice of online music distribution ("OMD") has forever changed the way we collect, consume, and experience music. This assertion is rather easily demonstrated by the fact that one can no longer avoid digital music. If you have a broadband Internet connection and are a music enthusiast, it is highly likely that you frequently download or stream music over the Internet. Even if you are not wired, there is a good chance you have experienced music that has made its way to your ear via several router stops on the Internet.

Academic writing on the subject of OMD is almost as ubiquitous as digital music itself. In particular, legal and economic scholars have shown a keen interest in the OMD phenomenon and have observed it from countless angles.⁴

When seen from a purely legal perspective, the issues of copyright infringement and liability for such infringement within the existing legal regime tend to dominate the picture: current law is applied to recently established technologies, and limitations are mapped out (hopefully) analogously to the restrictions in place for older technologies. In connection with OMD, the parallels drawn between old and new have become increasingly tenuous and a technology-induced rift has appeared between the copyright regime and copyright's constitutionally prescribed purpose of "promot[ing] the Progress of Science and useful Arts."⁵ As a result, many legal academics have been calling for reform of copyright law to bridge this gap and to better reflect the fundamentally changed circumstances of a digital world.⁶

Given the part that economic theory plays in lending legitimacy to the American system of copyright law,⁷ economists have been attracted to the debate surrounding the appropriate scope of copyright

⁴ The various aspects of file sharing have received the bulk of this attention but the general issue of music in its digital format has also received a large amount of attention.

⁵ U.S. CONST. art. I, § 8, cl. 8.

⁶ See, e.g., Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2010).

⁷ See Breyer, *supra* note 1, at 291–92 (discussing the arguments for copyright protection that rest upon economic inducement).

protection. Generally speaking, economists tend to examine both the creation of works and the dissemination of works, as these relate to efficiency and to social welfare.⁸ Traditionally, economists have focused their research on the amount of copyright protection needed to provide sufficient economic incentive for the creation and dissemination of original works.⁹ Until recently, it had been common practice to avoid examination of divergent creator and intermediary motivations, given the general alignment of their respective interests.¹⁰ The advent of OMD, however, has appeared to place these related yet distinct interests askew.¹¹ In this manner, the traditional role of the intermediary has been called into question.¹² In addition, the introduction of OMD has cast doubt on the continued validity of the traditional economic incentive theory as the most effective means for promoting efficiency and social welfare.¹³ As a result, economists have begun looking for an alternative economic model that explains and perhaps even justifies the current copyright regime and its peculiarities.¹⁴

⁸ See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 325 (1989) (examining the extent to which copyright may be explained as a means for “promoting efficient allocation of resources”).

⁹ See, e.g., *id.* at 335–36.

¹⁰ *Id.* at 327 (using the term “author” to mean both authors and publishers in their cost-of-expression analysis); see also Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, 10 INNOVATION POL’Y & ECON. 19, 50 n.1 (2010) (stating that their paper explicitly “neglect[s] the tensions that exist in copyright between artist and publisher interests”).

¹¹ See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 10–12 (2010) (pointing out the need to correct the historical disadvantage of creators in relation to distributors in light of the greatly reduced cost of dissemination).

¹² See, e.g., Jessica Litman, *The Copyright Revision Act of 2026*, 13 MARQ. INTELL. PROP. L. REV. 249, 253–54 (2009) (“[W]e should accept the fact that the role of intermediaries in the copyright system needs to evolve, and that, in the 21st century, it may no longer make sense to award the intermediaries so large a share of the copyright bargain.”).

¹³ “In our view, this makes it difficult to argue that weaker copyright protection has had a negative impact on artists’ incentives to be creative.” Oberholzer-Gee & Strumpf, *supra* note 10, at 50; see also Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 268 (2002) (“When the incentives for creation are examined in isolation from the incentives for distribution, the argument that copyright should limit personal and noncommercial copying of music cannot be justified, because of the existence of financial incentives for musicians to make music and the minimal role that copyright plays in creating those incentives.”). But see Stan J. Liebowitz, *Is Efficient Copyright a Reasonable Goal?*, 79 GEO. WASH. L. REV. 1692, 1707–11 (2011) (rebutting the argument that incentives are not necessary to spur creation).

¹⁴ See Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 36 (2004); see also Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 216 (2004). See generally Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 129–31 (2004) (distinguishing

These legal and economic inquiries have been conducted against the background of a recorded music industry (“RMI”),¹⁵ whose manner of doing business has been clearly affected by OMD. When technological advances in digital content, storage, and distribution rendered OMD possible on a wide scale, the RMI was still operating according to a relatively traditional business model.¹⁶ Those in the RMI were surely aware of the importance of these new technological breakthroughs.¹⁷ Still, the RMI was reluctant and rather slow to undertake proactive strategic steps in response to such innovative technologies.¹⁸ Instead, the RMI was content to adopt a wait-and-see attitude, only to furiously lash out as profits and opportunity vanished due to the emergence of OMD technologies such as peer-to-peer (“P2P”).

Although the law has been sluggish in addressing the complexity of this new reality, various OMD models have been developed based on the recognition that OMD is here to stay. Yet, given the relative lack of legislative guidance, the few judicial decisions to mark the outward boundary of the legally acceptable, and the general societal confusion (if not outright opposition) surrounding the law regulating enjoyment of digital content,¹⁹ creators of new OMD models and users of such models have been left to navigate the foggy waters of OMD without a compass. This lack of OMD policy—as part of a comprehensive copyright policy suitable for our digital world—has led to a pervasive copyright malaise felt by innovators, creators, users, in-

between the traditional (ex ante) economic justification for intellectual property and the new (ex post) explanations for intellectual property protection).

¹⁵ The term “recorded music industry” is meant to encompass major music firms as well as the Recording Industry Association of America (“RIAA”), which is the trade association representing music firms responsible for 85% of music produced and sold in the United States. See RIAA, RIAA, <http://www.riaa.com/aboutus.php> (last visited July 22, 2011). This definition is admittedly underinclusive.

¹⁶ It is important not to mistake “traditional” for “simple.” Given the various roles that a major music firm plays in the music value chain, the traditional model was anything but simple. See Martin Kretschmer et al., *The Changing Location of Intellectual Property Rights in Music: A Study of Music Publishers, Collecting Societies and Media Conglomerates*, 17 PROMETHEUS 163, 165–67 (1999). It was, however, very traditional in the sense that the music industry was centered on the mass production and distribution of physical goods.

¹⁷ But see *id.* at 177 (quoting various music firm executives and their common assessment that digitization would have a rather limited impact on the RMI).

¹⁸ *Id.* at 177–79.

¹⁹ “Most of the young people we interviewed were confused about copyright law.” John Palfrey et al., *Youth, Creativity, and Copyright in the Digital Age*, INT’L J. LEARNING & MEDIA, Spring 2009, at 79, 84, available at <http://dash.harvard.edu/handle/1/3128762>.

dustries, and institutions.²⁰ The result of this uneasiness has been the suboptimal utilization of the Internet as a truly revolutionary means of incentivizing both digital music content creation and its dissemination.

In order to understand how the RMI and OMD may be better synchronized so as to enhance social welfare, it is helpful to briefly survey the development of various OMD models. As such, Part I begins by introducing a rough technological taxonomy of OMD. Once a taxonomical framework has been created, Part II evaluates the introduction and establishment of OMD models within the context of the traditional RMI environment. Part III continues along this path by analyzing OMD innovation within the new OMD-influenced RMI ecosystem. Both Parts II and III place particular emphasis on identifying points of friction and collaboration at the relevant levels of innovation, creation, and use, among others. These Parts argue that comprehending the evolution and dynamic nature of the OMD-RMI relationship helps in determining the proper type and appropriate scope of any future policies concerning OMD. Part IV attempts a brief legal and economic analysis of OMD by taking up the dynamic interplay of innovation and competition within and among OMD models and the resulting impact of these forces on access to creative works. This Essay concludes by arguing that copyright should play an active role in promoting competition through the encouragement of widespread nonexclusive licensing; it also argues that institutional facilitation of copyright enforcement should be approximately inversely proportional to the amount of public access afforded to works by the RMI-OMD licensing arrangements.

I. SIMPLIFIED OMD TECHNOLOGICAL TAXONOMY

Such an overview could be constructed in a multitude of ways. For example, one could proceed in a strictly chronological fashion with no particular concern for classification according to type of distribution method, simply beginning with the history of the MP3,²¹ continuing on to the dissemination of MP3 files via Usenet, the eventual introduction of P2P, and so forth.²² Alternatively, the survey could be

²⁰ Here, “institution” refers to the institution of law generally and to copyright law in particular.

²¹ See *The History of mp3*, MP3LICENSING.COM, <http://www.mp3licensing.com/mp3/history.html> (last visited July 22, 2011).

²² See *Timeline of File Sharing*, WIKIPEDIA, http://en.wikipedia.org/wiki/File_sharing_timeline (last modified Aug. 17, 2011).

designed solely using principles of categorization, grouping OMD models based on their similar properties.²³ These approaches have been combined.

In a first step, models are classified according to certain technical distribution characteristics into “Download” and “Stream”. Within these categories, description at a greater level of specificity is included; both P2P and centralized downloading shops are discussed within the Download category. In a second step, and in order to track the development of the various OMD models, the story of each model in terms of its relationship to the RMI is told.

Constant technical innovation makes it difficult to create discrete technical ranks of OMD. Indeed, some OMD models may fit into several categories quite nicely, while others may not fit neatly into any class at all. Similar to the jurisprudence in this area, the categories are fuzzy at the edges. Moreover, the current trend toward OMD models that combine both interactive streaming as well as downloading options may eventually render most technical distinctions irrelevant.²⁴ Nonetheless, until technical factors cease to play a role in the overall experience of the user—i.e., are only marginally perceptible—categorization along such lines continues to make sense.²⁵

The classification of various OMD models according to technical characteristics is best demonstrated by the Figure below.

As the Figure shows, the OMD models have been placed into two general groups: Download and Streaming. The categories of

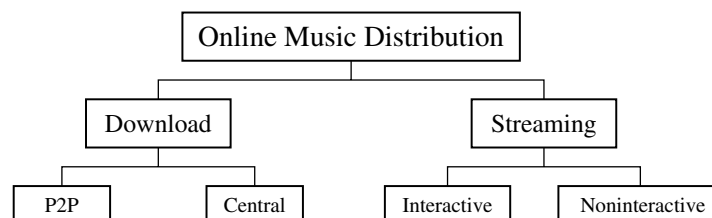
²³ See generally Eleanor Rosch, *Principles of Categorization*, in COGNITION AND CATEGORIZATION 27 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).

²⁴ For example, certain online music subscription services offer the combination of interactive streaming along with so-called limited or tethered downloads as part of their “premium” packages. See, e.g., *Spotify Premium*, SPOTIFY, <http://www.spotify.com/int/get-spotify/premium/> (last visited July 22 2011).

A limited download is a digital file that is delivered electronically to a computer or other device to reside there on a limited basis. There are two types of limited download: time-limited download (for example, the song resides on the computer for 30 days) and use-limited download (for example, the song can be heard 12 times before it can no longer be played). Limited downloads are sometimes called tethered downloads.

Digital Definitions, HFA, <http://www.harryfox.com/public/DigitalDefinitions.jsp> (last visited July 22, 2011); see also JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 106–07 (2008) (discussing the potential risks of “tethered appliances”).

²⁵ Certain technological advances, though distant, could render such categorization, among many other things, moot. See MICHAEL CHOROST, *WORLD WIDE MIND: THE COMING INTEGRATION OF HUMANITY, MACHINES, AND THE INTERNET* 12–13 (2011) (positing that the way our brains will eventually connect is in the “World Wide Mind,” a space similar to the Internet).

Figure. Classification of OMD Models

Download and Streaming have been further divided into the following categories: P2P, Central, Interactive, and Noninteractive.²⁶

It is important to note that the focus of the OMD models is entirely on the purely online distribution of digital music. Even within this limited scope, not all types, nor numerous combinations thereof, have been included. For example, the rather impressive distribution model innovation taking place directly at the artist level is not covered. To be sure, musicians are taking innovative approaches, which include a form of direct digital distribution as a core component of their business model.²⁷ These individual efforts provide a glimpse at what grassroots innovation in the field of OMD looks like, and give a sneak peak at models that may later be adopted on a mass commercial scale.²⁸

Brief, quasi-technical descriptions of each category, and the specific OMD models within them, are presented below.

²⁶ Within Streaming there are two groups, one of which is the Noninteractive group. This group includes all streaming models that limit or altogether exclude a user's ability to control the listening experience. It is the digital counterpart of traditional terrestrial radio and includes the Internet stream of a traditional terrestrial radio broadcast, pure web-based or Internet radio, as well as smart radio services (which permit a certain level of interactivity). See Kellen Meyers, *The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties*, 61 FED. COMM. L.J. 431, 440 (2009). SomaFM represents pure web-based/Internet radio whereas Pandora is an example of Internet radio with limited interactivity. PANDORA, <http://www.pandora.com> (last visited July 22, 2011); SOMAFM, <http://somafm.com/> (last visited July 22, 2011).

²⁷ The music artist Trent Reznor of Nine Inch Nails fame has pioneered direct digital distribution as a component of his overall business plan. See Mike Masnick, *My MidemNet Presentation: Trent Reznor and the Formula for Future Music Business Models*, TECHDIRT.COM (Feb. 5, 2009, 10:21 AM), <http://www.techdirt.com/articles/20090201/1408273588.shtml> (citing Reznor's digital business methods in a presentation).

²⁸ INT'L FED'N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REPORT 2010: MUSIC HOW, WHEN, WHERE YOU WANT IT 9 (2010) [hereinafter IFPI REPORT], available at <http://www.ifpi.org/content/library/DMR2010.pdf> (discussing labels' efforts to work with artists on direct-to-consumer sales).

A. *Download*

Traditionally, the infinitive verb “to download” has implied the act of copying data (usually an entire file) from a main source to a peripheral device (e.g., from the iTunes Music Store (“iTMS”) to iTunes).²⁹ However, with the advent of P2P networks—which also facilitate data copying by enabling those connected to the network to download files from others on the network—the “big-to-small” and “central-to-secondary” criteria have become mere connotations of the verb “download.” As such, downloading is now understood to encompass the general act of obtaining and, more than temporarily, storing data obtained using the Internet as a transfer network.³⁰

The distinction between the narrower meaning of “download” and its broader meaning does not likely lead to misunderstandings in everyday life. Given their baseline savvy, most Internet users simply refer to the specific OMD model used for downloading—e.g., “I downloaded ‘Puff the Magic Dragon’ from iTunes last night.” Nonetheless, the different scope of the two meanings plays a pivotal role in the treatment of a model by the RMI. As a result, this schematic utilizes two subcategories within Download.

The first group, P2P, includes models having a node-like, decentralized structure. The basic architectural aspects of P2P systems include a high degree of decentralization, self-organization, and multiple administrative domains.³¹ The following represent a few of the most well-known trade names (both living and extinct) of the P2P kind: Napster, Grokster, LimeWire, and BitTorrent.

The second group, Central, comprises those OMD models having a centralized structure. Although this centralized structure may take many forms, the overall effect of any central design remains the same: users are required to seek out and exchange information with a specific contact—usually an Internet download shop—in order to

²⁹ See *Download*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/download?show=1&t=1294741178> (last visited July 22, 2011) (defining the verb “download” as “to transfer (as data or files) from a usually large computer to the memory of another device (as a smaller computer)”; see also *Download*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/download#m_en_gb0242040 (last visited July 22, 2011) (defining the verb “download” as to “copy (data) from one computer system to another or to a disk”).

³⁰ See *Uploading and Downloading*, WIKIPEDIA, http://en.wikipedia.org/wiki/Uploading_and_downloading (last modified Aug. 7, 2011) (defining “downloading” in the context of computer networks); see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 n.1 (9th Cir. 2001) (providing a relevant definition of download in the OMD context).

³¹ See Rodrigo Rodrigues & Peter Druschel, *Peer-to-Peer Systems*, COMM. ACM, Oct. 2010, at 72, 72–74.

download a specific piece of digital music. The following OMD business names represent the most well-known members of the Central type: the iTunes and Amazon MP3.

B. Streaming

Streaming also involves obtaining data via the Internet as a transfer network. In contrast to downloading, however, streaming files may be perceived as they arrive (subject to a built-in buffer).³² To be sure, streaming in general, and certain forms of streaming in particular—e.g., progressive streaming (sometimes even referred to as “progressive download”)—involve saving a file to a peripheral device. Unlike downloading, however, streaming does not have the permanent storage of the transferred data as its central purpose.³³

It is also important to note that the overall structure of a streaming service may be either centralized or decentralized in nature. Thus, similar to the Download category, there exists both client-server streaming—i.e., centralized—as well as P2P streaming—i.e., decentralized.³⁴ These structural aspects are certainly important with regard to issues of cost, bandwidth, and scalability, and as such, should enter into policy discussions. Nonetheless, these network design matters are treated as secondary for technical categorization purposes.

Interactive streaming, as the name suggests, includes systems that allow the user to control the listening experience. Interactive streaming essentially means listening to whatever you want whenever you want, the only limiting factor being the necessity of maintaining an active Internet connection; that is, you cannot stream when offline. This type of streaming is also commonly referred to as “On Demand.” The following OMD models represent a few of the most well-known members of the interactive type: Rhapsody, Napster, Grooveshark, and Spotify.

II. THE EMERGENCE OF OMD WITHIN THE RECORDED MUSIC INDUSTRY

The fact that various OMD models have been the source of significant consternation for the RMI is well documented. Unsurpris-

³² See, e.g., *Streaming*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/streaming#m_en_gb0820000 (last visited July 22, 2011) (defining the adjective “streaming” as “(of data) transmitted in a continuous stream while earlier parts are being used”).

³³ See *Uploading and Downloading*, *supra* note 30.

³⁴ See Rodriques & Druschel, *supra* note 31, at 74 (discussing the popularity of P2P for streaming media distribution).

ingly, and as one might expect from any established industry when confronted with a new form of technology, the RMI's initial reaction to OMD was defensive, aggressive, and seemingly illogical.³⁵ The hostile aspects of OMD-RMI interaction have driven public debate, academic research, and years of copyright policymaking—which is not to be mistaken with lawmaking. In particular, the story of the RMI's struggle to acquire maximum control over networks, content, and users has been told.³⁶ This narrative often takes on a negative tone regardless of the perspective from which the story is recounted. Unfortunately, a one-sided depiction does not fully reflect the complex dynamic of OMD-RMI interaction.

Indeed, the RMI was initially almost equally resistant to all forms of OMD. Over time, however, a differentiated RMI approach to the various OMD models began to take shape. At the same time, OMD-model innovators progressed from playing the role of the rebellious and brash challengers of the RMI status quo to adopting a more pragmatic approach to OMD-model development within the existing regulatory framework. Tracking this dynamic relationship within OMD models and over time is essential to understanding the various forces at work and the respective effects on innovation, creation, use, industry, and institutions.

A. *P2P and the Recorded Music Industry*

In the distinct form of Napster, P2P invaded the native RMI habitat in 1999.³⁷ As a general matter, the P2P model possessed all characteristics necessary for successful completion of each stage of an RMI invasion, namely, the stages of Introduction, Proliferation, and Establishment.³⁸ With regard to Introduction, the initial investment of

³⁵ See Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725, 729–31 (2005) (arguing, in the context of RIAA lawsuits against P2P users, that the disadvantages of such lawsuits were overestimated and misunderstood). “As to the lawsuits against P2P end users, the ‘it’s not good business to sue your customers’ mantra was always more soundbite than sound analysis—because it failed to understand the relative anonymity of music companies in relation to music customers.” *Id.* at 765.

³⁶ See Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 567 (2009); see also ELEC. FRONTIER FOUND., *RIAA v. THE PEOPLE: FIVE YEARS LATER* 9 (2008), available at <https://www.eff.org/files/eff-riaa-whitepaper.pdf>.

³⁷ See MATTHEW DAVID, *PEER TO PEER AND THE MUSIC INDUSTRY: THE CRIMINALIZATION OF SHARING* 33 (2010) (chronicling the early history of Napster in his brief history of file sharing).

³⁸ This terminology is borrowed from the science of invasion ecology. See JULIE L. LOCKWOOD ET AL., *INVASION ECOLOGY* 9 (2007).

P2P is low in comparison to traditional client-server scenarios, in which a significant upfront capital investment is necessary for dedicated infrastructure.³⁹ This low capital barrier allows for the relatively simple release of a P2P network. The self-organizing aspect of the multiple administrative domains permits both rapid Establishment as well as swift Proliferation of P2P systems by so-called organic growth.⁴⁰

From the RMI point of view, the threatening beauty of a P2P network is exemplified by its ability to allow creators and users to efficiently bypass existing RMI revenue-generating distribution channels. As such, it is not difficult to understand why the RMI quickly classified P2P as a menacing technology and took measures—mainly in the courts—to inhibit its spread.⁴¹ The impact of this tactic has been evident at several levels.

At the level of P2P innovation, the RMI's successful opposition to Napster had the immediate effect of altering both the technological design and the business plan of subsequent P2P models.⁴² Following the shutdown of Napster, P2P software providers introduced structural modifications aimed at insulating them from the legal consequences stemming from any copyright-infringing file sharing occurring on their networks.⁴³ Over time, these network design alterations have not proved adequate to allow P2P software developers to benefit from the technological safe harbor articulated by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*⁴⁴ Indeed, the *In*

³⁹ See Rodriques & Druschel, *supra* note 31, at 74.

⁴⁰ *Id.*

⁴¹ The RMI has sued P2P file-sharing software providers. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The RMI has also sued quite a few individual users of P2P networks. See, e.g., *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008). See generally Ray Beckerman, *Index of Litigation Documents Referred to in "Recording Industry vs. the People"*, RAY BECKERMAN PC, <http://beckermanlegal.com/Documents.htm> (last updated Oct. 19, 2010).

⁴² See Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15, 59–62 (2005) (illustrating the “dialectic” between law and technology through the example of liability rules and design of P2P networks).

⁴³ See *Grokster*, 545 U.S. at 922 (stating that there are no central servers that would allow the interception or mediation by software provider); see also *Aimster*, 334 F.3d at 646 (describing the encryption used by Aimster, which prevented it from knowing the content of the files transferred through use of its software).

⁴⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (holding that the technology in question, Sony's VCR, was capable of “substantial noninfringing uses”).

*re Aimster Copyright Litigation*⁴⁵ and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*⁴⁶ cases make clear that P2P design is considered as merely one factor among many when determining secondary liability for copyright infringement.⁴⁷

What the *Aimster* and *Grokster* decisions failed to make clear, on the other hand, was the exact boundary of the *Sony* safe harbor.⁴⁸ Although difficult to quantify, it is likely that this legal uncertainty has led to a migration of OMD innovation efforts away from P2P technology to other, less risky, forms of OMD.⁴⁹ Thus, despite the effectiveness of P2P as an efficient technological solution to an array of intermediary-related transaction-cost issues,⁵⁰ the legal uncertainty surrounding P2P has made it more prudent to look for a breakthrough in OMD monetization elsewhere.⁵¹

⁴⁵ *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

⁴⁶ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁴⁷ *Id.* at 919 (holding “that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties”); *Aimster*, 334 F.3d at 650–51 (finding strategic “[w]illful blindness” not enough to overcome “invitation to infringement” in the form of tutorial on how to share copyrighted material). See generally Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577 (2008).

⁴⁸ See Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 128 (chronicling the secondary liability standard for technology providers as “an open-ended, unpredictable standard, driving legal uncertainty to a higher level”).

⁴⁹ “P2P development in the United States has ground to a screeching halt (with the exception of BitTorrent)” Thomas Mennecke, *Perfect Dark P2P Network Not So Perfect*, SLYCK.COM (June 10, 2010), http://www.slyck.com/story1983_Perfect_Dark_P2P_Network_Not_So_Perfect; see also Samuelson et al., *supra* note 6, at 19 (discussing the uncertainty surrounding the scope of the *Sony* safe harbor).

⁵⁰ It must be noted that P2P networks are first and foremost an elegant design solution to the ever-present issue of scalability. See generally Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695 (2011).

⁵¹ As a result, innovation in the area of P2P may have been effectively chilled just as the Electronic Frontier Foundation and others had warned. Press Release, Elec. Frontier Found., Supreme Court Ruling Will Chill Technology Innovation (June 27, 2005), <https://www.eff.org/press/archives/2005/06/27-0>; see also Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1388 (2004) (“Over and above the direct restrictions on innovation, the threat of lawsuits or criminal prosecutions against innovators is likely to deter a significant amount of innovation, some of which would unquestionably have been legal.”). But see Pamela Samuelson, *Three Reactions to MGM v. Grokster*, 13 MICH. TELECOMM. & TECH. L. REV. 177, 195 (2006) (disagreeing that the *Grokster* decision will have a chilling effect on innovation and citing the fact that, post-*Grokster*, “the entertainment industry has generally refrained from challenging new technologies that can make or distribute copies of copyrighted works”).

The impact of the RMI litigation campaign against individual users of P2P seems to have been rather considerable. First of all, the RMI appears to have achieved a modicum of success in increasing general public awareness of the perceived ills of file sharing.⁵² By increasing public awareness, the RMI may have been able to convince P2P users to resettle to RMI-friendly markets such as the iTunes.⁵³ Although far from being uncontested, some statistics show that use of P2P networks has gone down recently or has at least leveled out.⁵⁴ The stagnation of P2P use may be attributed to a number of factors—e.g., introduction of user-friendly, legal OMD systems, reduced P2P innovation due to a chilling effect, a shift to other web-based services such as cyberlockers,⁵⁵ etc. However, the threat of getting sued and having to pay steep statutory damages if found liable has to be counted among such considerations.⁵⁶

Despite the RMI's efforts to completely eradicate P2P use, it is clear that use of P2P remains substantial. The character and type of P2P use, however, appears to have changed.⁵⁷ A number of the unrepentant users of P2P networks have begun implementing antidetection technologies.⁵⁸ Although the impact of such obscurity may be

⁵² See Hughes, *supra* note 35, at 109–10 (placing the RIAA lawsuits' effect in perspective by asking the counterfactual question about what would have happened without the lawsuits and concluding, among other things, that lawsuits would have at least raised public awareness of copyright law).

⁵³ See ELEC. FRONTIER FOUND., *supra* note 36, at 12 (suggesting that the music industry's focus is shifting to the "carrot" of promoting legitimate download services (internal quotation marks omitted)).

⁵⁴ See HENDRIK SCHULZE & KLAUS MOCHALSKI, IPOQUE INTERNET STUDY 2008/2009, at 2 (2009), available at <http://www.ipoque.com/userfiles/file/ipoque-Internet-Study-08-09.pdf> (noting that there is a "[l]ower percentage of P2P than in 2007"); Press Release, British Recorded Music Indus., Growing Threat from Illegal Web Downloads (Dec. 18, 2009), <http://bpi.co.uk/press-area/news-amp3bpress-release/article/growing-threat-from-illegal-web-downloads.aspx> ("Levels of illegal peer-to-peer (P2P) filesharing in the UK have remained steady during 2009 . . ."). But see ELEC. FRONTIER FOUND., *supra* note 36, at 9–11 (calling attention to the difficulty of precisely measuring P2P use before stating that "virtually all surveys and studies agree that P2P usage has grown steadily since the RIAA's litigation campaign began in 2003").

⁵⁵ "Cyberlockers [are] online digital storage services which enable users to upload and store files, including copyrighted material. Users can . . . then instantly publish a specific link to those files on blogs, forums and other public websites. Examples of popular cyberlocker services include Rapidshare, Megaupload, Mediafire and zShare." Press Release, British Recorded Music Indus., *supra* note 54.

⁵⁶ See Hughes, *supra* note 35, at 735–36.

⁵⁷ See Helman, *supra* note 48, at 150–51.

⁵⁸ See, e.g., Ken Fisher, *Darknets Live On After P2P Ban at Ohio U*, ARS TECHNICA (May 9, 2007, 1:29 PM), <http://arstechnica.com/tech-policy/news/2007/05/darknets-live-on-after-p2p-ban-at-ohio-u.ars>. "When used to describe a file sharing network, the term ['darknet'] is often used as a synonym for 'friend-to-friend'—both describing networks where direct connections are

manifold, the employment of such technology may only decrease the already precarious P2P ease-of-use factor.⁵⁹ If the group of people using P2P networks gradually becomes limited to those technologically sophisticated enough to make use of tools such as IP filters, the number of users essential for the healthy functioning and proliferation of a P2P network should decrease⁶⁰—along with other P2P-enhancing network effects such as scalability.⁶¹

P2P-RMI dealings have also left their mark on the world of Internet Service Provider (“ISP”) networks. At the outset, ISPs got caught up in the litigation between the RMI and its customers.⁶² More recently, P2P and ISPs have crossed paths on the debate surrounding network neutrality.⁶³ As the RMI has moved away from suing individuals to pursuing a means of cooperating with ISPs to police

only established between trusted friends.” *Darknet (File Sharing)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Darknet_\(file_sharing\)](http://en.wikipedia.org/wiki/Darknet_(file_sharing)) (last modified July 3, 2011).

⁵⁹ But see Nate Anderson, *Darknets and the Future of P2P Investigators*, ARS TECHNICA (Mar. 5, 2009, 9:35 PM), <http://arstechnica.com/tech-policy/news/2009/03/the-new-version-of-p2p.ars> (arguing that darknets are going mainstream).

⁶⁰ Those P2P networks remaining, however, will become even more difficult to combat. Helman, *supra* note 48, at 154 (describing the transition of “file-sharing into a ‘shadow industry’”).

⁶¹ For an explanation of P2P scaling, see Bridy, *supra* note 50, at 4–5.

⁶² Specifically, the RMI requested that subpoenas be issued to ISPs with the direct objective of acquiring access to ISP customer information for those customers believed to be partaking in illegal file sharing. See *In re Charter Commc’ns, Inc.*, 393 F.3d 771, 772–73 (8th Cir. 2005); *Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003).

⁶³ Tim Wu describes this problem as follows:

Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application. The principle suggests that information networks are often more valuable when they are *less* specialized—when they are a platform for multiple uses, present and future.

Ben Kerschberg, *Net Neutrality Star Tim Wu Joins Federal Trade Commission as Senior Policy Advisor*, FORBES (Feb. 10, 2011, 9:14 AM), <http://blogs.forbes.com/benkerschberg/?p=38&preview=true> (internal quotation marks omitted). Initially, ISPs were simply caught selectively interfering with P2P protocols in the name of network management. See Peter Svensson, *Comcast Blocks Some Internet Traffic*, MSNBC.COM, http://www.msnbc.msn.com/id/21376597/ns/technology_and_science-internet/t/comcast-blocks-some-internet-traffic/ (last updated Oct. 19, 2007); see also *Comcast Corp.*, 23 FCC Rcd. 13028, 13028, 13031–32 (2008) (formal complaint of free press and public knowledge) (finding that selectively interfering with Internet traffic was “discriminatory and arbitrary”), *vacated*, *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); Aaron K. Brauer-Rieke, *The FCC Tackles Net Neutrality: Agency Jurisdiction and the Comcast Order*, 24 BERKELEY TECH. L.J. 593, 605 (2009). But see *Comcast Corp.*, 600 F.3d at 650 (holding that the FCC did not have jurisdiction to regulate such traffic management).

privately the use of P2P technology on the networks,⁶⁴ concerns about network neutrality have become more acute.⁶⁵ The discussion currently centers around the temporary and informal alliances between ISPs and the RIAA. Making this desirable is the confluence of separate yet related ISP and RIAA interests (reduced network congestion for ISPs and reduced P2P activity for the RIAA)⁶⁶ to police suspicious behavior, to issue warnings, and eventually to temporarily suspend the Internet service of repeat infringers.⁶⁷ In the near future, ISP and RMI business partnerships in connection with OMD, discussed below, will only serve to heighten the level of scrutiny applied to the legal assessment of any such private network-policing endeavors in light of the principle of network neutrality.

At the industry level, the RMI suffered almost irreparable harm to its image as a result of its crusade against P2P.⁶⁸ It is fair to say that the RMI was not perceived to be a collection of struggling artists trying to enforce their limited rights with scarce resources at their disposal. Instead, it was seen as a corporate machine seeking desperately to cling to an outdated and inefficient business model by any means possible, including by terrorizing its own customers.⁶⁹

As the RMI's tool for combating file sharing, the institution of copyright also "got a bad name for itself."⁷⁰ Many people were simply either unwilling or unable to comprehend a copyright regime that blocked the progress of such a consumer welfare-enhancing technology. The RMI lawsuits against individual users of P2P technology

⁶⁴ See, e.g., Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

⁶⁵ See Bridy, *supra* note 36, at 598–600.

⁶⁶ See Elkin-Koren, *supra* note 42, at 18 ("Here, ISPs and copyright holders, or for that matter, any law enforcement agencies, may share similar interests. Peer-to-peer technology, which was first introduced by non-market players, confronted ISPs with a dilemma: it boosted their business, increasing the demand for broadband and upgraded services, but at the same time created a growing burden of limitless bandwidth consumption.").

⁶⁷ See McBride & Smith, *supra* note 64. But see Greg Sandoval, *A Year Out, Where's RIAA's Promised ISP Help?*, CNET NEWS (Dec. 23, 2009, 4:00 AM), http://news.cnet.com/8301-31001_3-10420803-261.html (stating that "the number of ISPs that have acknowledged adopting the RIAA's graduated response program is zero").

⁶⁸ "Also lost down the P2P hole was the reputation of the industry, now widely seen as one that sues its own customers and is out of step with current technology." MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, *THE STATE OF MUSIC ONLINE: TEN YEARS AFTER NAPSTER 10* (2009), available at http://www.pewinternet.org/~media/Files/Reports/2009/The-State-of-Music-Online_-Ten-Years-After-Napster.pdf; see also McBride & Smith, *supra* note 64.

⁶⁹ See generally Jane C. Ginsburg, *Essay—How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61–62 (2002) (describing how copyright owners are "generally perceived to be large, impersonal and unlovable corporations").

⁷⁰ *Id.* at 61.

only worsened the matter by revealing certain aspects of copyright law to be particularly draconian.⁷¹

At the peak of the P2P frenzy, there were a great many voices calling for the reform of the copyright system. These proposals varied with regard both to the scope and the form any restructuring should take.⁷² Although many reforms of the copyright regime have been suggested, none have been adopted into law. Instead, the legal status quo has been preserved, resulting in a considerable amount of technological innovation being funneled into certain concentrated areas of OMD.⁷³

B. Central Download and the Recorded Music Industry

The P2P phenomenon did not lead to the introduction of a statutory license scheme for digital downloads and the RMI was unable to create a popular alternative to P2P on its own.⁷⁴ As such, the door was left open for others to fill the gap: enter Apple, its iPod, and the iTunes.

The iTunes was the first download shop with content from all of the major labels.⁷⁵ With the iTunes, Apple was able to furnish what the RMI was not: a viable alternative to P2P. Apart from the essential

⁷¹ “[W]e are troubled that statutory damage awards sometimes appear arbitrary or grossly excessive in comparison with a realistic assessment of actual damages incurred.” Samuelson et al., *supra* note 6, at 1196.

The Court has labored to fashion a reasonable limit on statutory damages awards against noncommercial individuals who illegally download and upload music such that the award of statutory damages does not veer into the realm of gross injustice. Finding a precise dollar amount that delineates the border between the jury’s wide discretion to calculate its own number to address Thomas-Rasset’s willful violations, Plaintiffs’ far-reaching, but nebulous damages, and the need to deter online piracy in general and the outrageousness of a \$2 million verdict is a considerable task.

Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1049 (D. Minn. 2010) (emphasis added).

⁷² See Litman, *supra* note 11, at 40 n.184 (citing many suggested copyright reform proposals).

⁷³ From a dialectic point of view, this development confirms the law’s ability to shape technology. P2P technology has made apparent the acute need for legal reform. Given the lack of legal reform, however, the jury is still out on P2P technology’s ability to shape the law.

⁷⁴ See Dan Tynan, *The 25 Worst Tech Products of All Time*, PCWORLD (May 26, 2006, 4:00 AM), http://www.pcworld.com/article/125772-3/the_25_worst_tech_products_of_all_time.html (ranking MusicNet and Pressplay, the RMI-backed OMD models, as the ninth worst tech products of all time).

⁷⁵ Tom Mainelli, *Apple Unveils Online Music Service*, PCWORLD (Apr. 28, 2003, 5:00 PM), http://www.pcworld.com/article/110482/apple_unveils_online_music_service.html.

ingredient of diverse and seemingly all-encompassing content, the appeal of the iTunes was its ease of use and, eventually, variable pricing.

The iTunes represents successful cooperation between innovators of OMD and the RMI. Although the relationship between Apple and the RMI has not been without a few tussles,⁷⁶ it is fair to say that the introduction of the iTunes has served as a financial boon for this otherwise fledgling industry. Billions of songs have been downloaded via the iTunes.⁷⁷ The effects of this success have been felt at several levels, namely, at the innovation, user, industry, and institutional levels.

At the level of innovation, Apple's foray into the RMI once again showed that innovation in the field of artistic content dissemination is not likely to come from within the respective content-producing industry. As in the past, pressure from outside the content industry—as is usual from a technology company—forced the copyright holders to participate in change.⁷⁸ Unlike past dealings between technological innovators and the copyright holders, however, the introduction of the iTunes by Apple did not follow the customary script of an initial brawl, followed by either the introduction of a statutory/voluntary collective license scheme or a judicial opinion that killed, enhanced, or had no effect on technology. Instead, thanks to careful negotiations and other favorable conditions, including, perhaps, a sense of urgency within the RMI,⁷⁹ the RMI and Apple were able to sidestep the almost inevitable ritual of copyright owners battling it out with purveyors of new copying-related technologies.

Apple also impacted OMD innovation by demonstrating that people are willing to spend money on digital downloads. Apple has successfully “competed with free” within the bounds of legality by providing extensive content choice, flexible pricing, and ease of use.⁸⁰

⁷⁶ See, e.g., Jeff Leeds, *Apple, Digital Music's Angel, Earns Record Industry's Scorn*, N.Y. TIMES, Aug. 27, 2005, http://www.nytimes.com/2005/08/27/technology/27apple.html?_r=2 (reporting on the beginnings of the long debate over variable pricing).

⁷⁷ Martyn Williams, *Timeline: iTunes Store at 10 Billion*, COMPUTERWORLD (Feb. 24, 2010, 4:56 PM), http://www.computerworld.com/s/article/9162018/Timeline_iTunes_Store_at_10_billion.

⁷⁸ See Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1619–30 (2001).

⁷⁹ See Mainelli, *supra* note 75 (citing the limited number of initial users, i.e., Mac users, as central to getting label approval); see also Jeff Goodell, *Steve Jobs: The Rolling Stone Interview*, ROLLING STONE (Dec. 03, 2003), http://www.keystonemac.com/pdfs/Steve_Jobs_Interview.pdf (describing the process of getting record companies on board with the iTunes).

⁸⁰ “iTunes has over 13 million songs Songs are priced at 69¢, 99¢, or \$1.29 each, and most albums cost just \$9.99.” See *iTunes A to Z*, APPLE, <http://www.apple.com/itunes/features/#purchasemusic> (last visited July 22, 2011). The iTunes catalogue now even includes the Beatles. Press Release, Apple, *The Beatles Now on iTunes* (Nov. 16, 2010), <http://www.apple>.

Upon observing Apple's success within this market, other large Internet players—e.g., Amazon.com—have launched their own download shops.⁸¹ As such, considerable innovational effort has become localized within the download-shop environment. Key areas of competition and innovation within this now staple area of OMD include: perfecting price points, optimizing user friendliness, creating new marketing strategies, introducing complementary digital content, and proprietary extensions for such digital content.

The success of the iTMS was also palpable at the user level. Those occasionally referred to as “marginal file sharers” were given the opportunity to go clean.⁸² In addition to allowing this switch for those already acquainted with acquiring digital music online, the download-shop model also introduced the convenience of digital music to millions of individuals previously either unwilling, due to legal or ethical factors, or reluctant, as late adopters of technology, to use P2P. In essence, the iTMS created an all-ages army of white-head-phone-wearing digital music enthusiasts.

This led to a seismic shift in the fundamental power structure of the RMI. Apple's position of power vis-à-vis the RMI is undeniable. The major labels cannot afford to remove their respective catalogue from the iTMS, as digital sales via this platform are simply too important to the bottom line.⁸³ In response to Apple's newfound power, traditional players within the industry are seeking opportunities for OMD model diversification so as to avoid having the terms of future agreements dictated to them by Apple.⁸⁴

The successful advance onto the field of OMD did not translate to improved reputations for the RMI or the institution of copyright. Apple's use of Digital Rights Management (“DRM”) that is protected by the Digital Millennium Copyright Act (“DMCA”)⁸⁵ “made Apple

com/pr/library/2010/11/16itunes.html. There are rumors that “iTunes is paying . . . royalties . . . directly to the band's company,” thereby cutting out several middlemen. Ed Christman, *Beatles Being Paid Directly by iTunes in Deal*, REUTERS (Jan. 5, 2011, 9:26 PM), <http://www.reuters.com/article/idUSTRE7050IC20110106> (reporting that the Beatles' deal may be more of a licensing pact).

⁸¹ News Release, Amazon.com, Amazon.com Launches Public Beta of Amazon MP3, a Digital Music Store Offering Customers Earth's Biggest Selection of a la Carte DRM-Free MP3 Music Downloads (Sept. 25, 2007), <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1055054>.

⁸² See Goodell, *supra* note 79; see also Mainelli, *supra* note 75.

⁸³ Tim Arango, *Despite iTunes Accord, Music Labels Still Fret*, N.Y. TIMES, Feb. 2, 2009, at B1.

⁸⁴ *Id.*

⁸⁵ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified

the subject of increasing criticism, threats of legal action, and actual legal action.”⁸⁶ In order to deflect criticism, Apple placed the blame for DRM squarely on the shoulder of the labels.⁸⁷ The general public largely perceived this to be part of the customary practice of overreaching by the RMI. As a result, the RMI’s already tattered image continued to plummet, and the reputation of copyright law spiraled downward along with it.

Perhaps the biggest institutional change brought about by the introduction of the iTMS relates to the dawn of the platform-content age within the RMI. We are now faced with a new set of pressing issues, not the least of which is the possible social welfare-reducing impact that a lack of competition among platforms may produce. As a result, the focus of legal and economic scholarship in the area of OMD has shifted from those issues typically identified with P2P (secondary liability, fair use, etc.) to concerns associated with new platform-content or network-content combinations (interoperability, tying, bundling, antitrust, network/platform neutrality, etc.).⁸⁸

III. OMD INNOVATION WITHIN THE OMD-INFLUENCED RECORDED MUSIC INDUSTRY ECOSYSTEM

The (quite literal) trials of P2P and the success of the iTMS stand out as symbols of OMD’s early years. OMD innovators such as Napster and Apple forced the reluctant RMI to enter the online digital music market. As the RMI became acquainted with the many advantages of embracing OMD, its desire to actively lead development in this area has increased. This shift in strategy is most obvious when reading RMI reports on digital music, which no longer merely condemn illegal file sharing, piracy, and the loss of profits related to such activity.⁸⁹ Today, these reports also sing the praises of the cooperative

as amended in scattered sections of 17 U.S.C.). The anticircumvention provisions are found in 17 U.S.C. § 1201 (2006).

⁸⁶ Nicola F. Sharpe & Olufunmilayo B. Arewa, *Is Apple Playing Fair? Navigating the iPod FairPlay DRM Controversy*, 5 NW. J. TECH. & INTELL. PROP. 332, 336 (2007).

⁸⁷ Steve Jobs, *Thoughts on Music*, APPLE (Feb. 6, 2007), <https://www.apple.com/fr/hotnews/thoughtsonmusic/> (“When Apple approached these companies to license their music to distribute legally over the Internet, they were extremely cautious and required Apple to protect their music from being illegally copied.”); see also Arango, *supra* note 83 (documenting Apple granting variable pricing in exchange for wireless downloads on the iPhone and the move away from DRM).

⁸⁸ See, e.g., Sharpe & Arewa, *supra* note 86, at 333–36; see also Robert P. Merges, IP Rights and Technological Platforms (Dec. 1, 2008) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315522.

⁸⁹ See IFPI REPORT, *supra* note 28, at 4.

activities of the RMI and its OMD business partners.⁹⁰ This treatment may also be taken as a sign of the gradual maturation of OMD-RMI relations.

A. *Interactive Streaming and the Recorded Music Industry*

Although praising their potential, the RMI continues to have mixed feelings about interactive streaming services. This is apparent when one examines the RMI's reluctance to enter into licensing agreements with such services in all markets. The RMI's general lack of faith in business models supported by advertising appears to be the main obstacle to negotiating licensing agreements in these markets.⁹¹ Although the advertisement-free version of each service usually requires a subscription fee, each service also relies heavily on (is indeed most well known for) its free, advertisement-supported service.

Certain interactive streaming services have a "license first, then launch" motto, while others have a "launch, then hopefully license" approach. The former approach led to significant delays in launching the Sweden-based Spotify in most markets, including in the United States.⁹² The latter tactic has meant operation for the United States-headquartered Groovespark in a manner not unlike P2P models; lawsuits have been filed and the service operates with liability for secondary copyright infringement looming very large.⁹³ It is fair to say that these models have reached a critical stage in their interaction with the RMI. Given the rather unsuccessful history of such models, the tastemakers have begun writing on the wall.⁹⁴ Nonetheless, the emergence of such models has influenced the OMD market in several ways.

At the level of OMD innovation, the success of these interactive streaming services has demonstrated the continued existence of space for OMD models seeking to fill gaps not filled by the à la carte download-shop model pioneered by Apple. Services such as Spotify

⁹⁰ It is interesting to note that the thirty-two page IFPI Report also uses the term "piracy" or "anti-piracy" approximately ninety times. *See generally id.*

⁹¹ Greg Sandoval, *Spotify Crashes into Apple on Way to U.S.*, CNET NEWS (Oct. 7, 2010, 3:54 PM), http://news.cnet.com/8301-31001_3-20018971-261.html.

⁹² *Id.* Spotify is currently available in Sweden, Norway, Finland, the United Kingdom, the United States, France, Spain, and the Netherlands. *What Countries Is Spotify Available in?*, SPOTIFY, <http://www.spotify.com/uk/help/faq/availability/country-availability/> (last visited July 17, 2011).

⁹³ *See* Matt Rosoff, *Groovespark Sued by Another Record Company*, CNET NEWS (Jan. 11, 2010, 11:33 AM), http://news.cnet.com/8301-13526_3-10432132-27.html?part=rss&subj=news&tag=2547-1_3-0-20.

⁹⁴ *See, e.g., id.*

have shown that some users are willing to forego owning a finite amount of music if they are able to get quick and easy access to millions of musical tracks for a reasonable subscription fee; they are tapping the market of music renters.⁹⁵ As such, interactive streaming services have further expanded the market for legal consumption of digital music. Similar to the download model established by Apple, OMD innovators have been drawn to this online rental model and begun fine tuning it in competition for not only the upper hand within the interactive streaming section of the OMD market but also a greater portion of the entire OMD market.

This broadening of the OMD market has also had implications for the RMI. With the addition of interactive streaming services and several new players in the download-shop category, it has become clear that Apple will no longer be able to set the OMD agenda. This newfound diversity has likely benefited the major labels, returning to them a bit of the OMD market power they had initially conceded to Apple. That being said, the struggle for influence within the OMD market is both far from over and extremely complex in its workings. The respective predicaments of Spotify and Grooveshark are exemplary of the interwoven interests of OMD market participants.

Currently, Spotify has been able to establish itself in certain European countries.⁹⁶ Its United States launch,⁹⁷ however, was delayed several times.⁹⁸ In addition to the general industry reluctance to license, as mentioned above, reports indicated that Apple CEO Steve Jobs was not very keen on seeing Spotify in the United States.⁹⁹ Such reports never fail to include both Apple's and Google's respective intentions in the field of OMD.¹⁰⁰

After first being sued by Electric & Musical Industries Ltd. ("EMI"), Grooveshark was able to negotiate a U.S. license agreement with this major label.¹⁰¹ Grooveshark is currently faced with a second

⁹⁵ For a discussion of the economics of selling versus renting digital music, see Thierry Rayna, *The Economics of Digital Goods: Selling vs. Renting Music Online* (DIME Intellectual Prop. Rights, Working Paper No. 13, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371097.

⁹⁶ See *What Countries Is Spotify Available in?*, *supra* note 92.

⁹⁷ *Hello America. Spotify Here.*, SPOTIFY (July 14, 2011), <http://www.spotify.com/int/about-us/press/hello-america-spotify-here/> (introducing Spotify to the United States on July 14, 2011).

⁹⁸ See Sandoval, *supra* note 91.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Eliot Van Buskirk, *EMI Drops Suit Against Grooveshark Music Service, Licenses It Instead*, WIRED.COM (Oct. 13, 2009, 12:00 PM), <http://www.wired.com/epicenter/2009/10/emi-drops-suit-against-grooveshark-music-service-licenses-it-instead/>.

lawsuit, however, filed by Universal Music Group (“UMG”), alleging copyright infringement.¹⁰² Interestingly, the Grooveshark application was removed from the Apple App Store as a consequence of the UMG litigation against Grooveshark,¹⁰³ yet another indication of both the tangled web of OMD market participant alliances and the Apple platform’s position of power within the OMD market.

Widespread availability of interactive streaming services should also likely lead to improvements at the institutional level. If the overall position of the user continues to improve, through expanded choice, increased user-friendliness, and price reduction, general public approval for copyright should also rise.

B. ISPs and the Recorded Music Industry

For some time, there have been voices advocating the introduction of OMD licensing schemes involving ISPs.¹⁰⁴ These proposals have covered calls for RMI-initiated licensing strategies, pleas for voluntary collective licensing, and, last but not least, appeals for statutory licensing.¹⁰⁵ Although different in form,¹⁰⁶ such plans share the common belief that ISP licensing is capable of directly curbing the ongoing P2P file sharing while simultaneously providing a method of effectively administering the economic rights granted by copyright.¹⁰⁷ In other words, many believe that widespread ISP licensing strikes the appropriate balance (or copyright tradeoff) between the costs of limiting access and the benefits provided by the incentives to create.

¹⁰² Sarah Hull, *UMG Goes After Golden Oldies Pirate*, COURTHOUSE NEWS SERVICE (Jan. 8, 2010, 11:17 AM), <http://www.courthousenews.com/2010/01/08/23474.htm>.

¹⁰³ Eliot Van Buskirk, *Apple Bows to Label Pressure, Yanks Grooveshark from App Store*, WIRED.COM (Aug. 17, 2010, 3:20 PM), <http://www.wired.com/epicenter/2010/08/apple-bows-to-label-pressure-yanks-grooveshark-from-app-store/>; *What Happened to the iPhone App?*, GROOVESHARK, <http://help.grooveshark.com/customer/portal/articles/4376-what-happened-to-the-iphone-app-> (last visited Jan. 10, 2011).

¹⁰⁴ See, e.g., FRED VON LOHMANN, A BETTER WAY FORWARD: VOLUNTARY COLLECTIVE LICENSING OF MUSIC FILE SHARING 2–3 (2008), available at <https://www.eff.org/files/eff-a-better-way-forward.pdf>.

¹⁰⁵ See, e.g., *id.* (voluntary collective licensing).

¹⁰⁶ For more on the difference between voluntary as opposed to statutory licenses, see Litman, *supra* note 11, at 49–52 (discussing the matter of de-trenching current intermediaries to “serve both simplification and disintermediation goals”). Regardless of the particular variation, the implementation of any ISP licensing scheme likely involves similar modalities, such as payment of a fee to the ISP or direct “tax” of the ISP, with possible further distribution to a collective management organization followed by payment disbursement to the respective copyright owner and artist.

¹⁰⁷ See, e.g., VON LOHMANN, *supra* note 104, at 2–3.

Recently, music companies have begun actively seeking out and entering into voluntary, if not collective, licensing agreements with ISPs in Europe.¹⁰⁸ This type of cooperation is attractive to both ISPs and the RMI. For an ISP, having an extensive music catalogue as part of its broadband service improves its competitive position within a relatively saturated broadband market.¹⁰⁹ The benefits of this superior market position include reduced customer churn, an enhanced ability to attract new customers, and new sources of income.¹¹⁰ For the RMI, the greatest advantage of ISP licensing agreements lies in the expanded market for its content and greater negotiating power within the overall OMD market.

RMI-ISP cooperation is still in its initial stages. Thus, it is too early to know the impact these agreements may have. Nonetheless, as ISP licensing agreements are targeted at addressing the P2P dilemma, it may be fair to say that the proliferation of such agreements has the potential to affect OMD on a scale rivaling P2P.

The effect that widespread ISP licensing agreements may have on the field of OMD innovation is difficult to imagine. On the one hand, one could take the view that such agreements offer the complete package—literally offered by the ISP as a package—and thereby entail the ultimate success in OMD model innovation. If a consumer can access, and perhaps even download, unlimited music as well as movies, TV episodes, books, and video games simply by paying an extra \$5.00, \$10.00, \$15.00, or \$20.00 on her monthly ISP bill, where is the room for OMD model improvement?¹¹¹

On the other hand, one could hold the opinion that, similar to interactive streaming, ISP licensing agreements merely represent further exhaustion of the remaining OMD innovation space not occupied by the à la carte download model or the interactive streaming services. In other words, not everyone will prefer getting music from their ISP

¹⁰⁸ See, e.g., Press Release, TDC, Unlimited Music to TDC's Customers (Mar. 31, 2008), <http://tdc.com/publish.php?id=16212> ("With PLAY, TDC is the first telco in the world to offer consumers unlimited music downloads 'bundled' with private broadband or mobile subscriptions, at no extra cost.").

¹⁰⁹ See INDUS. ANALYSIS & TECH. DIV., FCC, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2009 (2010), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0902/DOC-301294A1.pdf (showing a marked decline in new broadband service subscriptions).

¹¹⁰ See Matthew Hofmeister, *The RIAA and Online Piracy*, ENT. & SPORTS LAW., Spring 2010, at 1, 33–36.

¹¹¹ On the other hand, one could perceive such a network/content scheme as an incomparable nightmare for OMD innovation in particular and network neutrality in general. See Lawrence Lessig & Robert W. McChesney, *No Tolls on the Internet*, WASH. POST (June 8, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html>.

and such ISP packages are simply one additional consumer option in the world of OMD. However seen, it is likely that OMD innovators will cluster around the ISP model, continually modifying it in a competitive battle not only for control of the ISP section of the OMD market but also for a greater portion of the entire OMD market.

Without a doubt, pervasive RMI-ISP licensing agreements would significantly increase the market for legal consumption of digital music. If given the option to merely check a box for unlimited music for \$5.00 per month, many people who had never before used any form of OMD would be attracted to the service. It is also fair to predict that a certain number of P2P users would be drawn away from their current practices toward such a bundled model. Pervasive access to digital music via ISPs may even divert future generations of music fans from illegal file sharing altogether.

The increased numbers of digital-music consumers would initially result in augmented OMD model competition, which, in turn, is likely to lead to further realignment of the OMD market participant hierarchy. Predicting how this reorganization will shake out is difficult due to the multitude of factors at play; it is extremely probable, however, that diversification will continue to strengthen the RMI influence within this hierarchy. In addition, over time ISPs will come to occupy a literally central role at the expense of download-shop and interactive streaming service influence.

RMI-ISP licensing agreements would also have a profound impact at the network level. As mentioned previously in connection with the RMI-ISP private network-policing arrangements, separate yet related goals currently pit ISPs and the RMI against P2P technology.¹¹² Although bandwidth-consuming P2P basically drove the growth of broadband infrastructure and thereby the expansion of the ISP market, P2P usage tends to clog these newly laid information arteries to the financial detriment of ISPs.¹¹³ As such, ISPs have a keen interest in keeping P2P use to a minimum. If the RMI and ISPs were to enter into pervasive licensing agreements, the heretofore "separate, yet related" ISP goal of minimizing P2P use in the interest of reducing network congestion would begin to merge towards the RMI goal of annihilating P2P altogether. If left unregulated, this further alignment of ISP and RMI interests may have far reaching consequences for core principles such as network neutrality and fair use. Whereas erosion of the former principle would dramatically reshape the Internet land-

¹¹² See Elkin-Koren, *supra* note 42, at 18.

¹¹³ *Id.*

scape, corrosion of the latter would lead to reduced access to, and enjoyment of, copyrighted works.

At the institutional level, copyright law's image is likely to improve in direct relation to the increasingly positive experience of consumers. In other words, if RMI-ISP licensing agreements increase competition with the effect of expanded choice, increased user-friendliness, and price reduction, copyright's approval rating will continue to rise. Such a development would directly benefit the institutional copyright owners as well, helping to reestablish their historically entrenched position within the copyright regime.¹¹⁴

However, if ISP-RMI agreements produce only a short-lived competitive burst and are followed by pervasive lock-in to ISP model arrangements, general public esteem for copyright, seen as the tool facilitating such a result, will continue to diminish. In addition, if such temporary consumer gains are only achieved by sacrificing fundamental principles such as network neutrality and fair use, the dimensions of the fallout for the RMI and institution of copyright are difficult to fathom.

IV. LEGAL AND ECONOMIC ANALYSIS

In 1999, Napster started nothing less than a technical revolution in the field of OMD.¹¹⁵ The digital uprising that accompanied its launch has yet to subside; OMD models implementing P2P technology, however, have not been able to establish themselves as the standard for the legal dissemination of digital music. Apple's introduction of the iTunes in 2003 represented a first, crucial adjustment of the RMI to the radically changed technological landscape. The success of the iTunes indicated that content monetization in the field of OMD was possible. In this manner, the iTunes also threw a lifeline to the struggling economic incentive rationale underpinning the traditional copyright regime.

The major music labels' desire to expand licensing options, coupled with additional OMD model innovation, makes further expansion of legal and monetized OMD highly realistic. The potential social welfare-enhancing effects of such OMD diversification are manifold, though far from guaranteed. The brief history of OMD-model development presented above demonstrates that a lack of OMD policy may lead to unacceptable uncertainty, unwarranted delays and un-

¹¹⁴ See Litman, *supra* note 11 (documenting the historical blocking tactics of entrenched copyright intermediaries and the reform necessary to dislodge such intermediaries).

¹¹⁵ See DAVID, *supra* note 37, at 33–34.

desirable lock-in. Recent experience also tells us that a well-devised OMD policy must be multifaceted in nature in order to account for externalities at the levels of innovation, user, network, industry, and institution.

A. Innovation and Competition Within and Among OMD Models

According to the modern concept of innovation, the innovative process begins with the idea-sparking creation and concludes with the delivery of a product to the consumer. Consequently, as a tool for bringing digital music to listeners, OMD-model development is a crucial link in the innovational chain.

As documented above, there is significant innovation taking place within each OMD model. This type of innovation is a reflection of emerging competition *within* OMD models—e.g., Amazon.com competes with Apple for the greatest possible portion of the download-shop market. This competition within each OMD model may be referred to as “internal” competition.

OMD-model heterogeneity stemming from OMD-model innovation has also spurred competition within the overall market for OMD. In other words, Amazon.com no longer competes with Apple *for* the entire OMD market. Instead, Apple and Amazon.com compete amid Spotify, Grooveshark, and, in the near future perhaps, Comcast¹¹⁶—and, yes, even P2P—for a share of the OMD market pie. This competition *among* OMD models may be described as “external” competition.

When crafting an OMD regulatory policy, it is important to understand the correlation between internal and external competition to avoid the social welfare-decreasing effects of striking an improper balance between the two. To capture this interdependence, it is helpful to portray the internal competition of a particular OMD model and the manner in which external competition affects such internal competition by influencing further internal development. In keeping with the previous outline, internal and external competition is illustrated by drawing attention to its effects at several levels. As the OMD market has undergone the most maturation, the download-shop market provides perhaps the best specimen for our analysis.

The proliferation of market participants within the download-shop category has improved the negotiating position of the RMI vis-à-

¹¹⁶ Tim Arango & Brian Stelter, *Comcast Receives Approval for NBC Universal Merger*, N.Y. TIMES, Jan. 19, 2011, <http://www.nytimes.com/2011/01/19/business/media/19comcast.html>.

vis the download-shop market incumbent, Apple. This shift in power has led to perhaps the most visible effect of enhanced internal competition for the download-shop market: lower prices for downloads of digital music content. This reduction in price has been accompanied by an expanded assortment of content as well as greater flexibility in pricing. Internal competition is also likely responsible for the elimination of the interoperability-blocking and consumer-unfriendly tool, FairPlay—Apple's brand of DRM.

In addition to improving the position of consumers and copyright owners, internal competition for the download-shop market has driven innovation—and thereby competition—in the areas of both complementary digital content (e.g., digital movie sales), and proprietary extensions of such digital content (e.g., the iPad and Kindle).

Perhaps least noticeably, but conceivably most importantly, respect for the copyright regime has increased as the position of the consumer has improved through decreased prices, improved user-friendliness, and increased access to creative works.

In short, healthy internal competition for the download-shop market has been rife with benefits for consumers, copyright owners (i.e., the RMI), the copyright regime, and innovation within the download-shop model.

This internal competition has not occurred in a vacuum. External competitive forces, such as the continued development of interactive streaming services and the potential introduction of ISP services, have forced internal competitors to make strategic choices based not only on the conditions of the download-shop market but also on their respective position within the overall OMD market. In other words, external competition serves as a regulator of internal competition.

In the case of download-shop model innovators, this external pressure will tend to amplify the positive effects created by robust internal competition: prices will drop further, consumer options and access will continue to expand, and innovation in the field of complementary products and proprietary extensions will be strengthened. There is also likely to be a resulting feedback effect. In other words, robust internal competition within the download-shop market brought about, in part, by external competition will, in turn, work as an external competitive force driving the internal competition of the other OMD models.

This is a rather positive projection of the internal and external OMD competition cycle. It is possible, however, to envision a scenario in which a particular OMD model is able to outpace the others,

thus liberating it from external competitive forces. Such an occurrence could produce social welfare-decreasing effects and so should be closely evaluated.

In keeping with the previous example, it is necessary to analyze the external competitive effects of RMI-ISP licensing agreements on the download-shop market. Of course, this analysis depends on the particular features of yet unknown ISP-RMI licensing arrangements.¹¹⁷ Nonetheless, it is still possible to sketch out potential effects at a high level of abstraction.

Initially, the introduction of the ISP model should follow the pattern laid out above: increased internal competition for the download-shop market trailed by the aforementioned feedback effect would spur competition within the ISP model market. The duration of this welfare-enhancing cycle is difficult to predict; sooner or later, however, it is likely that the strategic advantage of ISPs as centrally located Internet gatekeepers should allow them to gain the upper hand in the overall OMD market and to become the standard for OMD, thereby marginalizing other forms of OMD and minimizing the competitive feedback loop.¹¹⁸ Internal competition would continue to exist. It would cease to be as robust, however, due to lack of external pressure. In addition, this remaining OMD competition would become largely dependent upon competition among ISPs for the general broadband market.

To summarize, OMD-model innovation augments competition at two mutually reinforcing levels: the internal level within each OMD model and the external level among the various OMD models. This innovation-driven enhanced competitive environment produces a multitude of consumer welfare-enhancing effects. This competition is not guaranteed, however. As such, incentivizing OMD-model innovation in a manner that strengthens internal and external competition, both within each OMD model and amid OMD models, must be a primary goal of copyright policy.

¹¹⁷ The variety of ways in which ISPs offer music will be limited only by licensing restrictions. In order to cover all established markets, they would be well advised to offer DRM-free downloads, tethered downloads, and interactive streaming. In addition, it would be prudent to cover as many pricing and content options as possible within these markets.

¹¹⁸ “[W]hy would an economically rational person keep paying 99¢ retail [to a download shop like the iTMS] when they have already paid for the right to unlimited downloading . . . ?” Christian L. Castle & Amy E. Mitchell, *What’s Wrong with ISP Music Licensing?*, ENT. & SPORTS LAW., Fall 2008, at 4, 5.

B. The Role of Copyright

At the dawn of the OMD age, copyright owners lacked both sufficient economic incentive and the technological expertise to develop OMD models on their own. As a result, OMD-model innovation was driven by technological innovators despite the content access problems caused by nonparticipatory copyright owners. These circumstances led to the P2P dilemma, the slow development of the OMD market, and the institutional crisis of copyright.

OMD-model innovation, however gradual, has largely addressed the copyright-owner perception of a lack of economic benefit in the OMD market. Indeed, instead of being an obstacle to RMI participation in OMD-model development and facilitation, the promise of a great financial payoff in the market of OMD now motivates copyright owners to push diversification and thereby innovation in the field of OMD. This is certainly a welcome change.

As the foregoing analysis shows, it has become clear that it is in the RMI's self-interest to explore a diversified OMD licensing policy. If the RMI is able to achieve such diversification, both internal as well as external OMD competition should be bolstered. This strengthening of competition is likely to produce a multitude of social welfare-enhancing effects. As the above examination in connection with the competitive feedback loop demonstrates, however, such effects are not guaranteed to last. Indeed, given the strategic gatekeeper position of ISPs in the content distribution chain, it is reasonable to think that booming competition amid OMD models may be temporary. The RMI should recognize the threat of this ISP lock-in and "bargain hard" to avoid it.¹¹⁹ In this manner, negotiating nonexclusive licenses with as many market participants as possible must be a central goal.

As part of an overall copyright policy, a comprehensive OMD policy must also recognize the benefits of mass licensing. As such, pervasive nonexclusive licensing practices by the RMI should be strongly encouraged. If the RMI does not prove up to the task of creating this self-benefitting OMD environment, either through widespread, nonexclusive licensing or voluntary collective licensing (that is, *ex post* solutions), Congress should strongly consider an *ex ante* solution: creating a compulsory license framework that promotes open access to works and remuneration.

¹¹⁹ See Merges, *supra* note 88, at 9 ("At a minimum, the prospect of lock-in suggests that market participants should bargain hard prior to being locked in to a new technology and then take steps to minimize that lock-in over the course of the technology cycle.").

To be sure, any OMD policy will be required to address the OMD-model black sheep, P2P. In the author's view, the institutional facilitation of copyright enforcement should be approximately inversely proportional to the amount of public access afforded to works by the RMI-OMD licensing arrangements. In other words, if access to works and remuneration is highly limited due to exclusive and unreasonably discriminatory licensing practices, lawmakers should absolutely refrain from further strengthening copyright law in favor of the RMI. As stated above, in such an unnecessarily suffocating environment, the Legislature should place, in a demonstrative fashion, the very real possibility of a statutory licensing framework on the copyright reform negotiation table. In the absence of such a compulsory scheme, lawmakers should articulate clear rules ensuring that fundamental principles—such as network neutrality and fair use—are not progressively marginalized through private regulation made possible by a lack of a well-conceived OMD policy. Protecting and promoting these essential principles may render copyright enforcement more burdensome, but it would be justified given overly limited access to works and the vital role of creative content in a democratic society.

Conversely, if easy and fair access to works and remuneration is the norm, lawmakers should limit themselves to reforming remedies and overall dispute resolution procedures involving file sharing. To be clear, this should not be done in a manner that further strengthens the rights of the RMI. Also, any reforms pertaining to dispute resolution should not lead to an erosion of core principles such as network neutrality and fair use. Such dispute resolution procedures should ensure that fundamental access-enhancing rights are respected in all instances.

If neither the RMI nor lawmakers are able to construct such an arrangement, competition law must keep a watchful eye on the OMD market in order to correct for excessive market inequality. This type of ex post regulation, however, must be seen as inferior to the solutions offered above, given the complexity of implementing competition-increasing structures in a highly networked environment.

CONCLUSION

“Will an unmodified *Sony* lead to a significant diminution in the amount or quality of creative work produced? Since copyright's basic objective is creation and its revenue objectives but a means to that

end, this is the underlying copyright question. . . . And its answer is far from clear.”¹²⁰

Over thirty-four years lie between the counterfactual at the beginning of this Essay and the one above. In this time, we have perhaps come no closer to reaching a consensus on, let alone finding a definitive answer to, this “underlying copyright question.” In the area of OMD, however, what we do know is this:

More than ten years after Napster, the RMI appears to be shifting from its initial combative position vis-à-vis OMD to a collaborative approach involving a widespread OMD licensing policy. This change in strategy should not be viewed as a sign of resigned defeat. Instead, it should be viewed within the context of a dynamic OMD-RMI relationship highly affected by OMD innovation. Such innovation forced the RMI to recognize that by successfully filling a portion of the technology-induced gap between copyright legality and everyday reality, it may be able to regain its unchallenged status as a beneficial intermediary within the copyright system.

RMI participation in and shaping of OMD should be critically evaluated from a copyright and competition law perspective. On the surface, the RMI adjustment to the digital environment may seem like an argument in favor of the copyright status quo and the traditional economic justifications thereof. However, an overdue, profit-oriented industry adjustment to market conditions brought about by radical technological breakthroughs should neither be mistaken for nor accepted as a reasonable substitute for an objective balancing between the costs of limiting access to creative works and the benefits provided by the incentives to create.

¹²⁰ Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 961 (2005) (Breyer, J., concurring).