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And Justice For . . . : An Analysis of Digital Music, Fair Use and Audience Rights

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AND JUSTICE FOR . . . : AN ANALYSIS OF DIGITAL MUSIC, FAIR USE AND AUDIENCE RIGHTS

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On July 12th, 2001, Metallica and Andre Young (a/k/a Dr. Dre) settled a year-long infringement suit with Napster, Inc.[1] Their success in court parroted the sentiment on the industry side of the musical equation, in that file-sharing, or more accurately, user-distributed content, violated owner and author copyrights.[2] Napster interim CEO commented on the settlement, "[w]e at Napster strongly believe that Napster and file-sharing will play an increasingly important role in how fans discover, share and purchase their music. We understand that Metallica and, indeed, all artists, must have a voice in this evolution."[3] The debate on this

[1] Andrew Dansby, *Metallica, Napster Settle*, ROLLING STONE, Jul. 12, 2001, *available at* http://www.rollingstone.com/artists/metallica/articles/story/5931788/metallica_napster_settle.

[2] Songwriters Association of Canada, A Proposal for the Monetization of the File Sharing of Music From the Songwriters and Recording Artists of Canada, Sec. 1, http://www.songwriters.ca/studio/proposal.php (last visited Apr. 17, 2009).

[3] Press Release: *Napster and Metallica Reach Accord* (Jul. 21, 2001), http://www.metallica.com/

issue has been largely one-sided, however, with a strict concentration on the ways that user-distributed content infringes owner copyrights.[4]

There is no question that the proliferation of the ".mp3" ("MP3") file extension has irretrievably altered the creation, distribution and consumption of musical content. The MP3, with its ability to represent tangible media recordings with little information loss and relatively small size, combined with high-bandwidth/fast bit-rate Internet connections, created a perfect storm that challenged the assumptions of the music industry business model.[5] The immediate and widespread impact of the MP3 has forced big music to examine its own viability, but has also created an explosion of consumption and access on the part of the audience.[6] Rather than embrace this new form of use and distribution, the industry immediately characterized this growing segment of consumers as pirates and attempted to secure digital music via the Secure Digital Music Initiative in order to monitor and protect their rights.[7] Their work to quash erosion of the market for tangible media eventually culminated in a series of lawsuits against 793 user-distributors of music files filed by the Recording Industry Association of America ("RIAA") between September 8, 2003 and January 21, 2004.[8]

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metdotcom/news/2001/july12.html (last visited Apr. 17, 2009).

[4] *Piracy: Online and in the Street, The Law*, http://www.riaa.org/physicalpiracy.php?content_selector=piracy_online_the_law (last visited Apr. 17, 2009) ("If you make digital copies of copyrighted music on your computer available to anyone through the Internet without the permission of the copyright holder, you're stealing. And if you allow a P2P file-sharing network to use part of your computer's hard drive to store copyrighted recordings that anyone can access and download, you're on the wrong side of the law. Having the hardware to make unauthorized music recordings doesn't give you the right to steal. Music has value for the artist and for everyone who works in the industry. Please respect that . . . . On piracy: It's commonly known as piracy, but it's a too benign term that doesn't even begin to adequately describe the toll that music theft takes on the many artists, songwriters, musicians, record label employees and others whose hard work and great talent make music possible. Music theft can take various forms: individuals who illegally upload or download music online, online companies who build businesses based on theft and encourage users to break the law, or criminals manufacturing mass numbers of counterfeit CDs for sale on street corners, in flea markets or at retail stores. Across the board, this theft has hurt the music community, with thousands of layoffs, songwriters out of work and new artists having a harder time getting signed and breaking into the business.").

[5] Reebee Garofalo, *From Music Publishing to MP3: Music and Industry in the Twentieth Century*, 17 AM. MUSIC 318, 349 (1999) ("Just as cassettes issued a challenge to centralized control in the seventies and eighties, newer technologies such as the MPEG 1—Audio Layer 3 (MP3) software compression format provides near-CD-quality, downloadable audio over the Internet. MP3 dates back to a 1987 collaboration between Germany's Fraunhofer Institut Integrierte Schaltungen and Dieter Seitzer from the University of Erlangen, whose work yielded a compression/decompression algorithm, or codec, that could shrink sound files to about one-tenth their normal size without sacrificing quality. In 1992 MP3 was approved as a standard by Moving Pictures Expert Group (MPEG), founded by Leonardo Chariglioni in Italy. But it wasn't until modem and computer clock speeds permitted efficient downloads of MP3 files that the technology threatened to turn the music industry on its head. By the late nineties music enthusiasts--, indeed, artists themselves—were converting audio CD files to MP3 and posting them on websites for easy, and most often unauthorized download.").

[6] *Id*. at 351 ("While transnational music corporations scramble to protect their bottom lines on new fronts, artists and fans may, at least momentarily, gain some direct access to each other and to sound reproduction possibilities that are becoming increasingly harder to control."). It should be noted that the author wrote *prior* to the explosion of the Napster service.

[7] *Id*. at 350 (noting that Leonardo Chariglioni, the initial certifier of the MP3 file format led the SDMI coalition, which included the RIAA, The Recording Industry Association of Japan, IFPI and the then Big Five recording companies. The SDMI proposed an open standard with "watermarked" digital files to note the owner and origin of digital music files.).

[8] Sudip Bhattacharjee et al*., Impact of Legal Threats on Online Music Sharing Activity: An*

Despite industry efforts to curb the spread of user-distributed content, it is estimated that there are approximately sixty million users of file-sharing services.[9] Moreover, the music industry cites this group of music consumers as the root cause of shrinkage in the overall music market.[10] The veracity of this causation argument is contravened by a myriad of other factors in any given market or economy over a decade. Citing one cause as the sole reason for a particular market decline is simply industry sleight of hand. Regardless, user-distributors remain a viable market force in terms of sheer numbers. Its legitimacy, however, has been continuously marginalized by the insistence that user-distributed content is piracy, rather than appreciated for its contribution to the growth of the musical audience. Furthermore, and most importantly, user-distributors have been marginalized due to the industry's desire to protect the legal rights that the Copyright Act imparts to authors and rights holders. This historical relationship between the music industry and its audience has existed on the assumption, however, that the musical audience has no place in the discussion of rights and ownership.[11] In the digital age, with revolutionary changes in the modalities of consumer choice, there should be an assessment of musical audience rights amidst the controversy.

This paper explores two major themes and what role they play in the current musical environment, specifically within the context of user-distributed content. I argue that the *A&M Records, Inc. v. Napster, Inc.* injunctions rested on flawed assumptions that mischaracterized fair use as it applies to user-distributed content.[12] In addition, copyright holders' rights to exclude run counter to the equities of fair use in this application, and that the musical audience possesses rights that the current practices of the musical audience. Admittedly, this is a complex issue that incorporates several different bodies of law. My goal, however, is to mention the various aspects of law and policy that inform conclusions regarding audience rights and the roles those rights play in user-distributed content. Hopefully, given the benefit of hindsight, grounds to reopen the discussion of musical consumption in the digital age will emerge taking into account an alternative set of assumptions. In addition, I hope to emphasize a new perspective on the user-distribution analysis that acknowledges user rights and encourages further exploration of their makeup.

I will present a brief overview of copyright and fair use doctrine, and then analyze the Ninth Circuit's decision in *A&M Records, Inc. v. Napster, Inc*.[13] Furthermore, I will examine the music industry and the norms of user-distributed content, and show that the equities of the *Napster, Inc.* case ran counter to the court's intuitions. Next, I provide a brief analysis and reformulation of the concept

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Analysis of Music Industry Legal Actions, 49 J. L. & ECON. 91, 95 (2006).

[9] Salil K. Mehra, *The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan*, 79 U. COLO. L. REV. 421, 432 (2008).

[10] IFPI, *IFPI Publishes Digital Music Report 2009* (Jan. 19, 2009), http://www.ifpi.org/content/section_resources/dmr2009.html) ("Despite these developments, the music sector is still overshadowed by the huge amount of unlicensed music distributed online.").

[11] Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 747 (2003) (noting that content consumer interests have been historically overlooked in the shaping of copyright law).

[12] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[13] *Id.*

of rights. In turn, I posit that the musical audience itself possesses rights derived from the Constitution, international law and copyright, which exist as a whole outside the scope of musical authors' limited monopolies. I then analyze potential business models that can account for musical audience rights and legitimize user-distributed content. Finally, I conclude that the *Napster, Inc.* decision deserves obsolescence as it encroaches on user rights, and that successful monetization of user-distributed content will only be possible if the music industry and the law legitimize user-distributed content in a way that respects audience rights.

I. FAIR USE OVERVIEW

A) Fair Use As a Right

The Copyright Act explicitly states that, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright."[14] It has been asserted that fair use should be considered an affirmative defense to an infringement suit only after a user has exhausted other available defenses.[15] On the other hand, fair uses can be seen as rights that are not within the scope of the owner's or author's exclusive rights.[16] Professor Weinreb argues that "[t]he uses that are mentioned as examples of fair use in the statute are . . . simply uses that, for one reason or another, we do not regard as clearly within the author's right."[17] Moreover, it is evident from the statute's inclusion of "such as" prior to the list of *possible* fair uses that the list is not exhaustive.[18] If the right to the uses are not within the author's domain, regardless of whether or not the rights have been explicitly mentioned within the statute, they must necessarily attach to the consumers of the content, as the notion of use rights logically implies users. Therefore, fair use rights also exist outside of the author's exclusive rights. Moreover, it is an inherent audience right, and not just an affirmative defense. In turn, uses are either within the owner's copyright, infringing, or fair.[19]

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[14] 17 U.S.C. § 107 (2006).

[15] Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CAL. L. REV. 1145, 1152 (2000) ("[F]air use arises only after a user has had a chance to assert a number of defenses: the idea-expression dichotomy, merger, de minimis, the originality requirement, independent creation, the first sale doctrine, and expired or invalid copyright.").

[16] Lloyd L. Weinreb, *Fair Use*, 67 FORDHAM L. REV. 1291, 1301 (1999).

[17] *Id*.

[18] 17 U.S.C. § 107 (2000).

[19] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 931 (2005) (commenting that in Sony Corp. v. Universal City Studios, 464 U.S. 417, 423-24 (2005), the court found time-shifting to be a fair, not an infringing use); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1128 (1990) ("Like a proprietor of land or an owner of contract rights, the copyright owner may sue to protect what he owns, regardless of his motivation. His rights, however, extend only to the limits of the copyright. As fair use is not an infringement, he has no power over it.").

B) Statutory Factors

The four statutory factors of a fair use determination are: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.[20] In a dispute over published excerpts in The Nation taken from Gerald Ford's unpublished, forthcoming memoirs in *Harper & Row v. Nation*, that the fourth factor, market harm, was the single most important factor to consider in any matter of fair use.[21] The Supreme Court reopened fair use doctrine in *Campbell v. Acuff-Rose* and handed down the most recent and important decision in fair use jurisprudence.[22] The Court in *Campbell* determined that sampling of the Roy Orbison song "Oh, Pretty Woman" for use in the song "Ugly Woman" was for parodic purposes, and that the transformative nature of the work was the most important issue to consider in fair use determinations.[23]

C) Equitable doctrine

In addition to the statutory factors, however, fair use has been characterized as an equitable doctrine.[24] As such, "beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[25] Therefore, although Campbell is the most recent Supreme Court analysis of fair use, its emphasis on transformativity within the four-factor analysis cannot be said to have abolished the equitable aspect of the test.[26]

II. NAPSTER ANALYSIS

In terms of user-distributed digital content, the law has taken the stance that there is no inherent right for music consumers to share files containing copyrighted content with other consumers. This relegation of user-distribution to the realm of infringement is the direct result of the Ninth Circuit's decision in *A&M Records v. Napster*. I contend, however, that the *Napster* decision was misguided and rested on faulty assumptions that skewed the court's application of the fair use doctrine. This analysis will show that commerciality and market harm factors of the fair use

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[20] 17 U.S.C. § 107 (2000).

[21] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

[22] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[23] *Id*. at 591.

[24] *See, e.g.,* Sony Corp of Am. v. Universal City Studios, Inc. 464 U.S. 417, 448 (1984) (applying "equitable rule of reason"); *see also* S. REP. NO. 94-473, at 62 (1075) ("[S]ince the doctrine is an equitable rule of reason, no . . . applicable definition is possible . . . ."); H.R. REP. NO. 94-1476, at 65 (1976); *but see* Leval, *supra* note 19, at 1127 (arguing that fair use is not an equitable doctrine because litigation began under the Statute of Anne in courts of law).

[25] *Sony*, 464 U.S. at 448.

[26] Tracey Topper Gonzalez, *Distinguishing the Derivative from the Transformative: Expanding Market-based Inquiries in Fair Use Adjudications*, 21 CARDOZO ARTS & ENT. L. J. 229, 230 (2003).

test favored a finding of fair use, and that the equities of the case support such a determination.

To provide some context as to where *Napster* is situated in terms of fair use and technology, it is important to include a view of the Supreme Court's examination of the interplay between copyright and modern technological development regarding copying in *Sony v. Universal City Studios*.[27] In tackling issues raised by videocassette technology and how home taping fit within the copyright regime, the Court reasoned that the test for whether or not a manufacturer of equipment with potential infringing uses could be held liable for contributory liability, was whether or not the product could be "merely capable of substantial noninfringing uses."[28] The Court also found that private, noncommercial time-shifting of broadcast television content was such a use.[29] Furthermore, the Court noted that respondents had failed to demonstrate that time-shifting would cause any likelihood of substantial harm to the market for or value of their copyrighted works and found it to be a fair use. [30]

The Ninth Circuit examined the legality of user-distributed content in *A&M Records v. Napster*, and the case has remained the definitive analysis of fair use in this context.[31] The Napster service provided a searchable database located on a centralized server that listed available users and their available content, as well as file transfer protocol to facilitate the transactions.[32] In the suit brought by the record labels and RIAA, the Ninth Circuit affirmed a District Court injunction for which the record labels had petitioned, enjoining Napster from "engaging in, or facilitating others in copying, downloading, uploading, transmitting or distributing plaintiffs' copyrighted musical compositions and sound recordings . . . without express permission of the rights owner."[33] The Ninth Circuit found that Napster had likely engaged in contributory and vicarious infringement, but remanded to the district court for modification of the injunction, requiring notice from the plaintiffs of copyrighted material on Napster's network before placing the company under a duty to remove the material.[34] Most importantly for the purposes of this paper, however, the *Napster* court explicitly took up the issue of fair use and how it pertains to user-distributed content.

A) Application of the Fair Use Doctrine

For the purposes herein, the Ninth Circuit's fair use analysis was the most important aspect of the case.[35] This view of fair use, however, which has since

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[27] *Sony*, 464 U.S. at 420.

[28] *Id*. at 442.

[29] *Id*.

[30] *Id*. at 456.

[31] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[32] *Id*. at 1011-12; *see also* Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks,* 89 VA. L. REV. 505, 511-12 (2003).

[33] A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

[34] *Napster*, 239 F.3d at 1024.

[35] *Compare id*. at 1015 (holding that sharing files over Napster's service was not a fair use of the

shaped the relationship between user-distributed content and copyright law, was inherently flawed. I will concentrate exclusively on the court's analysis of the first and fourth fair use statutory factors, as the court's treatment of factors two and three amounted to little more than a gloss on the fact that the copyrighted works were for the most part creative in nature, and that the use in question involved the dissemination of whole and complete copies.[36] The court did, however, rightfully mention that wholesale copying is not dispositive of a finding of infringement.[37]

1. Factor One: Purpose and Character of the Use

On the first factor, the Court found that there was no transformativity in shifting media to MP3's.[38] Within the noncommercial/commercial prong of the purpose and character factor, the Ninth Circuit agreed with shaky logic from the district court. First, the Court presented the district court's findings verbatim by stating, "Napster users engage in commercial use of the copyright materials largely because 1) 'a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester' and 2) 'Napster users get for free something they would ordinarily have to buy.'"[39] This analysis is problematic on two different fronts. In regard to argument number one, the court has presented a disjunctive notion of use, in that it is either commercial or personal, and that sending a file to an anonymous requester is inherently commercial. By characterizing file uploads for anonymous requesters as a commercial activity, however, this determination implies the unfortunate and untenable consequence of rendering the entire Internet as commercial.[40] The case law that the court provided to support the notion that direct economic benefit is not required to show commercial use, leads to even more absurd results within the context of the Internet and digital media.[41] Billions of unauthorized, repeated and exploitative copies of copyrighted works are made every second of every minute of every hour in order to allow the Internet to function.[42] By mentioning repeated and

musical works), *with* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005) (holding that Grokster's file-sharing network failed the *Sony* test and did not present enough of a nonsubstantial use to escape liability for inducing infringement). The Supreme Court assumed that file-sharing was infringement and never contemplated fair use as an issue.

[36] *Napster*, 239 F.3d at 1016.

[37] *Id*.

[38] *Id*. at 1015.

[39] *Id*. *See also* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (determining that shifting audio content from CD format to MP3 format is not a transformative use).

[40] *See* Ethan Zuckerman & Andrew McLaughlin, *Introduction to Internet Architecture and Institutions*, http://cyber.law.harvard.edu/digitaldemocracy/internetarchitecture.html (last visited Nov. 11, 2010). TCP/IP packet switching itself requires that content be broken down into pieces and uploaded to a series of computers as transmission. The court's lack of clarity and precision in their statement indicates the impossible nature of the claim. Admittedly, this analysis is granular, but it must be mentioned that literally every single digital communication that uses the Internet is in one form or another an upload. Rendering this process commercial renders the entire Internet as commercial.

[41] *Napster*, 239 F.3d at 1015.

[42] John C. Doyle et al., *The "Robust Yet Fragile" Nature of the Internet*, 102 PROC. OF THE NAT'L ACAD. OF SCI. 14497, 14498-99 (2005). This article is a granular, technical analysis of network infrastructure but is illustrative of how an understanding of Internet functionality can easily be taken for granted by the lay user, which is a population segment that also includes judges.

exploitative copying as grounds to conclude commercial use, the court relegated the entire Internet into a sphere of per se commerciality. Moreover, under the Court's construction of commercial, anyone who uses the Internet can be considered a commercial user by virtue of their connectivity under such a broad construction. The disjunction that the Court drew initially between commercial and personal use collapses immediately under the weight of the commercial half of the premise.

In regard to argument number two, if receiving something that one would normally have to buy can be classified as a commercial use, then giving gifts and sharing items that one would normally have to buy can be construed as commercial. Charity ceases to become charity, because the person receiving it would have had to buy the donation. Donations and gifts are no longer charity, but rather a commercial use of a good. This characterization of commercial use is plainly absurd, and should not have been supported by the Ninth Circuit. The insistence of the court that user-distributors are engaging in *per se* commercial activity is but one example of the court resting on flawed assumptions and outdated precedent that are irrelevant to the analysis.[43]

2. Factor Four: Potential Market Effects

Focusing on the fourth fair use factor, the Ninth Circuit supported the district court's findings that: "1) the more music that sampling users download, the less likely they are to eventually purchase the recordings on audio CD; and 2) even if the audio CD market is not harmed, Napster has adverse effects on the developing digital market."[44] The Ninth Circuit's market harm analysis, however, rested mainly on expert testimony brought in front of the court to expose the evils of the MP3.[45] These experts testified that use of Napster in the college demographic led to decreased sales of CDs and other tangible media.[46] This sale displacement theory, however, was again problematic for the same reasons that caused it to fail in serving the Court's analysis of the commerciality issue. Moreover, the Ninth Circuit correctly quoted this factor from *Harper & Row, Publishers*, but failed to recognize the language used in that opinion.[47]

The *Harper & Row, Publishers* opinion stated, "[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied."[48] The *Napster* court, however, hung their hat on major label expert testimony that file-sharing resulted in loss of album

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[43] *Napster*, 114 F. Supp. 2d at 927 (citing Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (holding that copying to save users expense of purchasing authorized copies has commercial character and thus weighs against finding of fair use)); *cf.* American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 922 (2d Cir. 1994) (holding that for-profit enterprise which made unauthorized copies of scholarly articles to facilitate scientific research reaped indirect economic advantage from copying and, hence, that copying constituted commercial use).

[44] *Napster*, 239 F.3d at 1018.

[45] *Id*. at 1017.

[46] *Id*.

[47] *Id*.

[48] *Harper & Row, Publishers, Inc.*, 471 U.S. at 566-67.

sales in the college markets, and that the service itself disrupted industry plans to enter the digital market.[49] On the second point, one can argue that this is a form of judicial protectionism, where the courts have determined that they will stop any form of competition from impeding major record label plans to enter the digital music market.

Hindsight has shown, however, that the correlative link between market shrinkage and user-distributed content is tenuous. User-distributed content offers sampling capabilities in the music industry that actually stimulate sales rather than leading to an overall decrease.[50] In fact, the economics of the practice indicate that low sampling costs positively impact consumer purchasing intentions, which stands in direct contrast to the idea that user-distributed content hinders music industry profitability.[51] Furthermore, the data show that the immediate effects of user-distributed content on the music industry as a whole are statistically insignificant.[52] The industry's support for their stance has been dubious at best, and represents a rather unimaginative cover-up for lack of ingenuity that the courts legitimized.[53]

It is counterintuitive for most judges to assume that increased access can generate total paid uses. The assumption of market harm, however, was an additional flaw in the court's analysis that ignored significant dynamics of technology and policy. The view that the Internet is unexceptional, and that traditional market forces apply in terms of consumption of digital content was at best misguided. Professor Daniel Gervais offers TechnoPolicy as a way to more effectively accommodate the continuously shifting landscape of technological progress and development.[54] TechnoPolicy involves a simple equation, wherein technology, markets and regulation form the corners of a triangle, where the dynamic vectors' force of each element react to actions by the other two.[55] It is a new and distinct iteration of the previous equation, where regulation and markets acted only with each other.[56]

If we replace regulation with judicial action, the resulting triangle parallels

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[49] *Napster*, 239 F.3d at 1016 (quoting *Napster*, 114 F. Supp. 2d at 913).

[50] Ram D. Gopal et al., *Do Artists Benefit from Online Music Sharing?*, 79 U. CHI. J. BUS. 1503, 1529 (2006).

[51] *Id*.

[52] Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 35 (2007) (concluding that a "one-standard-deviation increase in file-sharing reduces an album's weekly sales by a mere 368 copies…."); *see also* Daniel Gross, *Does A Free Download Equal a Lost Sale?*, N.Y. TIMES, (Nov. 21, 2004), *available at* http://www.nytimes.com /2004/11/21/business/yourmoney/21view.html ("While conceding that their research did not cover a representative sample, they concluded that every 10 downloads of music resulted in 1 to 2 lost sales.").

[53] John Schwartz, *A Heretical View of File Sharing*, N.Y. TIMES, (Apr. 5, 2004), *available at* http://www.nytimes.com/2004/04/05/technology/05music.html ("'The single-bullet theory employed by the R.I.A.A. has always been considered by anyone with even a modicum of economic knowledge to be pretty ambitious as spin,' said Joe Fleischer, the head of sales and marketing for BigChampagne, a company that tracks music downloads and is used by some record companies to measure the popularity of songs for marketing purposes.").

[54] Daniel Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 40 (2004).

[55] *Id*.

[56] *Id*.

the traditional TechnoPolicy model. Technology and markets interact differently with each other in TechnoPolicy as well, as in the context of the Internet, market forces are not driven by scarcity or rarity of a given good, but by using technology to ensure that goods and services are delivered to those who value it most.[57] The *Napster* court relied on assumptions in their analysis that simply missed the TechnoPolicy question altogether and applied an outdated perspective on markets and policy to the digital age.

Furthermore, their flawed assumptions have shown the consequences of ignorance toward TechnoPolicy in that technology has shown an ability to react to attempts at regulation that fail to take its structure into account. For example, although Sweden has simplified the process of identifying user-distributor identities via ISPs, users have been able to use software to anonymize their activity.[58] In fact, the formidability and effectiveness of user-distribution technology has led the Norwegian state broadcaster to implement it in delivering content.[59] TechnoPolicy has advanced to the point where an astute federal district court judge has allowed Harvard University's Berkman Center for Internet & Society to broadcast hearings from an infringement suit brought by Sony against a Boston University graduate student.[60] Regulators and the judiciary ignore this equation at their own peril. In the words of Chief Justice John Roberts: "[P]oliticians – and judges, for that matter – should be wary of the assumption that the future will be little more than an extension of things as they are."[61] Shortsightedness on this issue in the *Napster* decision generated flawed assumptions regarding the court's analysis of the market harm factor.[62]

Therefore, several conclusions can be drawn from the Ninth Circuit's fair use analysis in the *Napster* decision. First, the insistence that user-distributed content is commercial was a mistake. User-distributed content should be characterized as noncommercial personal use on both the upload and download side of the transaction. The Ninth Circuit's continued use of the term "file-sharing" itself implies a noncommercial use, and one that immediately contradicts the commercial characterization of the practice. Factor one of the fair use analysis should have counted in favor of a finding of fair use. In addition, the evidence that user-distributed content displaces sales was at best ambitious and rested on flawed assumptions about digital music and the dynamics of that particular market. The Court's predictive approach in siding with the record industry, was a simple case of acquiescence to dubious reasoning, and effectively allowed the fox to guard the

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[57] *Id*. at 57.

[58] Anonymizer, Wikipedia.org, http://en.wikipedia.org/wiki/Anonymizer (last visited Apr. 18, 2009); Anonymous Web Surfing, PC Mesh.com, http://www.pcmesh.com/surf-anonymous.htm (last visited Apr. 18, 2009).

[59] Eirik Solheim, *Norwegian Broadcasting Corporation Sets Up Its Own Bittorrent Tracker*, (Mar. 8, 2009), http://nrkbeta.no/norwegian-broadcasting-corporation-sets-up-its-own-bittorrent-tracker/.

[60] Order Re: Motion to Record and Narrowcast Hearing at 10, Civ. Action No. 03cv11661-NG (Mass. Dist. Ct. Jan. 14, 2009), *available at* http://joelfightsback.com/wp-content/uploads/730.pdf.

[61] Jeffrey Rosen, *Roberts v. the Future*, N.Y. TIMES (Aug. 28, 2005), *available at* http://www.nytimes.com/2005/08/28/magazine/28ROBERTS.html.

[62] Jesse Wiens, *A&M Records, Inc. v. Napster, Inc.: Copyright Infringement on the Internet*, 79 DENV. U.L. REV. 279, 292 (2001).

hen house in terms of fair use in the context of user-distributed content.

B) Napster and the Equitable Fair Use Doctrine

Even if we accept the *Napster* court's analysis of the four fair use factors, the decision itself neglected the fact that fair use is an equitable doctrine. Analysis of the equities of the case, including the music market and user-distributed as it has evolved to generate its own important set of particular social norms, indicates that the equities of the case cut against the court's intuitions. Most importantly, they strongly favor a finding of user-distributed content as fair use.

1. Music Market Data

It is necessary to understand the music industry as a whole and a portion of its dynamics in order to properly situate the equities of the case. According to the RIAA, the American market for musical recordings reached its peak in the year 2000 with a total retail value of $14.584 billion, which was comprised almost entirely of sales of physical product.[63] As of the end of 2007, the industry was at $10.370 billion of total retail value, which was a negative net change of 11.8%.[64] Moreover digital revenue represented 23% of total industry revenue in 2007.[65] The total industry-wide revenue has in fact recessed, with the RIAA blaming user-distributed content (and it seems ONLY user-distributed content) for the industry recession. As of 2006 US census data, however, entertainment expenditures per consumer have increased in the period from the year 2000 to 2006 from 2,009 dollars to 2,493 dollars.[66] During the same period, expenditures for audio and visual equipment and services increased from $622 dollars per consumer to $906 per consumer during the same period.[67]

Data for user-distributed content is difficult to track. According to a 2009 report from the International Federation of the Phonographic Industry ("IFPI"), an international music industry advocacy group affiliated with the RIAA, global "unauthorized file-sharing" is estimated at forty billion files in 2008, which means ninety-five percent of downloaded music files are obtained without compensation "to the artist or the music company that produced them."[68] The report also pointed

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[63] RIAA 2007 Year-End Shipment Statistics, http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf (last visited Apr. 17, 2009).

[64] *Id*.

[65] *Id*. This figure tracks the seven percent rate of growth in digital downloads since 2005. *See also* Staff Writer, *Study: CDs May Soon Be as Final as Vinyl,* CNET NEWS, (Sep. 2, 2003), http://news.cnet.com/Study-CDs-may-soon-be-as-final-as-vinyl/2100-1027_3-5070177.html?tag=mncol;txt (predicting that digital downloads will comprise 33% of industry revenues by 2008). This prediction tracks with the rate of growth in digital download revenue that the RIAA has published for the three preceding years. *Id.*

[66] Table 1192, Expenditures Per Consumer Unit for Entertainment and Reading: 1985 to 2006, http://www.census.gov/compendia/statab/tables/09s1192.pdf (last visited Apr. 17, 2009).

[67] *See id*.

[68] INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 2009, at 5, *available at* http://www.ifpi.org/content/library/DMR2009.pdf. It is important to note that this report does not list or cite any of the studies or data used to generate these figures.

out that college students accounted for 1.3 billion illegal downloads during 2006.[69] The group stated that it removed approximately three million infringing weblinks in 2008.[70] In terms of the domestic market, the NPD Group, a private market research company, estimated that forty-eight percent of teenagers did not purchase a single CD in 2007, and that nineteen percent of Internet users in the United States participated in user-distribution during the same time-period.[71]

In addition, while it could be considered more of a market statistic or valuation than social norm, the issue of price for music has emerged as being of normative value. The industry enacted a price-slashing campaign to stimulate sales and meet what they thought would be reasonable consumer pricing demands. Universal Music Group attempted this strategy by reducing average prices from seventeen and nineteen dollars per physical CD copy to thirteen dollars in 2003, representing a decrease of thirty-one percent.[72] Most recently, Apple's iTunes music service has announced changes to their pricing scheme, converting it into a three-tiered model at $.69, $.99, or $1.29 per song, depending on the record label supplying the content.[73] Pricing models in the musical industry had perennially been within the control of record labels. The economics of the issue however have shown, however, that uniform pricing across the board is a suboptimal method to maximize profitability, and that it does not capture the intrinsic value of the musical item itself.[74] In other words, the music industry has not found the proper price point to counteract the inclination of users to obtain and share a huge volume of content at virtually no cost. It could be that for a portion of the demographic that had been paying close to twenty dollars per CD for years, for musical content of value that did not warrant the price point, free music has been a backlash against industry profiteering. The younger demographic, which has shown a predilection for accessing musical content for free over the Internet, at this point, may not even know of a system that is different. At the present time though, it seems that the industry's inability to come up with right price point has prolonged user-distribution and the sharing culture that propagates it.

2. Audience norms

A brief exploration of the norms at issue in the user-distribution context is also informative regarding the equities of the *Napster* decision. Scholarship in regard to the norms of user-distribution has focused on the novelty of the practice

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[69] *Id*. at 30.

[70] *Id*.

[71] Press Release, The NPD Group, *The NPD Group:Consumers Acquired More Music in 2007, But Spent Less*, (Feb. 26, 2008), http://www.npd.com/press/releases/press_080226a.html.

[72] Tony Smith, *Universal to Slash US CD Prices*, THE REGISTER (Sept. 4, 2003), *available at* http://www.theregister.co.uk/2003/09/04/universal_to_slash_us_cd/).

[73] *Apple Cuts iTunes Pricing, Eases Copy Protection*, MSNBC (Jan. 6, 2009), http://www.msnbc.msn.com/id/28524749/. The tiered system represents a departure from the original iTunes pricing model, which was for the most part, $.99 per single song download and $9.99 per full album download.

[74] *See* Gopal, *supra* note 50, at 1529 (calling for additional research to derive "enhanced pricing models for such goods that incorporate individual consumer valuations as well as other marketing models that utilize consumer attitudes toward such goods.").

and how it relates to life in the digital age and the law's response. The norms surrounding this practice can, in many ways, be viewed as existing within the larger Internet normative culture.

There are several distinct social norms that have led to the development of the sharing culture that supports user-distributed content. Professor Stephen Hetcher has counted nine distinct popular norms that support a norm cluster underlying the practice.[75] Lior Jacob Strahilevitz has also analyzed the normative framework that allows the practices behind user-distributed content to flourish.[76] Strahilevitz's analysis posits a social norms framework that incorporates three key aspects: 1) behavior conforms more closely with social norms than with laws designed to shape behavior, 2) laws that parallel social norms will be adhered to widely and enforced easily, and 3) under certain conditions government laws and policies can alter social norms.[77] Furthermore, Strahilevitz offers several views of user-distributed content within this framework. For instance, the author questions why if it is illegal, does the community at-large offer no moral outrage over the practice?[78] He argues that the issue might be similar to speeding, in that it is a widely tolerated violation of a rule.[79] Strahilevitz concludes that the social norms that have given rise to user-distributed content are those of internalized conditional cooperation, based on "charismatic code" in the form of software that allows for the illumination of cooperation and altruism, and masks uncooperative behavior of those who choose not to reciprocate.[80] In other words, the distribution software and technology itself has given rise to a norm of sharing and cooperation among musical consumers that has been characterized as tolerable among the general population. This norm operates across a huge segment of the musical audience,

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[75] Stephen Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10, 16-19 (2004). They are:

> 1) file-sharing is good for the record industry because sharing MP3s online increases the public's appetite for music…; 2) owners of the hard copy containing the music, video, etc. should be able to do what they want with it…; 3) if file-sharing technology is ultra-convenient, I should be able to use it…; 4) the artists aren't being hurt anyway, because all CD revenues go to record companies which radically overcharge for their CDs…; 5) the artists claiming to be most affected are all rich anyway…; 6) it's not hurting anyone because it's like existing legal uses of technology such as VCR copying or copying tapes from radio stations…; 7) artists are creating music because they want to share their creative impulses, so it's illegitimate for anyone to attempt to restrict exposure based on a profit motive….; 8) file-sharing technology has such a high potential utility for society that it should not be impeded by the content industry's monopolistic practices…; and 9) anything on the Internet is public domain, and loses ownership characteristics.

Id. This list is not exhaustive, but marks several of the perspectives that inform the propensity for permissive sharing. Moreover, this list of permissive sharing norms is also in the context of its incorporation and view of an opposite set of norms informing the treatment of user-distribution as piracy.

[76] Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505 (May 2003).

[77] *Id*. at 537-38.

[78] *Id.* at 544.

[79] *Id*.

[80] *Id*. at 595.

and therefore, has swallowed up any attempt on behalf of the industry to change it and normatively characterize the practice as theft. Moreover, this strong social norm has proven resistant to changes in the law that have characterized it as illegal. In terms of Strahilevitz's normative framework model, in the case of user-distributed content, the law has failed to track properly with the social norms of the practice. In addition, enforcement and attempts at shaping behavior through judicial and legislative action have failed to account for the normative perspective of user distributors, and the behavior has for the most part remained robust since its initial proliferation.

In sum, the normative perspective on this issue is a powerful one. Based on the second pillar of the framework that Strahilevitz advocates, a judicial determination that contravenes the norms of user-distribution leads inevitably to thin adherence and weak enforcement. The potential for practical irrelevance of the resulting precedent from *Napster*, as a result of this normative construction informs the equities of the case, and lends significant weight to the prospect of finding fair use. A lack of consideration for the norms of user-distribution resulted in a misapprehension of the equities of the case, and a faulty construction of fair use in this context.

3. Public Policy Arguments

There are several policy arguments that would support this view of fair use, and its application to user-distributed content. For one, if the copyright at its heart is meant to promote the "useful arts and sciences," a key portion of that equation is comprised of the creative artists and authors. They are a necessary part of this particular engine of promotion. Creative musical artists themselves, however, have spoken out against prosecution of user-distributors as infringers.[81] After beginning as a crusade for artist rights, this debate has come full circle to where the very originators of musical content no longer agree with the adjudication that was meant to protect their interests.

Moreover, a fair use construction that allows for user-distribution is arguably a more efficient distribution system that removes the need for digital product, as well as a significant portion of marketing costs.[82] User-distribution could lead to a more streamlined system where users are accessing the market according to the established norms of the audience. User-distribution systems have also made available nearly every recorded musical song in the world.[83] This type of distribution could tap greater potential profitability for the industry as a whole by removing a significant amount of costs associated with their sales.[84] It also

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[81] Arifa Akbar, *It's Not a Crime to Download, Say Musicians*, THE INDEP. (Mar. 12, 2009), http://www.independent.co.uk/arts-entertainment/music/news/its-not-a-crime-to-download-say-musicians-1643217.html (Apr. 17, 2009).

[82] *See* Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 2 (2004).

[83] Songwriters Association of Canada, A Proposal for the Monetization of the File Sharing of Music From the Songwriters and Recording Artists of Canada, Sec. 2, http://www.songwriters.ca/studio/proposal.php (last visited Apr. 17, 2009).

[84] *See* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 304-05 (2002) ("The structure and

increases availability of content that had previously only been available on an extremely limited basis in a tangible media format. More music gets to more consumers. Jessica Litman argues that user-distributed content in particular is a far more efficient distribution and dissemination system than the conventional business model, and the industry statistics support this assertion.[85] Moreover, Litman posits that if dissemination of information is a more crucial aspect of copyright than compensation, and user-distributed content is the most efficient system of dissemination, then to interfere with this system is a backwards proposition.[86] This comment on the beneficial implications of user-distributed content imparts even greater value to the practice. In particular, it affirms user-distribution as a preferable system of consumption and distribution in the domestic music market. Rather than focus on eliminating user-distribution of content, the industry as a whole would be free to focus on greater profitability, modern business models and creation of quality content. This naturally entails freeing resources that have gone into litigation and lobbying efforts.[87]

C) Napster Conclusions

Napster has significantly limited the scope of fair use as it pertains to copyrighted material. Fair use is an audience right, and one that should not have been so limited without careful consideration and analysis. In light of the Ninth Circuit's mistakes, the *Napster* decision should have been a much closer call in terms of the fair use analysis, rather than an issue taken for granted. The recording industry was able to effectively limit positive legal rights of its audience through the judiciary, resulting in a policy toward user-distributed content that molests audience fair use rights. In short, with two out of the four elements of fair use inquiry going users' way, user-distributed content could actually be fair use audience-wide. Given the difficulty that the judiciary has in fashioning clear understandings of market effects in the context of new technologies, the *Napster* decision may deserve obsolescence, and user-distributors deserve the return of their fair use rights in the music they consume and share. [88]

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economics of cyberspace promise to end the free rider problem and the market failure associated with distributing content using the technologies of Gutenberg and the industrial revolution. Instead, digital technology provides the promise of a world in which content, once created, flows freely around the world in a stream of electrons. This is made possible by the fact that consumers bear the costs of distribution themselves, eliminating the need for third-party investments in distribution.").

[85] Litman, *supra* note 82.

[86] *Id*. at 31-32.

[87] Peter Lauria, *INFRINGMENT! Artists Say They Want Their Music Site Dough*, N.Y. POST (Feb. 27, 2008), *available at* http://www.nypost.com/seven/02272008/business/infringement__99428.htm (*last visited* Apr. 17, 2009). It was alleged that the RIAA and labels withheld settlement money in order to determine proper accounting for legal fees and levels of infringement of certain artists' material. It bears repeating that the initial fervor over Napster and user-distribution began under the impetus of securing artist rights to compensation and control over their content. Anecdotally, it seems that even victory in court could not accomplish this task.

[88] Wiens, *supra* note 62 at 292-93 (arguing that *Sony* and *Napster* might not be able to justifiably co-exist, and that the legislature might be better equipped to make these determinations).

III. AUDIENCE RIGHTS

A determination of fair use for user-distributed content places it within the audience's rights and outside the scope of the copyright holder's limited monopoly. There is a remaining question though. What is the scope of audience rights? If this question were posed to the RIAA or to music industry moguls, the answer might simply be to enjoy the content that artists and producers provide to the market at a set price. Given the complex web of the norms and equities that factor into the issue, this view is far too simplistic and based on the business model of a previous generation. To allow an industry to dictate to the audience its rights is an egregious oversight and amounts to little more than industry capture.[89] The question, however, remains for the most part unanswered.

A) Reconstructing Rights

The concept of rights as they apply in the context of legal scholarship is for the most part a settled and well-defined issue. Moreover, rights' counterparts, norms have not undergone any drastic definitional changes. It is, however often the case that norms can give rise to rights or generate a particular interest. Recognizing rights as purely an interest protected by law, however, limits the existence of rights in a variety of contexts. Moreover, such a narrow cabining of the rights as a legal concept precludes their growth outside the boundaries of legislation, which has occurred on multiple occasions in American history.[90] Moreover, rights derived from legislative mandates often forsake the normative backdrop of their function.

In order to understand what rights can exist for the current musical audience, it is necessary to examine rights from a perspective outside the legislative framework. Linda Ross Meyer proposes a view of rights that relies on the common law and norms to characterize rights.[91] She argues: "Treating rights as rules, given the nature of language itself, confines them to ill-fitting formulations that often seem to miss the point and generate strategic disobedience."[92] Moreover, Meyer points out that respect for the dignity of the individual is a necessary portion of rights, and that treating them simply as unilateral entitlements to goods or particular spheres of autonomy can lead to mistreatment of individuals on the outside of the shield that the particular right provides.[93] Furthermore, treating rights as rules, entitlements or interests leads to the erosion of the

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[89] *See* Ku, *supra* note 84, at 286 (citing Jessica Litman, *Digital Copyright,* 22-32 (2001) (describing content-driven industries' success in lobbying for greater copyright protection)); *see also* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3, 5 (1971); *see also* Richard A. Posner, *Theories of Regulation*, 5 BELL J. ECON. MGMT. SCI. 335 (1974). Capture theory argues that every industry that possesses enough political power will use that political power to control entry and slow the growth rate of new firms.

[90] *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973).

[91] Linda Ross Meyer, *Unruly Rights*, 22 CARDOZO L. REV. 1 (2000).

[92] *Id*. at 21.

[93] *Id*. at 12.

"imperative and peremptory force" that originally spurred their creation.[94] The loss of this force in turn leads to utilitarian calculus on behalf of the judicial body interpreting the right, most often in the form of balancing tests.[95] Justice Brennan has also spoken out against balancing tests, referring to them as "doctrinally destructive nihilism."[96] Meyers concludes that "[f]ocusing on respect practices enables rights to be joined with public welfare concerns by allowing for situational adjudication and by emphasizing the manner and intent of government's interactions with its citizens more than how much government 'takes away' citizens' property or autonomy."[97] This notion comports with the idea that the normative backdrop of a given practice is a necessary aspect of the culture of respect that envelopes rights.

Furthermore, the rights in the American legal system also operate against a de facto floor of human rights derived from both domestic law and customary international law. Although the music industry analysis herein focuses on domestic practices, the musical audience, and participation in user-distributed content, is truly global in scope.[98] Moreover, human rights regimes in their broadest terms emphasize the respect and dignity of the individual within the context of positive legal rights.[99] Therefore, Meyer's characterization of rights is in even greater harmony with the fundamental notion of rights at the bedrock of the domestic legal system. Moreover, this understanding of rights will play a key role in understanding the rights of the musical audience, in particular, as it pertains to user-distributed content.

B) Floor of Rights of the Musical Audience

There have been several systems or bills of rights written in regard to the various users and consumers in multiple sectors of the digital world.[100] I do not propose such an ambitious endeavor. Rather, I am hoping to arrive at a semblance of base protection of the rights of music consumers pulled from several general bodies of law. While this analysis posits a brief and general view of these base protections for the musical audience, my goal is to set in place these building blocks for further debate as to what might be included in a more complete list of audience rights. Hopefully, this argument for base protections of the musical audience will highlight the undue encroachment of cases, such as *Napster,* and the

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[94] *Id.* at 25.

[95] *Id*.

[96] *Id*. (quoting New Jersey v. T.L.O., 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)).

[97] Meyer, *supra* note 91, at 50.

[98] Strumpf, *supra* note 52, at 45 (see Table I "Geography of File-Sharing").

[99] *See, e.g.*, U.N. Charter art. 1, para. 3; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 at 71 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), *entered into force* Jan. 3, 1976, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

[100] *See, e.g.*, *Bloggers' Rights*, ELECTRONIC FRONTIER FOUNDATION, http://www.eff.org/issues/bloggers; *Coders' Rights Project*, ELECTRONIC FRONTIER FOUNDATION, http://www.eff.org/issues/coders.

invasive nature of industry action regarding user-distributors. In the meantime, this analysis is situated to at least initiate a conversation regarding the position of the audience relative to the authors and rights holders, and how these rights factor into the issue of user-distributed content.

1. Constitution

The Constitution empowers the legislature to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[101] This promotion aspect of the Copyright Clause, however, necessarily presumes access.[102] In conjunction with the First Amendment, the presumption of access within the Copyright Clause, as well as the limitations on monopoly within copyright itself, generate an audience right to access creative works.

2. International Human Rights Law

Furthermore, this access notion inherent in the Copyright Clause echoes the right of access to culture, arts and sciences echoed in the floor of human rights protection conferred by treaty and customary international law.[103] This is not to say that the rights of the musical audience have been elucidated in customary international law. The access to culture aspect of human rights, however, appears in several international treaties, showing that it could be a general practice of states accepted as law. For example, the United Nations Declaration of Human Rights (UNDHR) refers specifically to this right in Article 27 where it declares, "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share scientific advancements and its benefits."[104] This section of the treaty, however, also recognizes the rights of authors where it asserts, "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[105] These two provisions of Article 27 incorporate the twin aims of the Copyright Clause into the body of human rights law, ascribing protection of both the rights of authors and protection of the rights of human beings to access the culture. Including music under the category of culture, access to music is a fundamental human right, limited by the rights of the author.

The International Covenant on Economic, Social and Cultural Rights ("ICESCR") also includes the same rights and interests for both audience and author. It has expanded the scope of protection, however, by declaring that, "The steps to be taken by the States Parties . . . to achieve the full realization of this right

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[101] U.S. CONST. art. 1, § 8, cl. 8.

[102] Litman, *supra* note 82.

[103] *See, e.g.,* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (ALI 1987) ("[Customary International Law] is typically defined as a 'general practice of states followed by them from a sense of legal obligation.'").

[104] G.A. Res. 217A, *supra* note 99, art. 27, ¶ 1.

[105] *Id*. at ¶ 2.

shall include those necessary for the conservation, the development and the diffusion of science and culture."[106] Furthermore, "The States Parties . . . undertake to respect the freedom indispensable for scientific research and creative activity."[107] These provisions entail expansion of the human rights of cultural consumers to include protection of the *practices* of musical consumption. Not only does the audience enjoy a right to access music itself, but they enjoy protection of the means as well. The United States is a signatory to the convention but has not ratified it. Its terms, however, could be considered indicators of global human rights norms in the context of cultural access. While the issue of whether or not the provisions of the convention have risen to the level of customary international law is a lengthy debate, should these human rights obligations attain that height of legal significance, they will provide even further protection for musical audience practices.

3. Fair Use

The musical audience and all consumers of music also possess a fair use right that should be treated as such. Explaining away fair use as simply an affirmative defense to infringement creates an unnecessary and unwanted expansion of copyright protection for owners and authors. An understanding of fair use as a right requires an examination of what interests this right entails, and what might be respected regarding the individual rights holder, and the group of rights holders in this particular context as a whole. This right entails those uses outside of the scope of those requiring authorization by statute. In regard to digital music and user-distributed content, outside the prospect of the *Napster* Court's fair use analysis ever coming under review by the Supreme Court, whether or not user-distributed content can be considered fair use is a close call.[108] If we consider the characterization of rights as necessitating consideration for normative values and respect for the individual, the normative values of the current music market dictate that the fair use right they enjoy as members of the musical audience include the right to distribute content freely amongst themselves. In other words, the norms of use within the current musical audience must manifest themselves in the fair use rights they enjoy. This view of fair use as a right that includes audience norms should precipitate a finding that user-distributed content falls within its umbrella. Judicial expansion of copyright at the behest of the RIAA and on behalf of copyright owners has eroded audience rights and created an encroachment upon the fair use doctrine without solid justification.[109]

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[106] ICESCR art. 15, para. 2, Dec. 16, 1966, *entered into force* Jan. 3, 1976, http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

[107] *Id*. at ¶ 3.

[108] *Grokster*, 545 U.S. at 965-66 (2005) (Breyer, J., concurring) (arguing that *Sony* may not require modification to handle file-sharing, and copyright adjudication must bear in mind the risk of stifling technological innovation).

[109] Piracy: Online and On The Street, "What the Courts Have to Say About Illegal Uploading and Downloading…Copyrighted Sound Recordings," RECORDING INDUSTRY ASS'N OF AM., http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law (last visited Apr. 17, 2009). The RIAA cites four cases. *Napster* is the highest level of precedent on the issue. As *Napster's* construction of the copyright in terms of fair use is suspect, so is the RIAA's.

The concept of allowing user-distributors carte-blanche under the banner of fair use may seem inconceivable in terms of practice. It must be stressed here, however, that fair use determinations are still the province of the judiciary on a case-by-case basis.[110] Because the fair use right conferred by the Copyright Act contains no bright-line rule within its analysis, the limitations of the four factors would still apply. This still leaves open the possibility for judicial review in individual cases that owners of copyrights might wish to challenge.[111] Even if there is a shift in the view of user-distributed content as fair use, the ability of particular copyright holders to challenge a particular instance of consumer use remains available. Historically, however, infringement suits brought against consumers have had little net effect on user practice.[112] On the other hand, this construction of fair use prevents judicial expansion of copyright owners' exclusive rights via use of their resources in the courts. Audience rights will be respected and upheld, and copyright will remain confined within its boundaries and hopefully, relatively immune to industry pressure.[113] Additionally, protecting user practices comports with the human rights aspect of cultural access handed down from international law.

While this analysis is neither exhaustive nor fully inclusive of all possible rights of the musical audience, its utility lies with a continued discussion of the concept. By fostering such a discussion, the possibility exists for the audience members themselves to be included in the discussion of their own fate with regard to the consumption of content. User-distributors are a crucial segment of the overall musical audience. As such, it makes sense to extend the musical audience the respect for its individual members that rights entail.

IV. NEW BUSINESS MODEL ANALYSIS

For the most part, the biggest failure of the music industry regarding the proliferation of user-distributed content has been a lack of innovation and inability to monetize the practice. If we view the practice in terms of simple economics theory, then each instance of musical sharing or distribution can be regarded as a musical transaction within a given market. If we accept the view that transactions within a given economy are inherently good as they increase the net utility for each party to the transaction, then user-distribution of content generates billions of musical "transactions" increasing the overall utility of the economy.[114] Moreover,

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[110] *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 554 (2004).

[111] *Id*.

[112] Bhattacharjee, *supra* note 8, at 111.

[113] Ku, *supra* note 84, at 323-25 ("The expansion of copyright's monopoly into the new technologies of the Internet when its underlying justification no longer exists would hardly be consistent with Congress's power '[t]o promote the Progress of Science and useful Arts.'"); *see also* Litman, *supra* note 82.

[114] Ku, *supra* note 84. Viewing Ku's cost-shifting argument in terms of utilitarian analysis, each user-distribution transaction removes cost of distribution to disseminate content to the receiving user. The distribution costs have been assumed by the uploading party. If we examine each individual instance of sharing between two users, the downloader expands the audience for that particular artist by one user and so on. This growth process represents overall growth in the music market, generating a

as related purely to the music industry, this increase in overall utility has resulted in an audience that is currently bigger than it has ever been before, as barriers to consumption and distribution have come down for a wider segment of the population. Participation simply requires a computer and an Internet connection.[115] The exponential growth of the musical audience, however, has been viewed as growth in piracy, simply because the audience has displayed a preference for digital content over tangible media in many cases. The audience has become enormous, but the industry has not properly monetized this method of musical consumption.

The key to this issue, now that the technology has taken care of the dissemination and access aspect of copyright, is to respect the rights of the audience while at the same time generate compensation for authors and copyright owners. There is not one magic solution that will take care of all problems for the music industry. At the end of the day, they are responsible for their own fate and proper execution and management are still prerequisites for success within any business model.

Scholars have proposed several new business models to accomplish this goal, all with varying degrees of merit.[116] For example, Professor Neil Netanel advocates unrestricted noncommercial use of copyrighted content, and proposes a levy on products and services that take on additional value from user-distributed content.[117] Similarly, Professor William Fisher envisions a system where the copyright office would create a registration number for each work registered with the office, which artists could embed in digital copies of their work.[118] The Copyright Office would also impose a tax on digital music hardware, storage media and access services that would be divided amongst copyright holders in accordance with systems that track use of the work through the registration number.[119] Professor Raymond Ku proposes a simple noncommercial use allowance for user-distributors accomplished through a copyright law allowance for the Internet context.[120] Should traditional sales prove insufficient to promote continued creation of works from the music industry, he proposes a statutory levy on ISP's, computers and A/V hardware.[121]

The most important aspect of any monetization efforts for user-distribution, however, must include respect for the fundamental rights of the musical audience. Full recognition of audience rights brings into light a much simpler solution. If we accept that non-commercial distribution of music between audience members is fair use, then the practice need execute effective monetization to achieve a cease-

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variety of social goods independent of the audience growth.

[115] *Id*.

[116] Litman, *supra* note 82, at 33.

[117] Neil Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1, 35-59 (2003).

[118] WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 199-258 (2004).

[119] *Id*.; *see also* Ku, *supra* note 84, at 319-24.

[120] Fisher, *supra* note 118, at 199-258.

[121] *Id*.

fire of legitimacy in the struggle between big music and its listeners.

Rather than propose a completely novel approach to the music business, I advocate support for a particular system with some modifications in order to tailor it to the domestic American market. The Songwriter's Association of Canada has proposed a simple fee for internet users charged through their ISP for unlimited upload and download of user-distributed content.[122] A small portion of the revenue would be set aside for the ISPs with the remainder going toward compensation for rights holders.[123] Both users and rights holders would be given the option to opt out of the fee, with preset damages available for rights holders in the event of improper user-distribution.[124] Most importantly, the proposal calls for an amendment to Canadian copyright law to include a new right for copyright owners called "The Right to Remuneration for Music File Sharing."[125]

I propose several alterations to this system in order to square it with the rights regime and fair use construction developed herein. First, this system does not require alteration of copyright law to create a new right for artists. To do so in the United States would not only prove impractical legislatively, but would also entangle further an already complex licensing and royalty system.[126] Changes in copyright law, however, are redundant if we allow user-distribution to perpetuate itself under the umbrella of fair use. The immediate response to such an argument is to claim that this allowance would disincentivize payment. It might also be argued that this construction is no longer fair use, but is simply "fared use" wherein users pay for the exercise of fair use rights.[127] A more proper analogy, however, would be akin to a library card, where a nominal monthly fee in addition to internet subscription costs for the convenience of accessing the world's musical catalogue on an unlimited basis. This view comports exactly with the enumerated but not exhaustive list of statutory fair uses in the Copyright Act itself. The difference, however, is that the catalogue would have the added benefit of empowering users to create electronic infrastructure that suits them best at virtually no cost to the music industry. This system is no different from paying a fee to access and use private library's electronic files for noncommercial purposes. It would most assuredly guarantee the fundamental rights of the musical audience

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[122] Songwriters Association of Canada, *Our Proposal*, http://www.songwriters.ca/proposaldetailed.aspx (last visited Apr. 17, 2009).

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *See* Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 311 (Daniel Gervais ed., 2006).

[127] *Cf.* Marcy Rauer Wagman & Rachel Ellen Kopp, *The Digital Revolution is Being Downloaded: Why and How the Copyright Act Must Change to Accommodate an Ever-Evolving Music Industry*, 13 VILL. SPORTS & ENT. L.J. 271, 312 (2006) (proposing a nine month period of certified fair use including all of the exclusive rights that copyright imparts via registration and a fair use surcharge). It should be noted, however, that systems advocating payment for fair use strip the doctrine of its role in counter-balancing the exclusive monopoly that rights holders possess. "Fared use" runs the risk of eroding fair use in the musical context to nothing more than the addition of another right to the exclusive rights that authors and rights holders already have. In that sense, such a system brings fair uses back within the scope of the original monopoly.

while simultaneously compensating authors.

This proposal can be viewed as a "soft law" solution, wherein a gentleman's agreement between copyright holders and the audience exists via a set monthly fee. Copyright holders receive compensation for their works, while the audience is free to consume content as it chooses and share it within. Although future codification into law might be possible and eventually necessary, in the meantime, the SAC proposal pacifies the industry while at the same time providing a degree of legal certainty to the audience that they are acting within their rights.

The simple math of this plan reveals its incredible potential. This is not a complex idea, but is worth mentioning. If we accept the sixty million user-distributors estimation, and apply a monthly five dollar fee per user, the system generates $3.6 billion dollars of annual revenue. The monetary value of the user-distribution fee is an open question. It stands to reason though, that if the musical audience is willing to pay $9.99 per single album, that $5 per month for unlimited access to the world's musical catalogue is too low. Moreover, as the proposal advocates for incorporation of the fee into monthly broadband subscriptions, it is likely that due to the amount of subscribers that choose not to opt-out due to the certainty and guarantee of rights that the service ensures, the number of user-distributors will actually increase. The opportunity for the music industry to double dip on the practice exists as well, as tracking user-distribution provides invaluable and accurate demographic use information for marketing purposes.[128] In sum, this proposal marks an approach to the user-distribution issue that places the practice within the boundaries of the law, respects the rights of the audience and generates significant revenues for the music industry.

V. CONCLUSION

In an attempt to succinctly summarize the various threads that I have presented, it should first be mentioned that clear goals for the discussion on user-distribution and the future of the music industry have emerged. Foremost, is the need for user-distribution and the music industry to co-exist and mutually respect each other's rights within the available legal framework. This concept is not to foreclose the possibility of future legislative or judicial action. It does reiterate, however, the need to recognize fundamental rights on both sides of the debate, and to fashion a legal impetus to leverage the benefits of technological advance into sustainability. This is not a novel idea, but one that needs to be moved back to the forefront of the debate.

As for the fallout from *Napster* and its implications for digital music, the very fabric of the fair use doctrine itself implies that user-distribution deserves additional analysis and a re-examination of its ability to thrive within the letter of the law. To characterize the practice simply as infringement, and fair use as simply an inadequate defense deprives the musical audience of not only an unprecedented opportunity for exposure to a vast collection of creative works, but a deprivation of the rights that the law imparts.

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[128] *Thanks, Me Hearties*, THE ECONOMIST (Jul. 17, 2008), http://www.economist.com/business/displaystory.cfm?story_id=11751035.

Going forward, however, I propose that the musical audience be mindful of the power that their fundamental rights generate. The music industry claims that user-distribution has resulted in the erosion of their market. But the audience *is* the market. The concept of decrying user-distribution as being an external force affecting legitimate musical consumption is a fallacy. Not only is user-distribution within the musical market, it is an important market force steeped in the exercise of audience rights. It is not a malevolent force within music. Rather, it is the embodiment of access and profit that copyright envisions.