

A ROLE IN THE REMEDY: FINDING A PLACE FOR ISPS IN THE DIGITAL MUSIC WORLD

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Recent discussions of platform parity and three-strikes laws support the inevitability that Internet Service Providers (“ISPs”)¹ will need to play a role in the licensing, collection, and enforcement of digital music royalties.² Identifying the proper role of ISPs as part of a collective licensing model has the potential to push the dial much closer toward a uniform system for dealing with copyrighted music as 1’s and 0’s (“bits”),³ rather than context-specific sides of the §106⁴ dice. Properly addressing issues such as subscriber privacy, network neutrality, and infringement enforcement can lead to a fair solution for copyright owners, digital music service providers, ISPs, and fans.

“ISP” is used throughout as shorthand, but is meant to apply to any entity whose network is used to transmit music as bits.⁵ According to Informa, a market-research firm, mobile spending on content and data outpaced spending on handsets for the first time in 2008.⁶ EU Commissioner Viviane Reding recently discussed this trend and noted that 2009 is expected to see three quarters of the planet’s population having a mobile handset.⁷ She goes on to comment that the diffusion rate of mobile

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1. Internet service provider, http://en.wikipedia.org/wiki/Internet_service_provider (last visited June 14, 2009).

2. Kevin C. Parks, *Black Hole or Celestial Jukebox? Section 114 and the Future of Music*, 1.2 A.B.A. SEC. OF INTELL. PROP. LANDSLIDE 46 (2008); Mathew Ingram, *RIAA Drops Lawsuit Strategy for “Three Strikes” Plan*, GIGAOM, Dec. 19, 2008, <http://gigaom.com/2008/12/19/riaa-drops-lawsuit-strategy-for-three-strikes-plan/>.

3. See, e.g., HAL ABELSON ET. AL., *BLOWN TO BITS: YOUR LIFE, LIBERTY, AND HAPPINESS AFTER THE DIGITAL EXPLOSION 1* (2008).

4. 17 U.S.C. § 106 (2006) (defining the exclusive rights in copyrighted works).

5. See, e.g., ABELSON ET. AL., *supra* note 3, at 1.

6. *The Battle for the Smart-Phone’s Soul*, ECONOMIST, Nov. 22, 2008, at 76.

7. Viviane Reding, Member of the European Comm’n for Info. Soc’y and Media, Speech at European Internet Foundation: Digital Europe: The Internet Mega-trends that Will Shape Tomorrow’s Europe (Nov. 13, 2008).

technologies has been faster than even pen and paper in terms of penetration, use, and speed of take-up.⁸ A simplified collective licensing system with a central role for ISPs will allow new business models to flourish in an “innovate first, make adjustments later” balance rather than the current “permission first, innovation later.”⁹ Two authors recently noted, “it has proven impossible to make significant technological leaps, and yet take backward steps as far as users rights are concerned.”¹⁰

I. A QUICK CASE FOR COLLECTIVE LICENSING

Some say that the recent experimentation in the marketplace is pointing in the right direction.¹¹ But how much longer does the public need to wait for results? According to Warner executive Jim Griffin, “collective licensing is what people do when they lose control, or when control is no longer practical or efficient.”¹² Rather than copyright owners continuing a technological arms race,¹³ streamlining the royalty process through collective licensing should encourage competition. It should be simple enough to organize an opt-in effort from copyright owners, as the combined efforts of all industry players, not to mention the extensive media coverage that would result, would provide low-cost yet ubiquitous notification.¹⁴ This may also aid in the claiming of orphan works. It would be simpler to just make the license compulsory to avoid the difficulty of sorting out contractual claims or renegotiating them.¹⁵ In any event, an automated submission process can be established for copyright owners to register their works with the appropriate databases, similar to the

8. *Id.*

9. Fred Von Lohmann, *How Hollywood Has Been Trying to Disrupt Disruptive Innovation*, EETIMES, <http://www.eetimes.com/disruption/essays/vonlohmann.jhtml> (last visited Mar. 12, 2009) [hereinafter Von Lohmann, *Hollywood*].

10. DAVID KUSEK & GERD LEONHARD, *THE FUTURE OF MUSIC: MANIFESTO FOR THE DIGITAL REVOLUTION* 33 (2005).

11. Posting of Greg Sandoval to CNET News Blog, *Jim Griffin Says ISP Music Tax Only One Possibility*, http://news.cnet.com/8301-10784_3-9905952-7.html (Mar. 29, 2008, 06:00 PST) (Mitch Bainwol, chairman and CEO of the RIAA, noting that “There’s a lot of experimentation in the marketplace right now and that’s ultimately a good thing for the industry and for fans”).

12. Sam Gustin, *Fee for All*, CONDÉ NAST PORTFOLIO, Mar. 27, 2008, <http://www.portfolio.com/news-markets/top-5/2008/03/27/Warners-New-Web-Guru>.

13. See KUSEK & LEONHARD, *supra* note 10, at 96 (noting that a technological arms race by copyright owners against determined programmers would be futile at best).

14. Posting of Fred von Lohmann to EFF Deeplinks Blog, *Monetizing File-Sharing: Licensing Good, ISP Tax Bad*, <http://www.eff.org/deeplinks/2008/03/monetizing-file-sharing-collective-licensing-good-isp-tax-bad> (Mar. 20, 2008) [hereinafter Von Lohmann, *Monetizing*].

15. See *Reinhardt v. Wal-Mart Stores, Inc.*, 547 F. Supp. 2d 346, 354 (S.D.N.Y. 2008).

way many large companies currently do.¹⁶

Author's Guild board member James Gleick said, "[i]t is significant that one says book lover and music lover and art lover but not record lover or CD lover or, conversely, text lover."¹⁷ Is the U.S. ready to recognize a new right for "all things digital"? Creative Commons and the Open Source movement have shown that similar results can be achieved within the existing framework.¹⁸ Whether classified as an "online use" fee or "access" right,¹⁹ the overall theme is that we are pushing toward a unified digital right. Rights holders need to recognize that as the term of copyright has been continuously extended, there must be a concomitant change in the scope of that protection because as it stands, everything you do on the internet creates a copy.²⁰

In order to effectively implement an online monitoring scheme that focuses on whether a work is "used" or "accessed," RAM and buffer copies should first be treated as merely ephemeral and viewed as not meeting the transitory duration requirement necessary to constitute "fixation."²¹ Similarly, courts are in conflict over whether "making available" constitutes an act of distribution.²² The passage of the Digital Rights in Sound Recordings Act (DPRSRA), which required payment for digital audio transmissions of sound recordings (a historically physical product) and extended the mechanical license to digital phonorecord deliveries

16. Audible Magic, Content Registration Customers, <http://audiblemagic.com/clients-partners/registration.asp> (last visited Jan. 1, 2009).

17. James Gleick, Op-Ed., *How to Publish Without Perishing*, N.Y. TIMES, Nov. 30, 2008, at WK10.

18. Open Source Initiative, The Open Source Definition, <http://www.opensource.org/docs/osd> (last visited Jun. 14, 2009); Creative Commons, About Creative Commons, <http://creativecommons.org/about/> (last visited Mar. 19, 2009).

19. See Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC'Y 113, 113 (2003); Posting of Greg Sandoval to CNET News Blog, *supra* note 11.

20. See LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 108, 135 (2005).

21. See 17 U.S.C. § 101 (2007) (defining "fixation"); compare *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129-30 (2d Cir. 2001) (holding that a 1.2-second buffer copy did not constitute "fixation" of more than a transitory duration required to create a "copy"), with *MAI Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that temporary storage as RAM was a "copy" for purposes of the Copyright Act). A full discussion of this issue and the related issue of "incidental" DPDs and the Copyright Office's ringtone decision is beyond the scope of this article.

22. 17 U.S.C. § 106(3) (2007); compare *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153, 166 (D. Mass. 2008) (holding that "making available" did not constitute distribution), with *Elektra Entertainment Group, Inc. v. Barker*, 551 F.Supp.2d 234, 247 (S.D.N.Y. 2008) (denying defendant's motion for summary judgment based on plaintiff's infringement claims, and remanding to enable plaintiff to modify its "making available" allegation).

(“DPDs”), demonstrates the inevitability of both the reproduction and distribution rights becoming inseparable from the public performance right.²³

Current rates for “bits” uses vary considerably along with the procedures for their determination.²⁴ Uniformity of these rates would be necessary for implementation of a collective licensing scheme, and whatever mechanism is chosen to determine an aggregate “online use fee” could take into account the rights of reproduction, distribution, and public performance rather than waiting for legislative or judicial guidance. This uniformity would also likely lessen the need to distinguish between types of service providers, resulting in existing business models’ licensing schemes being folded into the collective licensing apparatus. As new models and uses develop, there will be uniform procedures in place to fit them into the new infrastructure, in which ISPs would play the central role.

II. SECTION 512, ANONYMITY, AND OTHER CONCERNS

ISPs would certainly not want to sacrifice any of their existing Section 512 immunity by participating in data collection or enforcement at the direction of third parties.²⁵ Immunity could perhaps be extended so that an ISP’s identification of transmitted copyrighted works would explicitly not be a “modification” of the transmission’s content.²⁶ Also, additional mechanisms to explicitly immunize ISPs for participation can be put into place, similar to existing notification, “reasonable implementation,” and takedown processes.²⁷ While voluntary cooperation amongst copyright owners and ISPs has some potential, explicit statutory immunities are necessary to reduce transaction costs and ensure participation by ISPs.²⁸ Users would not be affected, as they would embrace the newfound assurance that their online music activities are legitimate.²⁹ Copyright owners would benefit from larger quantities of

23. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at scattered sections of 17 U.S.C.).

24. Parks, *supra* note 2, at 49 (discussing royalty rates for different uses of music and providing overview of variations in 17 U.S.C. § 801(b)(1) Copyright Royalty Board proceedings).

25. See 17 U.S.C. § 512 (2007).

26. See *id.* § 512(b)(2)(A).

27. See *id.* §§ 512(c)(3), 512(c)(1)(C).

28. Christian L. Castle & Amy E. Mitchell, *What’s Wrong With ISP Music Licensing?*, 26.3 A.B.A. ENT. & SPORTS LAW. 4, 7 (2008).

29. Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, EFF WHITEPAPER SERIES (Apr. 30, 2008), <http://www.eff.org/files/eff-a-better-way-forward.pdf>, at 5 [hereinafter Von Lohmann, *A Better Way*].

higher quality data, leading to more and better accounting.³⁰

The Electronic Frontier Foundation (EFF) may be correct in asserting that any proposed blanket fee paid by users to their ISPs should be voluntary and not simply an “ISP tax” on all users.³¹ An opt-out user registration system would be similarly unfair. An opt-in system would likely be much more effective and respectful of subscriber freedoms.³² Giving users the benefit of the doubt that they will voluntarily pay the fee will go a long way in repairing the general perception that copyright owners are out to exploit users.³³ This may move us toward the reality that the creative industries rely on clearly defined rights and responsibilities for copyright owners, intermediaries, and users.

A pre-registration system can be set up and put into place after a predetermined number of users have opted in. For example, if Grandma has not opted in, but Little Johnny uses her account to access music, a simple notification can be sent instead of a lawsuit. A system similar to France’s or the RIAA’s “three-strikes” approach seems reasonable in light of the ease of access, interoperability, and portability of music that would be made available by a collective licensing model.³⁴ This “three-strikes” model would have to include built-in dispute resolution mechanisms and should only terminate a user’s service after extensive compliance efforts.³⁵

ISPs should be able to contact users about changes to the law and their Terms of Service inexpensively by emailing users or notifying them in their bills that each user is required to go online and sign a “clickwrap” agreement if they wish to comply with the new collective licensing model.³⁶ To kill two birds with one stone, included in this clickwrap agreement could be an indemnification of the ISP from claims related to disclosure of subscriber information or the contents of communications so that the ISPs come under the consent exceptions to the Electronic Communications Privacy Act (“ECPA”).³⁷ Any legislation creating a

30. *Contra* Castle & Mitchell, *supra* note 28.

31. Von Lohmann, *Monetizing*, *supra* note 14.

32. Von Lohmann, *A Better Way*, *supra* note 29, at 5.

33. *Id.* at 1; *see, e.g.*, Ingram, *supra* note 2.

34. *See* Ingram, *supra* note 2.

35. *See id.*

36. *See* Caspi v. Microsoft Network, LLC, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999) (holding a clickwrap agreement enforceable after user was presented with opportunity to scroll through terms); *but see* Specht v. Netscape Commc’ns Corp., 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff’d*, 306 F.3d 17 (2d Cir. 2002) (holding that a “browsewrap” agreement in a hard-to-find hyperlink did not provide sufficient notice and was thus unenforceable).

37. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (the relevant exceptions are contained within Title I, which amends the Wiretap Act, 18

collective licensing system should also eliminate any notice-based liability for ISPs' implementation of the plan.³⁸

Anonymous monitoring and reporting should be enough to squelch privacy concerns³⁹ and allow a three-strikes type rule. Fears that encryption by users or providers could stymie monitoring of ISPs are not unfounded.⁴⁰ But there would be no incentive to encrypt music data in the first place if its transfer were legal. Leaving issues of code as speech aside, the designated collection agents would have to implement enforcement and investigation efforts against any latent digital underground. Existing processes for obtaining IP addresses of those found to be transferring encrypted copyrighted music without authorization should be sufficient, provided there is legislative clarity on whether the designated collection entities are considered to be private or government entities. This will eliminate confusion over methods for release of subscriber information or the contents of communications under ECPA.⁴¹

III. COMPETITION, COMPLIANCE, AND OPEN ACCESS

While some have suggested competition amongst collecting societies,⁴² this ideal presumes uniformity in data collection, technical standards, and the like. This is not today's reality. Simply having two designated collection agents, one for sound recording owners and performers, and one for musical works owners, will lead to efficient development of technical standards and business practices. In addition, the foundation will be laid for future platform parity as the sampling, licensing, and audit mechanisms will be in place to manage "bits" uses of music.

Many complain, understandably, that even with YouTube's current licensing deals to monitor user-generated videos for music and pay labels, no label statements have included "YouTube" monies.⁴³ Open access to data in standardized file formats at all points in future processes will allow

U.S.C. §§ 2510–2522, and Title II, the Stored Communications Act, 18 U.S.C. §§ 2701–2711).

38. See cases cited *supra* note 36.

39. Von Lohmann, *A Better Way*, *supra* note 29, at 5.

40. See Chris Williams, *Surge in encrypted torrents blindsides record biz*, THE REGISTER, Nov. 8, 2007, http://www.theregister.co.uk/2007/11/08/bittorrent_encryption_explosion/.

41. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (the relevant exceptions are contained within Title I, which amends the Wiretap Act, 18 U.S.C. §§ 2510–2522, and Title II, the Stored Communications Act, 18 U.S.C. §§ 2701–2711).

42. Von Lohmann, *Monetizing*, *supra* note 14.

43. Posting of Greg Sandoval to CNET News Blog, *Musicians Still Waiting on a YouTube Payday*, http://news.cnet.com/8301-10784_3-9887167-7.html (Mar. 6, 2008 04:00 PST) (noting how artists are not getting YouTube money in their royalty statements).

completely transparent auditing by copyright owners and ISP subscribers. In addition, open access will ensure fair accounting to copyright owners in the first place. Nevertheless, automated systems to notify the designated agents of missing payments or unauthorized uses, and for lesser-known artists to report activity, will need to be in place.

ISP subscribers and others can use available tools like the EFF's Switzerland open source application to assess the integrity of ISP monitoring.⁴⁴ Antitrust considerations will have to be addressed as with the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) on the musical works side. On the sound recordings side, the scope of SoundExchange's existing authority would seem to support their designation.⁴⁵

Of course, the ISPs's role would warrant a percentage fee payment, to be used for investment in network capacity and to pay for up-to-date content identification and monitoring technologies. Perhaps a statutorily defined future evaluation of whether there should be competition amongst collection entities is warranted. For now, open and transparent access to standardized data would enable plenty of opportunities for new business models based on tracking, comparing, reporting, presentation, etc. One can imagine an iPhone application that alerts you when an open access reporting of a music use happens, or similarly when royalty money is deposited into your bank account! Similarly, services such as MP3.com's "locker" will be able to reemerge.⁴⁶

Having ISPs monitor both the sending and receipt of music packets will eliminate disputes over which ISP has what responsibilities at what point. Deep packet inspection and/or forged packets may be problematic,⁴⁷ but neutrality fears can be minimized provided that any practice is disclosed to users,⁴⁸ is completely anonymous, and ISPs change their

44. Electronic Frontier Foundation, Switzerland Network Testing Tool, <http://www.eff.org/testyourisp/switzerland> (last visited Jan. 2, 2009).

45. SoundExchange, <http://www.soundexchange.com> (last visited Jan. 2, 2009).

46. See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding that a third party Internet service which allowed users to listen to uploaded music from CDs from anywhere they have an Internet connection violated existing copyright laws).

47. Deep Packet Inspection, http://en.wikipedia.org/wiki/Deep_packet_inspection (last visited Jan. 2, 2009).

48. *In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management, Memorandum Opinion and Order, File No. EB-08-IH-1518, WC Docket No. 07-52 1 (2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

Terms of Service accordingly. After an initial period of spiked usage, levels of usage would normalize. A similar cycle would be seen if the ISP role were to also include monitoring for movies or other copyrighted works. Despite the necessity of network maintenance and management, user privacy in an increasingly vulnerable digital world militates in favor of content and bandwidth neutrality. Hence, ISPs must resist the temptation to turn their proposed information-monitoring role into a backdoor to charging high-volume users on a metered basis.

A mix of anonymous monitoring and sampling would work best.⁴⁹ Only in the case of unauthorized transfers should user identity be recorded and/or disclosed (and only after three strikes). Aggregating data from every layer in the TCP/IP stack⁵⁰ will lead to greater accuracy. For example, at the application layer, the iTunes setup assistant that currently notifies users that “Apple does not keep any information related to the contents of your music library,”⁵¹ would need to change into “Apple anonymously samples and reports the contents of your music library.” A reporting effort using audio fingerprinting technologies such as AudibleMagic’s CopySense, anonymous P2P monitoring with BigChampagne, anonymous monitoring by digital-music-providers, and Nielsen-like sampling would almost be enough. An ISP’s uniquely central and neutral position will allow them to monitor all layers of the TCP/IP stack, enabling the proper balance between sampling and per-track usage.

IV. EFFECTS ON THE CURRENT LANDSCAPE

A collective licensing scheme involving ISPs would have some initial effects on existing business models and types. The emergence of 360 deals,⁵² CDBaby and similar sites,⁵³ and new uses including video game licensing, suggest that copyright owners realize that selling content is just one of many revenue streams. Perhaps digital stores would have to pay a yearly fee to copyright owners in addition to their reporting functions in order to operate in the future. While this could lead to accusations that copyright owners are now “double dipping,” there is nothing unusual about

49. Von Lohmann, *A Better Way*, *supra* note 29, at 3.

50. TCP/IP Model, http://en.wikipedia.org/wiki/TCP/IP_model (last visited Dec. 28, 2008).

51. AppleInsider Staff, *Apple Addresses iTunes “MiniStore” Privacy Concerns*, APPLEINSIDER, Jan. 18, 2006, http://www.appleinsider.com/articles/06/01/18/apple_addresses_itunes_ministore_privacy_concerns.html.

52. About.com, Music Careers, 360 Deals, <http://musicians.about.com/od/ah/g/360deals.htm> (last visited Mar. 22, 2009).

53. See, e.g., About CD Baby, <http://cdbaby.com/about> (last visited Mar. 22, 2009).

a service paying to operate, and users paying a general fee for use.⁵⁴ This scenario would be no different than broadcasters paying fees to transmit copyrighted works, and users paying their cable providers for the service.⁵⁵

“Adapt or die” is the law governing the technology and internet world, and now copyright owners must face the same reality as the digital music services.⁵⁶ While iTunes could still operate as a store and enable a P2P-like environment, it and other services would compete based on promotions and giveaways, advertisements, sponsorship, recommendation systems, and other social features.⁵⁷ Two of Apple’s recent patent applications, one for a “Rewards System” and the other for “User Supplied and Refined Tags” of content in online store communities, demonstrate effective hedging.⁵⁸

Although the ISP serving as “the ultimate information intermediary” could have the ripple effect of transforming the collection of royalties online, this would still neither “plug the analog hole” nor establish royalties for the transfer of music to other devices. Requiring a payment by device makers to the newly created collection entities, perhaps by amending the Audio Home Recording Act,⁵⁹ would address the latter concern. For commercial public performances of streamed content, the restaurant or other entity could deduct the musical works portion of their “ISP fee” from their normal payments to BMI or ASCAP. Interoperability would emerge as DRM disappears, open access and standards are embraced, and “fingerprinting” technology becomes standardized. Current fair use or liability for the creation of unauthorized derivative works would still apply, although clearer standards will eventually need to be fleshed out in the online context.⁶⁰

In addition, further exploration of the effects of a collective licensing scheme in the international context would have to be explored. For example, a World Trade Organization panel found 1998’s Fairness in Music Licensing Act, which exempted certain establishments from paying public performance royalties, in violation of TRIPs.⁶¹ In developing a

54. See LESSIG, *supra* note 20, at 61.

55. *Id.*

56. KUSEK & LEONHARD, *supra* note 10, at 44.

57. Von Lohmann, *A Better Way*, *supra* note 29, at 5.

58. U.S. Patent App. 20080077489 (published Mar. 27, 2008); U.S. Patent App. 20080091549 (published Sept. 29, 2006).

59. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (added chapter 10, “Digital Audio Recording Devices and Media,” to Title 17).

60. See generally Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004).

61. Panel Report, *United States—Section 110(5) of U.S. Copyright Act*, WT/DS160/R (Jun.

collective rights paradigm in the United States for online uses, payments to the designated societies could be made through existing international affiliate agreements of these societies. Viviane Reding also called for cooperation in convergence and harmonization of rights licensing across borders.⁶²

V. CONCLUSION

Once the digital market becomes streamlined and rights are defined, methods for identifying and dealing with infringement will be less ad hoc. Part of the failure of current efforts is an attempt to destroy infringement in an effort to develop a legitimate market.⁶³ The market is there and copyright owners have the greatest marketing opportunity ever.⁶⁴ Technology will continue to develop, encryption will continue to strengthen, and no matter what happens, there will always be a necessity for some enforcement efforts. A collective licensing system that gives users the benefit of the doubt will remove the public relations obstacles and morality wars, allow companies to explore new opportunities without fear of liability, and let the music industry focus on delivering quality music to fans. Identifying the proper rights and responsibilities of ISPs as the ultimate intermediaries is the first step toward uniform “music as bits” laws and social norms that will establish the framework for the future of digital music.

15, 2000).

62. Viviane Reding, Comm’r for Info. Soc’y and Media, Eur. Comm’n, Speech at Brussels Publishers Forum: The Convergent Publisher—Print media in the Broadband Economy (Dec. 6, 2007).

63. See KUSEK & LEONHARD, *supra* note 10, at 103–04.

64. *Id.* at 101.