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[redacted]

November 15, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H (Annex B)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: P2P File-Sharing Workshop -- Comments, P034517

Please accept the following as my Comments in connection with the Federal Trade Commission's Public Workshop: "Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues," to be held in Washington, D.C., on December 15 and 16, 2004.

In its "Notice Announcing Public Workshop and Requesting Public Comment and Participation," the Commission identified seven separate but related topics that may be taken up at the Workshop. In these Comments, I will address two of those seven topics: "P2P File-Sharing and Music Distribution" and "P2P File-Sharing and Its Impact on Copyright Holders."

I. AN ALTERNATIVE TO THE SALES-BASED REVENUE MODEL IS NEEDED FOR DIGITAL TRANSMISSIONS OF COPYRIGHTED MUSICAL WORKS AND SOUND RECORDINGS

The crisis that grips the digital music marketplace is the making of the music industry itself. It results from the industry's failure to undertake the transformation required to meet the changed circumstances imposed on it by the Internet.

The Internet is fundamentally incompatible with a sales-based revenue model for works of popular culture, especially recorded music. Internet transmissions are instantaneous and worldwide in scope. Every Internet user, every member of a peer-to-peer file-sharing network ("P2P participants" and "P2P networks"), and every digital audio service provider in the world is a potential source for the unauthorized distribution of copyrighted musical works and sound recordings. In such a global network, it will not be possible to prevent the widespread unauthorized distribution of recorded music in digital format. Neither law, nor technology, nor moral suasion will suffice.

Through the Internet, the market for sale of individual recordings can be ruined in a moment's time and without payment of any royalties to songwriters, music publishers, recording artists or record labels. Given this, the music industry's traditional sales-based revenue model -- dependent, as it is, on the sale of hit recordings -- will soon no longer be sustainable.

Unfortunately, to date, the industry has resisted any meaningful change to its ways of doing business. Instead, it has sought to preserve the established relationships upon which its past successes were based, and to extend its sales-based revenue model into the digital age.

To this end, the industry has experimented with a variety of technological fixes. However, each access restriction or anti-copying measure has engendered an effective countermeasure, and news of the successful hack quickly found its way to everyone who cared to know it. And even if a particular workaround were too complicated for most consumers to apply, once a single hacker has distributed the recording on the Internet in unprotected form that work becomes available to all consumers without restriction.

In addition, the industry will not likely be able to rely on a technological solution such as audio players that only operate with files containing particular codes. Such "copyright friendly" audio players may raise "fair use" and free speech concerns depending on whether and how they impede individuals from communicating with each other. Moreover, it is obvious, that if given the opportunity, consumers would choose devices that accept all works, and recordings that play on all devices.

In any event, the industry's reliance on a succession of technological protective measures has proven unavailing. There is no reason to believe that the result will be different next time, or ever.

The industry has also turned to Congress for assistance. It has pursued a series of legislative proposals including, most recently, the Inducing Infringement of Copyrights Act of 2004. This bill is intended to protect the sales-based revenue model from the predations of infringement by limiting the business activities of technology firms and consumer electronics makers. The Induce Act would make it illegal to manufacture and distribute electronic devices and software programs that facilitate the infringement of copyrights by consumers. Much of what is already commonly found in home entertainment systems might no longer be available were the Induce Act to become law.

Finally, the industry has sought vindication through the courts. It has launched an anti-piracy campaign of infringement litigation that pits the industry directly against consumers, seeking ruinous damages for conduct occurring in the privacy of people's homes.

The industry's interference in the technology marketplace, its legislative agenda and its lawsuits have brought it ridicule and scorn. In my view, the fault with the industry's campaign against P2P in particular lies in the fact that, when all is said an done, the industry refuses to offer consumers a license so they can lawfully do what they want: share music with others. The alternative that the industry does support -- the opportunity to purchase music from iTunes and its competitors -- good as it is, is not a substitute for participating in P2P file-sharing unfettered by restrictive digital rights management systems. The difference is not lost on consumers.

Despite the industry's efforts, the threat to its sales-based revenue model has not been meaningfully reduced. The unauthorized downloading and copying of recorded music continue unabated, and P2P networks proliferate. Indeed, RIAA spokespersons have warned that established, popular, licensed, music sales destinations, such as iTunes and its competitors, cannot thrive if unlicensed sources of recorded music continue to operate.

These warnings go to the heart of the matter, yet they miss the point entirely. The market forces at work at the intersection of copyright and the Internet are wildly asymmetrical and to the disadvantage of music industry rights holders. Nonetheless, the industry persists in the belief that it will overcome this imbalance, suppress infringement, and secure its sales-based revenue model. This belief is contradicted by logic and

experience. So long as the industry's fortunes are tied to the sales-based revenue model, it will remain hostage to technology and to those who would give music away for free.

Even though the industry's strategy has not produced the desired results, it has had several undesirable collateral consequences.

It has stymied American technology and communications firms in their deployment of high-speed broadband connections for the consumer market. Consumers, it turns out, are reluctant to pay higher monthly access fees when rights holders will allow so little sought-after content to be made lawfully available. Similarly, consumer electronics makers, fearing liability, have been reluctant to manufacture and market new devices and systems with next generation capabilities. Digital audio service providers who wish to operate lawfully must accept unprecedented program content restrictions. And, of course, consumers have been exposed to liability for enjoying the music they most want to hear, when, where and how they want.

Sound public policy should strongly support the opportunity of those who create and own copyrighted musical works and sound recordings to derive ample rewards from their contributions to culture and commerce. It is incumbent upon us to secure their right to do so. By the same token, however, the music industry has no right to demand that public policy continue to support its desire to do business in a particular way.

Applying these criteria to the relationship between the music industry and the P2P file-sharing community, and viewing that relationship in the context of the industry's sale-based revenue, it is apparent that there can be no easy resolution to the conflict.

The music industry simply cannot agree to license P2P file-sharing; nor should Congress impose such a solution. To be sure, if the industry were to license P2P, it

would earn license fees paid by, or on behalf of, those P2P participants willing to obey the law. However, the industry would still have to contend with the impact on its sales-based revenue model of unlicensed P2P networks. And therein lies the rub.

If, as a general matter, P2P were lawful, file-sharing, as we now know it would change dramatically. Initially, P2P would benefit from the return of venture capital investment that fled when the RIAA sued those who funded the original Napster. With this infusion of capital, technology firms could improve the P2P experience for all consumers. P2P could become faster, more reliable, and free of viruses and spyware. Transmissions would not be subject to frequent interruptions; and more transmissions would result in the completed transfer of a recording. Incorrectly labeled or otherwise corrupt song files would be the exception instead of the rule.

However, if P2P were lawful, all file-sharing networks -- those that are licensed and those that are not -- would have the capability of becoming as sophisticated as any service operated by the largest Internet or entertainment companies. And if the disincentive of poor quality were removed, it is difficult to imagine what market force would keep consumers from choosing to obtain music for free from their favorite unlicensed P2P network rather than from a licensed network for any price.

The ongoing policy and business deadlock over the online use and protection of recorded music need not continue. It is possible simultaneously to protect the integrity of copyrights, promote technological innovation, facilitate the growth of all manner of digital audio services -- including P2P networks -- meet consumer demand and preserve consumer privacy. What is needed is an alternative to the sales-based revenue model for digital transmissions of musical works and sound recordings; an approach to rights

management that does not depend on the efficacy of access restrictions and anti-copying measures for its success; one that is specifically structured to accommodate the changed circumstances imposed by the emerging global digital network.

I suggest this:

II. CONGRESS SHOULD CREATE A DIGITAL TRANSMISSION RIGHT FOR COPYRIGHTED MUSICAL WORKS AND SOUND RECORDINGS

The Internet and other digital media will maximize the opportunity for music to be used and for rights in music to be licensed. But technology has rendered certain traditional rights unenforceable and blurred the distinction between others. New definitions of rights are needed to meet these changed circumstances.

For example, prior to the Internet, public performances presented through radio and television broadcasting, as such, only involved the public performance right in musical works. They did not involve the licensable reproduction or distribution of music or any rights at all in sound recordings. Similarly, the making and distribution of recordings did not involve public performances.

Streaming media and the ability of end users to download and retain perfect digital copies permit, for the first time, the simultaneous exploitation of the reproduction, distribution and public performance rights in songs and in the recordings that embody them. In addition, the loading of music onto a server and the incidental, transitory copies made in the course of transmissions to end users may count as the reproduction and distribution of both the songs and the recordings involved.

Moreover, as practical matter, it is not possible to know whether end users only listen to online performances or also download them. Nevertheless, knowing specifically

what end users are doing in each instance is key to licensing the public performance and distribution rights separately, as had been the practice prior to the Internet, and as continues to be with analog and other non-Internet uses.

Not knowing which rights are being exploited in a particular transmission has driven rights holders to increasingly great lengths to justify their Internet licensing practices. For examples, the performance rights organizations, ASCAP and BMI, assert that transmissions of musical works constitute performances even if the work was transmitted only for downloading and was inaudible at the time it was being sent. They seek to charge license fees for these unheard "public performances" even though their music publisher clients also collect mechanical license fees for the same transmissions.

Similarly, music publishers seek to impose mechanical license fees even if no permanent downloads are involved, such as with downloads that "time-out," or where the only "copies" made are transitory and incidental to transmissions that are nothing more than performances, such as in "on-demand" streaming.

Congressional action is needed. I suggest that Congress consider aggregating the separate rights of songwriters, music publishers, recording artists and record labels in their respective works, and creating a single, unified digital transmission right for musical works and sound recordings. This new, hybrid right would subsume and replace the parties' now-existing reproduction, distribution and public performance rights for purposes of digital transmissions.

Licenses under the digital transmission right would authorize all acts by digital audio service providers that may be involved in the transmission of music to end users. For these purposes, P2P network operators would be treated as digital audio service

providers. Licenses would also authorize all acts of P2P participants that may be involved in their sharing of music, including the acts of those who make music available as well as those who download music from the network.

Every act that, under current law, constitutes a licensable reproduction, distribution or public performance of a musical work or sound recording would also require authorization in order to be lawful under the digital transmission right. However, because the reproduction, distribution and public performance rights would no longer have independent existence, the digital transmission right could be licensed without regard to the conduct of end users.

Thus, it would no longer matter whether end users copied or only listened to transmissions. It would not be necessary to know how many copies, if any, were made in the course of a transmission. Nor would it matter whether transmitted copies were stored on a temporary or a permanent basis, or used on one audio playback device instead of another.

In addition, it would not matter if consumers re-distributed works through P2P networks, although they would need a license to do so lawfully. Unlike the reproduction and distribution rights that underlie the sales-based revenue model, but like the public performance right, the digital transmission right cannot be subverted by a single unlicensed service provider, Internet user, or P2P network. Whether or not particular transmissions are licensed would not affect the market for the digital transmission right over all.

The experience of music performance rights organizations proves this point. ASCAP and BMI license radio stations for over-the-air broadcast and Internet

performances of the musical works in their respective repertories. The license fees ASCAP and BMI collect from broadcasters compose a major portion of their annual revenue. However, even if the largest radio station or group of stations were not licensed at a particular time, the rights organizations' ability to license the nation's thousands of other broadcasters would not be impaired. People would continue to tune to their local stations to hear their favorite songs over and over again; and the overwhelming majority of broadcasters would continue to operate lawfully by securing the public performance licenses they need. Those who act outside the law can be sued for copyright infringement; and the courts should continue to require infringers to pay more in damages and other costs than they would have paid in license fees.

Finally, the digital transmission right would not depend on the efficacy of exclusionary technology for its success. Far from needing to limit access to their works, right holders would have every incentive to encourage the most extensive uses possible. This would free the industry from pursuit of invincible technological measures, allowing it to focus instead on development of the monitoring techniques needed to implement its rights in the digital environment.

A digital transmission right would represent a major shift in leverage and economics within the music industry, and it almost goes without saying that rights holders who think they have a strong position vis-à-vis other rights holders may not be interested in negotiating alternate arrangements. Nevertheless, the policy issues involved are broader than the interests of the music industry alone. In this important area, policy should be guided by what is fair and feasible and what is in the best interest in the long-run for everyone involved.

III. THE DIGITIAL TRANSMISSION RIGHT SHOULD BE SUBJECT TO A STATUTORY LICENSE

A digital transmission right would enable transmissions of music to be made available from a vast number of licensed sources, including through P2P networks, anytime, anywhere, to anyone with Internet access. It remains to be shown, however, how this new right can form the basis of a viable marketplace for music.

As a starting point, the digital transmission right should be subject to a statutory license.

There are hundreds of thousands of copyrighted musical works and sound recordings and tens of thousands of rights holders. Moreover, each of several rights holders may have an interest in any particular song or recording. Therefore, multiple licenses from separate rights holders would be required for each recording of each song transmitted online. It would be impractical and unfairly burdensome to require every digital audio service provider and every P2P participant to identify, locate and negotiate with every songwriter, music publisher, recording artist and record label whose works they wish to transmit. Such a requirement would be a strong disincentive to compliance.

In addition, there is also much uncertainty over pricing. Because of this, those service providers who are able to secure the rights they need have been required to pay license fees to multiple parties calculated on inconsistent bases. Of course, this is not a problem for the P2P community because licenses for file-sharing are not yet available.

In principle, voluntary market-driven licensing arrangements are to be preferred over statutory licenses. In practice, however, statutory licensing, or its equivalent, has been standard practice in the music industry for decades. Of the now-existing rights in musical works and sound recordings that the digital transmission right would replace,

only the record labels' right to sell recordings is not already subject to statutory licensing or to court ordered mandatory licensing under anti-trust consent decrees. Given the experience to date, experimentation with a free market for digital transmission rights in music may well result in continued market failure.

A statutory license is warranted for the online transmission right, but only a limited form of it is necessary. A parallel free market could also operate in which individual rights holders and digital audio service providers, P2p network operators and P2P participants could enter into voluntary, non-exclusive license agreements on whatever terms they find acceptable. Such a carve-out from the statutory license would be cost-effective for those who only offer transmissions of works belonging to a few rights holders. In addition, some rights holders may believe that even a statutory license imposes too many limitations on their ability to make their works available. Direct licensing would provide artists who wish to build an audience for their live concert performances with the opportunity to make their recordings even more widely available for less than the statutory rate, or for free.

The statutory license for the digital transmission right should be available to all digital audio service providers regardless of the business model they employ, the nature or density of their music use, or the content of their programming. It should also be available to P2P network operators and to individual P2P participants. In order to qualify for the statutory license, however, service providers, P2P network operators, and individual P2P participants may only transmit properly marked works and must cooperate in the transmission monitoring system discussed below. Beyond that, they need only

comply with the financial reporting requirements, where applicable, and pay their license fees in a timely manner.

IV. THE STATUTORY LICENSE SHOULD BE ADMINISTERED ON A COLLECTIVE BASIS

Collective administration is the most efficient and effective way to implement the statutory license.

Of the rights that the digital transmission right would replace, all but the record labels' right to sell recordings is already administered by a rights collective. ASCAP and BMI, operating under federal court supervision, license public performance rights in musical works for their respective songwriter and musical publisher members. The Harry Fox Agency acts as a clearinghouse on behalf of music publishers for the compulsory mechanical licenses. And Sound Exchange administers statutory licenses for digital performance rights in sound recordings under the Digital Millennium Copyright Act for the benefit of record labels.

Each of the existing collectives is chartered to serve a narrow constituency; none currently has the legal capacity to administer the digital transmission right, nor is it likely that these collectives, left to their own devices, would agree that such authority should be extended to one of them instead of another. The music industry is marked by long-standing divisions, particularly between music publishers and record labels regarding ownership, valuation and administration of the different rights each group controls. Songwriters and performing artists also have deep concerns over the nature of their relationships with the music publishers and record labels that control rights in the works they create.

A separate collective should be established for the digital transmission right. The collective would act on behalf of all songwriters, music publishers, recording artists and record labels to administer the new statutory license.

The collective would seek to maximize compliance by educating digital audio service providers, P2P network operators and P2P participants how to fulfill their obligations under the law. In addition, where appropriate, the collective would initiate infringement litigation against those who refuse a license and continue to transmit works without authorization obtained directly from the rights holders in interest. The collective would represent rights holders in industry-wide negotiations to set and adjust license fees. And it would analyze transmission data and distribute royalties to those whose works were actually transmitted pursuant to the statutory license.

Collective administration would reduce the cost to rights holders of administering digital transmission rights in their works. It would allow for uniform standards to be employed for marking works and monitoring them when transmitted. And it would ensure that all rights holders, large and small would benefit from digital transmissions of their works.

The collective must not be permitted to operate unchecked. The interests of individual rights holders, service providers, P2P network operators, P2P participants and the public at large must be protected. Therefore, the collective should operate in all respects on a transparent basis and be subject to Congressional -- or judicial -- oversight and review.

V. DIGITAL RIGHTS MANAGEMENT UNDER THE STATUTORY LICENSE NEED ONLY INVOLVE TECHNOLOGY SUFFICIENT TO MONITOR TRANSMISSIONS OF COVERED WORKS

Rights management for music in the digital age begins and ends with the ability to monitor transmissions. Knowing which works have been transmitted and by who underlies licensing, enforcement, contract administration and royalty distribution.

Initially, it is necessary to determine who is transmitting covered works in order to know who needs a license. If a license is refused, identification of works transmitted without authorization is necessary for enforcement litigation. Once licensed, transmission data may be needed to calculate the license fees that are due. And knowing specifically which works were transmitted by each licensed service provider or through licensed P2P networks is necessary to know who among the rights holders is entitled to receive royalty payments.

The foundation of digital rights management is the creation of a database identifying all works that are subject to the statutory license. Neither all music nor all sound recordings are copyrighted. Works that are not protected by copyright would not be covered by the statutory license.

Service providers and P2P participants need to know which works are protected so they will know if and when they need to comply. Those who are licensed need a way to confirm that they are not paying license fees specifically for transmissions of works in the public domain.

For the most part, digital audio service providers and P2P participants, acting on their own, will be unable to distinguish between copyrighted and public domain works. On the other hand, rights holders know precisely which of their works are protected and

which are not. Under these circumstances, rights holders should shoulder the burden of identifying the works in which they claim protection.

Rights holder must agree on a universal numbering system by which a unique identifying code would be assigned to each musical work and to each sound recording. By cross-referencing these codes with other information in the rights collective's database, it would be possible to determine each work's title, and to identify its writer, publisher, recording artists and record label. The reverse also is true. By knowing a work's title and the performing artist who recorded it, one could, in most instances, derive the relevant unique identifying code number.

Much of the data needed for this identification system already has been compiled. Some of it is held in databases operated by the existing rights collectives. Some is in the rights holders' own databases. Some of it is publicly available. Most of it is treated as trade secret information. Yet all of this data must be aggregated into a single database to be made accessible through the Internet to all licensed digital audio service providers, P2P network operators, and P2P participants. Without this, the systematic and comprehensive monitoring of digital transmissions will not be possible.

Whether or not a work is listed in the collective's database, its transmission by service providers, P2P participants, or through P2P networks that otherwise qualify for the statutory license should be deemed authorized and, therefore, not infringing. However, if a work is not listed in the database, then its transmission under the statutory license should not be subject to payment of any license fee. In any event, if a work were not listed, the rights collective would be unable to verify if or when the work had ever

been transmitted, and would not have a basis to distribute royalties to rights holders of such a work for transmissions occurring during any period the work was not listed.

Digital rights management also requires a means for physically marking audio files with codes identifying the works they contain, and a means for tracking digital transmissions of marked works. For this, the cooperation of digital audio service providers and P2P participants is essential.

The process of marking individual audio files requires either access to the files themselves or to the sound recordings from which the files were made. Until recently no one considered it necessary to encode recordings with the data needed to track their transmission in a global digital network. Therefore, existing recordings, by and large, are not marked and cannot be tracked when transmitted. Even once the industry begins marking newly made recordings, the problem with previously distributed unmarked works will remain.

The solution lies with service providers and P2P participants. Because they select the works to be made available for transmission they are in the best position to ensure that only properly marked works are transmitted.

Therefore, as a condition of the statutory license, service providers and P2P participants must share responsibility for ensuring that the works they transmit are properly marked. If the copy of a work to be transmitted is not already identified, the service provider or P2P participant must obtain the relevant information from the rights collective's database and embed it in the file prior to transmitting it. In addition, service providers and P2P participants must neither alter nor remove previously embedded identification codes. Transmission of works with altered codes, or works form which

embedded codes have been removed, or transmission of works that are not properly marked but for which the identification codes are available from the rights collective's database, should subject the service provider or the P2P participant to a suit for copyright infringement.

It would only be necessary to mark particular digital audio files one time. Once music is recorded, the work's identity is fixed: Its title, and the names of the songwriters and performing artists cannot change. Only the identities of the music publisher or record label are subject to change, for example, through the sale of a music publishing catalog, or the purchase of one record label by another. In the event of any such transfer of rights, the collective would modify the database to reflect the new ownership interests and, subsequently, would pay royalties to the new rights holders. However, the primary identifying code for each work involved would not have changed and there would be not any additional obligations imposed on service providers or P2P participants. In this way, it would be possible to build libraries of compliant digital audio files for ongoing use under the statutory license.

The solution to tracking digital transmissions lies with digital audio service providers and P2P network operators, though not necessarily with P2P participants. Service providers and network operators can generate and maintain log files to document activity on their services and networks. At a minimum, they should be required to capture the information that would identify the music that has been transmitted and when. The relevant data from these log files must be accessible to the rights collective for purposes of confirming license fee reports and payments and to support a royalty distribution system. Transmission of a covered work that is not disclosed by a service

provider or network operator's log files should subject that provider or operator to liability for copyright infringement even if the entity otherwise qualifies for the statutory license.

The form of digital rights management needed to support the statutory license places a heavy burden on service providers, P2P participants and P2P network operators, particularly smaller ones. Therefore, every effort should be made to minimize the cost and the effort of compliance. The works database must be readily accessible through the Internet, easily searched and fully supported at all times. Ideally, the rights collective itself would make compliant digital audio files of all works available through the Internet for use under the statutory license.

Finally, to the extent that the monitoring system proposed here results in the rights collective coming into possession of any personally identifying information of a P2P participant or other consumer of digital audio services, the rights collective's use of that information should be subject to limitations no less rigorous than those that apply under the Childrens Online Privacy Protection Act.

VI. STATUTORY LICENSE FEES SHOULD BE SET BY INDUSTRY-WIDE NEGOTIATIONS

The diverse rights in musical works and sound recordings granted under current law are administered by different parties. Therefore, those who are able to obtain authorization for online uses are required to pay several separate license fees calculated on inconsistent bases.

Moreover, with respect to each work that is transmitted, rights holders, in the aggregate, are requiring licensees to provide the title of the song; classification of the song by musical genre; name of the recording artist; title of the album; name of the music

publisher and of the record label; whether the work is instrumental or vocal; the number of times each work was transmitted; the date and duration of each transmission; and whether end users only listened to these transmissions or also made their own copies of them. It is unrealistic to expect those who transmit music online to know most of this information, and it is unfair to require them to provide it in order to maintain their licensed status. And again, such a requirement is a strong disincentive to compliance.

By contrast, under the digital transmission right, only a single license fee payment would be due for any reporting period. Because the digital transmission right would substitute for the parties' reproduction, distribution and public performance rights, and be subject to a statutory license, this single payment would cover all rights in all musical works and sound recordings that may be implicated by transmissions under the statutory license. Moreover, the only music use information that would be required is the server log file data showing when each work was transmitted and the publicly available unique identification number for each work.

The fee for the digital transmission right would be established through voluntary negotiations between the rights collective on the one hand and service providers, P2P network operators and P2P participants, or their representatives, on the other. If these negotiations failed, recourse could be had to government-supervised arbitration. Regardless of how it is accomplished, this process requires determination of a license fee structure, a rate and the base against which the rate is to be applied.

With respect to digital audio service providers, including P2P network operators, I favor a fee based on the greater of revenue or annual operating expenses. Adjustment could be made to reflect differences among service providers and network operators in

the prominence of their use of music and in the relative proportion of copyrighted, public domain, and directly licensed works they transmit. Such a structure could accommodate significant differences in business models and music use among licensed services and networks. It also results in a fair fee for all service providers and network operators; one that is proportionate to the economic benefit each derives from transmissions of covered works.

Another approach to license fee calculation is the pay-per-play or pay-per-transmission model. This approach is obvious, straightforward and relatively easy to implement. It also resonates of a rough justice borne of the notion that one ought only use as much of a thing as one can afford.

Nevertheless, a pay-per-transmission model would deprive rights holders of the opportunity to share proportionately in the value of the bounty created by digital transmissions of their works. Such a model is also regressive and discriminates against smaller service providers and P2P network operators. A pay-per-transmission license fee rewards those who report fewer uses of music than they actually make.

Finally, a pay-per-transmission license fee model also provides an opportunity for those who are unscrupulous to cause numerous transmissions to be made from a service they wish to sabotage by increasing its license fee obligations.

A revenue based license fee has none of these drawbacks and is, I believe, to be preferred.

With respect to P2P participants, I favor an annual license fee set at a flat dollar amount and payable at the beginning of each year or within on a very few days of first participation in the network.

VII. ROYALTY PAYMENTS SHOULD CORRESPOND PRECISELY WITH FEES COLLECTED FOR LICNESED TRANSMISSIONS

Internet transmission are digital and occur in a networked environment. It is possible, therefore, to identify all covered works that are transmitted under the statutory license. Cooperation between rights holders and licensees, coupled with the marking, tracking and logging requirements of the statutory license will provide the data on which such a census would be based. Only through a census can payment of royalties correspond precisely with licensed transmissions of individual works. This would ensure that digital transmission royalties are paid only to those rights holders who are entitled to receive them.

On the other hand, sample surveys, such as those relied on by ASCAP and BMI, credit only a fraction of licensed uses. Royalties generated from transmissions that fall within the sample are paid to the owners of the works in question; but royalties for transmissions of works that do not fall within the sample are not paid to the owners of those works; instead, they are paid to rights holders of other works that do fall within the sample. Thus, a royalty distribution system grounded in sampling necessarily results in rights holders not receiving royalties for all licensed uses of their works, and may result in some rights holders never receiving royalties for any licensed uses of their works.

Census-based royalty distribution under the digital transmission right would be a two-phase process.

In the first phase, the fees paid by each licensed digital audio service provider, P2P network operator, or P2P participant would be divided into four funds: one for songwriters, one for music publishers, one for recording artists and one for record labels.

This division could result from voluntary negotiations between these four groups conducted under the auspices of the rights collective. However, if these groups are unable to agree upon an allocation of royalties, an arbitration panel should be available to make that royalty distribution determination. This procedure is the same as that employed under other statutory licenses to divide a single undifferentiated royalty fund among competing copyright claimant groups.

I favor an equal distribution among these groups: 25% of the total fund should be allocated to each group.

The second phase of royalty distribution requires the further division of each of the four funds among the individual rights holders within each claimant group. This distribution could be made on a pro-rata basis, service provider by service provider, P2P network operator by operator, and P2P participant by participant.

The royalty distribution system proposed here would assure that all rights holders, large and small, would receive a share of royalties that is proportionate to the money actually paid in license fees for online uses of their creative works. It would also reduce the likelihood that royalty distribution disputes would arise and would limit the scope of those that did.

VIII. CONCLUSION

There appears to be no easy answer, no simple solution to how the relationship between the music industry, consumers and their intermediaries should proceed in the digital music marketplace. All that is clear is that resolution of the matter will require significant compromise by all the interested parties. In these Comments, I have tried to

highlight some areas where those responsible for negotiating such a settlement might wish to focus their attention.

Respectfully submitted,

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