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EMI v. MP3tunes: Business Model Proposals for the Music Industry in the Context of Emerging Technology

Lauren Spahn

The music industry has struggled to adapt its business models in response to technological innovation. With the emergence of cloud-computing trends, the music industry has seen first-hand the difficulty courts have interpreting existing legislation. Recent cases like EMI v. MP3tunes illustrate the importance of encouraging the music industry to work in conjunction with service providers. This article focuses on how existing legislation and current court interpretation are not the most effective answers for the music industry to thrive in this technological era; namely, this article explores new business models for the music industry to adapt to in an effort to maintain revenue in the future. By accepting technological changes, as well as working with service providers to provide consumers with their desires, the music industry will only strengthen its future long-term.

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I. INTRODUCTION

Much has been written on the chaos into which the music industry has been thrown as a result of technological innovation. The most recent challenge comes from emerging cloud-computing trends. As a result, courts have been confronted, in cases such as *EMI v. MP3tunes*, with the difficulty of interpreting current legislation in relation to cloud-based service and digital service providers. Many recent court decisions have favored digital service providers by concluding that the Digital Millennium Copyright Act “safe harbor” clause limits liability for cloud-based services.

Such decisions mark urgent hurdles the music industry must conquer and overcome because digital service providers are the new way that individuals listen to music. The availability of music via digital service providers puts pressure on the music industry’s current business models. Accordingly, the music industry must adapt its current business models to technologically evolving realities if it is to maintain revenue in the future.

This article explores the changes faced by the music industry, sketches some of the legal reactions to those changes, and suggests new business models that might be better adapted to the era of cloud-based computing and music access. Part I of this article explores the history of copyright law in the United

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States and examines the challenges copyright law has encountered due to legislation and technology. Part II discusses the particular impacts of cloud-based service providers on the music industry and judicial reactions to those technological changes. Part III evaluates the recent music copyright infringement case EMI v. MP3Tunes, and considers the impact the music industry is facing from the court’s decision. Lastly, Part IV of this article will explain how the music industry can adjust to these changes through new business models, as an alternative to relying on future legislation and court interpretation of existing legislation. New business models will allow the music industry to thrive and progress in conjunction with technological innovations.

II. BACKGROUND

A. Copyright Law in the United States

1. Early Copyright Law

Congress is constitutionally empowered to “promote the Progress of Science and useful Arts” by granting inventors and artists copyright and patent protection. Pursuant to the constitutional assumption that creators need economic incentive to create new works, Congress has granted the authors of creative works copyright protection. The early history of U.S. copyright demonstrates a continuing Congressional expansion of the scope of copyright protection.

Accordingly, the Copyright Act of 1909 granted music copyright owners the “exclusive right to make or sell any mechanical device that reproduced [a given] work in sounds.” In response, the American Society of Composers, Authors, and Publishers (ASCAP) was formed in 1914 to protect composers’ rights, specifically within musical works and public performances. As radio broadcasting flourished in the 1920s, issues surrounding music copyright owners’ rights became increasingly salient. In 1923, the United States District Court for the District of New Jersey held, in Whitmark & Sons v. Bamberger Co., that the 1909 Act required broadcasters to obtain licenses from songwriters for the radio broadcast of their compositions. This decision marked a significant triumph for the music industry and generated positive

5. JESSICA LITMAN, Digital Copyright 39 (Prometheus Books, 2006).
7. The biggest issue was whether a playing a musical work constituted a “public performance.” See Cleaf, supra note 4, at 351.
9. Id. at 780.
discussion surrounding music copyright. However, World War II created instability in the United States, and no negotiations were completed until the 1950s.\textsuperscript{10} when the Recording Industry Association of America formed to represent recording companies’ interest in copyright law.\textsuperscript{11} The formation of the Sound Recording Industry Association spurred the Sound Recording Act of 1971, which amended the 1909 Act, and ruled that phonorecords are “copies” within the statutory definition. Ultimately, sound recordings were afforded the copyright protection that the music industry had previously desired.\textsuperscript{12}

2. Copyright Act of 1976

Shortly after the 1971 Act, Congress created the Copyright Act of 1976 (1976 Act),\textsuperscript{13} which was purposely structured as a preventative safeguard against copyright infringement. A variety of industry interest groups were able to negotiate a bill that helped modernize United States copyright law by taking into account and including some of the major technological advances made throughout the twentieth century.\textsuperscript{14} In an effort to maintain the balance of copyright struck by the United States Constitution, the 1976 Act granted copyright holders five distinct rights: the right to reproduce works in copies and phonorecords, the right to distribute, the right to make derivative works, the right of public performance, and the right of public display.\textsuperscript{15}

Despite the achievements of the 1976 Act, the legislation created a number of ambiguities and challenges for the music industry. A notable example concerned performance royalties. The 1976 Act only granted performance royalties for the underlying compositions themselves and not for

\begin{itemize}
\item \textsuperscript{10} Litman, supra note 5, at 45.
\item \textsuperscript{12} \textit{Marshall Leaffer, Understanding Copyright Law} 13-14 (Mathew Bender, 4th ed. 2005).
\item \textsuperscript{13} 17 U.S.C. § 106 (2006).
\item \textsuperscript{14} See \textit{WGN Ctrl. Broad Co. v. United Video, Inc.}, 693 F.2d 622, 627 (7th Cir. 1982) (“The comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act, the Copyright Act of 1909, had not dealt with to Congress’s satisfaction”).
\item \textsuperscript{15} 17 U.S.C. § 106 (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”
\end{itemize}
public performances.\(^{16}\) Thus, the sound recording copyright holders were not independently compensated for the sound recordings when the song was performed publicly.\(^{17}\) This restriction was granted in the 1976 Act because of opposition from the broadcasting industry – the broadcast industry argued that they should not be charged twice for a song when they played the song on the air.\(^{18}\)

In addition, the emergence of new technologies since the 1976 Act led to calls to update copyright law. As digital technology increased in the 1990s, Congress enacted legislation to further protect the rights of copyright holders.\(^{19}\) In 1995, the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") was enacted\(^{20}\) and added to the 1976 Act as section 106(6), successfully granting public performance rights in sound recording for digital audio transmissions.\(^{21}\)

3. The Digital Millennium Copyright Act

As technology advanced throughout the twentieth century, copyright infringement became more prevalent,\(^{22}\) and the availability of digital downloading created illegal downloading services and widespread music piracy.\(^{23}\) As a result, the recording industry rapidly lost approximately one million dollars per day because of illegal activity.\(^{24}\) In response, industry interest groups effectively worked together to help establish the Digital Millennium Copyright Act ("DMCA").\(^{25}\) The DMCA, enacted in 1998, seeks to “balance the interests of copyright owners and online service providers by promoting cooperation, minimizing copyright infringement, and providing a higher degree of certainty to service providers on the question of copyright infringement.”\(^{26}\) Under the DMCA, a set statutory rate is established for the

\(^{16}\) Arista Records, LLC, v. Launch Media Inc., 578 F.3d 148, 152 (2nd Cir. 2009) (holding under the 1976 Act, “holders of sound recording copyrights... had no right to extract licensing fees from radio stations and other broadcasters of recorded music.”).

\(^{17}\) Arista, 578 F. 3d at 152.


\(^{22}\) Illegal downloading services like Napster largely attributed to the abundant amount of copyright infringement. See infra note 137.

\(^{23}\) LESSIG, supra note 20, at 56-59.

\(^{24}\) See Arista, 578 F. 3d at 155; See also Cleaf, supra note 4, at 359 (discussing how music piracy cost the music industry large sums of money).


performance of sound recordings.\textsuperscript{27} Congress decides the statutory rate, which is currently 9.1 cents or 1.75 cents per minute of playing time.\textsuperscript{28}

The DMCA provides certain limitations on copyright infringement, called “safe harbors.”\textsuperscript{29} A safe harbor acts as a protection for online service providers by precluding the service providers from copyright liability, provided they meet certain criteria\textsuperscript{30} and must adhere to the guidelines.\textsuperscript{31} Qualifying service providers are granted this immunity; however, the immunity “is not presumptive, but granted only to ‘innocent’ service providers."\textsuperscript{32} Under the safe harbors, service providers must reasonably prevent use of their services by repeat infringers.\textsuperscript{33}

4. Economic View of Copyright Law

Copyright legislation is often shaped by the incentives, or lack thereof, that copyright holders face. Economically, creative works are considered public goods.\textsuperscript{34} Public goods are non-rival and non-excludable; the consumption of the good by one individual does not impact the consumption of the good by others, and, accordingly, no one can effectively be excluded from using the good.\textsuperscript{35} Public goods are often characterized by a lack of competition and difficulty in limiting access.\textsuperscript{36} However, these goods have high production costs and it is often difficult to profit from them.\textsuperscript{37} Therefore, there is little incentive for people to produce such goods; the lack of incentive would only be overcome if there were some guarantee that individuals could profit from their works.\textsuperscript{38}

\begin{thebibliography}{99}
\bibitem{27} 112 U.S.C. § at 2901.
\bibitem{28} 17 U.S.C. § 115.
\bibitem{29} 17 U.S.C. § 512; \textit{See also MP3tunes}, 2011 WL 5104616, at *44.
\bibitem{30} \textit{See} 17 U.S.C. § 512 (holding to qualify for safe harbor protection, service providers must: (1) have no knowledge of, or financial benefit from, infringing activity on its network (2) have a copyright policy and provide proper notification of that policy to its subscribers; and (3) list an agent to deal with copyright complaints.).
\bibitem{31} 17 U.S.C. § 512(h). (stating that to obtain a subpoena under the DMCA, copyright owners must identify the work(s) on which copyright is being infringed and the material that is claimed to be infringing; supply the location of that material on the ISP network and contact information for the copyright owner; provide statements attesting to the accuracy of the information provided (particularly the status of copyright owner or agent), as well as a “good faith belief” that the copyright in question is being violated; and make a sworn statement that the information obtained will be used only for copyright-protection purposes).
\bibitem{32} \textit{ALS Scan}, 239 F.3d at 625.
\bibitem{33} \textit{In re Aimster Copyright Litig.}, 334 F.3d 643, 655 (7th Cir. 2003).
\bibitem{35} \textit{See} Hal R. Varian, \textit{Microeconomic Analysis} 144-57 (3d ed. 1992) (discussing the difference between private and public goods).
\bibitem{36} \textit{See id. See also} David Lindsay, \textit{supra} note 34.
\bibitem{37} \textit{See} Hal R. Varian, \textit{supra} note 35 (discussing the difference between private and public goods).
\bibitem{38} David Lindsay, \textit{supra} note 33, at 25 (“To the extent that an information producer is unable to recover the costs of production, incentives for the production of information goods, such
Copyright laws protect producers’ capability of pricing creative goods above cost of production by limiting supply and restricting access. This practice introduces competition and exclusion in what would otherwise be considered public goods. Allowing such restrictions gives the producers an incentive to produce such goods. The utilitarian philosophy of copyright law highlights the economic view of copyright law. The primary purpose of copyright law under the utilitarian philosophy is to promote widespread production and availability of artistic works. Therefore, granting authors financial incentives encourages them to create new works. This monopolistic view is justified as long as society benefits from the works created.

5. Advances in Technology

Technology generates a sense of creativity and productivity in the music industry. Increased competition in the digital consumption of music has altered the way consumers acquire music. Accordingly, the music industry must focus its efforts on using the Internet as the primary way of distributing music to consumers.

a. Shift in Acquiring Music

As technology has evolved, so has the way consumers obtain music. Once dependent on physical records, technology now allows the public to access music at the touch of their fingertips. The public can now download and stream music at the click of a button.

In 2000, compact disc sales in the United States peaked at 785 million albums; eight years later, the number of albums sold dropped drastically to 535 million albums. This decrease in physical record sales is largely attributed to changes in digital technology, especially the widespread use of the Internet. As the sale of compact discs has decreased, the sale of digital downloads has increased – In 2008, CD sales were outnumbered by download sales for the first time. As a result, in 2008, the total number of digital sales was 1.2
b. Effect on the Music Industry

The advancement of technology has been both advantageous and detrimental to the music industry. More specifically, digital downloading has provided a new challenge for the music industry because of legal and illegal downloading. Legal digital download services provide new profit opportunities for the music industry, whereas illegal digital downloading depletes possible income opportunities.

The music industry previously depended on a market in which the distribution of music was highly concentrated in physical CDs. Physical CDs were not easily obtainable unless they were paid for - thus, illegal music piracy was not widespread. However, the shift to digital downloads has produced difficult hurdles for copyright enforcement. The enforcement of copyright with recorded music has become almost impossible. This is largely attributed to the proliferation of digital copies. As a result, in the past ten years, the rise of illegally distributed music has lessened potential revenue for the music industry, and has caused the music industry to face many financial hardships.


47. See Moser, supra note 41 at 102.
49. Yeh, supra note 43, at 225.
50. Perritt, supra note 46, at 88.
51. See Moser, supra note 41 at 82 (“Through the combination of digital technology and the Internet, it has become possible to reproduce musical works without copying the work onto a tradition physical object such as a compact disk.”).
52. Perritt, supra note 46, at 93.
53. See What Do You Need to Know About Codecs, Codecs.com (Feb. 19, 2006), http://www.free-codecs.com/guides/What_you_need_to_know_about_codecs.htm (In digital downloads, you “reduce the size of digital audio samples and video frames in order to speed up transmission and save storage space.”).
55. Music sales in the United States fell approximately 4 percent in 2001, 8 percent in 2002, and 6 percent in 2003. Whereas, it has been reported that an average of 8 million users were online and sharing 10 million gigabytes of data at any given time during June 2004 See Congressional Budget Office, Copyright Law and Technological Change (Aug. 2004); John Borland, SURVEY: MOVIE-SWAPPING UP; KAZAA DOWN, CNET NEWS.COM (July 13, 2004), available at http://news.com.com/2100-1025_3-5267992.html).
c. “Cloudification” – The Essence of Technological Innovation

What is “Cloudification?”

Cloud computing services create new methods for content distribution and consumption. These services create virtual servers throughout the Internet, thereby sharing information over a network rather than through a product. Upon a single download, consumers can access the material from any computer using the “cloud.” These services, such as Netflix, Hulu, and Flickr, provide consumers with a place to store their information without requiring a physical end system. Content access is easily obtainable from a multitude of devices, making it likely that cloud-computing services rapidly increased since 2010.

Cloud Services and the Music Industry

Cloud-based services provide a platform for subscribers to access music. With such services becoming rapidly available on the Internet, subscribers are given the opportunity to access music that they do not already own. One type of cloud-based service is the digital music locker, which allows users to upload, stream, and access music, video and other multimedia files from a variety of devices. The files are on remote servers, which users can access from smartphones, computers, and tablets. Essentially, these services allow customers to manage and play their own music, as well as gain access to others’ music.

Legal Implications of “Cloudification” Services

Currently, there is a heated debate reported in the media concerning the legality of the use of cloud-based music locker services in the music industry. Specifically, legal issues have arisen with regard to the following topics: (1) reproduction, (2) streaming, (3) downloading/distribution, (4) optimization/creating a derivative work, and (5) liability of the service provider.

58. See Sherman, supra note 57, at 67.
61. See Sherman, supra note 57, at 67.
focuses on the balance between copyright holders’ exclusive rights to reproduce and publicly perform their works, and consumers’ rights to make lawful use of the works. There has been much confusion as to whether the consumers’ use infringes the copyright holders’ rights.

Courts have been left to examine whether cloud-based services are permissible under current legislation. For example, in *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, the Second Circuit addressed the copyright implications of a cloud-based DVR system. The Court held that “because each RS-DVR transmission is made using a single unique copy of a work, made by an individual subscriber” only one subscriber is capable of receiving the transmission of that particular work and therefore the performance is not “public.” However, this decision has left confusion as to whether streaming legal content to an end user on the cloud implicates the public performance right.

Additionally, these services pose serious legal questions regarding ownership, copying responsibility, reproduction rights, distribution rights, and licensing. These types of questions examining the rights of copyright owners highlight the confusion surrounding the legality of cloud-based services. Despite the confusion about their legality, many digital music locker sites launched their services without securing licensing rights from record labels. While music licensing determines the distribution and availability of music, allowing the digital service providers access to the music without securing licensing takes revenue away from the music industry. Courts in cases such as *EMI v. MP3tunes* and *Cartoon Network* have discussed this question. Such cases expose the potential legal implications of cloud-based digital music services, which the likes of Amazon, Google, and Apple now offer. However, because the law on the “cloud” is unclear, the music industry is challenging service providers about the cloud’s legality.

62. *Id.*
64. *Id.* at 135.
65. See Sherman, supra note 57, at 69.
III. COURT’S DECISION IN EMI v. MP3TUNES

A. Background

MP3tunes operates two websites: www.mp3tunes.com and www.sideload.com.69 Both sites provide integrated music services for their users. MP3tunes.com grants members an online music locker with “unlimited storage of music, as well as the ability to stream music from the locker, listen to music from any computer with an Internet connection, and to download copies of the music to any computer.”70 Payment of a $39.95 fee ensures members the opportunity to upload files to their locker and then download the uploaded files to any computer or portable music player.71

Sideload.com creates an organized list of music files and provides links to the files identified on the list.72 All files on sideload.com are hosted on third party websites.73 Additionally, the website allows users to “search for a song, browse an alphabetical catalog of artists, or choose songs from lists of ‘Most Popular Tracks,’ ‘Newest Tracks,’ and ‘Featured Tracks.’”74 A simple click of the link to a music file allows the song to be streamed to the user.75 Additionally, simply selecting an icon allows a copy of the file to be stored in the user’s music locker at MP3tunes.com.76 Finally, users can copy songs from any third-party website and place them in their personal music locker with the installation of “Oboe Sideload Plugin.”77 Any type of duplication of a song from a third-party website creates a link to the specific song being generated onto sideload.com.78 The end result is a domino effect - as “users discover free songs on the internet, the number of songs available through Sideload.com increases.”79

Before activating an MP3 locker, users must agree to adhere to MP3tunes’s anti-infringement policies. The anti-infringement policies prohibit users from storing illegally obtained songs in their music locker.80 If a user is accessing a song that infringes copyright, MP3tunes, through its registration with the Copyright Office, will receive notice of the alleged infringement from copyright owners.81

70. Id.
71. Id.
72. Id.
73. Id.
76. Id. at ¶ 43.
77. Id. at ¶ 44.
78. Id. at ¶ 48.
80. Id. at 635.
81. Id.
On September 4, 2007, EMI Music Group North America (“EMI”) issued a takedown notice to MP3tunes requiring MP3tunes to remove 350 song titles and web addresses that infringed EMI’s copyrights from mp3tunes.com. In response, MP3tunes removed the links to the specific web addresses, but did not remove the infringing songs from its users’ lockers. Shortly after, two additional takedown notices were issued to MP3tunes by EMI and EMI Entertainment World. Ultimately, MP3tunes removed the specific links but did not remove the content from users’ lockers.

B. Procedural History

On November 9, 2007, Plaintiffs “EMI” and fourteen record companies and music publishers brought a copyright infringement action against Defendant, MP3tunes LLC. On July 28, 2009, the Plaintiffs filed an Amended Complaint, adding fifteen additional music publishing companies as plaintiffs. Ultimately, the Defendant’s motion to dismiss the direct infringement claims was denied because MP3tunes had not identified a single track “as definitely lawful, non-infringing, and lawfully included in the cease-and-desist letter.” Following the Defendant’s motion to dismiss, all parties moved for summary judgment. In response, District Judge William H. Pauley III, for the United States District Court for the Southern District of New York, ruled that both party’s motions were granted in part and denied in part.

C. Decision

The Court found that MP3tunes could sufficiently claim safe harbor protection for the EMI works stored in MP3tunes.com and linked to Sideload.com. The court stated that MP3tunes is “precisely the type of system routinely protected by the DMCA safe harbor.” Accordingly, MP3tunes adhered to the repeat infringer policy and was only expected to reasonably enforce copyright infringement. Thus, it did not have an affirmative duty to police its users, and a general awareness of rampant infringement was not enough to disqualify its service from the safe harbor protection. However, the Court also found that once MP3tunes received a valid takedown notice, it had an obligation to remove the infringing material from customers’ personal music

82. Id.
83. Id.
84. Id.
85. Id. at *1.
87. Id. at *3.
89. Id. at 646.
90. Id. at 650.
lockers. Because MP3tunes did not remove the infringing material from personal music lockers, it was found liable for contributory infringement.  

The Court also explored the question of EMI’s public performance rights. Because MP3tunes does not employ a “master copy” storage system, its system is protected by the DMCA safe harbor clause, and MP3tunes is not required to obtain master-use licenses from record labels for its services.

IV. ANALYSIS – POSSIBILITIES TO PROTECT THE MUSIC INDUSTRY

A. How does this Impact Other Digital Service Providers?

Proponents of the music industry carefully monitored the court’s decision in *EMI v. MP3tunes*. Even though the popularity of cloud services has increased in recent years, no major court decision has decided the legality of cloud-based music services. Thus, the court’s decision in this case impacts the likes of Amazon, Google, and Grooveshark, and sets a bar for how future courts should rule in digital service provider cases.

Grooveshark is a cloud-based music service like MP3tunes – it provides online music streaming and music search engine for consumers. Like MP3tunes, Grooveshark allows users to upload music and create playlists. In November 2011, Universal Music Group filed a copyright lawsuit against Grooveshark claiming Grooveshark’s leaders posted more than 100,000 pirated songs onto its music service. Using the same tactics as MP3tunes, Grooveshark is claiming that it is not liable for copyright violations because Grooveshark is protected under the safe harbor provision in the DMCA. As the court explained in the *EMI v. MP3tunes*, the DMCA protects digital service providers from liability for copyright infringement committed by its users; however, if Universal’s allegations are true, Grooveshark will not be

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93. Id. at 649-50.
95. These service providers have launched cloud music services. Only Apple has secured licenses. The Court’s interpretation of cloud-based services and the DMCA will only encourage these types of services to launch their products without first securing licenses. See id.
97. Id.
99. See supra discussion, at 15 (discussing the holding in the *MP3tunes* case).
101. Universal claims that not only users, but individuals in the company committed acts of infringement.
protected from its own acts of infringement.\(^\text{102}\)

Although Grooveshark has negotiated direct licensing deals with EMI and other independent record labels,\(^\text{103}\) Grooveshark has not secured such licenses with other recording entities such as Universal.\(^\text{104}\) Like the digital service provider in \textit{MP3tunes}, Grooveshark’s users are able to upload their own music. However, record labels like Universal own copyrights in the music, and often, Grooveshark has not secured direct licenses with the record labels to use the music content.\(^\text{105}\) As the court stated in \textit{MP3tunes}, the safe harbor clause under the DMCA protects digital service providers from the copyright infringement of its users, so long as the company did not have direct knowledge of the infringing activity, and, once notified, they immediately removed access to the content.\(^\text{106}\) However, unlike in \textit{MP3tunes}, the allegations against Grooveshark contend that the company had direct knowledge of the copyright infringement.\(^\text{107}\)

Even though Universal’s claim against Grooveshark is not directly paralleled in \textit{MP3tunes},\(^\text{108}\) both cases mark the importance of proper legislation, court interpretation, and business models surrounding copyright for the music industry. As technology changes and new and improved digital service providers emerge, updated legislation, court interpretation, and new business models are needed to safeguard the music industry. These practices would strike the proper balance that copyright law in the United States strives for: innovation and incentive. However, current legislation, court interpretation, and music industry business models have not adapted to the new challenges that technological innovations, such as cloud-based computing systems, have posed. Thus, these three aspects need to be further examined to determine how copyright holders, and, more specifically, the music industry, can properly secure their rights under copyright law despite the transformation of

\begin{footnotes}
\footnotetext[104]{Id.}
\footnotetext[106]{Capital Records, Inc., 821 F. Supp. 2d at 646.}
\footnotetext[108]{One of the primary claims against Grooveshark is that the company had direct knowledge of the copyright infringement, whereas MP3tunes claimed that its employees were not accessing the music.}
\end{footnotes}
Legislation plays a fundamental role in regulating, promoting, and preventing copyright infringement in the United States. However, as the Library of Congress describes, the enactment of a new law is extremely time-consuming and difficult. Not only does the drafting process require a great deal of research, writing, and agreement, but then the House and the Senate must pass the bill. This process can often take years to complete – and that is if the bill is even able to complete each step in the process. Because this process can take a great deal of time and effort, it marks a huge hurdle for creating new and updated legislation, specifically legislation that encompasses the ever-shifting technological innovations. As a result, individuals are continuously relying on the courts’ interpretations of previously enacted statutes to determine how the statutes apply to ever-changing technology. Although Congress’s effort in passing both the MPSR and the DMCA was aimed at protecting the music industry’s copyrights, digital technology has made it even more difficult for the music industry to adapt to technological changes.

In Robert Levin’s *Free Ride: How Digital Parasites Are Destroying the Culture Business, and How the Culture Business Can Fight Back*, the former Billboard executive editor examined the challenges new technology poses to the music industry, and the survival tactics the industry should adopt to overcome these challenges. One of his suggestions to ensure that digital service providers pay for the music they have taken is to revisit or reinterpret the DMCA. Although reinterpreting the DMCA would give Internet service providers more responsibility for how their products are used, it is too lengthy a process. As a result, the legislation is outdated and does not relate to the current technology the music industry is facing. Thus, the courts are left to interpret the legislation and configure it to apply to new technology.

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109. *See 17 U.S.C. § 501 (“anyone who violates any of the exclusive rights of the copyright owner... is an infringer of the copyright or right of the author.”).*
111. *Id.*
112. *Id.* It took 19 years from the 1976 Copyright Act to be passed.
114. *Id.*
C. Should We Continue to Rely on the Court's Interpretations?

The difficulty in enacting updated legislation has left the courts responsible for interpreting the current statutes. Although there have been triumphs for the music industry against illegal technologically advanced services, like digital service providers, this question still remains: “How equipped are the courts in deciphering technological copyright infringement claims?” Because legislation enacted by Congress is too outdated to address new legal challenges presented by current technology, courts and parties are interpreting and negotiating the legislation more often than following the current statutes themselves.

Even though judges are left to interpret legislation and make their own conclusions, complex copyright cases such as EMI v. MP3tunes provide a platform for other judges to follow. Often, judges are not experts in the complex field of copyright law; thus, it is easier for the judges to follow the rulings of other courts. However, this practice is not fair to the music industry and does not properly establish the balance that copyright law in the United States strives to achieve.

There are prominent federal rulings that have required the music industry to rethink its position regarding the DMCA. Although these rulings do not make it impossible for major players in the music industry, like EMI, to continue to threaten and sue online music service providers and consumers, the rulings severely limit the legal actions the major players can take. As a result, the music industry is left to protect itself from possible copyright infringement from digital service providers. Consequently, one of the only options left for the music industry is to rethink its current business models and make changes that will allow it to adapt and ensure its profitability in the face of technological advancements. These changes will allow the music industry to challenge the setbacks it has faced in the new era of digital service providers and cloud-based computing.

115. See Metro-Goldwyn-Mayer, Inc. v. Grokster Ltd. 545 U.S. 913 (2005) (“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”); Jacobsen v. Katzer 535 F.3d 1373 (Fed. Cir. 2008) (holding that violating terms of licenses constitutes copyright infringement); but see Recording Indus. Ass’n of America, Inc. v. Verizon Internet Services, Inc. 351 F.3d 1229 (D.C. Cir. 2003) (ruling against the RIAA in its use of the Digital Millennium Copyright Act’s subpoena provision to obtain identifying information about individual Internet users suspected of infringing copyright.


117. See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 914-16 (2005) (holding that P2P file-sharing software distributors can be liable for user downloads); Jacobsen v. Katzer, 535 F.3d 1373, 1380-82 (Fed. Cir. 2008) (holding that violation of music licenses is copyright infringement); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015-18 (9th Cir. 2001) (noting that sampling of music does not constitute fair-use).

D. Suggestions for New Business Models in the Music Industry

Because current legislation and court decisions involving new technology, like digital service providers, have collided with the survival of the music industry, the music industry is faced with challenging the issues themselves. Additionally, the law surrounding technology like cloud-based services and music lockers is unsettled, so the music industry will have to improvise and discover new options for their business if they want a resolution in the near future. Many critics have concluded that one of the reasons for illegal downloading stems from the record labels’ lack of response to customers’ wishes. If the music industry wants to set stricter objectives in an effort to prevent copyright infringement, it is going to have to recognize the policies that are currently holding it back and create and implement new business models that overcome those restrictions.

 Shortly after the court’s decision in MP3tunes, Michael Robertson, the CEO of MP3tunes, remarked, “We’re pleased that the court upheld our fundamental business model and, more broadly, unlicensed cloud music.” This statement highlights the importance of business models in the music industry, as well as posing an important question: How can the music industry shift its business model plans in an effort to adapt to the ever-changing technology? Music industry entities, such as Billboard Magazine, have highlighted this issue and stated “the music biz is in the middle of a very long and painful transition from one business model to a new and undefined one.” Thus, it is important to look at the old business models the music industry has held onto and explore how it can establish an effective and profitable new business model.

Old Business Model

The business model adopted by the music industry in the late twentieth century heavily relied on revenue from recorded music, live performances, and publishing. Record labels and radio stations controlled access to the market because of their availability to mass-market the distribution of music. Record labels produced the music, and radio stations gave consumers the ability to listen to the music. However, as technology has shifted, so have the means of

122. See generally Perritt, supra note 46.
123. Id. at 73.
124. Id. at 73-74.
acquiring music and gaining revenue. Consumers now have the ability to access music through portable music players, digital files on computers, and the Internet. Technology has reduced the barrier of entry into the music industry, causing record labels and radio stations to no longer function as the effective gatekeepers. Musicians can now make their music available to the general public without the help of record labels and radio stations. Therefore, the music industry has had to adapt to these new changes in an effort to achieve a profitable business.

Under the old business model, revenue acquired by recorded music focused on CD album sales and radio airplay. However, as portability and technology have expanded, the means for acquiring revenue from these sources has drastically altered. First, recorded music is purchased digitally more often than physically. Next, like recorded music, technology has also shifted the way revenue is acquired through live performances. Live performances generate three to four billion dollars in revenue for the music industry per year, and are enhanced by technological innovation. Lastly, royalties arising from performance and derivative work licenses mark a crucial source of income for the music industry. Technology largely impacts all three sources of income originating from the old business model. Thus, it is up to the music industry to alter its current business model and accept the technological changes that the Internet has generated.

“Push” vs. “Pull” Marketing

One recent issue facing the current business models of the music industry is “push v. pull” marketing. Copyright scholar William Patry has defined “push marketing” as a system in which businesses sell products in accordance with what they want to sell; the alternative is to sell products in accordance with what consumers want to buy. Until recently, the music industry has been able to adopt the former view and rely on the products it desires to put on the market. This view has largely contributed to the current structure of the music industry and the ways in which artists are marketed.

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126. Id.; Perritt supra note 46, at 75 (“The wide availability of inexpensive portable music players, the introduction of digital formats and compression software pre-installed on almost every personal computer, and the ubiquity of the Internet destroyed the control exercised by traditional gatekeepers and made intellectual property in recorded music essentially unenforceable”).
127. See Hart, supra note 125; Perritt, supra note 46, at 75.
129. See Louis Hau, Another Record Year for the Concert Industry, FORBES, (Jan. 4, 2008), http://www.forbes.com/2008/01/04/concert-revenues-2007-biz-media-cx_lh_0104bizconcert.html (total ‘primary market’ concert ticket sales for 2007 were $3.9 billion, up 8% from 3.6 billion in 2006).
industry. Major record labels have very little competition; the three major labels account for over 60% of the record labels in the world. As such, they can sell music on their own terms and do not have to respond to consumer preferences. Such a system makes record labels completely reliant on having absolute control over the distribution of music. As a result, record labels are generally resistant to innovation in technology because it weakens their absolute control over the distribution of their products. However, this “push” marketing concept forces the music industry to alter their current business model.

In contrast, Internet distribution systems adopt a “pull marketing” approach. Service providers adapt their products to successfully meet the needs of consumers. “Pull marketing” does not try to forecast demands – rather, it “quickly respond[s] to consumer preferences with an ever expanding range of options, harnessing the creative ideas of consumers in order to offer goods and services more quickly tailored toward meeting their needs.” On the other hand, “push marketing” producers forecast consumer demands on what they expect consumers to buy. The “pull marketing” approach allows consumers to interact with producers by making their preferences known. Consequently, this consumer-driven culture of the Internet “renders push marketing and vertical monopolization impossible.”

The “pull marketing” approach adapted from the Internet is in direct conflict with the traditional business model adopted by the music industry. However, as Internet use has increased, record labels have lost the ability to exercise absolute control over the distribution of music. Now, the music industry is faced with the crucial issue of shifting its current business model.

The Napster case presents an example of the failure of “push marketing” in the old business model. Users of Napster desired a peer-to-peer file sharing service that allowed them to share music files over the Internet. However, the music industry opposed these services because it threatened record labels’ control over content distribution. According to William Patry, “Napster is reported to have offered a billion dollars to the industry to settle the litigation and to be permitted to operate Napster solely as a licensed subscription service, paying a monthly subscription fee of $10, split fifty-fifty between Napster and the music industry.” Patry further describes how the music industry could

132. Patry, supra note 130, at 6.
133. McKay, supra note 39 at 5-6.
134. Id. at 5.
135. Patry, supra note 130, at 7.
136. See supra note 126.
137. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). See also McKay, supra note 38, at 1 (discussing the impact Napster had on the music industry).
138. P2P stands for peer-to-peer. It is a computer network that allows users to access each other’s files.
139. Patry, supra note 130, at 1.
have made $792 million a year from Napster’s offer, if even just half of Napster’s users paid the monthly subscription fee. However, the music industry executives did not accept Napster’s deal and ultimately brought suit against them. Napster lost in the Ninth Circuit – however, this loss did not exactly prove to be a victory for the music industry. Instead, once Napster was shut down, the peer-to-peer market quickly spread into multiple file-sharing services. The likes of these services – such as Grokster, Kazaa, and LimeWire all generated a greater amount of music piracy and very difficult litigation for the music industry to pursue.

The Napster situation does not provide a concrete answer for the music industry. It can be argued that accepting the Napster model could have prevented the myriad of illegal file sharing services that quickly surfaced once Napster was shut down – however, this argument only serves as an example and not an answer for the music industry. Thus, if the music industry adopts the “pull marketing approach” and gives consumers what they desire, it may have a more stable and profitable future. Thus, the music industry has to turn to new business models, in order to allow their businesses to thrive. The following examples of potential business models would provide stability and new incentives for the music industry, while allowing the music industry to flourish in revenue and innovation.

Stable Income Opportunities

The Subscription Model: Provider of Stable Income

Among the easiest types of business models the music industry has looked to adopt is the subscription model. This model, which allows users to legally listen to music, has accounted for substantial increases in digital service providers on the Internet. The subscription model marks a logical shift from

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142. (“After Napster was shut down, new networks quickly appeared. Napster was replaced by Aimster and AudioGalaxy, which were supplanted in turn by LimeWire, Morpheus and Kazaa, which were then partially supplanted by eDonkey and BitTorrent.”).
143. E.g., Grokster, 545 U.S. at 914-16.
144. See Nate Anderson, British Music Boss: We Should Have Embraced Napster, ARS TECHNICA (June 28, 2009), http://arstechnica.com/tech-policy/news/2009/06/british-music-boss-we-should-have-embraced-napster (posing the question that “[m]usic has gotten over its fear of the online world. Had that been true a decade ago (and had Napster truly been willing to do a workable deal), where might we be today?”).
146. See Tom Cheredar, Streaming Music Services are Giving the Music Industry a Huge Revenue Boost, Venture Beat (Mar. 27, 2012), http://venturebeat.com/2012/03/27/riaa-
physical to digital music acquisition.\textsuperscript{147} Services like Spotify and Facebook Music allow users to listen to limited songs at no cost, or unlimited songs at a low cost. As technology continues to create new innovative services, on-demand music will be available to consumers in plethora of new ways – in the car, at home, on their phone, and on their computer. Thus, music streaming royalties will provide a constant payment to music artists and writers.\textsuperscript{148}

Even though streaming music currently results in only a small percentage of all music listening,\textsuperscript{149} it is rapidly growing into a prominent business model of the future. A new study from ABI Research forecasts that by 2016, accessing music through streaming services will become more important than owning songs, albums, or tracks,\textsuperscript{150} and predicts there will be over 161 million subscribers by 2016.\textsuperscript{151} The study examines how streaming services will have a positive impact on both consumers and the music industry. Consumers will have easier access to music, while the music industry will profit from users’ legal consumption of music.\textsuperscript{152} Therefore, both consumers and the music industry win from these developments.

There are two main reasons that subscription services are promising for the music industry: the pay and the exposure. As compared to a digital download, where an artist only gets paid once, these types of music-streaming services pay royalties to the artist \textit{each time} the song is played.\textsuperscript{153} In comparison, once an individual downloads a song, they can listen to it a million times, or even place it on a CD and distribute it to 500 different people (although this could be considered copyright infringement). These types of activities do not bring any revenue to the artist; rather, the artist and writer only profit from the single, initial download. Alternatively, when a user streams a song from a digital service like Spotify, the artist is given infinite potential to secure future royalty payments.\textsuperscript{154} As technology continues to flourish, these...
types of services will provide a consistent compensation for the music industry legally, rather than encouraging people to illegally listen to or download music.

Next, music subscription services provide continual exposure for artists. As users listen to artists’ songs on these services, users will be encouraged to buy the entire album, or purchase concert tickets and event merchandise. However, many established acts such as Adele and Coldplay are opting out of the subscription model. These well-known acts are instead using a more purpose-driven approach to digital marketing, influencing listeners to purchase or download their music instead of allowing them to use on-demand services (such as Spotify). In so doing, these artists feel that their purpose-driven approach ensures that the fans will buy the song rather than listen for free via an on-demand service. Although this method seems foolproof, it marks the “push” type of marketing that the music industry needs to disembark from – the music industry is relying on the products they want to put on the market, rather than the products the consumer wants. If a consumer’s only method of listening to an artist’s music is to spend money to purchase or download it, the consumer will very likely resort to other, often illegal ways of obtaining the music. Thus adapting to the “pull” type of marketing employed by music subscriptions services will allow the music industry to obtain a profit while exposing users to the artists. Ultimately, consumers are encouraged to listen to music legally and still enable the music industry to profit from consumers listening to their songs.

Additionally, these types of services allow exposure for an artist’s music, concerts, merchandise, and news. If consumers can be exposed to artists’ music legally at no or little cost, they will be more likely to desire additional exposure to that artist. Users will be more inclined to attend live performances, read news surrounding the artist, and purchase artist merchandise. More importantly, listening to music through subscription services will hopefully encourage consumers to purchase the artist’s entire album and other sound recordings.

The subscription model highlights the importance of adopting the new business model. Such a model will encourage the “pull marketing” approach while allowing consumers to make choices of their own. The music industry should be more accepting of this method – otherwise, like the Napster case, the

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156. Id.
157. Id.
158. Id.
160. See Rose supra note 146.
outcome could be detrimental to the music industry. Consumers could rebel and adopt illegal file sharing methods, rather than taking part in the legal music listening methods that are available to them.

Global Repertoire Database

In addition to subscription services, a global repertoire database could provide steady compensation for the music industry. At the National Association of Recording Merchandiser’s Entertainment & Technology Conference on November 4, 2011, Adam Parness of Rhapsody recognized that one of the biggest issues surrounding digital service providers and licensing is “actually finding all the publishers you have to pay.” One suggestion for overcoming this issue is to create the Global Repertoire Database (“Database”). This Database would serve as the sole database that contains all musical works; it will establish a central source for music licensing and will be governed by standardized rules and communication procedures. The Database would determine which publisher or songwriter owns the right to the song and would enable the copyright owner to effectively get paid each time their song is played online or through mobile services. Such a Database would solve many of the dilemmas facing copyright holders in the digital age – i.e., making sure copyright holders get paid for their work despite the increased use of music copyrights from the digital era.

Because there is not currently a single document, catalogue, or database that details the millions of songs and recordings that are presently available, the Database would overcome many of the licensing issues facing the music industry. First, the Database would grow the marketplace for legitimate distribution of digital media. By eliminating the need for numerous national

163. Music Ally, Global Repertoire Database Group Launches Scoping and Stakeholder Study (Sept. 28, 2011), http://musically.com/2011/09/28/global-repertoire-database-group-launches-scoping-and-stakeholder-study (“Its aim is to provide a single, comprehensive and authoritative representation of the global ownership and control of musical works in order to reduce data management and working capital costs and to lower the administrative barriers to businesses seeking to distribute content online, as well as to ensure that rights owners are quickly and efficiently compensated for their work.”).
165. See also Luiz A. Buff, Copyright Efficiency, MUSIC BUSINESS JOURNAL, http://www.globalrepertoiredatabase.com/index.php/background-to-the-grd . See also http://www.thembj.org/2012/10/copyright-efficiency/
166. Although the “copyleft” perspective might argue that such a Database will restrict access for users, the Database will actually create a rich public domain by giving users greater access to digital media. Instead of users being restricted because they are uncertain of the copyright owners, they would be able to access the information in one central database. Additionally, the copyleft regime would argue that once the songs are accessed, they should enter the public domain. See Severine Dusollier, Open Source and Copyleft: Authorship Reconsidered?, 26 COLUM. J.L. & ARTS 28 (1997). However, there would be no incentive for authors if they were
societies to maintain different and incompatible databases\textsuperscript{167}, the Database would instead create a central database for users. Users who wish to license a repertoire of works and recordings can access the central database, drastically reducing the number of licenses needed.\textsuperscript{168} Next, the Database would allow users to easily identify the rights they are exploiting, therefore allowing them to more easily obtain licenses legally.\textsuperscript{169} Users would be provided with a simple way to acquire information for the licenses they need without having to access a multitude of databases.\textsuperscript{170} Lastly, the Database would provide efficiency and simplification in copyright licensing, while encouraging innovation and competition in licensing solutions.\textsuperscript{171} Participants in the industry could devote resources towards one robust database, allowing smaller players and new entrants to play a larger role in the system.

Vast arrays of music services have been launched this year: Amazon Cloud Drive, Spotify, and Google Music, just to name a few.\textsuperscript{172} As previously discussed, these services contribute to uncertainty as to who owns the copyright of musical works.\textsuperscript{173} However, the Database would ensure that copyright holders are identified and properly compensated whenever their works are used.

EMI Music Publishing, Universal Music Publishing, iTunes, PRS for Music, STIM and SACEM have joined together to create the Global Repertoire Database Working Group.\textsuperscript{174} In a cross-sector initiative, this group will research twenty representative organizations, including collecting societies, publishers, songwriter associations, digital retailers, and other large entities in the music industry to determine the governance, funding, and design of the Database.\textsuperscript{175}

Such a Database would solve many problems facing copyright holders. Not only would it simplify the music licensing process, but, like the

\textsuperscript{167} These organizations are called Performance Rights Organizations (PROs). The main ones in the United States are ASCAP, BMI, and SESAC.


\textsuperscript{169} ec.europa.eu Global Repertoire Database at 2.


\textsuperscript{171} ec.europa.eu Global Repertoire Database at 2.


\textsuperscript{173} See discussion supra 10-12.


\textsuperscript{175} Id.; See also 2011 WLNR 14077073.
subscription services, it would provide a steady flow of income to artists and publishers. The creation of the Global Repertoire Database would mark a crucial step in ensuring that individuals in the music industry get paid for their work, while overcoming much of the confusion caused by digital technology. Jane Dyball, Senior Vice President of Warner/Chappell Music Ltd in London highlighted the importance of a repertoire database, stating that it would create “one source of truth for data which relates to musical works throughout the world.”

Individuals in the music industry should work together to quickly create such a Database, and recognize the importance of such a change. By accepting the change, the music industry can more efficiently protect itself in the area of licensing, while securing revenue for the future.

The New Business Model: Embracing Technological Change

Although streaming and licensing revenue provides income for the music industry, it does not generate enough to overcome the revenue gap produced by the downward pressure on prices. Instead, the music industry will have to focus its attention on expanding their revenue through the use of technological innovation. Advertising, fan interactions, and live performances are all means of using technology to help promote artists, while helping to fill the revenue gap.

In order to develop a new business model, the music industry must focus on tapping into new revenue streams. To do this effectively, the music industry must focus on three crucial steps: (1) identify and strategize tapping into a new revenue stream; (2) create easy sources of acquiring the music; and (3) persuade potential consumers to invest in that particular service or product.

In essence, it is crucial for artists to develop a “brand.” Once developed, all elements of that “brand” can be sold and the music industry can maximize its revenue-acquiring possibilities. Furthermore, all of these potential sources of new revenue are enhanced by technology because it allows the music industry to reach out to consumers in a creative and efficient manner.

Digital Services Provide Promotion

Digital service providers often create a sense of uneasiness in the music industry. While many entities in the music industry frown at the thought of non-licensed digital service providers, the reality is that these services cannot be ignored. Turntable.fm was one of the biggest stories in digital service

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177. See, e.g., Rose, supra note 146.

178. See Perritt, supra note 46, at 66.

179. Id. at 191.

180. E.g., merchandise, videos, & fan clubs.
providers in the year 2011. Turntable is a social media platform that allows users to create a playlist and act as a DJ, using their playlist to compete against other users. Instead of rushing to shutdown Turntable, music copyright owners have engaged in productive talks about the possible legal implications of the service. Because many of the new innovative digital services providers are DMCA-compliant, i.e., they create their business models around not having to negotiate licenses, individuals within the music industry have to accept the services and learn to adapt. In order for the music industry to continue to thrive in the upcoming years, music copyright owners must be willing to work with the new types of services. How can they do this, and what types of steps can they take to continue to accept these emerging technological services?

At first glance these types of services seem to detract revenue from the music industry (because songs are being used without being paid for). However, the services provide a promotional incentive for the music industry. Listening to artists’ songs on these types of digital services is likely to encourage consumers to download or stream the actual song, persuade them to download and stream other songs by the same artist, attend live shows, and purchase merchandise. In order to create a model accepting of technology, individuals in the music industry need to create changes in their business models that embrace the emerging technology. The long-term benefit of acquiring revenue in a variety of ways will provide a steady future for the music industry. Thus, the music industry should, at the very least, participate in conversations with such services, and work collectively to help develop business models that are not only profitable for the consumers, but for the music industry as well. Furthermore, by working collectively, the music industry will be able to create new revenue streams and maximize its use of technology by creating a brand for its artists.

E. Uncertainty

Although these suggestions provide an encouraging outlook on the future of the music industry, uncertainty would remain if the music industry were to accept these changes. Many of these technological innovations, like digital service providers and cloud-based computing systems, are new to not only the music industry, but to the Internet as well. The long-term significance and impact of these services has not been determined. Ultimately, the goal of copyright law is to provide incentive for copyright holders. Yet, it is not certain that accepting the changes in technology and embracing the new technological

183. Peoples, supra note 180.
184. See id.
services will remain consistent with the U.S. Constitution’s intent to promote the Arts and Sciences. If this cannot be done through the new business models, then the music and copyright industry will have to reevaluate the current structures. This might mean amending legislation, or investigating and improving upon the way courts determine copyright infringement cases in light of technological innovation.\textsuperscript{185} However, before Congress or the courts start looking at making these types of changes, the music industry should try to overcome the setbacks with the legislation and interpretation that is currently in place. Hopefully, by accepting the changes and working with new business models, the revenue streams will continue to be profitable in the future.

V. CONCLUSION

The court’s decision in \textit{MP3tunes} highlights the importance of investigating technology’s impact on the music industry. An examination of the court’s reasoning clarifies the need for new business models. Instead of relying on the court’s interpretation of existing legislation, the music industry should take the initiative to create viable new business models. Such business models, developed through the “pull marketing” approach, would allow the music industry to be more accepting of new technology and strengthen its future long-term. Hopefully the music industry can embrace the changes, working together with service providers to enhance not only the experience for consumers, but also for themselves.