

The Continuing Vitality of Music Performance Rights Organizations

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I. Introduction

The market for recorded music today is in a major upheaval. The internet has caused overwhelming changes in how music is distributed. With these changes have come repeated calls for changes in the legal structure of IP rights that apply to music. Many of the proposed changes to the music copyright system include a restructuring of the role of the performing rights organizations (PROs) and the manner in which rights to music are cleared. The more radical proposals would have the effect of eviscerating or essentially eliminating PROs on the premise that they have become unnecessary given current technological and legal conditions. Others would eliminate them as currently structured, either folding their operations into a single, overarching musical rights licensing entity, or absorbing them into a statutory compulsory licensing scheme. The overall idea is to eliminate one of the rightholders involved in the clearance of contemporary music rights, and thereby streamline the rights clearance process.

In this paper, I argue that adopting any one of these proposals would be a major mistake. The traditional function served by PROs has in no way been rendered obsolete by the changes sweeping the music industry. Songwriters still deserve to be compensated for their work, as they have been since the advent of the PRO in the early twentieth century. The basic rationale of the music PRO – to permit songwriters to make a living at their chosen specialty –

makes as much sense today as it always has. The new models of music distribution have not changed this basic truth. Indeed, as I argue later, the music landscape is becoming ever more transaction-intensive, as new platforms and music markets proliferate. In this setting, it makes sense to *increase* rather than decrease the functional reach of PROs today. No other established organizations with a long track record of effectively monitoring music use and distributing royalties are in place today.

To get a sense of the contributions that PROs make to songwriters' livelihoods, consider the most recent royalty distributions from the three major US music PROs, SESAC, ASCAP and BMI. In the year ending July, 2007, these three PROs distributed roughly \$ 1.5 billion to songwriters and their publishers;¹ market leader BMI alone handed out \$ 732 million in its 2006-2007 fiscal year. (See Figure 1, below.)² The total number of copyright licensing and royalty payment transactions exceeded 5 billion during this period – a sure sign that PROs' hefty investments in transactional infrastructure have been effective and are serving songwriters well.³

¹ See ASCAP Annual Report, avail. at http://www.ascap.com/annual_report/2006/ascap_annual_report2006.pdf, p. 20;

² See "BMI Posts Record-Setting Royalty Distributions, Revenues," avail. at <http://www.bmi.com/news/entry/535402>.

³ For example, consider the "BlueArrow" digital capture and sampling technology from BMI's Landmark Digital subsidiary. This capability permits fast and accurate real-time identification of even short snippets of music, and therefore facilitates payment to songwriters for even brief performances of copyrighted works. See <http://landmarkdigital.com/how>.

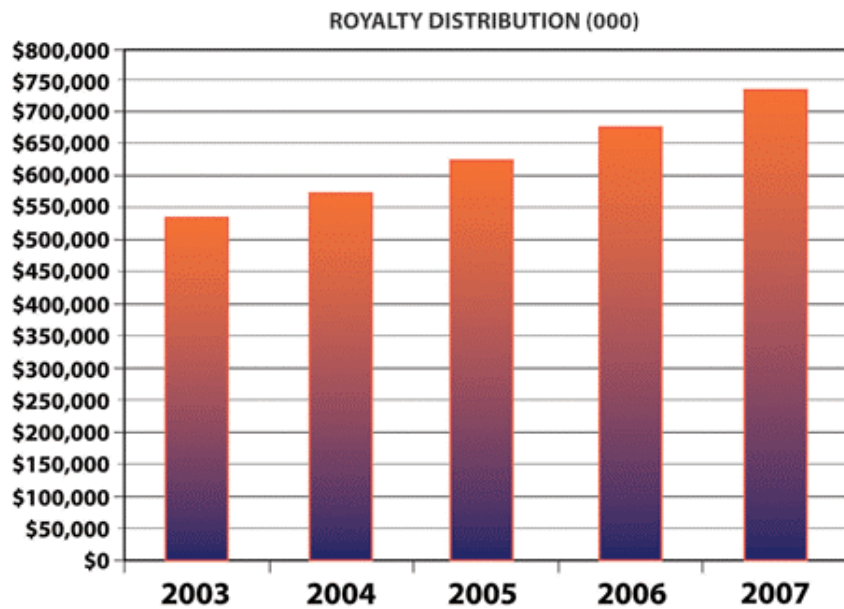


Figure 1: BMI Royalty Payments

Clearly, reform proposals carry a heavy burden in the face of this evidence that PROs are working, and working well, to serve the interests of songwriters. In my view, all of the current “reform proposals” suffer from what has been termed the “nirvana fallacy”: they propose “ideal” licensing institutions and mechanisms, and compare these idealized visions against real (but imperfect) PROs.⁴ Naturally, the idealized vision looks superior; it always does. But when the ideal alternatives are analyzed more closely, the picture changes. Each proposal suffers from serious defects. Compulsory licensing is far inferior to private bargaining as a way to set prices for IP content. It either

⁴ See, e.g., Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: University of Chicago Press, 1994).

suffers from fatal rigidity or a never-ending cycle of legislative revision, and therefore instability. Proposals to consolidate music rights to facilitate licensing are also way off the mark; songwriters or their representatives would see their interests swept aside by the owners of sound recording copyrights, which would undermine the gains songwriters have made since the advent of PROs. It is these gains that permit music composition to be a viable and separate *profession*, so in effect consolidating music rights might mean the end of independent songwriting as a viable way to make a living. There is no reason why the advent of the internet, and the markets made possible by the new technologies of digital media, should lead to the demise of the independent songwriting sector. Continued legal support for songwriters, and in particular for PROs as currently constituted, is essential if we as a society are to avoid this quite preventable backward step.

A. Proposals for Change

There are all sorts of predictions and visions regarding the future of music. Some see the beginning of a grand utopia in the “leveling” and “democratization” of music – an internet-mediated future where every musician and songwriter has his or her sixteen minutes (or perhaps, sixteen milliseconds) of fame.⁵ In this vision, copyright becomes less important as a way to compensate professional creators. Intellectual property (IP) appears in these accounts as an outdated and largely unnecessary brake on the leveling forces that the internet has set loose in the world of culture. Copyright reform consists of removing obstacles to the wave of “user-created” content, so that as much amateur material as possible can be created with as few legal

⁵ See, e.g., Lawrence Lessig, *The Future of Ideas* (2001); Yochai Benkler, *The Wealth of Networks* (New Haven: Yale Univ. Press 2006).

impediments as possible.⁶ In the long run, many of these authors imply, copyright will become essentially irrelevant, as the volume of user-generated “free” content grows and the “bottom up” generation of culture becomes the norm. Copyright, it appears, will simply wither away under the force of so much free content.

Others are more realistic about the need for continuing IP protection in the music industry. They set their sights not on the withering away of copyright, but on what they describe as the need to streamline it. They call on policymakers (and perhaps “stakeholders”) to take drastic steps to ease the licensing of IP rights for music. In other words, their focus is on transaction costs, as the following passage from copyright scholar Lydia Lorens makes clear:

The fast paced world of digital delivery of music needs to have a different structure for facilitating downstream use and for assuring compensation to authors. That structure must significantly reduce transaction costs, which are particularly high in the music industry. In a world in which the speed of delivery is measured not in days or weeks but in seconds and fractions thereof, these high transaction costs created by the current structure of the 1976 Act impose serious obstacles for achieving the goal

⁶ See especially Yochai Benkler, *The Wealth of Networks*, *supra*. In a characteristic passage, Benkler says (at 425-26):

Just as the recording industry stamps CDs, promotes them on radio stations, and places them on distribution chain shelves, p2p networks produce the physical and informational aspects of a music distribution system. However, p2p networks do so collaboratively, by sharing the capacity of their computers, hard drives, and network connections. Filtering and accreditation, or “promotion,” are produced on the model that [copyright scholar] Eben Moglen called “anarchist distribution.” . . . Filesharing systems produce distribution and “promotion” of music in a social-sharing modality. Alongside peer-produced music reviews, they could entirely supplant the role of the recording industry.

of copyright. Additionally, the delay, and oftentimes the outright failure, in obtaining legal clearance for certain activities merely results in more demand for unauthorized channels of distribution.⁷

Some would solve the problem by unifying music copyrights; the separate public performance and sound recording rights would be rolled into one in various ways. This would create a unified licensing entity, which many advocates see as the most important aspect of any reform.⁸ Others go further, arguing that in addition to a single music right, Congress should create a sweeping compulsory licensing scheme to eliminate private bargaining of any kind over music rights.⁹

⁷ Lydia Palens Loren, *Untangling the Web of Music Copyright*, 53 *Case West. L. Rev.* 673 (2003), at 676.

⁸ See, e.g., Lydia Palens Loren, *supra*; W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 *Iowa L. Rev.* 935, 938 (2007) (proposing a “regulatory merger” of the various music licensing entities; “divided administration creates economic conditions that discourage innovative use, stifling the success of new music technologies not only in the digital era, but throughout the past century”).

⁹ See, e.g., William Fisher, *Promises to Keep: Technology, Law and the Future of Entertainment* (Palo Alto: Stanford Univ. Press 2004), at Chapter 6 (“An Alternative Compensation System”). See also *At Policy Summit, Panelists Discuss Whether to Save, Scrap, Compulsory License Sections*, 27 *Pat. Trademark & Copyrt. J.* 1, May 18, 2007 (describing conference statement of Professor Julie Cohen of Georgetown Law School):

[Professor Cohen] said that much of the confusion and complications inherent in the system today stem from the fact that the various rights accorded to authors of musical works have been developed at different points in time. Congress and the courts have also imposed certain limitations on the organizations tasked with enforcing and collecting royalties for the authors, in part to correct many of the historical market imbalances (such as monopoly) that the system suffered through in the early days. Thus, while the system makes sense from a historical perspective, it currently adds up to “too many middlemen, [] too many costs,” and lots of confusion, she said.

II. Historical Perspective

The principles on which copyright is based are well understood. What is perhaps not as well understood is that this principle, as applied historically, not only *rewards* authors, but in fact *makes it possible* for authors to set themselves up for professional authorial careers. It literally makes the job of author feasible, or possible. In this section, I explore the major stages in the development of music composition as a distinct career. I show that the strengthening of IP rights was an essential element in this process. IP rights for compositions made it possible first, for songwriters to separate themselves from individual service employment with particular noblemen or courts; and then, to make a real living as independent creative professionals at the dawn of the modern era. The joint development of mass media technology (first, radio, then TV) and the PRO made it possible for songwriters to supply music to, and be paid by, a mass audience, further increasing the viability of music composition as a distinct career track. The point of the overview is simply this: at each major stage of development, strong, functional IP rights were necessary for music composition to be a realistic career option for creative professionals. None of the major recent changes on the music scene have changed this fact. Indeed, as we will see later (in section IV), there is a strong argument that the role of PROs ought to be expanded in the current environment.

A. The Patronage System

The traditional, pre-eighteenth century, economic arrangement for music composers, as well as writers, performers, and various scholars, was the patronage system.¹⁰ To be a creative professional, one had to find someone who

¹⁰ See, e.g., Paul J. Korshin, *Types of Eighteenth-Century Literary Patronage*, 7 *Eighteenth-Century Studies* 453 (1974).

would pay for creative output. Patrons, usually members of the nobility, and often kings and other sorts of political rulers, could add to their prestige by employing composers and others to write music for performance at court or in similar settings. (Wealthy churches also employed composers.)

Joseph Lowenstein, in a study of the literary marketplace in history, makes note of the difficult situation of pre-modern authors: “Technically, however, the situation of authors was extremely stark: a Renaissance author never quite *owned* a literary work, or at least not a literary work as we now somewhat abstractly conceive it. (The development of such an abstract notion of literary work was a slow process: it depended on – among other things – the expansion of authorial rights within the seventeenth-century literary market. . . .).”¹¹ This lack of control bothered composers as much as the struggle to earn a living. As the eighteenth century Italian composer Luigi Boccherini said: “But remember that there is nothing worse than to tie the hands of a poor author, that is to say, to confine his ideas and imagination by subjecting him to rules.”¹²

Scholars generally agree that with this assessment: things began to change in the eighteenth century. Owing to a combination of factors – changes in political structures in many countries, growing wealth and appreciation of music by non-nobles, and, not least important, stronger IP rights for musical compositions – creative professionals began to earn at least part of their income through *direct contact* with a mass audience. Small payments from many

¹¹ Joseph Lowenstein, *The Script in the Marketplace*, 12 *Representations* 101 (1985), at 102.

¹² Germaine de Rothschild, *Luigi Boccherini: His Life and Work* (Andreas Mayor, trans.) (Oxford: Oxford Univ. Press 1965), 66-67.

anonymous consumers replaced one large payment from a single wealthy patron.

Because there was no real alternative in the early period, composers and other creative professionals had to live with the patronage system. Those who lived during the transitional period of the eighteenth century were therefore perhaps better attuned to the advantages and disadvantages of patronage versus mass market participation. A famous and trenchant comparison comes to us from the famous writer and wit Samuel Johnson, whose views on this (and many other matters) were preserved and transmitted by James Boswell. A book review of Boswell's *Life of Johnson* (itself written by the eminent nineteenth century historian Sir Thomas Carlyle, reviewing a nineteenth century edition of Boswell's *Life*) surveys Johnson's experience with and attitudes toward on patronage:

At the time of Johnson's appearance in the field, Literature . . . was in the very act of passing from the protection of Patrons into that of the Public; no longer to supply its necessities by laudatory Dedications to the Great, but by judicious Bargains with Booksellers At the time of Johnson's appearance, there were still two ways, on which an Author might attempt proceeding: [patronage and commerce with booksellers]. To a considerate man it might seem uncertain which method were the preferable: neither had very high attractions; the Patron's aid was now well nigh *necessarily* polluted by sycophancy, before it could come to hand; the Bookseller's was deformed with greedy stupidity, not to say entire wooden-headedness and disgust . . . , and barely could keep the thread of life together. The one was the wages of suffering and poverty; the other, unless you gave strict heed to it, the wages of sin. In time, Johnson had the opportunity of looking into both methods, and ascertaining what they were; but found, at first trial, that the former

would in nowise do for him. Listen, once again, to that far-flamed Blast of Doom, proclaiming into the ear of Lord Chesterfield and, through him, of the listening world, that Patronage should be no more!¹³

B. IP Rights and the Birth of the Mass Audience

At the theoretical level, there is a clear relationship between stronger, clearer IP rights, and the viability of music composing as a profession. IP, like all property, is really all about the making of markets: rights are granted over a thing so everyone who might want to use that thing knows whom to contact, and whom to pay for its use. Without a property right on the thing one produces, there is no *direct* market for that thing. There may be other ways to get paid for making it – as an employee, for example, contributing something to a larger product but paid only for the labor spent in the process. But only if some form of property right covers what one makes can one confidently sell one’s output on a mass market, to a large number of strangers.¹⁴

This basic logic played an important part in the growth of the market for compositions, and hence, the emergence of composing as a viable professional option. It is no coincidence that the professional composer, supported in part at least outside the traditional patronage system, came of age at the same time the copyright system was explicitly recognizing the rights of composers. For example, a celebrated eighteenth century British case involving C.P.E. Bach

¹³ Thomas Carlyle, *Boswell’s Life of Johnson* (Book Review), 5 *Fraser’s Magazine* 396-98 (1832). For the text of Johnson’s famous letter to Lord Chesterfield, perhaps the most eloquent critique of the indignities of the patronage relationship, see James Boswell. *The Life of Samuel Johnson, LL.D.*. Vol I. Alexander Napier, ed. (London: George Bell & Sons, 1884), at 210-11.

¹⁴ See, e.g., Robert P. Merges, *A Transactional View of Property Rights*, 20 *Berkeley Tech. L.J.* 1477 (2005); Ashish Arora and Robert P. Merges, *Specialized Supply Firms, Property Rights, and Firm Boundaries*, 13 *Ind. & Corp. Change* 451-475 (2004).

(son of Johann Sebastian). In a case challenging the rights of composers to claim copyright in their written music, the celebrated jurist Lord Chief Justice Edwin Mansfield ruled in favor of Bach after hearing oral argument from Bach's attorney:¹⁵

The words of the Act of Parliament are very large: "books and other writings." It is not confined to language or letters. Music is a science; it may be written; and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use.... [W]e are of opinion, that a musical composition is a writing within the Statute of the 8th of Queen Anne.

This expansion in the rights of composers was not limited to Great Britain. Throughout Europe, courts and legislators in the nineteenth century came to grant copyrights for musical compositions. The question that scholars have tried to answer is, did these changes have the anticipated effect; was professional composing a more viable, more rewarding career after these changes took effect?

The economist F.M. Scherer has gone the furthest to answer this question. Scherer's statistical analysis tries to estimate the effect of stronger copyright protection on the career choices of Europeans in the eighteenth and nineteenth centuries.¹⁶ His findings are best described as mixed. On a strictly quantitative basis, he concludes that it is impossible to demonstrate that increased copyright protection definitively increased the number of composer/songwriters in Europe during the period under study. At first glance,

¹⁵ Bach v. Longman et al., 2 Cowper 623 (1777).

¹⁶ F.M. Scherer, *Quarter Notes and Bank Notes: The Economics of Music Composition in Eighteenth and Nineteenth Centuries* (Princeton, N.J: Princeton Univ. Press 2004).

this strikes a blow against the idea that copyright protection matters for composers of music – that it is an important factor in making composing/songwriting a viable career choice. Before accepting this, however, two pertinent points must be noted. First, despite the importance of copyright during this period, composer-songwriters still usually made at least part of their income from non-copyright related sources. This means that the marginal effect of increased copyright protection may not have been significant enough to persuade more people into careers as full-time composers. This does not mean that copyright was irrelevant, however. As the case of Verdi shows, copyright allowed at least some composers greater control over their professional lives.¹⁷ So the relevant issue may not be whether people chose to become composers; those with talent may have seen that it was possible to make a living at it even when copyright was weak or nonexistent. It may

¹⁷ See Scherer, *Quarter Notes and Bank Notes*, *supra*, at add cite

During the late 1840s Verdi and Ricordi began to levy fees for each performance. Initially a fixed fee of 400 Francs, or three months' earnings for a building craftsman in southern England) was asked, with a 50 percent reduction in territories lacking a copyright law. This led theater impresarios in some of the smaller towns to ignore Verdi's copyright, obtaining their scores surreptitiously, and to lobby for the repeal of Sardinia's copyright law. In an exchange of letters during 1850, Ricordi explained to Verdi the principles of what economists now call second-degree price discrimination. "It is more advantageous," he wrote, "to provide access to these scores for all theaters, adapting the price to their special means, because I obtain much more from many small theaters at the price of 300 or 250 Lire, than from ten or twelve at the price of a thousand."¹⁷ Ricordi proposed to Verdi that each performance fee from a provincial theater be separately negotiated in accordance with ability to pay. Verdi would then receive 30 percent of the revenue from score rentals and 40 percent of score sale revenues for the first ten years of an opera's life. The arrangement was accepted, and later Verdi's share was raised to 50 percent. To enforce it, Ricordi deployed a team of field agents to oversee the use of scores by provincial theaters and prevent theft. He also retained lawyers in the larger Italian cities to handle performance contract disputes. These transaction costs, Ricordi argued, justified his retaining a majority share of the provincial theater licensing revenues. Obtaining substantial revenues from score sales and performance fees, Verdi observed that he no longer needed to be a "galley slave" and to compose at a frantic pace.¹⁷ Between 1840 and 1849 (he was 36 years old in 1849), Verdi composed 14 operas. During the 1850s he composed seven, in the 1860s two, and one in each of the succeeding three decades.

instead be what *mix* of activities professional composers chose to undertake. All the qualitative evidence here points to an important conclusion, which comprises Scherer's second main contribution. Scherer shows that the strengthening of copyright gave composers greater control over what kinds of works they could compose while enabling them to make a living as professional composers. In the end, then, it is clear that stronger IP protection did in fact give a major boost to the viability of composing as a rewarding career.

The best evidence here is the statements of composers themselves. Consider this impassioned statement from musical composer Arthur Sullivan, of Gilbert and Sullivan fame, in a packed New York theater on the U.S. opening night of the now-famous musical comedy *The Mikado*:

It may be that some day the legislators of this magnificent country . . . may see fit to afford the same protection to a man who employs his brains in literature [as to a mechanical inventor] But even when that day comes, as I hope and believe it will come . . . we . . . shall still, . . . trust mainly to the unerring instinct of the great public for what is good, right, and honest.¹⁸

Sullivan was referring to the fact that in 1885, when he was speaking, patent protection in the U.S was considered robust and effective. (This was in contrast with Sullivan's native England, where the late nineteenth century patent system was said to be quite behind that of the U.S. at the time.)¹⁹ He might also have been referring to international protection: when he spoke,

¹⁸ Amusements, N.Y. Times, Sept. 25, 1885, at 5, quoted in Zvi S. Rosen, *The Twilight of the Opera Pilots: The Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 *Cardozo Arts & Ent. L.J.* 1157, 1178 (2007).

¹⁹ See Zorina Khan, *The Democratization of Invention: Patents and Copyright in American Economic Development, 1790-1920* (New York: Cambridge Univ. Press 2005).

international patent protection was already in place in the U.S. (thanks to its adherence to the Paris Convention of 1883, during the first wave of international interest in patent harmonization), but the U.S was much slower to adhere to the Berne Convention²⁰, not becoming a full member until the late twentieth century.

C. Evolution of the PRO: Solving the Transaction Cost Problem

The next major step in the development of music composition as a distinct and viable professional choice came with the advent of mass media technologies in the 1920s and later. This story has been told many times, so there is no reason to dwell on it here – except for one highly pertinent point. It must be remembered that PROs developed “organically,” as it were, from the confluence of traditional copyright (which, since Mansfield’s time, gave IP rights to composer-songwriters) and the possibilities ushered in by mass media. PROs emerged to resolve what seemed like a hopeless impasse: the rights of songwriters, on the one hand; and the need for a huge number of discrete, separate licensing transactions, between those songwriters and the new radio (and later, TV) stations that needed copyright clearance to operate legally.

Resolving this impasse took time and patience. This lesson is crucial to the situation the music industry faces today. The short-term focus of most music-related discussions has become one of the key stumbling blocks. Policymakers and scholars forget how long it can take for transactional mechanisms to become established. ASCAP, for example, was founded in the early 20th century. In the 1920s, with the advent of radio, the early transactional mechanisms (set up to license music to restaurants and other live venues) were obviously stretched well beyond the bounds of their original

²⁰ The Berne Convention for the Protection of Literary and Artistic Works is one of the world’s most important copyright treaties.

design. What is interesting, in reading the early radio cases, is that despite the now-apparent transactional difficulties ***no one even argued that transaction costs militated against copyright enforcement.*** The courts' analysis of the issues was actually quite straightforward. The questions were presented simply: was a radio broadcast a "public performance"?²¹ or, was a hotel's "passive" retransmission of a broadcast, itself a broadcast?²² These questions were addressed head-on, with essentially no discussion of their consequences or policy ramifications. They were in this sense models of "formalist jurisprudence," and despite the slightly pejorative connotations of this label, they exhibit the virtues that some scholars have come to associate with this style of legal decision: clarity, finality, and trust in the abilities of rational parties to sort out and order their activities in the aftermath of legal decisions, rather than decree and order these relationships in toto "from the top down."²³

What is interesting historically – and quite relevant, from the perspective of today's academic debates – is that it was scholars studying these early cases who introduced transaction cost considerations into the discussion. So for example, Zechariah Chaffee provided a long laundry list of detailed questions that were left hanging by the *Jewell-LaSalle* case:²⁴

²¹ Jerome H. Remick & Co. v. General Elec. Co., 16 F.2d 829 (1926).

²² *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 51 S. Ct. 410, 75 L. Ed. 971 (1931) (Brandeis, J.). This decision was partly overruled in one of the early cable TV retransmission cases, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 88 S. Ct. 2084, 20 L. Ed. 2d 1176 (1968). However, the *Fortnightly* approach was itself rejected, and the *Jewell-LaSalle* reasoning reinstated, by Congress in the 1976 Copyright Act. See 17 U.S.C. § 111.

²³ A good example of this newer appreciation of the virtues of formalism, and limited legal structuring in general, is Richard Epstein, *Simple Rules for a Complex World* (Cambridge, MA: Harvard Univ. Press 1995) at xi ("cooperative ventures between individuals are better left to private ordering than to public control . . .").

²⁴ Zechariah Chaffee, Jr., *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 528 (1945).

The hotel [in *Jewell-LaSalle*] was heavily liable if it rebroadcast unlicensed music, but how could it protect itself? Must it maintain a monitor always on the job to sit with a list before him pages long showing what pieces are licensed and turn off the master set the instant an unlicensed piece comes from the broadcasting station?

It was as if Chaffee had conceded that to protect the songwriters' rights might make sense in a sort of abstract way, but that to protect these rights *in practice* presented all manner of practical obstacles that the *Jewell-LaSalle* court had not considered. In a phrase, it would create *transaction costs*. The courts in these cases – wisely, in my view – chose to ignore these arguments. They were swayed more, we can see in retrospect, by a simple view of their job and a basic trust in the ability of private parties to bargain in good faith, to reasonable solutions. The fact that a series of successful, working organizations – in the U.S. and abroad – have now evolved, appears to more than vindicate the basic common law instincts of these early courts.

Another similarity between the formative era of PROs and the scene today is the idea that “entrenched players” in the music industry somehow did not understand their own self-interest. It was not unusual for defendants in these early cases to argue that radio broadcasts were a boon for composition copyright holders. Defendants asked the courts, in effect, to disabuse music copyright owners of their folly and permit the practices at issue in the cases. This sounds all too familiar, and echoes the arguments of defendants in cases such as *Napster*<<add cite>>. Indeed, the theme of an out-of-touch, backward-looking music industry is featured in much of the critical writing on music copyright today.

What is instructive, for our purposes, is that courts uniformly rejected these arguments. Their reasoning was straightforward, and again might serve

as a useful answer to similar arguments made on behalf of filesharers, webcasters, and the like. Consider for example this language from *M. Witmark & Sons v. L. Bamberger & Co.*, a 1923 case from the District Court of New Jersey:

The defendant argues that the plaintiff should not complain of the broadcasting of its song because of the great advertising service thereby accorded the copyrighted number. Our own opinion of the possibilities of advertising by radio leads us to the belief that the broadcasting of a newly copyrighted musical composition would greatly enhance the sales of the printed sheet. But the copyright owners and the music publishers themselves are perhaps the best judges of the method of popularizing musical selections. There may be various methods of bringing them to the attention of music lovers. It may be that one type of song is treated differently than a song of another type. But, be that as it may, the method, we think, is the privilege of the owner. He has the exclusive right to publish and vend, as well as to perform.²⁵

In light of contemporary controversies, it is well worth taking a moment to contemplate this sentence: “But the copyright owners and the music publishers themselves are perhaps the best judges of the method of popularizing musical selections.” Critics argue that copyright holders today cannot be trusted to understand their own best interests. They say that filesharing, “mashups,” fan web sites, and other recent uses of copyrighted works will all work to expand, rather than harm, existing markets for those works. While they are in some cases undoubtedly right about this, the *M. Witmark* court provides a highly insightful response: the copyright owners

²⁵ 291 F. 776, 780 (D.N.J. 1923).

themselves are in the best position to decide which of these uses will add to the value of copyrighted works. As we contemplate the road ahead for the music industry, it would be a good idea to keep this thought in mind.

III. The Story Today: New Technologies and Enduring Truths

Copyright commentators today are very fond of saying “the internet has changed everything.” Under this theory, even if I am correct that the history of PROs is a success story, we should still expect things to play out differently in the internet era. Specifically, these observers argue, we ought to expect a good deal more delay in the emergence of solutions to licensing problems today.

I think this is wrong, for two reasons. First, we have a major advantage today: the organizations that emerged out of the early period of the “first” mass media era – radio and TV – are now up and running. So we might expect that they can be part of the solution to today’s problem. Second, even in areas where no pre-internet organization existed, solutions to licensing bottlenecks are already emerging in the internet era. The basic dynamics have not changed, in other words, despite the possibilities created by the new technology.

What is useful about starting with actual, existing institutions is that they are the only proven vehicles for accommodating individual property rights and transaction cost concerns. Property rights are the foundation of the IP system. At the same time, transaction costs are and have been a major focus of IP law and policy. It is easy to speculate about transactions that *might have been* effectuated, or to theorize about uses of digital content that might be desirable, if only transaction costs did not stand so firmly in the way. My own approach has been to look into transactional *success stories*, to get a better idea of (1) whether the claims of high transaction costs are really true, and (2)

how future successes can be structured and enabled, perhaps through some instrument of public policy.²⁶

In this respect, it is worth considering a successful experiment in the pooling of academic literature copyrights. This is the story of the JSTOR literature service, which began in 1994 as a pilot study to digitize ten academic journals.²⁷ This small effort has now evolved into a very large organization that gathers together 446 separate academic publishers, and now makes available over 700 separate academic journals containing over 3.8 million separate articles.²⁸ The service has been accessed over 240 million times since its inception. As with PROs in the pre-internet era, JSTOR had to overcome significant startup transaction costs, and many predicted that it would not ultimately succeed. One key difficulty was the need to pull together a large enough group of publishers to make an electronic consortium feasible. (This was made easier by the fact that JSTOR had its origins in the Mellon Foundation, a large philanthropic organization with the wherewithal to adequately fund its early operations.)²⁹

The development of JSTOR demonstrates that the same forces that led to the emergence of the PRO model in the early days of radio and TV are at work in the internet era, and that PRO-type solutions (pooled IP rights with blanket

²⁶ See, e.g., Robert P. Merges, *Contacting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293 (1996); “Institutions for Intellectual Property Exchange: The Case of Patent Pools,” in *Intellectual Products: Novel Claims to Protection and Their Boundaries* (Oxford Univ. Press, 2001) (Rochelle Dreyfuss, ed.).

²⁷ Roger C. Schonfeld, *JSTOR: A History* (Princeton: Princeton Univ. Press 2003), at 20.

²⁸ 11 JSTORNews, Issue 2, avail.
http://news.jstor.org/jstornews/2007/06/june_2007_no_11_issue_2_jstor.html.

²⁹ Roger C. Schonfeld, *JSTOR*, at 17-45.

licensing) are still the most logical and effective way to solve high-volume licensing bottlenecks.

A. Investing in Transactional Technologies: PROs Look to the Future

JSTOR is not the only collective licensing entity that continues to invest in the transactional infrastructure necessary to preserve individual IP rights in the context of a high-volume and demanding transactional environment. Music PROs are doing the same thing. Consider for example the “BlueArrow” intelligent audio recognition technology developed by Landmark Digital Services, Inc., a wholly-owned technology subsidiary of BMI.³⁰ Landmark continuously monitors over 400 radio stations in 62 markets, collecting information on what music is broadcast, for how long, in each market. Sophisticated digital monitoring techniques allow Landmark to sample a huge number of media outlets,³¹ identifying whatever music (whether pre-identified or registered with BMI or not) those outlets broadcast. This sampling information is then used to supplement reports of music use by companies, thereby allowing both verification of reported music use and identification of music uses that fall outside the reporting requirements.

³⁰ BMI’s rival, ASCAP, has a technology it calls “MediaGuide” that is designed to track uses of ASCAP-registered music in various media environments. See Mark Holden, ASCAP’s MediaGuide: Will it Identify Your Music?, *FilmMusic Magazine*, April 11, 2006, avail. at <http://www.filmmusicmag.com/?p=653>; <http://www.mediaguide.com/> (describing MediaGuide’s monitoring of various radio stations and internet services).

³¹ There are plans to significantly increase the reach of Landmark’s “BlueArrow” technology in the near future. Interview with Robert J. Barone, Managing Director, Landmark Digital, May 27, 2008.

Landmark's BlueArrow technology was the result of a significant investment in research and development.³² The company now employs over 60 people, all of whom focus full-time on developing a state of the art monitoring and reporting infrastructure for the music industry. (The company serves some clients besides BMI and other PROs; advertisers, for instance, use BlueArrow to verify that their ads are playing when they are supposed to.)

Just as in the JSTOR case, Landmark Digital demonstrates that collective licensing solutions can work effectively and can continue to innovate. Indeed, ironically, BlueArrow represents precisely the sort of sophisticated monitoring and reporting technology that compulsory licensing advocates dream about. The difference of course is that with PROs, songwriters do not have to rely on the idealistic prospect that compulsory licensing mechanisms will be fairly designed and efficiently administered. They are getting the benefit of state-of-the art transactional technologies today – while maintaining their traditional rights under copyright law. Rather than being transactional nightmares or bottlenecks, as critics contend, PROs are pioneering innovative ways to gather songwriter copyrights, administer blanket licenses, and distribute fairly proportional royalties.

B. The Costs of Changing Course

As one can see from the preceding, most of the proposals for change to the structure of the PROs resolve into two basic ideas: eliminate the need for licensing transactions (by imposing a compulsory license), or consolidate the IP rights covering various aspects of music. Consolidation proposals take several

³² BMI actually acquired the underlying technology, primarily in the form of a substantial patent portfolio, from a British company, Shazam Entertainment, Ltd., that had pioneered it. See <http://blade018.landmarkdigital.com/about>.

forms – including creating a single government-denominated music license entity, and re-defining the property structures in music – but they are motivated by the same desire that inspires compulsory licensing proposals: the dream of lowering transaction costs.

The impetus behind these proposals is the idea, voiced in various ways, that the costs of clearing music rights have become prohibitive. This is the result, commentators argue, of several factors. One is the fact that copyrights over music are split into several distinct rights. Those arguing for change often claim that the rights structure that evolved during the twentieth century was cumbersome but workable given the technical, legal and business constraints of the era. But now, with the advent of digital content and the internet, the argument is that this structure has become archaic. One claim is that the *social cost* of this cumbersome rights structure is now much higher than it was. Because new technologies make music content easier to access, transfer, and re-use (e.g., in remixes or mashups), these advocates argue that the old rights structure is now standing in the way of a huge number of potential uses of music.³³ The social interest in these uses is so great that the rights structure must be changed.³⁴

³³ In a recent article, I argue against the idea of a *right* to remix, and in favor of what is becoming more or less the accepted practice today: a plethora of freely-given content, whose owners waive their rights voluntarily so remix fans can do their thing. See Robert P. Merges, *Locke Remixed*, 40 U.C. Davis L. Rev. 1259 (2007).

³⁴ See, e.g., W. Jonathan Cardi, *Uber-Middlemen: A Reshaping the Broken Landscape of Music Copyright*, 92 Iowa L. Rev. 835, 838 (2007):

This Article illustrates the problems caused by the fractured administration of music copyrights by reference to the current intra-industry battle over music licensing for use in Internet streaming and downloading services. This battle has been a primary cause of the delays the public has experienced in the licensing of music in compressed digital form. The Article then suggests a deceptively simple and inevitably controversial

My earlier work points out a significant cost that accompanies compulsory licensing solutions. The basic problem is that these schemes are implemented through the legislature. In the past, that has meant that they are excessively rigid. Prices for content set in one era can, due to the well-known difficulty of changing existing legislation, persist for a very long time. Examples include the mechanical recording compulsory license and the old juke-box compulsory license.³⁵

Another cost to this approach has become clear in recent years. As the never-ending saga over “webcasting” royalties has shown, the possibility always exists that a party dissatisfied with a royalty arbitration, or the last round of legislation, can threaten to destabilize things by re-opening the issue with more hearings, further appeals, or the like. Although actual change may be difficult (as I mentioned), the constant revisiting of yesterday’s “final” determination causes instability and uncertainty. In practice, then, because they are ultimately creatures of legislation, compulsory licenses in the internet era have not as of yet anyway produced a stable platform on which the music industry can base its operations.

C. An Overlooked Cost: Losing the “Songwriter’s Voice”

Most copyright commentators and reform advocates are careful to note that their proposals include mechanisms to maintain songwriters’ financial compensation for music. Very few observers of the copyright scene would feel comfortable arguing otherwise. The proposals always claim that their effect will

remedy: a regulatory merger of the licensing functions of the various administrators of music copyright.

³⁵ See Robert P. Merges, Contracting into Liability Rules, *supra*.

be only to reduce transaction costs, or increase the freedom of music users (or both). Streamlining, updating, modernizing – these are the order of the day.

The assumption here is straightforward: songwriters as a group will continue to be compensated, even if PROs are eliminated, subsumed, or replaced by compulsory licensing schemes. A closer look at the situation, and some sense of history, should dispel this idea fairly quickly. The basic problem with these proposals is that they minimize the importance of having a separate and distinct voice at the music rights (and revenues) bargaining table. There is little in the history of the music industry to support the idea that songwriters will not lose ground if a separate public performance right is eliminated. Owners of sound recording rights, or any successor organization formed to administer them, cannot be expected to voluntarily compensate songwriters to the same extent as they are compensated under the current regime.

Because the public performance right for songwriters comprises only a portion of the total package of rights – and, in general, a smaller portion than the sound recording right, judging from relative revenues – the fear is that songwriters or their representatives would be edged out of the lion’s share of compensation in any “internal” negotiations taking place in a unified music right organization. The point is clear: replacing a separate property right with an amorphous share of a larger, unified right would likely result in lost control and income for songwriters. It would therefore represent a step backward in the evolution of songwriters’ IP rights.

Another potential problem is that “unified” licensing entities might well proliferate. According to Rob Glaser of RealNetworks, testifying on music copyright reform in 2005,

[T]he [unified licensing] proposal [at issue in the hearings] does not ensure that the smoothly-operating ASCAP and BMI licensing processes

would extend to reproduction and distribution rights. Though it is of course possible that the PROs would voluntarily extend to distribution and reproduction rights their existing operational procedures (i.e., blanket licensing on request and then negotiating price), it seems unlikely that publishers and songwriters would approve this practice. It seems more likely to us that the mere possibility of blanket licensing on request would incentivize publishers and songwriters to create many more MROs [Music Rights Organizations – i.e., unified licensing entities] than the Copyright Office predicts.³⁶

Glaser may not be completely correct in asserting that the PROs would not be willing to extend their scope to include reproduction and distribution rights, but his essential point is well-taken: in the absence of a statutorily-mandated single licensing entity, proliferation is a likely scenario.

D. Competition and Continuing Oversight: the Role of the Antitrust Consent Decrees and the “Rate Court”

One of the ironies of the current situation is that observers of the music scene worry about the competitive impact of any licensing solution. As the excerpt from Rob Glaser just above makes clear, some are concerned that we may wind up with too many music licensing organizations. Others have expressed the opposite concern: that a single, unitary organization may exercise too much unilateral power in the absence of competition from other organizations.

³⁶ Senate Music Licensing Reform Hearings, 109th Congress (statement of Rob Glaser), avail. at http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4447.

The irony stems once again from a lack of historical perspective. These same concerns have played out over the history of PROs; first, the unilateral power of a single entity (ASCAP), followed by competition (from BMI, and later SESAC); and later, with the “regulated competition” resulting from antitrust consent decrees that apply now to ASCAP³⁷ and BMI.³⁸ As the history of ASCAP-BMI competition makes abundantly clear, the competition between these organizations has benefitted songwriters enormously, for two reasons: first because of the general benefit of competition (elementary theory dictates that party A gets a better deal with party B if A has a viable alternative, or “outside option,” to dealing with B, e.g., the existence of potential trading partner, C); and second, because a single organization may grow stale and fail to adapt to changing circumstances without the spur of outside competition. The best example of this latter benefit of competition is the well-known story of how the newer BMI embraced jazz and country music – two categories routinely ignored by ASCAP in its early years – in the 1940s and 1950s.³⁹

What this history shows is that the combination of competition and reasonable regulation has served songwriters well for a long time. At a minimum, those arguing for drastic changes bear the heavy burden of showing that any proposed change will not worsen the situation, and will not end up as a costly and duplicative exercise that simply recapitulates the history of the past sixty years.

³⁷ See U.S. v. ASCAP, Second Amended Final Judgment, June 11, 2001, avail. at <http://www.ascap.com/reference/ascapafj2.pdf>.

³⁸ See Amended Final Judgment entered in United States v. Broadcast Music, Inc., 1966 U.S. Dist. LEXIS 10449, 1966 Trade Cas. (CCH) P 71,941 (S.D.N.Y. 1966), modified by 1994 U.S. Dist. LEXIS 21476, 1996-1 Trade Cas. (CCH) P 71,378 (S.D.N.Y. 1994).

³⁹ See John Ryan, *The Production of Culture in the Music Industry: The ASCAP-BMI Controversy* (N.Y.: University Press of America, 1985).

E. What About DRMs?

Digital Rights Management (DRM) technology – or, more properly, the *idea* of perfect or near-complete DRM protection for content – are discussed in two very different ways by observers of the contemporary music industry. One group argues that DRMs are a dangerous development that makes it possible for owners of music content to achieve near-total control over all uses of music. So in this view, DRMs are a threat to the delicate historical balance that has been worked out by Congress and the courts with respect to permissible uses of music. A second way DRMs enter the discussion is as savior, rather than culprit. Some say that DRMs provide such a perfect vehicle for distributing music and compensating its owners that traditional legal institutions will and should drop away in importance. I address both these claims below.

The first claim is that changes in law and technology fundamentally changed the “social contract” between those who produce music and those who consume it. The idea is that practices that were once accepted as integral to the music scene, such as the right of listeners to hear music for free on the radio before buying a record or CD, or the right of people to perform music for a small group of friends, can now be monitored and controlled by music copyright owners. The basic thought is that DRMs and other technologies of control have *in effect* eliminated many rights that users used to have implicitly, because of limits on how well copyright owners could police their property rights.

The simple answer to this argument, at least from the perspective of the music industry, is: nice theory, but it does not in any way comport with reality. The truth is that while some successful DRM systems are in place (notably Apple’s iTunes system), for the most part DRMs remain a small part of the story in the area of music licensing. And whatever else they have achieved,

DRMs have hardly insured the complete control of content that their critics fear. The more realistic view is that DRMs may play a growing part in the effort to maintain the music industry as a profit-making enterprise, but so far they have hardly stemmed the tide of change. Filesharing and other forces are far more important. Which means that DRMs have proven useful in stemming the total *loss of control* over music that current technology threatens, but they have hardly resulted in the theorized achievement of *complete control* that critics fear.

The other way DRMs enter the discussion is a savior of the industry. If one attack on current institutions takes the form of no-property (or sweeping compulsory licensing) proposals, another is more specifically centered on technological possibilities. I am referring here to proposals to encourage or at least permit the implementation of full-scale DRM systems. The dream here is attractive, no doubt about it: automate and streamline the entire chain of IP licensing deals required to move information from producers to users. These visions take numerous forms, but usually the basic idea is simple: allow a technological system to automatically track usage, and make appropriate compensation, for each piece of digital content that is moved around the internet.

Before moving to a critique of the idea that DRMs can provide a *sweeping* solution to the problem of transaction costs in the digital space, I must make mention of the fact that DRMs can and do play a crucial role in the market for digital content today. Thus I want to be clear that I am not anti-DRM; I simply want to maintain a clear-eyed perspective on what DRMs can – and can't! – do for content industries such as music.

So, first the advantages of DRMs, as currently implemented and as planned for the near future. To begin, Apple's very successful iTunes/iPod

product pairing depends critically on DRMs to function. (It is thus more than a little ironic that many opponents of big and bad DRMs are also rabid users and supporters of the Apple iPod.) The music downloading business depends on DRMs to maintain some reasonable degree of copy-control over downloaded music files. Without this safeguard, given the history and experience with Napster and other filesharing services, music copyright owners would simply not permit their crown jewels to be loaded onto the Apple system. Subscription services also take advantage of DRMs. Without the ability to police uses, and without the possibility of differentiating post-download usage (e.g., by length of time, number of copies made, and continued payment of subscription fees), a crucial feature of subscription services would be lost: differential pricing. This is obviously a crucial feature of the current digital environment, and one that is fueling a great deal of experimentation and growth in the market for music.

Indeed, it seems clear now that what is at work here – what DRMs really enable, in practice – is the unbundling of usage rights from the content itself. DRMs, by monitoring post-download activity, allow content owners to sell all kinds of different “content-plus-rights” bundles. So a music label or music service can sell users music outright, or license an unlimited supply of music for a set period of time, or allow the use of music on one, two, or more devices simultaneously, or provide different combinations of all these.

But what about the idea that DRMs could *replace* existing institutions, that they could so thoroughly automate the process of revenue collection and distribution that things like PROs and compulsory licensing schemes would be simply eliminated?⁴⁰ Again, this is an attractive theory. But it, like some of the

⁴⁰ This is a theme in Ariel Katz, *The Potential Demise of Another Natural Monopoly: New Technologies and the Future of Collective Administration of Copyrights*, Univ. of Toronto Law and Economics Res. Pap. 02-04 (2004).

ideas discussed earlier, suffers from a form of “reality deficit.” Technologies, just like idealized institutions, are also capable of suffering from the “nirvana fallacy.” Proponents of simple, sweeping solutions usually forget the crucial implementation stage. DRMs do not simply arise, full-blown. They have to be devised, hammered out, and of course, adjusted. This is crucial: the same bargaining difficulties that accompany today’s proposals will still be in place after a DRM is proposed or adopted.⁴¹ There is no way to simply define away the differing interests of songwriters, performers, record labels, and the other “stakeholders” in the music industry. No DRM can magically simplify the landscape, at least not without skewering one or more constituencies that represent a legitimate sector of the industry. As with compulsory licensing solutions, any proposal for a simple “solution” to the industry’s problems is bound to eliminate an important voice in the debate, and important claimant to the industry’s revenue stream.

IV. Conclusion: Harnessing Existing Institutions

The irony of much commentary on the legal issues surrounding music is this: it simultaneously bemoans the opportunities lost due to high transaction costs, and overlooks or condemns one of the most effective and time-tested mechanisms for overcoming those costs, the music PRO. The question is why – why do commentators on the music scene make this mistake?

⁴¹ This may in part explain why three of the four “major” record labels have agreed to sell music in unrestricted, DRM-free format. See Nate Anderson, “Three Downm One to Go: Warner Music Group Drops DRM, Ars Technica, Dec. 27, 2007, avail. at <http://arstechnica.com/news.ars/post/20071227-3down-1-to-go-warner-music-group-drops-drm.html>.

Basically for two reasons. One is familiarity: PROs work so well, they are often taken for granted. Their effectiveness is in a sense so embedded into the music industry that it has become almost invisible. That is the only explanation for the following fact: that commentators continually wring their hands over the *potential* music transactions that are not being consummated today, while overlooking the millions of music transactions that *are* being conducted under the auspices of the PROs. When commentators write wistfully about the hoped-for future of ubiquitous subscription services, or download on demand to any device anywhere, they often point to the current structure of the music industry and its legal rights to explain why these visions are not in fact coming true (or coming true as fast as they would like). They point to either the impossibility of conducting all the transactions that would be necessary to effectuate their vision, or to the harmful power and control conferred by IP rights, which has the potential to interfere with users' freedom to access and "re-purpose" music. The former concern is belied by the successful (and almost invisible) operation of successful music licensing, monitoring and compensation mechanisms operating inside music PROs. And the latter is belied by the fact that music copyright owners have little incentive to play power games with copyrights; and that if they did, the antitrust authorities that regulate them, and the first amendment protections of users, would stand as powerful obstacles in their way. The point is that, in the end, copyright commentators in search of solutions to licensing impasses in the digital age are missing an obvious and effective solution. The answer, if they are listening to a radio or watching a TV, is right in front of their faces.

PROs serve an important, and perhaps even *more crucial* function, in the internet era, than they have to date. The increasing volume and "velocity" of consumer transactions involving music content mean that existing licensing mechanisms should be reinforced, rather than scrapped. Proposals to

“streamline” music rights transactions by eliminating or curtailing songwriters’ IP rights are exactly the wrong way to go. In addition, proposals to create a “nirvana” licensing solution – a single compulsory license, to be painlessly divided among all music rightholders – should also be resisted. This is because centralization in this case would come at a great cost. The ability of individual songwriters to make a decent living (or even to have a chance to make a decent living) will be severely undermined by any “streamlining” of rights that takes away their singular, collective voice, the PRO. A centralized, “unified” IP structure for music would eliminate the separate bargaining position that songwriters currently have as a result of the separate IP right for musical compositions. This would leave them at the mercy of larger, more powerful voices in a centralized licensing agency, presumably the owners of sound recording copyrights – not a bright prospect for songwriters who rely on music composition royalties as their primary income source.

And of course it is to these songwriters that we must return at the end of the day. Their ability to make a living, a decent living, is what is really at stake here. Interestingly, even a strong advocate for a simplified IP rights structure in music recognizes this. Yochai Benkler, in his celebration of “social production” and “shared culture” recognizes that changing the structure of IP rights over music may well affect the distribution of revenue for various classes of musicians. He seems not to be too worried. As he puts it, with filesharing as the distributional model, “[p]erhaps there will be fewer millionaires. Perhaps fewer mediocre musicians with attractive physiques will be sold as geniuses, and more talented musicians will be heard than otherwise would have”⁴²

My concern, based on the history recounted earlier, is that this is far too sanguine a view. There are and always have been precious few millionaires

⁴² Yoachai Benkler, *The Wealth of Networks*, supra, at 426.

whose primary occupation is music composition. And for the most part, being behind the scenes in many cases, it is hard to “sell” a songwriter, regardless of his or her physique. Finally, no songwriter – and nothing under current law – keeps any aspiring musician or would-be songwriter from being heard. The risk is just the opposite. By weakening or eliminating songwriters’ IP rights, or by fundamentally changing the role of their professional voice, the PRO, we risk all the gains songwriters have historically made in creating a small but viable economic niche for their unique talents. If we as a society start changing the basic formula that has made this possible, we may not realize how badly we have fared until this important sector of the music industry is badly damaged – or even killed outright. Sure, as Benkler says, people will always make music, and people will always compose music too. But to maintain the progress songwriters have made over time, and to see that the songwriters’ profession continues with vigor, we have to retain their distinctive IP rights and the institutions that have evolved to administer them efficiently, the PROs. This is the best way to make sure this group of creative professionals can not just survive, but also thrive, and do so with dignity.