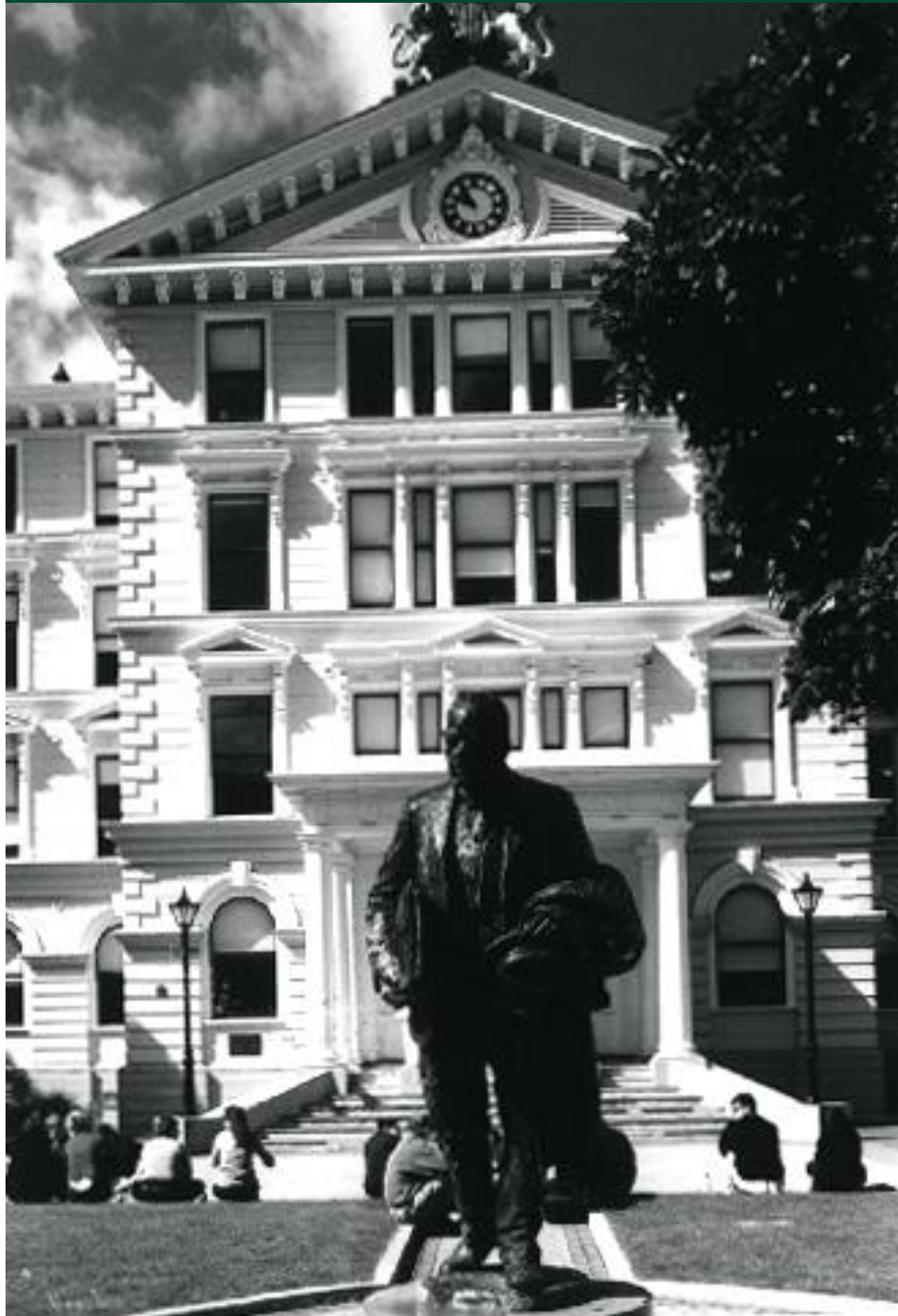


THE NEW ZEALAND CENTRE OF
INTERNATIONAL ECONOMIC LAW



The New Zealand Centre of International Economic Law



The Songwriters Association of Canada's Proposal to Monetize the Non-commercial Sharing of Music

By Eddie Schwartz

January 2011

Occasional Paper No 1



The Songwriters Association of Canada's Proposal to Monetize the Non-commercial Sharing of Music

Introduction

In October of 2007 we at the Songwriters Association of Canada published a proposal for the monetization of music file-sharing. At that time, we suggested a legislative solution to the significant challenge posed by the sharing of music by means of P2P and similar technologies on wired and wireless networks.

At the core of the 2007 proposal was the creation of a new “right of remuneration” for the sharing of music. Consumers would pay a reasonable ISP levy of a few dollars a month. The levy would apply to all broadband Internet accounts, and allow consumers to share music using the technology of their choice. Revenues derived from the levy would be pooled, and pro rata distributions would be made to music creators and rights-holders on a regular basis by existing collectives.

Since that time we've welcomed a great deal of input from consumer advocates, music industry colleagues, copyright, legal and technology experts, economists, Canadian legislators, regulators and other government officials, as well as songwriters and performers, among others.

Thanks to this broad based input, some elements of our proposal have been reconsidered while others have been further developed. **Rather than a legislative approach to the monetization of music file-sharing as we originally envisioned, the S.A.C. is now focused on a “business to business” model that requires no new legislation be enacted in Canada.**

Our basic belief however remains the same: **Music file-sharing is a vibrant, open, global distribution system for music of all kinds, and presents a tremendous opportunity to both creators and rights-holders. Additionally, once a fair and reasonable monetization system is in place, all stakeholders including consumers and Internet service providers will benefit substantially.**

As discussed below, not only is there significant precedent for this model, but also the technology and infrastructure to realize it are largely in place.

Background

The non-commercial file-sharing of music on wired and wireless networks by means of peer to peer and other technologies is the dominant method by which music is currently acquired, and by some measures constitutes over 95% of music download activity, or a ratio of file-shared songs to paid downloads of 20 to 1. ¹

While authorized music services have grown, more than a decade after the advent of the first file-sharing service, authorized sites continue to constitute a relatively minor fraction of total music downloads. ²

Ironically, Apple's iTunes software, often cited as one of the rare success stories in this area, plays a crucial role by allowing the transfer of music acquired by way of file-sharing to iPods, iPads, iPhones and other similar devices. **While many are willing to pay a few hundred dollars for a large capacity iPod, few are willing to pay the \$40,000 it might cost at Apple's online music store to fill such a device with the 40,000 songs it can accommodate.**

In addition, unauthorized music file-sharing networks offer something in the order of 100 million unique songs, essentially the world's entire repertoire of recorded music, while most authorized music sites offer less than 10 million unique titles. ³

For many, file-sharing is an excellent user experience that provides access to a vast catalogue of music in an open and accessible manner. It is no wonder then that a decade of locks, lawsuits and other repressive measures have had little effect on consumer behavior, and no end is in sight for music file-sharing.

The current "graduated" response approach, adopted by some territories, may result in households losing vital access to the internet, while file-sharing is simply driven "underground" through the use of increasingly sophisticated encryption technologies.

None of these repressive approaches offers a viable business model going forward.

Infringement as Innovation: A Brief History of Music Licensing

An alternative approach to repressive measures not only exists, but has proven itself remarkably effective in the past. That approach has been licensing. Two particular examples are illustrative; the licensing of live performances in Paris in the mid 19th century, and the licensing of the early broadcast industry in the United States in the second decade of the last century.

The modern live performance industry was born in Paris in 1850 when a small group of composers led by Ernest Bourget, began licensing eating and drinking establishments which up to that point had been infringing their copyrights. ⁴

Similarly, the modern broadcast industry was licensed for the performance of music in the 1920's after the American performing rights society, ASCAP, finally abandoned attempts to shut it down. ⁵

Currently, these one time “infringers”, live concerts and broadcasters, generate hundreds of billions of dollars in combined revenues annually, and performing rights societies around the world collect billions in license fees to distribute to music creators and rights-holders.

Almost by definition, infringers are “coloring outside the box”, using music in ways not conceived of by the original creators or rights-holders. **By licensing infringers in both these prior examples, the door was opened to dynamic new business models and generations of innovation, growth and iconic music. The creative and economic benefits cannot be overstated.**

We at the S.A.C. believe that licensing music-file sharing will set the stage for the same kind of growth, innovation and financial support for music creators that licensing other uses of our work has created in the past.

Precursors of Our Model

The Songwriters Association of Canada’s current model draws inspiration from two long tested, robust methods of monetizing copyrighted works. They are:

- 1) The Collective Administration of Performing Rights, and
- 2) Cable Television

One hundred and sixty years after the licensing of performing rights started in Paris, performing rights societies exist in most countries around the world and constitute a global system for the collection and distribution of royalties. While record labels have seen revenues from the distribution and sale of physical product decline dramatically in recent years, in many cases revenues received and distributed by performing rights societies have increased. ⁶

Performing rights societies generally issue a blanket license, which allows broadcasters to play any song they wish, as frequently as they wish, whenever they wish. It is important to note that PROs license performances of music regardless of technology. Net revenues are pooled, and pro rata distributions based on performance data are made to songwriters and music publishers. Many countries around the world have a similar system in place to remunerate performers and record labels for broadcast use of their works.

Cable television also provides some guidance as to how music file-sharing can be monetized. One cannot simply buy “dumb pipe” access without content through cable television carriers. Consumers must purchase a bundle of content and access. A basic service is usually made available, as well as value added services that offer various types

of content such as movie, sports and music tiers. Revenues are often shared between carriers and channel (content) providers.

From these previously existing and successful models, we have derived much of our current thinking.

Key Components of the S.A.C. Model to Monetize Private Non-Commercial Music File-Sharing

- 1) **Private individuals and households who wish to music file-share would be licensed to do so in conjunction with an agreement to pay a reasonable monthly license fee.** The license would cover the private, noncommercial sharing of music, between two or more parties, using any Internet-based file-sharing client. A license fee differs fundamentally from a levy or tax in that consumers may opt out if they self-declare not to music file-share. [7](#)
- 2) **Only those who wish to share copies of musical works without motive of financial gain would be covered by this license.** Parties who receive, or seek to receive financial compensation for file-sharing, or other commercial purpose, would not be covered, and would be required to obtain the appropriate licenses and/or approvals from those bodies who license commercial music use.
- 3) **Any Internet-based technology could be used for music file-sharing,** including current technologies such as torrents, social networking sites, etc., as well as new technologies as they become available. **No behavior modification whatsoever is required on the part of the consumer.**
- 4) **Existing collectives would license consumers. License fees would be pooled and pro rata distributions based on non-intrusive data collection would be made to performers, songwriters, and rights holders.** Such data is already being accurately collected in regard to P2P file-sharing in a manner that ensures consumer privacy by companies such as Big Champagne based in California, and is currently used by both major record labels and movie distributors for marketing purposes. [8](#)
- 5) **ISPs would partner with collectives in order to facilitate the licensing process. Access and content could be bundled.** The proposed license fee would appear as a line item on monthly Internet access statements sent to consumers by ISPs.
- 6) **ISPs may deduct a reasonable collection fee before forwarding net revenue to collectives for distribution to music creators and rights-holders.**
- 7) **Net revenues would be split between performers, songwriters, and rights-holders.** Any particular musical work would attract a pro rata share of the entire revenue pool based on the number of times that work was file-shared. Once that

pro rata share was determined, the performer, songwriter, record label and music publisher would split that amount based on an agreed upon formula and contractual obligations.

Back of the Envelope

The Songwriters Association of Canada has no specific suggestion as to the amount of a monthly license fee consumers would pay. We believe this amount would best be determined through a process that would include key stakeholders, including consumers. Also, it may be helpful to phase in a fee over a reasonable period of time.

The following calculations are offered only as a way of indicating the potential revenues a model such as this one might generate. The numbers are based on a Canadian illustration, and for reference, SOCAN, Canada's performing rights society, currently collects in the neighborhood of \$250 million annually. ⁹

Based on the participation of 7 million Internet access accounts in Canada, a \$5.00 monthly license fee would generate \$420 million annually. A \$10 monthly fee would generate \$840 million annually. This amount approaches the total combined gross revenues earned by major record labels in Canada during the peak earning year of 2000. ¹⁰

Given that Canada has approximately 10% of the population of the U.S., revenues generated by the proposed model in the United States might range between \$4.2 and \$8.4 billion annually.

Additional Benefits:

For Consumers

For a reasonable monthly fee, consumers would have access to the world's repertoire of music, and could obtain thousands of songs in any given time period. By way of comparison, the possible \$5.00 monthly fee spent at iTunes would purchase 5 songs. **A monetized file-sharing model clearly offers consumers a tremendous value proposition.**

Also, as mentioned earlier, **no behavior modification is necessary on the part of consumers.** For those millions of people who music file-share, their current method of acquiring music will continue exactly as it is now.

For Creators

Once monetized, music file-sharing technologies offer a world-wide distribution system for creators at every level of accomplishment and every musical genre.

For the aspiring, niche genres, ethnic and aboriginal creators it provides an opportunity to develop a global audience, while for established creators this model offers an unprecedented global marketing and distribution tool. In all cases creators will be remunerated for this massive use of their works.

Moreover, music creators do not want an adversarial relationship with those we call our audience and fans. The adoption of this model would allow the promise of the Internet to be realized for consumers and creators alike, in a balanced and fair way.

For Rights-holders

Record labels and music publishers would realize a significant new revenue stream. In addition, given the enormous volume of new music available, **their expertise in artist development, marketing and promotion will be critical to the careers of emerging performers and songwriters, as well as maintaining the continuing success of established artists and songwriters.**

For Internet Service Providers

As previously mentioned, ISPs would benefit from participation in collected revenue.

Once music file-sharing is an authorized activity, ISPs would be able to dramatically reduce bandwidth costs by caching the most frequently shared songs on their own proprietary servers. In addition, they may develop and participate in new synergies, such as cross promotion of live performances and other value added services.

Finally, while “safe harbor” laws may continue to protect ISPs from litigation, working with creators and rights-holders to monetize music file-sharing would address moral and ethical concerns, and reduce the threat of further legal challenges.

The Hertfordshire Study

Of critical importance for the success of the proposed model is consumer willingness to pay for music file-sharing. The S.A.C. has recently employed an internationally recognized and respected accounting firm to survey Canadians in order to obtain data on this question.

There does exist a recent study undertaken by the University of Hertfordshire in Britain that directly addresses this question. **According to their findings, 80% of those engaged in music file-sharing would pay for a legal option to do so.** ¹¹

Anti-Infringement Measures

It must be remembered that to date, consumers who wish to music file-share have had no choice but to do so “outside the law”. This continues to be the case.

We at the Songwriters Association of Canada are supporters of copyright and fully understand the need for strong anti-infringement policies. We also believe however, **that the surest and swiftest way to dramatically reduce infringement is to give consumers an authorized way to music file-share. Once such an authorized system is in place, consumers who refuse to pay a reasonable license fee will clearly be choosing to infringe and can be dealt with accordingly.**

Using the Hertfordshire study as guidance, once a monetized system is in place, those who refuse a reasonable license fee may well be less than 20% of those who music file-share, and would constitute a minority of the activity as opposed to the vast majority as currently is the case.

In a world where unauthorized activity is reduced to a minority of downloads, anti-infringement measures finally make sense. And there would be an authorized music file-sharing system to “shepherd” infringers into.

For perhaps the cost of a cup of coffee a month, the majority of “pirates” would be transformed into participants in the rebirth of the music industry.

Infrastructure

Music file-sharing has created a global distribution system that provides consumers with ready access to the world’s repertoire of music. This vast repository of all kinds of music resides on millions of computers and networked devices around the world, and can be accessed by virtually anyone using a variety of sharing technologies.

At the same time, there exists a global network of societies, collectives and agencies that are already in the business of licensing users of music, and in most cases have a long history of doing so. In addition, **they have developed the data bases and back office capabilities to make distributions to music creators and rights-holders.** As mentioned earlier, input from companies such as Big Champagne that monitor music file-sharing usage would enable accurate distributions.

These distributions could enjoy the same kind of reciprocal arrangements that currently allow performance royalties earned by a musical work of Australian origin for example, performed in Canada or the U.S., to find their way to the original composer(s) and rights-holder(s) in Australia.

Thus, the key components of a global monetized music file-sharing model are already in place. For little additional cost these elements could be integrated to create an efficient reborn global music business.

Performing rights began in one country, France, and grew into a global business over the course of time. We believe Canada provides an excellent regulatory and legislative environment to initiate the monetized music file-sharing model that we believe will inevitably be a significant global business.

Local Oversight

Since most countries have nationally based collectives and agencies for the collection and distribution of royalty streams, local statutory, legal and regulatory practices would govern licensing fees, and the distribution of revenues derived from a monetized file-sharing model.

In addition, reasonable cultural deductions might be considered in order to help the establishment and preservation of specific musical traditions, genres, or communities.

Other Cultural Industries: One Size Does Not Fit All

While it may seem logical that any system to monetize music file-sharing would eventually apply to other cultural industries affected by file-sharing, in recent months films and print media have found notable success in alternate approaches.

Historically, different types of content have been monetized in very different ways. There is no reason to assume that will not continue to be the case.

Netflix, for example, the subscription based streaming and mail service for films is experiencing exponential growth in the United States. ¹² In addition, much of the momentum in the film industry remains with large format, high definition audio and video, and increasingly 3D technologies which require sophisticated storage and delivery systems not suited to the lower fidelity associated with file-sharing.

In regard to print materials, the iPad, the Kindle and a plethora of other “eReaders” are gaining considerable traction in the marketplace. Recently, the Kindle has become Amazon’s largest selling single item. ¹³

For music on the other hand, the last decade has seen a long list of failed digital music models, and music file-sharing continues to dominate the digital landscape unabated.

Existing Music Services

While new technologies habitually raise the fear of cannibalization of pre-existing ones, the reality has been quite the opposite, and it is now clear that multiple technologies to deliver content can not only thrive in the marketplace, but actually reinforce consumption patterns. Thanks to an array of new and older media, the movie industry has recently enjoyed some of its most profitable years ever. ¹⁴

There is no reason to believe that a wide variety of methods of accessing and enjoying music cannot coexist and find audiences just as they have in the film and television industry. Music file-sharing, while clearly enjoyed by millions of people, offers a basic service, with no artwork, liner notes, musician credits, and limited fidelity. The re-emergence of vinyl records and turntables, and the success of the streaming service

Spotify in Europe point the way to a future where consumers support multiple options, monetized music file-sharing among them.

The long term success or failure of any of these businesses will depend on the quality of the consumer experience, and not on the artificial suppression of competing models.

Also, Apple, which owns and operates the most successful existing service, derives profits not primarily from iTunes, but from the selling of devices such as the iPod, iPhone and iPad. Monetized music sharing would have little or no impact on Apple's profitability, given so much of the music on these devices comes from file-shared sources.

International Legal Considerations

Like performing rights, all parties have the option of not participating in the proposed model. This is compatible with international copyright treaties. It should be noted that in practice however, very few creators and rights-holders opt out of the collective administration of performing rights since doing so would result in the loss of participation in a significant revenue stream.

Summary

People have always shared music and always will. The music we share defines who we are, and who our friends and peers are. The importance of music in the fabric of our own culture, as well as those around the world, is inextricably bound to the experience of sharing.

Rather than continuing to engage in increasingly futile efforts to stop people from using new technologies to share music, we at the Songwriters Association of Canada believe this massive use of creators' work should be licensed just as live performances and broadcasting, also initially considered infringement, were ultimately licensed in the past. In both these previous examples, new business models, dynamic growth, and decades a wonderful music ensued.

By monetizing behavior rather than any specific technology, music creators and rights-holders will lay the foundations for a business model that can continue for decades rather than attempting the almost impossible task of trying to monetize the ever shortening cycle of changing technology.

Thanks to the existence of a global network of societies that collect and distribute royalties, the infrastructure to license music sharing on a global scale and make distributions to music creators and rights-holders is already in place.

Canada, due to its favorable regulatory and legislative environment, would be an excellent choice of territory to test the specific business to business model we have presented in this document, or explore variations. A real world test of the model is crucial to determine where further modification and re-evaluation may be necessary. Currently, we at the S.A.C. are working with other stakeholders groups to initiate a pilot project in

Canada to do so.

A monetized music file-sharing system would give consumers access to the world's entire catalogue of recorded music, and at the same time fairly compensate creators and rights-holders. We invite our colleagues in the music industry, consumers, ISPs and all stakeholders to join with us in realizing this exciting vision of the future.

Eddie Schwartz, January 10, 2011

Notes

1. IFPI Digital Music Report 2008
2. Paid Music Content: The Answer is Blowing in the Cloud by Paul Verna, January 2010
3. "Virtually every title that has ever been popular with any audience, no matter how small, is available at one time or another on P2P networks...the variety of titles is limited only by the imaginations of every one of the tens of millions of P2P users." Eric Garland – Big Champagne in MacNewsWorld article June 16, 2004/ IFPI Digital Music Report 2008
4. Intellectual Property: A Reference Handbook, by Aaron Schwabach
5. www.ascap.com
6. www.socan.ca
7. A written undertaking to not music file-share may be utilized to strengthen this self declaration
8. <http://bcdash.bigchampagne.com/>
9. <http://www.socan.ca/pdf/pub/FinancialReport2009.pdf>
10. <http://www.pch.gc.ca/pgm/fmusc-cmusf/pubs/prfl/103-eng.cfm>
11. a copy of the study is available at www.songwriters.ca
12. <http://ir.netflix.com/>
13. www.amazon.com
14. <http://www.the-numbers.com/market/2008.php>