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September 9, 2009

The Honourable Tony Clement
Minister of Industry, Science & Technology
House of Commons
Ottawa, Ontario
K1A 0A6

The Honourable James Moore
Minister of Canadian Heritage and Official Languages
House of Commons
Ottawa, Ontario
K1A 0A6

The Honourable Stephen Harper
House of Commons
Ottawa, Ontario
K1A 0A6

Re: Copyright Consultations

Dear Ministers:

Please accept these Comments in connection with the Copyright Consultations. They address the public policy and business considerations that are relevant to the monetization of digital transmissions of recorded music. I submit them in my individual capacity and not on behalf of any other person or organization.

I. Introduction

The music industry is in desperate trouble. It has been in a decade-long death-spiral for which no one has yet offered a recovery plan that has worked.

It is my purpose in these Comments to propose legal reform and a comprehensive alternative approach to rights administration that will not only reverse the music industry's decline but will also simultaneously promote technological innovation, enhance the free markets for consumer electronics and technology products, facilitate the growth of all manner of licensed music services (including licensed streaming and download services, and licensed P2P and social networks), and meet consumer demand for full, unfettered, DRM-free and lawful access to music.

The plan I propose involves the creation of a new right for music industry rights holders specifically adapted to digital transmissions of sound recordings and the musical works they embody. In Part III, I will define this new right (the "digital transmission right"), and discuss ownership, authority to grant licenses, division of royalties earned, conduct for which a license would be required, and the parties who would be responsible for obtaining licenses in particular circumstances.

The digital transmission right would be implemented through a combination of voluntary collective rights management and licenses freely negotiated between individual rights holders and music service providers (known as "direct licenses").

In this regard, in Part IV, I will discuss the formation and regulation of voluntary collective rights management organizations; offer suggestions regarding governance, transparency, accountability and regulation; discuss the relationship of collectives to the individual rights holders who are their members; the relationship to each other of collectives in different territories; the relationship of collectives to digital music service providers; the basis upon which collectives might license digital transmissions, including transmissions that begin in one territory and end in another; the role of direct licensing in the context of collective management; license fees; the conduct of music use monitoring to support royalty distribution; and the allocation and payment of royalties to rights

holders, including royalties payable for transborder transmissions.

The digital transmission right would not depend on the use of DRM for its success. Its monetization would not involve the imposition on rights holders of a statutory, compulsory or legal license. It would not require that a broadband access levy or tax be imposed on Internet users. And it would not require the compelled enlistment of ISPs or colleges and universities as enforcers on behalf of music industry rights holders.

Through the digital transmission right, implemented as I suggest in these Comments, authorized transmissions of recorded music could be made available from the largest number and widest array of licensed sources, anytime, anywhere, to anyone with network access. This, in turn, would provide authors, publishers, artists and producers, in the aggregate, with their best opportunity to do as well -- if not better -- financially than they have done under the system that the digital transmission right would replace.

Finally, in Part V, I will briefly critique proposals made by others regarding the possible roles that ISPs might play in efforts to resolve the crisis in the digital music marketplace. These include: Graduated response; licensing ISPs in their capacities as music service providers as a standalone proposition; compulsory licensing for "non-commercial" P2P coupled with a mandatory Internet access levy (as proposed by the German Green Party); and voluntary licensing of P2P that occurs "without motive of financial gain" coupled with payment of a voluntary Internet access levy (as proposed by the Songwriters Association of Canada). As will be seen, however, none of these offers a solution that meets the needs of all the relevant stakeholders; none provides a full and fair solution to the ongoing public policy deadlock.

II. The Music Industry's Efforts to Preserve the Ways Things Were, and Their Consequences

The music industry's predicament is largely of its own making. It results from insistence by those who benefited most from how the industry operated before the Internet arose that the established legal relationships and business practices upon which their past successes were based be preserved as the digital music marketplace develops. In particular, the major record labels, music publishers, and collecting societies that they dominate have been committed to the single-minded pursuit of ways in which to make the Internet safe for the sale of recorded music on terms and conditions that they alone decide. They risked everything on the false hope that they could contain unauthorized distribution of recorded music.

Simply put, the Internet is fundamentally incompatible with a sales-based revenue model for works of popular culture that can be rendered in digital format. This is especially so for recorded music. Every Internet user, whether or not involved in P2P or social networking, and every webcaster, podcaster, or other digital music service provider in the world is a potential source of unauthorized mass distribution of recorded music in pristine and unprotected form.

Through the Internet, the market for sale of individual recordings can be saturated in a moment's time and without payment of any royalties to anyone. The dollar amount at risk may well be greater for larger rights holders, but all rights holders, large and small, are impacted to the extent they share in revenue earned from the sale of recordings. IFPI estimates that, worldwide, only about 5% of the 40+ billion music files that were downloaded through the end of 2008 were licensed. Given this, the industry's principal revenue model, based on the sale of hit recordings at thin margins, can no longer be sustained.

Nevertheless, the industry has pursued a multi-faceted strategy to preserve its sales-based revenue model.

It has experimented with a variety of access restrictions and anti-copying measures. But all of these have engendered effective technological countermeasures and news of each successful hack quickly found its way to everyone who cared to know it. Those who create DRM tools for the music industry have proven to be no match for smart kids with computers, many of whom are beyond the easy reach of the law. In any event, punishing music enthusiasts as criminals has not brought about the principal result that the industry seeks. The landscape is littered with failed DRM schemes and abandoned security initiatives. There is no reason to believe that the result will be different next time, or ever.

The industry has pursued legislation banning the use of digital audio file formats that cannot be configured to inhibit consumers from downloading music without authorization. It has also sought legislation banning hardware and software that might undermine the sales-based revenue model by inducing infringement. As a result, consumer electronics makers, fearing liability, have been slow to offer greater interoperability between the many recording, playback, and communications devices that are available. They have also been reluctant to offer new products with next generation capabilities, such as web-enabled home entertainment systems or embedded device recording capabilities. In addition, technology firms and their investors, also fearing liability, have withdrawn support for certain of their own previously released software products or located their operations off shore.

These efforts to limit the market to copyright "friendly" files, players, and other devices and systems may raise public policy concerns depending on whether and how they impede individuals from communicating with each other. Besides, consumers want

devices that accept all works, and recordings that play on all devices.

The industry has turned to the courts for assistance in shutting down services that offer consumers new and appealing ways to acquire and to interact with music but which the industry has exercised its right under current law not to license. By doing so, however, the industry has relegated consumers to unlicensed services. In turn, it has seeded these services with spyware, and engaged in "spoofing" by which consumers who search P2P networks for music files have instead been sent corrupted files that may damage their computers.

And, of course, the industry has pursued an aggressive campaign of infringement litigation against consumers seeking ruinous damages for conduct occurring in the privacy of people's homes and dorm rooms.

The industry fears, correctly, that streaming will allow consumers to make unauthorized copies of the recordings being transmitted. Accordingly, because preservation of the sales-based revenue model has been foremost in the industry's mind, it has sought to suppress Internet streaming altogether.

To be sure, the majors have licensed certain services. But they have encumbered these "lawful offers" with music use restrictions, content limitations and user interface requirements. Moreover, the labels demand large upfront payments in order to secure licenses, and then impose license fees calculated on a per-stream basis. This mimics the sales-based revenue model and, as intended, is a structure that few streaming services can afford.

In any event, these "lawful offers" are, at best, alternatives to those services that consumers demand, not substitutes for them. And because they fall short of meeting

consumer demand they leave the industry's sales-based revenue model vulnerable to widespread infringement by consumers who refuse to accept less than they already know they can have.

The market forces at work at the intersection of the Internet and the music industry's sales-based revenue model are wildly asymmetrical and to the disadvantage of music industry rights holders. The network is everywhere and music is everywhere a part of it.

Thus, despite the industry's efforts, the unauthorized digital distribution of recorded music continues unabated; P2P and social networking services proliferate; and new means of mass distribution have arisen. If anything, the industry's efforts to date have resulted in fewer licensed transmissions of fewer recordings and slowed the growth of royalties that authors, publishers, artists, and producers otherwise may have earned.

The success of iTunes does not change this conclusion. iTunes accounts for approximately 70% of the lawful market for digital downloads. Yet, Apple has benefited far more from the sale of iPods than the music industry has from the sale of downloads through the iTunes store. The vast majority of recordings found on iPods were not even purchased from iTunes (and may be infringing copies). Nevertheless, the industry has become Apple's unwitting hostage, reluctant to consider alternative business models for fear of jeopardizing this single source of revenue.

Public policy should strongly support both the right and the opportunity of music industry rights holders to derive ample financial rewards from their contributions to commerce and to culture. By the same token, however, the music industry should not have the right to demand that public policy support its desire to do business in a particular way. Policy makers should seek to accommodate the interests of all relevant stakeholders in the digital music marketplace.

The problem does not lie with the Internet. Nor with technology run amok. Nor with consumers who cannot be made to relinquish their newly-acquired ability to enjoy music when, where and how they want. Rather, the problem lies with the music industry's addiction to the sales-based revenue model. As long as the industry's fortunes are tied to sales it will require the continued complicity of policy makers to enforce punitive measures against consumers and to suppress the free markets for technology, consumer electronics, and digital music services.

The music industry must reorient its perspective regarding digital transmissions of recorded music. Instead of squandering resources and good will seeking to thwart consumer demand, it should fulfill it. Instead of seeking to throttle Internet transmissions of music, it should promote the most widespread uses of music possible. The industry must embrace the Internet as the entertainment and communications medium that it is; a necessary and irresistible destination to which consumers will return again and again even if their personal music libraries contain copies of every recording ever made.

III. A Newly Created Right is Needed for Digital Transmissions of Recorded Music

An alternative to the sales based revenue model is needed for digital transmissions of musical works and sound recordings. I suggest this:

A. Definition and Scope

Lawmakers should aggregate the rights of authors, publishers, artists and producers in their respective musical works and sound recordings and create a single right for digital transmissions of recorded music.

This "digital transmission right" would be a new right, not an additional right. It would replace the parties' now-existing reproduction, public performance and distribution rights (and, where applicable, the making available right and the right of communication to the public). These would no longer have separate or independent existence for purposes of digital transmissions of sound recordings or the musical works embodied in them.

The only act that would require a license, or payment of a license fee, would be the digital transmission of recorded music. Every transmission that is not subject to exemption would require authorization. This does not mean that separate payment would be due for each transmission of each recording; only that, regardless how license fees may be calculated, all non-exempt transmissions would require authorization.

Licenses would be made available unconstrained by the concerns that have driven the industry's failed campaign to salvage its sales-based revenue model. The determinative consideration would be whether or not recordings had been digitally transmitted, not whether transmissions result in sales, promote sales, or cause sales of recordings to be lost.

Licenses would be issued without regard to whether recordings are streamed, downloaded, or transmitted by some means not yet devised; whether music programming is interactive or non-interactive, or contains this, that or another recording; whether the service accepts user-generated content, operates as a P2P or social network, or otherwise retransmits or further transmits recordings that originate from other sites or services. The number of copies necessary to effect transmissions and the type of transmission technology used would not affect the availability of a license.

B. Ownership

Ownership of the digital transmission right in each recording will be held jointly by the author(s), publisher(s), artist(s) and producer that contribute to it. Each of these parties will be treated as a co-owner of the digital transmission right of the recording in question.

C. Authority to Grant Non-Exclusive Licenses; Royalty Shares

The interests of all co-owners would be implicated by every digital transmission of a recording. No one co-owner would be permitted to act as gatekeeper of the rights of all, with sole discretion to determine, by way of a veto, if, when, how, and by whom this newly-established right may be exploited. Rather, regardless of the nature of their relationships to each other under pre-existing agreements, or to particular recordings under current law, under the digital transmission right each rights holder would have independent and sufficient authority to grant non-exclusive licenses on any terms that they and their licensees find to be mutually acceptable.

The only limitation on this authority would be the obligation to account to co-owners for royalties earned.

Rights holders of individual recordings would be free to make whatever arrangements they wish among themselves regarding this division of royalties. Nevertheless, as a starting point for negotiations generally, and as a default when voluntary agreement is not possible, I suggest that the interests of authors, publishers, artists and producers should each be allocated a 25% share of the total royalty earned from licensed digital transmissions of their recordings. In this way, singer-songwriters would receive 50% of all royalties earned from licensed transmissions of their recordings, and 100% of those royalties if they also self-publish and produce their own recordings.

D. Authority to Grant Exclusive Licenses

Rights holders would also be free to coordinate their licensing efforts. If all agree, they may license their jointly owned recordings to a single music service provider for all purposes on an exclusive basis, or to multiple service providers, each on a different exclusive basis (e.g., time, territory, or type of service). Exclusive licenses, however, derive value from the ability of the license holder to exclude others from using the work in the same manner during the period of exclusivity. The music industry's experience to date demonstrates the futility of efforts to restrict uses of recorded music on the Internet. Because of this, the useful lifespan of exclusive rights in the digital music marketplace will be short, their value uncertain. Music service providers may do better being the first source of particular content rather than trying to maintain their status as the only source of it.

E. Conduct for Which a License Would Be Required; Parties Who Would Be Responsible for Obtaining Licenses in Particular Circumstances

The digital transmission right would be enforceable only against those directly involved in providing digital transmissions, retransmissions or further transmissions of recorded music.

Accordingly, consumers would not incur any liability merely for accessing the Internet, listening to streaming media, or downloading music files. Copying for personal use also would not require authorization. Consumers still may be required to pay network operators for Internet access, and to pay music service providers for their activities in connection with particular web sites or services. But whether consumers listen to streams or download recordings; make one or many copies of a recording for personal use; or use

recordings on one or several playback devices would have no effect on their obligation to music industry rights holders. None of this conduct would require consumers to obtain licenses or to pay license fees under the digital transmission right.

Similarly, software developers, technology firms, consumer electronics makers, telecommunications providers, and ISPs, when operating as such, would have no liability under the digital transmission right. However, any of these (ISPs, for example) would need licenses if they directly provided digital transmissions of recorded music.

Any entity that operates a web site or other service that provides digital transmissions of recorded music (a music service provider) would need a license. Consumers would need licenses if they upload music files to web sites or services that accept user-generated content but that do not have licenses authorizing such transmissions by their users; or if they offer recordings to others through participation in unlicensed P2P networks, or similar services.

Most web sites and services that offer musical programming only allow consumers to access music, either through streaming, downloading, or both. They do not allow consumers to upload recorded music; they do not accept user-generated content. In these circumstances, only the service provider would be engaged in providing digital transmissions of recorded music; and only the service provider would need authorization. Consumers, as transmission recipients, would not have any liability for these transmissions.

Other sites and services are configured specifically to enable consumers to upload recorded music and other content, as well as to access streams or download music files or programs from the service. Uploading would involve the digital transmission of the recordings involved; and any consumer from whose computer or other device such

uploads originate would need a license under the digital transmission right. The service provider that enables the uploading of user-generated content would also be liable for its users' conduct.

For services that accept the upload of user-generated content, a license held by the Internet user would suffice to authorize uploading to that service by that user of the recordings covered by the license. I propose, however, that a single license held by the service provider would authorize all transmissions for which the service provider and users of the service would be jointly and severally liable (e.g., user-generated uploading to the service), as well as all transmissions for which the service provider alone would be liable (e.g., streaming and downloading from the service to its users). Such a license would eliminate the need for individual consumers who wish to upload recorded music to that service to obtain licenses in their own right.

A similar analysis applies to the P2P context.

P2P participants who download music files or access streams through the network but who do not offer works to others would not need a license. On the other hand, individuals who facilitate transmissions of recordings to others through the network would need authorization.

For centralized P2P networks, the network operator and all users of the network would be legally responsible for the file sharing that goes on. (Each user for his or her transmissions to the network servers. The operator for the conduct of its users and for its own further transmissions of recordings to users.) A single license held by the operator would suffice to authorize all transmissions, retransmissions and further transmissions of the licensed recordings through the network. In such a case, individual network participants would not need to obtain licenses in their own right, and yet would be free to

share the licensed recordings through the network whenever they wished.

The situation is different for decentralized P2P networks. These do not have centralized servers through which file-sharing transmissions pass. Moreover, by and large, the tens of millions of copies of file-sharing software for decentralized networks that already have been downloaded by Internet users are beyond the control of the distributors who released them. Software developers and distributors who do not control the decentralized networks that their products spawn would not be liable for the P2P activities that go on there. Because of this, however, there would be no single entity to which a network-wide license could be issued. Accordingly, each participant in an unlicensed decentralized P2P network would be responsible for securing authorization for his or her own conduct on that network.

On the other hand, distributors of file-sharing software for decentralized networks who wish to secure licenses for their services could do so if they configured future releases of their software to allow them to prohibit sharing of specific recordings (which likely would only rarely be necessary under the digital transmission right), and to track which recordings had been shared so that rights holders could receive royalties. A license held by the software distributor would cover all individual file-sharers who use the enhanced software.

The digital transmission right favors licensed P2P networks (both centralized and decentralized). Licensed networks, being lawful, would be able to operate openly, attract investment capital (without exposing investors to copyright infringement liability), and offer consumers the sophisticated functionalities they desire. And there being no reason remaining for music industry rights holders to undermine them, licensed services would be free of many of the security, privacy, and related concerns that plague users of their black market counterparts.

It stands to reason that the vast majority of consumers who are interested in P2P would likely seek out networks that had secured licenses that authorize their file- and stream-sharing activities; especially if the sharing that is permitted actually offers consumers whatever it is that they want from the P2P experience at any given moment. In addition, however, those who participate in otherwise unlicensed P2P networks would have the opportunity to act lawfully by securing licenses in their own right. In this way, the digital transmission right would foster a culture of compliance in place of a culture of defiance.

There are certain transmissions for which more than a single site or service would be separately and independently liable. These include, for example, transmissions of recorded music through sites that use linking and/or framing technology to incorporate content from a third-party site and to make it appear as if that content were part of the first site's overall offering. Insofar as the site that is framed transmits recorded music, it would need authorization under the digital transmission right without regard to the fact that it is being framed by another site (a fact about which it may be unaware in any event). In addition, a site that frames another site that transmits recorded music would need authorization whether or not the site that is being framed is licensed. However, while both sites would need a license, each site would pay a license fee based only on the revenue it earned that is attributable to the transmissions in question.

Similarly, where a music player that is resident on one site becomes embedded in a third-party site such that transmissions of recorded music that are received by users of the third-party site originate from the first site's server, both sites would need authorization under the digital transmission right. And again, each site would pay a license fee based only on the revenue it realized from the transmissions in question.

F. The Impact of Infringement

The digital transmission right would be all but impervious to copyright infringement. Unlike the sales-based revenue model, the digital transmission right could not be subverted by one or more unlicensed music services, webcasters, or P2P or social networks. Whether or not particular transmissions are licensed would not significantly affect the market for the digital transmission right over all.

If music industry rights holders made licenses available on reasonable terms that authorize the uses of recorded music that people want to make, the overwhelming majority of those whose digital transmissions would require authorization – music service providers and, where applicable, individuals alike – would pay the license fees that are due. If this is not the case, then all is surely lost for the music industry.

No doubt, no matter what is done, a Darknet of unauthorized uses of recorded music disguised by encryption will continue to operate. However, enforcement of the digital transmission rights against alleged wrong-doers would not require rights holder to resort to the extra-judicial self-help contemplated by the various proposals for "graduated response." Rather, those accused of infringement would be provided all the protections normally accorded under law. Given this, if the music industry made licenses readily available to those who wish to comply with their obligations to obtain authorization for their transmissions of recorded music, there likely would be little, if any, public outcry over the industry's litigation campaign against those who continue to infringe.

IV. Implementation of the Digital Transmission Right

Through the digital transmission right, authorized transmissions of recorded music could be made available through the largest number and widest array of licensed sources,

anytime, anywhere, to anyone with network access. The matter that remains is how best to administer this new right: How to convert this vast base of music service providers into licensed account; and how to convert the license fees they pay into royalties for those authors, publishers, artist and producers whose recordings these services transmit.

The digital transmission right would be implemented through a combination of voluntary collective rights management and license agreements freely negotiated between individual rights holders and music service providers (known as “direct licenses”).

Collecting societies will continue to play the key role in rights administration; and existing collectives would be positioned to lead the way. In order to do so, however, they must adapt to the new relationships that authors, publishers, artists and producers will have with each other and to their musical works and sound recordings under the digital transmission right. Collectives must reexamine the assumptions upon which they operate, and repurpose themselves accordingly.

In order to maximize compliance, collecting societies should make it as easy as reasonably possible for music service providers to obtain and to administer the licenses they need. The over all burden of compliance, including the cost of license fees and the effort needed to fulfill music use reporting requirements, should be so obviously fair that knowing non-compliance could only come from a willful and unjustifiable refusal.

The best results for rights holders, music service providers, and consumers would flow from a marketplace in which collective management was the norm and direct licensing the exception. It would be ideal if there were at least one collective in each territory whose catalog encompassed all or nearly all recordings and which was authorized to grant worldwide rights at its local rates for all digital transmissions, retransmissions, or further transmissions of recorded music that originate in its territory.

A. Formation and Regulation of Collectives

As a starting point, rights holders would be free to establish as many collectives as they wish; and, as a general matter, collectives would be permitted to operate in any manner that they choose.

By the same token, it will be necessary to establish criteria by which to determine whether by reason of their market position certain collectives should be subject to some degree of regulation. Consideration might be given to the number of rights holders a collective represents, the number of recordings in its catalog, or the proportion of all digital transmissions attributable to those recordings. Collectives that meet the threshold criteria for regulation, which should be low, would be required to accept into membership all authors, publishers, artists and producers who wish to join and who own an interest in at least one protected recording; to treat all members on an equal and non-discriminatory basis, especially with respect to the manner in which music use is monitored and royalties are calculated and paid; to license any music service provider who requests authorization and who does not have an outstanding and indisputable license fee balance under a prior agreement with the collective; and to offer the same terms and conditions of licensure to all music service providers.

Regulated collectives would be required to operate in all respects on a transparent basis. Each collective would be required to provide an accurate, current, and easily searched online database identifying every recording in its catalog, together with information identifying each rights holder of each work (though contact information for rights holders who are individuals – as opposed to business entities -- should only be made publicly available if the individuals in question unequivocally authorize such disclosure). Each regulated collective also would be required to publicly disclose the identity of music

services it had licensed (though not the identity of individual Internet users who may have obtained licenses in their own right), its total license fee collections (though not the amounts paid by individual music services), the collective's gross operating budget, the basis for its calculation of royalties, the total royalties paid (though not the amounts paid to particular rights holders), and all rules relating to governance of the organization. Regulated collectives also would be subject to government agency oversight or judicial supervision.

B. Relationship of Collectives to the Rights Holders Who Are Their Members; the Right to License Transmissions of Particular Works; and Relationships Among Collectives in Different Territories

Within this general framework, individual authors, publishers, artists and producers would be free to affiliate with a collective, or not to join any collective at all. It would not be necessary for all rights holders with an interest in the same recording to belong to the same collective. They may each belong to a different organization. However, no individual rights holder would be permitted to belong to more than a single collective at any one time.

Moreover, inasmuch as digital transmissions of their works can originate from any territory, rights holders would be free to join a collective in any territory that they wish. They would not be limited in this regard by their nationality, by the territory in which they reside, or, if the rights holder is a business enterprise, by the territory in which it is incorporated or has its principal economic residence.

Existing collectives to which rights holders may belong for the administration of rights in their works under current law would not be permitted to interfere, either directly or indirectly, with their members' affiliation decisions for the newly-established digital transmission right. By the same token, existing collectives should not be limited by their

pre-existing charters and should be permitted to repurpose themselves to operate under the digital transmission right and to solicit any and all authors, publishers, artists and producers to become members.

Each rights holder who joins a collective would grant it the non-exclusive worldwide right to license digital transmissions of all recordings in which the rights holder has an ownership interest. Each collective's catalog would be composed of all such recordings, including those in which one or more co-owners had granted their rights to another collective.

If all rights holders of a particular recording belong to the same collective, then that collective would be the only organization in its territory with authority to license digital transmissions of that recording. If they belong to different collectives, then each of those collectives would have a non-exclusive right to license the recording in question. A license from any collective whose catalog contains a particular recording would be sufficient, standing alone, to authorize digital transmissions of that recording by any music service provider holding the license. There would not also be a need for a license from any of the other collectives to which other rights holders of the work may belong.

Rights holders would be free to terminate their membership in a collective at the end of any calendar year. In the event of termination, the collective would lose the right to license digital transmissions of the recordings in which the terminating rights holder has an interest; but only to the extent of that rights holder's interest in those recordings. If other co-owners of those recordings are (and remain) members of the collective, then the recordings themselves would remain in the collective's catalog and continue to be available for licensing by that collective.

Regulated collectives would be required to enter into reciprocal administration agreements with regulated collectives (but not with unregulated collectives) in other territories if the foreign collective seeking affiliation licenses music service providers and calculates and pays royalties on a substantially equivalent basis as the local collective. (See Sections IV.E and IV.G, below, for a discussion of the basis for setting license fees and rules for royalty distribution, respectively.) If a collective in one territory has reciprocal administration agreements with collectives in other territories, then the catalog of the local collective would include the recordings in the catalogs of those affiliated foreign collectives.

C. The Role of Direct Licensing in the Context of Collective Rights Management

Individual authors, publishers, artists and producers that join a collective would retain the right to issue direct licenses on a non-exclusive basis for digital transmissions of their recordings to any music service providers with whom they choose to do business. Subject to whatever limitations rights holders of particular works may voluntarily agree to among themselves, and subject to the obligation of rights holders to account to their co-owners for royalties earned, individual rights holders and service providers would be permitted to agree upon any terms and conditions for such non-exclusive direct licenses that they find to be mutually acceptable.

Rights holders would be required to advise their collectives of the existence of any direct licenses they grant, the works that are involved, and the identity of the service provider whose transmissions have been authorized. These disclosures are necessary so that the collective will know not to seek to license the music service provider in question insofar as the works that are subject to the direct license are concerned; and if that service provider is licensed by the collective because of its transmissions of other recordings, not to distribute royalties for transmissions of the directly licensed works by that service

provider. Such disclosures also will tend to safeguard the interests of co-owners of works who are not parties to the direct license.

D. Treatment of Music Service Providers; One-Stop Shops; Worldwide Rights

Each collective would be authorized to issue licenses that grant worldwide rights for transmissions, retransmissions, and further transmissions that originate from its own territory. In this way, each collective would offer a single source, a "one-stop-shop" with respect to digital transmissions of the recordings in its catalog.

The license fees charged, including those for transborder transmissions, would be based on the rates prevailing in the territory of the collective issuing the license. By contrast, the practice under the industry's sales-based revenue model is to charge the license fee prevailing in the territory of reception. This is done to protect the local market for sale of recordings in that territory. This consideration would not be relevant under the digital transmission right where sales, per se, are no longer a concern. Moreover, when the license fee of the territory of reception is charged, service providers, whose transmissions are available for reception worldwide, are unable to develop well-informed business strategies because they are not able accurately to predict their music license fee costs in advance. This disincentive to compliance is removed if the license fee charged is that prevailing in the territory of the collective issuing the license.

For their part, music service providers would be free to operate their services from any territory that they wish, and to obtain needed authorization from the collective(s) operating in that territory. They would not be limited to obtaining licenses only from the collective in the territory in which they are incorporated or in which they have their principal economic residence.

If (as I suggest in Part IV.E, below) license fees are based on a percentage of revenue attributable to a service provider's digital transmissions of recorded music, and if (as I suggested in Part IV.B, above) the license fee rates charged by regulated collectives that wish to be affiliated with regulated collectives in other territories must be substantially equivalent (e.g., tend to equalize around a particular percentage), there would be no advantage for music service providers to locate in a foreign territory for the purpose of forum shopping for lower license fees. In this way, the digital transmission right would not encourage the "race to the bottom" on license fees that so many rights holders say they fear.

The central concern for music service providers is with how many sources they must deal in order to obtain the rights they need on reasonably acceptable terms. The presence in each territory of at least one "one-stop-shop" from which to obtain a single license agreement granting worldwide digital transmission rights to nearly all recordings will be key to service provider compliance.

Service providers who enter into a license agreement with a "qualifying" collective (one that has greater than a specified market share) would be entitled to assume that they had secured authorization through that license to digitally transmit any and all recordings. For purposes of this safe harbor, the market share necessary for a collective to "qualify" should be high; and, again, the determination of market share could be based on either the number of rights holders a collective represents, the number of recordings in its catalog, or the proportion of all digital transmissions attributable to those recordings.

Under this safe harbor, a music service provider would not be liable for monetary damages as an infringer of the digital transmission right in any recording that is not in that "qualifying" collective's catalog unless, and until, a rights holder of such recording serves a notice demanding removal of the recording from the service. Only if the service

provider fails to remove the work within a reasonable time after receiving the notice would it be liable for damages. Moreover, once a work has been removed pursuant to a notice for takedown, the service provider must use commercially reasonable efforts including, for example, industry standard filtering technology, to keep that recording from again being offered on the service without a license.

Under the industry's sales-based revenue model, where licenses are generally unavailable, the primary use of filtering has been as a means to ferret out acts of infringement. By contrast, under the digital transmission right, where licenses will be readily available, the primary use of filtering will be as a tool of license administration. Given this, filtering should no longer be as widely or strongly opposed as it has been.

E. License Fees

In the past, record labels were able to set the sale price for recordings because they effectively controlled the retail market. Today, however, the industry does not control the market for digital distribution of its products. Nevertheless, it continues to seek per-unit license fees from online retailers for their sales of recordings.

In addition, the industry uses license fees for streaming as an indirect means of giving life support to its moribund sales-based revenue model. It treats every streaming transmission as if it displaced sale of the recording involved. It seeks license fees from streaming services based on the greater of a specified and often quite high percentage of revenue and either a unit payment per-song/per-stream/per-listener or payment based on the aggregate number of hours that users receive streaming transmissions of recorded music.

License fees calculated on either a per-stream or aggregate tuning hours basis can quickly exceed a music service provider's revenue. It does not provide an incentive to comply. It

penalizes use and, therefore, discourages it. It will lead to fewer licensed transmissions as music serv1ices are driven out of business or underground. And for it all, the industry will not have saved its sales-based revenue model.

Under the digital transmission right the base for calculating license fees would be the revenue attributable to a service provider's digital transmissions of recorded music. By way of example only, reportable revenue would include that derived from subscription streaming or subscription downloads; one-off charges for the download or streaming of individual songs, entire CDs, or musical programming containing one or more recordings; and an allocated portion of revenue derived from the sale of bundled products of which recordings comprise a part. It would also include advertising revenue derived from areas of a site or service from which transmissions of music (whether streams or downloads) originate; and advertising revenue derived from those areas in which streaming performances can be heard even though the stream was launched from elsewhere on the site or service (or in the case of links, frames and embedded players, from another site or service entirely).

A minimum license fee would be payable in all instances.

For centralized P2P, the minimum payable by the by network operator would be a flat annual amount for each unique participant who shares music through the service. For decentralized P2P, software distributors would pay a minimum flat annual amount for each unique network participant who shares recorded music by means of the enhanced software that allows the distributor to conduct the filtering and music use monitoring upon which its license is predicated.

Individual Internet users who participate in otherwise unlicensed P2P (or social networks) would pay a flat annual license fee so that their conduct would be lawful.

These payments could be made either to the collective(s) that administer rights in the recordings in question, or through ISPs who, in turn, would pass these payments along either directly to the rights holders in interest or to the relevant collective(s).

The rate to be applied to the revenue base to calculate the fee owed in particular circumstances, as well as the amount of the minimum fees to be paid, would be the subject of negotiations; or, failing voluntary agreement, determination by a royalty board or other empowered expert agency.

This license fee structure would allow music industry rights holders to participate in the growing bounty that will be created by digital transmissions of recorded music. It would provide service providers with a license fee obligation that scales with the benefit they derive from their transmissions of music. It would encourage licensed transmissions. And, it would provide a way to act lawfully at a reasonable price for those individual Internet users who wish to transmit recorded music other than through licensed sites and services that had secured authorization for their users' conduct.

F. Music Use Monitoring

Collective management in the digital music marketplace begins and ends with the ability to monitor transmissions of the recordings in question. Knowing which recordings have been digitally transmitted and by which music services underlies licensing, enforcement, contract administration, and royalty distribution.

With respect to royalty distribution, a census-based monitoring system would assure that all rights holders, large and small, receive that share of royalties that is proportionate to the fees paid by licensed services for transmissions of their recordings. The principal drawback of a census is the cost to administer it.

The alternative is to base royalty distribution on sampling. Sample surveys credit only a fraction of the transmissions that occur. Royalties generated from transmissions of recordings that fall within the sample would be paid to the owners of those recordings. However, royalties for licensed transmissions of recordings that do not fall within the sample would not be paid to the owners of those works; rather, they would be paid to owners of recordings that do fall within the sample.

Currently, the industry requires music service providers to bear the entire burden of music use monitoring for purposes of royalty distribution. This obligation is obtrusive and costly.

Rights holders need to find a way to maximize the depth and accuracy of monitoring while reducing the burden of it on service providers. One possible solution involves encoding recordings with copyright management information and using complementary software that would allow automatic tracking of the encoded files by licensed services. Collectives should provide this tracking software free of charge. In addition, each collective might also provide licensed services with access to encoded files of all recordings covered by the collective's license. These, too, should be provided free of charge. (This approach would make no sense under the industry's existing sales-based revenue model; but it is eminently reasonable under the digital transmission right.)

Service providers should not be required to use either the encoded files or the industry-standard tracking software. Rather, they should be offered a reduction in license fees as an incentive for their cooperation in music use monitoring through use of these preferred tools. Service providers who elect not to use these tools would not be offered a reduction in license fees but would still be required to meet the monitoring and reporting requirements of their license agreements.

G. Royalty Distribution

Each collective would pay royalties only to those authors, publishers, artists and producers whose interests it represents. If the rights holders of a particular recording belong to different collectives, they would each look only to their own collective for payment of royalties. Thereafter, and unless they have agreed otherwise among themselves, each rights holder would have the obligation to account to their co-owners for royalties received from their respective collectives. If all rights holders of a particular recording belong to the same collective, they would each receive their full share of royalties directly from that collective and there would be no need for later accounting and reconciliation among them.

The rules that govern royalty distribution under the digital transmission right would take into account that some licensed transmissions will begin and end entirely within the territory of the collective that licensed the transmissions, while others will begin in that territory and end in another.

For transmissions that begin and end in the same territory, 100% of the author(s)' and artist(s)' respective shares of royalties would be paid to the author(s) and artist(s) of the recording in question; and 100% of the publisher(s)' and producer's respective shares would be paid to the publisher(s) and producer who control the digital transmission right in that territory. For transmissions that begin in one territory and end in another, 100% of the author(s)' and artist(s)' respective shares would be paid to the author(s) and artist(s) of the recording in question; but the publisher(s)' and the producer's respective shares would each be split 50/50 between the publisher(s) and the producer/record distributor(s) who control the digital transmission right in each of the two territories involved.

This structure will assure that publishers and producers in the territory from which a transmission originates as well as those in the territory where it is received will share in the royalties earned from that transmission. Authors and artists, on the other hand, would always receive 100% of their share of royalties regardless of the territory from which a transmission of their recording originates or in which it is received.

H. A Period of Transition

It is my intention that music industry rights holders in the aggregate should do at least as well financially under the digital transmission right as they have done under the system that the digital transmission right would replace. Therefore, as a near-term objective, industry revenues under the digital transmission right should equal the sum of total net profits for producers and publishers and total royalty income for authors and artists derived from sales and licensed public performances of their musical works and sound recordings (the "base amount").

Although the industry has been unable to make the digital music marketplace safe for its traditional ways of doing business, its various Internet strategies have effectively suppressed the market for music-enabled web sites and other services. Therefore, in the short-term, there may well be a shortfall between the base amount (however much that turns out to be) and the amount that rights holders will collect in license fees under the digital transmission right.

I expect that music service providers, who are eager to meet consumer demand by lawful means, will rush to enter into license agreements under the digital transmission right. Therefore, the duration of any revenue short-fall likely will depend on how quickly and how well music industry rights holders organize and roll-out the structures needed to implement their new right.

In the meantime, steps should be taken to make up some portion (perhaps 50%) of any shortfall that may occur. For this limited purpose, I suggest that a temporary levy should be imposed on consumer electronics and technology products.

Consumer electronic makers and technology firms, as such, would have no liability under the digital transmission right. Nevertheless, because of the digital transmission right, they will be free to innovate in whatever ways and to whatever extent necessary to satisfy ongoing consumer demand for new music-related products and services. I think it is appropriate, therefore, that these businesses should bear the burden of the levy; they should not be permitted to pass the levy through to consumers.

It is not intended that the levy result in a windfall for music industry rights holders; it is only meant to assist them during transition to the digital transmission right. Therefore, the levy should be adjusted downward in response to increases in music industry license fee collections. In addition, the levy must be subject to sunset, a definite date (I suggest two to four years from implementation) by which time the music industry would be expected to thrive in the digital music marketplace without subsidies.

V. Proposals Made By Others Regarding Possible Roles to Be Played by ISPs

Several proposals have been made regarding the role ISPs might play in the digital music marketplace.

The most widely discussed proposal is an enhanced enforcement measure known as "Graduated Response." It would require ISPs to take action against subscribers who use their networks to infringe copyright. This may include notifying users of claims of infringement; disclosing to rights holders the identity of users against whose IP address

claims of infringement have been made; blocking download of specific content; limiting web browser capabilities of those identified as infringers; and denying Internet access to the most serious offenders.

Some governments have embraced Graduated Response, though each to a different degree. Others have rejected it outright. The European Commission held that it is inappropriate to deny Internet access to those accused of copyright infringement because doing so would violate the fundamental right of citizens to access information.

Graduated Response will not make the Internet safe for the sale of recorded music. It will spur development of cloaking technology and the spread of private networks. Consumers will use these to act anonymously as they continue to share music illegally. By the time ISPs terminate the accounts of any given day's most serious infringers, those wrong-doers already will have caused great and irreparable economic loss to rights holders. Moreover, as long as the music industry allows consumer demand to go unmet, the ranks of the "most serious infringers" will continue to swell, though they will be more difficult to detect and to identify.

In addition, Graduated Response puts the music industry on the wrong side of the Net Neutrality debate. The industry's future lies in maximizing use of music through digital media not curtailing it. It is against the industry's interest to encourage ISPs to throttle web browsers or to deny anyone Internet access for any reason.

Other recent initiatives focus on revenues.

In one, rights holders would license ISPs to offer music, and music-related functions and features to their subscribers. Unlike the digital transmission right, however, this proposal would do nothing to resolve the many issues that have impeded the licensing of music

service providers generally. Nor would it relieve the industry of the need to pursue unlicensed music uses of every kind, including P2P.

Initially, this approach will generate much badly needed revenue. However, it would allow ISPs to play the dominant role in their relationship with rights holders, as Apple has. And while Apple only controlled the music industry's access to a single playback device, the iPod, ISPs control access to virtually everything else. If ISPs as a sector paid the lion's share of music industry revenues, they would be in position to pressure rights holders for ever lower license fees.

By contrast, under the digital transmission right the licensing of ISPs that operate as music service providers would be part of a much broader licensing initiative. This would increase the base of licensed accounts and limit the relative importance of ISPs in the fee setting process.

The German Green Party also has proposed a revenue measure. It would impose a legal license for "non-commercial" P2P coupled with a mandatory levy on all broadband access. Similarly, Canadian songwriters and recording artists have proposed to authorize P2P occurring "without motive of financial gain." However, unlike the Green Party's proposal, participation in SAC's scheme would be voluntary both for rights holders and for Internet users.

Both of these proposals will founder on the difficulty of defining the scope of "non-commercial" and "without motive of financial gain" in the P2P context. If the scope were too restrictive, it would limit P2P to the debased experience that is currently available. Consumers would reject that. If the scope is too broad then talented people will find ways to collaborate to offer a P2P experience that is both non-commercial and fully satisfying for consumers. This outcome would be wholly inconsistent with continued viability of

the music industry's sales-based revenue model.

Moreover, it is unlikely that music industry rights holders would be the only stakeholders to receive payment from the fund created by these levies. It may start out that way. Soon, however, owners of other types of content (much of which may not involve any music) will also seek payments to offset losses from use of their works in non-commercial P2P. This would pit the music industry against those other rights holders in endless rounds of litigation over division of the fund. CISAC recently estimated that the share of such a fund payable to authors' societies worldwide would represent only approximately 5% of overall collections.

Under the digital transmission right the results would be different and far better for all those with a stake in the digital music marketplace.

VI. Conclusion

The music industry is in free fall, and it is dragging down all other relevant stakeholders with it. To date, all that the industry has accomplished through its brute force efforts is to waste time, lose money, and squander goodwill. No time remains for stopgap measures. There can be no justification for further delay in the implementation of needed change.

The digital transmission right, administered as I have suggested, will bring about change that is directly and proportionately responsive to the challenges presented by the Internet; change that creates a new and fair balance between the rights of creators and those of music users; change that is technologically neutral; change that meets the needs of all the many competing stakeholders in the digital music marketplace. The digital transmission right will foster a legal marketplace for digital transmissions of recorded music with rules that are as simple, straightforward and clear as the context will allow; rules that are

sufficiently flexible to adapt to the continually changing economic and technological environment of the global digital network.

Adoption of the digital transmission right would establish Canada as the leader in the worldwide effort to reform intellectual property law for the digital age.

Respectfully submitted,

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