

## A COLLECTIVE RIGHTS SOCIETY FOR THE DIGITAL AGE

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### ABSTRACT

*Variations in digital copyright law in the international sphere have created unnecessary transaction costs to both consumers and producers who wish to transfer digital media efficiently. This article argues that the international community should create a collective rights organisation to bring uniformity, fairness, and efficiency to the process of transferring digital media and endeavours to construct the ideal model for such a collective rights organisation by describing a hypothetical collective rights organisation named PICRO (Possible International Collective Rights Organisation) and examining its operation using the example of digital music distribution. By illustrating the PICRO model in the light of current trends in international digital copyright law, the article aims to highlight the advantages of the proposed new system while underscoring the inherent weaknesses of having different digital copyright laws for different territories.*

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## I. INTRODUCTION

Geography is no longer a barrier to expression. Hence decisions regarding the structure of digital entertainment law must be made with international implications in mind. It is of little importance that the United States Copyright Arbitration Panel has come to an agreement that weighs the interests of access and compensation for a particular service if another country comes to a different conclusion with a different royalty rate. The smart investor can simply choose to form his or her business in the kinder jurisdiction. Such digital copyright havens could cause global market distortions by charging their businesses a lower royalty rate.

Territorially limited rights and differing local laws impose unnecessary transaction costs for the worldwide transfer of digital entertainment. In order to reduce transaction costs for the distribution of digital music, a uniform method of regulating and licensing digital music is necessary for the internet market, which transcends traditional boundaries. Therefore, getting the nations of the world to agree upon a uniform compulsory licensing structure to regulate the distribution of music on the internet is in the interests of rights-holders, as well as the nations that benefit from their Gross Domestic Product (GDP).

However, getting the developing nations of the world to agree on the somewhat arbitrary royalty rates set by the United States and the United Kingdom will not be easy. An ideal package, to induce these nations to enter a uniform regime, should offer them the ability to participate in the global intellectual property market. The model solution would be one that allows production companies to set their own price flexibly, allows retailers worldwide to license the products efficiently, and allows consumers to purchase the product at a price that is reasonable considering their economic circumstances. Any solution should also, in order to ensure widespread acceptance among different legal traditions, consider the differences between the economic incentive framework of copyright law found in common law countries and the respect for the rights of authors found in civil law nations.<sup>1</sup>

This article illustrates the need for an international rights organisation that is capable of granting publishing and recording rights to musical works throughout the world, and describes how that system could work. I will first illustrate the advantages of an international collective rights organisation over the traditional domestic rights organisations in the context of Internet distribution. After establishing the reasons why such an organisation would be superior, I will explore the Internet distribution models currently employed by the music industry and assess their feasibility in an international collective rights organisation. Further, I will describe how such an organisation could adopt distribution models and maintain price discrimination so that people throughout the world can afford access to musical works while balancing the interests of rights holders in an efficient manner.

## **II. THE ADVANTAGES OF AN INTERNATIONAL COLLECTIVE RIGHTS ORGANISATION**

Blanket licensing of music is currently administered by a handful of collective rights organisations: in the U.S., for example, this is done by organisations such as the Harry Fox Agency, ASCAP and BMI. These bodies have proven capable of reducing transaction costs for multiple subscribers who would otherwise have had to negotiate directly with the recording and publishing companies.<sup>2</sup> They have done well for composers in the traditional radio and record markets that are easily confined to national boundaries, but are poorly suited for the challenges of the digital age because they do not have the power to license music throughout the world. The collective rights organisation of the digital age must be international in nature and must represent both the publishing and recording industries, because both publishing and recording rights are implicated in digital distribution models and dealing with

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*See generally* STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS (2d ed. 1989) (discussing copyright frameworks in both common law and civil law jurisdictions).

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DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 220-21 (2003). *See also* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 2001 Supplement 135-37 (2d ed. 2001) (listing examples of overseas performance rights societies).

both would result in economies of scale.<sup>3</sup> It should also be focused solely on internet markets in order to increase their efficiency, provide a one-stop shop for webmasters, and respond to this fundamentally different market.

This collective rights organisation, the Possible International Collective Rights Organisation (hereinafter “PICRO”), should attempt to fill the demand for licensed content of currently employed methods of digital entertainment distribution to reach businesses and end users throughout the world. A central

licensing grantor, capable of worldwide licensing after processing a simple application, will be useful in several ways.

Firstly, by creating a blanket rights organisation capable of granting licences to cover all territories, the PICRO would provide access to music for users throughout the world, especially users within the under-served nations outside of the major market. For example, a Tongan citizen's current ability to meet with music industry executives and strike licensing deals is slim and inefficient both to the Tongan, who may not be able to recover his negotiating expenses, and to the record company executives, who would probably prefer to focus their energies on more profitable projects.

Even though these markets are under-served, the countries they represent are charged with protecting these works from infringement through the TRIPS agreement,<sup>4</sup> the WIPO Copyright Treaty<sup>5</sup> and a range of other treaties. Whether a lack of digital music delivery services is a result of disinterest in the local market or a business decision to focus distribution efforts on the major markets is debatable. What is less debatable, however, is the unfairness of requiring developing nations to incur expenditure to enforce copyright interests in music that is not licensed to them. The PICRO could alleviate this problem with little transactional expense to the record company or the Tongan entrepreneur

<sup>3</sup> See generally KOHN & KOHN, *supra* note 2, at 410-14 (discussing the distinction between the copyright in a recording and the copyright in a particular song). This collective rights organisation should not represent both industries in a lobbying role because of the conflicts between competing publishers and sound recording interests.

<sup>4</sup> Agreement on Trade-Related Aspects of International Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>5</sup> World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 828 U.N.T.S. 3 [hereinafter "WIPO Copyright Treaty"].

while opening the entertainment market to millions of distributors and consumers.<sup>6</sup>

Secondly, an international compulsory-licensing scheme that allows non-major-market users to distribute digital music can also prevent piracy in the major markets. As Internet use spreads among the non-major-market countries, the demand for digital entertainment will grow as well.<sup>7</sup> If music files are not available to people living in these countries at a reasonable price — which is determined by considering what the local market can bear — users will probably turn to piracy networks to gain access to music files.

An inefficient market for digital music is a problem for both the recording and publishing industries in terms of lost sales due to piracy in both major and non-major markets.<sup>8</sup> Because of the nature of file-sharing networks, piracy in

foreign markets — even those markets that have never been a substantial source of revenue — will affect the total revenue the music industry can generate.<sup>9</sup>

Thirdly, peer-to-peer networks work through a series of connections that allow users to make copies of files on other users' system.<sup>10</sup> Current versions of such software allow the user to connect directly to a large number of users simultaneously, thereby increasing connection speed and reducing downloading time.<sup>11</sup> As users from other countries, especially those who are not offered viable entertainment solutions, turn to these networks, the variety in the networks' catalogues will increase, and download times will shorten further.<sup>12</sup> This may

<sup>6</sup> See generally KOHN & KOHN, *supra* note 2, at 234-35 (discussing the potential of the internet to expand the music industry).

<sup>7</sup> While I appreciate that many people in the developing countries do not have Internet access, the market is growing. See Internet Usage World Stats – Internet and Population Statistics, at <http://www.internetworldstats.com/>. The problem should be confronted now before it becomes intractable. Additionally, kiosks can be used as a means of reaching users who cannot afford their own computer, but who can afford a digital audio player.

<sup>8</sup> See, e.g., Brad King, *Music Biz Laments: Stealing Hurts*, WIRED, Sep. 26, 2002, <http://wired.com/news/mp3/0,1285,55393,00.html>.

<sup>9</sup> See *id.*

<sup>10</sup> Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, n.1 (2005).<sup>11</sup>

<sup>12</sup> See *id.* at 586.

lead to increased piracy in the major markets, as peer-to-peer network providers close the “convenience gap” between themselves and legitimate suppliers.<sup>13</sup>

However, creating a uniform legal and licensing structure alone will not be sufficient to stem the tide of piracy and provide developing countries with manageable enforcement duties. The nations in the WTO and the entertainment industry must provide for a framework that allows people in developing countries to purchase entertainment at affordable prices. Otherwise, piracy will continue to grow in these countries, as will the associated cost of combating it.

The need to meet local pricing demands should be evident. After the Napster network demonstrated the high demand for digital music and the ability of pirate networks to undermine sales, the recording industry scrambled to provide consumers with a viable alternative to the pirate networks.<sup>14</sup> Along with creating user-friendly stores that add value to the customer's shopping experience, the recording industry roughly decided that a price of around one dollar per song is what the major markets could bear.<sup>15</sup> However, while one-dollar songs may sell well to the average American buyer, US\$1 is a relatively high price to the average Indian buyer because of the considerably weaker

purchasing power of the Indian rupee. Any international licensing policy should take into account the particular licence granted and the particular user paying for the licence when determining a reasonable sales rate to the end user, while balancing the interests of the creator or holder of the work.

<sup>13</sup> See Ed Oswald, *Study: iTunes More Popular than P2P*, June 7, 2005, at [http://www.betanews.com/article/print/Study\\_iTunes\\_More\\_Popular\\_than\\_P2P/1118158804](http://www.betanews.com/article/print/Study_iTunes_More_Popular_than_P2P/1118158804). See generally Urs Gasser et al., *iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media – A Case Study*, June 15, 2004, <http://cyber.law.harvard.edu/media/uploads/81/iTunesWhitePaper0604.pdf> (explaining the value of the shopping experience on the iTunes music store, as compared to the experience on P2P networks).

<sup>14</sup> PASSMAN, *supra* note 2, at 373-77. <sup>15</sup> See Alex Veiga, *Recording Labels, Apple Divided Over Pricing*, Apr. 2, 2006, <http://www.msnbc.msn.com/id/12122837/>. The files are reportedly licensed for roughly seventy cents apiece, with the remainder constituting the service providers' transaction costs and profit margin. *Id.*

### III. DISTRIBUTION MODELS

In order to address the more important issues in international digital music licensing, and describe how they may be handled by the PICRO, it is useful to examine some existing business models:

#### A. Tethered-Download Subscription Services

'Tethered downloads',<sup>16</sup> is an industry term that refers to music files that have certain restrictions placed on them as to use and transferability to different mediums.<sup>17</sup> Tethered downloads have made an impact in the 'subscription service' model.<sup>18</sup> Users pay a monthly fee for access to a website's entire repertoire of music files, and are generally allowed to play an unlimited amount of music, but are restricted from transferring the files to portable music devices or storage media such as CDs.<sup>19</sup> Users are only allowed to use the files for a specified amount of time, and they lose access to the files if they do not renew their leases.<sup>20</sup>

The right the consumer has can be adequately characterised as a rental right, but is different from the current rental model popularly employed by movie rental stores.<sup>21</sup> The main reason behind this difference in distribution is that when a consumer 'rents' a particular music file, he does not *borrow* the web

<sup>16</sup> See generally, KOHN & KOHN, *supra* note 2, at 152-54 (discussing interactive electronic transmissions and distinguishing them from non-interactive, or traditional broadcast, transmissions). <sup>17</sup> Harry Fox Agency, Definitions,

<http://www.harryfox.com/public/infoFAQDefinitions.jsp>.

<sup>18</sup> *Id.* <sup>19</sup> See Michael A. Einhorn and Bill Rosenblatt, *Peer-to-Peer Networking and Digital Rights Management: How Market Tools can Solve Copyright Problems*, Cato Institute Policy Analysis no. 534, 3-7 (2005), available at

[http://www.cato.org/pub\\_display.php?pub\\_id=3670](http://www.cato.org/pub_display.php?pub_id=3670). <sup>20</sup> If the user does not pay his or her bill, the service may be cancelled by the provider.

See, e.g., Napster

– Terms and Conditions, <http://www.napster.com/terms.html> (for example, “You agree to pay for all Tracks and Materials that you purchase through the Service and Napster may charge your billing payment method for any such payment(s) . . . [i]f Napster receives a notice alleging that you have engaged in behavior that infringes Napster’s or other’s intellectual property rights or reasonably suspects the same, Napster may suspend or terminate your account without notice to you”).

<sup>21</sup> There is currently no first sale exhaustion of the copyright protection of a music file like there is for a DVD; this is because the second sale is likely to be a copy of the first and the product is leased. See David R. Johnstone, *The Pirates are Always With Us: What Can and Cannot be Done About Unauthorized Use of MP3 Files on the Internet*, 1 BUFF. INTELL. PROP. L.J. 122, 123-24 (2001).

distributor’s file, like at the movie rental store, but makes a *copy* of the website’s ‘ephemeral’ copy,<sup>22</sup> clearly implicating the author’s copyright interests. Because of this copying, a licence must be obtained for both the publishing and the sound recording rights to provide these services.<sup>23</sup>

Currently, the rights to the sound recording are licensed to the service provider based on negotiations that take into account the size of the site’s membership (or forecasted membership), the site’s catalogue, the digital rights software employed, and the site’s ability to act as a substitute to traditional consumer music ownership.<sup>24</sup>

If these rights were subject to a compulsory-licensing scheme, such a regime could possibly mimic one of the following models, neither of which is satisfactory from a business or a licensing standpoint:

## 1. Price per Song in Catalogue

In this model, the collective rights society would charge website owners a set amount each term to include a song in their catalogues. The price of inclusion would have to take into account the size of the site’s membership, to address concerns regarding the amount of people who will forgo purchasing the album or the song because of their access to the subscription service. The size of the website’s catalogue will also have to be considered. A smaller catalogue will probably be cheaper to offer, and if it had all the music the user wanted, it may be more attractive to the consumer as a substitute for purchasing music.

This ‘price-per-song’ method is clearly not amenable to a compulsory-licensing scheme. Songs that are accessed repeatedly are not rewarded as such

<sup>22</sup> An ephemeral copy of a musical work is one that is usually copied from a CD and then placed on a

computer server that will later be transmitted to the consumer. It implicates both the rights of the sound recording artist and the composer of the underlying work. See KOHN & KOHN, *supra* note 2, at 450.

<sup>23</sup> The Harry Fox Agency currently administers tethered download licensing, but there is no counterpart licence for the sound recording. See Harry Fox Agency, *Songfile*, <http://www.harryfox.com/public/songfile.jsp> (last visited Nov. 19, 2006); see also SoundExchange, *Licensing 101*, <http://www.soundexchange.com/licensing101.html#a3> (last visited Nov. 19, 2006) (explaining how to obtain a statutory licence to produce ephemeral copies).

<sup>24</sup> See generally C. Krishan Bhatia, Richard C. Gay & W. Ross Honey, *Windows Into the Future - How Lessons From Hollywood Will Shape the Music Industry*, 17 J. INTERACTIVE MARKETING 70 (2003), available at <http://www.boozallen.com/media/file/76799.pdf>.

because their inclusion is based on a set price. On the other hand, if the webmaster had to pay an amount each time a user accessed a song, the model would be difficult to employ. It would have to take into account forecasted traffic in a market that is quickly evolving each day. Negotiation with the copyright-holder over licensing rights, specifically tailored to the provider's and the customer's needs, is preferable in this approach.

## 2. Percentage of Revenue

This method of determining a reasonable royalty rate is another possible means of structuring internet radio licences.<sup>25</sup> By this approach, a percentage of revenue collected by the service provider is put aside for royalty payments. The amount collected is disbursed to the copyright-holders based on the number of times a particular work was accessed by a user. This method has the benefit of taking into account the size of the user's membership. The more users a site has, the more revenue is increased. This method also takes into account each song that is potentially used as a substitute for purchase. Songs in the catalogue that are accessed frequently are rewarded as such. If applied to a tethered download subscription service, the model could look like this:

(a) A website owner operating under this compulsory licence must pay X% of all subscription revenue earned.

(b) A website owner operating under this licence must provide reports of the songs accessed by users, and the total amount of 'spins' their service provided for each song, and the totals for the amount of all songs accessed for that month (or different term).

The problem is evident – if the subscription cost is only a dollar per year, but the website collects advertising revenue for its profit, the copyright-holder is short-changed. On the other hand, requiring the website owner to pay a percentage of revenue from all sources would stifle innovative businesses that incorporate multiple business models and revenue streams. The only viable

<sup>25</sup> See U.S. Copyright Office, *Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings*, [http://www.copyright.gov/carp/webcasting\\_rates\\_final.html](http://www.copyright.gov/carp/webcasting_rates_final.html) (discussing how the Librarian of Congress rejected the proposal of using a



percentage of revenue model within the internet radio context). alternative would be to require a minimum subscription price for a catalogue of a certain size. This would entail complex business decisions, which should be specialised rather than open to a compulsory-licensing scheme.

Furthermore, policing costs for this model are particularly high. If many webmasters were allowed to employ this model, there would be far too many providers who would have to be trusted to report their revenue honestly. If the PICRO were charged with policing their revenue, it would have to take on an additional service – auditing revenue. This would be inefficient with the model proposed for the other forms of digital licensing, because it is so different from monitoring use.

Despite the popularity of tethered downloads, this is the method of distribution that is least favourable to a compulsory-licensing scheme, mainly because of the complex business decisions that must go into catalogue pricing in this particular model. The widespread international agreement needed for this scheme is also problematic because of the complex negotiations involved, which could extend the process indefinitely.

Because of these difficulties, a tethered-download model should not be included as one of the PICRO's licensing schemes.

## **B. Internet Radio**

Radio is the most popular means of transmitting audible sound throughout the world. This is partly because the user receives radio transmissions for free, and partly because the technology is mature and can be employed with little infrastructure.<sup>26</sup> Traditionally, radio is broadcast through radio waves to consumers within a certain radius of the radio transmitter.

Internet radio is fundamentally different. The consumer of Internet radio, unlike traditional radio, can be located anywhere in the world when they access the Internet radio channel no matter where the broadcaster is located. Because the broadcaster can reach a worldwide audience, there is a real incentive to

<sup>26</sup> See generally Internews.org, *Activity – Media Infrastructure – Building Radio Stations*, <http://www.internews.org/activity/infrastructure/radio.shtm> (discussing the ease of setting up radio stations in countries with little infrastructure).

conduct forum-shopping to find the nation that offers the most attractive licensing system with regard to the technical requirements and royalty rates for a compulsory licence to broadcast music over the internet. For example, both the United States and the United Kingdom require the webmaster's Internet radio station to meet a number of technical requirements to qualify for a

compulsory licence.

The most important of these is the sound recording performance requirement.<sup>27</sup> This requirement is placed on webmasters to allay the music industry's fears that the combination of the use of Internet radio capture technology and the predictability of radio station programmes will lead to piracy.<sup>28</sup> The requirement is as follows:

(a) The station cannot play more than three songs from any particular album, or more than two songs from the same album consecutively, during any three-hour period.<sup>29</sup>

(b) The station cannot play more than four songs by a particular artist, or more than three songs from a particular artist consecutively, during any three-hour period.<sup>30</sup>

While this approach is rationally tailored to the goal of minimising piracy, it is questionable whether or not each country in the world will agree on the particular numbers employed by the Copyright Arbitration Panel, especially since the threat seems to be somewhat a product of the record companies' nightmares.

Radio stations had, for a long time, broadcasted hour-long blocks featuring an artist or an album.<sup>31</sup> During this period, songs could easily be duplicated on

<sup>27</sup> Other provisions require a webmaster to use and transmit songs that are protected by digital security software, to take steps to prevent copying, and to give the author of a work proper attribution. These protections are established by article 16 of the WIPO Copyright Treaty and should not be difficult to implement. WIPO Copyright Treaty, *supra* note 7, at art. 16.

<sup>28</sup> See KOHN & KOHN, *supra* note 2, at 432-33.<sup>29</sup> 17 U.S.C. § 114(j)(13)(A) (2006).

<sup>30</sup> *Id.* at § 114(j)(13)(B).<sup>31</sup> For example, Gater 98.7 FM aired a programme in South Florida called "Get the Led Out," which was

an hour-long block of Led Zeppelin songs.

to cassettes, yet there was no corresponding decline in cassette sales.<sup>32</sup> The assertion that captured radio will serve as a commercially significant market substitute to music purchases is therefore questionable. The argument that users will use this combination to commit piracy is further weakened when one considers the many options the user has to select an illegal file-sharing network that can deliver all the pirated music needed within minutes.

The above restrictions can limit the music programmes that an internet radio station can broadcast. Many countries may resist placing these restrictions on their webmasters to give them an advantage over their foreign counterparts, or to protect freedom of speech. Of course, to some extent, these minimums are necessary – otherwise, webmasters could set up entire stations devoted to

specific artists, specific albums, or even specific songs, in which case they might possibly serve as free substitutes for the tethered-download system. Therefore, the United States and the United Kingdom have an interest in persuading other nations to acquiesce to this particular scheme or a variation thereof because of these possible distortions in the market. This can perhaps be accomplished through favourable discounts in other compulsory licensing mechanisms, or through trade concessions.

Related to the restrictions placed on Internet broadcasters' programme formats is a requirement that broadcasters refrain from letting their users know their playlist in advance.<sup>32</sup> This restriction was also put in place out of fear of the effect of capture technology.<sup>34</sup> This point should be easier to implement internationally. While Internet radio stations' publication of song lists may be a feature consumers enjoy, the requirement is reasonable, and rational, if not well suited to its goal.<sup>35</sup> Furthermore, the lack of arbitrary numbers regarding its implementation also makes it easier for this particular requirement to get uniform acceptance. It is a simple concept to understand, and therefore, is not open to

<sup>32</sup> RECORDING INDUSTRY ASSOCIATION OF AMERICA, 2005 YEAR-END STATISTICS (2005), <http://www.riaa.com/News/newsletter/pdf/2005yrEndStats.pdf>.<sup>33</sup>

<sup>17</sup> U.S.C. § 114(d)(2)(C)(ii) (2006).

<sup>34</sup> The perceived threat is that an Internet surfer could know when to begin recording songs from a station, and could find playlists through search engines. Teasers or hints as to what the playlist will be are allowed. *Id.*

<sup>35</sup> Such a requirement would be in accordance with the anti-circumvention norms embodied in the WIPO Treaty. WIPO Copyright Treaty, *supra* note 5, at art. 12.

many interpretations. Achieving consensus on this point should thus not be particularly difficult.

The final, and perhaps the most crucial, part of a worldwide blanket licence is setting the rate. The rate chosen should be a reasonable royalty rate resembling that to which a willing buyer and seller would agree. For this, the first step is determining the value of the right to the business. In order for the business applying for the blanket licensing to determine the value of the copyrighted material, it is important to look at the end user of the product. In the case of Internet radio licensing, as opposed to other forms of licensing discussed in this essay, the end user is largely unknown at the time of broadcast. Because the broadcast is free to users and can be accessed by users worldwide, the end user can adequately be described as anyone in the world with an internet connection. The rate set by the PICRO should be uniformly charged to every Internet radio owner in the world, regardless of their locale, so that businesses have equal footing in light of the fact that an Internet radio station can compete with other stations around the world for the same user.

Of course, this will be no easy task. In order for the PICRO rate to be effective, it must be lower than, or equal to, the statutory rate set by each country. Getting the nations of the world to agree on a set rate will certainly be difficult; getting them to agree on the changes that need to be made every couple of years only compounds the problem. There are two solutions for setting the rate today and in the future. One way would be to set a price-increase formula at the outset. The other way would be to establish an arbitration panel that will hear arguments from the recording, publishing, and broadcasting industries. Based upon their findings, the arbitration panel would set a rate structure. The rate structure could then be adopted by the nations as part of their total adoption of the PICRO system. This arbitration panel could be an ad hoc panel at the WIPO or other international body, or a panel in a completely new international organisation. The arbitration panel should be separate from the PICRO because it cannot represent both the interests of the recording and publishing industries. (The PICRO should not have any role to play in the determination of rates; it should simply implement the decisions that are made.) Rate changes in the future would be deemed approved, unless there is a consensus of disapproval (similar to the WTO method).

### **C. Digital Permanent Downloads**

Digital permanent downloads (DPDs) are quickly becoming the most popular means of distributing digital music.<sup>36</sup> When a user receives a DPD, he or she has the full ability to transfer the file to portable media devices and storage media such as CDs, MP3 players, and computers without having to pay a subscription fee.<sup>37</sup>

Currently DPDs are distributed to the major markets through services like Napster, iTunes, and Walmart.com. The demand for this product should continue to grow throughout the world because of the flexibility of DPD use.<sup>38</sup>

While these licences are popular throughout the world, they are not offered to consumers worldwide. Where the market has failed to offer a legal option to acquire digital music, the pirate networks have delivered and will continue to do so. As these networks gain popularity in areas where legal supply is nonexistent and demand remains high, the cost of copyright policing will increase. In order to combat this threat, or at least allow users to have an option to obtain digital music files, nations should enact compulsory licensing laws for the delivery of DPDs. This would allow for the proliferation of businesses that offer digital music online.

Without requiring the negotiation of specific licences with each prospective distributor, the transaction costs and upfront costs of operating a digital music store will be greatly reduced. This reduction in costs will open up the market to

increased competition among the various distributors, of whom there is now only a handful. Instead of generic stores, owned by corporations engaging in lengthy negotiations with industry executives in order to appeal to a wide and sterilised market, the small 'mom and pop' webmaster can apply for compulsory

<sup>36</sup> See generally Johnstone, *supra* note 21; Harry Fox Agency, *supra* note 17 (defining digital permanent downloads).

<sup>37</sup> See Harry Fox Agency, *supra* note 17 (defining digital permanent downloads). See generally MusicMatch, Terms of Service for Yahoo Music MusicMatch for Yahoo! Music MusicMatch Jukebox 10.1, Term #16, <http://www.musicmatch.com/info/terms/10-1.htm> (last visited Nov. 26, 2006) (Term #16, Permanent Download of Content, provides the terms that govern what a purchaser can do with a DPD music file).

<sup>38</sup> See IFPI, *Global Digital Music Sales Triple to US\$ 1.1 Billion in 2005 As New Market Takes Shape*, [http://www.ifpi.org/content/section\\_news/dmr-2006.html](http://www.ifpi.org/content/section_news/dmr-2006.html)

licences and establish independent digital music stores. The local operator, run out of business by multinational corporations, can compete in a world where travel to the next store is instantaneous and sales are made based on the value a service adds to the product.

The record companies should not, however, be forced to give up their right to receive an economic benefit for their work. Therefore, it is essential that the PICRO offer the recording and publishing industries a flexible royalty structure. The simple solution would be to allow the recording industry to set their own price for each item that is licensed, and have them work out their own separate agreements with the publishing companies, as they do with CDs.<sup>39</sup> The recording company will set the lowest price for which they license the product, with exceptions available for promotional discounts. The wording of these exception provisions should be carefully written so as to avoid monopolistic behaviour. The rate will be based on a type of most-favoured-nation clause that allows all webmasters to compete on the same footing, regardless of their power in other areas.

It is also necessary to offer digital music to the citizens of the developing nations at an affordable price. If citizens in developing nations are required to pay a higher price for digital music, these users may turn to pirate networks. If users in developing nations begin to turn to pirated digital music, then the leaders of these nations will not be able to receive the benefits needed to compensate for the concessions they make on internet radio broadcasting rates. If the recording industry were able to set its own prices for each country, it is foreseeable that it might not make the kind of reductions necessary to make music affordable to non-major-market users. This fact will dilute the benefit of the PICRO system, and may weigh against the total adoption of this licensing scheme.

In order for the non-major-market countries to be sure that the PICRO will open access to the arts for their people, the discount formula for licensing

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Publishers should also be forced to accept the pro-rata discounts that will be applied by the PICRO so mechanical royalties do not become uncontrollable. See David Kostiner, *Will Mechanicals Break the Digital Machine?: Determining a Fair Mechanical Royalty Rate for Permanent Digital Phonographic Downloads*, 21 SANTA CLARA COMPUTER & HIGH TECH L.J. 235 (2004) (offering a detailed discussion of the importance of controlling the cost of mechanical royalties in this digital distribution model).

rates must be part of the overall structure. This discount formula should be one that aims to make music affordable to the majority of a country's citizens, following the pricing plan that the music industry employs in the major markets.<sup>40</sup>

One possible way the discount formula could work is that a single country will be chosen as the base market. For the sake of simplicity, the base market country should be the country that had the highest amount of music sales for the previous year. This market will also be the market that the majority of the entertainment industry will base its price on, because it is the most important source of revenue for them. In years where the base market changes, the formula used the next year must take into account those changes so that the price per point does not change; otherwise users with previously purchased points will have their point values changed.

The copyright-holder will then set a price for the base market, as previously discussed. All the other nations of the world will be compared to that base market in terms of the money their average citizen has. Perhaps the comparison should be done by the use of a formula based on the GDP of a nation, or its purchasing power parity, or both.<sup>41</sup> This system will almost certainly be a point of much debate and negotiation, and this author will not attempt to choose which system will be best for this purpose. For the purpose of illustration, let us say that the base market price is tied to GDP per capita, so that if a non-base country has a GDP per capita of US\$20,500, and the base country has a GDP of US\$41,000, the non-base-market users will only pay half as much for the file as the users in the base market. On the other hand, if the non-base country had a higher GDP per capita than the base country, the non-base-market users would pay more.

This scenario illustrates a potential problem. How do webmasters sell regularly priced music to one user and discount-price music to another user on the same site? One answer to the solution would be to display all the songs as a

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I realise that not every citizen in the major markets can afford the luxury of purchasing digital music, but it is fair to say that the market is not tailored only for wealthy people in these nations. Therefore, the discount rate that applies to a country like India, a non-major-market nation, should not only make it affordable to wealthy Indians, but also to the average Indian.



<sup>41</sup> It is probably more realistic to set the discount rate to only a certain portion of the price so that there is a base, or to use a less steep formula, but this is merely for the purpose of illustration.

price in “credits” or “points”. Each point will represent a unit of currency in the base market, or could be otherwise tied to the base currency. The currency conversions and discounting will be done when the user purchases the credits. After the credits are stored in the purchaser’s account, the purchaser may spend them in online music stores without realising that the pricing difference has been hidden from them. Of course, the website owner who wants to deal in currency can always opt to change the points back to currency by reversing the formula.

For example, website owner A who wants to sell his products to users worldwide will have a store that shows these prices in the universal ‘points’ price along with the likely addition of a few fractions of a point or a premium for access, to cover his time, costs and profits. When a United States user buys points in this model, she will be offered no discount, because she lives in the base market. However, when B, a resident of India, purchases a song, the software will recognise her location by her billing address, or IP address, as being a nation subject to a discount. It will then perform the proper formula to show the discount and convert the currency. The fact that the credits represent a different amount of money to different users is of no importance; the price can be displayed universally. Webmasters no longer need to negotiate the terms of the deal and establish a new site for every country because of the universal pricing structure. They have a universal price that can handle the rights implicated by users who access the site worldwide. The site just has to be translated to all of the major languages, a task that will be accomplished as long as there is interest in it.

#### **IV. EFFICIENT POLICING OF LICENCES**

Policing the compliance of norms set by the PICRO is another relevant issue. By pooling the costs of the employees who will have to surf the internet to ensure that internet radio and DPD stores are complying with the regulations set by PICRO, expenses that are currently being incurred by the Harry Fox Agency, ASCAP, BMI, SoundExchange, and their counterparts around the world can be saved. The DPD scheme would increase policing costs, but only because it creates a new service. To keep their duties manageable, webmasters must agree to be audited both in their accounting and traffic statements. Website owners must also be required to keep detailed reports of both these items.

However, checking the accounting of even randomly selected sites will be expensive, and will not help the PICRO make distributions for the sale of DPDs to the right artists on a regular basis. This is because there is always some degree of error in sampling. When sampling through more variables – in this

case the number of songs available – sampling becomes even more problematic. Therefore, after webmasters select which DPD songs will be included in their catalog, the PICRO software will generate links that will identify the song and relevant licence by code. The vendor's code will be included in the link, similar to current affiliate-programme software. Whether the link will lead to a digital repository of songs managed by the PICRO, act as a buffer, or be a redirect link, will be a matter of debate.

If the generated link is used to access a digital repository, then users anywhere will be able to sell the products in their online stores without having to buy the CDs individually, or pay for an ephemeral licence for the music that is placed on their servers. This could reduce the cost of opening an online music store drastically, provide access to music worldwide that may not be available locally, and create uniformity in copyright management software among stores, thus reducing the need to police standards. Therefore, it should seriously be examined as a potential means of distribution, especially since centralising the servers will reduce server costs.<sup>42</sup> If this were the case, the PICRO would have to charge either the webmaster or the author for the transfer costs. If the link acts simply as a buffer link that hits a counter to let the PICRO know how much a particular account had earned, the DPD provider will have to deal with the issues of ephemeral licensing and software security as part of the package.

In either situation, the price charged will be set by the owner of the work in relation to the number of hits an item has. The number of hits will be multiplied by the price to create an amount that is owed to the owner of that work. When all such charges are added up and sorted by vendor ID, an accounting method can be employed. Either billing will be sent out to them for the products they sold or checked against reserve accounts from money paid in advance.

<sup>42</sup> This is based on the widely accepted theory that economies of scale can reduce the costs of producing a unit – in this case a unit of bandwidth – by taking advantage of operational efficiencies. *See* BLACK'S LAW DICTIONARY 531 (7th ed. 1999) (defining economy of scale).

In order to calculate the correct amount to charge, the PICRO must know which uses came from which countries and so forth. That is why when a user is, in whatever way, directed through the ID link described above, their link will not only represent the information mentioned before, but will also include the country code or discount code that was applied to the sale. This full link will be what is recorded at the PICRO. Based on the country code, proper accounting and billing can be done with a minimal amount of human labour, thereby increasing returns to rights-holders and/or lowering prices to distributors and consumers.<sup>43</sup>



## V. PROTECTION OF MORAL RIGHTS

Under the Berne Convention and the national laws of many moral-rights-based copyright regimes, artistic integrity is protected by operation of law.<sup>44</sup> The provisions establishing the PICRO should also recognise and address these rights.

Protection for the rights of authors is easier in the context of Internet radio. The provider must use legally obtained music, not bootlegs or unauthorised versions of a work.<sup>45</sup> Additionally, the webcaster has to give proper attribution to the artist. In addition to these moral rights protections, the webcaster must also take steps to ensure that it does not infringe on the artist's right to publicity by using a work in a way that suggests endorsement.<sup>46</sup>

The DPD music storeowners could do the same, but there are some additional concerns. For example, an artist might have reservations about having his or her music sold on certain sites, especially those that deal with pornography or hate speech. The decision to revoke the licence for these types of sites should be allowed to the artist, who should be able to place reasonable restrictions on the PICRO database, so that website owners in these and other similarly situated

<sup>43</sup> See generally KOHN & KOHN, *supra* note 2, at 211-13. <sup>44</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 6, Sept. 9, 1886, *as last*

*revised at Paris on July 24, 1971*, 1161 U.N.T.S. 30. <sup>45</sup> 17 U.S.C. § 114(d)(2)(C)(vii) (2006). <sup>46</sup> *Id.* at § 114(d)(2)(C)(iv).

categories of content providers could know not to carry the file.<sup>47</sup> Clear violations by the website owner should be punished by fines.

Artists interested in this system can manage their listings through their PICRO account, which will show them all their products and where they are licensed. While the price should be set by the copyright holder, the right to revoke a site's use of the song should be left to the author. It should also be an inalienable right in order to ensure that the record companies do not use this as a way to direct traffic to companies with which they have ties or which they own.<sup>48</sup>

In addition to the protection of authors from having their work associated with unsavoury sites, there is also a need to protect the quality of the work that is distributed. Therefore, along with the information already supplied to the PICRO with each song, the author should be allowed to set a minimum bitrate at which a music file of their work can be sold under the licence. If the PICRO

acts as a central server, there will be no need for these provisions or their policing. Only those files that the artist submits will be offered by the PICRO. If the artist chooses not to submit singles and only submits full albums for sale, the PICRO should respect that decision and only allow webmasters to offer the entire album.

Other issues that will need to be addressed include the need of website owners to have images to correspond to their products, and the need of copyright owners to receive protection for the images they create.<sup>49</sup> The licensing scheme should then contain a provision that would allow website users the right to use an album cover or other cover art associated with a particular single or album. There would be no significant loss to the music industry from this, since these images are traditionally widely distributed as part of the promotion to sell the single or album and can be said to fairly represent the work. Furthermore, the cost of creating the image can be factored into the price set at the PICRO.

<sup>47</sup> See Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP.

L.J. 1, 22 (2001).<sup>48</sup> See, e.g., *id.* at 12-14 (suggesting the adoption of protections for authors that exist under the French model).

<sup>49</sup> Images are covered in the scope of protected works under the Berne Convention. See Berne Convention, *supra* note 45, at art. 2(1).

## VI. CONCLUSION

The PICRO could establish a new age of digital distribution by removing the barriers to negotiating licences and the cost of maintaining inventory. By allowing every entrepreneur in the world to open his or her own digital record store, the PICRO could take advantage of the decentralised nature of the internet and serve as a catalyst for niche market stores specialising in a particular genre, or for the development of innovative business models. Through the proliferation of unique distribution outlets, users will be exposed to and influenced by a variety of expressive creations and may come across music that they would not normally be exposed to because of the market distortions caused by advertising.

In addition, the PICRO will offer the nations of the world a viable means of obtaining reasonably priced artistic creations, without the need of independently establishing and maintaining their own collective rights societies. The potential affordability, access, efficiency, and uniformity features that the PICRO would have to offer indicate that such an organisation would be of considerable help in tackling tasks such as digital music distribution – in fact, an organisation such as the PICRO could be of immense help in other divergent areas as well.

However, initiative needs to be taken to put this plan into action, and thus the merits of setting up a PICRO-styled organisation need to be made clear to the players involved so that the benefits can be felt by both developing and developed nations alike.