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THE FUTURE OF MUSIC

Jenny Toomey[a1]

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Editor's note: on November 1, 2001, *THE JOURNAL hosted a discussion on emerging intellectual-property issues in the distribution of music.*[aa1] *The evening began with a presentation by Jenny Toomey, from the Future of Music Coalition. Following the presentation was a panel discussion, moderated by Professor R. Anthony Reese of the University of Texas School of Law, that fielded questions on various topics with diverse viewpoints. The panel included Ms. Toomey, Brian Szymczak, from the Austin office of Baker Botts L.L.P., and Garland Stephens, from the New York office of Pennie & Edmonds LLP. The following is an edited transcript of Ms. Toomey's presentation*.

Introductions

DEAN WILLIAM POWERS: Good evening. My name is Bill Powers. I'm the Dean of the law school, and I have the very enjoyable but simple task to welcome you here to "The Future of Music." This is the first installment of a speaker series put on by the *Texas Intellectual Property Law Journal*. Welcome to all of you here who are visiting the law school. I know that some of you are law students and have been in this room before. I understand that there are people from outside the ***222** University, practicing lawyers, and people from other departments and schools in the University. I want to extend our welcome to the School of Law. I hope this will be the first of many occasions that you visit.

I want to welcome and thank Jenny Toomey, Garland Stephens, and Brian Szymczak, who will be speaking here tonight. I am not an intellectual property lawyer, and I can't carry a tune, but I enjoy music. I hope that whatever else comes out of this conference, the future of music will be such that there *is* one. I know that the issues that you are looking at are critical issues at the intersection of music, technology, law and public policy. I think this is a terribly fascinating and important topic that lawyers, as well as culture and society generally, will be facing.

I again want to thank Jenny for being here and leading the program and discussion. I think it's appropriate to be having a conference on the future of music in Austin. Music is important to all of us. It comes to us in a variety of ways: classical music, rock 'n roll, jazz, and others. In Austin, we like to say this is the live music capital of the world. For those of you who are from out of town, there is live music going on all the time in many venues in Austin. It's a very important part of Austin's culture. These are important issues and I'm delighted that this conference is taking place here at the law school at the University of Texas.

Let me turn over the program to Professor Tony Reese. Tony is a professor on our faculty who specializes in intellectual property and copyright law. He also has been very active in working with the students in trying to build the curriculum and programs that meet the needs of intellectual property as we go forward into the new century. I'll just say Tony is one of our bright, bright young stars. We're banking the future on you, Tony, and we're very confident that the future looks bright. So let me turn over the program to Tony Reese. Again, thank all of you for being here tonight.

PROFESSOR R. ANTHONY REESE: Thank you, Dean Powers. Let me just add my welcome to all of you. It's my pleasure to start off by introducing Jenny Toomey, who is tonight's main speaker. She's the Executive Director of the Future of Music Coalition. She's a composer and performer—her work appears on dozens of records and in a musical. She is known as the singer/songwriter/guitarist of Tsunami, Licorice, and Grenadine. Her CD "Antidote" was released earlier this month. From 1990 to 1998 she co-ran an independent record label called Simple Machine that had over 70 releases and which also published a book called *The Mechanic's Guide to Putting Out Records*,[1] which launched something of a renaissance of do-it-yourself independent labels in the music industry. Then, from 1998 to 2001, she was a writer. She wrote for the *Washington Post*, and she wrote music and technology reviews for *Village Voice* and *CNET* and developed an ***223** interest in music and technology. That interest led her to become one of the leading forces behind the creation of the Future of Music Coalition.

The Future of Music Coalition's tour has been in several cities and law schools around the country. For a description of the Future of Music Coalition, rather than me trying to paraphrase, I'll give you their own language. "The Future of Music Coalition is a not-for-profit collaboration between members of the music, technology, public policy, and intellectual property law communities. The [Coalition] seeks to educate the media, policymakers, and the public about music and technology issues, while also bringing together diverse voices in an effort to come up with creative solutions to some of the challenges in this space. The [Coalition] also aims to identify and promote innovative business models that will help musicians and citizens to benefit from new technologies."[2] Jenny has spoken widely on music and technology, both as part of this tour and elsewhere, and she was recently named by the *Internet Weekly* as one of the "25 Unsung Heroes of the Web."[3] I don't know if the *Internet Weekly* realized the irony of "unsung hero", given her status as a musician, but we're delighted to recognize her heroic status on the web and to have her join us tonight to talk about the future of music. Jenny?

JENNY TOOMEY: Wow. Now you're really going to expect something. It's my pleasure to be here. Thanks for having me. Actually it's been very, very fun. This is the last stop of this tour and the last time I'm giving this speech before we give it in front of rockers in a New York City rock show. We've traveled from Washington D.C. all the way across the west coast and then down and back around. This presentation touches on a lot—it's a distillation of everything the Future of Music Coalition has been working on, and that's six and a half years worth of work. Anyway, my name is Jenny Toomey. I'm the Executive Director of the Coalition for the Future of Music. We are a not-for-profit think tank in Washington D.C. that's working on recent technology issues, and we're looking at the impact that new technology is having on citizens and creators.

Background

I'm not an expert on copyright law, and I'm not even an expert on these issues. What I am, primarily, is a citizen who has been working in music technology space, particularly the music activist space for my entire adult life. I like to think that my background as a musician, record label owner, and reporter on these issues helps. But primarily, I'm a citizen. I'm concerned about extending the knowledge that I've gained to other citizens so they can help participate in the debate that leads to legislation and technologies that we have to live with in the future. I'm hoping to raise the level of understanding so that citizens can insert their voice in the middle of this debate that often takes place without their participation. The inspiration behind our manifesto, which is the mission statement of our ***224** organization, is derived from two places. First, it was inspired by the love of music that all four Future of Music board members share. Secondly, it came from the recognition of legal and legislative structures that have led to the historical absence of the majority of creators and citizens in the policy

debates.

This historic absence was articulated to me a couple years ago at the Third Annual MP3 Policy Summit, where Professor Pamela Samuelson explained the general template of how legislation regarding technological innovation tends to occur.[4] In her keynote speech, she explained that there were three steps to the process. First, she noted innovation occurs in the marketplace to a point where it begins to threaten or impact the established business industries. Then, there is a period of legal conflict that the traditional industries use to establish laws to try to protect their business model. Obviously, we've seen this tactic at work in the recent lawsuits that have occurred between the Internet start-ups and the entertainment industry. Ultimately, we get to a place where it seems like the existing law cannot address the complexities that arrive with the new technology, and this is when we begin to see legislative interest from Congress. First, [Congress acts] through fact-finding hearings designed to outline the solution, and ultimately through actual legislation that's brought forth usually at the urging of two conflicting business interests. The final point of her speech was that, ultimately, any law that gets passed has to be one that both industries can live with, assuming that there is a balance of power between those industries. However, the creation of legislation often takes place not in the public forum, but as negotiations between industries behind closed doors. So we find large industries fighting in *public* and suing one another in *public*, and then negotiating with one another and lobbying members of Congress in *private* to establish new precedents that take their needs into account. What is missing from this picture? Citizens and creators.

Here, I need to emphasize a point that was recently made by Marybeth Peters in a discussion I had with her. Marybeth has been the Register of the United States Copyright Office since 1994. She told me that, in the matter of copyrights, it's only citizens and creators that are mentioned in the original Copyright Act, not corporations like record labels that amass copyright material, and not the industries that promote them, like radio stations, or the retailers who sell them, like Wal-Mart. The only groups that are directly protected by the original copyright law are citizens and creators. To me, this means that those groups, if they could get their interests together and bring their needs to Congress, would have an unquestionably legitimate platform on which to work for a better structure to protect our citizens' access to the music they want in the form that they want it. And musicians, I believe, will be able to better guard the value of their artistic labor.

So why are these citizens and creators missing from the debate? Well, there are at least two structural reasons which I think are obvious. The first is the lack of easy-to-understand information that distills complicated issues down into digestible ***225** chunks. A second reason is the lack of a mechanism that makes it possible for informed citizens and creators to participate in the debate once they understand the issues.

As a musician and someone who's been studying these issues for some time, I think there are three more specific reasons why *musicians* tend not to participate in these debates. (1) Musicians are poor. They are cash poor, and they are time poor, and artistic labor is devalued. These factors contribute to an environment that keeps most musicians undereducated about critical issues. (2) Another reason is that musicians are forced to work in a marketplace that is artificially constrained. (3) Also, there is a climate of competition within the industry that makes it hard for artists to see areas of common interest.

So let me take a moment and look a little bit more at these three reasons. First, *musicians are poor*. Last year, the National Endowment of the Arts produced a study that was called "More Than Once in a Blue Moon" which tried to give us a sense of how artists live.[5] The most startling statistic for me was the fact that over 80 percent of musicians work two jobs to meet their household expenses. Another statistic was that the median income for those artists was around $30,000 a year. So you've got musicians working two jobs to meet their household expenses and making around $30,000 a year. What does that suggest? First of all, they're cash poor, which means they're not really early adopters of expensive new technology. Because they are not buying the newest technology, they're not generally familiar with what technology can do, how it could help them, what ways it could make their lives easier, etcetera.

But as I said before, they're not only cash poor but they're also time poor. If they are working two jobs to meet their household expenses, when exactly are they practicing or playing music? On top of that, when would they have time to learn about new technologies or even old technologies? It's been my experience that most musicians do not have even the most basic understanding of copyright, publishing, and royalties—which are, incidentally, the three mechanisms that flow the most significant income back to artists.

Let me get to the second reason. Musicians are forced to work in an *artificially constrained marketplace*. The major labels in America have built a business model over the past 100 years that (a) makes it difficult to compete outside the established structure, and (b) requires the signing over of one's copyrights in order to participate in the dominant structure. Let me take

these two points about the conditions of the constrained marketplace and explain them in practical terms.

Musicians have a handful of “choices” about how they participate in the marketplace. Many artists want a major label deal because of the real and perceived benefits of that choice. If an artist refuses to sign a major label deal and participate in the dominant structure—which artificially constrains the marketplace—he or she ***226** will have little access to commercial radio, little access to distribution through chain stores, and little access to promotion through major promotion channels. So that’s why we see artists signing these deals.

That said, if an artist signs a major label deal, he or she will, hypothetically, have access to these channels, although there is no guarantee. But in the process of signing that contract he or she will also sign away all of the copyrights. I think that this standard industry practice of signing one’s copyright away is the main contributing factor to artists being so woefully under-educated about the value of copyrights, publishing, and royalties. In an artificially constrained marketplace the only way that artists can actually extract the value of the copyright is by aligning with a dominant force. Yet, the moment that they align with the major labels, the artists also give away a majority of their rights. So, in the eyes of most musicians, the only value ascribed to their copyrights is the value for which they can exchange them by signing them away. I think it’s fair to say that once you’ve done that—once you’ve signed your copyrights away, it’s difficult to criticize the dominant structure, even if it’s flawed, because your value and your livelihood is now dependent on that structure.

So let’s look a little at a contrasting reality. In French copyright law, there is something called moral rights and, according to these rights, artists tend to keep at least some interest in their copyright. This is interesting to me because it has a direct market effect. Artists in France generally participate in the value extracted from the works they create. Their laws are distinct from ours, and I’m not arguing that we need to put American copyright laws in line with the French copyright law, but one of the better aspects of moral rights is that we generally see more active participation in France by artists on behalf of the copyright. And, I believe, if you follow this logic, that, in an environment where artists are able to extract the value of their copyright in a direct way, they will also fight to protect the value of those rights. It just makes sense. It’s he same reason why you want to live in a building where more people own their apartment than rent it. The idea is that when you own something you value it. You take care of it.

The third reason why artists aren’t participating in the legislative debates is the *climate of competition*. The devaluation of artistic labor in the artificially constrained marketplace leads to a climate of competition inside the industry. This makes it difficult for artists to see areas of common interest and work together for a structural forum and constitutes the third reason why they’re not participating in these debates. Artificially constrained markets lead to an artificially scarce resource. The business model for major labels, as I will soon explain, is one that’s based on economies of scale. In other words, the major labels make enormous profits by selling huge quantities of a remarkably small number of titles.

Markets such as this tend to exhibit huge financial barriers to entry and have been described as “winner-take-all markets.” In winner-take-all markets, we generally see large groups of people with equal skills, value, and talent, yet only a very small number of participants are ever given the enormous financial resources ***227** necessary to get them past that barrier to entry. The term “winner take all” is based on the idea that the difference between first and second place performance is out of proportion with first and second place value. So in this winner-take-all market, where only a small number of musicians are able to extract a fair market value for their labor, and success is based less on some objective measure of talent and work and more on one’s ability to get someone to invest massive resources into that talent and work, there is of course a tendency for musicians to see themselves in competition with one another instead of aligned with one another. Since the overwhelming majority of musicians are not aligned, they actually have fewer resources or power representing them in the music technology debates that are playing out in Congress.

I think I’ve established here a bit of a climate and motivation behind the work that I do in Washington. So what are we trying to do today? Well, the goals of the speech are to clearly present the key policy issues surrounding the digital technology and artists’ rights, and to educate students and musicians about the issues of the intersection of music and this technology. To do this, we’re going to look at four areas: traditional business models, new business models, the copyright bargain, and the digital commons. As I said before, it’s not going to be a definitive overview of all the nuances of these themes. What this speech is attempting to do is to pique your interest in these questions and draw you into the debate.

I. Traditional Business Models

A. Do They Serve Musicians?

So let me look at the first question in this area: do traditional music business models serve musicians? In my opinion, aside from the cultural legitimization that comes with signing a major label deal, there are three need-based reasons why musicians sign major labor deals. The first one is *access to resources*. Labels advance artists' money to pay studio bills and private expenses that they incur during their recording for most of their records. They also afford these artists access to big-time producers and studios, which is an entrée into a world that's often not available for an unsigned artist.

The second reason is *access to distribution*. Manufacturing, stocking, shipping, and accepting returns are all very expensive propositions. Most people outside the industry have a hard time understanding that the moment at which an independent label gets in trouble isn't when they've sold three records at a very moderate level—but rather the moment where they have *one* record that is selling beyond their means to support it. Since most independent labels sell on consignment, they can very easily get into a situation where they've sold out of the records, and yet they still have to wait 120 days to get paid from the distributors in order to have cash to press more records. When this happens, indie labels can lose the benefit of that small window of interest that they have in their artist. And it can also lead to strained relationships with artists in whom they've invested time and money. This problem can lead independent labels to make rash decisions like ***228** borrowing money at an unfair rate, or aligning with larger labels with production and distribution deals that often result in an independent label relinquishing control of the copyright, or making a further split of very meager profits.

What's worse, unless the independent label has bands that are incredibly successful, they will have little to no access to the larger major chain stores where the majority of records are sold. And unless their artists sell well and consistently, they will always be the last to get paid.

To emphasize how hard it is to compete at the retail level, consider the major labels, which have a strong relationship with major manufacturers and distribution chains. In a *Washington Post* story last year, David Segal examined the incredibly competitive process involved in getting new releases added to the rack at a large retail chain.[6] In his article, Segal discussed the process of pitching new releases to the Handleman Company, a wholesaler that had the responsibility for stocking the shelves for over 4,000 stores in the United States. And that included the second largest music retailer in the United States. It was particularly upsetting to me to read in this article that each of the five major labels had paid for *office space* in Handleman's offices in Troy, Michigan in order to ensure that they had access to the most possible face time with this critically important rack jobber.

Clearly this is something the independent label will never be able to compete with. There is an incredibly expensive series of costs that most major music retailers now extract from labels as "positioning fees" to put music in listening stations or in prime places around the store, to hang posters, and to promote tours. According to the same article, it costs $40,000 per title to be positioned in each of the Handleman-managed stores for one month. And Christmas positioning in one mall-based chain costs as much as $100,000 for one title for six weeks. In the very same article, Hilary Rosen, who's the president of the RIAA, the Recording Industry Association of America, the lobbying trade group for the five major labels, is quoted as saying, "You have to pay for exposure at retail. And the cost of promoting any record has gone up."[7] This is an expense that no independent label could afford.

The final reason that artists are signing these deals is *access to promotion*. And I could talk about many promotional channels, such as buying stations in stores, but I'm going to talk here a little bit about commercial radio. The 1996 Telecommunications Act changed the number of stations that were allowed to be owned by one company in a marketplace.[8] In certain markets it went from four stations[9] to eight.[10] In the period of the last six years, there has been an incredible ***229** land grab of bandwidth largely by two companies buying up "super duopolies" in major markets—which means they're owning more than seven stations in one marketplace. In the current environment, this has put a lot of power into the hands of two companies; together, they have consolidated control over a majority of the major commercial stations. But in a market that's so incredibly constrained, in order to get music on the radio, labels pay independent radio promoters who in turn make promotional deals with radio stations. Now, if this sounds like payola to you that's because it *is* a once-removed form of payola that's been expertly documented in recent pieces in the *L.A. Times*[11] and *Salon.com*.[12] These articles detail this practice, which legitimizes the selling of portions of our publicly owned airwaves for the increased financial benefit of just a few large corporations.

In reporting on pay-per-play, these articles indicate that it costs as much as three million dollars to get a single track added in all major markets, and if you don't play this promotional game, your material won't be played. Now, we can understand three

million dollars is well out of the price range of an independent musician. At a Future of Music Policy Conference last year,[13] a recording-industry panelist from the recording inducsty said that artists have a choice: if they want to be "real" musicians and get on the radio, they could sign a major labor deal, and if they want to do it themselves, they could be independent. Her point: No one is forcing artists to sign these deals. Well, in response to her, another panelist agreed that *in a fair market economy* that would be true. But if we were in a fair market economy, we would see a variety of deals being offered and [a broad distribution] with variations of success and failure levels for artists—and that is something we don't see. What we do know is there are a very small number of artists that are incredibly successful and an overwhelming number of artists that are unsuccessful.

We've already discussed how all but the most powerful artists who sign major label deals are forced to sign away their copyrights. Still, many folks would say that artists are not giving away their copyrights, but rather they're trading them in a fair market where the label gives them the ability to reach the next level. Let's see if that's true.

Who benefits from this deal? Who benefits from this structure? What percentage of artists that work with the major label deals benefit from that association? Well, that's a hard question to answer in absolute terms. But one ***230** obvious measure of success is the artist's ability to make a living—to regularly generate royalties. So maybe a better question is: What percentage of artists that are within the major label system are actually making money regularly based on actual record sales? Well, Alanis Morissette said 99.6 percent of the major label artists never recoup. Another version of this statistic comes from Cary Sherman, who's lead counsel for the RIAA, and he said recently that over 90 percent of their artists don't recoup.[14] So, whether you believe Alanis Morissette's 99.6 percent or Cary Sherman's 90 percent, it's still a pretty sorry, embarrassing statistic. And yet representatives of the RIAA like Sherman regularly go before Congress and they give this statistic as a means to explain what a difficult business they're in.

When they bring these statistics forward, it almost implies that these poor corporations are somehow the victims of the willful lack of success of their own artists. But are these corporations really unsuccessful? According to the RIAA's available statistics, the total value of the music business was $14.3 billion.[15] This includes the sale of over one billion units. The statistics show that both the number of items for sale and the value of those sales have increased over the last decade. Recently, the rate of growth has slowed, but it's still a massive industry.

It's clear to see that even with the overwhelming failure rate of either 99.6 percent or 90 percent of their artists, the recording industry's market continues to grow and sustain huge amounts of revenue. So maybe instead of assuming these labels are victims of failing artists or bad a business model, we should look at the possibility that these labels are, in fact, victimizing artists by allowing a majority of them to fail—and that that *is* their business model. This is a clear example of the benefit of an economy of scale. One can make far more money selling a thousand copies of one thing than ten copies each of a hundred things. It's more efficient to manufacture, promote, distribute, and do the accounting for sales of one superstar album than to do the same for ten records. Yet in the case of the music industry, we have to remember what's lost when we reduce artistic production to the economic bottom line. We're not choosing one version of a widget over another one. We're choosing one artist's ability to make a living over another, and there are huge social implications for artists who participate in this practice.

We must also remember that there is another benefit that can be derived even if the majority of the artists fail commercially. In the process of signing all these artists and allowing them to fail, the corporations ensure that they lock down and own all these artists' copyrights. This is something that may be of a negligible value particularly when many of these copyrights that the labels are controlling are from artists are who considered unsuccessful. Yet the value of these seemingly unsuccessful and un-valuable copyrights can be invaluable at the moment when the corporations can use the sheer number of copyrights that they control to influence ***231** innovations in the marketplace. And that's something I'll be talking about a little bit later when I discuss the implications of the current model on citizens.

To finish up the look at how the traditional music business model under-serves the musicians who choose to work with this system, I want to look a little bit at traditional major label contracts. Aside from the obvious problem of the artists signing away their copyrights, these contracts also require artists to pay the entirety of their recording costs and much of the promotion costs of their albums out of the advance that they're given when they sign. Even if they were one of the few who actually recoup and pay back the advance, they still don't get to own their master tapes. Senator Orrin Hatch gave a speech at last year's Future of Music Policy Conference[16] and he likened this practice to asking someone to take out a mortgage for a house and then after they have paid off the mortgage in its entirety, telling them the bank still owns the house.

There is a lot more in major label contracts that needs to be challenged. And the Future of Music Coalition has been working

with a number of entertainment lawyers on a research project where we are looking at 12 other clauses which do not benefit the creator.[17] The worst thing about these clauses is the fact that in the system, there is rarely an alternative to these clauses. These 12 clauses are considered deal breakers, and unproven artists have little power to negotiate changes. Thus, they lock in at an unfair rate that will limit their income usually for the next seven releases. The major labels' control of independent radio promoters and major distribution channels make this the only game in town for those musicians who wish to be superstars. What's worse, this dominant system also under-serves the musicians who choose *not* to participate. These financial barriers to entry ensure that musicians who have no access to the system or who refuse to participate in the system are largely locked out of the most lucrative channels. And this is why the hugely successful artists like Phish, Ani DiFranco, and Fugazi, who sell a hundred thousand copies of each record straight out of the box, are still unheard of on commercial radio. And you never find their posters hanging up anywhere in major chain stores and you never listen to them in the listening stations. They are locked out of this system.

B. Do They Serve Citizens?

So let me touch for a minute, then, on the second part of the major question in this section, which is: Do the traditional media structures serve citizens? Here I point to a couple of reasons why I think this model under-serves citizens as well as musicians. And the three points to consider are (1) the fair value of music for ***232** consumers, (2) the range of choice offered to consumers, and the (3) labels' responsiveness to consumers.

First there is the issue of *fair value*. Remember when CDs first came out in their new format? They were a little bit more expensive. You paid a little bit more for them, because they were new. Over time, the increased manufacturing costs associated with them dropped, but the price of CDs remained artificially high. Why is that? It seems like some of the attorneys general wondered the same thing because in August of 2000 twenty-eight states filed suit against the five major labels and two retail chains accusing them of conspiring to fix CD prices.[18] This discrepancy between retail price and the cost of manufacturing is always explained away as the added cost of promotion. Remember what Hilary Rosen said—it costs a lot to promote a record.[19] But here I remind you that, as I've explained before, many of these added costs walk a very close line between proper and improper business practices. Here we have "pay-per-play," paying for retail space, and so on. Also, these added costs benefit only those with huge amounts of capital and only serve to lock up the marketplace away from fair competition. So it seems to me that this is a clear example of where inflated costs and diminished diversity of music is not beneficial to artists ... or citizens.

A second area to look at the *increasing dissatisfaction of music listeners* in the wake of radio's consolidation and the marketing practice of pay-for-play.[20] The Future of Music Coalition is in the process of organizing a study that will attempt to codify some of the dissatisfaction experienced by citizens as the result of recent radio programming trends. There is some value in just pointing out anecdotally the frustration that citizens are feeling in the wake of this consolidation of radio. As we move from a situation where a large number of companies control commercial radio down to a situation where there is programming from singular sites sending that programming feed out around the country on satellite, we can understand that it's very likely we're being offered less diverse music—and that's something that citizens might not like.

Next, I would say that a third measure of the failure of the system is its *lack of responsiveness to its customers*. At last year's Future of Music Policy Conference, Jim Griffin of Cherry Lane Digital mentioned an annual RIAA study that surveys music consumers to ask who their favorite artist is and when their most recent record came out. The result? Seventy percent of the time the person does not know that their favorite artist has a new record out. Well, to me, this statistic can be read one of two ways. Either (a) the labels are doing a bad job of making sure music fans keep in touch with the artists they love, or (b) the labels are less interested in ***233** keeping music fans in touch with the artists they love than they are interested in encouraging music fans to purchase music from one of the few artists that are getting the serious push.

A business practice that would back up the second theory is the way that major labels allow huge portions of their catalog to remain dormant or to go out of print. This practice neither offers the music lover access to legitimate diversity of music that's out there, nor does it offer the musicians themselves the ability to have records in print, so they can sell them. Artists in this position, incidentally, have little to no contractual recourse against their labels to require them to keep records in print or available.

These are three obvious reasons why we believe the traditional music business model doesn't serve the majority of the citizens, but maybe the most obvious recent example of how this traditional music business model under-serves citizens is

explained by the artificial limits that these labels have placed on new technologies that would allow citizens to have access to their music in an on-demand digital format.

II. New Business Models: Do They Serve Musicians?

It has been three years since the Digital Millennium Copyright Act was passed. This was a law that was intended to give the labels new legislative protections that would allow them to open the gate offering their catalog as digital music, and yet we still have very little legitimate music available for purchase through the web in digital format. Well, why could that be? Digital files cost almost nothing to produce. They remove manufacturing, distribution, shipping, stocking, overstock, and breakage costs. Why wouldn't the five major labels be embracing this new technology that would lower their expenses? Well, the first answer to that question by labels has always been fear of piracy. But before we investigate that theory, I think it might be better to look at the ways that digital technologies could be used to break up the artificially constrained marketplace. So a good way to do that would be to revisit the three reasons, as I said before, why we think artists tend to sign contracts that are not in their best interest. Remember they need access to resources, promotion, and distribution.

As far as the resources to create music are concerned, with access to new technology those price points are diminishing and continue to drop. For $10,000 an artist can buy a state-of-the-art setup. They can get a powerful computer with a big hard drive and they could probably buy a couple of good microphones. Gone are the days when studio budgets need to be enormous in order to ensure the quality of the music.

Obviously, the artists need to promote and distribute the music once it's recorded. How can technology help them do that? On the bright side, the Internet promises to be a wonderful resource for connecting musicians and fans and allowing musicians to directly promote music. For artists that are locked out of major terrestrial channels like radio and locked out of traditional distribution ***234** channels, the infinite space and low cost of the web could counteract those artificially constrained channels. And if that happens—well, there will be fewer reasons to sign major label deals. And here, I believe, is the crux of the labels' resistance to move forward into the digital landscape. The major labels' business model is one that is dependent on an unfair playing field. Any move towards a more open system threatens their business model. That's why, I believe, we see a pattern of these corporations leveraging their political, financial, legal, and copyright power in order to ensure that future models mimic the past ones.

There is no way to distill the last two years of congressional hearings, lawsuits, and press releases, but I'm going to point to a couple of ways that I think the labels are attempting to replicate their terrestrial model in a digital world, which are (1) forms of licensing, (2) forms of download, and (3) forms of partnership.

First, *forms of licensing*. New technology companies need access to content— music—in order for them to become legitimate businesses. The labels have used the power of potential access to their amassed copyrights in order to threaten or levy lawsuits which use or dry up capital investments for emerging companies, license only other large labels that have the same interests of maintaining the status quo, and take equity in emerging companies in order to control them. I just want to mention here that recently the five major labels were served subpoenas by the Department of Justice, which is doing an inquiry into their licensing practices and whether they were licensing fairly to digital start-ups that want access to music.

Second, there are *forms of downloads*. Despite the success of Napster-like systems that offer unlimited access to single tracks, the labels continue to build out models which instead require consumers to purchase music forms that parallel the terrestrial models in the form of encrypted albums and encrypted singles, purchase music at price points that do not reflect the low costs associated with digital transactions, and purchase only from a limited catalog of the available tracks that they are pushing.

The third problem is *forms of partnership*. We see the five majors all pairing up with other large corporations such as AOL, Real Networks, and Microsoft to create two mega-subscription service portals, MusicNet and Pressplay.

These services will very likely require *artists* to sign exclusive deals with one or the other. This pressure to sign exclusive deals hurts the artists. Artists don't benefit from these arrangements. They want to have your music in every place that anybody might go looking for it, not just in the places available though the exclusive deal. Unless they're getting a huge advance, there is no benefit to this arrangement. But these labels are unfairly pressuring their artists to go through one pipeline. In addition, we believe the service portals are going to require *citizens* to pay inflated fees to have access to all the

major label content.

The creation of these two pipelines on the Internet, each carrying their own unique content, threatens to re-establish the same types of artificially constrained distribution and promotion channels that we looked to the Internet to correct! If we ***235** aren't careful, creators and artists and citizens are going to find themselves in the same artificially constrained environment on the web that exist in the traditional business models today.

Now, a lot of leveraging of power is coming from what seems to be a strange place: copyright law. This can be seen by looking specifically at ways that copyright guards the value of artistic labor, ways that that value can be diminished through an artificially constrained marketplace, and ways that amassed pools of copyrights can contribute to constraining the marketplace.

III. The Copyright Bargain

I'm not a lawyer. So there may be many of you in the audience that have a better understanding of all of the nuances of copyright law. My main purpose for discussing basic copyright here is simply to take a quick look at the copyright landscape and to see what was originally intended by the framers, and to see how copyright is currently functioning.

American intellectual property law and copyright gets its authority from the *United States Constitution*, article 1, section 8, clause 8, which states as its goal "[t]o promote the Progress of Science and useful Arts." The Constitution says that in order to encourage creativity, Congress can grant to authors exclusive rights in their writings. Then it's Congress that casts the balance. So the rights that are granted to artists start out as exclusive rights and then they have a number of limitations and exceptions that are applied to them. We must always remember the Copyright Act was intended for the benefit of the public. It was meant to serve as an engine to encourage new expression, but only so that all of us, as members of the public, whether we are artists or citizens, can have access to that expression in all but the few circumstances where access would destroy the incentive for the creation of the work in the first place. Often when we talk about copyright law we remember the creators and forget the public's rights. But the role that that balance plays in this is critical.

When you look at the historical origins of these documents, it's easier to see that balance. In 18th century Europe, stationers' and printers' guilds had established complete commercial control over literary works. In that artificially constrained environment, it was very difficult for authors to get paid and oversee the distribution of their material. So this monopoly hurt the creators, but more importantly it had the effect of limiting the number and variety of works that were made available to the public. Around 1710, the British Parliament passed the *Statute of Anne* to help break that monopoly. And, in 1790, in this country, the founding fathers wrote the first American copyright act in order to secure some rights for authors and wrest some of the control away from the institutions that were artificially constraining that marketplace. The original length of the copyright provided a limited monopoly to authors to sell or reproduce maps, charts, and books for an initial term of 14 years, which was renewable for another 14 years if that author was still alive. As new categories of works and new ways to exploit ***236** these works were created, we saw new and extended rights develop. In the current term, we see that the law has been extended so that it covers either the life of the author plus 70 years or a fixed period of 95 years for works that are considered works made for hire. "Works made for hire" is a term of art that has significant implications for artists, as I'll explain shortly.

Since 1790, authors have had the exclusive rights of copyright law, which extended from a period of a possible 28 years in 1790, to a period of 95 years or life plus 70 possible years today. After this period, the work falls into what's called the public domain, where the public has free access to use the work without having to compensate or receive permission from the author. Now, from outside this looks pretty great for the creators. They and their heirs now have as much as maybe 150 years to extract the value of their artistic labor, or so it seems. But, here again, I need to remind you that in the case of music, standard industry practice requires artists, the creators in this case, to sign away their copyrights. And that's at the moment that they sign the deal. So who really stands to extract the bulk of the value of the musicians' copyrights for 150 years? It's the copyright aggregators, which in almost all cases are major labels or large corporations.

There is one potential limitation to that extended exclusive period that I want to mention briefly. It's something called *reversion*, which was written into law in the 1976 Copyright Act and took effect in 1978. This amendment gave authors the right to terminate their grant or assignment of copyright in their own work 35 years after they signed any contract—unless it was a work made for hire. So in other words, if I'm an artist and I'm signing a deal with a record label and in that contract it says I am giving away the right to my master tapes in perpetuity throughout the universe forever and ever and ever and ever,

exclamation point, it seems pretty likely considering that language that the label will be the one extracting full value of the extended copyright term. Ah-hah! I make my money at the moment that I sign the deal, but they make any potential money from the copyrights for the next 95 to 150 years.

The reversion clause, however, says that no matter how long I sign away my copyrights for, in 35 years I can terminate that assignment and the copyrights revert back to me. Remember here that the reversion clause has yet to be tested. Though it was passed in 1976, it won't take effect until 2013, which means we really don't know what will happen. When, for example, Paul McCartney terminates his license in order to have his copyrights reverted, he's probably in for a serious legal battle. Despite the existence of this law in the books, I'm very confident that none of those copyrights will ever revert.

The evidence that backs up my seemingly cynical position can be found with the events surrounding the work-for-hire scandal two years ago when an amendment to the copyright law was passed, at the urging of the RIAA, without a hearing, in one of those closed rooms I was talking about at the beginning of the speech, as part of the appropriations bills. In this bill the term "sound recordings" was added to the list of categories of works that are considered to be works made ***237** for hire.[21] And without going into a full definition of what works made for hire are, I can let you know that works that fall within that category *do not have the right to employ the reversion clause*. So we see here a pretty clear case of industry trying to route around established law of the reversion clause to ensure that they will be able maintain their control over creators' copyrights. So the emergence of a digital marketplace only makes this crisis more apparent.

At the 2001 Future of Music Policy Conference, John Perry Barlow, co-founder of the Electronic Frontier Foundation (EFF) and lyricist for the Grateful Dead, explained his theory. "Right now," he said, "we are at a critical tipping point. The institutions that presently claim to own intellectual property see that the bottles in which they have been capturing expression are about to go away. Rather than allowing the library model to dominate they want to have everyone in society to pay for wine by the sip." And here, I'd ask you to think about what would happen if you were expected to pay for every single sip of wine. Well, you'd probably drink less wine, wouldn't you? And you'd take fewer risks in the type of wine that you would sip. This model would be devastating to those in the independent music community. And here I'd like to move briefly into a discussion of what is lost to creators in a society where valuable information is locked down in this manner.

IV. The Digital Commons and the Public Domain

Will musicians and citizens benefit from a future where knowledge and creativity are increasingly patented and owned? You are probably wondering what I, as a musician and a copyright creator, am doing up here defending public domain and the digital commons. After all, my primary motivation for this work is making sure that a more of the musicians can make a better living using these kind of technologies. Some would feel that goal is at odds with the goals of people who would like to conserve or even expand public domain or access to free music in the digital space. This misconception is all too common. In my opinion, history has shown us that musicians have everything to gain from the expanded and free flow of information.

Whenever new technologies are introduced, there is always a period of fear and unrest in the creator environment. In 1878 when the Edison Speaking Phonograph Company was founded, and surely at that time there were artists that were terrified to record. These artists believed that acetate records would cannibalize their ability to sell tickets to their shows. If you could buy records of them singing why would you ever pay money to go out and see them play live? Looking back we know that at least in that case their fear was unwarranted. ***238** Ultimately, artists realized that record sales *grow* fan bases and increase concert attendance.

Even better, 26 years later when Victor finally initiated the practice of issuing royalty payments to artists for their recordings, musicians realized records didn't just extend the revenue streams that were [in existence], they created new ones. The same was true with radio. Many labels, as well as the American Society of Composers, Authors, and Publishers (ASCAP), were convinced that music made freely available through broadcasts on the pubic airwaves would make it unnecessary for citizens to go out and buy records. Considering the enormous amount of money that I talked about before, which is being paid to independent radio promoters in order to get music played on the radio, I think at least in that case, we can guess that the value of giving music away far outstrips the value of locking it down. And for the artists, publishers, and performance rights organizations that are getting paid regularly through broadcasting public performance licensing, radio has become an incredibly valuable revenue stream. How valuable? The performance rights organizations collect about $1.1 billion dollars annually. So to paraphrase Jim Griffin at last year's Future of Music Policy Conference, where he spoke so eloquently about the possibility of using technology to grow the marketplace, radio, like television, is a medium that lets the community

experience music as free— without the music actually being free. Radio music feels free to consumers, but there is a mechanism in place that allows the financial value of advertising and promotional dollars to flow back to the creator and the copyright owners.

So what will be the mechanisms for the Internet in the future? We can't be sure. But I'm confident that they will be worked out in the marketplace over the next few years. We need to remember that this has historically always been an incremental process. Radio existed for over 20 years before ASCAP standardized the licensing of compositions for stations for public performance. Before these technological advances, creators could get paid for writing songs and performing them. Thanks to recording and broadcast innovation, they can also get paid for record sales and radio and television broadcasts, not to mention advertising, synch licenses, and so on. There is no reason to believe that the Internet will not continue this pattern of growing the market and adding to the revenue streams.

I'm concerned, however, that unless creators step up to participate in the discussions surrounding the creation of these structures, we're going to end up with structures that are as imbalanced as the record deals that I discussed before. And this is particularly critical for musicians in the case of the discussion of the new royalty structures that are being put into place, as the digital royalty is becoming more of a reality. This is one of the issues that led to the founding of our organization. We actually had three primary issues and this is one of them: Sound Exchange.

In 2000, the RIAA created an organization called Sound Exchange, which is the sole collection and payment mechanism for all digital satellite and web casting ***239** royalties for non-interactive usage in the United States. In other words, it's the main pipeline through which all future non-interactive digital royalties will be collected and paid, and it is solely owned and controlled by the majors. Therefore, unless something is done, all musicians, even those that don't go through the major label system, will have to count on that pipeline to get paid their digital royalties. Now, does this sound a little bit like the fox guarding the hen house to you?

It's even worse. The RIAA has been lobbying Congress to have all of these new royalties flow through their systems for dispensation to the artists—through their *label* deals. The majors have publicly said that revenue streams will not be cross-collateralized against album deals. But privately, they've been saying that they need to do exactly that. The labels have been telling Congressmen that they have to have access to these new royalties. We believe that that means that all the artists that are unrecouped—which is either 90 or 99 percent of all the artists who go through the major-label system—will very likely not get paid a penny of these new royalties.

Artist representation is needed on Capitol Hill to explain to the members of Congress that historically, broadcast royalties never flow against album deals. Unless an artist signs a publishing deal with a label, the broadcast royalties are kept separately. I might be a million dollars in debt with my label on a record deal, and ASCAP could be handing me a million dollar check for broadcast royalties, but my label would have no right to meddle with any of that separate money.

In contrast, what's happening here with the digital royalties is that Sound Exchange is acting as a collection agent. What they're trying to do is apply those new digital-broadcast royalties against their separate record-contract debt. There is no historical precedent for it. So without artist representation up on Capitol Hill, many crucial lawmakers might be willing to take the RIAA's word that the labels need this money to be able to offer artists the big advances that they want. Incidentally, the Future of Music Coalition has filed its comments with the Copyright Office suggesting limits to the power of Sound Exchange and demanding artists get paid their 45 percent of the royalties directly.

I hope I've made a strong case here that artists are struggling with a structural problem. The fact that the overwhelming majority of musicians are not served by these structures is not an accident, it happened by design. In this marketplace, making a living is difficult for artists. But without the ability to get their music heard in this marketplace, making a living is impossible.

I'd like to talk a little bit about the importance of a vital public commons and the free flow of information for both citizens and creators. I've explained the concept of public domain earlier in the copyright section, but let me take a second to explain the concept of the digital commons. I'm going to paraphrase here from David Bollier's book *Public Assets, Private Profits*.[22] In it he explains this usage of ***240** the term "commons" originates in the period of the English Enclosure Movement, which began in the 15th and ran through the 19th century. In that period, in order to exploit the emerging markets and solidify power, the aristocracies prevailed upon the parliament to allow them to seize millions and millions of acres of commonly used forests, meadows, and game. The enclosure led to the creation of modern industrial markets, but it also inflicted

devastating social, environmental, and human costs on rural communities. So if you look at the people who didn't get to enclose—but became enclosed—well, you can see what happens.

With similar dynamics today, many business sectors are finding it irresistible to enclose common resources that were once commonly shared. In America, we are accustomed to thinking about the individual, and we focus on property as a tangible thing owned by individuals. We have a hard time understanding that some of our most important wealth is collective and social in character.

Stories relating to the commons of the public domain are all around us. For example, Disney, has been one of the main forces behind these extensions of copyright law. Man of the first stories that Disney ever animated were stories that had fallen into the public domain—Brother's Grimm, Hans Christian Anderson, and Kipling's *The Jungle Book*. These were all written and owned by someone at some time. The folks at Disney took those stories and made them into another thing, which they then owned the copyright on, and they have extended and extended the copyright so that other people wouldn't be able to do the same thing with the works that they've created.

Another example of things in the public domain is the American flag. Our version of the American flag that Betsy Ross created is a design that was derived from a flag that was created essentially by the East India Flag Company. Thankfully, the flag design is protected by copyright. Imagine that every time you wanted to put up a flag, you actually had to pay someone a flag-hanging royalty. It seems extreme, but with the prevailing attitudes on even accidental uses of trademarks and copyrights, our access to information is becoming locked down ever more and more.

You may argue that derivative works are not duplications—I'm not diminishing that distinction. Musicians benefit from this rough line all the time. One need only listen to "Louie Louie" next to "Wild Thing" in order to know this is the case. But increasingly the desire to lock down ownership of information limits the musical decisions made by artists. Who knows what hip-hop collages would never have been created without that period of innovation that was free of the draconian extremities of the very lucrative sampling-clearance process. And what about the political or artistic works like the controversial U2 record that was released by the musical collective Negativeland, which would never have been cleared? Should artists be denied the ability to create and should citizens be denied the ability to hear certain creations because their subjects fear that the images are unflattering? These are critically important questions and they point directly to ***241** what we gain as citizens by the free flow of information that's created in an environment of a vital digital commons.

It isn't always easy to identify areas that fall into public information commons. David Bollier breaks the varieties of our collective wealth down into six major categories and, in the interest of time, I'll just list a few of the major categories and talk specifically about the ways privatization of the digital commons is having an impact on artists and citizens.

The first category is *government-owned properties*, such as public land, public research, public information, and public bandwidth. Public bandwidth is easy. I've already discussed it in the first section of this speech when I talked about radio being bought and sold. In the case of public information, however, I can cite the fact that the Future of Music Coalition has been trying to do a study about commercial radio in the wake of the Telecommunications Act. Since the collection of radio station data is privatized and much of it is no longer directly collected by the Federal Communications Commission but rather is purchased by them, we have to pay $4,000 to the company that collected the radio station data just to get the numbers to do our study. We also must become a member of Arbitron and pay another fee, and Arbitron has the right to deny us membership. So here we can really, obviously, see how what was once publicly collected and publicly owned has been privatized and removed from circulation to the detriment of citizens and musicians who need it to understand the environment where we're making our living.

Another category is *user-managed regimes*, such as land conservation, software development, and water supplies. Here again I can't help but quote from David Bollier about the Internet.
Government investment and the gift economy ethos of academia helped make the Internet the largest most robust information commons in human history. Now this unparalleled public vehicle for free speech and social communication stands on the threshold of market enclosure. Various industries are seeking to compromise the open, end-to-end architecture of the Internet and replace the public's information commons with proprietary control. The enclosure of the Internet commons is being achieved through (1) the attempted subversion of open technical standards, (2) unprecedented expansions of intellectual property law at the expense of free information exchange; and (3) "techno-locks" that reduce the public domain and fair use rights.[23]

An example of this last one that specifically impacted the music community is something called SDMI, Secure Digital Music Initiative. Spearheaded by the RIAA, SDMI attempted to pull together a limited group of powerful consumer electronic manufacturers, PC manufacturers, software manufacturers, and the major labels in order to agree upon a copyright-enabled alternative to the MP3 format. Many viewed this process as a misguided and desperate scramble by those in the existing music business monopoly to maintain their stranglehold on the channels of ***242** distribution through the application of a standardized encryption or watermarking program. Our key criticism was the fact that creators were never invited to participate in the discussion and that without access to these conversations, artists had every reason to believe the new technological standards would, once again, lock creators out of distribution channels that could be most beneficial to them. So in the terrestrial world, if the people who have control of the shelf space are allowed to charge us $40,000 to put the titles up there, there is no reason for us to believe that people who own the key to the encryption lock couldn't do the same thing. Without us in the room participating in the discussion about how these new encryption structures are made, we can't be sure that we won't be on the wrong side of that lock.

The third category is the *gift economy and shared knowledge*. So how did I get the information to put this speech together for you today? I found some information from libraries. I read some in books. But, largely, my crash course education in the music technology labels came from one place and one place alone. It's called the "Pho list." The Pho list is a listserv that discusses music technology issues in real time. In the original days of Pho list, its membership included many of the various people that I've actually quoted here today. The head of the RIAA, Hilary Rosen was on it, as was Napster creator Sean Fanning, one of the board members of ASCAP Dean Kay, John Perry Barlow of the EFF, Jamie Boyle, Jim Griffin ... and what was remarkable about this list, besides the variety of opinion, was the fact that it was a great example of gift economy at work. The combined historical knowledge of the group was so compelling that a careful and regular reading of discussions held within those seemingly endless posts could, in a way, level the playing field to one where information balances spin and power. The shared historical knowledge like, for example, critiquing the major label contracts which came out during this discussion, or the shared scientific research like explanations of strengths and failure of watermarking technology, or even the shared information about folk wisdom, basic organizing principles that we've learned-all of this was shared within a gift economy and is largely responsible for any success that the Future of Music Coalition has been able to have in the music technology environment. This is something I always need to remember when I feel the temptation as an artist to lock down and extend my copyrights. I need to look at that impulse and see where it's coming from.

In many ways, I believe, the desire to lock down intellectual property comes from the same place as the desire to lock down physical property. When one lives in a neighborhood where little is owned, much is stolen. People tend to lock the doors out of self-preservation, but locking doors doesn't change the climate of crime outside the door. It only protects one inside to the extent that they are willing to be a prisoner of their own fears, and loss of circulation in the community has a devastating effect. When, however, we work together to truly reduce the climate of crime, citizens can then genuinely feel safe to open their doors and circulate. In the case of music technology, I believe, it's going to take the removal of unfair business practices and an artificially constrained marketplace in order to allow the ***243** musicians to understand the value of unlocking the doors to circulation of their music. Should they be paid for that circulation? Absolutely. In every case? Maybe not. But that's to be worked out in a new marketplace between citizens and creators who must work together to wrench some power back from the consolidators to ensure that the healthy balance established by the framers in the origins of copyright law is not going to be lost for generations to come. Thanks.

More information on the Future of Music Coalition can be found on the world wide web at <http://www.futureofmusic.org>.

Footnotes

[a1] Ms. Toomey is the Executive Director of the Future of Music Coalition.

[aa1] THE JOURNAL is grateful to Baker Botts L.L.P. and the University of Texas School of Law for their sponsorship of this event.

[1] Kristin Thomson and Jenny Toomey, *An Introductory Mechanic's Guide to Putting Out Records, Cassettes and CDs, at* http://www.simplemachines.net/mech.html (last modified Mar. 19, 2001).

[2] *Future of Music Coalition, at* http://www.futureofmusic.org/ (last visited Apr. 8, 2002).

[3] *FMC Board Members, at* http://www.futureofmusic.org/members.cfm (last visited Apr. 8, 2002).

[4] Pamela Samuelson, *A New Politics of Intellectual Property*, Address at the MP3 2001 Summit, University of California, San Diego, *available at* http:// www.sims.berkeley.edu/~pam/tutorials.htm (June 21, 2000).

[5] WASSALL ALPER, MORE THAN ONCE IN A BLUE MOON: MULTIPLE JOBHOLDINGS BY AMERICAN ARTISTS. (2000), *summary at* http:// www.nea.gov/pub/Researcharts/Summary40.html.

[6] David Segal, *They Sell Songs the Whole World Sings; Mass Merchants Offer Convenience, Less Choice*, WASHINGTON POST, February 21, 2001, at A1.

[7] *Id.*

[8] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(b)(1)(a), 110 Stat. 56, 110 (1996).

[9] 47 C.F.R. 73.3555 (a)(1)(ii) (1995).

[10] 47 C.F.R. 73.3555 (a)(1)(i) (1996).

[11] Chuck Phillips, *Logs Link Payments with Radio Airplay*, LOS ANGELES TIMES, May 29, 2001 at A1.

[12] Eric Boehlert, *More Waves in the Radio Business*, SALON.COM, August 6, 2001, *at* www.salon.com/ent/music/feature/2001/08/06/radio_ records/index.html; Eric Boehlert, *Payola City*, SALON.COM, July 24, 2001, *at* www.salon.com/ent/music/feature/2001/07/24/urban_radio/index.html; Eric Boehlert, *One Big Happy Channel*?, SALON.COM, June 28, 2001, *at* www.salon.com/tech/feature/2001/06/28/telecom_dereg/index.html; Eric Boehlert, *The "Bootylicious" Gambit*, SALON.COM, June 5, 2001, *at* www.salon.com/ent/feature/2001/06/05/sony_payola/index.html; Eric Boehlert, *Radio's Big Bully: Dirty tricks and crappy programming*, SALON.COM, April 30, 2001, *at* www.salon.com/ent/feature/2001/04/30/clear_channel/index.html; Eric Boehlert, *Pay for Play*, SALON.COM, March 14, 2001, *at* www.salon.com/ent/feature/2001/03/14/payola/index.html.

[13] First Annual Future of Music Coalition Policy Summit, Georgetown University, Washington, DC (Jan. 10-11, 2001) (*Conference schedule available at* http://www.futureofmusic.org/events/summit0101/schedule.cfm).

[14] Chris Marlowe, *Artists, RIAA plead cases at '7-year-statute' hearing*, HOLLYWOOD REPORTER, September 6, 2001.

[15] *The Recording Industry Association of America's 2000 Yearend Statistics, available at* http://www.riaa.org/pdf/year_end_2000.pdf (last modified Feb. 16, 2001).

[16] Senator Orrin Hatch, Address at the First Annual Future of Music Coalition Policy Summit, Georgetown University, Washington, DC (Jan. 10-11, 2001) (*Conference schedule available at* http:// www.futureofmusic.org/events/summit0101/schedule.cfm; *audio recording of the address available at* http://www2.cddc.vt.edu/eff/radioeff.html).

[17] *Major Label Contract Clause Critique, at* http:// www.futureofmusic.org/contractcrit.cfm (last modified Oct. 3, 2001).

[18] Christopher Stern, *Big Labels Accused Of Fixing CD Prices; States Also Name Record Chains*, WASHINGTON POST, August 9, 2000, at E1.

[19] David Segal, *They Sell Songs the Whole World Sings; Mass Merchants Offer Convenience, Less Choice*, WASHINGTON POST, February 21, 2001, at A1.

[20] Eric Boehlert, *Pay for Play*, SALON.COM, March 14, 2001, *at* www.salon.com/ent/feature/2001/03/14/payola/index.html.

[21] Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 1000 (a)(9), § 1011 (d) (1999) (explicitly adding "sound recording" to the exemplary list of "work[s] made for hire" in 17 U.S.C. § 101), *repealed by* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, § 2 (2000) (deleting "sound recording" from the exemplary list, and adding language in 17 U.S.C. § 101 to indicate that the addition and subsequent deletion of "sound recording" should not be understood as indicators of congressional intent).

[22] DAVID BOLLIER, PUBLIC ASSETS, PRIVATE PROFITS: RECLAIMING THE AMERICAN COMMONS IN AGE OF MARKET ENCLOSURE (2001).

[23] *Id.*