SANFRAN MUSICTECH SUMMIT

CONTINUING LEGAL EDUCATION PROGRAM
MONDAY OCTOBER 20, 2008
HOTEL KABUKI, SAN FRANCISCO, CA

REFERENCE COURSE MATERIALS

"Non-Traditional Licensing & Custom Deals"

"Ethical Issues in Music & Technology Law"

Digital copy of Reference Course Materials available online at:
http://sanfranmusictechsummit/cle3.pdf

Program presented in partnership with the
ABA Forum on the Entertainment &Sports Industries

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SANFRAN MUSICTECH SUMMIT

The SanFran MusicTech Summit

Presents

Non-Traditional Licensing & Custom Deals

9:20 – 10:20 AM

Panelists include:

Heather Rafter, Esq. – General Counsel, DigiDesign
Joyce Dollinger, Esq. – Dollinger, Gonski & Grossman, of Counsel
Christopher Sabec, Esq. – Manager, Tea Leaf Green
Jonathan Blaufarb, Esq. – Davis Shapiro, Partner
Matt Burrows, Esq. – Apple, Inc. - iTunes, Senior Counsel

Ethical Issues in Music & Technololgy Law

10:30 – 11:30 AM

Panelists include:

Whitney Broussard, Esq. – Selverne, Mandelbaum & Mintz, of Counsel
Elliot Cahn, Esq. – Law Offices of Elliot Cahn
Michael Ashburne, Esq. – Law Offices of Michael Ashburne

This is part of a full day conference on the Music & Technology industry

Monday, October 20, 2008
Hotel Kabuki, Japantown
1625 Post Street
San Francisco, CA 94115
Breakfast served & evening cocktail party to follow

For Information: www.sanfranmusictech.com

Faculty Names & Credentials

Heather D. Rafter, Esq.

Heather Dembert Rafter is the General Counsel of Digidesign, a division of Avid Technology, Inc. Ms. Rafter is responsible for managing Digidesign's legal affairs. The company's hardware and software is used worldwide by individuals and companies who create digital audio content, from home music hobbyists to editors of feature films in Hollywood. Digidesign has received numerous industry awards, including a Grammy® award for Outstanding Technical Achievement and, more recently, an Oscar® statuette representing the 2003 Scientific and Technical Award for the design, development, and implementation of the Digidesign Pro Tools digital audio workstation.

Ms. Rafter is active in the American Bar Association and is the Immediate Past Chair of the ABA's Section of Science & Technology Law. She is also past Chair of the Barristers' Intellectual Property Committee of the Bar Association of San Francisco. Ms. Rafter frequently lectures and writes on intellectual property, Internet and computer law issues. She received her undergraduate degree from Princeton University, *magna cum laude*, and her J.D. from Columbia Law School, where she was a Harlan Fiske Stone Scholar. She is admitted to the bars of the State of California, the Northern District of California and the Ninth Circuit Court of Appeals.

Joyce S. Dollinger, Esq.

Joyce Sydnee Dollinger, Esq., of counsel with Dollinger, Gonski and Grossman, practices in the entertainment law field and concentrates on music law transactions in addition to corporate and business entity dealings and some film and television representation. A client of interest in her practice is a company that designs, manufactures and sells innovative music jewelry and also gives back to the music community by donating a percentage of the profits to the MusiCares Foundation®.

Ms. Dollinger has enjoyed a successful law career in the music industry for major and independent labels such as Arista, RCA, BMG Special Products, Motown, Island, RykoDisc, Palm Pictures and Sony Entertainment. Ms. Dollinger was also co-founder of a concert promotion company, which provided exposure to emerging artists at unique venues, as well as vice president and in-house counsel for a talent management firm representing major recording artists, songwriters and producers. Career highlights include: negotiating with a record label to reclaim ownership of music masters for a recording artist; and spearheading all contract administration, administering all intellectual property assets, and drafting and negotiating cutting edge contracts and licenses.

Since 1998, Ms. Dollinger has been affiliated with the National Academy of Recording Arts and Sciences (The Grammy Awards), and is a former contributing writer to Vocal Mag, Music Dish and the Indie Music Newsletter. She also served as director of business affairs for Powerhouse Group Inc./Inner Circle which was a conglomerate of young executives from various major record labels providing business networking and social events for music industry taste makers.

Ms. Dollinger is frequently asked to be a guest speaker on topics surrounding entertainment law, careers and artist management. Recent speaking engagements include: the Practicing Law Institute, Law School Admission Council and the annual CMJ Music Marathon. For the past three years, she has been the CLE Program Co-Chair and Program Director of an all-day Music Business Law Seminar presented by the Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association (NYSBA) and the CMJ Music Marathon & Film Festival.

Admitted to practice in the States of New York and Florida, Ms. Dollinger is also a member of the New York State, Florida State and American Bar Association entertainment law sections. Due to her enthusiasm and work ethic, she was appointed as the Co-Chair of the Programs Committee of the EASL Section of the NYSBA.

She has always been passionate about the entertainment field and the law. While still in high school she secured an internship at Rolling Stone magazine, and during her college days at Bucknell University, she produced an outdoor rock concert featuring the Indigo Girls, interned at NBC in media relations and the ABC morning show "Good Morning America." After enrolling at the University of Miami School of Law, Ms. Dollinger immersed herself in many extra-curricular activities including working in the Miami City Attorney's Office and serving as research editor for an international law journal. She feels most fortunate to have been able to meld her two passions into a satisfying career. Ms. Dollinger lives and works in New York City.

Christopher Sabec, Esq.

Christopher Sabec is a Bay Area music attorney and manager. He is currently the manager for Tea Leaf Green. Sabec has also served as CEO of the Jerry Garcia Estate LLC, EVP for BurnLounge, Manager for Hanson, and Attorney for the Dave Matthews Band. Sabec earned his J.D. from the University of Georgia School of Law.

Jonathan Blaufab, Esq.

Jonathan Blaufarb is the Managing Partner of the San Francisco law office of Davis, Shapiro Lewit & Hayes, LLP, a national music law firm with other offices in New York and Beverly Hills. His law practice includes advising recording and performing artists, songwriters, producers, record labels, digital music companies, merchandising companies, film and television talent, and authors. Jon was formerly a partner in the Beverly Hills entertainment law firm of Bloom, Hergott, Diemer & Cook. His background also includes complex business and entertainment litigation with Rogers & Wells and Wyman, Bautzer, as well as music transactions as in-house counsel for Sony Music. Jon's music business experience also includes personal management of recording artists, record retail operations, and performing and recording as a professional musician.

Whitney Broussard, Esq.

Whitney Broussard, Esq. is an entertainment attorney and digital media consultant based in the Bay Area. In his consulting practice, he advises technology companies with respect to their dealings with entertainment companies and in that regard has advised companies such as RealNetworks, Verizon Wireless, Motorola, Rowe International/AMI Entertainment and Singshot Media.

Prior to moving to the Bay Area, Mr. Broussard was a partner in the New York entertainment law firm of Selverne, Mandelbaum & Mintz, LLP, where he remains of counsel. He has represented numerous music-related entities throughout his 15 year career, including such artists as Ludacris, Fat Joe, The Wu-Tang Clan, N.E.R.D/The Neptunes, The Fugees, Wyclef Jean, Motley Crue, Gov't Mule and Third Eye Blind, and companies that include Capitol Records, Virgin Records, Blue Note Records, 19 Entertainment (American Idol), The National Geographic Society, MTV Networks, Kobalt Music Publishing and Caroline Distribution. Mr. Broussard has spoken at a wide variety of venues, including the New York State Bar Association's Antitrust Division, New York University, Duke University, Georgetown University, Hasting Law School, Loyola University of New Orleans, The University of New Orleans, New York Law School and the Future of Music Policy Summit. Mr. Broussard has been quoted widely in the press regarding digital music and other music industry issues, in publications and programs such as NPR, The New York Times, The New York Post, The San Francisco Chronicle, The Washington Post, USA Today, Billboard, Spin, Wired, the Atlantic Monthly and GQ.

Elliot Cahn, Esq.

Elliot Cahn started his music career as an artist (vocals and guitar). While attending Columbia University, with some friends he started a band called Sha Na Na (named after a line in the hit song "Get A Job," performed by the Silhouettes). The band achieved national fame after playing the Woodstock Festival.

Elliot left the band and played with ex-Sha Na Na member, Henry Gross for about one year, before moving to the West Coast. In California, he completed his education earning his Bachelor's Degree, Master's Degree (Juris Prudence & Social Policy) and Law Degree at the University of California, Berkeley.

Though Elliot practiced law after graduating, it was another several years before fate landed him back into the music business. At the time, a prominent Bay Area Music Attorney was looking for an Associate, and Elliot begrudgingly got back in the Biz. Two years later he went into solo practice.

Over the past twenty years, Elliot has been the attorney for Primus, Papa Roach, Rancid, Exodus, The Offspring, Luce, Charlie Hunter, Ocean Park Music Group, Bryan Todd, producer Mark Needham, and producer Jim Scott, to name a few. Also an Artist Manager, he has managed the careers of Green Day (from their start through the Dookie album which sold two million albums and won a Grammy for best rock album), Testament, Fisher, and currently R&B songstress Goapele and guitar aficionado Justin King.

Outside of legal work and management duties, Elliot stays busy with a variety of music business activities. He was the CEO of a joint venture label with MCA records and is currently the Business Manager for label, Skyblaze Recordings (which until recently had a joint venture deal with Sony). Elliot has music supervised two major studio films: Kevin Smiths' Mall Rats and Angus. He also is a guest speaker on many music panels for organizations like California Lawyers for the Arts, SXSW and the Westcoast Songwriters annual conference.

Michael Ashburne, Esq.

Michael Ashburne is an Oakland, California based entertainment attorney who has specialized in the representation of recording artists, record labels, producers, songwriters, and personal managers for 30 years. He has represented such clients as Richard Pryor and Ice Cube. He authored the book, "Sampling in the Record Industry," is an adjunct professor at San Francisco State University, and serves on the Advisory Board of the Black Entertainment & Sports Lawyer Association (BELSA). Mr. Ashburne earned his J.D. from the University of California, Berkeley, School of Law.

Matt Burrows, Esq.

Matt Burrows is Senior Counsel at iTunes where he is responsible for negotiating and structuring various agreements for music, television and motion picture content distributed on the iTunes Store.

Prior to joining Apple, Mr. Burrows was Of Counsel to Lapidus & Haft, LLP, an entertainment law firm in Santa Monica, California, focusing on the representation of major record labels, artists, and producers. He was also previously Head of Music Business Affairs at the William Morris Agency in Beverly Hills, California where he was responsible for matters concerning The Eagles, Whitney Houston and the Lollapalooza concert tours.

Mr. Burrows is currently a Non-resident Fellow at the Stanford Law School, Center for Internet and Society where he is focusing on fair use issues.

Mr. Burrows received his B.A. in Rhetoric from the University of California, Berkeley in 1987, and his J.D. from Loyola Law School, Los Angeles in 1991.

Topics & Descriptions

Non Traditional Licensing & Custom Deals

This panel will discuss the challenges of creating and negotiating deals in emerging areas when there is no industry standard or form book to rely upon. What are the factors for determining value, fee structures, scope, and terms? How do the parties decide what is fair? This panel features attorneys providing advice & guidance based on their years of experience with such negotiations.

Ethical Issues in Music & Technology Law

This panel focuses on ethical issues that arise in the area of music & technology law. Experienced practitioners will examine the myriad of ethical issues that arise in actual day-to-day practice. Hypotheticals will be used to engage participants in an interactive discussion that will highlight typical ethical issues that music & technology lawyer face in these emerging areas of law.

About the Event Producers:

Shoshana Zisk, Esq. produces the SanFran MusicTech Summit. She is a member of the California, New York, and Florida Bars. Shoshana is an entertainment lawyer with a wide range of experience in the music industry. Her recent industry experience includes Interim Chief Operating Officer of In Ticketing, Business & Legal Affairs for George Clinton and his musical groups Parliament, Funkadelic and The P-Funk Allstars, and General Manager of Clinton's independent record label The C Kunspyruzy. Her previous positions include Business & Legal Affairs at BMG U.S. Latin, the Copyright Department at Motown, and A&R Administration for Island Records. Shoshana is currently the CEO of Kiddie Village, which creates award-winning children's videos and music. She graduated from the University of Miami with a bachelor degree in Classical Piano Performance and a Juris Doctorate (Cum Laude).

Brian Zisk produces the SanFran MusicTech Summit. He is a serial entrepreneur and technology industry consultant specializing in digital media, web broadcasting and distribution technologies. Brian is a Co-Founder and Technologies Director of the Future of Music Coalition. Additionally, he is a Board Member and Strategic Advisor for a wide variety of tech companies and non-profits. He is active in many influential computer-mediated forums, is quoted and published extensively in the media, frequently appears on panels and at industry events domestically and abroad, and is an expert at frenzy whipping, brand awareness, and in creating new business models. He is married to Shoshana Zisk.

REVOLUTIONS ALL THE TIME

Mark A. Fischer
Fish & Richardson P.C.
Boston, MA

As of September 11, 2008

I. The Digital Revolution and File-Swapping

A. Background

1. The Betamax Case

In the landmark decision *Sony Corp. of America v. Universal Studios, Inc*., 464 U.S. 417 (1984), the U.S. Supreme Court ruled that creators and distributors of copying devices could not be held liable under copyright law as long as the technology was capable of substantial non-copyright-infringing uses. The court reasoned that Sony's Betamax video recorders could be used for non-infringing purposes such as recording public domain programs or simply "time-shifting" programs that were aired on broadcast television stations. While the decision particularly addressed Sony's sale of Betamax video recorders, for almost two decades it has been, and continues to be, applied to similar technological innovations, including file-swapping programs.

2. Contributory and Vicarious Infringement

Individuals who infringe copyright are liable for direct infringement, but people who help those individuals commit the infringement may be liable for contributory or vicarious copyright infringement. For example, the owner of a flea-market may be held responsible for knowingly providing a forum for the sale of pirated recordings. Not surprisingly, this flea-market example has often been analogized to file-swapping programs.

Contributory and vicarious infringement are subject to different criteria, but the two offenses are similar enough that they often occur in tandem. In order to prove contributory infringement, the plaintiff must show that the defendant (1) had knowledge of the infringing activity and (2) materially contributed to the infringement. For vicarious liability, on the other hand, the plaintiff must show that the defendant (1) received some financial benefit from the infringement and (2) had the right and ability to control or stop the infringing activity.

B. The Recording Industry's Approach to File-Swapping

Before digital formatting was developed, the recording industry produced music in analog formats. The nature of the process for producing or reproducing analog recordings was such that the sound quality of analog copies diminished with each subsequent generation. Further, the ability to make multiple analog copies required an investment in expensive copying equipment.

There was little risk that the typical music fan would set up a bootlegging shop with commercial impact.

With the emergence of digital formatting, however, just one person equipped with a computer can easily reproduce a virtually unlimited number of perfect copies. Furthermore, when that person's computer is connected to the Internet, he or she can distribute that perfect copy worldwide at little to no cost. The popularity of such file-swapping has placed the recording industry in the awkward position of labeling the activities of its consumer base as "piracy." In efforts to contain file-swapping, the recording industry has challenged both the file-swapping services and those end users who actually swap files. The recording industry has also turned to lobbying efforts and technological measures such as digital rights management software in order to deal with the challenges.

1. The Technology

i. *A&M Records v. Napster,* 239 F.3d 1004 (9th Cir. 2001)

In December 1999, A&M Records brought suit against Napster for contributory and vicarious infringement. In July 2000, the district court granted a preliminary injunction against Napster prohibiting it "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings." Napster appealed to the Ninth Circuit Court of Appeals, but the court affirmed the injunction. Central to the Circuit Court's finding of contributory infringement was the fact that Napster maintained a central server with the names of all of the files that were being swapped on its system and thus had actual knowledge of the infringement. Also, because this central server was an integral part of the system and its maintenance was necessary for the file-swapping to occur, the court found that Napster could essentially control the file-swapping and thus satisfied a central requirement for vicariously liability as well.

ii. *Arista Records, Inc. v. MP3Board Inc*., 2002 Copr. L. Dec. P. 28,483 (S.D.N.Y 2002)

Arista Records, Inc. filed a suit against MP3Board, Inc., alleging that MP3Board's website supported copyright infringement by users. The parties filed motions for summary judgment. MP3Board's site allegedly linked users to unauthorized copies of music recordings. Arista argued that MP3Board should be held liable for both contributory and vicarious infringement. The court denied Arista's motion, ruling that issues of fact remained as to whether the users actually downloaded files and whether the files were disseminated to the public. The district court also rejected MP3Board's fair use arguments and denied its claim.

iii. *Virgin Records Am., Inc. v. Does 1-35*, 2006 Copr. L. Dec. P. 29,168 (D.D.C. 2006)

The D.C. District Court's 2006 ruling on the establishment of personal jurisdiction as it relates to online copyright infringement cases expanded the available jurisdictions in which the record labels may file their suits. In response to a motion to quash a subpoena, the court took a broad view in finding personal jurisdiction in a case involving active peer-to-peer network use. The issue was alleged unauthorized uploading, downloading, and distribution with other peer-to-peer

users. These factors were cited by the court. First, merely contracting with a D.C.-based ISP was sufficient to allow the case to proceed. Second, the nationwide distribution was sufficient for jurisdiction because the defendants can anticipate that infringement may occur in D.C. Third, by installing the peer-to-peer software and logging onto a peer-to-peer network, the defendants were disseminating copyrighted works to anyone that wanted them, including residents of the jurisdiction.

iv. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003)

In June 2003, the Seventh Circuit Court of Appeals denied Aimster's appeal of a district judge's order of preliminary injunction against the company. Aimster argued that the breadth of the injunction had the effect of shutting it down. Plaintiff owners of copyrighted popular music successfully argued that Aimster had committed contributory and vicarious copyright infringement.

Aimster was a file-swapping service that piggy-backed off of AOL's popular Instant Messenger and allowed its users to swap their computer files containing copyrighted music. Like Napster, Aimster maintained a central server that facilitated the file-sharing, though the contents of the files were encrypted.

The recording industry argued that Aimster provided a service and did not sell "articles of commerce" like Sony. The Seventh Circuit distinguished *Sony* from this case. Sony relinquished control over the use of the Betamax recorders after they were distributed. Aimster provided a "service" in maintaining the central server and as such maintained control over the service while the infringing acts were taking place.

In January 2004, the U.S. Supreme Court denied Aimster's appeal petition meaning that the injunction issued by the District Court and upheld by the 7th Circuit Court of Appeals stands.

v. *Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. 913 (2005)

In June 2005, the Supreme Court ruled that companies that distribute peer-to-peer software or devices that facilitate digital file-sharing over the Internet may be held liable for the infringing activities of third-party users. The Supreme Court overturned the Ninth Circuit's decision that defendant Grokster and StreamCast's software programs were capable of substantial non-infringing uses and that, based on the Supreme Court's decision in the *Sony* case, the defendants were therefore not liable for contributory infringement because they had no actual knowledge of their user's infringement. The Ninth Circuit's decision acknowledged that the Grokster system's architecture differed from Napster in a significant way. When Grokster users searched for a file, the information is relayed between users' computers. No information ever passed through a computer owned by Grokster. The Napster system relied on a central server owned and run by Napster that maintained an index of users' files available on the network. Due to the decentralized nature of the software, it was the users and not Grokster or StreamCast who searched, retrieved, and stored the infringing files.

The Supreme Court held that the Ninth Circuit had erred in applying the holding from *Sony* so broadly and remanded the case for further proceedings. The Court held that the *Sony* ruling does not apply whenever a product is capable of a substantial lawful use but, instead, should apply

only where intent to infringe is being imputed from the design of a product that is capable of a substantial lawful use. The *Sony* decision was largely based on patent law's "staple article of commerce doctrine" under which a manufacturer will not be held liable for contributory infringement if its product has substantial non-infringing uses, even if the product provides a means of potential infringement. The Court held that this doctrine was properly applied in *Sony* because Sony had not expressed any desire to bring about copyright infringement with the VCR and had not taken active steps to increase profits from unlawful taping.

In *Grokster*, however, the Court held that a theory of contributory infringement could be based on direct evidence of Grokster and StreamCast's affirmative actions to induce infringement. The "inducement" rule – like the staple of commerce doctrine – is rooted in patent law and holds liable those who have shown a purposeful, culpable expression of affirmative steps to foster infringement. The Court focused on three particular features of the evidence that showed that Grokster and StreamCast intended to "induce" copyright infringement. First, each company aimed to satisfy a known source for demand for copyright infringement by targeting former Napster users. StreamCast's internal documents made reference to Napster and the company placed ads on Napster-compatible programs that urged users to adopt their software program which would have been readily understood to serve the same functions as Napster. Grokster's name, the court found, was apparently derived from Napster and Grokster sought to capture Napster's former audience. Second, neither company attempted to develop methods to filter or otherwise diminish users' infringing activities. Third, StreamCast and Grokster both made money selling advertising space. To earn the most revenue, the companies encouraged high-volume use.

In a concurring opinion favorable to developers of new technologies, Justice Breyer addressed the standard for contributory infringement established in *Sony*. In *Sony*, the court determined that the videotape recorder (VTR) had substantial non-infringing uses based on a showing that roughly 9% of all VTR recordings were of a non-infringing nature. In light of this determination, Justice Breyer expressed that *Grokster* would satisfy the *Sony* standard based on evidence that 10% of its utility involved non-infringing uses. Justice Breyer found the 10% figure to be a reasonable foundation where, as with peer-to-peer software, there is a reasonable prospect of expanded legitimate uses over time. Although the 10% non-infringing figure can be disputed statistically on the basis of available files versus those actually downloaded, Justice Breyer maintained the *Sony* rule is a clear standard that promotes the distribution of new technology, while still imposing liability for products that are used almost exclusively for infringing purposes.

The implications of this decision are not entirely clear. Finding evidence of inducement in the companies' advertising and marketing strategies instead of in the design of the product itself, Justice Souter's majority opinion attempted to preserve the *Sony* ruling in order to protect technological innovations that have substantial non-infringing uses. This marketing-based standard may be effective in finding inducement by commercial software companies with advertising departments and cohesive marketing strategies. It may be unlikely, however, that this standard will be effective when applied to individuals throughout the world programming peer-to-peer software. What if a software company provides a free, file-sharing program with no

advertising at all? The *Grokster* decision does not provide an easy answer. Justices Ginsberg, Rehnquist, and Kennedy seem to say that the makers of this kind of program might still be held liable for contributory infringement if such a program is primarily used for infringement while Justices Breyer, Stevens, and O'Connor seem to say that if there is no evidence of inducement and the product has a substantial non-infringing use, the makers of the product will not be held liable for contributory infringement. This view seems to stress the advertising of the program and the appearance of the program's usage without inquiring into the reality of the program's function.

The majority's third inducement factor also creates a potentially hard to enforce standard on many Web-based businesses by allowing business models to be considered evidence of inducement. Peer-to-peer software is, obviously, not the only type of software that is based on a business model where an increase in the use of the software leads to an increase in revenue. Search engines, for instance typically depend on many users using the search engine to increase advertising revenue.

Following the decision, Grokster agreed to settle for $50 million in damages. The company also shut down its network and posted the following message on its site:

> The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners. There are legal services for downloading music and movies. This service is not one of them.

Defendant StreamCast chose not to settle and has continued to argue its case on remand. In *Metro-Goldwin-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966 (C.D. Cal. 2006) the U.S. District Court for the Central District of California granted the plaintiff's motion for summary judgment on StreamCast's liability for infringement and found that StreamCast customers used the network "overwhelmingly" for infringement. On October 16, 2007, in *Metro-Goldwin-Mayer Studios, Inc. v. Grokster, Ltd.,* 518 F.Supp.2d 1197 (D. Cal. 2007) the same court granted in part the plaintiff's motion for a permanent injunction against StreamCast that would enjoin it from directly or indirectly infringing the plaintiff's copyrighted works. The injunction requires StreamCast to "use the most effective means available to reduce the infringing capabilities of the Morpheus System and Software, while preserving its noninfringing uses as feasible" and appointed a special master to supervise enforcement of the injunction.

It appears that the court did not order a more exhaustive permanent injunction (i.e., a complete shutdown of StreamCast) because it was concerned about the needs of the general public. On one hand, the public benefits when the rights of copyright owners are preserved. On the other hand, despite the past "overwhelming" use of StreamCast for infringement, the public benefits from the noninfringing capabilities of the StreamCast network. However, the court acknowledged that the effectiveness of filtering mechanisms and efforts to empower users of older legacy (non-filtered) software will continue to be litigated, which explains why a special master was appointed to oversee the feasibility and implementation of the enforcement, including whether the filtering mechanisms make the infringement less "overwhelming." Overall, it will be interesting to see

whether the plaintiff will argue that the permanent injunction is too broad and that it undermines and goes against the spirit of the 2005 Supreme Court decision.

vi. Kazaa Settlement

In July 2006, the Motion Picture Association of America ("MPAA") and the Recording Industry Association of America ("RIAA") announced that the major music and film companies they represent entered into a settlement agreement with Sharman Networks, Ltd., operators of Kazaa peer-to-peer digital file-sharing network. Kazaa was one of the world's largest peer-to-peer networks for the illegal distribution of music and films, and at the height of its popularity in 2003, it was estimated that Kazaa was responsible for over 239 million downloads.

As one of several co-defendants in the *Grokster* case, Sharman had been actively engaged in negotiations in an effort to avoid further litigation after the Supreme Court ruling. Although the exact amount of the settlement has not been confirmed, it was reported that Sharman agreed to pay approximately $115 million to the major record companies and a smaller undisclosed amount to the movie studios. Sharman stated it would continue its operations by obtaining licenses from entertainment companies to lawfully distribute music and movies and agreed to implement new applications and technologies (e.g., a new filtering technology) to limit unauthorized sharing and unlawful distribution of the copyrighted materials.

This landmark settlement was the first of its kind, marking the hopeful beginning of new cooperative relationships between peer-to-peer technology and content industries. The Kazaa settlement indicates that the entertainment industry is making progress in its war to eliminate illegal peer-to-peer file sharing by working directly with companies in order to transform them into legitimate online distributors of music and film and may serve as a model for other file-sharing services seeking to legitimize their practices.

vii. *Arista Records L.L.C. v. LimeWire L.L.C.*, 06 CV 5936 (S.D.N.Y. *complaint filed* Aug. 4, 2006)

In August 2006, major record companies filed suit against LimeWire, a peer-to-peer file-sharing program, for copyright infringement. The lawsuit was filed in the U.S. District Court for the Southern District of New York and named Lime Group L.L.C., its subsidiaries, and the corporation's top executives in the suit. In their complaint, the record companies alleged that LimeWire permitted and encouraged thousands of copyrighted songs to be pirated by its users and that the program was specifically designed to distribute sound recordings without paying any required royalties. The record companies further alleged "the scope of infringement is massive," the operators of LimeWire are "actively facilitating, encouraging and enticing" online users to steal copyrighted music, and that LimeWire is liable for the "inducement" of this infringement.

This case marks the first music-piracy lawsuit to be brought against a distributor of file-sharing software since the landmark *Grokster* decision. In *Grokster,* the U.S. Supreme Court ruled that tech companies may be liable for copyright infringement if they encourage customers to steal music and/or movies over the Internet. The record companies are seeking compensatory and punitive damages, including a minimum of $150,000 for each willful infringement, and injunctive relief.

In September 2006, LimeWire responded to the record company and counterclaimed with antitrust violations under the Sherman Act and Clayton Act. LimeWire alleges that the record labels created their own electronic distribution services to destroy other music distribution services they did not control. They are seeking monetary damages and attorneys fees. As of September 2008, both parties have filed motions for summary judgment.

viii. *Universal Music Group Recordings, Inc., v. MySpace, Inc.*, 06 CV 07361 (C.D. Cal. *complaint filed* Nov. 17, 2006)

In November 2006, Universal Music Group filed suit against MySpace for copyright infringement. Universal is seeking $150,000 for each unauthorized song or video posted on MySpace and an injunction to prevent MySpace from distributing infringing material. Universal alleges that much of MySpace's "user created content" is actually "user-stolen." MySpace stated that the lawsuit was "unnecessary and meritless," among other things claiming its activities fall within the safe harbor provision of the Digital Millennium Copyright Act.

In 2007, Universal reportedly required that all of its recording artists limit music posted on third-party sites to 90-second samples, unless the site had a previously existing contract with Universal which allowed it access to the full song. Alternatively, Universal artists may add an audio tag to the beginning and end of audio files rather than provide only the 90-second clip.

ix. *Arista Records LLC, et al. v. Usenet.com, Inc.,* 07 CIV 8822 (S.D.N.Y. *complaint filed* Oct. 12, 2007)

In October 2007, the RIAA and several major record companies filed suit in the District Court for the Southern District of New York to obtain a permanent injunction against the Usenet newsgroup service for alleged direct, contributory, and vicarious copyright infringement and alleged inducement of copyright infringement. This is the first suit that major record companies and the RIAA have filed against a newsgroup service. The plaintiff record companies claimed that the "[d]efendant touts its service as a haven for those seeking pirating content, claiming that it provides '[t]oday's hottest way of sharing MP3 files over the internet' without getting caught." Unlike a P2P file-sharing network such as Grokster, a newsgroup service can actually store content on its own servers. It is alleged in the lawsuit that Usenet is storing copyrighted content on its server and that Usenet actively encourages users to share pirated content. Usenet has not answered the complaint, but in one article, Electronic Frontier Foundation (EFF) attorney Fred von Lohmann suggested that the company may argue that it is protected by the safe-harbor provisions of the DMCA which "protects services that are hosting material on behalf of users or linking to material." The RIAA is clearly looking to liken newsgroup services with peer-to-peer file sharing networks, and it remains to be seen whether a court will make a distinction and allow newsgroup services to avail itself of the safe-harbor provisions of the DMCA.

x. *Capitol Records, Inc., et al. v. Hi5, et al.* 08 CV 5831 (S.D.N.Y. *complaint filed* June 27, 2008)

In June 2008, Capitol Records, Virgin Records, and other plaintiffs, all affiliated companies of EMI Music Group, initiated a lawsuit against the Hi5 social networking site, VideoEgg (which had provided video functionality in the past for the website), and 10 John Does to be named later

alleging infringement of copyright of music videos that appear on the website. The alleged infringement involves use of an application from VideoEgg made available Hi5 users. That application allows them to upload their own video creations, including music clips playing in the background. VideoEgg, although no longer affiliated with Hi5, was included in the lawsuit because it allegedly allowed the videos to be uploaded over its servers. Plaintiffs allege that VideoEgg directly profits from the infringing clips by attaching video advertisements to them. VideoEgg's CEO, Matt Sanchez, says that the company complies with all DMCA takedown demands, but did not receive one from EMI. EMI is looking for damages of $150,000 per infringed work.

xi. *EMI Entertainment World v. Premium Wireless Services*, 07 CV 232 (S.D.N.Y. *complaint filed* January 12, 2007)

In January 2007, EMI's publishing division filed a $100 million lawsuit against InfoSpace, a mobile entertainment provider, and its subsidiaries. EMI alleged that InfoSpace breached two ringtone license agreements by underpaying royalties, fraudulently reporting royalties, and infringing EMI's copyrights by using unlicensed works. InfoSpace indicated that it had lost large customer, Cingular, when the company decided to deal directly with music recording companies for its ringtone services. In July 2008, the suit settled under undisclosed terms, although InfoSpace indicated the settlement would not "adversely affect the Company's business."

2. The Consumers

i. *Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003)

At first, the RIAA focused on litigation targeting file-swapping services with centralized servers that could be shut down. In peer-to-peer systems, however, there are no centralized servers that the RIAA can pursue. Because of this, some record companies sought out individual infringers using a controversial subpoena provision of the Digital Millennium Copyright Act ("DMCA") §512(h). This procedure, they argued, allowed copyright holders to compel Internet Service Providers ("ISPs") to surrender the names of alleged infringers.

In 2003, the RIAA argued its motion to compel a subpoena served on Verizon in 2002 before the D.C. District Court in an effort to obtain the names of Verizon subscribers who were allegedly engaging in unauthorized file-swapping. Agreeing with the RIAA, the D.C. District Court ordered Verizon to hand over the names of its subscribers. The D.C. Circuit Court of Appeals affirmed the district court's decision to authorize the subpoena.

Verizon again came before the Circuit Court to quash a second District Court subpoena. This time the D.C. Circuit Court of Appeals overruled the District Court and found that both subpoenas were improper. The court found that under the DMCA a subpoena could only be issued to an ISP that actually stored infringing material on its servers. As Verizon merely acted as a conduit to infringing material, the district court had improperly authorized the subpoena. The Circuit Court, therefore, granted Verizon's order to quash the second subpoena and vacated the order enforcing the first.

In October 2004, the Supreme Court denied the RIAA's petition for certiorari, thus leaving D.C. Circuit Court's decision to govern the use of this DMCA provision within the circuit.

ii. *In re: Charter Communications, Inc.*, 393 F.3d 771 (8th Cir. 2005)

Notwithstanding the *Verizon* decision, the RIAA attempted to subpoena another ISP, Charter Communications, in order to gain access to the names, addresses and phone numbers of subscribers the RIAA alleged had engaged in unauthorized file swapping through Charter's service. Charter's motion to quash the subpoena and its subsequent appeals were denied by the U.S. District Court for the Eastern District of Missouri, and the ISP ultimately turned over its records before filing an appeal to the 8th Circuit.

Adopting the reasoning of the D.C. Circuit's *Grokster* decision, the Court found that the DMCA's § 512(h) is "structurally linked to the storage functions of an ISP and not to its transmission functions." The Court held that, like Verizon, Charter acted as a mere conduit for the transfer of allegedly copyrighted files through its network and hence the subpoena provision of DMCA did not permit the RIAA to obtain personal information about Charter's subscribers. The circuit court vacated the subpoenas, remanded the case to the district court directing it to order the RIAA to return all subscriber data obtained by the subpoenas and to maintain no record and make no further use of that information.

iii. *BMG Music, et al. v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005)

In January 2005, BMG Music; Sony Entertainment Inc.; UMG Recordings, Inc.; Fonovisa, Inc.; and Atlantic Recording Corp. brought suit against Cecilia Gonzalez claiming that Gonzalez had infringed their copyrights in sound recordings by downloading 30 songs onto her home computer.

A federal court granted summary judgment for the plaintiffs and rejected the defendant's claim that her copying constituted a fair use and that any damages awarded in the case should be nominal because the defendant qualified as an "innocent infringer." Rejecting the defendant's fair use defense, the court relied on *Napster* in finding that downloading music files to sample can not be considered a fair use and that, even if defendant's actions could not be shown to cause financial harm, the cumulative effect of direct infringers, like the defendant, harms the recording industry and raises a barrier to the industry's entry into the digital download market.

The Court also found the defense of innocent infringement under section 402(d) inapplicable in this case because notice of copyright was included on the published recordings. Although the notice appeared on the actual CDs and not on the digital downloads, the Court held that the CDs were in circulation and available and that the innocent infringer defense is not applicable where a defendant had reason to be aware of infringement. BMG was awarded $22,500 ($750/song) in damages and granted an injunction from further infringement against Gonzalez; both of these remedies were upheld on appeal in December 2005.

iv. *Interscope Records v. Duty*, 2006 WL 988086, 79 U.S.P.Q. 2d 1043 (D. Ariz. 2006)

Lindsey Duty allegedly used the Kazaa peer-to-peer network to download and distribute music without authorization. Duty filed a motion to dismiss arguing that Interscope failed to provide evidence of dissemination. In response to defendant's motion , the court found that the listing of songs in the defendants "Kazaa shared folder" was sufficient to support the record company's claim following the 9th Circuit's ruling in *Napster*.

v. RIAA, University Students and i2hub File Sharing

Students at the University of Massachusetts in Amherst are demanding that the now-defunct i2hub file-sharing service pay to settle copyright infringement claims brought against the students by the RIAA. The students claim that i2hub had placed advertisements on campus that mislead students into believing that the software was sanctioned by the university.

Wayne Chang, a University of Massachusetts student, created i2hub using DC++ software and the Abilene Network which allows data transfers at higher rates than normal internet connections. I2hub began on the Amherst campus and, over time, expanded to over 400 universities and colleges in the US and abroad. In November 2005, i2hub shut down, citing legal concerns. Chang claimed that i2hub's EULA warned students against trading and downloading copyrighted material over the network.

In early 2007, the RIAA started a new initiative targeting college students for illegal peer-to-peer file sharing. On behalf of the major record companies, the RIAA sends pre-litigation settlement letters to universities, which are then responsible for distributing the letters to respective students. These letters offer students the choice either to settle the matter by paying a settlement fee on a website or face a copyright infringement lawsuit. Although a legal market place has developed since the first lawsuits by the RIAA in 2003, the RIAA claims illegal downloading of copyrighted material still remains a significant problem with university students.

In June 2007, the U.S. District Court for the District of New Mexico denied a record company's attempt to compel the University of New Mexico to disclose the identity of students the company suspected of using the university's online systems to download and distribute the company's copyrighted works without permission. *Capitol Records Inc. v. Does 1-16*, No. 07-485 WJ/LFG (D.N.M. 2007). The court said that granting access to the students' information could violate their privacy rights, noting that "access to a subscriber's Internet information may include a wealth of information including name, address, social security numbers, credit card information, purchase histories, as well as road map of the subscribers' Internet activities, and perhaps disclosure of their private e-mail communications." In refusing the ex parte application, the Court acted to ensure that subscribers "actually receive notification and are given a reasonable opportunity to intervene in order to stop the disclosure of [such] sensitive information."

More recently, in April 2008, Judge Gertner of the District Court of Massachusetts initially refused the RIAA's request for Boston University students' names, pursuant to its suit against several BU students. Citing First Amendment considerations, the Judge issued a fifty-four page decision at least temporarily prohibiting BU from giving the RIAA students names, until she

could review the internet service agreement BU has with its students, so as to interpret what privacy rights are granted to the students. In July 2008, the president of Tufts University sent a letter to Judge Gertner requesting an opportunity to discuss its concerns with the subpoena served by the RIAA. Because of limitations of Tufts system, when attempting to provide the user names of the requested IP addresses, Tufts could only narrow the list to forty individuals. Tufts is concerned about turning over so many names with such uncertainty as to the actual user at the requested IP address.

vi. *Capitol Records Inc. v. Foster*, 2007 Copr.L.Dec. P. 29,345 (W.D. Okla. 2007)

In July 2007, the District Court for the Western District of Oklahoma upheld an award of attorneys' fees to one defendant against whom previous claims of infringement had been dropped. In 2004, several record labels filed suit for copyright infringement against Deborah Foster and her adult daughter alleging that both had illegally downloaded recordings. However, despite the labels dropping the infringement claims against her, Foster pursued a counterclaim against the labels, seeking a declaratory judgment of non-infringement. While the court ordered that Foster's counterclaims (which included a prima facie tort claim) be dismissed, it nonetheless declared her the "prevailing party" of the action. As such, the court upheld her request for attorneys' fees. Though the record labels contended that attorneys' fees and expenses should not be awarded because these fees could have been mitigated by Foster's assisting the labels' investigation of the infringement, Foster was awarded $68,685.23, which represented "reasonable" attorneys' fees and legal expenses.

vii. Peer-to-Peer "Bill of Rights & Responsibilities"

Another way consumers have been affected by peer-to-peer file sharing is that certain ISPs allegedly limit the bandwith allocated to peer-to-peer network users. In response to a petition filed with the FCC for allegedly limiting bandwith allocated to customers who were peer-to-peer network users, Comcast announced in April 2008 a collaboration with "P2P" content provider Pando Networks to create and institute an industry wide "Bill of Rights and Responsibilities" for peer-to-peer users and internet service providers. The purpose of this collaboration is to "clarify what choices and controls consumers should have when using 'P2P' applications as well as what processes and practices [internet service providers] should use to manage 'P2P' applications running on their networks." The companies hope to help "'P2P' companies, [internet service providers], and content owners find common ground to support consumers who want to use 'P2P' applications to deliver legal content." At the Distributed Computing Industry Association (DCIA)'s P2P Media Summit in May 2008, with more than one-hundred member companies representing peer-to-peer (P2P) and social networking software providers, content rights holders, ISPs, and service-and-support companies, the DCIA announced that it would now spearhead this "P2P Best Practices Initiative." Comcast responded to this development by stating that the DCIA is an "ideal forum for the entire industry to collaborate and develop some best practices."

3. Surveillance

In June 2003, the RIAA began large-scale surveillance of peer-to-peer networks, gathering evidence and preparing lawsuits against users who "share" a "substantial amount" of copyrighted

songs over the Internet. Thousands of lawsuits were eventually filed against alleged copyright infringers. RIAA President Cary Sherman, said "the law is clear… this activity is illegal, you are not anonymous when you do it, and engaging in it can have real consequences." The RIAA maintains that peer-to-peer piracy is negatively affecting artists and their livelihood.

In a lawsuit filed by BMG Music and other record labels against 203 peer-to-peer users in Philadelphia, a judge for the District Court for the Eastern District of Pennsylvania ruled that BMG had improperly joined 202 of the defendant file-swappers pursuant to Fed. R. Civ. Pro. 20-21. The court ordered the record labels to file separate complaints against each of the defendants. In a similar case in Atlanta, the court declined to rule on the joinder issue, but required that the ISP be allowed 25 days before compliance with the subpoena, so that the subscribers could have extra time to object to identification if they so desired—as had subscribers in the *Verizon* case filed in the District of Columbia.

i. *Tanya Andersen v. Atlantic Recording Company*, No. CV 07-934 BR (D. Or. 2007)

In 2005, Tanya Andersen was sued by Atlantic Recording Company and other record labels ("Atlantic") for allegedly downloading gangster rap over Kazaa. Andersen denied engaging in piracy, and in October 2005, she filed a countersuit accusing the record industry of racketeering, fraud, and deceptive business practices. Then in June 2007, Andersen and Atlantic agreed to dismiss the case against her with prejudice, making her the prevailing party and eligible for attorneys' fees.

In August 2007, Andersen filed court documents in an Oregon federal court to elevate the case to class action status. Andersen hopes to make a class out of those "who were sued or were threatened with suit by Defendants for file-sharing, downloading or other similar activities, who have not actually engaged in actual copyright infringement." In the complaint, Andersen alleges that Atlantic "has engaged in a coordinated enterprise to pursue a scheme of threatening and intimidating litigation in an attempt to maintain its music distribution monopoly." Some of Andersen's claims against Atlantic have been tried by other defendants, but this is apparently the first time that a judge has been asked to consolidate such lawsuits into a class action. This suit is still pending, awaiting class action certification.

ii. *Atlantic Recording Corporation, et al v. Andersen*, No. CV-05-933-AC (D. Or. 2008)

As noted above, in light of Atlantic's stipulation to dismiss its case against her with prejudice, the judge in the original case recommended that Andersen's motion seeking costs and attorney's fees be granted. Andersen then requested $298,995.00 in attorney's fees and $5,387.05 in court costs. In May 2008, the magistrate judge to whom this motion was assigned recommended that the District Court award Andersen $103,175 in attorney's fees and $4,659 in costs, and in June 2008, the District Court judge granted the Magistrate's suggested award. The District Court judge stated that attorney's fees to the prevailing party are "'the rule rather than the exception' under the Copyright Act, and 'should be awarded routinely.'"

iii. EFF Publishes RIAA File-Sharing Lawsuit White Paper

In August 2007, the Electronic Frontier Foundation (EFF) released a "white paper" chronicling the RIAA's four-year legal campaign against illegal file-sharing. The paper (titled "RIAA v. The People: Four Years Later") concludes that the RIAA has failed to diminish the volume of worldwide illegal file-sharing, despite having filed over 20,000 lawsuits against individuals suspected of committing copyright infringement on file-sharing networks. Instead of suing consumers, the EFF proposes that the music industry form one or more "collecting societies," wherein file swappers would be able to continue to share music in exchange for a "reasonable regular payment." This fee would then be divided among artists and copyright holders based on the relative popularity of their music.

The RIAA shows no signs of relaxing its campaign. In January 2008, the RIAA, in its twelfth wave of the campaign, sent over 400 pre-litigation letters to 18 universities. However, recent decisions in the "making available" cases (see below) may be forcing RIAA to more stringently prove the "sharing" aspect of file-sharing infringement cases.

iv. *Maverick Recording Company, et al. v. Harper*, 07-CV-026-XR (W.D. Tex. *complaint filed* January 9, 2007)

Plaintiffs, Maverick Recording, UMG Recordings, Arista Records, Warner Brothers, and Sony BMG, filed suit against 16-year old Whitney Harper for copyright infringement in connection with her use of Kazaa, seeking $750 per infringement. Harper admitted to copying, but she asserted an innocent infringer defense which could limit the damages to $200 per infringement. The RIAA filed a summary judgment motion arguing that the defense could not apply since copyright notices are part of CDs sold in stores. In August 2008, the court disagreed and denied the motion regarding damages unless the RIAA agreed to accept $200 per infringement. The court held that the RIAA did not present evidence to counter Harper's assertion that she innocently infringed the copyrights. The court allowed the RIAA to decide whether to accept the $200 per infringement in damages or to continue pursuing the case.

4. "Making Available"

Many of the RIAA members' file infringement claims relate to consumer use of "peer-to-peer" networks, such as Kazaa. However, district courts differ as to the liability of a user who merely makes copyrighted songs available to other users. A District of Minnesota jury found a defendant user who had made over twenty songs available on her Kazaa account liable for infringement and damages over $200,000.

Other district courts—in New York, Massachusetts, and Arizona—have found that the "making available" of songs is not infringement, unless the plaintiff also shows actual downloading of the song. A Massachusetts judge went so far as to attribute a certain amount of creativity to the act of downloading music. By associating downloading with "the self-expressive act of identification with a particular recording," the judge allocated some measure of First Amendment protection to certain aspects of music downloading.

These past three decisions occurred subsequent to the Minnesota case, which may indicate a trend toward placing the additional burden on a plaintiff to show more than a mere "making available" of copyrighted works by the consumer.

i. *Capitol Records, Inc.,. et al. (formerly Virgin Records America, Inc., et al.) v. Thomas*, No. 06 CV1497 MJD/RLE (D. Mn. 2007).

Jammie Thomas, a single mother, was sued by several major record labels for allegedly infringing the copyrights in twenty-four songs. The labels contended that Thomas illegally made available files on the Kazaa file-sharing network. Thomas denied that she shared the files, and the case went to trial after Thomas decided that she would not accept a RIAA settlement offer. The District Court judge instructed the jury that the record labels had to show only that Thomas made the copyrighted sound recordings available for electronic distribution and not whether the recordings were actually transmitted to other Kazaa users.

In October 2007, a jury found that Thomas was liable for copyright infringement and awarded $222,000 in damages to the record labels ($9,250 for each of the 24 songs). In an interview with the Wired.com "Threat Level" site, Michael Hegg, one of the jurors on the case, stated that the jury "wanted to send a message" that people should not illegally download copyrighted content and that the jury had considered larger financial penalties. Thomas stated that she would appeal the decision and has solicited donations for her legal defense on YouTube.

The verdict emboldened the recording industry to continue to sue individuals for alleged copyright infringement. Additionally, according to the *New York Times*, "the verdict is likely to reinforce the notion that computer users who do become targets of lawsuits—a small fraction of the population using file-swapping networks—are better off settling."

In light of three subsequent decisions, the "making available" claim is being challenged by Thomas in her appeal. In May 2008, the trial judge announced that he was contemplating granting a new trial on the grounds that the court committed a manifest error of law when it instructed the jury that making a copyrighted song available was a violation of the copyright owner's rights "regardless of whether actual distribution has been shown." The court cites National Car Rental System, Inc. v. Computer Associates Int'l, Inc., 991 F.2d. 426 (8th Cir. 2001), in which the Eighth Circuit held that, "infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords." The court also notes that one case which plaintiff originally relied on to support the questioned jury instruction has since been vacated. In June 2008, EFF and other industry groups filed amicus curiae briefs, which have been allowed by the judge, arguing that the original "making available" jury instruction constituted an incorrect statement of the law. The RIAA stands to lose a cornerstone to its charge against individual file-sharers.

ii. *Elektra Entertainment Group, Inc. v. Barker* 2008 WL 857527 (S.D.N.Y., 2008)

In contrast to the *Thomas* case, the District Court for the Southern District of New York held in a March 2008 decision that, while the exclusive right of "publication" conferred to copyright holders is equivalent to the right to distribute, merely "making available" copyrighted works

does not in itself constitute infringement. Denise Barker had, like Jammie Thomas, made several music recordings available to the public through a Kazaa profile. The Court held that Elektra will have to show that Barker not only "made an offer to distribute" but also that "the offer to distribute was for the purpose of further distribution, public performance or public display." The Court did give Elektra time to modify its complaint so as to "track the language of the Copyright Act that prohibits an 'illegal offer to distribute.'" Elektra filed an amended complaint in April 2008. Of particular concern to the RIAA is the effect this decision will have on the *Thomas* decision, which is the RIAA's greatest resource in its campaign against would-be copyright infringers. In July 2008, Barker filed her answer to the amended complaint and admitted to using Kazaa but argued innocent infringement.

She also alleged that the statutory damages were an unconstitutional construction because they would be several hundred times greater than the actual damages sustained. The RIAA valued each download at between $750 and $150,000 based on statutory damage guidance. Barker's attorney constructed a maximum fine of $3.50 per stolen song. These issues were never adjudicated, as the parties reached a settlement on August 15, 2008. Under the terms of the settlement, Barker agreed to pay $6050 to Elektra and refrain from further infringement.

iii. *London-Sire Records, Inc. v. Doe 1 et al.*, 542 F.Supp.2d 153 (D. Mass 2008)

On the same day as the *Elektra* decision, the U.S. District Court for Massachusetts granted two motions to quash subpoenas filed by plaintiff record companies seeking the identities of several defendants for copyright violations. In granting the motions, the Court rejected the record companies' "making available" argument, which alleged that the defendants had distributed the record companies' music and thereby violated their copyrights by uploading recordings on a peer-to-peer sharing network. The court stated that "[b]y the plain meaning of [the Copyright Act] all 'distributions…to the public' are publications. But not all publications are distributions to the public." Therefore, the court reasoned that just because these defendants took all the necessary steps to make the copyrighted recordings available to the public does not necessarily mean that "distribution"—one of the exclusive copyrights—had occurred. According to the court, however, for the purposes of filing a complaint, that a reasonable fact finder *could* infer that a distribution had occurred is sufficient. As such, the Court held that while the record labels have a valid complaint against the defendants, they cannot proceed with legal action until they identify the defendants.

iv. *Atlantic Recording Corporation, et al., v. Howell*, No. CV06-02076-PHX-NVW (D. Ariz. 2007)

In August 2007, a judge held that the "making available" of copyrighted content on a file-sharing network can constitute copyright infringement. Pursuant to 17 U.S.C. § 106(3), the distribution of copyrighted material need not involve a physical transfer. Thus according to the judge hearing the case, screenshots of the contents of Jeffrey Howell's Kazaa shared folder, taken by the P2P monitoring firm MediaSentry, provided enough evidence to establish infringement and grant the label's motion for summary judgment. "It is no defense that a Kazaa user did not directly oversee the unauthorized distribution of copyrighted material," the ruling stated.

Though the court originally granted Atlantic's motion for summary judgment, it vacated that order.

In April 2008, the court denied Atlantic's motion for summary judgment, holding that the "making available" of music files does not constitute distribution. The court held that it was necessary to prove that someone actually downloaded forty-two files which were included in Atlantic's claim of infringement. Although Atlantic's investigators did download twelve files, they did not download the other forty-two recordings that Atlantic included in the infringement claim. As such, only the twelve downloaded songs may be considered as part of the suit. Additionally, the court held "that the labels must prove at trial that Howell was responsible for sharing the files."

In August 2008, in response to a motion filed by Atlantic, a judge entered a default judgment against Howell because he had destroyed evidence of file sharing in bad faith. Howell had reformatted his hard drive, deleted Kazaa and files from his shared Kazaa folder, ran a file wiping program, and destroyed logs of his file wiping activities. The court granted statutory damages in the amount request by the recording companies, $750 per download for a total of $40,500, plus $350 in costs. The court also entered an injunction to prevent further infringement by Howell.

v. *Warner Bros. Records, Inc., et al. v. Cassin,* 06-CIV.3089 (SCR) (S.D.N.Y. *complaint filed* April 21, 2006)

After monitoring Joan Cassin's distribution of music to other users of Kazaa, plaintiffs Warner Brothers, Capitol Records, UMG Recordings, Sony BMG, Maverick Recording, and Arista Records brought suit against her for copyright infringement. Plaintiffs claimed that Ms. Cassin made 349 music files available to millions of other users on this P2P network. Interestingly, after two years of litigation, the RIAA voluntarily dropped its lawsuit in June 2008. Defendant's attorney suggested that the suit may have been dropped due to a potential challenge to the RIAA's "making available" infringement theory and the decisions in the *Howell* and *Thomas* cases. Reportedly, Defendant's attorney discovered papers that showed the RIAA had actually re-filed its case against Cassin in the case *Warner v. Does 1*-4. The second case was assigned to a different judge and creates speculation of forum shopping by the RIAA. Defense counsel has asked for clarification of the dismissal as "with prejudice" in the former case and for this matter to be returned to the former judge since it is a "related matter."

5. Digital Rights Management ("DRM")

i. Apple's view on DRM

In February 2007, Steve Jobs, CEO of Apple, took on the controversial subject of ceasing DRM systems to protect digital music downloaded from Apple's iTunes service. Apple was the first online retailer to secure music licenses conditioned on implementing DRM systems by the four major record labels. In his statement, Jobs highlighted three future alternatives to the current situations: 1) to maintain the status quo, 2) sharing its FairPlay DRM with corporations, or 3) abandoning DRM altogether. He believes that DRM-free licensing would open up the market and facilitate a larger growth of digital music sales by 15% to 20%. eMusic, the No. 2 online

music retailer, is currently the most successful retailer to sell unrestricted songs in the MP3 format.

In a major breakthrough for Apple, EMI Group decided to abandon DRM on its digital music downloads beginning in April 2007. Apple's iTunes store was the first to obtain the new downloads.

ii. Sony DRM Software

In October 2005, a security researcher discovered that Sony (now "SonyBMG") had included on its music CDs DRM software that would load on customers' computers when the CDs were played without their consent. The DRM restricted consumers in the number of times the audio files could be copied and the use on portable digital devices such as iPods. It also exposed the computer to security risks by allowing unauthorized access to consumers' computers and making it difficult to install.

In November 2005, Texas was the first state to bring action against Sony alleging violation of the state's Consumer Protection Against Computer Spyware Act and deceptive trade practices laws. Lawyers in California and New York filed class-action suits against Sony alleging that Sony's software violated statutes including Unfair Competition Law, laws governing deceptive trade practices, and the Consumer Protection against Computer Spyware Act, prohibiting software controlling a user's computer or misrepresenting a user's ability to uninstall the program.

Sony first settled with New York in January 2006. The settlement was to provide consumers with replacement CDs and two incentive packages: 1) a cash payment of $7.50 and a promotional code that allowed the consumer to download an additional album from the list of more than 200 titles or 2) an opportunity to download three additional albums. New York consumers had until December 2006 to file a claim.

In December 2006, both Texas and California entered into a settlement agreement with Sony. Under the agreement each state was to receive up to $750,000 in civil penalties and costs. The consumers in these states are to receive $175 if they filed their claim within 180 days of the agreement stating that their computers had been damaged while trying to uninstall the DRM.

The latest settlement by Sony was with the Federal Trade Commission ("FTC") in January 2007. The FTC charged Sony with violating federal law when it sold CDs with the hidden DRM without the consent and knowledge of the customers. The settlement requires Sony to: 1.) disclose the presence of DRM on the packaging of any CDs, 2.) obtain authorization via a click-through license prior to installing the DRM software, 3.) discontinue any use of the information previously gathered through the DRM, and 4.) provide an effective method of uninstalling the DRM. The settlement also provides relief for the effected consumers by allowing them to exchange any CD with the DRM purchased prior to December 31, 2006 and to reimburse them up to $150 for damages that were a direct result of consumers attempting to uninstall the DRM. Under the settlement agreement, Sony also has a responsibility to the retailers to provide a financial incentive to return problematic CDs and to clearly label any CDs in stock sold to retailers. The FTC retained the rights to monitor the compliance with the order.

Subsequently, Sony has settled lawsuits with a consortium of thirty-nine states and the District of Columbia for $4.25 million.

6. Enacted Legislation

i. Artists' Rights and Theft Prevention Act

In the first major change to criminal copyright law since the No Electronic Theft Act of 1997, Congress has enacted the "Artists' Rights and Theft Prevention Act of 2005" as part of the Family Entertainment and Copyright Act. This legislation adds two new criminal standards to current criminal penalties for copyright infringement. The Act criminalizes using a video recorder to record a film in the movie theater. The Act also criminalizes the willful distribution of pre-release software, movies, and music by making it available on computer networks accessible to the public. The Act provides additional provisions for copyright owners to register their pre-release works with the Copyright Office.

ii. California's File-Swapping Law

In September 2004, Gov. Schwarzenegger signed into law legislation that seeks to terminate file-swapping by requiring file-swappers who share files to ten users or more to attach their legitimate email addresses to each swapped file. Those who violate the law can be charged with a misdemeanor resulting in up to $2,500 in fines and possibly jail time. Minors, however, would only be charged up to $250 for their first two offenses.

A second, related piece of legislation was introduced to the California legislature in January 2005 by Senator Kevin Murray. SB-96 would subject those who sell, advertise, or distribute peer-to-peer software to a fine of $2,500 per charge or a year in jail for failure to incorporate filtering technology into the software to prevent the unauthorized swapping of copyrighted works via their software. Currently, the bill is listed as inactive and Murray resigned from the Senate due to term limits.

7. Pending and Withdrawn Legislation

i. Prioritizing Resources and Organization for Intellectual Property Act of 2007

In an attempt to curb the piracy of intellectual property, the House Judiciary Committee unanimously voted for the recently introduced "PRO IP" Bill, which is meant to "enhance remedies for violations of intellectual property laws, and for other purposes." The bill aims to increase both the level of protection associated with intellectual property and the financial penalties for infringement. If enacted, the bill would amend copyright law to: "(1) provide a safe harbor for copyright registrations that contain inaccurate information; (2) provide that copyright registration requirements apply to civil (not criminal) infringement actions; (3) require courts to issue protective orders to prevent disclosure of seized records relating to copyright infringement; (4) revise standards for civil damages in copyright infringement and counterfeiting cases; and (5) prohibit importing and exporting of infringing copies of copyrighted works." The bill would also increase the financial damages for infringement.

The bill also seeks to increase the number of government agents associated with policing intellectual property issues, both domestically and internationally. The increases include a new Intellectual Property Enforcement Division at the Department of Justice and the appointment of ten additional "attachés to work with foreign countries to combat counterfeiting and piracy of intellectual property." The bill has passed in the House and went to the Senate in May 2008. It has been referred to the Committee on the Judiciary and appears to have a good chance of becoming law as of this writing.

ii. The College Opportunity and Affordability Act of 2007

Introduced in November 2007, the College Opportunity and Affordability Act of 2008 is designed to amend the Higher Education Act of 1965 and address the rampant illegal downloading, distribution, and sharing of copyrighted files on college and university campuses. Under the amendment, colleges and universities would be required to "make publicly available" their rules, policies, and sanctions pursuant to the downloading, distribution and sharing of copyrighted materials. They would also be required to "develop…plan[s] for offering alternatives to illegal downloading or peer-to-peer distribution of intellectual property as well as…plan[s] to explore technology-based deterrents to prevent such illegal activity." The bill passed the House in February 2008 and is presently in committee in the Senate.

iii. Copyright Modernization Act of 2006

The Copyright Modernization Act of 2006 was sponsored by Rep. Lamar Smith, the chairperson of the House Subcommittee on Courts, the Internet, and Intellectual Property. It was withdrawn on September 27, 2006. The bill would have created a blanket mechanical license for all digital music with licensing rates and terms set by the Copyright Royalty Board. Additionally, it would have reduced the remedies available against infringing parties who performed a reasonably diligent good faith search for the copyright owner, but were unable to find the owner.

iv. Platform Equality and Remedies for Rights Holders in Music Act of 2007

In April 2006, Senators Feinstein and Graham introduced a bill that would establish "the fair market value" of licensing rights for digital music distribution in a variety of medias – including the Internet. The bill (S. 256) was revived in 2007 after the 2006 version did not become law. The "PERFORM Act" would equalize royalties for internet, cable television, and satellite services. At the same time, the Act would require such services to use readily available and feasible technology to prevent the making of unauthorized copies of music.

v. House Resolution to Urge China to Prevent Piracy

In July 2004, in an ongoing effort to encourage the Chinese government to more strictly enforce intellectual property rights, H.R. 576, a bill sponsored by Rep. Diane Watson which recommended that the Chinese government implement more effective customs and border measures to help curb exportation of pirated goods into the U.S. passed the House. The Resolution also encouraged the Chinese government to implement a legal framework for the protection of intellectual property rights and to allow foreign producers greater market access to reduce the number of counterfeit goods sold in China.

January 2007, at Apple's Macworld event, CEO Steve Jobs announced that Apple had over 350 TV shows and would shortly offer over 250 movies through their iTunes service. The company's website indicates that iTunes has sold over 5 billion songs as of June 2008. In 2008, iTunes launched Movie Rentals which will offer over 1,000 titles to rent.

iv. Emusic.com

Emusic is a subscription based, online music store. The service differs from other online music stores in that the mp3 files available for download are free from DRM software. As of June 2008, the service made 3.5 million tracks available for download.

v. Zune Marketplace/MSN Music Store

In 2004, Microsoft introduced MSN Music, an online music store intended to compete with Apple's iTunes Music Store. The MSN Music Store could be accessed through Windows Media Player or through an internet browser. The store utilizes Microsoft's Windows Media Player application and proprietary Windows Media Format files (protected .wma files). MSN Music has been replaced by the Zune Marketplace. In April 2008, MSN Entertainment sent out emails to customers advising them that they must assign all purchased songs to their authorized computers before August 31, 2008 because the company will no longer support retrieval of license keys, which previously would allow songs to play on any computer whether authorized or not. After that date, users' music will play only on up to five machines previously authorized by the system.

vi. Napster

In February 2005, the reborn Napster introduced its Napster To Go service. Under this unique model, the user pays a monthly fee to "rent" as much of Napster's entire music catalog as the user can download and fit onto a portable device. The songs are available in samples, permanent downloads, mp3 permanent downloads, and DRM permanent downloads with varying degrees of availability for downloading and transferring depending on the category. Starting in May 2008, all permanent downloads are sold in the mp3 DRM-free format. In January 2007, AOL announced that it would partner with Napster and migrate all of its customers on its Music Now service to Napster.

II. The Digital Revolution and Sampling

A. Sampling of Unoriginal Jazz Loop Not Actionable

In *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003), the Ninth Circuit rejected jazz musician James Newton's claim of copyright infringement brought against the rap/rock outfit the Beastie Boys. Newton claimed that the Beastie Boys sampled his six-second, three-note sequence without permission. The Beastie Boys, who had cleared the sound recording with ECM Records, but not the musical composition, which Newton owned, looped (repeated continuously) the sequence throughout their popular song "Pass the Mic."

The Ninth Circuit held that the sequence was not sufficiently original to be afforded copyright protection. The court found that even if the sequence were original, the Beastie Boys' use of the sequence was de minimis. In June 2005, the Supreme Court declined to consider the case and let the Ninth Circuit ruling stand without comment.

B. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005)

In September 2004, the Sixth Circuit Court of Appeals held that any unlicensed sampling of sound recordings constitutes direct copyright infringement. The case involved the song "100 Miles and Runnin'" from the soundtrack to the movie *I Got the Hook Up*. The song used a three-note, four second sample of a guitar riff from the song, "Get Off Your Ass and Jam." The court based its decision primarily on the text of Section 114(b) of the U.S. Code, which grants sound recording copyright holders the exclusive right to "rearrange" or "remix" the recording. Given that "sampling is never accidental" and that the defendants in this case admitted to sampling the song, the court saw no reason to conduct the usual "substantial similarity" test for direct copyright infringement. In an amended opinion in June 2005, the court further clarified its original opinion by reasoning that only a new recording consisting entirely of an independent fixation of other sounds will not constitute infringement, even where these sounds imitate those in the copyrighted recording. The court believed that the music industry, as well as the courts, are best served by such a bright-line rule.

III. The Digital Revolution and Video-Sharing Services

A. *Tur v. YouTube Inc.*, 06 CV 4436 (C.D. Cal. *complaint filed* Nov. 13, 2006)

In July 2006, Robert Tur, a journalist and owner of the Los Angeles News Service, filed suit against YouTube Inc. in the U.S. District Court for the Central District of California alleging that the video-sharing site encourages copyright infringement by hosting footage from users who do not have the necessary permissions from copyright holders to upload and download the footage. This was the first copyright lawsuit filed against YouTube. Tur alleged YouTube posted unauthorized copyrighted footage owned by him and was viewed more than 1000 times before it was removed. This case was dismissed.

B. *The Football Association Premier League Ltd., et al. v. YouTube, Inc.* 07 CV 03582 (S.D.N.Y. *complaint filed* May 4, 2007)

In May 2007, several groups joined in a proposed class action suit against YouTube, including former Plaintiff Robert Tur. According to press reports during the *Tur* case, YouTube considered including within its defenses the safe-harbor provision of the Digital Millennium Copyright Act ("DMCA"), which is designed to allow content owners to request the removal of infringing material and to limit the liability of complying internet service providers. Presumably, it may consider similar defenses in this class action suit.

C. *Viacom Int'l, Inc. v. YouTube, Inc.*, 07 CV 2103 (S.D.N.Y. complaint filed March 13, 2007)

In March 2007, Viacom Inc, owner of MTV and Comedy Central, sued YouTube, owned by Google, in US District Court of the Southern District of New York. Viacom seeks $1 billion in damages for international copyright infringement as well as an injunction prohibiting further infringement. According to the press, Google states among its defenses that it is within the protection of the "safe harbor" provision of the DMCA. This is the first major lawsuit by a media conglomerate against YouTube. While there was some speculation that Viacom's suit would precede other media suits against Google, no other media companies have filed since Viacom. On the contrary, NBC-Universal and Universal Music Group have tendered deals with Google to provide content on the YouTube site. In July 2008, the District Court denied Viacom and the Football Association's [see above referenced case] joint Motion to Compel YouTube or Google to produce: (1) the source code for the YouTube.com search function; (2) the source code for the YouTube.com Video ID program; (3) data fields for all videos posted to YouTube.com which defendants agreed to produce only for the works-in-suit; (4) the schema for Google's advertising database; (5) the private videos and any data related to those. The judge granted Viacom and the Football Association's Motion to Compel YouTube and Google to produce: (1) all removed videos; (2) all data from the logging database concerning each time a YouTube video has been viewed on YouTube.com or through embedding on a third-party website; and (3) the schema for the Google video content database.

D. *MoveOn.org Civic Action v. Viacom Int'l, Inc.,* 07 CV 01657(C.D. Cal. *complaint filed* March 21, 2007)

The Viacom lawsuit spawned a new suit against Viacom by the Electronic Frontier Foundation ("EFF"), representing MoveOn.org and Brave New Films, which alleged that Viacom had improperly directed YouTube to take down a parody based on the "The Colbert Report." The EFF claimed that the snippets of "The Colbert Report" used fall under the parody exception of the "fair use" doctrine, and therefore, Viacom's action was infringing the free-speech rights of the videomakers. Viacom claimed that it had no objections to the posting of the parody and stated that it did not target it in its 160,000 takedown notices sent to YouTube. This case was voluntarily dismissed in April 2007. The video snippet is again viewable on YouTube.

E. *Universal Music Group Recordings, Inc., v. Grouper Networks, Inc.,* (C.D. Cal. *complaint filed* Oct. 16, 2006); and *Universal Music Group Recordings, Inc., v. Bolt, Inc.*, (C.D. Cal. *complaint filed* Oct. 16, 2006)

In two separate lawsuits, Universal filed suit against Grouper Networks ("Grouper.com") and Bolt Inc. ("Bolt.com") for copyright infringement of its music videos. Each website provides to users music videos to which Universal owns the copyright. According to comScore, an online audience measurement firm, Bolt.com had 8.1 million unique visitors and Grouper had 1.8 million unique visitors, in comparison to YouTube which had 72.1 million unique visitors in the

month of August 2006. In October 2006, prior to YouTube's sale to Google, it entered into a content deal with Universal in which it agreed to use new technology to filter out unauthorized content..

In March 2007, Universal and Bolt.com entered into a settlement agreement in which Bolt.com was required to pay Universal a multi-million dollar sum for past infringement against a percentage of the value of the company. Bolt.com also agreed to implement filtering technologies within sixty days. After the settlement, Bolt.com suffered financially, and after a failed acquisition by GoFish in August 2007, Bolt.com entered into an assignment of benefit of creditors with Net Revolution, Inc. as is no longer in operation. In August 2006, Sony bought Grouper. After the purchase, Sony removed the offending videos relevant to the *Universal* suit and relaunched Grouper as Crackle.com.

IV. The Digital Revolution and Radio

A. Satellite Radio

1. *Atlantic Recording Corp. v. XM Satellite Radio Inc., 2007 U.S. Dist. LEXIS 4290,* 81 U.S.P.Q.2D (BNA) 1407 (S.D.N.Y. 2007)

In May 2006, several record labels filed suit against XM Satellite Radio ("XM") accusing it of copyright infringement of sound recordings. The lawsuit focuses on the ability of XM subscribers to record songs and programs on its "XM +MP3" player, a digital audio recording device, enabling subscribers to: listen to broadcasts, record songs from playlists, and replay them as mp3 files. Specifically, the labels assert that XM, by enabling subscribers to record mp3 files off of its transmissions, is acting similarly to legal online music retailers, and markets the player as an iPod-alternative.

In January 2007, a U.S. District judge denied XM's motion to dismiss for failure to state a claim. XM alleged that under the Audio Home Recording Act of 1992 ("AHRA") it was immune to the labels' lawsuit because its XM+MP3 player complied with the AHRA barring copyright infringement actions based on distribution of a digital audio recording device. The District Court sided with the labels, finding that they were not suing XM for its practices as an XM+MP3 player distributor but rather for distributing digital copies of the sound recordings without authorization to these players. The Court found that XM had entered into license agreements with the record labels only to transmit music, and the delivery of music onto the XM+MP3 was outside the scope of the license. Therefore, for the purpose of the motion, by acting as both a radio transmitter as well as a music distributor, XM was not protected by the AHRA.

This lawsuit generated other copyright infringement lawsuits against XM in March 2007 by music publishers, such as the National Music Publisher's Association ("NMPA") and EMI Music Publishing, who are making allegations similar to those of the record labels.

Meanwhile by early 2008, three of the major record labels party to the suit—Universal Music Group, Warner Music Group, and most recently Sony BMG—settled with XM and withdrew as

plaintiffs. In June 2008, XM also settled with EMI Music Group, the last major record label to withdraw from the complaint. Also in June 2008, XM settled the first of the publishers' lawsuits by reaching an agreement with EMI Music Publishing. Details of the settlements have not been available.

B. Terrestrial Radio

1. Anti-Payola Settlement

The Federal Communications Commission ("FCC") and the four major radio broadcasters (Clear Channel Communications, CBS Radio, Entercom Communications, and Citadel Broadcasting) are currently finalizing a $12.5 million Anti-Payola settlement agreement. Payola is an illegal bribe of incentives by record companies in exchange for the broadcast of songs on the radio. Under terms of the agreement, the broadcasters will provide to independent labels and their artists 8,400 half-hour segments of free airtime, which will not apply to the four major records labels. The broadcasters will also be required to create "rules of engagement," which will be negotiated with the independent labels to prevent further payola practices.

C. Internet Radio

1. RealNetworks' Rhapsody

Instead of buying songs and albums on the internet, consumers may also subscribe to a digital-jukebox service, such as RealNetworks' Rhapsody. Rhapsody allows a user to pay a monthly fee in exchange for on-demand access to Rhapsody's music library.

Streaming audio does not allow users to own or keep the songs to which they have access; however, the relatively affordable monthly price makes streaming audio an attractive alternative to many customers.

2. Pandora

Pandora is a unique Internet radio service created by the Music Genome Project as an outgrowth of the group's extensive technical analysis of songs' "musical attributes" and "focus traits." Pandora makes automated recommendations based on pieces with musical similarities to the user's own choices of songs and artists. The user then has the option to either approve or disapprove of the service's choice, which will be taken into consideration for future selections. The service allows the user to create an unlimited amount of "stations" that reflect the different musical styles the user enjoys. Users are offered the ability to buy songs or albums at Amazon.com or iTunes Store. Pandora has both a free subscription service supported by advertisements or a fee-based subscription without advertisements. Due to the Copyright Royalty Board's 2007 ruling that increased fees and required licensing guarantees, Pandora is now only available in the United States.

V. The Digital Revolution and Other Developments

A. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005)

In April 2005, the New York Court of Appeals held that in New York, common law copyright in sound recordings exists in perpetuity or until preempted by federal statute. Capitol Records owns the rights to a number of classical music recordings produced in the United Kingdom in the 1930s, which it re-mastered and distributed in the United States under an exclusive license. The original recordings entered the public domain in the United Kingdom in 1990. In 1999, Naxos re-mastered the recordings from the original shellac records and offered them for sale in the United States. Capitol Records' subsequent copyright infringement claim against Naxos reached the Second Circuit Court of Appeals.

The Second Circuit asked the New York Court of Appeals to certify whether Capitol Records could sustain its copyright infringement claim in New York where the sound recordings were created before 1972 and had entered the public domain in the United Kingdom. The New York Court of Appeals held that the expiration of the United Kingdom copyright did not terminate Capitol Records' New York common law copyright in the works and allowed the suit to continue.

B. *United States v. Am. Society of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. 2008)

In April 2007, the U.S. District Court for the Southern District of New York held that a musical work downloaded via the Internet involves the right of reproduction and not the performance right under Section 106 of the Copyright Act. AOL LLC, Yahoo! Inc., and RealNetworks, Inc., applied to ASCAP for a public performance license for their respective online music services. When the parties were unable to agree on an appropriate royalty, ASCAP applied to the court for a determination of a reasonable fee. In examining the definition of public performance, the court concluded that "in order for a song to be performed, it must be transmitted in a manner designed for contemporaneous perception," which the court concluded was not the case with respect to pure downloads. The court held that downloading is more accurately characterized as a method of reproducing a file, not publicly performing it: "the mere fact that …each segment …is capable of playback as soon as the transmission is completed, does not change the fact that the transmission is a data transmission rather than a musical broadcast."

On April 30, 2008 the court rejected both ASCAP's and the defendant's proposed formulas for determining royalties owed to ASCAP. The court determined its own formula which was similar to ASCAP's proposal, but with the royalty reduced from ASCAP's proposed 3% to a "more reasonable" 2.5% of each company's "music-use-adjusted revenues." This new rate is retro-active to 2002, and runs through December 31, 2009. According to the court, the music-use-adjusted revenue is to be computed by dividing each company's total hours of streaming music by the total number of hours users were logged into each site, as estimated by comScore, a

disinterested party. The parties may still provide further documentation to the extent that they disagree with the comScore estimates.

C. *UMG Recordings, Inc. v. Troy Augusto Case*, No. 2:07-cv-3106 SJO (AJWx) (C. D. Cal. 2007)

Universal Music Group Recordings, Inc. (UMG) sued Troy Augusto, an eBay "re-seller" of "promotional" CDs. The defendant, whose legal team includes the Electronic Frontier Foundation (EFF), claimed that his sales of the CDs were lawful under the "first sale" doctrine (as codified under 17 USC 109 of the Copyright Act), and filed a counterclaim against UMG under 17 U.S.C. §512(f) for having allegedly "knowingly materially misrepresented" that the CDs sold by the defendant were infringing.

While the first sale doctrine provides that the owner of a CD is entitled to resell it without the permission of the copyright holder, UMG claimed that CDs marked as "promotional use only" remain the property of Universal and thus can never be resold. Augusto denied any contractual obligation and maintains that he was the true owner of the copies at issue, having acquired them from previous owners other than UMG. In June 2008, a federal judge allowed Augusto's summary judgment motion and ruled that his actions are protected under the first sale doctrine as the promo CDs from UMG are gifts. UMG indicates that it plans to appeal the ruling.

D. Guns N' Roses Case

In August 2008, Kevin Cogill was arrested and charged under the Family Entertainment and Copyright Act of 2005 for posting on his blog nine unreleased songs from an upcoming Guns N' Roses album. He admitted to posting the songs online briefly, but removed them upon the band's request. Under the statute, for his first-time offense, Cogill could be imprisoned for not more than three years, fined up to $250,000, or both. The band could also file a civil suit against Cogill, but has not done so as of this writing.

E. *Lennon et al v. Premise Media Corp. L.P. et al*, No. 1:2008cv03812 (S.D.N.Y. 2008) and *EMI Records v. Premise Media Corp. L.P.*, No. 601209/08 (N.Y. 2008)

In April 2008, the widow and children of John Lennon, along with the publisher of the song "Imagine," filed a complaint in federal court against those involved with "Expelled: No Intelligence Allowed," a feature-length film that used a 15 second portion of "Imagine" without obtaining permission. The film is a commercially released documentary dealing with what it considers to be unfair treatment by the academic community toward proponents of Intelligent Design. The complaint requested damages for copyright infringement as well as a preliminary injunction to prevent the further distribution of the film. In June 2008, the District Court for the Southern District of New York found that the plaintiffs successfully alleged a prima facie cause of action for common law copyright infringement, but after considering the four fair use factors of Section 107, determined that the plaintiffs did not demonstrate a probability of success. First,

the court found the use of the song for the purpose of criticism to be transformative, regardless of whether the film as a whole was made for commercial purposes. Second, the court found that, as an artistic work, the nature of "Imagine" "falls close to 'the core of the copyright's protective purposes.'" Third, the court found "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" to be small, as only 8% of the song was used and the defendants did not make it "the heart of 'Expelled.'" Fourth, the court found that there is no cognizable harm to the plaintiffs based on the use of the song in the film. Because the court determined that the factors of Section 107 favor a finding of fair use, it also determined that a presumption of irreparable injury was unwarranted. Thus, the court denied the denied the plaintiffs' motion seeking a preliminary injunction. At the same time, the court also denied the defendants' motion to dismiss, and the case is currently pending.

The owner of the "Imagine" recording, EMI Records Ltd., and the exclusive United States licensee of the recording, Capitol Records, also filed suit in *state court* against Premise Media Corp. in April 2008. The Supreme Court of the State of New York also found that the plaintiffs alleged a prima facie case for common law copyright infringement, as they did demonstrate valid ownership and unauthorized reproduction of the copyrighted work. The court held that fair use is available as a defense in the context of sound recordings under state law and considered the four factors of Section 107 as applied to Premise's use of the "Imagine" recording. The state court reached the same conclusions with respect to each of the four factors as did the District Court for the Southern District of New York in *Lennon*, and thus found that the plaintiffs failed to demonstrate a likelihood of success. Because of this finding, the state court similarly found that a presumption of irreparable injury was unwarranted. The state court then denied the plaintiffs' motion for a preliminary injunction and denied the defendants' motion to dismiss. This case too is currently pending.

F. Digital Millennium Copyright Act

1. Misrepresentations

17 U.S.C. §512(f) (2007) allows service providers and alleged infringers under the act to sue individuals who "knowingly materially misrepresent" that content the service provider is presenting on the Internet is infringing. If the service provider prevails, a court may impose damages, costs and attorneys' fees.

In *Marvel Entm't Inc., v. NCSoft Corp.*, 74 U.S.P.Q. 2d 1303 (C.D. Cal. 2005), the court did not dismiss a §512(f) claim after Marvel sent a take down notice to the publisher of an online video game that allowed its users to create superhero characters, where some of the characters were created by Marvel attorneys. Marvel argued that NCSoft was not an ISP so §512(f) was not available to them, but the court stated that the passive and innocent nature of an ISP is not the basis of standing with regard to §512(f). The suit quickly settled.

In March 2006, an author of a *World of Warcraft* strategy book filed suit under §512(f) against Blizzard Entertainment Inc., the owners of *World of Warcraft*, who had repeatedly sent take down notices to eBay regarding the book, even though it did not include text from the game,

only included a few screen shots, and contained a disclaimer on the first page stating it was not "official." *Kopp v. Vivendi Universal Games*, No. 06-01767 (C.D. Cal. *complaint filed* March 23, 2006). Months after Kopp's complaint, Blizzard dropped its claims for copyright and trademark infringement.

In *Lenz v. Universal Music Publishing Inc.*, No. 07-3783 (N.D. Cal. 2008), a mother filed a complaint in the U.S. District Court for the Northern District of California, seeking injunctive relief and damages under §512(f) in response to Universal Music Publishing Inc.'s allegation that a home video she made of her child infringed the copyright in a sound recording that was audible on the video. The video, which was posted on YouTube, featured Lenz's infant son dancing to the Prince song "Let's Go Crazy." While Lenz acknowledges that Universal owns the copyright for "Let's Go Crazy," she maintains that the video does not infringe any copyrights owned or administered by Defendants because her use of the Prince song "is a self-evident non-infringing fair use under 17 U.S.C. § 107." The Court granted Universal's motion to dismiss Lenz's §512(f) misrepresentation claim, but with leave to amend. In its analysis, the Court stressed that the misrepresentation must be *knowingly* made by the copyright owner. In *Online Policy Group v. Diebold*, the Court had previously defined "knowingly" as meaning "that a party actually knew, should have known if it acted with reasonable care or diligence, or would have had no substantial doubt had it been acting in good faith, that it was making misrepresentations." However, unlike the facts in that case, the Court determined that Lenz had not asserted any facts that Universal made a knowing misrepresentation. Additionally, the court dismissed Lenz's motion for judicial declaration of non-infringement because Universal never actually filed an infringement claim against Lenz. In fact, the video in question was reposted on YouTube, and can still be viewed (*see* http://www.youtube.com/watch?v=N1KfJHFWlhQ). Lenz filed an amended complaint in April 2008, alleging that Universal acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine. Because the court found this allegation sufficient to state a §512(f) misrepresentation claim, Universal's motion to dismiss the amended complaint was denied on August 20, 2008.

2. Reasonable Implementation

17 U.S.C. §512(i) (2007) establishes that a service provider has to have "reasonably implemented" a system that terminates the account of subscribers and account holders of the service provider's system in appropriate circumstances and upon informing the subscribers and account holders.

In the recent case *Perfect 10, Inc. v. CCBILL LLC,* 2007 U.S. App. LEXIS 7238 (9th Cir. 2007), the court set a low standard for online service providers to comply in reasonably implementing a system under §512(i). The court held that a service provider complied with §512(i), if it terminates "repeat infringers" when "appropriate," but does not have to affirmatively police its users for evidence of repeat infringement. In addition, the court held that to comply with the reasonableness standard, a service provider only need to implement a notification system as well as not hinder content owners from collecting information necessary to provide such notifications.

3. Boucher Bill

In February 2007, Virginia congressman Rick Boucher proposed a bill titled, the "Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007," (the FAIR USE Act) in an effort to restore the "carefully calibrated balance between the rights of copyright owners and the rights of the users of copyrighted material." The bill, originally introduced in 2003 and again in 2005 as the 'Digital Media Consumers Rights Act of 2005,' is in response to the Digital Millennium Copyright Act. Boucher believes the DMCA has "dramatically tilted the copyright balance toward complete copyright protection at the expense of the public's right to fair use," and has been calling for significant changes to the DMCA since 2002.

His new bill would instruct courts to refrain from imposing statutory damages on a defendant found guilty of aiding others in copyright infringement unless the copyright owner can show that "no reasonable person could have believed" the conduct constituting the infringement was lawful under the circumstances. It would also codify the "Sony-Betamax standard" by exempting hardware manufacturers from copyright infringement for the design, manufacture, or distribution of a device capable of "substantial, commercially significant non-infringing use." Finally the bill would make permanent the latest round of DMCA exemptions from the Copyright Office (November 2006), as well as add new exemptions for consumers wishing to circumvent copyright protection schemes for the purpose of engaging in certain enumerated activities (e.g., making a compilation of audiovisual works for classroom use, skipping commercials, transmitting files over a home network, accessing works in the public domain, and accessing works "of substantial public interest solely for purposes of criticism, comment, news, reporting, scholarship, or research").

G. Communications Decency Act

In May 2008, the U.S. District Court for the District of New Hampshire declined to reconsider a lower court's order in *Doe v. Friendfinder Network Inc.*, D.N.H., No. 07-cv-286 in which the court ruled that Defendant, an adult online networking service, was immune from liability under the Communications Decency Act for allegedly defamatory third-party postings located on its service. Section 230 of the Communications Decency Act provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The District Court notes that, "this language leaves no room for liability on the theory that a service provider 're-posted' – by actions of either man or machine – actionable information, so long as that information was provided by somebody else."

Additionally, the court declined to reconsider the lower court's ruling that the Communications Decency Act did *not* preclude Plaintiff's common-law right of publicity claim. As of May 2008, this claim remains pending.

VI.

A. International Developments

1. European Union

In January 2007, the IFPI warned ISPs that it may sue them in order to properly protect the rights of its members. The chairperson and CEO of the group stated that they should not have to wage the war against piracy alone, but need the cooperation of ISPs. The IFPI reported that record labels sold $2.9 billion USD worth of music online or through mobile phones in 2007. The report also indicated that billions of illegal files were swapped in 2007, at a 20 to 1 ratio of unlicensed tracks downloaded to legal tracks sold.

In April 2007, the European Commission charged Apple iTunes with violating European antitrust law. The Commission alleges that Apple is restricting music sales in Europe by limiting consumers to purchase music from iTunes in their country of residence rather than a single European market. These allegations arose out of a British consumer group filing a complaint with the Commission highlighting the price discrepancies of a digital download in different European countries. Digital downloads vary from $1.32 to $1.56 depending on the country. Apple stated that it had initially wanted to open an European store, but the music industry imposed the current business model. In January 2008, the EC settled with Apple by agreeing to drop its antitrust suit in exchange for Apple's lowering of prices in the U.K. in order to equalize "pricing across its European iTunes stores within six months," according to *Fortune Magazine*. In July 2008, Apple announced that it would not be lowering U.K. prices, as a change in exchange rates had resulted in the 79p charged in the U.K. being of relatively equal value to the .99 euros charged throughout the rest of Europe. The EC has not responded as of this writing, but there has been some criticism that there will once again be price discrepancies when exchange rates inevitably change in the future.

In December 2007, the EU put into place the Lisbon Treaty. It was scheduled to take effect in 2009, subject to ratification by all 27 member states. The treaty would eliminate many of the member countries' individual veto powers giving the EU dominion over certain intellectual property rights in the hopes of a more unified and efficient system. In June 2008, Ireland voters rejected the treaty. Although, the fate of the treaty is in question, the European Commission stated it would continue with the ratification process and address the Ireland situation later in the year.

In July 2008, the EU Parliament approved the "Telecom Reform Package" and proposed amendments. The package includes a wide range of reforms to numerous telecommunications industries. Opponents, including the Foundation for a Free Internet Infrastructure (FFII), are concerned that the language of some of the proposed amendments could lead to grave effects on consumers, such as: peer-to-peer and other software applications being deemed "unlawful" under a software licensing authority; the codification of the use of warning letters sent to copyright infringers by ISPs transforming into a "three strikes" policy; and allowance by network providers to "ensure network security" which would allow them to block DRM-circumvention software.

Supporters of the reform argue that the opponents' warnings are unwarranted and that any language open to interpretation will be "adequately modified." The complete package will be voted on in late September 2008.

Additionally, in July 2008, the European Commission proposed a change in copyright to expand the term of protection for recordings from 50 to 95 years. Included in the proposal is a reversion of the copyright to the original performers after 50 years if the recording label does not actively market the content. Moreover, if the work is not being exploited in the market by the performer, record company, etc., it enters the public domain. Composers and authors receive copyright protection of life plus 70 years. The proposal will go to the European Parliament for debate.

i. Denmark

In February 2008, one of the smaller broadband providers in Denmark (4% of traffic)—Tele2—was ordered to block the Pirate Bay website (see "Sweden" below). Tele2 has stated it will comply with the order. A Danish enforcement court also ordered DMT2 to close the connection to Pirate Bay and its users, and the ISP complied. Pirate Bay responded to the orders by opening a new URL, jesperbay.org, named after the head of the Danish IFPI.

ii. Germany

In January 2005, Germany's Higher Regional Court of Frankfurt ruled that an ISP was not required to reveal the personal information of a customer who operated a music file server through the provider's network. The court ruled that a provider only supplies "technical access" to the Internet and need not police its network for infringing data. While a provider is obligated to block access when it learns of infringing content on its network, the court held that because the provider itself has not violated copyright law, it is not required to reveal the personal information of the customer. Separately in September 2007, the Higher Regional Court of Cologne upheld but modified an injunction sought by GEMA, Germany's performance rights organization, against the RapidShare webhosting sites. The court ruled that while the original injunction was too broad, operators of the sites still have the duty not only to check and remove unlawful recordings from their services, but also to check external third-party links on their sites that could lead RapidShare users to pirated content.

iii. Netherlands

In December 2003, the Supreme Court of the Netherlands upheld an appellate court's holding that the file-swapping software company, Kazaa BV, was not liable for the copyright infringement of its users. The appellate court's decision was the first anywhere to protect a file-swapping company against copyright liability.

iv. Spain

Most recently, Spanish telecom company Telefonica SA refused to give Promusicae (described as "a Spanish trade group for film and music producers") the names and information of customers who had used Kazaa to "distribute copyrighted materials owned by [Promusicae's] members." The company's refusal was upheld in January 2008 by an EU court. The decision offers a precedent to EU member countries. The EU approach has not been entirely consistent

on a national basis: a Belgian court required internet companies to include blocking software to prohibit file sharing, but a German court ruled against record labels which had requested that internet providers be required to give labels user information. The decision does leave open music owners' rights to seek redress in civil action. In its opinion, the court also acknowledged the need for all EU countries to balance the right to privacy with the need to enforce intellectual property rights.

In June 2008, the government announced a mandated anti-piracy tax on media devices, such as iPods, to begin July 1. The surcharge will likely amount to mere cents on a purchase which manufacturers may either pass on to consumers or absorb themselves. The tax will be doled out to collecting societies.

v. Sweden

The Pirate Bay, a Swedish "file sharing hub" established in 2003 by the Swedish anti-copyright organization "The Piracy Bureau" and within which an estimated 157,000 motion pictures have been illegally downloaded, is still operating despite been shut down in 2006. Swedish prosecutors are preparing a case against the company. In January 2008, Swedish prosecutors filed charges against four of the individuals behind the site. Because the servers which house the content are hosted in various countries, The Pirate Bay may pose a challenge for copyright owners for some time to come.

vi. United Kingdom

The United Kingdom Internet Service Providers' Association believes that ISPs should not be responsible for monitoring all the information passing through their networks and should bear no liability for infringing content that is not on their servers.

In October 2007, the music file-sharing website, OiNK, was shut down. After a two-year investigation by Interpol, International Federation of the Phonographic Industry (IFPI), British Phonographic Industry (BPI), and British police, officers arrested 24-year-old Alan Ellis, the administrator of OiNK.cd for suspicion of conspiracy to defraud and infringement of copyright law. Officers raided the man's home, as well as his employer's offices and his father's house. OiNK's Amsterdam-based servers were also seized in the raids.

OiNK used BitTorrent, a peer-to-peer file sharing (P2P) communications protocol, which allowed users to create a music index from which members could enjoy free music. Approximately 180,000 members joined the site on an invite-only basis. Upon joining, members could download five gigabytes of music - approximately 1,000 songs. Members did not pay a fee, but were given the option to contribute donations to the site's maintenance. These monetary donations are the source for investigators' claims that this was a criminal network. IFPI described the site as the "world's biggest source of pirated pre-release albums." In 2007, it is estimated that the UK-run site leaked 60 major pre-release albums.

In May 2008, six other former members were arrested and questioned. All of them were investigated for leaking one or more pre-released music albums. Police have been granted a third extension until July 1, 2008, to bring charges against Ellis. The arrests themselves, though,

represent an unusual criminal slant to the attack on file-sharing rather than the usual civil action brought against both providers and users of these services.

In June 2008, British ISPs and music rights holders began negotiations to resolve massive piracy issues after pressure from legislators that they would step in if the groups could not reach their own solutions. One option under consideration is a licensed file-sharing framework through broadband subscription services. In July 2008, British ISPs signed the Memorandum of Understanding (MoU) and agreed to send letters to subscribers responsible for illegal downloading. The ISPs have clarified that undertaking termination of subscriber accounts is not part of this agreement.

vii. France

In August 2006, French President Jacques Chirac signed into law copyright legislation that may have a considerable impact on software and entertainment companies selling digital music players or online music services in France.

The legislative process started in March 2006 when French lawmakers passed a draft of a bill (referred to by the French abbreviation DADVSI) through the lower house of the legislature, the Assemblé National, that required sellers of digital music players and online music services in France to open up their DRM and become entirely interoperable (e.g., usable or playable on any device or software program). Although the bill had reportedly been intended to harmonize French copyright law with the European Copyright Directive, this proposed legislation went far beyond these norms in mandating interoperability among digital media, thus breaking the hold any one technology might have over a cultural or artistic work. This makes the purchase of digital music or videos more similar to the purchase capability of CDs or DVDs, which are playable on any appropriate device/machine. The pending legislation, commonly referred to as the "iPod Law," greatly concerned the digital music industry leader Apple.

Although the bill was initially approved by the French Senate and National Assembly, the pending "iPod law" was brought before the Conseil Constitutionnel for review. In July 2006, after reviewing the proposed "iPod Law," the Council declared a major section of the legislation unconstitutional in violation of the constitutional protections of property. The Council relied primarily on the 1789 Declaration of Human Rights in support of its decision.

The bill had previously allowed individuals to circumvent DRM protections to enable interoperability; however, changes to the legislation now make such conduct illegal and punishable by a fine. Additionally, provisions protecting open source development of related applications have been virtually eliminated.

The Council further determined that Apple and its competitors in the digital media market could not be forced to share their copy-protection technology without being paid for it. Thus, while the Council addressed the need for compensation, the Council opted to have the principle of forced interoperability remain in place. As a result, the law will now introduce a DRM licensing authority for companies using rights protection which may order companies to provide information to competitors to enable interoperability. Effectively, this restriction may eliminate IP proprietors' rights to negotiate the terms of an IP licensing agreement. Additionally, it has

been implied from the language of the amended legislation that any party seeking to petition the DRM licensing authority must qualify as a "competitor" e.g., have the capability to compete with the company from whom it seeks license.

The Council also raised the penalties provision for file sharing at the consumer level which, as initially drafted, was the equivalent of a parking ticket, and maintained stricter fines of up to € 300,000 (about $382,500 USD) and three years in prison.

A critical component of forced interoperability (i.e., the compulsory licensing mechanism) remains in place in the law that was formally put into effect. In April 2007, France implemented the independent regulatory body responsible for enforcing the law, Autorité de Régulation des Mesures Techniques (ARMT). It is apparent that the law will have far-reaching consequences for the software and entertainment industries in the long term. Currently, other European nations, such as Norway, Denmark, and Sweden are pursuing similar legislation and have begun to initiate proposals or regulatory moves.

In June 2008, an anti-piracy law based on the Sarkozy/Olivennes Agreement signed in the Fall 2007 by ISPs, music rights groups, and the government received the backing of the French cabinet. The bill goes before parliament this fall with potential implementation on January 1, 2009. Under the so-called "three strikes" law, French Internet users who download illegal content via peer-to-peer sharing would receive an email warning for the first offense, followed by a registered letter for the second, and suspension of Internet access for up to a year after the third offense. ISPs will be responsible for monitoring the activity and issuing the warnings. Enforcement will be overseen by the High Authority for Copyright Protection and Dissemination (HADOPI). In addition, the Olivennes Agreement included a commitment by the music industry, represented by IFPI, to phase out the use of non-interoperable DRM but only for sales of music tracks online.

2. Australia

In September 2005, an Australian court found the operators of Kazaa liable for copyright infringement. The suit was brought in late 2004 by the Australian record labels (EMI, Sony, BMG, Warner, and Festival Mushroom). The court ruled that Kazaa's distributors actively encouraged users to share copyrighted files. The judge found Sharman Networks' small print warning on the Kazaa website an ineffective way to deter its estimated one hundred million users from downloading copyrighted music. The judge also found evidence of focus group reports that showed the site's popularity was based on downloading free copyrighted music. The judge ruled that Sharman Networks not only failed to take steps to reduce copyright infringement, but actively encouraged users to increase their file-sharing. The judge described a Web page entitled "Join the Revolution" that criticizes record companies for opposing file-sharing. In his opinion, the judge explained that both individuals who make copyrighted files available and users who download the unauthorized material are liable for infringement.

The judge attributed liability for the copyright law violations to Sharman Networks, which has owned Kazaa since early 2002. The ruling also placed blame on the chief executive officer, Altnet (the company that distributes licensed music files on Kazaa), and Brilliant Digital Entertainment (Altnet's parent company). The court froze the equivalent of $30 million USD in

cash and real estate controlled by the company and gave Sharman Networks two months to develop an updated version of the software that contains keyword filtering to block the exchange of copyrighted material. The court also ordered the company to pay ninety percent of the record companies' attorneys' fees. As discussed above, Kazaa settled with the record labels in excess of $100 million USD.

The recording industry saw this case as another victory for copyright holders against peer-to-peer networks. The case is in line with *Grokster* in which the US Supreme Court ruled that a company can be sued for inducing users to download copyrighted material.

In December 2006, an Australian appellate court unanimously upheld a finding of an ISP's secondary liability for hosting a website that provided hyperlinks to infringing music. The court held that the ISP was "aware of the high level of usage . . . and of the copyright problems [implicated]."

In November 2006, the Australian Parliament debated amendments to its copyright laws. Five of the schedules became effective after Royal Assent was received in December 2006, with the remaining schedules effective January 1 and 8, 2007. Free speech advocates were particularly concerned with the criminal aspects of the new laws and the shift to favor copyright holders over consumers. Amendments to the copyright bill changed some of these issues to allow private citizens to use new technology without criminal liability.

3. China

In July 2005, seven record companies including SonyBMG, Warner Music, and Universal Music accused one of China's largest search engines, Baidu.com, of engaging in copyright infringement. Baidu stated that it searched all music file formats indiscriminate of copyright protection or format. Beijing's First Intermediate Court denied the relief the record companies sought: a suspension of the downloading service and compensation equivalent to $216,250 USD. Baidu is still operating as of June 2008 after the People's High Court of Beijing granted a reprieve which upheld a lower court's ruling that Baidu had not violated the copyright to songs. However, record-industry sources indicate that the decision may have little practical meaning because the copyright laws applicable to China have changed since the original suit was filed. The record companies have already filed a new lawsuit. When judged under the new laws, sources claim, Baidu could be held liable for copyright infringement as Yahoo China was. Yahoo was sued by the IFPI in 2006 for violation of copyright by engaging in a practice called "deep linking" – a process linking to file-sharing sites and, in many instances, directly linking to pirated songs hosted on servers throughout China.

4. Norway

In June 2006, Norway's consumer protection agency first filed a complaint against Apple, alleging it violates Norwegian consumer law by prohibiting consumers to play songs bought on iTunes with competitors' digital devices other than iPods. In January 2007, the Norwegian consumer ombudsman gave Apple until the end of September 2007 to change its business practices by making iTunes downloads interoperable with competitors' devices. A March 2008 report from the Norwegian ombudsman website, states that iTunes amended its contract terms

and at the same time the four largest record companies decided to sell digital music without DRM.

5. South Korea

In January 2005, a South Korean appeals court acquitted the owners of file-swapping site Soribada of copyright infringement charges brought by the Korean music industry. Like Grokster, Soribada had no centralized file server through which the owners could monitor their users' allegedly unauthorized file swapping. As a result, the court held that although Soribada's users may have infringed copyrights, the owners themselves did not for purposes of that lawsuit. However, that same day the Seoul High Court found in a separate ruling that the Soribada service itself was contributorily or vicariously liable for its users' copyright violations and ordered the site shut down. The site's owners were ordered to pay approximately $18,500 to the Korean Music Copyright Association.

6. Taiwan

In June 2007, Taiwan amended its Copyright Act making illegal "the unauthorized distribution of copyrighted works over peer-to-peer networks." Penalties for infringement include fines up to approximately $15,000, and/or imprisonment of up to twenty-four months. Additionally, once convicted, infringers may be immediately enjoined from further infringement.

7. Canada

In June 2008, Interior Minister Jim Prentice proposed new legislation (Bill C-61) in the Canadian parliament which would overhaul current copyright laws. Under the proposed law, ISPs would remain exempt from infringement due to their users' violations. In addition, ISPs would only be required to pass on notices of violations to their users rather than be required to take down the material as U.S. law requires. Users would be allowed to time-shift television and radio programs, but could not permanently store such recordings in a personal library. The bill would also limit individuals' liability for making illegal copies of music or movies to a maximum C$500, in addition to C$20,000 per infringement if digital locks were broken. Higher penalties would still also apply to posting copyrighted music on P2P technology or posting images to websites, such as YouTube. One online group, Fair Copyright for Canada, claims that the proposed legislation has fine print that would still hold individuals in violation if they "lock down" recordings.

VI. Conclusion

Digital transmission has deeply changed the landscape of the media industries, creating potential new outlets for record companies and movie studios but also new concerns about unauthorized copying and distribution. While digital transmission allows listeners anywhere in the world quick and easy access to high quality sound and video files, such wide availability creates a much greater danger of illegal copying and distribution. Copyright owners, users, and lawmakers have yet to come to a common understanding on the solutions that could strike the appropriate

balance between the interests of consumers and those of copyright owners. If anything, the number of interested parties in the copyright world has grown (creators, distributors, consumers, ISPs, pirates, etc.) to a level that makes achieving consensus on copyright difficult. Because copyright is a creature of national law and Internet distribution is inherently international, finding frameworks for legal worldwide distribution is ultimately one of the most complex tasks ahead. Consumers want music, video, and other content everywhere. The challenge for copyright owners is to find a business model that permits wide availability of content for consumers while protecting the interests of – and providing incentives for -- content creators and distributors. The music industry will survive, even thrive, in new forms. Essential to the endeavor is an equitable revenue model. If one thing is certain, musicians will always create music and we will always want to hear and enjoy music.

A PRIMER FOR ENTERTAINMENT CLIENTS REGARDING CONFLICT OF INTEREST WAIVERS BETWEEN CLIENTS AND ATTORNEYS

Given the small number of entertainment lawyers in a particular community, it is not unusual for the same entertainment lawyer to represent many entertainment clients in that community. This circumstance gives rise to the frequent occurrence where one attorney or law firm, has a relationship with two clients whose interests may conflict.

Conflict situations arise under a variety of other circumstances. Two or more clients may intentionally seek out the attorney to provide services in connection with the formation of an entertainment based partnership (such as a band partnership agreement), LLC, or Corporation that they intend to form. An artist and a producer that wish to work together may already be represented by the same attorney. A manager may refer an artist that they manage to their attorney for representation. These parties may be unaware of the potential conflicts that could arise between them as a result of these circumstances. Or they may be aware of the conflicts, but would rather share one attorney to either save costs and time.

Sometimes a client does not realize that their attorney already has a present or past relationship with the party with whom that client is seeking to conclude a business transaction. Or, clients may be aware that they share the same attorney on other matters, but may not be aware that a situation has arisen which will put their interests in conflict.

In all situations where there is an actual or potential conflict of interest, it is the duty of the attorney, not the client, to make the client aware of the conflict. If the client is unaware of the conflict, and the attorney proceeds with the representation without informing him, the attorney is potentially liable for any damages that may be sustained by the client due to his dual representation.

By law, an attorney is charged with having the highest duty of trust and undivided loyalty towards their client. An attorney is prohibited from representing clients with differing interests unless all clients agree to sign a written conflict of interest waiver (in California, called an “informed written consent”). A conflict waiver is a written agreement where the affected clients agree to the joint representation after disclosure by the attorney of the actual or potential conflicts that may exist between them. This waiver protect attorneys from malpractice claims in the future based on allegations that one or more of the clients sustained damage due to the attorney’s joint representation of them with conflicting positions or objectives.

Where the attorney does make the client aware of a conflict between two clients, at that point, the attorney must either decline the representation of one of the parties or obtain the written waiver or “informed written consent” from the clients involved in order to proceed.

It is also prohibited for an attorney who has obtained confidential information from a prior or current client, to accept a new client with adverse interests, where that information could be used to the detriment of the prior or existing client, unless the written permission of the prior client is first obtained.

Most entertainment attorneys would rather not have divided loyalties between clients. The possibility of adverse consequences arising between parties who were once closely aligned is ever present. As a result, entertainment attorneys who have represented clients with differing interests can be caught in a controversy which can cost everyone involved - an unpleasant experience even if the attorney is protected by a waiver.
For this reason, suggesting that all clients who have potentially differing interests seek independent counsel would be the best way to solve the problem. However, from a practical and economic point of view, that is often

undesirable. For example, a band has four members, and they desire to form a partnership. If each of them hires their own attorneys, the cost of representation may be several times what it would be if they consulted only one entertainment lawyer and waived the conflict of interest by signing an informed consent.

Assuming that the requisite number of experienced entertainment attorneys can be found to represent each party in a transaction, there is also an increased risk of delay. When several attorneys are involved in the same transaction representing different parties, they will likely have their own schedule, perspective and approach. This can add substantial amounts of time to conclude the transaction –far in excess of what may have been the case if only one attorney was involved.

As a result of these considerations, even where the conflict of interest is disclosed to the client, the client(s) may still wish to proceed with the representation by the attorney. Under these circumstances in California, they should be presented by the attorney with informed consent forms to sign. The State Bar of California promulgates Rules of Professional Conduct which cover conflicts of interest. Rule 3-310 provisions set forth the various situations which require attorneys to either decline to accept the client or to continue representation unless an informed written consent is obtained from the client.

CALIFORNIA STATE BAR RULES OF PROFESSIONAL CONDUCT
2008 CURRENT RULES
Rule 3-310. Avoiding the Representation of
Adverse Interests
(A) For purposes of this rule:
(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;
(3) "Written" means any writing as defined in Evidence Code section 250.
(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
(2) The member knows or reasonably should know that:
(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
(b) the previous relationship would substantially affect the member's representation; or
(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.
(C) A member shall not, without the informed written
consent of each client:
(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.
(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of

or against the clients without the informed written consent of each client.
(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the
representation of the client or former client, the member has obtained confidential information material to the employment.
(F) A member shall not accept compensation for representing a client from one other than the client unless:
(1) There is no interference with the member's independence of professional judgment or with the client lawyer relationship; and
(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
(3) The member obtains the client's informed written consent…

This section, or excerpts from it, is often quoted in the informed consent letter presented by the attorney to the client. Any questions that the client has about the language or how it applies to their situation should be raised with the attorney prior to signing.

In addition, the parties are usually advised of a provision from Section 962 of the California Evidence Code which is quoted below:

"Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest)"

This section advises the clients that by seeking simultaneous representation, they will be giving up their right to require the attorney to maintain their privilege of keeping all attorney-client communications undisclosed in the event of a future legal proceeding brought by one client against the other. Another consequence of the joint representation is that in all likelihood, in such litigation, the attorney would not be able to represent either client.

Where the parties decide to forego individual representation and agree to representation by a single attorney, they should remember that the decision is not absolute. Any of the parties can change their mind at any time. In all cases where the parties are concerned about the fairness of the terms, they should seek outside advice from an experienced professional in the entertainment industry. At some point during the process, clients may decide to retain their own separate counsel to conclude the entire transaction, or in a contract matter, to simply get an independent opinion from an outside attorney on a final draft before executing it.

Where financial terms are to be negotiated between jointly represented parties, it is advisable for the parties themselves to become knowledgeable regarding the range of possibilities. This should put them in a position to agree amongst themselves on financial deal points rather than putting the attorney in a position of making recommendations that might be perceived as favoring one party over another. If the parties have personal managers who represent them, perhaps they can negotiate those terms with each other and leave the attorney in the background.

Despite the drawbacks of joint representation, there can also be benefit in addition to cost and time savings which were alluded to above. When working with one attorney there is typically a lack of an adversarial posture during the process. This atmosphere is often conducive to retaining goodwill and a close working relationship between all the parties at the end of the process.

Michael Ashburne

[DATE]

_____
_____
_____
_____
_____

Re: _____

Dear_____:

You have asked me to prepare the above-referenced _____ agreement. As you may know, a colleague in the firm represents _____ in connection with certain business matters unrelated to your _____ agreement with him. This firm will not be representing in connection with your ____ _____ agreement with him. Since both you and____ are clients of this firm, however, and both of your interests may be adversely affected by the negotiation of the aforesaid agreement, I want to advise you of the following:

The firm has, as mentioned above, a professional relationship with _____, whose interests are directly in conflict with yours in this matter. The firm's relationship with_____ potentially affect your interests in the future in the following ways:

1. While we shall make every effort to protect your interests in the above- referenced matter, the possibility always exists in situations such as this that the attorneys handling the negotiations will not be as aggressive on your behalf as they would be if the firm did not also represent the other client, albeit in connection with an unrelated matter, because they may be concerned with preserving the firm's relationship with the other client.

2. We may have acquired confidential information from _____ which potentially could benefit you in our negotiation of the above-referenced agreement. Due to our obligation to maintain attorney-client confidentiality, however, we will be unable to disclose to you any such confidential information which we may have acquired from _____, in the same manner as we will not disclose to ____ _____ confidential information that we may have acquired from you.

3. The possibility exists that a dispute could arise, at some point in the future, between you and _____ in respect of his satisfactory completion of services under the agreement or the terms of payment thereunder or similar matters. In the event any such dispute(s) were to arise between you and _____, the firm may not be able to serve as counsel for you or _____ in connection therewith. This means that you may be required to obtain separate representation to settle any such dispute(s).

You should feel free to seek independent legal counsel in respect of this matter if you feel that this firm's ability to protect your interests in this matter have been lessened. If, however, you consent to the firm's continued representation of _____ in connection with matters unrelated to your agreement with him and my continued representation of you in this matter as described above, please indicate your consent by signing the statement below, where indicated, and returning the original letter to me in the enclosed self-addressed, stamped envelope.

Should you have any questions regarding this letter, please give me a call.

Best regards.

Very truly yours,

_____

I have read the above and understand the potential adverse consequences which could occur should the law firm of [LAW FIRM] represent _____ and, at the same time, represent me in the above-referenced matter and any matters which may arise thereunder or in connection therewith. Despite such potential adverse consequences, I hereby consent to the representation of me by [LAW FIRM] in the negotiation of the above-referenced agreement, and their continued representation of _____ in matters unrelated to his _____ agreement with me. I understand that I may, at any time, notwithstanding my consent herein, seek the counsel of another law firm.

_____
[CLIENT]

Dated:_____

[DATE]

_____
_____
_____
_____

Re:_____

_____
Dear _____:

As you know, a colleague in the firm represents _____ ("Artist"). Artist has asked my colleague to prepare the above-referenced "_____" agreement. Although we no longer represent you, since you are a former client of this firm, both your and Artist's interests may be adversely affected by the negotiation of the aforesaid agreement.

The firm has, as mentioned above, a professional relationship with Artist whose interests are directly in conflict with yours in this matter. The relationship could potentially affect your interests in the following ways:

1. We may have acquired confidential information from Artist which potentially could benefit you in the negotiation of the above-referenced agreement. Due to my obligation to maintain attorney-client confidentiality, however, we will be unable to disclose to you any such confidential information which we may have acquired from Artist.

2. This firm may, in the course of our representation of you, have obtained confidential information which could benefit Artist. Notwithstanding our knowledge of such information, we will continue to represent Artist in all matters requested by Artist, including any negotiations with you. Of course, due to our obligation to maintain attorney-client confidentiality, we will not disclose to Artist any confidential information obtained during the course of our representation of you.

3. The possibility exists that a dispute could arise, at some point in the future, between Artist and you in respect to Artist's satisfactory completion of services under the agreement or the terms of payment thereunder or similar matters. In the event any such dispute(s) were to arise between you and Artist, the firm may not be able to serve as counsel for you or Artist in connection therewith.

You should feel free to seek independent legal counsel in respect of this matter. However, by executing this letter, you acknowledge that we have disclosed to you that we represent, and will represent in the future, Artist. In addition, you hereby consent to our representation of Artist in the negotiation of the above-referenced agreement, and any matters which may arise thereunder, or in connection therewith.

We are, of course, sending a similar letter to Artist.

Should you have any questions regarding this letter, please give me a call.

Best regards.

Very truly yours,

_____
[Representative]
[LAWFIRM]

I have read and understood the potential adverse consequences which could arise should the law firm of [LAWFIRM] represent Artist in the above- referenced matter and any matters which may arise thereunder or in connection therewith. Despite such potential adverse effects, I hereby consent to [LAWFIRM]'s representation of Artist in the negotiation of the above-referenced "_____" agreement, and their continued representation of Artist in matters unrelated to the "_____" agreement. I understand that I may, at any time, notwithstanding my consent herein, seek the counsel of another law firm.

_____
[Producer]

Dated:_____

[DATE]

_____
_____
_____
_____

Re: _____

Dear _____:

You have asked me to prepare the above-referenced _____ agreement. As you may know, a colleague in the firm represents _____, and has been asked by _____ to represent him in connection with his agreement with you. Since both you and _____ are clients of this firm, and both of your interests may be adversely affected by the negotiation of the aforesaid agreement, I want to advise you of the following:

The firm has, as mentioned above, a professional relationship with _____, whose interests are directly in conflict with yours in this matter. The firm's relationship with _____ could potentially affect your interests in the future in the following ways:

(1) While we shall make every effort to protect your interests in the above- referenced matter, the possibility always exists in situations such as this that the attorneys handling the negotiations will not be as aggressive on behalf of their individual clients as they would be if the firm did not also represent the other client, because the attorneys may be concerned with preserving the firm's relationship with the other client.

(2) We may have acquired confidential information from _____ which potentially could benefit you in our negotiation of the above-referenced agreement. Due to our obligation to maintain attorney-client confidentiality, however, we will be unable to disclose to you any such confidential information which we may have acquired from _____, in the same manner as we will not disclose to _____ confidential information that we may have acquired from you.

(3) The possibility exists that a dispute could arise, at some point in the future, between you and _____ in respect of his satisfactory completion of services under the agreement or the terms of payment thereunder or similar matters. In the event any such dispute(s) were to arise between you and _____, the firm may not be able to serve as counsel for you or _____ in connection therewith. This means that you may be required to obtain separate representation to settle any such dispute(s).

You should feel free to seek independent legal counsel in respect of this matter if you feel that this firm's ability to protect your interests in this matter have been lessened. If, however, you consent to the firm's continued representation of _____ and my continued representation of you in this matter as described above, please indicate your consent by signing the statement below, where indicated, and returning the original letter to me in the enclosed self- addressed, stamped envelope.

Should you have any questions regarding this letter, please give me a call.

Best regards.

Very truly yours,

_____

I have read the above and understand the potential adverse consequences which could occur should the law firm of [LAW FIRM] represent _____ and, at the same time, represent me in the above-referenced matter and any matters which may arise thereunder or in connection therewith. Despite such potential adverse consequences, I hereby consent to representation of me by [LAW FIRM] and _____ in the negotiation of the above-referenced _____ agreement. I understand that I may, at any time, notwithstanding my consent herein, seek the counsel of another law firm.

_____
[CLIENT]

Dated:_____

PARTNERSHIP AGREEMENT

This agreement is made and entered into as of [DATE], by and among [PARTNERS], and such new partners as may be admitted pursuant to the provisions of this agreement (individually and collectively "Partners") to form a general partnership ("Partnership").

RECITALS

WHEREAS, the Partners hereto have heretofore been and are conducting business as a partnership under the name of [GROUP NAME] ("Group Name"), pursuant to an oral agreement entered into by the Partners on or about [DATE OF FORMATION OF GROUP], under which each of the Partners has been sharing in the profits and losses in the percentage described herein:

WHEREAS, the Partners desire to continue conducting their business as a musical group comprising the Partners ("Group") and to commit their agreement to writing; and

WHEREAS, The Partners desire to set forth herein their respective rights and obligations with regard to the Group, the Group Name and otherwise.

NOW, THEREFORE, in consideration of, and pursuant to, the foregoing recitals, which are a material part of, and incorporated in, this agreement, and the mutual covenants and promises contained in this agreement, the Partners hereby agree as follows:

1. AGREEMENT OF PARTNERSHIP.

The Partners hereby associate themselves together as a general partnership under the laws of the State of [STATE OF PARTNERSHIP] and upon the terms and conditions set forth in this agreement.

2. PARTNERSHIP NAME.

The name under which the Partnership will conduct its business is [GROUP NAME] ("Partnership Name"); the Partners may, however, agree to adopt other or additional fictitious business names. The Partners hereby acknowledge and agree that the Partnership Name may not be used by any Partner separate and apart from the use thereof in connection with the Partnership.

3. CHARACTER OF BUSINESS.

(a) The business of the Partnership ("Partnership Business"), is to promote and enhance the professional standing, reputation and success of the Group and to commercially exploit, and to license or authorize others to do so (including, without limitation, one (1) or more entities owned by the Partners), throughout the universe in all manners and media, now or hereafter known: (i) the Partner's respective entertainment services in their capacity as members of the Group, including, without limitation, in such capacity, personal appearances, concert appearances (unless the Partner's services in connection with such concert appearances are furnished through another firm or corporation), audio and/or visual recording and any and all other similar services and performances of the Partners in their capacity as members of the Group (individually and collectively "Services"); (ii) all right, title and interest in and to the Partners' respective names, photographs, likenesses, voices and other identifying features and characteristics, and biographical materials, in their capacity as members of the Group, including, without limitation, for merchandising, sponsorship and/or endorsement by, and/or otherwise in connection with, the Group and for use in connection with the exploitation of the results and proceeds of the Services (individually

and collectively "Name and Likeness"); and (iii) the Group Name. The agreements that the Partnership may enter into in furtherance of Partnership Business may be referred to collectively herein as the "Agreements."

(b) The Partnership shall own all rights in and to the Group Name, all trademarks, service marks and other material related thereto and all goodwill appurtenant thereto and/or represented thereby.

4. PRINCIPAL PLACE OF BUSINESS.

The principal place of business of the Partnership shall be c/o [ADDRESS] or c/o such other certified public accountant of the Partnership as the Partners may select (the "Accountant"), or at such other place to which the Partners agree.

5. TERM OF THE PARTNERSHIP.

The term ("Term") of the Partnership shall commence as of the date of this agreement and shall continue until the Partnership is terminated and dissolved pursuant to the provisions of this agreement.

6. FINANCES AND ACCOUNTING.

6.1 Capital Accounts

An individual capital account shall be maintained for each Partner. Income received directly by any Partner(s) from third parties with regard to Partnership Business shall be given promptly to the Accountant for handling as a Partnership asset pursuant to the provisions of this agreement.

6.2 Contributions to Capital

Each Partner shall be credited with an initial capital account balance of One Dollar ($1.00).

6.3 Withdrawal of Capital

No Partner shall withdraw any portion of the capital of the Partnership unless agreed to by the Partners.

6.4 Additional Capital

Whenever it is determined by the unanimous approval of the Partners that the capital of the Partnership is likely to become insufficient for the conduct of the Partnership business, the Partners shall make additional capital contributions in the proportions in which such Partners are then entitled to share in the profits of the Partnership. If any Partner fails to make any contribution to the Partnership's capital at the time and in the amount required by this agreement, any other Partner may, at its sole discretion, loan money to said defaulting Partner on such terms as may be agreed upon by the parties or, in the alternative may withdraw its own capital contribution and instead lend money to the Partnership pursuant to paragraph 6.5 below.

6.5 Loans to the Partnership

Any loans to the Partnership (whether from the Partners or from unrelated third parties) shall be payable by the Partnership on such terms as the parties shall mutually agree, may bear reasonable interest and shall constitute an obligation of the Partnership which shall be prior to the return of capital or any distribution provided herein

6.6 Instruments, Equipment, Etc.

All of the instruments, musical, sound and video equipment owned by each Partner and used in connection with the activities of the Partnership shall continue to belong to such Partner according to such Partner's present ownership therein, but during the term of the Partnership, during which such Partner shall remain a Partner, the Partnership shall be entitled to the full use thereof, free of expense, except for insurance and repairs. All other instruments, musical and/or video equipment hereafter acquired in connection with the Partnership activities shall be paid for from the Partnership monies and shall be deemed additional capital of the Partnership.

7. PARTNERSHIP BANK ACCOUNTS.

One or more Partnership bank accounts shall be opened and maintained by the Partnership in the name of the Partnership with such bank(s) as the Partners shall determine. The Partners shall determine the signatory(ies) on the account(s) at such bank(s).

8. ALLOCATION OF PROCEEDS; DISTRIBUTIONS; ACCOUNTINGS.

8.1 Allocation of Proceeds

Except as otherwise provided herein, or unless otherwise agreed to by the Partners, the net profits and losses of the Partnership (including, without limitation, gain or loss on the sale or other disposition of Partnership assets) shall be equally shared and borne, respectively, by the Partners. A Partner's percentage interest in such net profits and losses is hereinafter sometimes referred to as such Partner's "Percentage Interest." Notwithstanding anything to the contrary contained herein, solely with respect to net profits and losses derived from so-called "music publishing" (i.e. mechanical royalties, public performance royalties, synchronization licenses) the Partner's Percentage Interests shall be those set forth on Schedule "A" attached hereto and incorporated herein by reference.

8.2 Definition of Net Profits and Net Losses

The terms "net profits" and "net losses" as used in this agreement shall mean the profits and losses, respectively, resulting from the operation of Partnership Business. In computing net profits and net losses, Partnership Business expenses shall include, without limitation, personal management, talent agency and publicist commissions and fees, legal, accounting and business management commissions and fees, taxes, operating expenses, travel and any other expense incurred in the transaction of Partnership Business, insurance premiums and bank charges, and all other overhead expenses of the Partnership.

8.3 Distributions

Cash distributions shall be made to the Partners from the funds of the Partnership on dates and in amounts to be agreed to by the Partners upon consultation with the Accountant (after payment of all expenses of the Partnership), with reasonably sufficient reserves being retained by the Partnership to the extent practicable to conduct Partnership Business. Each such distribution (other than pursuant to the liquidation provisions in this agreement) shall be divided among the Partners in proportion to their respective Percentage Interests, and each Partner's share of such distribution shall be charged against such Partner's individual capital account.

8.4 Accountings

As soon as is reasonably practicable after the close of each calendar year or portion thereof during the Term

("Fiscal Year"), but not later then ninety (90) days thereafter, or on such other date(s) to which the Partners shall agree, the Partners shall instruct the Accountant to: (a) provide a full and accurate accounting ("Accounting") to each Partner of the affairs of the Partnership as of the close of such Fiscal Year, including, without limitation, a copy of the balance sheet of the Partnership as of the close of such Fiscal Year, a statement of income (or loss) of the Partnership for such Fiscal Year, a statement showing the amounts allocated to each Partner's capital account pursuant to this agreement for such Fiscal Year and a schedule of items, deductions, credits or losses allocated to each Partner pursuant to the then-current Internal Revenue Code, in accordance with the cash basis method of accounting; and (b) prepare and file federal and state tax returns for the Partnership and any entities owned thereby.

9. RIGHTS AND DUTIES OF PARTNERS.

9.1 Services to be Furnished, and Rights to be Granted, to the Partnership

(a) At all times hereunder, each Partner shall furnish to the Partnership exclusively, faithfully and to the best of such Partner's ability such Partner's Services and shall comply fully and faithfully with the provisions of this agreement and each of the Agreements.

(b) All Partners shall comply with all rules pertaining to the Partnership and the Group which will be established from time to time by the agreement of the Partners. These rules will govern the obligations and responsibilities which each Partner has to the Partnership and the Group including, without limitation, such matters as Group policies relating to all aspects of touring (including travel arrangements), attendance at rehearsals, recording sessions and live performances, rules pertaining to personal conduct, etc.

9.1 Time Devoted to Partnership

(a) During the Term, each Partner shall devote exclusively such Partner's services to Partnership Business to the best of such Partner's ability. Subject to the foregoing and to the Agreements, each Partner may engage in other businesses or activities, including, without limitation, acting, "side-artist" performances, producing and engineering (individually and collectively "Noncompetitive Activities") that, directly or indirectly, do not and will not: (i) compete with, or derogate from, Partnership Business; (ii) constitute an anticipatory or actual breach of any of the Agreements; or (iii) interfere with such Partner's or the Partnership's full and faithful compliance with the provisions of this agreement or the Agreements or impair or diminish such Partner's Services pursuant to this agreement or the Agreements.

(b) Any and all monies or things of value derived hereunder by each Partner as a result of, or in connection with, anything other than Noncompetitive Activities shall belong solely to the Partnership.

9.1 Salaries

Except as otherwise agreed by the Partners, no Partner shall be entitled to any salary or other compensation for Services rendered to, or on behalf of, the Partnership.

9.2 Reimbursement of Expenses

No Partner shall be reimbursed for payments made, or liabilities incurred, by such Partner in the conduct of Partnership Business, or for the preservation of Partnership Business or assets, unless agreed to by the Partners.

10. MANAGEMENT AND CONTROL.

10.1 Powers of Partners

(a) Except as otherwise provided in this agreement, each Partner may participate in the management, control and direction of the Partnership and any decision of the Partnership shall require the agreement of the Partners. As used in this agreement, the terms "as the Partners agree," "by agreement of the Partners" and any other reference to the Agreement of the Partners shall, except as otherwise provided in this agreement, mean a vote of a majority of all of the Partners. Each of the Partners shall have one (1) vote on any and all Partnership matters on which a vote is taken.

(b) For purposes of clarification, creative decisions as to artistic task and judgment shall be determined by the agreement of the Partners. Such decisions shall include, without limitation, the selection of songs to record and/or perform; the studio(s) in which to record; the producer to be engaged; when, where and with whom to make concert and other appearances, including, without limitation, the selection of "opening acts" and/or "headliners"; the selection of concert promoters, booking agents, concert equipment and/or service providers, security and/or limousine services, sponsors and merchandising licensees; and the selection of album artwork.

(c) Upon reasonable notice, the Partners may, from time to time elect to call a meeting of the Partners at any reasonable time at the Partnership's principal place of business. In such event, any and all expenses incurred by the Partners in attending such meeting shall be borne solely by each said Partner unless the Partners agree otherwise.

10.1 Limitation on Authority

Except as otherwise provided in this agreement, neither the Partnership nor any of the Partners shall do, or have the authority to do, or authorize any third party to do, any of the following, except by the agreement of all of the Partners:

(a) Borrow money on behalf of the Partnership, or refund, refinance, increase, modify, consolidate or extend the maturity of any indebtedness created by such borrowing;

(i) Lend to any Person any Partnership funds;

(ii) In the name, or on behalf, of the Partnership, endorse any note or act as an accommodation party, or otherwise cause the Partnership to become a surety for any person;

(iii) Sell, purchase, invest, transfer, mortgage or otherwise dispose of, or encumber any Partnership assets;

(iv) Confess a judgment against the Partnership, submit a claim or liability of the Partnership to arbitration or admit liability on behalf of the Partnership;

(v) Execute or deliver any assignment for the benefit of the creditors of the Partnership;

11. ADMISSION OF A PARTNER.

With respect to the admission ("Admission") into the Partnership of a new Partner, the other Partners shall agree in advance of the Admission on, among other things, the extent, if any, to which such new Partner shall share in Partnership assets and income therefrom, what such new Partner's Percentage Interest shall be (and what shall be the concomitant reduction in the respective Percentage Interest of the other Partners) and the extent, if any, to which such new Partner shall be responsible for liabilities of the Partnership and have voting power.

Such new Partner shall agree in writing to be bound by, and comply with, the provisions of this agreement as a condition to Admission. Notwithstanding anything to the contrary contained in this agreement, no new Partner shall be admitted to the partnership without the agreement of all of the Partners.

12. DEATH, VOLUNTARY WITHDRAWAL OR EXPULSION OF A PARTNER.

12.1 Death of a Partner

Upon the death of a Partner, the estate of the deceased Partner shall be deemed to have sold to the Partnership, and the Partnership shall be deemed to have purchased from the estate of the deceased Partner, at the Purchase Price, the deceased Partner's Percentage Interest.

12.2 Voluntary Withdrawal of a Partner

(a) Subject to paragraphs 12.2(b) and 12.2(c) of this agreement and the terms and conditions of the Agreements, any Partner may withdraw voluntarily from the Partnership upon the giving of notice thereof to the Partnership except that such withdrawal shall not be permitted pursuant to this agreement, unless otherwise agreed by the Partners, if it would constitute a breach or anticipatory breach of, or impair the Partnership's ability to comply with its obligations pursuant to any of the Agreements or provide the basis for termination of any of the Agreements by any third party(ies). The Partners agree that any Partner who voluntarily withdraws from the Partnership shall be liable for all consequential costs, refund and penalty obligations which the remaining Partners may have to third parties, and all costs and expenses which the remaining Partners suffer by reason of such Partner's withdrawal (including, without limitation, all monies paid to or in connection with replacement personnel and auditioning and rehearsing such replacements and travel and lodging therefor, etc.). Any Partner who voluntarily withdraws from the Partnership shall have no rights, remedies or claims as against, or interest in, the Partnership or the other Partners except as set forth expressly herein.

(b) If a Partner withdraws from the Partnership but (i) gives the Partnership at least one hundred fifty (150) days prior written notice of his desire to withdraw and (ii) during such one hundred fifty (150) day period, he continues to perform in good faith and to the best of his abilities all Services required of him; and (iii) in addition to the foregoing, he continues to perform (in good faith and to the best of his abilities) at all personal appearance performance engagements which are part of any scheduled live tour (or any extension thereof) until such tour (or extension) is completed, then such Partner shall be deemed to have sold to the Partnership and the Partnership shall be deemed to have purchased from such withdrawing Partner, at the Purchase Price, the withdrawing Partner's Percentage Interest.

(c) If a Partner withdraws from the Partnership but fails to give the Partnership at least one hundred fifty (150) days prior written notice of his desire to withdraw and/or fails to continue to perform in good faith and to the best of his abilities as provided in subparagraphs 12.2(b)(ii) and 12.2(b)(iii) above, then he will be deemed to have sold to the Partnership and the Partnership shall be deemed to have purchased from the withdrawing Partner, at fifty (50%) percent of the Purchase Price, the withdrawing Partner's Percentage Interest.

12.1 Expulsion of a Partner

(a) Any Partner may be expelled for any or no reason by the agreement of all of the other Partners. Unless a Partner is expelled for Actual Cause (as defined in paragraph 12.3(c) of this agreement), upon the giving of notice of such expulsion, the expelled Partner shall be deemed to have sold to the Partnership, and the Partnership shall be deemed to have purchased from the expelled Partner, at the Purchase Price, the withdrawing Partner's Percentage Interest. An expelled Partner shall have no rights, remedies or claims against, or interest in, the Partnership or the other Partners except as set forth expressly in this agreement.

(b) The determination as to whether a Partner shall be expelled from the Partnership by reason of disability, shall be made by the agreement of all of the other Partners, provided that a Partner may only be terminated by reason of disability if such Partner is unable to perform his Services at the same levels of quality, competency and frequency for a period of four (4) consecutive months, or for shorter periods which total five (5) months during any consecutive twelve (12) month period, except that if a physician determines that such Partner will be incapable of performing his aforesaid Services in the aforesaid manner for a period of at least four (4) consecutive months, then the Partnership shall have the right to terminate such Partner for disability without waiting for such four (4) month period to expire. To the extent that prior to a Partner being terminated by reason of disability, the Partnership incurs costs or expenses by reason of such disability (including, without limitation, costs relating to the hiring and training of a replacement performer), the Partner suffering from disability shall be liable for all such costs and expenses. The Partners shall also have the right to determine that in lieu of terminating the disabled Partner, the Partnership may permit such Partner to remain a Partner, but deduct from such Partner's share of any and all monies, all costs and expenses that the Partnership necessarily incurs by reason of such disability.

(c) (i) For purposes of this agreement, the term "Actual Cause" shall mean that in the judgment of all of the other Partners, a particular Partner has materially breached the provisions of this agreement, and has not cured such breach within a reasonable period of time even after having been given specific written notice thereof.

(ii) If a Partner is expelled for Actual Cause, then it is acknowledged and recognized by all Partners that such Partner being expelled shall be liable for all consequential costs, refund and penalty obligations which the remaining Partners may have to third parties, and all costs and expenses which the remainder of the Partners suffer by reason of such Partner being expelled for Actual Cause (including, without limitation, all monies paid to or in connection with replacement personnel and auditioning and rehearsing such replacement personnel and travel and lodging therefor, etc.). Any Partner expelled for Actual Cause shall be deemed to have sold to the Partnership and the Partnership shall be deemed to have purchased from the expelled Partner, at ten percent (10%) of the Purchase Price, the expelled Partner's Percentage Interest.

12.1 Use of Group Name by Expelled or Withdrawing Partner

A Former Partner (as hereinafter defined) shall not have the right to use the Group Name in any manner whatsoever or to identify himself as being formerly a member of the Group except as may be expressly agreed in writing by the remaining Partners.

12.2 Purchase Price of Partnership Interest

(a) An obligation solely of the Partnership payable solely from present and future Partnership assets, the purchase price ("Purchase Price") of the Percentage Interest of a deceased, voluntarily withdrawn or expelled Partner (collectively referred to as a "Former Partner"), shall comprise the following:

(i) The book value ("Book Value") of such Former Partner's Percentage Interest as of the date of such Former Partner's death, voluntary withdrawal or expulsion from the Partnership ("Separation Date"), as determined ("Determination") by the Accountant not later than one hundred twenty (120) days after the Separation Date, payable in twelve (12) approximately equal monthly installments commencing not later than ninety (90) days after the Determination; provided, however, that if the Partnership does not have sufficient liquid assets to comply with the aforesaid payment obligations of this paragraph 12.5(a)(i) within the time provided, the Partnership shall pay within such time such amount, if any, as the Partnership reasonably can pay without impairing in any manner the Partnership's ability to conduct Partnership Business and to maintain reasonable

living standards of the Partners, and the Partnership shall pay the remainder as and when practicable but not later than within forty-eight (48) months after the Determination. Book Value shall be defined, in accordance with generally accepted accounting principles based on accrual for GAPP, to include Partnership liabilities, if any, and deficits, if any, allocable to such Former Partner's Percentage Interest and solely the following Partnership assets (excluding Partnership goodwill, the Group Name, the Partnership Name, the Name and Likeness and Partnership receipts or credits after the Separation Date): (A) nonreturnable cash on hand; (B) tangible personal property; and (C) real property; and

(ii) (A) A participation ("Participation") in receipts ("Receipts"), if any, and not credits, after the Separation Date solely from the sources listed immediately below ("Sources") in an amount equal to the Former Partner's Percentage Interest (calculated as of the Separation Date):

(aa) Services performed fully by the Group or such Former Partner as a member thereof before the Separation Date (e.g., recordings or videos made, in whole or in part, by such Former Partner; compositions authored, in whole or in part, by such Former Partner; personal appearances by the Group with such Former Partner;

(bb) Commercial exploitation of the Group Name before the Separation Date (e.g., merchandise placed in commerce; endorsed products placed in commerce; advertisements broadcast or otherwise published with regard to endorsed products or services; sponsored concert or other appearances taking place);

(cc) Commercial exploitation of such Former Partner's Name and Likeness before the Separation Date (notwithstanding anything to the contrary in this agreement, the Partnership shall have the perpetual right to commercially exploit each Former Partner's Name and Likeness in connection with the results and proceeds of Services performed, and rights granted, before the Separation Date by, among others, the Group or such Former Partner and as provided in the Agreements).

(B) Receipts shall mean nonreturnable Partnership's gross receipts minus the following:

(aa) Attorney and accountants' fees and costs of negotiation, preparation, maintenance and enforcement (e.g., collection costs regardless whether arbitration or litigation results) of Agreements and with regard to Receipts;

(bb) Accounting, auditing (regardless whether there is a recovery), personal management, business management, talent agent, publicist and other third party(ies) fees, advances, commissions, other payments and costs in connection with Agreements and with regard to Receipts;

(cc) Payments required by any collective bargaining agreements regarding Receipts and/or Agreements.

(b) Notwithstanding anything to the contrary in this paragraph 12.5:

(i) Such Former Partner shall not be paid more than once with regard to any Partnership asset or receipt or otherwise.

(ii) Such Former Partner's Participation shall not be subject to, or reduced by, any advance or other recoupable payment to the Group, any Partner or any other person after the Separation Date except to the extent related to the Sources (e.g., independent promotion costs, video production costs) (e.g., if an advance paid

to the Group for an album recorded after the Separation Date is recouped from royalties payable to the Partnership on an album recorded before the Separation Date ("Prior Album"), the Partnership shall nevertheless pay to such Former Partner his Participation with respect to the Prior Album as though there were no such recoupment).

(iii) In the event that the Book Value with regard to such Former Partner's Percentage Interest is in a deficit position, the Partnership shall be entitled to deduct from such Former Partner's Participation an amount equal to such deficit.

(c) For any semiannual period after the Separation Date for which a Participation payment is due such Former Partner, the Partnership shall cause the Accountant to render to such Former Partner an accounting together with such payment, within one hundred twenty (120) days after the close of such semiannual period. Each such statement shall be final and binding upon such Former Partner unless an objection is made in writing, stating in detail the basis therefor, and is delivered to and received by the Partnership within one (1) year after the date of such statement, and if the Partnership denies the validity of the objection or any portion thereof and gives notice of such denial, unless suit thereon is instituted within one (1) year after the date the Partnership gives such notice. Once during the one (1) year period following the rendering of each statement, a certified public accountant not then conducting an audit for any other Partner or Former Partner, shall have the right at such Former Partner's sole expense to inspect the books and records of the Partnership, upon reasonable advance written notice and at reasonable times, subject to the maintenance of confidentiality with regard to information disclosed, solely for the purpose of verifying the accuracy of such statement and such audit shall not be conducted on a contingent fee arrangement. Such Former Partner, if at all, must commence suit thereon within such one (1) year period, and such Former Partner shall be barred from suing thereon thereafter. The Partnership shall have the unlimited right to inspect such Former Partner's books and records to determine whether such Former Partner has received amounts belonging to the Partnership.

(d) The payment of the amounts set forth in this paragraph 12.5 shall constitute a full and complete buy out, settlement, release, discharge and liquidation of any and all right, title, interest, claims and/or remedies of any nature whatsoever which such Former Partner, or such Former Partner's estate, may have against the Partnership or the Partners with regard to the Group, the results and proceeds thereof, the Group Name, the Agreements or otherwise. Without limiting the generality of the foregoing and except as specifically provided in this paragraph 12.5, no such Former Partner, or such Former Partner's estate, shall have any interest in income received by, or credited to, the Partnership nor shall such Former Partner have any ownership interest in any results or proceeds of such Former Partner's Services. Except as expressly provided herein, such Former Partner shall not have any right, title, interest, claims and/or remedies of any nature whatsoever in or to any properties or assets created or produced, or acquired, by the Group, the Partners or the Partnership before or after the Separation Date, or any proceeds of the foregoing.

13. DISSOLUTION AND LIQUIDATION OF THE PARTNERSHIP.

13.1 Dissolution

The Partnership shall be dissolved upon the first to occur of the following events:

(a) The agreement of all of the Partners to dissolve the Partnership; or

(b) As otherwise provided by operation of law, except that the addition of a new Partner in, or the death, voluntary withdrawal or expulsion of a Partner from the Partnership, shall not dissolve the Partnership.

13.1 Liquidation of the Partnership

Upon dissolution of the Partnership pursuant to this agreement, the Partnership shall be liquidated, its receivables collected and its assets liquidated as promptly as is consistent with obtaining the fair value thereof (except as provided in paragraph 13.2(c) hereof). Upon liquidation, the Partnership shall engage in no further business other than as necessary to operate Partnership Business on an interim basis during the collection of its receivables and liquidation of its assets.

(a) Priority

Upon dissolution, the proceeds of the liquidation of the Partnership assets, and the collection of its receivables, shall be applied in the following order:

(i) To the expenses of liquidation and the debts of the Partnership other than debts owing to the Partners;

(ii) To debts owing to the Partners, including debts arising from loans made to or for the benefit of the Partnership, except that if the amount of such proceeds is insufficient to pay such debts in full, payment shall be made on a pro rata basis;

(iii) As provided in paragraph 8.3.

(b) Further Assurances

The Partners shall execute all instruments for facilitating the collection of the partnership receivables and liquidation of the Partnership assets and for the mutual indemnity or release of the Partners as may be requisite or proper.

(c) Distributions in Kind

Any tangible personal property owned or controlled by the Partnership at the time of dissolution from which income is being derived shall not be sold, but shall be retained and distributed in the manner hereinafter set forth. Any monies derived from such property, after the payment of all Partnership debts and liabilities, shall be credited, distributed and divided among the Partners in the same manner and in the same order as herein provided for the computation, determination and payment of net profits. After the payments pursuant to subparagraph 13.2(a)(i) and (ii) have been made in full, any such property shall be fixed at its Book Value as of the date of liquidation. Such property shall then be distributed in equal shares among the Partners (excluding Former Partners).

14. ASSIGNMENT OF PERCENTAGE INTEREST.

Except as otherwise provided in this agreement, no Partner, Former Partner or executor or administrator of a deceased Partner's estate, shall sell, assign or transfer, or authorize or allow any third party to sell, assign or transfer, all or any part of his or its Percentage Interest except upon the agreement of the Partners. Any sale, assignment or transfer in violation of this paragraph 14 shall be null and void.

19. RESTRICTIONS ON INTEREST OF SPOUSES.

(a) Limited Rights of Spouse

In the event that a Partner ("Affected Partner") is unable to acquire the community property interest, if any, of the Affected Partner's spouse ("Spouse") in the Affected Partner's interest in the Partnership in

connection with the dissolution of their marriage and in the further event that the Spouse is required by a court order or otherwise to receive an interest in the Partnership, the Partners agree that such interest of the Spouse shall be limited solely to the right to receive a portion of the allocations and distributions otherwise to be made to the Affected Partner pursuant to the terms of this agreement. The spouse shall not be admitted as a Partner in the Partnership and shall have no rights of any kind or nature whatsoever with respect to the management, control, decision making or operation of the Partnership or otherwise, it being specifically understood and agreed that the right of the Spouse solely shall be to receive a portion of the net profits, net losses, and distributions of net receipts, if any, otherwise to be made hereunder to the Affected Partner. The Spouse shall not transfer any interest of the Spouse with regard to the Partnership.

(b) Death of a Spouse

In the event of the death of a Partner's spouse ("Deceased Spouse"), and in the further event that the community property interest, if any, of the Deceased Spouse in such Partner's interest in the Partnership is bequeathed or otherwise transferred to someone other than such Partner ("Spouse Transferee"), such interest of the Spouse Transferee shall be limited solely to the right to receive a portion of the net profits, net losses and distributions of net receipts otherwise to be made to such Partner pursuant to this agreement. The Spouse Transferee shall not be admitted as a Partner in the Partnership and shall have no rights of any kind or nature whatsoever with respect to the management and operation of the Partnership, it being specifically understood and agreed that the right of the Spouse Transferee solely shall be to receive a portion of the net profits, net loss and distributions of net receipts, if any otherwise to be made to such Partner pursuant to this agreement.

(c) Consent of Spouses

The respective spouses, if any, of the Partners consent to the terms of this agreement as it affects them by their execution of Exhibit "A" attached hereto and incorporated herein by this reference as though fully set forth. Any Partner who acquires a spouse after the date of this agreement shall cause such spouse to execute Exhibit "B".

20. NOTICES.

All notices, accountings and payments (collectively "notices") required or desired to be given hereunder shall be given in writing, by personal delivery or by authorized, registered or certified mail, return receipt requested (provided that accountings and/or payments may be sent by regular mail), at the respective addresses of the Partners as they appear in the records of the Partnership, or at such other addresses as may be designated in writing. Notice given by mail or by telegraph shall be deemed given on the date of mailing thereof or on the date of delivery of such telegraph to a telegraph office, charges prepaid or to be billed to the sending party, and notice given by personal delivery shall be deemed given on the date of delivery thereof; provided, however, that notices of change of address shall be deemed given on the date received regardless of how sent. Mandatory copies of all notices to the Partnership shall be sent to Selverne, Mandelbaum & Mintz, LLP, 353 Lexington Avenue, Penthouse, New York, New York, 10016, attn: _____.

21. GENERAL PROVISIONS.

21.1 Personal Liability / Indemnity.

(a) Any Partner who enters into any agreement, contract or otherwise incurs any obligation in the name or on the credit of the Partnership in violation of the provisions of this agreement may be held individually liable by the Partnership and the other Partners for the entire amount of the obligation or loss thus incurred and any damages therefrom. The Partnership shall have the right to offset and withhold any and all damages,

liabilities, costs, claims and expenses (including, without limitation, attorneys' fees and costs) incurred or which are anticipated due to a breach of alleged breach of a Partner of any agreement, representation or warranty contained herein, from any and all monies otherwise payable by the Partnership to such Partner.

(b) The liability of the Partnership or the Partners arising out of any activities of the Partnership shall, to the extent possible, be covered by appropriate policies of insurance. In the event that any liability shall not adequately be covered by insurance, the amount of liability not so insured against shall first be satisfied out of the assets of the Partnership.

(c) Each Partner and Former Partner hereby agrees that he shall defend, indemnify and hold each and every other Partner, and such Partner's successors, licensees and assigns, the Partnership and its successors, licensees and assigns, harmless from and against any and all claims, damages, liabilities, costs and expenses (including without limitation reasonable attorneys' fees whether or not litigation is actually commenced) arising out of a breach by any Partner of this agreement or any Agreement(s), including, without limitation, such Partner's warranties, representations or obligations hereunder and any acts or omissions not authorized by this agreement or any Agreement(s), including, without limitation, the Noncompetitive Activities. Each former Partner hereby agrees to and shall continuously indemnify each Partner, other Former Partners, the Partnership and the respective successors, assignees, relatives, employers, attorneys agents and other representations thereof from and against any and all costs, expenses (including, without limitation, attorneys' fees and costs), liabilities, judgments and damages with regard to any and all acts or omissions by such Former Partner as of such Former Partner's Separation Date. Further, the Partnership hereby agrees to defend, indemnify and hold harmless each Partner and the Partnership for acts within the scope of, and authorized by, this agreement. Each Partner shall promptly notify the other Partners if such Partner knows of the existence of such a claim, demand, action or right of action and shall be given a reasonable opportunity to participate in the defense thereof.

(d) Subject to the restrictions on assignments set forth in this agreement, the provisions of this agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the Partners.

21.2 <u>Amendment of Partnership Agreement</u>

Only a written instrument executed by all of the Partners may amend this agreement. If all of the Partners, or the Partnership (by unanimous written agreement of the Partners), enter into any agreement in writing the terms and conditions of which are inconsistent with the terms and conditions of this agreement, the terms and conditions of such other agreement shall control.

21.3 <u>Waiver; Cumulative Remedies</u>

No waiver by any Partner, whether express or implied, of any provision of this agreement shall affect such Partner's right thereafter to enforce such provision or to exercise any right or remedy in the event of any other default, whether or not similar. All rights and remedies at law or in equity, or pursuant to any provision of this agreement, which the Partnership, or any Partner, may have as a result of the default or breach of this agreement by the Partnership or any other Partner or Former Partner, shall be deemed cumulative and not exclusive of one another, and nothing contained in this agreement shall be deemed to constitute a waiver of any such rights or remedies.

21.4 <u>Interpretation</u>

The headings of the paragraphs of this agreement are for convenience of reference only and shall not be deemed to limit, or in any way affect, the scope, meaning or intent of this agreement or any part hereof. The world

"person" shall mean any individual, corporation, partnership, association or other entity, or any other organized group of individuals or legal successors or representatives of the foregoing. Words used in this agreement, regardless of the number and gender specifically used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine or feminine, as the context requires.

21.5 Construction; Entire Agreement; Severability; Cure

The Partners deem this agreement to be entered into in the State of [STATE OF PARTNERSHIP] and it shall be governed by and interpreted under and in accordance with the laws of such State applicable to agreements wholly to be performed therein. Each Partner warrants that such Partner is a resident of the State of [STATE OF PARTNERSHIP] and a citizen of the United States. This agreement sets forth the entire understanding of the Partners relating to the subject matter hereof and supersedes all prior and contemporaneous agreements, understanding and negotiations of the Partners. Each Partner acknowledges that no representations, inducements, promises or agreements, oral or written, with reference to the subject matter hereof have been made other than as expressly set forth herein. In the event that any provision, or portion thereof, contained in this agreement is unenforceable, the remaining provisions, or portions thereof, shall nevertheless be enforceable. The Partnership shall not be deemed in breach hereof unless the Partnership fails to cure any breach hereof within forty-five (45) days after receipt of written notice thereof from any Partner(s) or Former Partner(s), or if such breach is incapable of being cured within such period, if the Partnership does not endeavor reasonably to cure such breach within such period and to conclude the cure promptly thereafter.

21.6 Injunctive Relief

(a) The Partnership shall be entitled to seek injunctive and other equitable relief, in addition to its other rights and remedies, in the event of an actual or threatened breach of this agreement by any Partner or Former Partner.

(b) In the event of an actual or threatened breach by the Partnership of this agreement, the sole remedy of the Partners and Former Partners, if any, respectively, shall be to seek monetary damages, if any, and an accounting and no Partner or Former Partner shall in such event be entitled to seek injunctive or other equitable relief against the Partnership or any Partner or against any party to any of the Agreements nor to rescind or terminate this agreement or any of the Agreements.

21.7 Former Partner not a Partner

The term "Partner" as used in this agreement shall not mean a Former Partner.

22. CONFIDENTIALITY

As the terms of this agreement are of a confidential nature, no Partner or Former Partner shall disclose, or authorize the disclosure, to any third party (other than a representative of such Partner or Former Partner) the terms of this agreement except under compulsion by a body having jurisdiction thereof. The Partnership shall be entitled to injunctive relief, without limitation of its other rights and remedies, in the event of a breach here.

23. **WAIVER OF POTENTIAL CONFLICT OF INTEREST**

EACH OF THE UNDERSIGNED UNDERSTANDS AND AGREES THAT THE PARTNERSHIP HAS ENGAGED [LAW FIRM] TO PREPARE THIS PARTNERSHIP AGREEMENT AND TO IMPLEMENT ANY AND ALL OF THE TERMS AND PROVISIONS THEREOF. EACH OF THE UNDERSIGNED FURTHER ACKNOWLEDGES AND UNDERSTANDS THAT [LAW FIRM] IS REPRESENTING THE INTERESTS OF

THE PARTNERSHIP AS A GROUP AND THAT SUCH LEGAL REPRESENTATION CREATES A POTENTIAL OR ACTUAL CONFLICT OF INTEREST IN THAT [LAW FIRM] ADVOCATING THE INTERESTS OF THE PARTNERSHIP AND NOT NECESSARILY THE INTERESTS OF THE UNDERSIGNED INDIVIDUALLY. EACH OF THE UNDERSIGNED ACKNOWLEDGES AND UNDERSTANDS THAT [LAW FIRM] MAY NOT REPRESENT CLIENTS WITH CONFLICTING, OR POTENTIALLY CONFLICTING INTERESTS WITHOUT FIRST DISCLOSING SUCH REPRESENTATION AND THE NATURE OF THE CONFLICT OR POTENTIAL CONFLICT, AND OBTAINING THE CONSENT OF ALL SUCH CLIENTS WITH REGARD THERETO, AND EACH OF THE UNDERSIGNED HEREBY ACKNOWLEDGES THAT SUCH DISCLOSURE HAS IN FACT BEEN MADE WITH REGARD TO THE PARTNERSHIP AND THAT THE CONSENT OF THE UNDERSIGNED HAS BEEN OBTAINED. EACH OF THE UNDERSIGNED ACKNOWLEDGES AND UNDERSTANDS THAT EACH IS FREE, AND HAS HAD AMPLE OPPORTUNITY, TO SEEK INDEPENDENT LEGAL COUNSEL WITH REGARD TO THE INTERPRETATION AND LEGAL EFFECT OF THIS PARTNERSHIP AGREEMENT. RECOGNIZING AND UNDERSTANDING ALL OF THE FOREGOING, EACH OF THE UNDERSIGNED OF HIS OWN FREE WILL HEREBY CONSENTS KNOWINGLY TO THE REPRESENTATION OF THE PARTNERSHIP BY [LAW FIRM] IN CONNECTION WITH THE PREPARATION OF THIS AGREEMENT, ITS IMPLEMENTATION AND OTHERWISE. EACH OF THE UNDERSIGNED UNDERSTANDS AND AGREES THAT AT NO TIME SHALL ANY ACTION TAKEN BY [LAW FIRM] ON BEHALF OF THE PARTNERSHIP WITH REGARD TO THIS AGREEMENT OR THE IMPLEMENTATION THEREOF OR OTHERWISE, BE DEEMED A BREACH OF ANY FIDUCIARY RELATIONSHIP BETWEEN [LAW FIRM] AND ANY OF THE UNDERSIGNED, AFFECT THE VALIDITY AND/OR ENFORCEABILITY OF THIS AGREEMENT, OR DEROGATE FROM THE BINDING NATURE OF THIS AGREEMENT.

IN WITNESS WHEREOF, the Partners have executed this agreement as of the day and year first above written.

_____
Name (Partner)

_____
Name (Partner)

_____
Name (Partner)

_____
Name (Partner)

_____
Name (Partner)

EXHIBIT "A"

CONSENT OF SPOUSES

We certify that:

1. We are the respective spouses of the persons who executed the _____ Partnership agreement to which this Exhibit "A" is attached ("Agreement"), which persons are the Partners of the partnership described in the Agreement ("Partnership").

2. We have read, understand and approve the provisions of the Agreement as they affect or pertain to us, including, without limitation, paragraph 19 of the Agreement, and have either sought and obtained the advice of independent counsel with regard to the interpretation and legal effect of the Agreement, or hereby, of our own free will and without duress, undue influence or coercion, individually and knowingly waive any right to do so, after having had ample opportunity to do so.

3. We hereby agree to be bound by, and accept, the provisions of the Agreement as they affect or pertain to us in lieu of all other interests we, or any one of us, respectively, may have in or in connection with the Agreement, any agreement entered into by the Partnership or the Corporation (as defined in paragraph 13.1(a) of the Agreement), the Partnership, any right, title or interest therein or thereof or in the group now known as _____ (or the name thereof) or in the results or proceeds thereof or the agreements entered into thereby, whether such interest(s) may be community property or otherwise.

Executed as of _____, 19 _____

_____
Mrs. _____

_____
Mrs. _____

_____
Mrs. _____

EXHIBIT "B"

CONSENT OF SPOUSE

We certify that:

1. I am the spouse of _____, whom is a party to the _____ Partnership agreement to which this Exhibit "B" is attached ("Agreement") and a Partner of the partnership described in the Agreement ("Partnership").

2. I have read, understand and approve the provisions of the Agreement as they affect or pertain to me, including, without limitation, paragraph 19 of the Agreement, and have either sought and obtained the advice of independent counsel with regard to the interpretation and legal effect of the Agreement, or hereby, of my own free will and without duress, undue influence or coercion, individually and knowingly waive any right to do so, after having had ample opportunity to do so.

3. I hereby agree to be bound by, and accept, the provisions of the Agreement as they affect or pertain to me in lieu of all other interests I may have or in connection with the Agreement, any agreements entered into by the Partnership or the Corporation (as defined in paragraph 13.1(a) of the Agreement), the Partnership, any right, title or interest therein or thereof or in the group now known as _____ (or the name thereof) or in the results or proceeds thereof or the agreements entered into thereby, whether such interest(s) may be community property or otherwise.

Executed as of _____, 19 _____.

_____

Mrs. _____

Date

_____
_____
_____
_____

Re: Copyright License Letter Agreement

Dear _____:

Pursuant to previous correspondence and phone conversations between _____("Company") and your musical band, _____ ("Band") (collectively "the parties"), for good and valuable consideration, the parties agree to the following representations and promises, and agree to comply with the following terms:

1. OWNERSHIP. BAND is the owner of all rights, title and interest in the following musical sound recordings (collectively, the "Works"):

a.

b.
c.
d.
e.
f.
g.
h.

2. GRANT. BAND grants to Company and its manufacturers, distributors, advertisers, retailers and end-user customers a worldwide, nonexclusive right to use, make copies of, and distribute any of the Works, in whole or in part, in connection with the manufacture, sale, offer for sale and distribution of an MP3 player ("Product") during the Term and thereafter for so long as any Product created during the Term is used or sold. BAND shall retain ownership of the rights in the Works and the right to use, license or assign the Works in its sole discretion, subject to the license granted by this letter agreement. Upon BAND's request, Company will make reasonable efforts to place appropriate acknowledgements of BAND's ownership rights on, or otherwise in connection with, copies of the Recordings.

3. COMPENSATION. If sales of Product exceed 100,000 units per year, as additional consideration for the rights granted herein, Company agrees to pay BAND the flat sum of $_____.

4. TERM AND TERMINATION. This Agreement shall remain in full force and effect, unless and until terminated earlier in accordance with this agreement, for so long as Company, its manufacturers, distributors, advertisers, and retailers continues to sell Product utilizing the Works. Either party may immediately terminate this agreement if the other party fails to perform or fulfill any term or obligation of this agreement and such failure is not cured within

thirty (60) days after the breaching party receives written notice of such failure from the other party. Upon expiration or termination of this agreement, Company agrees to cease using, copying and distributing the Works under this agreement, provided however that after expiration or termination, Company and its manufacturers, distributors, advertisers, retailers and end-user customers may continue to perform activities under the Agreement with respect to only those Products created during the Term of this Agreement, and so long as any such Products created during the Term are used or sold.

5. REPRESENTATIONS AND WARRANTIES. BAND represents and warrants that the Works when used by Company or its manufacturers, distributors, advertisers, retailers and end-user customers as permitted will not violate the rights of any third party, and will not create any monetary or other obligations to any third party. BAND represents and warrants that it is the sole owner of the Works, including their associated lyrics and musical compositions, and/or has the full right and power to grant this license, and that there is no adverse decision, claim or, to BAND's knowledge, threatened claim concerning the Works or their associated lyrics or musical compositions.

6. ASSIGNMENT. Company shall have the right to assign or transfer this Agreement to any third party to whom Company assigns or transfers all or substantially all of its rights in and to the Product. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

7. ENTIRE AGREEMENT. This agreement constitutes the entire agreement between the parties with respect to its subject matter. Any modifications or amendments to this agreement must be in writing and signed by the parties. The invalidity of any provision of this agreement shall not affect the validity of the other provisions of this agreement.

If you believe this letter correctly recites the agreement between BAND and Company, and if you agree to be bound by the terms and conditions recited in this letter, please have an authorized agent or representative of BAND countersign a copy of this letter and return it to us at your earliest convenience.

Sincerely,

COMPANY

By: _____

Acknowledged and agreed to
.

BAND

By: _____

Agreement made as of November 2, 2007, between [redacted], c/o [redacted] Attn: [redacted] (hereinafter "you" or the "Performer"), and [redacted] general partnership, [redacted] (hereinafter, [redacted]. This agreement is sometimes referred to as the "Brand Equity Agreement."

Reference is made to the recording agreement dated as of [redacted] (the "Artist Agreement") between you and [redacted] with respect to your recording services. Capitalized terms used and not defined herein shall have the same meanings assigned to them in the Artist Agreement.

1. Territory: The "Territory," as used in this agreement, shall mean the Universe.

2. Term:

The term of this agreement (hereinafter, the "Term") shall begin on the date set forth above and shall be coterminous with the term of the Artist Agreement.

3. Intentionally Omitted Without Implication

4. Income Participation.

(a) Subject to subparagraph 4(b) below, [redacted] will be entitled to the listed percentages (the [redacted] Share") of all monies otherwise payable to you or the Performer (or to a third party on your and/or the Performer's behalf) during the Term or pursuant to any agreements, commitments or engagements entered into or secured during the term in connection with the following, unless other specified herein (all such monies are referred to herein as "Covered Revenues," and the activities referred in clauses (i) through (iv) below are sometimes referred to herein as "Covered Activities") whether the Covered Revenues under such agreements are received during or after the Term:

(i) Live performance engagements – [redacted] percent ([redacted]%) of live performance income per each [redacted] thousand dollars ($[redacted]000) which [redacted] expends on tour support pursuant to section 8B of the Artist Agreement, provided that: (a) in no event shall [redacted] Share of live performance income exceed [redacted] and (b) the [redacted] Share on live performance income shall be reduced [redacted] percent ([redacted]%) for each f[redacted] of the total live performance income received by you or the Performer; subject to a floor of [redacted] percent ([redacted]%);

(ii) Music publishing [redacted] percent ([redacted]) for the life of copyrights from musical compositions recorded during the Term, provided that (a) you shall retain [redacted] ([redacted]%) percent of the first [redacted] dollars ($[redacted]) of music publishing income and (b) [redacted] shall not participate in the initial advance you will receive from [redacted] pursuant to the publishing agreement dated [DATE];

(iii) The use of the name of the Performer and/or likeness and/or logo on merchandise (other than records and Merchandise Uses under the Artist Agreement) – [redacted] percent ([redacted]%), provided that you shall retain [redacted] percent of the first [redacted] dollars ([redacted]) of merchandise income; and

(iv) Endorsements and strategic partnerships - [redacted] percent ([redacted]%).

(b) The Performer will be entitled to deduct actual commissions charged by and paid to her managers, agents, attorneys and advisors in connection with the Covered Revenues concerned, provided that the aggregate amount of the deductions to be applied to Covered Revenues, in any instance, shall not exceed [redacted] percent ([redacted]) of the Covered Revenues (the "Maximum Deduction") provided, in the event the Performer engages an agent in connection with the activity covered under subparagraph 4(a)(i), then the Maximum Deduction shall not exceed [redacted] percent ([redacted]%). The Performer will also be entitled to deduct legitimate, direct, actual, third party, out-of-pocket costs incurred by Performer to generate the Covered Revenues concerned (e.g. lighting or buses for a tour).

(c) (i) With respect to income earned from the activities listed in subparagraphs 4(a)(ii) and (iii) above, you will irrevocably direct and will use best efforts to cause each Person from which you or the Performer or any Person receiving revenues on your or the Performer's behalf receive Covered Revenues ("Third Party"), to account directly to for share of such Covered Revenues at the same times and subject to the same accounting terms as apply to accountings to you, the Performer and/or the applicable Person receiving Covered Revenues on your or Performer's behalf, but no less frequently than semi-annually. You shall use reasonable efforts to cause all agreements with Third Parties (each, a "Covered Revenue Agreement") to provide that shall have the right to examine each Third Party's books and records with respect to Covered Revenues subject to the same terms and limitations as apply to accountings to you, the Performer and/or the applicable Person receiving Covered Revenues on your or Performer's behalf. You will provide with a copy of each Covered Revenue Agreement within ten (10) business days after the execution of such agreement. Without limiting the foregoing, shall have the right to examine your books and records and the books and records of the Performer (not more than once per twelve (12)-month period and upon reasonable prior notice to you), at your and/or the Performer's offices where the records concerned are kept, provided, at request you will make all such records available at one (1) such office. If it is not practicable for you to obtain such direct accounting and audit rights for in any instance, you will notify upon conclusion of each Covered Revenue Agreement if you have not obtained such direct accounting and audit rights for and you will render statements and payments to for the Share of all Covered Revenue within ten (10) business days after the receipt of each statement under each Covered Revenue Agreement. Without limiting the foregoing, you will provide with a copy of each statement received by you under each Covered Revenue Agreement within ten (10) business days after receipt of such statement. Nothing in any Covered Revenue Agreement will relieve you of your obligation to make such payments to if not paid to by the applicable Third Party, within ten (10) business days after the rendering of each accounting which includes such Covered Revenues concerned, or within ten (10) business days after receipt by you or on your behalf of such Covered Revenues if for any reason not included in an accounting, in each instance, and you will be liable to for all such payments not made to as required by this paragraph 4.

(ii) Solely with respect to accounting to for Covered Revenue from live performance engagements, you shall have the option of either (1) abiding by the terms of subparagraph 4(c)(i) above or (ii) issuing a letter or direction to your business manager (if you do not have a business manager, you shall account directly) to account and pay to for share of such Covered Revenues at the end of each segment of a continuous tours, but no less frequently than semi-annually. Without limiting the foregoing, shall have the right to examine your books and records and the books and records of the Performer (not more than once per twelve (12)-month period and upon reasonable prior notice to you), at your and/or the Performer's offices where the records concerned are kept, provided, at request you will make all such records available at one (1) such office.

5. Warranties: Representations: Indemnity

You warrant and represent that:

(a) You have the right and power to enter into and fully perform this agreement. If you are a corporation, that you are and shall continuously be a corporation in good standing in the jurisdiction of your incorporation.

(b) shall not be required to make any payments of any nature for, or in connection with, the acquisition, exercise or exploitation of rights by pursuant to this agreement except as specifically provided in this agreement. You and the Performer shall be solely responsible for all costs and liabilities in connection with the Covered Activities subject to contractual tour support reimbursement by if any, or as otherwise agreed between you and

(c) You will not grant rights in or otherwise encumber the Share of Covered Revenues.

(e) (i) You shall at all times indemnify and hold harmless and any Licensee of from and against any and all claims, losses, damages, liabilities, costs and expenses,

including, without limitation, legal expenses and reasonable counsel fees, arising out of any breach or alleged breach by you of any warranty or representation made by you in this agreement or any other act or omission by you or the Performer, provided the claim concerned has been settled or has resulted in a judgment against or Licensees. shall notify you of any action commenced on such a claim. You may participate in the defense of any such claim through counsel of your selection at your own expense, but shall have the right at all times, in sole discretion, to retain or resume control of the conduct of the defense. If any claim involving such subject matter has not been resolved, or has been resolved by a judgment or other disposition which is not adverse to or Licensees, you shall reimburse for fifty percent (50%) of the expenses actually incurred by and Licensees in connection with that claim. Pending the resolution of any such claim, may withhold monies which would otherwise be payable to you under this agreement in an amount consistent with such claim. If no action or other proceeding for recovery on such a claim has been commenced within twelve (12) months after its assertion shall not continue to withhold monies in connection with that particular claim under this subparagraph 5(e)(i) unless believes, in reasonable judgment, that such a proceeding may be instituted notwithstanding the passage of that time.

(ii) If pays more than Five Thousand Dollars ($5,000) in settlement of any such claim, you shall not be obligated to reimburse for the excess unless you have consented to the settlement, except as provided in the next sentence. If you do not consent to any settlement proposed by for an amount exceeding Five Thousand Dollars ($5,000) you shall nevertheless be required to reimburse for the full amount paid unless you make bonding arrangements, satisfactory to in reasonable discretion, to assure of reimbursement for all damages, liabilities, costs and expenses (including, without limitation, legal expenses and reasonable counsel fees) which or Licensees may incur as a result of that claim.

6. NOTICES

Except as otherwise specifically provided herein, all notices under this agreement shall be in writing and shall be given by courier or other personal delivery or by registered or certified mail at the appropriate address below or at a substitute address designated by notice by the party concerned.

TO YOU:	The address shown above.
TO THE PERFORMER:	In your care, at the address shown above.
TO	

Each notice to shall be addressed for the attention of [redacted] and a copy of each notice to shall be sent simultaneously to the Law Department for the attention of its [redacted] shall undertake to send a copy of each notice sent to you to , Attn: but failure to send any such copy shall not constitute a breach of this agreement or impair the effectiveness of the notice concerned. Notices shall be deemed given when mailed or, if personally delivered, when so delivered, except that a notice of change of address shall be effective only from the date of its receipt.

7. MISCELLANEOUS

(a) The parties hereto agree that: (i) all understandings and agreements heretofore made between them with respect to the subject matter hereof are merged in this agreement, which fully and completely expresses their agreement with respect to the subject matter hereof and (ii) except as specifically set forth herein, all prior agreements among the parties with respect to such subject matter are superseded by this agreement which integrates all promises, agreements, conditions and understandings among the parties with respect to such subject matter. In addition, you acknowledge that neither nor any person acting on behalf of (including its agents, its representatives or its

attorneys) has made any promise, representation or warranty whatsoever, express or implied, oral or written, not contained herein, and you further acknowledge that you have not executed, and have not been induced to execute, this agreement in reliance upon any promise, representation or warranty. No change, modification, waiver or termination of this agreement shall be binding upon unless it is made by an instrument signed by an authorized officer of No change of this agreement shall be binding upon you or the Performer unless it is made by an instrument signed by you or the Performer. A waiver by either party of any provision of this agreement in any instance shall not be deemed a waiver of such provision, or any other provision hereof, as to any future instance or occurrence. All remedies, rights, undertakings, and obligations contained in this agreement shall be cumulative and none of them shall be in limitation of any other remedy, right, undertaking, or obligation of either party. The captions of the Articles in this agreement are included for convenience only and shall not affect the interpretation of any provision.

(b) (i) may assign rights under this agreement in whole or in part to any subsidiary, affiliated or controlling corporation, to any Person owning or acquiring a substantial portion of the stock or assets of or to any partnership or other venture in which participates, and such rights may be similarly assigned by any assignee. No such assignment shall relieve of any of obligations hereunder. You shall not have the right to assign this agreement or any of your rights hereunder without prior written consent. You shall not have the right to assign this agreement or any of your rights hereunder without prior written consent, (except as expressly permitted under subparagraph 7(b)(ii) below).

(ii) You may assign your rights under this agreement to a corporation, all of whose capital stock is owned solely by you, subject to the following conditions:

(1) Intentionally Omitted Without Implication;

(2) The assignment shall not be effective until you have delivered to an instrument satisfactory to in sole discretion effecting the assignment and the assignee's assumption of your obligations, and has executed that instrument to evidence approval of it (such approval not to be unreasonably withheld);

(3) No such assignment shall relieve you of your obligations under this agreement; and

(4) If such an assignment takes place, any further transfer of the rights assigned shall be subject to the same conditions.

Any purported assignment by you in violation of this subparagraph 7(b)(ii) shall be void.

(c) If any part of this agreement, or the application thereof to any party, shall be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect the remainder of this agreement, which shall continue in full force and effect, or the application of this agreement to the remaining parties.

(d) Neither party shall be entitled to recover damages or to terminate the Term by reason of any breach by the other party of its material obligations, unless the latter party has failed to remedy the breach within thirty (30) days following receipt of notice thereof, or, if such breach cannot be remedied within such thirty (30) day period, unless the latter party has failed to commence remedying such breach within such thirty (30) day period and has failed to proceed diligently to cure such breach within a reasonable time following receipt of notice thereof.

(e) THIS AGREEMENT HAS BEEN ENTERED INTO IN THE STATE OF NEW YORK, AND THE VALIDITY, INTERPRETATION AND LEGAL EFFECT OF THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS ENTERED INTO AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK (WITHOUT GIVING EFFECT TO ANY CONFLICT OF LAW PRINCIPLES UNDER NEW YORK LAW). THE NEW YORK COURTS (STATE AND FEDERAL), SHALL HAVE SOLE JURISDICTION OF ANY

CONTROVERSIES REGARDING THIS AGREEMENT; ANY ACTION OR OTHER PROCEEDING WHICH INVOLVES SUCH A CONTROVERSY SHALL BE BROUGHT IN THOSE COURTS IN NEW YORK COUNTY AND NOT ELSEWHERE. THE PARTIES WAIVE ANY AND ALL OBJECTIONS TO VENUE IN THOSE COURTS AND HEREBY SUBMIT TO THE JURISDICTION OF THOSE COURTS. ANY PROCESS IN ANY SUCH ACTION OR PROCEEDING MAY, AMONG OTHER METHODS, BE SERVED UPON YOU BY DELIVERING IT OR MAILING IT, BY REGISTERED OR CERTIFIED MAIL, DIRECTED TO THE ADDRESS FIRST ABOVE WRITTEN OR SUCH OTHER ADDRESS AS YOU MAY DESIGNATE PURSUANT TO PARAGRAPH 6. ANY SUCH PROCESS MAY, AMONG OTHER METHODS, BE SERVED UPON THE PERFORMER OR ANY OTHER PERSON WHO APPROVES, RATIFIES, OR ASSENTS TO THIS AGREEMENT TO INDUCE TO ENTER INTO IT, BY DELIVERING THE PROCESS OR MAILING IT BY REGISTERED OR CERTIFIED MAIL, DIRECTED TO THE ADDRESS FIRST ABOVE WRITTEN OR SUCH OTHER ADDRESS AS THE PERFORMER OR THE OTHER PERSON CONCERNED MAY DESIGNATE IN THE MANNER DESCRIBED IN ARTICLE 17. ANY SUCH DELIVERY OR MAIL SERVICE SHALL BE DEEMED TO HAVE THE SAME FORCE AND EFFECT AS PERSONAL SERVICE WITHIN THE STATE OF NEW YORK.

(f) In entering into this agreement, and in providing services pursuant hereto, you and the Performer have and shall have the status of independent contractors. Nothing herein contained shall contemplate or constitute you or the Performer as agents or employees, and nothing herein shall constitute a partnership, joint venture or fiduciary relationship between you and

(g) This agreement shall not become effective until executed by all proposed parties hereto.

AGREED: