

The Future of Online Music Distribution:  
Examining the Viability of A Digital First Sale Doctrine

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“Musicmatch Downloads are just like the music you buy from a retail store.”

-MusicMatch Website<sup>1</sup>

On September 3<sup>rd</sup>, 2003, George Hotelling placed an auction on eBay.com to sell a music song he owned.<sup>2</sup> This song was unlike most other music sold on eBay. Instead of auctioning off a vintage vinyl album, cassette tape or compact disc, he was attempting to sell a music file lawfully purchased from an online music distributor and fixed to his computer hard drive. He would transfer a copy of the music file to the highest bidder, while simultaneously deleting his copy. Additionally, he would provide shipping and handling at no cost to the purchaser. He bought the music file from the Apple’s iTunes music store for just \$0.99. At the time eBay removed his posting for violating its downloadable media policy, the going rate was \$15,099. Mr. Hotelling’s attempt to transfer a lawfully owned music file via online distribution raises many issues about the future of digital content ownership and the rights that come with such ownership, if any. Traditionally, a lawful purchaser of a cassette tape, compact disc or other material object embodying copyrighted material was free to sell or otherwise dispose<sup>3</sup> of that material object.<sup>4</sup> This right granted to purchasers is presently authorized under §109(a) of the Copyright Act of 1976 – known as the First Sale Doctrine. While lawful purchasers are free to dispose of a particular copy of a copyrighted work, they may not implicate any other exclusive right of the copyright owner, namely the right to reproduce the work.<sup>5</sup> Nevertheless, once a copyright owner distributes a copyrighted work, the owner can no longer wield control over that particular copy.

Traditional distribution models and concepts of copyright ownership, however, do not apply to the online landscape. The purchasing of a music file via online distribution is significantly different than purchasing a compact disc containing the music format. And, copyright owners have the capability to control their copyrighted works in the online landscape even after a first sale has been made. Ultimately, this precludes a purchaser’s ability to dispose of a music file in the same way a purchaser may dispose of a compact disc or other material object. It remains unclear whether the First Sale Doctrine applies to copyrighted material purchased through online distribution and even if it does, how viable the doctrine will be in the online landscape.

This article examines the application of the First Sale Doctrine to online music distribution. First, whether the statutory grant under §109(a) applies to online distribution of copyrighted material. Second, in the case that §109(a) does not apply, whether a digital First Sale Doctrine should be

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<sup>1</sup> MusicMatch website, at <http://www.musicmatch.com>.

<sup>2</sup> Paul Sweeting, *Talking Trade*, VIDEO BUSINESS, November 10, 2003, at 10.

<sup>3</sup> Dispose, for purposes of this article, is defined as the ability to transfer a tangible object from one person to another without retaining a copy of the tangible object.

<sup>4</sup> But see 17 U.S.C. §109(b) preventing the rental, lease, or lending of a sound recording without the authorization of the copyright owner.

<sup>5</sup> The First Sale Doctrine solely limits the copyright owner’s distribution right after a first sale has been made. The doctrine does not grant owners of a particular copy of a work the authority to reproduce the work and then distribute the reproduction.

legislatively enacted granting purchasers the ability to transfer<sup>6</sup> lawfully purchased online music files as they would compact discs or other material objects. Finally, if some form of a First Sale Doctrine does apply, what steps need to be taken to ensure free alienability of property ownership, while balancing copyright owners' incentive to create and make music content permanently available online.

### I. First Sale Doctrine: History & Policy

In 1908, the U.S. Supreme Court held that once the owner of a copyrighted work relinquished possession of a particular copy of that work, the owner could no longer control a lawful purchaser's subsequent disposition of that copy.<sup>7</sup> Alas, the First Sale Doctrine was created. The Court made clear the distinction between owning copyrighted material and owning a particular copy of the copyrighted material. Recognizing that lawful purchasers gained property rights in the material object and not the copyrighted material itself, the Court ruled against restraints on the alienation of tangible property.<sup>8</sup> The historical policy against restraints on property survives today, as evident from codification of the First Sale Doctrine in §109(a) of the Copyright Act of 1976.

The First Sale Doctrine has traditionally been applied to the disposition of a material object containing copyrighted material thereon, such as a soundrecording fixed onto a compact disc. As will be discussed below, in the online landscape lawful purchasers would not be transferring the material object. Rather, purchasers would be transferring music files (i.e. copyrighted material) from one material object to another. Such an ability to transfer arguably falls outside the scope of the policy against restraints on the alienation of tangible property, thus eliminating any rationale for application of a First Sale Doctrine to online transfers of lawfully purchased music files.

### II. Distinguishing Mediums of Ownership with Transfer of Format

Before the Copyright Act protects copyrightable material, the material must be "fixed in a tangible medium of expression."<sup>9</sup> Once it is fixed in a tangible medium, the Act recognizes protection in the expression only.<sup>10</sup> For instance, musical notation and lyrics contained in a songwriter's mind are ideas. But, in order to receive copyright protection, the songwriter must express the ideas onto a medium, such as staff paper. Once fixed, the Copyright Act classifies this particular copyrightable expression as a musical composition. When the songwriter sells this protected expression to a consumer, the consumer receives the expression embodied in a medium (i.e. the consumer receives the staff paper with the musical composition fixed thereon).

If the musical composition is performed and fixed in an audible form, the Copyright Act recognizes a separate protected expression classified as a soundrecording. The soundrecording is a combination of sound waves that creates music. The sound waves (i.e. soundrecording) must be fixed in a tangible medium before the Copyright Act affords protection in the expression. The soundrecording may be fixed within a number of mediums, including vinyl albums, cassette tapes, or compact discs. Thus, just as a songwriter sells copyrighted expression to a consumer via

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<sup>6</sup> Transfer, for purposes of this article, is defined as the ability to transmit a digital format from one medium to another medium, while simultaneously deleting the digital format from the medium of origin.

<sup>7</sup> *Bobbs-Merrill Co. v. R.H. Macy & Co.*, 210 U.S. 339 (1908)

<sup>8</sup> *Bobbs-Merrill Co. v. R.H. Macy & Co.*, 210 U.S. 339 (1908); S. Rep. No. 162, 98th Cong., 1st Sess. 4 (1983).

<sup>9</sup> 17 U.S.C. §102

<sup>10</sup> Lord Mansfield, in *Miller v. Taylor*, stated that the ownership in copyright is "a property in notion, and has no corporeal, tangible substance." (cited in *Bobbs-Merrill Co. v. R.H. Macy & Co.*, 210 U.S. 339 (1908)).

staff paper, an owner in a soundrecording copyright sells the expression of sound waves via a cassette tape or compact disc.<sup>11</sup>

In all cases, the medium (i.e. material object) captures the protected subject matter of expression. Sound waves (i.e. expression) are captured on the medium in either analog or digital format. The analog format is an exact replication of the sound wave. A digital format takes a sample of those sound waves, converts them into 0s and 1s, and transmits them onto a digital medium. For instance, the compact disc is a digital medium that captures a certain sample rate (i.e. digital format) that is classified “compact disc quality.”<sup>12</sup> MP3, and the newly introduced Advanced Audio Coding [AAC],<sup>13</sup> are other digital formats that are merely smaller samples of a sound wave. In this way, the MP3 sample rate (i.e. digital format) can be fixed on a compact disc, even though it is not “compact disc quality.” This is because the compact disc is a digital medium that captures particular expression, and is not the expression itself.

Before technology was widely available to the general public, the process of fixing a format onto a medium was left to recording engineers. Through personal computers, the process has become widely available. When online music distributors transfer music files to lawful purchasers they are sending the digital format not fixed in a medium. When the format reaches the purchaser’s computer, it is then fixed in the medium, namely placed on the hard drive. The format is already protected expression as a soundrecording because it has been fixed prior to online distribution. Nevertheless, online distribution solely transfers the format, unlike traditional distribution that distributes the format embodied on a medium. Ultimately, the purchaser is gaining possession over, and having the ability to transfer, something fundamentally and technology different than the digital music format captured on a medium.

### III. Application of the First Sale Doctrine

The First Sale Doctrine applies to formats of expression embodied in mediums, not to formats of expression themselves. Under the Copyright Act, all fixed expression embodied in a medium is classified as either a copy or a phonorecord<sup>14</sup> (not to be confused with the expression being classified as a musical composition or sound recording). Section 109(a) states,

“Notwithstanding §106(3) [the right of distribution], the owner of a particular copy or phonorecord lawfully made under this title [Title 17], or any person authorized by such owner, is entitled without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”<sup>15</sup>

The phonorecord identifies the medium (i.e. material object) that contains copyrighted expression thereon. Correspondingly, the First Sale Doctrine has always granted the lawful purchaser of a compact disc the authority to dispose of the underlying copyrighted expression contained on that disc, so long as the compact disc was simultaneously disposed of too. As discussed *supra*, however, online music distribution models are not selling copyrighted expression fixed on a medium (i.e. phonorecord).

Strictly based on a statutory analysis, it cannot be said that the First Sale Doctrine authorizes the transfer of the copyrighted expression (i.e. format) itself without being fixed in a phonorecord.

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<sup>11</sup> Incidentally, the musical composition is also fixed on the medium.

<sup>12</sup> Digital format at 160kbps (kilobytes per second) is considered compact disc quality.

<sup>13</sup> MP3 and AAC formats are samples of the audio signal at 128kbps, decreasing the file size.

<sup>14</sup> Phonorecord is “a material object in which sounds [] are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” §101.

<sup>15</sup> 17 U.S.C. §109(a).

Only after the format is transferred to a purchaser's computer does it become fixed to a phonorecord, namely a computer hard drive. To satisfy the requirements of the First Sale Doctrine, as written, the lawful purchaser of a music format would have to dispose of the hard drive.<sup>16</sup> Or, if the digital music format were uploaded onto a portable digital music player, the purchaser would have to dispose of the entire player. Such a result is merely form over substance.<sup>17</sup> It is impractical to require or expect the consuming public to remove their hard drives or sell their portable music players in the name of the First Sale Doctrine. A court could reasonably find that ownership in the format itself (as opposed to ownership in the copyrighted expression) is just like owning the format fixed in a phonorecord. Arguably then, the policy underlying the prevention of restraints on property should dictate that the lawful purchaser of a format not fixed in a phonorecord be allowed to dispose of that format in effectually the same manner as disposal of a compact disc containing copyrighted expression thereon. The statutory language of §109(a), however, in no way conforms to the fundamental and technological differences of ownership and transfer of a music format not fixed in a phonorecord.

#### IV. Ownership Rights in the Online Landscape

Section 201 of the Copyright Act explicitly distinguishes between ownership in copyrighted material (i.e. soundrecording) and ownership in a particular copy of that copyrighted material (i.e. phonorecord). The Copyright Act grants the owner of copyrighted material many rights to exploit that material. Once the owner exercises those rights to dispose of a copy of the material, the lawful purchaser is then afforded property rights in that particular copy. Ownership in the particular copy, and the concern against restraints on the alienation of property, serves as the foundation for developing a First Sale Doctrine.

In the online landscape, however, the lawful purchaser is not gaining traditional property ownership over a particular copy of copyrighted material. Rather, the lawful purchaser simply receives the copyrighted material. And although the copyrighted material is fixed in a medium (i.e. computer hard drive) once it is distributed, the ability to transfer the material not fixed in a phonorecord distinguishes the property ownership in online music formats versus ownership in a compact disc. Arguably, underlying policy driving traditional ownership rights should not apply in the online landscape.<sup>18</sup> The U.S. Supreme Court, however, has stated otherwise. In a case dealing with public performance right in musical compositions by radio signal, the Court stated "when technological change has rendered [the Copyright Act's] literal terms ambiguous, the Act must be construed in light of this basic purpose [to]...stimulate artistic creativity for the general public good."<sup>19</sup> It is questionable whether the current online music distribution models go far enough to balance copyright protection with the public's right of access to the copyrighted works.

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<sup>16</sup> Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 613 (2003); See also Brian Mencher, *Digital Transmissions: To Bodily Go Where No First Sale Doctrine Has Gone Before*, 10 UCLA ENT. L. REV. at 63 (2002).

<sup>17</sup> See generally, Bobby Rosenblum, *An Analysis of the DMCA Section 104 Report as it Pertains to the Music Industry*, ABA (2001).

<sup>18</sup> U.S. Copyright Office's Digital Millennium Copyright Act, § 104 Report (August 29, 2001) (The Register of Copyrights, in a Congressionally mandated report in 2001, found that the First Sale Doctrine was not applicable to the online landscape).

<sup>19</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 (1975) as discussed in Victor F. Calaba, *Quibbles 'N Bits: Making a Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. TECH L. REV. 1 (2002).

## V. Current State of Online Music Distribution

The online music distribution models being offered today are much different than the models of just a few years ago. To witness such an evolution in a short period of time is remarkable, given that standard distribution of compact discs has remained relatively stable throughout its history. Some models are beginning to provide consumers with more rights, albeit falling short of effectuating a First Sale Doctrine.

In the past, music was merely licensed to online consumers through streaming and limited downloads. Streaming only provided a music consumer with the ability to listen to music while online. And, limited downloads allowed the consumer to listen to the music for a certain amount of times (i.e. 10 times) or only a certain amount of days (i.e. 30 days) before it was deleted from the user's computer hard drive. Likely due to consumer demand for more ownership rights, online distributors have introduced newer versions of online music distribution.

Most notably, Apple iTunes and Napster 2.0 [Napster] have granted some of the most generous online distribution rights of all the models. Napster's basic plan is free to join. It sells "tracks" for \$0.99 each and full albums for \$9.99. Once a consumer purchases a track, the digital format is distributed onto the consumer's computer hard drive. In addition to ownership of that particular track, the consumer receives the right to burn the track on up to five compact discs and unlimited uploading on compatible portable music players. Napster also allows the consumer to obtain<sup>20</sup> copies of purchased tracks for use on up to two additional computers. The service offers a multitude of other features, including full-length streams and online radio for the \$9.95 per month premium membership.

Apple iTunes offers similar rights for the same price. Instead of limiting burning to five compact discs, however, iTunes offers unlimited burning, so long as the playlist is the same for each burned copy. The service also allows unlimited uploading onto portable music players, but only iPod models. And, a consumer may play songs on up to three computers, Macintosh or Windows compatible. Other online music distributors, such as MusicMatch and MusicNet, offer similar services. Rhapsody, on the other hand, remains a streaming audio service only. For a monthly subscription fee of \$9.95, a user can access the Rhapsody network and listen to music. The songs cannot be downloaded onto the user's computer hard drive, nor can they be transferred to a portable music player. They may only be burned onto compact discs for an additional \$0.79 per song per CD burned.

Even though online music distributors are beginning to offer greater access and music ownership to consumers, they still control content availability and ownership. A combination of copyright protection, the Internet's infrastructure, and technological control mechanisms guarded by the Digital Millennium Copyright Act<sup>21</sup> favor the rights of copyright owners over the traditional rights generally afforded purchaser's of copyrighted materials.

## VI. Copyright Protection, Technology, and Infrastructure: Precluding a Digital First Sale Right

The current online music distribution models are a large step in the right direction to balancing the public's right of use in copyrighted works with the copyright owners' rights to protect their works from infringement. More music is legally available online now than ever before. Legislation alone, however, cannot mandate a working First Sale Doctrine in the online

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<sup>20</sup> Napster is not specific whether obtaining a copy of the track on two other computers means only while signed on to the Napster system or an actual download onto the hard drive.

<sup>21</sup> The merits of the DMCA are not in question in this article. *But see* Peter Moore, *Steal this Disk: Copy Protection, Consumers' Rights, and the Digital Millennium Copyright Act*, 97 NW. U.L. REV. 1437 (2003); Katherine Elizabeth Macdonald, *Speed Bump on the Information Superhighway: Slowing Transmissions of Digital Works to Protect Copyright Owners*, 63 LA. L. REV. 441 (2003).

landscape. Copyright protections, the Internet's infrastructure, and technology mechanisms facilitate distribution models that control music availability and dictate music accessibility.

#### A. Copyright Protections – No Compulsory License in Soundrecordings

Copyright law protects the music industry's most important assets – musical compositions and sound recordings. The copyright owners in musical compositions, generally music publishers, cannot control the availability of their song catalog. Under copyright law, once compositions are publicly released in a phonorecord, composition copyright owners are required to grant licenses to those musical compositions for use in all other soundrecordings. Congress established this compulsory license in the hopes that it would prevent copyright owners from controlling record manufacturing.<sup>22</sup> In return, the government granted the copyright owners a statutory royalty (known as a mechanical royalty) paid by the licensee, currently set at 8.5 cents per musical composition used per sound recording distributed.<sup>23</sup>

The copyright owners in soundrecording copyrights, generally record companies, on the other hand, are not required to distribute their sound recordings, even after an initial public release has been made. In many respects, the recording industry has the power to control the availability of music. Being in the business of selling records, however, the industry distributes millions of copies of copyrighted works to the consuming public each year. The inability to control the works once they are distributed, along with a legal mandate granting consumers the right to dispose of their property, are realities the recording industry has come to live with.

Unlike traditional models of distribution, the online landscape affords copyright owners the ability to control access to copyrighted material even after it is distributed. And when copyright owners have the ability to exercise greater control over their copyrighted material, they dictate the future of music availability.<sup>24</sup> The choice of whether to license their soundrecordings to a particular online distributor is voluntary. Because the Copyright Act does not contain a compulsory license in soundrecordings for online distribution, the recording industry can selectively limit online distribution licenses to companies that do not facilitate a second-hand market, preventing any practical application of the First Sale Doctrine to the online setting.<sup>25</sup> Nevertheless, where the recording industry does choose to license its copyrighted works for online distribution, technology has enabled the industry to control access to its works even after initial distribution.

#### B. Technology

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<sup>22</sup> H.R. Rep. No. 60-2222, at 7 (1909), reprinted in 6 Legislative History of the 1909 Copyright Act, *supra* note 58, at S-1 *as discussed in* Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1628 (2001) (“The House feared that music copyright owners “by controlling these copyrights [would] monopolize the business of manufacturing [and] selling music-producing machines, otherwise free to the world”).

<sup>23</sup> 37 CFR 255.3 (2003).

<sup>24</sup> *See Ginsburg, supra* note \_\_\_ at 1634 (“If one believes that the market for hard copies is likely to recede as works become ubiquitously available through audio and video streaming and downloading, then digital networks will supply the principal markets for copyrighted works. This means that control over access to digitally distributed works will become the principal way in which exclusive rights are exercised.”).

<sup>25</sup> *See Ginsburg, supra* note 19 at 1630 (“When new technology develops a new mode of exploitation that does not supplant known markets for the work, and especially when copyright owners appear to be endeavoring to prevent the dissemination of that technology, Congress will split the difference between copyright owners and other entrepreneurs or users, by providing for compensation, but not for exclusive control over the new exploitation. On the other hand, where the new mode of exploitation threatens to replace or substantially compete with traditional markets, and when the new markets are ones the copyright owners seek to exploit, Congress will provide for exclusive rights.”).

In the online landscape, the copyright owner dictates access and availability to online music distribution. Once music is made available online, technology controls access and subsequent use of the protected works. In order to gain initial access to the copyrighted material, consumers must receive a password and/or pay a membership fee. After gaining access, consumers are limited in the extent of use they are granted in the lawfully purchased works. For instance, ability to listen to a music file fixed on a computer hard drive is restricted to a certain number of computers. Additionally, the music file is only playable on the distributor's compatible digital music player, and the consumer may only burn the file to a limited number of compact discs. Regardless of where the content ends up, the online distributor always has control over it. In fact, the online music distributors, through technological measures or lack thereof, have deliberately precluded the consumer's ability to transfer a music file not fixed in a phonorecord. And, the Digital Millennium Copyright Act prevents consumers from circumventing these technological controls, even in the name of the First Sale Doctrine. Technology has had an equal impact on the creation and structure of the Internet – an online landscape that promotes disconnected communities.

### C. Internet Infrastructure

The Internet's infrastructure facilitates isolated communities. Data contained in one community may not be available or accessible in another community. In online music distribution models, this infrastructure allows for the creation of models unthinkable in tangible goods distribution. For example, a consumer purchases two compact disc of the same popular album from Best Buy and Tower Records. The compact disc purchased from Best Buy is only compatible with disc players sold at Best Buy (or better yet, only disc players manufactured by Best Buy). Notably, the compact disc purchased at Tower Records is not compatible with the Best Buy disc player, and vice versa. The consumer can alleviate this problem by purchasing all compact discs from one store. That is, until a compact disc is not available at their store, requiring the consumer to purchase a compact disc and the compatible disc player from another store.<sup>26</sup>

This is the current state of online music distribution. Tracks purchased in one community cannot be accessed while in another community, nor can they be utilized on another community's portable music player. Even if a particular online distributor allowed consumers to transfer the music format not fixed in a phonorecord, the transfer would be limited to two users in the same online community. Combined with technological controls and lack of a compulsory license in sound recordings for online distribution, the First Sale Doctrine is far from implementation in the online landscape.

## VII. A Proposed Online Music Distribution Model: Applying the First Sale Doctrine

Current online music distributors have empowered consumers with the ability to dispose of lawfully purchased online music files. The ability to dispose of, in the traditional sense, is significantly different than the ability to transfer the music format that is not fixed in a phonorecord. The online music distributors current models provide the consumer with a limited right to burn music files to compact disc. Once the music format is fixed in a phonorecord, the compact disc, the First Sale Doctrine permits the consumer to dispose of that particular phonorecord (which is not limited to a particular music player).

If the First Sale Doctrine applies in the above example, and it is clear that it does, then online music distributors should preclude further access to the music format once it is burned onto a

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<sup>26</sup> This is notably different than, for example, Best Buy purchasing exclusive rights to The Rolling Stone's latest album. Best Buy is not also dictating that The Rolling Stone's compact disc can only be played on a Best Buy compatible music player.

compact disc. But they continue to provide access to the copyrighted work, even after it is burned onto multiple compact discs and potentially sold to third parties. Additionally, they permit consumers to upload the music format on to a number of portable digital music players and still allow the consumer to retain a copy on the computer hard drive. The rights granted by online music distributors are very consistent with the freedom consumers' gain over store-purchased compact discs. The distribution models have evolved, but the means to dispose of copyrighted works has not. The current online models embrace the new technology of distributing a music format not fixed in a phonorecord, but refuse to grant consumers with an equal ability to transfer that music format from their computer hard drives to another consumer's hard drive – facilitating a digital First Sale Doctrine.

This article suggests that a digital First Sale Doctrine not only promotes the underlying policy of copyright law to enrich public culture, but also aids marketing of the recording industry, which in turn, benefits its bottom line. The online music distributors, through their recording industry licensors, must realize that greater accessibility equals greater exposure, and ultimately greater profit margins. To fully employ a digital First Sale Doctrine, however, sweeping measures are required.

#### A. Congressional Legislation

When an online music distributor distributes the music file to a consumer, it is only the format that is being distributed. The current First Sale Doctrine does not apply to formats. Congress must enact a digital First Sale Doctrine that accounts for the technological maneuver that occurs when a music format is transferred from one hard drive to another.<sup>27</sup> The legislation must make clear that transfer of the music format to a third party must not implicate the reproduction right.<sup>28</sup> Based on the overreaching controls copyright owners exercise over copyrighted material, legislation alone cannot implement a First Sale Doctrine in the online setting.

#### B. Compulsory Licensing of Sound Recordings

Soundrecording copyright owners are not required to distribute their music online or license it out to online music distributors. Even if Congress did enact a digital First Sale Doctrine and an online music distributor created a model that enabled purchasers the ability to transfer a music format without being fixed in a phonorecord the copyright owners would refuse to license their works to that particular distributor. A compulsory license in soundrecordings is necessary to ensure that investment will be made in developing newer models of online distribution. Without assurance that copyright owners must license their works to all lawful online distributors, investors have no incentive to aide in the development of First Sale Doctrine technology. In 2001, Rep. Cannon proposed legislation mandating a compulsory license in soundrecordings – the Music Online Competition Act [MOCA].<sup>29</sup> Like the compulsory license in musical compositions, MOCA required soundrecording copyright owners to license their works to all similar distribution entities once an initial license was granted to an affiliated online distributor.<sup>30</sup> An amended law should trigger the compulsory license once a license is granted to any online

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<sup>27</sup> Since 1997, there have been three bills presented to the Congress that, in effect, incorporate the grant of the First Sale Doctrine to the transfer of music formats not fixed in phonorecords; See Digital Era Copyrighted Enhancement Act, H.R. 3048, 105<sup>th</sup> Cong. (1997); Digital Choice and Freedom Act, H.R. 5522, 107<sup>th</sup> Cong. (2002); Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1621, 108<sup>th</sup> Cong. (2003).

<sup>28</sup> But see Brian Mencher, *Digital Transmissions: To Boldly Go Where No First Sale Doctrine Has Gone Before*, 10 UCLA Ent. L. Rev. 47 (2002) for an article that proposes a business model that implicates the reproduction right but allows for payments to be transmitted to copyright holders.

<sup>29</sup> Music Online Competition Act of 2001, H.R. 2724, 107<sup>th</sup> Cong. (2001).

<sup>30</sup> Of course, like the Harry Fox Agency collects mechanical royalties on behalf of music publishers, an organization should be created to collect the royalties due recording companies for the compulsory licensing of soundrecordings.

distributor. Not until Congress enacts laws creating a digital First Sale Doctrine and make the licensing of soundrecordings to online distributors compulsory will an investment into developing the technology be undertaken.

#### C. Technological Development

The current online music distribution models are not programmed to facilitate, record, or police the transfer of a digital format not fixed in a phonorecord. In order to ensure that the transfer does not implicate the reproduction right, distributors would have to either prevent burning and uploading onto portable music players or once the consumer chose to burn and/or upload the digital format, disengage the transfer option. The technology is feasible. Like all other new technologies, the purchasing public will quickly come to understand their property rights in online music. The legal groundwork must be laid before the technology is developed and operational. Technology alone, however, cannot ensure the free alienability of music in the same way a compact disc may be alienated.

#### D. Broad-Based Community Infrastructure

Each online music distributor represents a separate and isolated community. Users from one community can only communicate with other users in that community. If First Sale Doctrine technology existed, the users of a particular community would be limited in the genres of music they could trade or sell and the amount of people they could trade or sell to. No single online distributor offers every soundrecording ever created. All music purchasers do not subscribe to the same online distributor. And, a music format purchased from one distributor might not be compatible with the media devices utilized by another distributor. It is not feasible to have every user register with each online distributor in order to effectuate the First Sale Doctrine.

As online music distribution grows in popularity, specialty distributors will begin to emerge. These distributors will focus in a specific genre of music or a specific artist, offering tracks that larger distributors would not make available due to storage space and administrative costs. If a First Sale Doctrine in the online landscape is going to work, there must be broad-based community infrastructure that 1) allows users from one community the ability to transfer a music format to other users in different communities and 2) ensure that the music format is converted to make it compatible with another online distribution model.

In the traditional distribution model, it would be unheard of to prevent a lawful purchaser from selling or trading a non-commercially released album from a local music store to a purchaser that shops at a commercial music outlet, but not the local store. A super distributor linked to all online music distributors is needed. The super distributor would serve as a transfer and conversion system enabling users from one music distributor the ability to transfer a music format to the user of another online distributor.<sup>31</sup> By using a super distributor, rather than requiring every distributor to create or utilize a universally compatible music format, the online distributors retain autonomy over their music catalogs and marketing strategy. In any case, the super distributor must be an organization operated with the participation of every online music distributor.<sup>32</sup>

#### E. Economic Incentive

Ultimately, the ability to initiate an operational digital First Sale Doctrine rests in Congress recognizing lawful purchasers' right to transfer the music format via online distribution and forcing the soundrecording copyright owners to license their works to online distributors. Future investors need assurance that the content will be available before they will invest in developing

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<sup>31</sup> Information about the operation of the super distributor is outside the scope of this article's general analysis.

<sup>32</sup> Each online music distributor would have to facilitate transfers through the super distributor, as well as provide the super distributor with its format requirements in order for the super distributor to perform conversion.

First Sale Doctrine technology. Surely the soundrecording copyright owners will not invest the money to develop a second-hand online music market that arguably usurps what would be otherwise first sales. With the legal foundation laid, copyright owners will become nearly irrelevant.

Even without legal foundation, however, copyright owners should develop and embrace First Sale Doctrine technology. Some commentators have argued that a second hand market actually results in more first sales by allowing consumers to offset initial costs through a subsequent sale.<sup>33</sup> This argument is equally applicable to the online landscape. Most importantly, the model proposed in this article opens up a market once dominated by the major record labels. And, it is to the benefit of the major record labels too. By empowering consumers, this proposed distribution model enables millions of music purchasers to teach others and learn about new forms of music. In turn, this equates into a larger percentage of the consuming public utilizing online music distribution, and ultimately, larger online music sales spread over a larger percentage of musicians.<sup>34</sup> In the case of the independent labels, it allows them to reach users in other distribution models that do not license the independents' catalogs. The major labels also benefit from the promotion garnered for less marketed artists. The cost of initially releasing albums online is significantly less than a full marketing campaign and compact disc manufacturing. If this model is successful, the record labels need not necessarily continue searching for hit records, nor have to worry about large overhead costs for promoting new artists. Instead, they can place the artist in the online distribution stream and see how far word of mouth takes them (how up-and-coming musicians gain local and regional popularity through live performances).

#### VIII. Conclusion

Online music distribution is far from implementing a digital First Sale Doctrine. It is not as simple as enacting legislation that grants music purchasers the ability to transfer a digital format not fixed in a phonorecord. A convergence of law, technology, Internet infrastructure, and economic incentive must be present before a viable digital First Sale Doctrine can flourish in the online music distribution model.

Public access to creative works is the foundation by which copyright law was established in the United States. The ability to dispose of lawfully purchased property is equally important to the balance between copyright owners and consumers. If these policies underlying copyright law apply in the online landscape, then property ownership in a music format should be alienable like all other property. Digital formats are not mediums containing information, but they certainly might fit within the broader definition of property. If market demand shapes the marketplace, as online music distribution gains in popularity, more challenges on the application of copyright law in the online setting should be expected. George Hotelling is just the beginning.

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<sup>33</sup> See e.g., Justin Graham, *Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape*, 2002 STAN. TECH. L. REV. 1 (2002).

<sup>34</sup> Refer to John Schwartz, *For the Ex-Buccaneer, A Pillage-Free Playlist*, N.Y. TIMES, January 1, 2004, at G1 for a fantastic summary of the current state of online music distribution and the benefits of providing greater public access.