LIVE PERFORMANCE, COPYRIGHT, AND THE FUTURE OF THE MUSIC BUSINESS

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I. INTRODUCTION

A great rock show can change the world, some claim, but can concerts save the popular music business? Since squeezing revenue out of exploiting copyrights in recorded music has become increasingly difficult, many contend that live performance will become the focal point of the music business. The common claim is that the concert business will support not only itself, but also finance the production of studio recordings. This article considers the viability of business models based on linking freely available recordings to other revenue-producing activities, particularly live performance.

As it becomes ever more difficult to persuade people to pay for recorded music, some suggest that live performance is the last economic redoubt for musicians—the only unique, excludable, non-duplicable product left in the music business. David Bowie summed up the argument nicely in a *New York Times* interview several years ago:

> "I'm fully confident that copyright . . . will no longer exist in 10 years, and authorship and intellectual property is in for such a bash-

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> ing. Music . . . is going to become like running water or electricity. . . . [T]ake advantage of these last few years because none of this is ever going to happen again. You'd better be prepared for doing a lot of touring because that's really the only unique situation that's going to be left."[1]

Bowie is hardly alone in his visionary musings. It is commonplace wisdom that most musicians make their money on tour,[2] and popular commentators regularly proclaim that the era of copyright is over and the era of live performance is at hand.[3] Typically, they believe that musicians will continue to make recordings in order to build support for their concert business.[4]

The music business certainly would continue in some form if copyright protection for recorded works became wholly ineffective. The recording business is only a subset of the music business. Unlike most other creators—for example, the authors of novels and the creators of movies—musicians have an alternative stream of revenue from live performance that existed long before copyright and has continued to exist alongside copyright-centered business models.

The important questions are thus not about the health of the entire music business or the viability of the existing businesses in the industry. Change is inevitable. The question is how and why recordings will be made. If musicians had to finance records with indirect revenues from touring, how would such a business model

1. Jon Pareles, *David Bowie, 21st-Century Entrepreneur,* N.Y. TIMES, June 9, 2002, § 2, at 1.

2. *See, e.g.,* Peter Kafka, *Concert Tours Are Where the Real Money Is*, ABC NEWS, July 11, 2003, http://abcnews.go.com/Business/story?id=86535&page=1 ("'The top 10 percent of artists make money selling records. The rest go on tour,' says Scott Welch, who manages singers Alanis Morissette and LeAnn Rimes.").

3. *See* Posting of Chris Anderson to The Long Tail Blog, http://www.longtail.com/the_long_tail/2007/01/give_away_the_m.html (Jan. 28, 2007 20:06 EST) ("Music as a digital product enjoys near-zero costs of production and distribution—classic abundance economics. When costs are near zero, you might as well make the price zero, too, something thousands of bands have figured out. Meanwhile, the one thing that you can't digitize and distribute with full fidelity is a live show. That's scarcity economics.") [hereinafter Posting of Chris Anderson]; *see also* John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, *available at* http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html ("One existing model for the future conveyance of intellectual property is real-time performance, a medium currently used only in theater, music, lectures, stand-up comedy, and pedagogy. I believe the concept of performance will expand to include most of the information economy, from multicasted soap operas to stock analysis. In these instances, commercial exchange will be more like ticket sales to a continuous show than the purchase of discrete bundles of that which is being shown.")

4. *See* Posting of Chris Anderson, *supra* note 3.

affect the quantity, quality and variety of recordings that consumers would enjoy?

For insight, this article draws on two bodies of literature from economics. The research on the economics of copyright has a great deal to say about business models that may allow the producers of copyrighted works to benefit from widespread copying.[5] The cultural economics literature, very rarely discussed in United States legal copyright literature, has even more to say about the viability of live performance as an economic activity.[6] This article draws lessons from these two bodies of literature to consider the viability of a live-performance-based recording industry.

There are two keys to a sustainable business model based on indirectly profiting from sharing or widespread copying. First, there must be a link between the free availability of copies and the demand for a revenue-producing good or service.[7] Second, the revenue-producing activity has to be sufficiently remunerative—ideally, gains will offset the revenue lost to foregoing direct sales, but at the very least, gains must cover the costs of making a recording, both production costs and opportunity costs.[8] To the extent either of these conditions is not met, one can expect a reduction in the quantity, quality, or variety of music-produced copies.[9]

The nature of live performance makes it an economically challenging activity. In this article, I discuss data that I have collected that indicates older, very well-established acts with portfolios of hit records benefit most from touring and may benefit from file sharing as well.[10] Additional data shows, however, that the "middle-class" of the music business may not be doing as well, as ticket prices appear to have remained relatively stagnant over the last ten years.[11]

Part I begins by putting live-performance-based models into the context of the rapidly changing music industry. The proposed live performance models, as well as other "free" business models, deserve serious consideration and response, as the music busi-

5. *See* discussion *infra* Part III.
6. *See* discussion *infra* Part IV.B.3.
7. *See* discussion *infra* Part III.B.1.
8. *See infra* notes 155–56 and accompanying text.
9. *See* discussion *infra* Part III.B.2.
10. See *infra* Part IV.B.2, fig.1.
11. See *infra* Part IV.B.2, fig.2.

ness is too much in flux to disregard any potential business model. Part II then summarizes the literature regarding the economics of business models that indirectly benefit from copying. This part considers two case studies of businesses that exploit alternative models for financing content: Red Hat's Enterprise Linux and Ganz's Webkinz stuffed animals and online games. Part III applies these lessons to the music business. Part IV concludes by examining the relative benefits of "free" models and models based on direct exploitation of copyright.

II. LIVE PERFORMANCE AS AN ALTERNATE MODEL FOR FINANCING THE CREATION OF RECORDED MUSIC

I have great confidence that we will have the best record company in the industry, but the reality is, in today's world, we might have the best dinosaur. Until a new model is agreed upon and rolling, we can be the best at the existing paradigm, but until the paradigm shifts, it's going to be a declining business. This model is done.

Rick Rubin, Co-Chairman, Columbia Records, September 2007[12]

One of the most pressing questions in the popular music industry today is finding a viable business model for the future. While change is a constant in most businesses, large and mature industries rarely endure changes as rapid and all-consuming as those the music business is currently facing. Digital technology and networks are presenting new opportunities and challenges of an historic nature, and those opportunities and challenges, as consuming and transformative as they are, appear ordinary next to the existential threat represented by file sharing and other forms of widespread unauthorized consumer copying.[13] Paying for music seems to have become voluntary.[14]

Such challenges naturally have participants and interested observers of the music business considering and experimenting with

12. Lynn Hirschberg, *The Music Man,* N.Y. TIMES, Sept. 2, 2007, § 6 (Magazine), at 26, *available at* http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html?pagewanted =5&_ r=1.

13. *See* Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKLEY TECH. L.J. 651, 658–62 (2006) (discussing file sharing and unauthorized consumer copying).

14. *Id.* at 655.

many potential new business models. Few proposals are too radical to merit serious consideration given the state of the record business. While the sentiment that musicians can no longer rely on copyright is radical, it is not completely out of bounds.

This part of the article puts the proposed live performance model for financing recordings in the context of the wide variety of business models being considered by the industry. It first describes the transformative pressures that are reshaping the music industry; it then surveys the recording business's serious consideration of alternatives to copyright-supported, direct sales models; it describes proposed live-performance-based business models and support for them in greater detail; and finally, it explains why the viability of live performance as an alternative model is a relevant and important question for copyright law.

A. *The Pressure To Transform Business Models and the Pressure on Copyright*

The recording industry is struggling to adapt to four challenges, any one of which would probably be sufficient to transform its business. First, as is well known, copyright enforcement has become much more difficult as technology has enabled consumers to copy with ease on a mass scale.[15] Payment has, in some sense, become voluntary for large portions of the population.[16] Second, the cost of recording has declined as recording technology and editing tools have been transformed by new digital technology and software.[17] Third, the costs of producing and distributing copies of recording is falling as online delivery dramatically extends the potential reach of recorded music, while reducing costs by eliminating the need for most physical infrastructure.[18] Fourth, online communications and communities have opened up new ways to communicate with potential listeners and fans.[19] This change transforms the marketing and promotion of recordings, while potentially reducing costs.

15. *See id.* at 658–68.

16. *Id*. at 655.

17. *See* Urs Gasser et al., *iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media—A Case Study*, 54 (The Berkman Center for Internet & Society at Harvard Law School, White Paper 2004), *available at* http://cyber.law.harvard.edu/media/uploads/81/iTunesWhitePaper0604.pdf.

18. *See id.*

19. *See* Schultz*, supra* note 13, at 670–75.

These challenges are affecting and changing every link in the chain that brings recorded music to consumers, as well as the financial model that supports this chain. Some of the changes present opportunities—challenging ones, but opportunities nonetheless. Others, like file sharing, are calling into question the viability and necessity of existing business models and of the institutions like copyright law that support them.

Until the turn of this century, the structure of the record business was fairly settled and stable in its broad, general outlines, relying on record companies and copyright to make it work.[20] The process of getting music to consumers was a relatively high-risk, high-cost proposition.[21] Record companies have played an essential (albeit much-maligned) role of absorbing both the risks and the costs in the recording business.[22] The risk in the recording business results from the uncertainty inherent in creative endeavors. Nobody is really certain whether a new type of music, new artist, or new recording will excite consumer demand.

Record companies manage risk by launching large numbers of new acts, compensating for the many misses in their portfolios with the hits.[23] The costs of recording, promotion, and distribution, until recently, have been significantly higher than the typical musical act could self-finance at the beginning of its career.[24] Record companies have the resources to finance these activities. In exchange, the companies enjoyed the opportunity to profit from selling recordings (usually taking the lion's share). So long as enough of the record label's bands hit, the company would make money. One of the linchpins of the system was copyright: given

20. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 81–86 (2000).

21. *See id*. at 81–84.

22. This is a somewhat stylized version of the role of record companies. Standard record contracts are reviled for pushing as much of the risk and cost back on bands as possible, which is usually a lot, given the weak bargaining power of bands signing their first record deals. Record companies provide bands with advances to pay the costs of recording, video production, radio promotion, and other expenses, and then the label recoups expenses from the band's royalties. *Id*. at 110, 114. The typical record deal ensures that the label, and everyone else involved, gets all expenses paid out of royalties and all of its money out first, long before the band. *See id.* at 88–91; *see also* Chuck Philips, *A Woman of Independent Means; Ani DiFranco's Got a Great Royalty Rate—It's Her Label*, L.A. TIMES, July 5, 1996, at D1. Still, if the record does not sell, the record label swallows the losses. *See* PASSMAN, *supra* note 20, at 105. Any entrepreneur who has taken money from venture capitalists is familiar with the scenario: investors always get paid first.

23. *See* Philips, *supra* note 22.

24. *See id.*

the ease of copying music, record companies could not have accepted such risks or incurred such costs if competitors could have appropriated their revenue stream through copying.

Changing technology has challenged the viability of this long-standing model enabled by direct exploitation of copyright. Most urgently, file sharing and other forms of mass consumer copying have introduced a new kind of risk into the recording business. The new risk is that copyright will no longer assure that those financing recordings—artists, record companies, or others—have *any* opportunity to recoup their costs by selling recordings. Even popular recordings will lose money if people simply copy them instead of buying them. This kind of risk, as opposed to ordinary business risk, is intolerable. It thus has players in the music business casting about for alternate ways to make money and more secure revenue streams. Some change in the business model seems inevitable.

At the same time, changing technology has also challenged the *necessity* of the long-standing business model embodied by traditional recording companies. As the cost of creating recordings falls, self-financing becomes less difficult.[25] Similarly, digital distribution drastically reduces the costs of getting music to consumers.[26] The Internet provides nearly costless means for promoting and marketing recordings. All of these cost reductions call into question the traditional rationales for recording companies. If up-front costs are lower, then less assistance is needed to bring recordings to market. Moreover, although consumer tastes may be as unpredictable as ever, lower costs reduce the consequences of failure. Musicians and other third parties may thus be able to bear the risk of commercial failure themselves without needing to engage in the sort of broad "risk-pooling" practiced by record companies. Thus institutional change also seems likely; not only

25. Jen Fish, *Getting the Rock out,* PORTLAND PRESS HERALD (Me.), May 22, 2006, at D1. ("The digital age is here and the result is cheaper and easier to use audio/video equipment, which means that today's aspiring rock 'n' roll stars can make music and promote themselves easily.") There are still some costs that are often overlooked in a rush to embrace the romantic vision of a musician recording a song in his living room, posting it on a social networking website, and finding an audience overnight. *See* Fish, *supra*; *see also* WILLIAM BAUMOL & WILLIAM BOWEN, PERFORMING ARTS—THE ECONOMIC DILEMMA 169 (1966).

26. *See* Revella Cook, *The Impact of Digital Distribution on the Duration of Recording Contracts*, 6 VAND. J. ENT. L. & PRAC. 40, 40 (2003).

will business models change, but new players are likely to emerge.

Indeed, the opportunities presented by the reduced need for record labels have not been lost on musicians and their potential business partners. Over the past decade, it has become more legitimate and lucrative for musicians to go it alone. Artists with relatively modest followings have achieved financial and critical success with this strategy. For example, critical favorite Ani DiFranco has made a decent living producing music on her own record label since 1990.[27] As an independent, self-published artist, Australian John Butler enjoyed commercial success in Australia and won several Australian Record Industry Association awards (the Australian equivalent of the Grammy awards) in 2004.[28] Butler has since gone on to sell records and perform throughout the world, including an extensive North American tour.[29]

The year 2007 may have marked a milestone in the end run around the record labels, as blockbuster acts followed in the footsteps of independents. The Eagles entered a successful exclusive, non-label distribution deal with Wal-Mart.[30] Paul McCartney and Joni Mitchell did a similar deal with Starbucks, as did the Spice Girls with Victoria's Secret.[31] Madonna also spurned the record labels, signing a $120 million deal with concert promoter Live Nation for two albums and exclusive touring rights for ten years.[32] Since then, AC/DC has struck its own deal with Wal-Mart,[33] and other performers, including rapper Jay-Z, have done deals with Live Nation.[34] In short, easier and more open distribution and reduced costs have made it more attractive for artists and new players in the business to cut out the record labels en-

27. Philips*, supra* note 22.

28. John Butler Trio, Biography, http://www.johnbutlertrio.com/bio.php (last visited Dec. 20, 2008).

29. *Id.*

30. Joan Anderman, *Life in the Vast Chain amid a Shifting Industry Landscape: The Eagles Partner with Wal-Mart,* BOSTON GLOBE, Oct. 28, 2007, at N1.

31. *Id.*

32. Ethan Smith, *Live Nation's New Act: Concert Giant Seeks More Business Areas Where It Can Lead*, WALL ST. J., Nov. 30, 2007, at B1; *Madonna Leaves Warner for Concert Promoter*, L.A. TIMES, Oct. 17, 2007, at C7.

33. *See* Ed Christman, *Thunderstruck: Retailers Smarting at Wal-Mart's AC/DC Exclusive*, BILLBOARD, June 21, 2008, at 5.

34. *See* Jeff Leeds, *In Rapper's $150 Million Deal, New Model for Ailing Business,* N.Y. TIMES, Apr. 3, 2008, at A1.

tirely, allowing them to retain a greater portion of the rewards from any success.[35]

These circumstances have put most of the pieces in the recording business in play; what happens next is anybody's guess. With the dire threat of consumer copying to spur them on, music-industry players and observers are proposing and experimenting with a myriad of new business models. Much of the conventional wisdom and most of the settled arrangements in the music business are now subject to question.

The possibility for dramatic change seems even more convincing when one considers just how dramatic the changes in the recorded music businesses have already been. Some of the more settled, mainstream parts of today's music business appear to be extraordinary innovations from the vantage point of about fifteen or twenty years ago. For example, online retailers like Amazon.com have vastly expanded the inventory of music available to consumers.[36] The typical Wal-Mart carries about five thousand albums; Amazon carries about a million.[37] This development created a greater potential for niche markets while reducing distribution costs.[38] Also, online services like CDBaby have allowed musical acts without a record deal to make money distributing professionally copied and packaged CDs.[39] Finally, iTunes proved the viability of online commercial distribution, while the iPod and other MP3 players have changed the way people buy music (by the track) and where they take their music (everywhere).[40] These once remarkable but now commonplace business developments presage even greater changes to come.

We thus are in a time where even the most seemingly revolutionary proposals must be taken seriously. Business models are rapidly changing and very few proposals are off the table any-

35. *See* Devin Leonard, *Big Musicians Flex Their Muscle with Record Labels*, FORTUNE, Aug. 21, 2006, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2006/08/21/838 3597/index.htm.

36. *See* CHRIS ANDERSON, THE LONG TAIL 155 (2006) (discussing the effect of increased consumer choice created by online retailing) [hereinafter ANDERSON, THE LONG TAIL].

37. *See id.*

38. *See id.* at 5–6.

39. Antony Bruno, *How To Pull a Radiohead*, BILLBOARD, Oct. 25, 2008, at 12.

40. *See* Sandra Barrera, *Carry a Tune; Apple's iPod and Its Competitors Are Changing the Way We Listen to Music*, DAILY NEWS OF L.A., Jan. 25, 2005, at U4.

more, including the record business's copyright-based reliance on direct sales of music.

B. *Serious Alternatives to Copyright-Centered Business Models*

The dramatic transformation of the music business has led many to believe that the future of recorded music lies elsewhere than with copyright. Some of the new business models being seriously considered by the music industry and commentators thus would completely or partly abandon reliance on the direct exploitation of copyright. These discussions and experiments are driven by a combination of pessimism and optimism about the future—pessimism about the viability of directly selling music and optimism about the declining costs of production, distribution, and marketing.

Some of the proposals betray a hint of desperation, or at least indicate a hope that virtue can be made of necessity. For example, Rick Rubin, Co-Chair of Columbia Records, has observed that the current business model based on direct sales of physical product is "done."[41] He has also expressed the opinion that the iTunes' direct digital sale model would become obsolete.[42] Instead, he contended that a monthly subscription model would allow consumers to download all the music they wanted for a flat monthly fee which, in his estimation, could grow the music business to ten times its current size.[43] Rubin's status as a "guru" [44] perhaps encourages such visionary pronouncements. Other music industry executives of equal rank, but lacking guru status, are more willing to admit to cluelessness. For example, Doug Morris, CEO of Universal Music Group, recently admitted that the record business "just didn't know what to do [about digital technology]. It's like if you were suddenly asked to operate on your dog to remove his kidney. What would you do?"[45] After long battling change, Morris has pushed forward digital-rights-management free music

41. *See* Hirschberg, *supra* note 121.
42. *Id.*
43. *Id.*
44. *See, e.g.*, Sarah Rodman, *Metallica's "Death" Has Plenty of New Life*, BOSTON GLOBE, Sept. 12, 2008, at D1.
45. Seth Mnookin, *The Angry Mogul,* WIRED, Dec. 2007, at 202, 208.

sales on online retailers and has moved to create a fixed, monthly fee online subscription service called Total Music.[46]

Despite the fact that Rubin and other commentators sometimes hail online subscription services as a new idea, they have actually been up and running for a number of years. Napster, once the scourge of the music industry, was reborn a few years after its litigation-induced demise as a subscription service that focuses on large, university customers.[47] The services typically enter agreements with universities that pay a flat, per-student fee.[48] Some users complain about the limitations on the services—there are restrictions on transferability[49] and downloads expire with the user's subscription[50]—but they appear to be a significant, although thus far limited, alternative to the older direct sale model.

Another proposed model that abandons the centrality of copyright is the government-administered collective license. This model, embraced by a number of scholars, would allow consumers to download music (and perhaps other media) for personal use, free of copyright restrictions.[51] To support the recorded music industry, the public would pay a tax or "levy" on income or on some set of goods used to copy or enjoy music.[52] Detailed discussion of

46. *Id.*

47. *See* Nick Wingfield, *College Students To Get Free Access to Napster Service*, WALL ST. J., Nov. 7, 2003, at B5.

48. *See id.* (noting one such agreement between Napster and Penn State University). Penn State has since switched to Ruckus, an online ad-supported subscription service that boasts over 700,000 subscribers as of fall 2007. William Colsher, *Ruckus Gains Users*, DAILY COLLEGIAN (State College, Pa.), Sept. 20, 2007 *available at* http://www.collegian.psu.edu/archive/2007/09/20/ruckus_gains_users_2. aspx.

49. Ruckus is not compatible with Macintosh computers. *See* Leslie Finlay & Lauren McCormack, *PSU Signs with Ruckus, Ends Service with Napster*, DAILY COLLEGIAN (State College, Pa.), Apr. 27, 2007 *available at* http://www.collegian.psu.edu/archive/2007/04/04-27-07tdc/04-27-07dnews-07.asp. The songs may not be transferred to an iPod, and there is a fee to burn songs to a compact disc. *Id.*

50. Amanda DeBard, *Piracy Legislation Would Require Colleges To Act*, DAILY TEXAN, Nov. 15, 2007.

51. A number of prominent scholars have proposed various forms of compulsory or blanket licensing as an alternative to the current system of direct sales of recordings. *See, e.g.*, WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 199–203 (2004); Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 57–66 (2004). *See generally* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003).

52. *See* FISHER, *supra* note 51, at 217–23; Gervais, *supra* note 51, at 4–7; Ku, *supra* note 51, at 311–22.

this model is beyond the scope of this article, but it represents yet another proposed departure from the copyright-centric direct sales model.

Other scholars have contended that falling costs and alternate forms of production enabled by networked communications obviate the need for full exploitation of copyright. Some, notably Yochai Benkler, have celebrated the possibilities of amateur production as a replacement for the exploitation of copyright.[53] The Creative Commons movement, spearheaded by Larry Lessig, encourages creators to renounce some of their rights in an effort to grow the public domain and encourage collaboration.[54]

As of this writing, the mainstream music industry seems more willing than ever to engage in radical experimentation. For example, in October 2007, the popular band Radiohead tried an experiment with a "tip jar" model of remuneration.[55] Fans could download advance .mp3 files of Radiohead's latest, self-released album in exchange for a self-determined price—which could be set as low as zero.[56] Radiohead has not released sales figures, but some fairly unscientific estimates are that it collected $6 to $10 million in revenues on the first 1.2 million downloads during the initial days of the experiment.[57]

C. *Live Performance as a Business Model for Supporting the Recording Industry*

Yet another alternative business model for the record business proposed by some is the subject of this article: reliance on revenues from live performance. Some contend that even if enforcing copyright against consumer copying were completely impracticable, performers would still make recordings in order to spur demand for concert tickets. In discussing this article, I have found that a significant minority is surprised that the live-concert-based model is advocated or taken seriously at all, while another sizable

53. *See generally* YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006).

54. LAWRENCE LESSIG, FREE CUTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 282–86 (2004).

55. *See* Posting of Eliot Van Buskirk to Wired Blog Network: Underwire, http://blog.wired.com/underwire/2007/10/fans-to-determi.html (Oct. 1, 2007, 13:10 EST).

56. *Id.*

57. Posting of Eliot Van Buskirk to Wired Blog Network: Listening Post, http://blog.wired.com/music/2007/10/estimates-radio.html (Oct. 19, 2007, 11:35 EST).

group finds the model to be beyond question.[58] It is therefore worthwhile to describe the support that this model has and some of the reasons for that support.

In a deal that has been heralded by some as a sign of things to come, the world's largest concert promoter, Live Nation, struck a $120 million deal with Madonna that "makes Live Nation the pop star's exclusive partner for merchandise, recorded music, touring and other music-related businesses for 10 years."[59] The arrangement has garnered a great deal of attention for both its novelty—a concert promoter acting as a record label—and size.[60] The parties believe that this large, innovative deal is justified by a reversal of the traditional relationship between the record business and the performance business.[61] Madonna's manager, Guy Oseary, described the change this way: "In the past, people would tour to promote their albums; today they put out albums to promote their tours. . . . The pendulum has swung, and Live Nation is at the forefront of touring."[62]

Many share this view of the ascendance of the live performance business, leading them to contend that live performance and other related revenue sources hold the key to the future of the recorded music business. Proponents of this model believe that directly charging consumers for recorded music is becoming less viable, but that musicians will still produce recordings because they serve an important promotional function.[63] As a Live Nation executive described the rationale for the recording portion of the Madonna deal, the company was not motivated by the opportunity to make money selling recordings, but instead planned to "balance the album-related expenses against revenue from more profitable businesses like merchandise."[64] Recording is thus seen as a necessary promotional expense for other, more profitable businesses like touring and merchandising.[65]

58. *See infra* Part IV.
59. Smith, *supra* note 32.
60. *See id.*
61. *See id.*; *Madonna Leaves Warner for Concert Promoter*, *supra* note 32.
62. Smith, *supra* note 32.
63. *See id.*
64. *Id.*
65. *See id.*

There is plenty of precedent for supporting the creation of original music through live performance. Before recording technology ever existed, some musicians supported the creation of new music with performance. For example, Mozart sold subscriptions to works-in-progress, entitling his subscribers to attend the performance of the completed work.[66] Beethoven derived some of his income from his great skill as a pianist, and he created a competitive advantage as a performer by creating original compositions so difficult that only he could play them well.[67] Today, many musicians continue to make a living by performing their own works and those of others. Some superstars like Madonna, U2, and the Rolling Stones make a fortune.[68] Some do not make much, but to the extent they are making anything at all, it is mostly income from performance. Jazz and folk musicians, symphony orchestras, and jambands often fall into this category.

As copyright owners find it increasingly difficult to prevent unauthorized copying, the unique, excludable nature of live performance begins to look relatively more attractive. Popular technology business writer Chris Anderson[69] describes the attraction like this:

> Music as a digital product enjoys near-zero costs of production and distribution—classic abundance economics. When costs are near zero, you might as well make the price zero, too, something thousands of bands have figured out. Meanwhile, the one thing that you can't

66. MAYNARD SOLOMAN, MOZART: A LIFE 290–92 (1995).

67. BARRY COOPER, BEETHOVEN 45 (2000); *see* MAYNARD SOLOMAN, BEETHOVEN 78 (2d ed. 1993).

68. *See* Daryl D, *Twenty-Five Years After Her Debut, Madonna Still Leads the Way*, BLOGCRITICS MAGAZINE, Oct. 12, 2007, http://blogcritics.org/archives/2007/10/12/082750.php; Louis Hau, *Another Record Year for the Concert Industry*, FORBES, Jan. 4, 2008, *available at* http://www.forbes.com/2008/01/04/concert-revenues-2007-biz-media-cx_lh-0104bizconcert.html; *Rolling Stones, U2 Help Drive Concert Revenues to Record in 2005*, USA TODAY, Dec. 29, 2005, *available at* http://www.usatoday.com/life/music/news/2005-12-29-concert-tour-money_x.htm.

69. Anderson is currently editor-in-chief of *Wired* magazine and author of the best-selling business book *The Long Tail*. *See* About Me, Long Tail FAQ, http://www.thelongtail.com/about.html (last visited Dec. 19, 2008). Anderson's much-heralded "Long Tail" theory describes the consequences of a new economics of abundance, where producers and retailers are able to make a vast amount of digitized content available to consumers on demand at low cost. *See* ANDERSON, THE LONG TAIL, *supra* note 36, at 5. Among the consequences celebrated by Anderson are vastly improved opportunities for niche producers and greater satisfaction of consumer preferences because of improved choices and increased variety. *See id.* at 6, 8–9. Anderson's primary insight is that there are tremendous business opportunities that have heretofore not been exploited in the "long tail" of the distribution of demand. *See id.* at 10–11.

> digitize and distribute with full fidelity is a live show. That's scarcity economics.[70]

As recordings come to resemble public goods (non-excludable and non-rivalrous in consumption), some see the salvation of the music business as lying in the non-copyable, eminently excludable live concert experience.

Many other commentators have shared Anderson's belief in the performance-based business model for recorded music, with various levels of enthusiasm. Activist and songwriter John Perry Barlow[71] was an early promoter of live performance in an influential and sweeping 1994 essay that questioned the viability of intellectual property, predicting that the model of "real-time performance, a medium currently used only in theater, music, lectures, stand-up comedy, and pedagogy . . . will expand to include most of the information economy."[72]

Some copyright scholars, while less bombastic than the popular press, have embraced similar visions of live performance playing a central role in the music business. For example, Yochai Benkler has forecast the end of the era of copyright as a means for supporting the production of music:

> The solution must assume that peer-to-peer file sharing is here to stay and that attempting to stamp out flexible, adaptive, general-purpose personal computers and criminalize one of our most basic social-cultural practices will, and ought to, fail. Once we understand that, we can focus our energies on the range of solutions that have been suggested—from government funding to tip jars and performances—that aim at preserving the livelihood of artists, not the twentieth-century business model of industrial cultural production.[73]

70. Posting of Chris Anderson, *supra* note 3.

71. Barlow is a lyricist for the Grateful Dead and other bands and was co-founder of the technology-related civil liberties group the Electronic Frontier Foundation. *See* Barlow, *supra* note 3.

72. *Id.*

73. Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production,* 114 YALE L.J. 273, 353 (2004) (citations omitted).

Several economists who study copyright have advocated similar views,[74] as has the Nobel Prize-winning economist and *New York Times* columnist Paul Krugman.[75]

Perhaps most consequentially of all, record labels, desperate to find new revenue streams, have begun to seek a portion of tour revenue in so-called "360 deals."[76] Signaling this new thinking, Warner Music Group ("WMG") chair Edgar Bronfman, Jr. abandoned the label "record company" in 2007 and instead took to referring to WMG as a "music based content company"[77] as he touted the development of new revenue streams other than the direct sale of recorded music, including from touring. [78] Although the details of 360 deals are not yet widely reported, *The New York Times* gained access to a 360 deal offered by Atlantic Records.[79] It included the "conventional cash advance to sign the artist, who would receive a royalty for sales after expenses were recouped," but it also included an "option to pay an additional $200,000 in exchange for 30 percent of the net income from all touring, merchandise, endorsements and fan-club fees."[80] Some record industry executives contend that these deals will benefit not only the industry by giving it a fresh revenue stream, but will also benefit artists by allowing record labels to invest more patiently in an artist's career by freeing the labels from the "tyranny of mega-hits."[81]

Not everyone is sold on the viability of the new 360 deals or the Live Nation/Madonna deal. "Many talent managers view 360s as a thinly veiled money grab and are skeptical that the labels, with

74. *See* Amit Gayer & Oz Shy, *Publishers, Artists, and Copyright Enforcement,* 18 INF. ECON. & POL'Y 374, 382 (2006); William R. Johnson, *Creative Pricing in Markets for Intellectual Property,* 2 REV. OF ECON. RES. ON COPYRIGHT ISSUES 5, 7–8 (2005); N. CURIEN ET AL., CONSERVATOIRE NATIONAL DES ARTS ET MÉTIERS, TOWARDS A NEW BUSINESS MODEL FOR THE MUSIC INDUSTRY: ACCOMMODATING PIRACY THROUGH ANCILLARY PRODUCTS 1, 4–5 (2004), http://www.cnam-econometrie.com/upload/curien-et-al(1).pdf.

75. *See* Paul Krugman, Op-Ed., *Bits, Bands, and Books,* N.Y. TIMES, June 6, 2008, at A21.

76. Jeff Leeds, *The New Deal: Band as Brand,* N.Y. TIMES, Nov. 11, 2007, § 2, at 1.

77. *See, e.g., Job Cuts Sounded at Warner Music,* BBC NEWS, May 8, 2007, http://news.bbc.co.uk/2/hi/business/6635813.stm.

78. Posting by Peter Kafka to Silicon Alley Insider, http://www.alleyinsider.com/2007/11/live_warner_music_wmg_q4_call.html (Nov. 29, 2007, 08:29 EST) (summarizing Bronfman's 2007 Q4 earnings call).

79. *See* Leeds, *supra* note 76.

80. Leeds, *supra* note 76.

81. *Id.*

their work forces shrinking amid industry-wide cost cutting, will deliver on their promises of patience."[82] To date, the market's judgment of the Live Nation deal has been even harsher, as Live Nation's stock price began a plunge upon announcement of the Madonna deal, losing about 34 percent of its value over the course of seven weeks.[83]

Despite these doubts, there is every reason to take the live-performance-based model seriously. It may not wholly replace the current copyright-centered model of supporting the production of live music, but it has gained popularity among commentators and, most important, has been at least partly embraced by the industry.

D. *Copyright Law and the Live-Performance-Based Model*

Although the live performance model may be getting serious consideration in discussions regarding the future of the recording industry, one might rightly ask what its significance is to copyright law. Copyright owners have always been free to let others copy or otherwise freely enjoy their work, and they often do so.[84] The live performance model could be seen as yet another variation on models such as broadcast television or radio, where free content for the public drives revenue from other sources such as advertising. There are three reasons why analyzing the live performance model is significant to copyright law and policy.

First, many have come to challenge both the value and viability of copyright as an institution. Those most skeptical of copyright often invoke the live performance model as a way to assuage any concerns as to any ill effects of abandoning copyright.[85] Others

82. *Id.*

83. *See* Smith, *supra* note 34. In a report tinged with *schadenfreude*, music industry insider blog *Idolator* reported that finances were so tight at Live Nation in late 2007 that employees were asked to bring their own drinks and food to staff holiday parties. Idolator, http://idolator.com/tunes/holidays-r-hell/live-nation-to-employees-please-help-us-stock-our-bar-for-the-holidays-327494.php (last visited Dec. 20, 2008).

84. *See* Mark F. Schultz, *Copynorms: Copyright Law and Social Norms*, *in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH 201, 211 (Peter K. Yu ed., 2007).

85. For example, Yochai Benkler condemns the campaign to combat unauthorized file sharing as something that ought to fail. Benkler, *supra* note 73, at 353. Benkler suggests abandoning the "twentieth-century business model of industrial cultural production." *Id.* In its place, he proposes to explore other ways of supporting musicians "from government funding to tip jars and performances." *Id.* (citations omitted).

are perhaps not so sanguine (for example, David Bowie's warning that copyright "will no longer exist in 10 years"[86]), but see touring as the only viable replacement. Although these normative and descriptive views of copyright may be on the far end of the spectrum, they are hardly off the spectrum. Many in the academy are skeptical as to the value of copyright just as many in the music industry are skeptical of its viability. The value and viability of the alternative embraced by many of these skeptics merits a thorough examination.

Second, analyzing the potential effect of a move to exclusive reliance on live performance can yield insights about copyright's role in fostering the creation and distribution of recorded music. There almost certainly would be some kind of recorded music business even without copyright protection, but the content of that business would likely be quite different. Considering what might be lost or gained, and what would remain the same, highlights copyright's role in the recording business.

Third, the existence and health of the live performance market has been invoked to justify doctrinal and policy positions in copyright law. Most notably, it was cited by Justice Breyer to justify his position regarding the *Sony* safe harbor in *MGM v. Grokster*.[87] In dueling concurrences in *Grokster,* Justice Ginsburg and Justice Breyer debated the future application of the *Sony* safe harbor.[88] Justice Breyer contended that Justice Ginsburg was seeking to modify the rule in *Sony* by narrowing it.[89] Justice Breyer asserted that the essential question was: "Will an unmodified *Sony* lead to a significant diminution in the amount or quality of creative work produced? Since copyright's basic objective is creation and its revenue objectives but a means to that end, this is the underlying copyright question."[90]

Justice Breyer concluded that there was insufficient evidence of harm to the production of music to justify modifying *Sony*: "The extent to which related production has actually and resultingly declined remains uncertain, though there is good reason to be-

86. *See* Pareles, *supra* note 1.
87. 545 U.S. 913, 961–62 (2005) (Breyer, J., concurring).
88. *Id.* at 942 (Ginsburg, J., concurring); *id.* at 949 (Breyer, J., concurring).
89. *Id.* at 959 (Breyer, J., concurring).
90. *Id.* at 961.

lieve that the decline, if any, is not substantial."[91] In support of this conclusion, Justice Breyer quotes Yochai Benkler's contention that live performance has not been harmed by file sharing:

> "Much of the actual flow of revenue to artists—from performances and other sources—is stable even assuming a complete displacement of the CD market by peer-to-peer distribution . . . [I]t would be silly to think that music, a cultural form without which no human society has existed, will cease to be in our world [because of illegal file swapping]."[92]

Thus, the live performance business model has entered the doctrinal debate regarding secondary liability for copyright infringement.

One problem with citing the health of the live performance business to support a particular rule regarding liability for unauthorized copying of recorded music is that the live performance business is not the same as the recorded music business. There are some empirical and normative assumptions packed into Benkler's statement quoted by Breyer that deserve further examination. The health of the live performance business does not necessarily signal that the "the amount or quality of creative work produced" remains the same.[93] The fact that musicians are getting paid to play music does not ensure that they are creating new music or, if they are, that such music is being preserved in the form of recordings.

III. THE THEORY AND PRACTICE OF ALTERNATE MODELS FOR FINANCING THE PRODUCTION OF CREATIVE WORKS

Although most producers of copyrighted works make money by selling their works directly to consumers, direct sales have never been the only way to make money from copyrighted works. Even as examples of direct sales abound including movie tickets, CDs, DVDs, and books other, less direct business models are equally familiar. For example, neither the producers of broadcast television programs, nor the broadcast networks that show those programs, charge consumers to view their work.[94] Instead, broadcas-

91. *Id.* at 962.
92. *Id.* at 962 (quoting Benkler, *supra* note 73, at 351–52).
93. *Id.* at 961.
94. This does not include cable and satellite operators who do charge customers for access and pass on some of those revenues in the form of licensing fees.

ters make money by selling advertising and, in turn, purchase shows from producers that they hope will generate an audience.[95]

The proposed live performance business model for financing the creation of popular music recordings is thus a variation on a familiar business model in the creative industries. In such models, the audience that enjoys a creative work does not pay for the work directly; rather, its attention or interest is leveraged by the creator or a third party to create value elsewhere. The producer thus derives economic value indirectly from its audience's demand for copying, performing, sharing, or using the work.

A large body of literature on the economics of copyright and information goods has come to recognize the potential benefits of alternatives to direct sales. Since landmark economic papers in the 1980s by Stan Liebowitz, and by Stanley Besen and Sheila Kirby, showed that unauthorized copying or other use can actually benefit the producer of content, theoretical models extending the idea have proliferated.[96] More generally, business writers and other popular commentators have become enamored with the "free" business models of Google and other successful online businesses.[97] Authors like Chris Anderson, author of the forthcoming *Free! Why $0.00 Is the Future of Business*[98] have followed this insight to its logical conclusion.

Nevertheless, some restraint is warranted before discarding business models based on charging consumers directly for copyrighted works. Liebowitz, whose 1985 paper launched the literature, recently commented that "[t]he current literature on this subject . . . seems to be badly out of kilter," as it has gone too far

95. *See* Meg James, *Prime Time Can Still Sell Ads*, L.A. TIMES, June 10, 2008, at C1; Brian Stelter, *TV Stations Seek Shows To Post Online*, N.Y. TIMES, Feb. 1, 2008, at C7 ("As Oprah Winfrey and Alex Trebek can attest, syndication is a backbone of local broadcasting: affiliates purchase the local rights to specific shows and sell ads alongside the content.").

96. *See, e.g.*, Stanley M. Besen & Sheila Nataraj Kirby, *Private Copying, Appropriability, and Optimal Copying Royalties*, 32 J.L. & ECON. 255, 280 (1989); S.J. Liebowitz, *Copying and Indirect Appropriability: Photocopying of Journals,* 93 J. POL. ECON. 945, 947–48 (1985) [hereinafter Liebowitz, *Copying and Indirect Appropriability*].

97. *See* Chris Anderson, *Free! Why $0.00 Is the Future of Business*, WIRED, Feb. 25, 2008, http://www.wired.com/techbiz/it/magazine/16-03/ff_free [hereinafter Anderson, *Free!*]; *see also* Matt Asay, *Lessons from Google and Red Hat for Facebook and Open Source*, THE OPEN ROAD, Nov. 18, 2007, http://news.cnet.com/8301-13505_3-9819669-16.html.

98. Anderson, *Free!*, *supra* note 97. Anderson's book is due to be published by Hyperion in 2009. *Id.*

in embracing the benefits of unauthorized copying.[99] Although there is more than one way to extract revenue from the interest of one's audience, charging them directly remains the most common way to do so in most creative endeavors.[100] Thus, copying and sharing often do result in losses to the extent they substitute for direct sales.

Alternative, indirect models for selling content prosper only under certain specific conditions. The following discussion first considers lessons from the economic literature on the benefits and limits of indirect appropriation business models. It then further examines a few real life examples to gain a better understanding of how content creators make such models work in the actual marketplace.

A. *The Potential Benefits of Alternative Business Models*

The literature on the economics of copyright has shown that foregoing at least some direct sales to consumers can benefit content producers under some circumstances.[101] In some instances, producers at least have been able to replace revenues otherwise lost to unauthorized copying or usage. Models suggest that producers' profits might even increase with unauthorized copying and usage because of one or more beneficial effects.[102] This subsection examines these potential benefits before turning to important limitations on the applicability of these models.

99. Stan Liebowitz, *Economists' Topsy-Turvy View of Piracy*, 2 REV. ECON. RESEARCH COPYRIGHT ISSUES 5, 5 (2005) [hereinafter Liebowitz, *Economists' Topsy-Turvy View*]. He observes that "[t]heoretical models now abound in the literature 'demonstrating' all the ways that the producer of a product might benefit from piracy. Economic articles on this subject would seem to imply that it is almost always a terrific strategy to have third parties providing free copies of your product. And these articles generally conclude that society would almost always be better off in such a situation." *Id.*

100. Most examinations of indirect appropriation begin with an acknowledgement that direct appropriation remains common and that copying does deprive creators of sales in many cases. *See, e.g.*, Besen & Kirby, *supra* note 96, at 257.

101. *See id.* at 264–67.

102. The discussion in this section leaves aside consideration of total welfare effects and focuses on producer revenues. See *infra* Parts V.A & V.C.2 for a discussion of consumer welfare.

1. Indirect Appropriation

In some instances, producers can indirectly appropriate the value created by consumer copying if they can increase the price they charge for the originals.[103] Indirect appropriation was first observed in a study of the effect of photocopying on print publishers.[104] Liebowitz argued that photocopying would not harm a publisher if it increased demand for the original publication.[105] Liebowitz found this apparently to be true in the case of libraries:

> A library's willingness to pay for journals should increase when photocopying is done on the premises because the availability of photocopying causes a library's users to value the library's journal holdings more highly and library funding is (almost certainly) related in some manner to the tastes and values of library users.[106]

Liebowitz tested this proposition by reviewing subscription price data in 1959 and 1982.[107] Publishers appeared to engage in indirect appropriation by charging more to libraries (where sharing and copying occurs) than to individuals.[108] This price discrimination increased with the advent of photocopying.[109] Moreover, demand increased for materials that were more easily copied—journals—and declined for materials less easily copied—books.[110] Besen and Kirby extended Liebowitz's insights with a formal model.[111]

Other real-life examples of indirect appropriation of the value of copies appear to be rare. Liebowitz plausibly proposed that the price of CDs likely accounted for the value of a cassette copies that the purchaser made for personal use.[112] The same could likely be said for CDs and the ability to copy the file onto an MP3 player. The ability to copy the original and use it in other settings would make it more valuable to the purchaser and thus increase willingness to pay. For reasons discussed below, however, it is

103. Besen & Kirby, *supra* note 96, at 264–67.
104. Liebowitz, *Copying and Indirect Appropriability*, *supra* note 96, at 950–55.
105. *Id*. at 955–56.
106. *Id*. at 949.
107. *Id.* at 950.
108. *Id.* at 949–50.
109. *Id.* at 953.
110. *See id.* at 949.
111. *See* Besen & Kirby, *supra* note 96, at 264–72.
112. Liebowitz, *Economists' Topsy-Turvy View*, *supra* note 99, at 8.

generally difficult to capture the value of copying recordings by charging more for the original—and likely increasingly so, as digital technology and networked communications enable a vast flood of copies from a single original. Nevertheless, the early work by Liebowitz and others spawned a substantial body of literature on ways in which producers might benefit from or mitigate the effects of copying or shared use of copyrighted works.

2. Sharing of Information Goods

The insights regarding the potential benefits of using indirect appropriation to capture the value of copying have been extended to the sharing of information goods among groups of consumers.[113] Just as in the case of journal copying, the ability to share may make the work more valuable to the purchaser. The producer may thus be able to charge a price that accounts for the value of all those sharing.[114] In some cases, sharing may actually be more profitable than direct sales to individuals.[115]

Examples of groups sharing copyrighted works are quite common. Some are small groups, including families subscribing to cable television,[116] parents reading books to children,[117] and friends sharing a performance of a DVD or recorded music.[118] In each of these examples, the good or service becomes more valuable to the consumer making the purchase because she can share it with family and friends.[119]

Sometimes the group doing the sharing is a customer base or audience. Thus, video store customers share DVDs through rentals, and public library patrons share books through borrowing.[120]

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113. Yannis Bakos et al., *Shared Information Goods*, 42 J.L. & ECON. 117, 119, 126 (1999); Michael J. Meurer, *Too Many Markets or Too Few? Copyright Policy Toward Shared Works,* 77 S. CAL. L. REV. 903, 913–15 (2004); Hal R. Varian, *Buying, Sharing, and Renting Information Goods,* 48 J. INDUS. ECON. 473, 473, 483, 485–86 (2000).

114. Bakos et al., *supra* note 113, at 122, 141–43, 148.

115. *See id*. at 141–43.

116. *Id*. at 121.

117. Meurer, *supra* note 113, at 905.

118. Bakos et al., *supra* note 113, at 121.

119. Meurer, *supra* note 113, at 923.

120. Bakos et al., *supra* note 113, at 120–21; Meurer *supra* note 113, at 913.

Sharing models based on advertising revenue are very common. As noted earlier, broadcast television is one example of such a model. Broadcast radio is another, as songwriters license songs to radio stations which sell ads based on the size of their audience.[121] The producers of some internet content such as stock tickers, newswire articles, etc., license their work to websites, which are also in the ad business. In some instances, a producer shares its own content with an audience in order to generate ad revenue. Television networks do this with the portion of their programming that they self-produce (for example, news and some programs) as do web services like MSN and Yahoo!, free newspapers, and daily newspapers and magazines that give their content away for free online.

3. Bundled and Complementary Goods

Firms may mitigate the effects of unauthorized copying by bundling a copyable work or other information good with a non-copyable product or service.[122] For example, software firms often provide customer support or updates and upgrades only to customers who possess the authorized version of the work. Because many users find these bundled elements to be essential, they are less likely to find a copied version acceptable. In instances where use of the product requires access to an online resource, it simply may be rendered useless without the bundled service.[123]

121. Meurer describes radio as an example of a successful sharing model. *See* Meurer, *supra* note 113, at 925–26. Some of the literature on the sharing of information goods disregards mass-market models like broadcast radio or television, but broadcast radio or television fit the general model very well. *See, e.g.*, Bakos et al. *supra* note 113, at 122 (arguing that market-based models do not allow for diversity of consumer transactions). In fact, radio and television would seem to be among the most commercially successful examples of sharing.

122. *See* Martin Peitz & Patrick Waelbroeck, *Privacy of Digital Products: A Critical Review of the Theoretical Literature* 1 (Int'l Sch. of Bus. in F.R.G., Working Paper Group Paper No. 42/2006, 2006), *available at* http://ssrn.com/abstract=466063 [hereinafter Peitz & Waelbroeck, *Piracy of Digital Products*]. In the economics of copyright literature, this strategy is also often thought of as a product differentiation strategy that makes the originals more valuable than copies. *See, e.g.*, *id.* at 4 (concluding the availability of a pirated good either reduces the creator's profits or leaves them unchanged). While updates and upgrades are likely to be just as vulnerable to copying as the original, they come so frequently for some modern software products that copying would become impracticable for many consumers.

123. For example, the TiVo digital video recorder's software checks in with an online service and downloads a current television guide.

Bundling is more of a way to protect revenues from copying rather than to replace revenues lost to copying. However, some suggest that products that are sufficiently differentiated in quality from freely available copies via bundling may actually benefit from the existence of those copies. If the value of the product increases to consumers because of the sampling or network effects described above, their willingness to pay for the higher quality, bundled version may increase.[124]

Similarly, a producer of digital works that are freely available, either by design or default, may capture some of the value of free copies by selling complementary products or services separately. This model is employed by businesses in the open source software industry, such as Red Hat, a publicly held company that distributes its own version of Linux, the open source operating system.[125] Since Red Hat's version of Linux is published under the GNU General Public License,[126] others are free to copy and distribute it.[127] Red Hat makes its money by selling complementary services: subscriptions to upgrades and unlimited support for its version of Linux.[128]

4. Effects that May Cause Free Availability To Increase Profits

The models described thus far—indirect appropriation, sharing, bundling, and complementary sales—may do more than simply replace direct sales. A number of models suggest that the free availability of copyright works could generate effects that increase profitability. The three that are arguably most relevant to

124. *See* Martin Peitz & Patrick Waelbroeck, *Why the Music Industry May Gain from Free Downloading—The Role of Sampling,* 24 INT'L J. INDUS. ORG. 907, 910 n.6 (2005), *available at* http://ssrm.com/abstracts=829544 [hereinafter Peitz & Waelbroeck, *The Role of Sampling*].

125. *See* David K. Levine & Michele Boldrin*, Market Structure and Property Rights in Open Source Industries* 6–8 (UCLA Dep't of Econ., Working Paper No. 122247000000*00 2269), *available* at http://www.dklevine.com/papers/os_wustl_lawreview.pdf (describing Red Hat's business model).

126. *See id.*

127. See GNU Operating System, Various Licenses and Comments About Them, http://www.gnu.org/philosophy/ license-list.html (last visited Dec. 20, 2008) for a description of various open source licenses and how they work.

128. *See* Red Hat, Why Subscriptions, http://www.redhat.com/about/whysubscriptions/?intcmp=70160000000HX03 (last visited Dec. 20, 2008).

this article are reducing transaction costs, sampling, and network effects.[129]

Copying or sharing may increase profits by reducing transactions costs. In the case of tangible goods, an intermediary like a library, rental store, or group may have a much more efficient way to share or provide copies to consumers.[130] With respect to digital goods, the savings may be less because the marginal production costs of digital goods are negligibly small.[131] Nevertheless, marketing and distribution costs still ought to be accounted for as customers need to be persuaded to buy the goods and the purchase likely involves some payment processing costs.[132] Private copying done within the context of a group or as part of a bundle may avoid those transaction costs.[133]

Demand for originals may also increase if consumers have an opportunity to sample some works via copying or sharing. Many information goods, particularly music, movies, and books, are experience goods—goods in which product characteristics are difficult to ascertain before consumption.[134] Freely available copies can allow people to satisfy their tastes better and, as Peitz and

129. This list leaves off at least two other potentially positive effects discussed in the literature: demand "smoothing" (the aggregation effect) and the opportunity to engage in price discrimination. See Meurer, *supra* note 113, at 916 for a useful discussion of the various potential negative and positive effects on profits from information sharing. Demand smoothing or aggregation is the topic of considerable discussion in the literature. *See, e.g.,* Bakos et al., *supra* note 113, at 123–26; Meurer, *supra* note 113, at 916. Selling a product to a group that shares or copies it can increase profits by aggregating the demand of the users and "smoothing" the dispersion of demand. *See* Bakos et al., *supra* note 113, at 123–26 (discussing and modeling this phenomenon). The price discrimination effect is less technical. The aggregation of users into different groups that are sharing or copying may enable price discrimination. For example, movie studios are able to price discriminate between high and low value users by selling DVDs at a higher price to individuals who value them most and by renting to those who value them less. *See* Varian, *supra* note 113, at 486–87 (noting this discrimination is enabled by the movie studios engaging in revenue sharing with chain rental stores). As Meurer describes, the American Society of Composers, Authors, and Publishers ("ASCAP"), along with other collecting societies, are able to engage in perfect price discrimination among radio stations, as they use ratings that show the size of the customer base to determine prices. *See* Meurer, *supra* note 113, at 925–26.

130. *See* Meurer, *supra* note 113, at 916–17 ("Sellers benefit directly by avoiding production and distribution costs on each foregone sale."); Varian, *supra* note 113, at 477 (finding, in the case of academic journals, "[i]f there are economies of scale in storage and retrieval, libraries would be more cost effective than individuals").

131. *See* Peitz & Waelbroeck, *Piracy of Digital Products*, *supra* note 122, at 17.

132. *See id.*

133. *See id.*

134. *See generally* Phillip Nelson, *Information and Consumer Behavior,* 78 J. POL. ECON. 311 (1970) (originating the concept of experience goods).

Waelbroeck show, this greater satisfaction could lead to greater willingness to pay for originals—provided the originals are somehow superior to the copies sampled.[135] Sampling also works if the freely available good is similar to, but not the same as, goods that are not freely available.[136] For example, a consumer might purchase a musician's CDs after downloading a few sample songs the musician makes available.

Finally, network effects from copying might increase demand for originals. The most commonly discussed example of this effect is in the software industry.[137] The need for interoperability makes certain software programs more valuable to users as the overall user base increases, whether through purchasing or unauthorized copying. Thus, a spreadsheet program is more valuable if many others use it, as it becomes easier to exchange files and data.

Some have theorized that file sharing may produce network effects for music.[138] The difficulty with this assertion is that these analyses often seem to confuse sampling effects with network effects. Sampling may help people find music they like, and widespread availability may make it easier to engage in sampling. However, network effects only occur if an increase in the *number* of people enjoying music makes music more valuable to consumers.[139]

B. *The Limits of Alternative Business Models*

Despite the large volume of academic literature and popular enthusiasm regarding the potential financial benefits of allowing consumers to copy or share copyrighted works, such models only work well in certain limited circumstances. This discussion con-

135. *See* Peitz & Waelbroeck, *The Role of Sampling, supra* note 124, at 908.

136. *See id.*

137. *See, e.g.*, Kathleen R. Conner & Richard P. Rumelt, *Software Piracy: An Analysis of Protection Strategies,* 37 MGMT. SCI. 125, 125 (1991); Oz Shy & Jacques F. Thisse, *A Strategic Approach to Software Protection*, 8 J. ECON. & MGMT. STRATEGY, 163, 163 (1999); Lisa N. Takeyama, *The Welfare Implications of Unauthorized Reproduction of Intellectual Property in the Presence of Demand Network Externalities,* 42 J. INDUS. ECON. 155, 155–56 (1994).

138. *See, e.g.*, Amit Gayer & Oz Shy, *Copyright Enforcement in the Digital Era*, *in* INDUSTRIAL ORGANIZATION AND THE DIGITAL ECONOMY 229, 233–34, 236–38 (Gerhard Illing & Martin Peite eds., 2006).

139. *See* Liebowitz, *Economists' Topsy-Turvy View*, *supra* note 99, at 15.

siders those limitations that are most relevant to the discussion of the concert-based model for financing the recording industry.

Two requirements can be generalized from the earlier discussion about the potential benefits of copying- or sharing-based models. To the extent either of these conditions is not met, copying or sharing will undermine the viability of any business model based on free availability. First, there is a "linkage requirement"— free availability must be strongly and positively linked to demand either for the original or for another good or service that produces revenue for the creator. Second, there is a "revenue requirement"—the revenue-producing part of the model must be sufficiently remunerative to make up for the tolerance (whether explicit or implicit) of copying or sharing.

1. Linkage

To satisfy the linkage requirement, one would need to craft a business arrangement that forges a link as strong as those described earlier. One might engage in indirect appropriation by charging a purchaser a price that accounts for the copies made from it. As Liebowitz observes, however, "the value received by the individual using the unauthorized copy must be registered, at least to some extent, with the individual providing the authorized copy from which the unauthorized copy is made. This is an absolutely necessary precondition for indirect appropriability."[140] The purchaser is unlikely to pay more for an original out of pure altruism just because others can copy it. Instead, the copying must increase the value to the original purchaser, as patron copying did for libraries in the example examined by Liebowitz.[141]

Business models based on sharing face a similar constraint—the ability to share the work must increase its value. This condition is most readily met in mass market circumstances where an intermediary obtains revenue from allowing consumers to share the good. Thus, radio stations are willing to pay blanket licensing fees to ASCAP, Broadvast Music, Inc. ("BMI"), or SESAC because they can sell advertising based on the size of the audience "sharing" or listening to the music.[142] Video rental chains similarly

140. *Id*. at 9.
141. *See* Liebowitz, *Copying and Indirect Appropriability*, *supra* note 96, at 949.
142. *See* Meurer, *supra* note 113, at 925.

were willing to pay relatively high prices for VHS tapes and DVDs because they were able to capture the value obtained from "sharing" (in other words, renting) their DVDs with customers.[143]

If a business model is based on selling complementary goods or services, then the goods or services being sold must indeed be complements with the freely available goods. Classic examples of complementary goods that illustrate the necessary strength of the linkage are hot dogs and buns and left and right shoes—goods that are typically or almost always consumed together. Thus, the cross elasticity of demand for the good must be negative—sales of the revenue-producing good or service should be driven by consumption of the free good. Red Hat's Linux services were an example given earlier that will be explored in depth later.

Apple, Inc., is another example of a company that has greatly benefitted from exploiting a complementary relationship. In this case, it is the complementarity between digital music files and digital music players. Music players like the iPod are generally the most convenient way to listen to digital music; Apple has sold vast numbers of iPods as consumers accumulate digital music files by both legitimate and illegitimate means.[144] At the same time, increasing sales of iPods increase digital music sales. Apple CEO Steve Jobs was prescient in foreseeing this link. He thus persuaded the major labels to provide his iTunes store with then unprecedented access to their catalogs, which has allowed Apple to benefit from both sides of the complementary relationship.[145]

Bundling also can produce a strong link between a freely available good and a revenue producing good or service. In the case of goods that are easy to copy, however, the key to success is to ensure that the customer *must* purchase the copyable good as part of a bundle to also obtain something highly desirable or necessary that cannot be copied. For example, software companies bundle their products with services and upgrades by employing unique serial numbers and online verification of legitimacy.

143. *See* Varian, *supra* note 113, at 478. In the last decade, this older model of initial high prices has been largely superseded by a newer model where movie studios share revenue with national rental chains in exchange for lower prices. *See id.* at 487.

144. Press Release, Apple, 100 Million iPods Sold (April 9, 2007), *available at* http://www.apple.com/pr/library/2007/04/09ipod.html.

145. *See* Jeff Goodell, *Steve Jobs: The Rolling Stone Interview*, ROLLING STONE, Dec. 25, 2003, at 31, 32.

Even if a strong link is created between a freely available good and a revenue-producing good or service, that link is often based on the fact that copying or sharing is linked to a specific original and limited to a specific group of identifiable consumers.[146] These conditions were met in the library example, as physical copying is limited to a particular location and tends to be done by one patron at a time, going back to the original.[147] Similarly, until several years ago, access to shared goods like broadcast television was limited, and consumers were exposed to commercials fairly regularly.[148]

Once the market is flooded with copies and copies are substitutable for originals, the link breaks down.[149] Digitization and file sharing have opened the floodgates. It has become increasingly difficult to charge extra for an "original" when perfect substitutes are available everywhere. Thus, television studios and broadcast networks are rushing to meet the challenge of digital copying of television shows to their business models.[150] If consumers can easily obtain high quality of copies of television shows, sans commercials, on the Internet, then the advertising-based model breaks down.

Similarly, sampling effects are undermined by copies that are substitutable for the original. Many sampling models have argued that file sharing can promote the purchase of originals. For example, Peitz and Waelbroeck assume that MP3 files are not perfect substitutes for originals because consumers derive an extra benefit from "lyrics, booklet, pictures, song information, [and] feel-good factor to have indirectly paid the artist."[151] Increasing-

146. Many of the theoretical models that show sharing to be profitable depend very explicitly on limited access and copying. For example, Bakos, Brynjolfsson, and Lichtman state the assumption that "social norms, a legal rule, or a product packaging decision cause the relevant sharing to occur among friends and family members, and not as part of an efficient market for secondhand goods." Bakos et al., *supra* note 113, at 146–47.

147. *See* Liebowitz, *Copying and Indirect Appropriability*, *supra* note 96, at 949.

148. Digital video recorders, file sharing, commercial sales websites like iTunes and Amazon, and streaming from network-affiliated websites have eroded this limitation. Video tape recorders also eroded value a bit, but not as much, due to differences in convenience and quality.

149. Justin P. Johnson & Michael Waldman, *The Limits of Indirect Appropriability in Markets for Copyable Goods*, 2 REV. ECON. RES. COPYRIGHT ISSUES, 19, 20 (2005).

150. The Hulu online streaming service backed by NBC and News Corp. (Fox) is a prime example of the new efforts. Hulu, Media Info, http://www.hulu.com/about (last visited Dec. 20, 2008).

151. Peitz & Waelbroeck, *The Role of Sampling, supra* note 124, at 909 n.5.

ly, these items seem less of a point of differentiation, as consumers become accustomed to buying music from online music stores. In addition, cover art and lyrics are widely available online.

Finally, sometimes the link between free availability and increased revenues is temporary and should not be mistaken as a sustainable business model for a product, career, or entire industry.[152] For example, an unknown musician might benefit from sampling via file sharing, becoming well-known enough to achieve some sales. This success likely represents an increase in sales *relative* to the rest of the music industry rather than an increase in sales for the industry overall.[153] It would be like free samples encouraging sales of a new brand of cola—sales likely would come from Coke and Pepsi rather than a growth in the overall market.

Trendiness or herd behavior can also be seen as producing a network effect, but this effect is also most likely to be merely relative.[154] Even if a particular piece of music or artist benefits from trendiness, the effect likely just shifts demand within the market for music rather than creating a larger market for music. In the next week or month, demand may shift to yet another trendy artist without increasing overall demand.

2. Revenue Requirement

Even if copying or sharing has some positive effect on sales of a revenue-producing linked good or service, the effect will not necessarily be enough to have a positive impact. As Hal Varian observes, "The impact of sharing on profits depends on how the value of the shared good increases as compared to how the number of copies sold decreases. If the first effect outweighs the second, profits will increase, otherwise they will decrease."[155]

The *net* effect of free availability must be sufficiently positive to sustain incentives to create the good being copied or shared. This condition is implicit but not really previously discussed in the lit-

152. Liebowitz, *Economists*' *Topsy-Turvy View*, *supra* note 99, at 8.

153. The net effect depends on whether consumers simply shift consumption among acts, or whether consumers derive sufficiently greater satisfaction from their new discovery that they increase their consumption of music overall.

154. Liebowitz, *Economists' Topsy-Turvy View*, *supra* note 99, at 7–8.

155. Varian, *supra* note 113, at 478.

erature. It is particularly relevant here because of the many challenges that the concert business imposes.

The net effect on revenue is a function of two things: the magnitude of the positive effect and the characteristics of the revenue-producing good or service. In particular, if the copied or shared good becomes completely free, as some say will happen with recorded music, the market for the revenue-producing good must support the cost of the free good.

In the case where a producer must give away the copyable good, then it must be able to charge a price that covers its combined costs for both the free good and the revenue-producing good or service. Even if one adopts the common assumption of zero marginal costs for the production of the creative work,[156] there are still fixed costs of production to be covered as well as opportunity costs. It may be difficult to cover these costs if the market for the revenue producing good is relatively small or if demand is elastic.

C. *Examples of and Lessons from Indirect Appropriation Business Models*

To the extent that any concert-based model for financing recordings works, it is likely to rely on some version of complementary goods or bundling. It is thus worthwhile to examine successful examples of such models in greater depth to see what makes them work. The following discussion looks at two such examples. The first is Red Hat Enterprise Linux, where the link between the freely available good—an open source operating system—and revenue-providing services is the result of inherent complementarities. The second is an online virtual world for children known as Webkinz, where the "free" online game is bundled with a revenue-producing toy and the link is the product of design and clever marketing.

Just as some propose that popular musicians give away their recordings, Red Hat allows competitors and consumers to copy

156. This assumption is useful for modeling but may be too optimistic for real-world business planning. *See supra* notes 130–33 and accompanying text. For example, high advertising and customer acquisition and retention costs characterize many online businesses. In a world flooded with information and choices, it is hard to get and keep the attention of consumers.

freely the source code for the customized version of Linux that it has developed.[157] Red Hat Enterprise Linux is released under a license that allows customers and competitors to copy the source code provided they remove trademarks and change server links.[158] Significant copying does occur, even by as formidable a competitor as Oracle, Inc., which very noisily announced in 2006 that it was copying Red Hat's software to create its own version of Linux.[159] Red Hat's business model embraces such copying despite the fact that Red Hat invests significant resources in contributing to the Linux development community and in developing and testing its own version.[160]

Despite, or arguably because of, the free availability of its software, Red Hat is still able to capture a great deal of value from its version of Linux. First of all, its investment in building its version of Linux and in participating in the Linux community does not go to waste, as it has helped develop and establish Red Hat's expertise.[161] Businesses that depend on Linux for important functions are willing to pay Red Hat for its expertise and support.[162] No wonder some companies rely on Red Hat for mission critical applications. As of this writing, the Red Hat website touts its relationship with the automated travel reservation service, Sabre Holdings, Inc.[163] Sabre's information technology infrastructure

157. Red Hat Enterprise Linux is released under the General Public License (GPL) but cannot be copied and redistributed commercially unless the copier first removes the "RED HAT" trademarks. *See* Appendix 2: License Agreement and Limited Product Warranty Red Hat® Enterprise Linux® and Red Hat Applications, http://www.redhat.com/licenses/rhel_us_3.html? (last visited Dec. 20, 2008) ("If Client makes a commercial redis- tribution of RHDS, unless a separate agreement with Red Hat is executed or other permission granted, then Client must modify any files identified as "REDHAT-LOGOS" and "anaconda-images" to remove all images containing the "Red Hat" trademark or the "Shadowman" logo. Merely deleting these files may corrupt RHDS."). In other words, Red Hat simultaneously leverages and protects its brand by integrating its trademarks into its products. This strategy is a clever form of product differentiation that arguably makes the original more valuable and slightly increases the cost of copying.

158. *See id.*

159. Steven J. Vaughan-Nichols, *Oracle Adopts Red Hat Linux as Its Own*, LINUX-WATCH, Oct. 25, 2006, http://www.linux-watch.com/news/NS7266264422.html.

160. Levine & Boldrin, *supra* note 125, at 6 (noting that Red Hat employs some of the main developers, contributes to community projects, and otherwise expends resources).

161. *See, e.g.*, *id.*

162. *See, e.g.,* Red Hat, *Red Hat Delivers Unmatched Performance and Reduced Costs for Sabre Holdings, Travelocity*, http://www.redhat.com/f/pdf/blog/RH_SabreHoldings_CS_734891_ 0808 _cw_web.pdf.

163. *See id.*

handles 32,000 transactions per second and requires 100 percent uptime.[164]

The importance of Red Hat's software to businesses ensures that Red Hat's services are a strong complement to its freely available software. For a company like Sabre, Red Hat's support and reputation are absolutely essential.[165] A chief information officer for a company with such intensive needs must be able to justify technology selection decisions to her employers, who in turn have to account to shareholders. In such circumstances, the availability of reliable support from a company with an established reputation greatly increases a customer's willingness to use the software. The "cost-free" nature of the software is likely almost irrelevant.

Turning to a very different story, a successful product bundle consisting of an online game for kids and a stuffed animal illustrate some other features that likely would be relevant to any concert-based model for financing recordings. This business is a children's product known as Webkinz, which combines an online game with plush toys.[166] Webkinz provides a useful case study regarding how to build a successful model that gives away an information good as part of a product bundle.

In the case of Webkinz, the "free" creative work is an immensely popular virtual world game known as Webkinz World, which is aimed at children ages six to thirteen.[167] The game is produced by the Ganz toy company and provided free of charge—with some strings attached. Although there are no subscription fees *per se,* the user must purchase a Webkinz plush toy, which comes with a unique code that establishes a Webkinz account good for a year.[168] The primary function of the "free" Webkinz World game is to drive sales of Webkinz stuffed animals while creating loyalty and enthusiasm for the brand.[169]

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164. *Id.*

165. *See id.*

166. *See* Webkinz Home Page, http://www.webkinz.com/us_en/ (last visited Dec. 20, 2008).

167. *See* Webkinz, For Parents, http://www.webkinz.com/us_en/faq_parents.html (last visited Dec. 20, 2008).

168. *See* Webkinz, General Questions, http://www.webkinz.com/us_en/faq_general.html (last visited Dec. 20, 2008). The game is marketed as a "free" additional benefit. *See id.*

169. Because marketing to children is a matter of some delicacy and Ganz is privately held, it never puts things so bluntly. However, its application for a business method patent

The game is a fairly substantial undertaking, as it currently draws nearly 12 million unique visitors a month[170] and is constantly updated with new material. Users establish a persistent virtual home, care for virtual pets, play games, earn currency that they can use to furnish their virtual homes ("Kinz Cash"), and engage in limited social networking.[171] Unlike other virtual worlds, however, the creator does not directly appropriate value from the game by charging monthly fees.[172] Rather, players are subtly encouraged or manipulated, within the bounds of what parents and children's watchdog groups will tolerate, to buy more Webkinz toys or collateral merchandise like t-shirts.[173]

One reason the Webkinz business model works so well is that the two products—the game and the toys—are closely tied, and customers want each part of the package. One industry analyst observed, "We've found most kids are actively playing both the online version . . . and with the physical toy. If either one didn't work on its own, I don't think the combination would be as magical."[174] The tie is also unavoidable. A customer must buy a Webkinz plush toy to receive access to the online game. In turn, the game encourages customers to collect more Webkinz plush toys with special notices about newly released "pets" and promotions, bonuses related to ownership of particular pets, and a lump sum payment of Kinz Cash that comes with each new pet "adopted."[175]

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does so. *See* System and Method For Product Marketing Using Feature Codes, U.S. Patent No. 20,080,163,055, ¶ 79 (filed Dec. 5, 2007) (issued July 3, 2008), *available at* http://appft1.uspto.gov/netahtml/PTO/srchnum.html [hereinafter, '055 Patent] (enter "20,080,163,055").

170. Jocelyn Christie, *Kids Virtual World Scene Getting Quite Crowded*, KIDSCREEN, May 1, 2008, at 27.

171. *See*, '055 Patent *supra* note 169, at ¶ 113–14, 132, 141.

172. *See* Webkinz, For Parents, *supra* note 167.

173. *See* Julianna Parker, *Webkinz Take over the Net,* NORMAN TRANSCRIPT (Norman, Okla.) Aug. 1, 2008, http://www.normantranscript.com/features/local_story_214002432 ("'I don't know any kids who come in here and have just one or two,' said Roxanne Avery, manager at J's Hallmark in Sooner Mall. 'They have a lot. . . . I even have kids who have 50. It is a craze.'").

174. Abbey Klaassen, *Entertainment Marketers of the Year: Howard Ganz*, ADVERTISING AGE, May 19, 2008, at S10.

175. *See, e.g.*, Webkinz, The Pet of the Month Program Details, http://www.webkinz.com/us_en/bulletinz_potm.html (last visited Dec. 20, 2008), ("The Webkinz Pet of the Month is an exciting monthly program in Webkinz World where a special plush pet is spotlighted and celebrated with special gifts and special events all month."); '055 Patent, *supra* note 169, at ¶ 136–37.

The other factor that makes Webkinz work is that customers are willing to pay a premium for the revenue-producing part of the bundle, the plush toy. While ordinary plush toys of similar quality and size could be had for under $5, Webkinz plush toys typically retail for between $12 and $15.[176] Ganz is a privately held company, so it does not report sales figures, but one analyst estimated sales of over $100 million in 2007.[177] Retailers that stock Webkinz plush toys report booming sales. The Limited Too chain's sales have been boosted by stocking the toys, and its parent company's stock price has gone up based on the strength of its status as a Webkinz distributor.[178]

Red Hat and Webkinz both illustrate different ways of building a successful alternative business model by "giving away" an information good. Any successful concert-revenue-based model for financing recordings would need to have similar strengths.

In both cases, the free good is strongly linked to the revenue-producing good or service. In the case of Red Hat, its corporate users absolutely need the services that Red Hat provides, and Red Hat's expertise and reputation ensure that it is the source of the services that its customers seek out. In the case of Webkinz, the link is created and made unavoidable through bundling and technical security measures and is reinforced through clever marketing.

In both cases, the revenue-producing part of the business is substantial enough to support the production of the free good. In the case of Red Hat, its costs of production for the free good are reduced somewhat by the open-source nature of the program—Redhat is building on something that was made freely available. Moreover, the bet-the-company situations in which the product is used increase the willingness of customers to pay. In the case of Webkinz, it appears that there likely are substantial costs to create and maintain the game, but the revenue-producing part of the package is a low-cost plush toy. Moreover, the game reinforces loyalty and encourages demand for the product.

176. Prices are based on a review of Amazon.com during July 2008. *See* Amazon.com, Webkinz, http://www.amazon.com/tag/webkinz (last visited Dec. 20, 2008).

177. Brian Hindo, *Toys with a Second Life*, BUS. WK., Dec. 31, 2007, at 91.

178. Jeffrey Sheban, *Tween Brands Stock Rises on Webkinz News: Plush Toys Seen as Profit Booster,* COLUMBUS DISPATCH (Columbus, Ohio) June 26, 2007, http://www.columbusdispatch.com/live/content/business/stories/2007/06/26/webkinz.html.

Successful examples like Red Hat and Webkinz show that businesses can build successful models by profiting indirectly from copyrighted works for which other businesses charge directly. Research on the economics of copyright explains why such models can work. Both that research and the various real life examples discussed in this section, however, show the limits of "free" business models. Costs and revenue cannot simply be shifted from one business to another. Each business has its own unique constraints, and the music business is no exception.

IV. SUPPORTING THE RECORDING BUSINESS WITH REVENUES FROM LIVE PERFORMANCE

Shifting the primary means of financing recorded popular music from the sale of recordings to indirect support from live performance revenue would be more difficult than some may think. Alternative business models based on exploiting the positive effects of widespread copying seem theoretically possible. But reality often proves far more difficult. As Liebowitz concluded in his pioneering study on the positive effects of journal copying, "[o]nly case-by-case empirical investigations of institutions and markets can discover the impacts of [each] form[ ] of copying."[179]

This discussion considers the unique characteristics and challenges posed by live performance as a business and how they would affect the ability of the concert business to support the recording business. Live performance as an economic activity is both aided and constrained by its uniqueness and its scarcity. On the one hand, live performance seems to offer an opportunity. While it seems to be getting more difficult to persuade people to pay for recorded music, they really have no choice but to pay if they want to experience a live performance. On the other hand, the uniquely scarce and limited nature of live performance imposes some challenges as a business model in its own right, as well as a way to support the recording business.

The following discussion considers each of the criteria discussed in the previous section for successfully deriving value from freely available copies. First, the link between freely available recordings and the demand for live performance is considered.

179. Liebowitz, *Copying and Indirect Appropriability, supra* note 96, at 956.

Second, the economic structure of the concert business is considered to determine whether it might support the recording business.

A. *The Link Between Freely Available Recordings and Demand for Live Concerts*

The link between free availability of recordings and demand for live concerts is unlikely to be strong enough to replace the loss of revenue from direct sales of recordings or even to sustain a smaller recording business of any significant size. There are two reasons. First, the link between free recordings and live concerts is unlikely to be one of the stronger types of links—for example, a case of indirect appropriation or bundling. Instead, free recordings may simply be a form of sampling or advertising for concerts. Second, to the extent that freely available recordings do produce a link, the nature of concerts and the concert market is likely to undermine that link.

1. A Weak Link

The earlier discussion of alternative business models based on allowing or tolerating copying or sharing described several examples where a content producer benefitted from a strong tie between a freely available work and a revenue-producing work. In a case of indirect appropriation, journal publishers could charge the library where patrons needed to go to copy a journal.[180] In a case of a sharing-based model, television studios charge the broadcast networks that, until a few years ago, were the sole source of favorite shows for television viewers.[181] In a case of a complementarity, Red Hat charges its customers a premium for its expert support for free software that runs vital functions.[182] In a case of a bundling, Webkinz charges its customers a premium for plush stuffed toys that come with a year of access to a popular online game.[183]

180. *See supra* notes 101–08 and accompanying text.
181. *See supra* notes 94, 121 and accompanying text.
182. *See supra* notes 125–28, 157–63 and accompanying text.
183. *See supra* note 166 and accompanying text.

The music business is unlikely ever to forge such a strong link between freely available recordings and live concerts. The journal and broadcast television examples simply do not fit—consumers do not need to go to concerts to get copies of recordings as they once needed to go to libraries to copy journals or watch television broadcasts, with accompanying commercials, to view television shows. High quality copies of recorded music are available from many sources.

If concerts are a complement to recorded music, then they would seem to be a weak one. They certainly are not as strong of a complement as Red Hat's services are to Red Hat Enterprise Linux. Modern companies need software to run their systems, and they need to ensure that the software runs their systems reliably. For serious corporate customers, there is little point in using the software without the services to back it up. There is no analog with respect to music. Consumers simply do not need to go to concerts in order to enjoy recorded music.

On a more prosaic level, recorded music and concerts do not even go together as well as the classic example of complements, hot dogs and buns. Most people eat the two together—rarely does a consumer leave a store with one and without the other. The consumption of recorded music and concert tickets is separated in time and place, and a consumer can easily enjoy one without the other.

In contrast to these examples, people enjoy recorded music without ever buying a concert ticket. In fact, given the inherent limits of live performance, many people never get a chance to see their favorite musicians perform. Mortality impedes some fans; such is the case for fans of Jimi Hendrix or John Lennon. Inherent limits on supply frustrate others because sometimes, tickets are impossible to find at any price—this year those unobtainable tickets are for a superstar named Miley Cyrus beloved by young teens.[184]

Bundling could hold a bit more promise. In 2004, the musician Prince gave away hundreds of thousands of copies of his CD "Mu-

184. The young performer is also known as Hannah Montana. *See* Randall Stross, *Hannah Montana Tickets on Sale! Oops, They're Gone,* N.Y. TIMES, Dec. 16, 2007, § 3, at 4.

sicology" to concertgoers.[185] Reports said that concert ticket prices included the cost of the CD.[186] Later, in 2007, *The Mail*, a United Kingdom newspaper, bundled Prince's "Planet Earth" CD with newspapers.[187] The newspaper paid Prince for the CDs, which helped him publicize his twenty-one-date tour in the U.K.[188]

Could musicians adopt the Webkinz strategy, selling their music as part of a bundle? One difficulty is that bundling recordings with concert tickets forces the consumer to wait until he attends a concert, or at least buys a ticket, to possess a copy of the music. This strategy may work for a well-established artist like Prince, but it poses a chicken-egg problem for lesser-known artists. At least some consumers will want to get to know an artist's music before deciding to attend a concert. In addition, the Webkinz bundling strategy relies on controlling access to the digital good through unique product codes and passwords. If the record industry could control access to its works, it would not be in so much trouble. It is hard to charge a premium for a bundle when the market is flooded with copies.[189]

Of all the positive effects of copying or sharing distilled from the literature on the economics of copying, sampling seems most likely to do some good for the music business. As an experience good,[190] music is something that consumers are never sure they like until after they consume it. Free previews can help to sell such goods. Radio has long played this role, but it can never cater perfectly to all tastes. Each station needs to aim its programming at a relatively broad, local audience, as it needs to aggregate as many listeners as possible to sell advertising. Freely available downloads offer people a chance to sample a far greater variety of music. More niche tastes may be served and cultivated.

Sampling will not work if samples supplant demand for the original—but that is where concerts come in. In a digital world, samples that are perfect digital copies do not serve to sell the

185. Randy Lewis, *New Sales Strategy: Give It Away*, L.A. TIMES, Mar. 31, 2004, at E6.
186. *Id.*
187. Jon Pareles, *The Once and Future Prince,* N.Y. TIMES, July 22, 2007, at AR1.
188. *Id.*
189. *See* Johnson & Waldman, *supra* note 149, at 20 (describing how widespread copying undermines the linkages required for various alternative, copying-based business models).
190. *See supra* notes 134–36 and accompanying text.

original. However, such samples can help to sell an artist's other work, which is not freely available, by telling consumers how it might sound.[191] For that reason, practically every musician now has a web site or MySpace page with free downloads of selected songs from the musician's catalog.[192] The problem is that the non-sampled music also leaks onto file sharing networks, which means that the musician's entire catalogue is a free sample and there is nothing left that the consumer must pay to obtain. Concerts do not pose this problem, as one must buy a ticket to enjoy the experience of attending a concert.

The sampling of freely available music thus might inform consumers of concerts they might like to attend. Without incurring a monetary cost, they can acquire enough of an artist's repertoire to determine what they might hear at a live performance and get an idea of what the experience might be like. Of course, the congruence is unlikely to be perfect. The live experience is different from listening to studio recordings, and some performers are viewed as better on stage than others. Still, if digital audio files could perfectly duplicate a concert experience, then the sampling effect would not work, as the recordings would be replacements rather than samples. Sampling that encourages concert attendance is thus the best hope for generating positive effects from freely available recordings.

Sampling will not work well as a business model, however, unless it increases demand for concerts rather than just shifting demand to the concerts of one act from others. Will consumers attend more concerts because they have an opportunity to sample music online? The answer to this question must be "yes" for the concert business generally if the business model is to be judged a success compared to today's business models. Under the traditional model, new bands occasionally break out of obscurity by giving away music, which has long been an important function of the radio. Such success is likely at the expense of the market share of other bands.

191. *See* Peitz & Waelbroeck, *The Role of Sampling, supra* note 124, at 908.

192. Michelle Quinn & Andrea Chang, *The Nation: More Teens Dissing Discs in Favor of Online Tunes*, L.A. TIMES, Feb. 27, 2008, at A1; *see also* Posting of Dave Parrack to TECH.BLORGE, http://tech.blorge.com/structure:0/020/2008/09/15/is-myspace-music-going-to-revolutionise-the-music-industry/ (Sept. 15, 2008, 20:14 EST).

One way that sampling might grow the entire business is by ensuring that consumers are far more satisfied with their musical choices. If customers are able to sample a broader variety of music, then they are more likely to find the music in which they are most interested. These more intensely interested consumers might be more willing to go to concerts and might have a greater willingness to pay. There is, however, a somewhat perverse alternate outcome to this story. As Liebowitz points out, a more satisfied consumer might actually consume *less* music.[193] Imperfect information may lead a consumer to try more new bands in the hope of satisfying his preference.[194] A consumer with better information may become more quickly and fully satiated and, thus, might settle down with a smaller number of more suitable products.

Even if sampling effects do not grow the concert business, they may still provide a reason to produce recordings if the music business is unable to stem the tide of unauthorized copying or find other business models to support recording. Recordings may simply become a cost of doing business—a way to provide consumers with better information and to maintain a profile.

If recordings function solely as advertisements for concerts, however, then their production will be constrained. As free advertisements, they would no longer be a separate and large business, but rather an additional expense for a business that is only a fraction of the size of today's recording industry.

2. Characteristics of the Concert Market that Could Blunt Sampling and Other Positive Effects

However strong the *potential* positive link between freely available recordings and the concert business might be, the nature of the concert market severely limits how strong that link can be in reality. If the recording business relied entirely on concert revenue to finance its expenses, then opportunities would be severely constrained. Live performance is an economic activity characterized by scarcity. As such, it suffers from a number of limits.

193. Liebowitz, *Economists' Topsy-Turvy View*, *supra* note 99, at 8.
194. *Id.*

First, the supply of concerts that any performer can produce is limited by time and space. There are only 365 nights in a year, and that number is further limited by travel time, rehearsal time, recording time, fatigue, and other practicalities. Performers can only be in one place at a time. In the short run, the supply of venues is largely fixed—places large enough to hold an audience are not built overnight, and requisite permits and other preparations take time. Moreover, the size of venues is limited. Stadiums and arenas have been used for decades, but they seem to represent an outer limit for the number of people that can practicably be entertained in a live concert setting.[195]

Practical realities also constrain demand for live concerts. Since concerts require the consumer to be at a particular place during a particular time, they may impose a larger opportunity cost than other leisure activities. If the times or dates are inconvenient or conflict with other events or commitments, the consumer may choose not to attend even if he has a strong interest in the performer. Concert attendance also tends to demand more of consumers than many leisure activities, as it typically involves late evenings, crowds, and venues that serve alcohol and are sometimes smoke-filled. Therefore, it is not an activity that appeals to everyone or that can be enjoyed by everyone—for example, some shows are not open to minors. A consumer must also travel to the venue, which may be a significant cost if he does not live nearby. In short, it is much easier to be a casual consumer of recorded music than it is to be one of live concerts.

The concert market also faces a serious timing problem, at least if it is to be tied to the market for recorded music. If a band releases a recording that takes time to become popular but tours immediately, it may find that its concert tour is ill-timed. New fans may find that they missed the opportunity to see the band play in or near their city, and interest may wane before the band comes around again. Musicians face this problem now, but at

195. One-off outdoor events like festivals, political rallies, holiday celebrations, and special free concerts are an exception. *See*, *e.g.*, David Browne, *Pop Life '97: Tunes Were Empty, But the Coffers Were Full*, N.Y. TIMES, July 1, 2007, at 4 (noting that a Garth Brooks concert in New York's Central Park drew one million fans). In fact, Bruno Frey has observed that the reliance on festivals in Europe's classical music business appears to arise from a need to contend with the inherent limits of live performance discussed in this section. *See* Bruno Frey, *Festivals*, *in* A HANDBOOK OF CULTURAL ECONOMICS 231, 231–35 (2003).

least they still enjoy the benefit of consumer payment for recordings. If the only way to exploit a recording is through touring, then timing problems become more serious. Then there are the ultimate timing problems—once a band breaks up or a key member dies, touring is no longer an option. The window for making a living by touring is limited in both the short and long run.

In sum, even if freely available recordings increase the demand for concerts, they may not increase it enough to matter. The performer may not be in the right place at the right time, or a consumer might become more interested in seeing a performer, but not so much as to overcome other limitations such as time, distance, or opportunity cost.

The limitations of touring seem particularly notable in contrast to the ever-expanding horizons of the world of digital music. Recorded music has a long shelf life, especially in a digital environment. Digital music files can be maintained and made available commercially at a very low cost.[196] Devices like iPods allow consumers to enjoy music in an increasingly wide variety of settings.[197] While concerts are characterized by scarcity, digital music is now characterized by abundance.

The abundance of digital music is not just a matter of quantity; it is characterized by a greater variety of musicians and genres. Digital distribution has opened up greater opportunities for niche performers. They can aggregate their small audiences to create tremendous value. The fact that their fans are thin on the ground matters little in the low transaction cost environment of the Internet. In a recent popular online essay, business and technology writer Kevin Kelly theorized that 1000 "true fans" might be enough to support a creator in an online environment.[198] He contends that 1000 fans buying $100 worth of creative work and related merchandise might be enough to support an artist.[199] The online environment makes it possible to foster such a community and keeps costs low enough to stay in touch with and to benefit

196. Posting of Kevin Kelly to the Technium, http://www.kk.org/thetechnium/archives/2008/03/1000_true_fans.php (Mar. 4, 2008, 13:51 EST) [hereinafter posting of Kevin Kelly].

197. *See* Apple, iPod Your Life, http://www.apple.com/ipod/ipodyourlife/ (last visited Dec. 20, 2008).

198. *See* Posting of Kevin Kelly, *supra* note 196.

199. *See id.*

from this audience.[200] While Kelly's numbers may have been a bit optimistic, the concept is sound enough; lower transactions costs create greater opportunities.

The opportunity to reach niche markets leads to the much-lauded effect characterized as the "Long Tail."[201] Retail stores have limited space and no desire to carry inventory. They thus stock a relatively small number of CDs that are likely to move quickly. Online retailers, particularly digital music sellers like iTunes, can afford to carry a vast multiple of this number. This creates an opportunity for people to find more satisfactory choices.

Relying on live concert revenue to support the music industry essentially chops off the long tail. Billboard counted 3275 touring acts in the U.S. last year.[202] While the number seems large, it is dwarfed by the number of artists with songs and albums being sold by digital music stores—estimates are now in the millions.[203] Fans can find almost anything they like online, and artists can potentially find their "1000 true fans" in that environment.[204] The same is not likely to be true in the concert market. Unless your 1000 true fans, or even 10,000 true fans, all happen to live in the same city, then mounting a tour to reach them is an expensive proposition.

The structure of the touring business makes it difficult for artists to reach a widely dispersed audience created online. Unlike the online world, it matters a great deal if your fans are thin on the ground in the physical world of touring.

These simple facts make puzzling the enthusiasm for the touring model displayed by Long Tail originator Chris Anderson and other Long Tail advocates.[205] At the very moment when new opportunities are opening up to artists and fans, some would send them back to an old economy model of scarcity and limitations. It is hard to link revenue-producing opportunities in a short-tail

200. *See id.*

201. *See* ANDERSON, THE LONG TAIL, *supra* note 36, at 5–6, 10.

202. *See* Memorandum from Brad Powers, Research Assistant, Regarding Correspondence with *Billboard* to Professor Mark Schultz, S. Ill. Sch. of Law 1 (Jan. 25, 2008) (on file with author) [hereinafter Memorandum from Brad Powers].

203. *See* ANDERSON, THE LONG TAIL, *supra* note 36, at 8.

204. *See* Posting of Kevin Kelly, *supra* note 196.

205. *See* Posting of Chris Anderson, *supra* note 3.

world to a long-tail creative economy. The concert business is poorly matched to the type of value created online—episodic, limited-time events tied to aggregating fans in a physical place, versus thinly spread, long-enduring niche interests. Unfortunately, the concert model is not just limited by its physical structure; the financial structure poses some challenges as well.

B. *The Prospects for the Live Concert Business as a Source of Revenue for Financing the Recording Business*

Notwithstanding the problem with weak links between recorded music and demand for live concerts, let us assume that the music business attempted to move entirely to using concert revenue to support the production of recorded music. Musicians and bands would record music and freely distribute it for the purpose of promoting their concert tours. Would the revenue and cost structure of the industry support such a change? Could musicians form small, vertically integrated organizations that finance recording and touring out of the same pot of money?

Although some amount of vertical integration may be in the industry's future, touring revenues seem to be a shaky sole foundation. Three problems with the concert industry lead to skepticism that it can absorb the cost of making recordings and effectively sustain both the concert business and the production of recordings at any level like the one we enjoy today. First, if recordings and concerts are treated as jointly produced goods, then one can see that the assumption that lost revenue from one product can be made up from the other is fundamentally flawed. Second, the music industry's touring revenues are heavily skewed toward a handful of top performers. Third, as the cultural economics literature describes, live performance is subject to a "cost disease"—ever-rising costs caused by stagnant productivity.

1. The Jointly Produced Goods Problem

It is often asserted that musicians make all their money by touring. A typical version of this sentiment is quoted in Alan Krueger and Marie Connolly's paper on "Rockonomics": Scott Welch, the manager for Alanis Morisette and LeAnn Rimes, claims that "[t]he top 10% of artists make money selling records, the rest go on tour."[206]

Although there may be reason to doubt that such assertions are completely accurate,[207] they at least reflect the traditional division of risk/reward in the industry. Record companies have long advanced the money for recording and made musicians wait until those costs were recouped, and then some, before they received their share of proceeds via royalties.[208] Meanwhile, performers have gone on tours with little or no support from the record company, but have received more of those proceeds up front and shared little of the revenue.[209] It has recently been suggested that this division has pitted artists against record companies as performers may encourage people to distribute recordings to create a buzz to promote the touring portion of the business.[210]

206. Marie Connolly & Alan B. Krueger, Rockonomics: The Economics of Popular Music 6 (Nat'l Bureau of Econ. Research, Working Paper No. 11282, 2005), *available at* http://www.nber.org/papers/w11282.pdf.

207. The common assertion that musicians make most or all of their money from live performance rather than recordings covers a lot of ground. It is probably true in some senses but not in others. It is certainly true in the most trivial sense: if one accounts for every musician that makes some money from performing, which would include every cover band that plays in the local bar or fraternity house, then it seems certain that most pop musicians make no money from recordings. If, however, the statement only applies to acts that make studio recordings, then its accuracy is less certain. It is common to hear that certain successful acts have never received royalties from sales of their recordings. *See, e.g.*, Posting of Eliot Van Buskirk to Wired Blog Network: Listening Post, http://blog.wired.com/music/2008/07/ lyle-lovett-nev.html#more (July 21, 2008, 15:49 EST) (pointing to Lyle Lovett's track record of never "mak[ing] a dime" on record sales). However, the picture is complicated by the fact that performers typically receive advances before they make the recording. *See, e.g.*, *id.* (noting that Lyle Lovett's advances are so large that he has never recouped them to the point of profiting from sales of his music). Although the artists are obligated to pay recording expenses out of the advance, they still might retain money from the advance. Then, depending on contractual arrangements, if they write their own songs, they may make money from mechanical and performance royalties or the sale of synchronization rights. *See* PASSMAN, *supra* note 20, at 114, 115. Some recording artists rarely or never tour—Kate Bush, for example—*see infra* notes 339–40 and accompanying text, indicating that some performers can sustain themselves on revenues from recordings. Moreover, because the recording industry probably relies on a relative handful of hits for most of its revenue, *see infra* note 247 and accompanying text, royalties from recordings may be quite large in the aggregate, but such royalties are concentrated in a few superstars.

208. *See* PASSMAN, *supra* note 20, at 100.

209. Record companies once more commonly supported tours to promote performers, but do so less often now, as tours are considered money-losers. *Id.* at 159. Record companies are now seeking to share touring revenue. *See supra* notes 76–81 and accompanying text.

210. *See* Gayer & Shy, *supra* note 74, at 375–76.

These perceptions that musicians do not benefit from the recording business apparently have led some commentators to believe that musicians would have little to lose from giving away their music. Of course, financing for the recording would need to come from somewhere, and some commentators assume that cost could simply be shifted to the concert business.[211]

There are problems with this logic. First, the numbers do not match up well. According to data compiled by Krueger and Connolly, revenue from concert tickets was $2.1 billion in 2003, while revenue from the sales of recordings that year was $11.8 billion.[212] It is hard to see how a business less than one-fifth of the size of another can absorb the costs, let alone make up, the revenue from the other, much larger business.

The numbers disparity points to a fairly basic economic concept that some advocates of the live performance model may be overlooking. Just because there are two markets in which musicians can sell music does not mean that revenues lost in one can simply be made up in the other.

The problem resembles the description of jointly produced products that goes at least as far back as Alfred Marshall.[213] Marshall's classic formulation discussed the production of beef and hides, both of which came from cows. If the demand for one of these products is reduced to zero (e.g., hides), then the production of cows becomes less profitable and the size of the overall market decreases.[214] Even if the hide seller is different from the butcher, the lack of revenue from hides affects the supply of cows available to the butcher and ultimately the market for beef.[215] The rancher cannot simply make up for the loss of hide revenue by charging the butcher more.[216]

211. Connolly & Krueger, *supra* note 206, at 6.

212. *See, e.g.*, Posting of Chris Anderson, *supra* note 3.

213. *See* 1 ALFRED MARSHALL, PRINCIPLES OF ECONOMICS § V.VI 4, at 388–90 (9th ed. 1961). I am indebted to Stan Liebowitz for pointing out to me this way of viewing the problem.

214. *See id.*

215. *See id.*

216. *See id.* As Marshall observed:

> It more frequently happens that a business, or even an industry finds its advantage in using a good deal of the same plant, technical skill, and business organization for several classes of products. In such cases the cost of anything used for several purposes has to be defrayed by its fruits in all of them . . . .

Substituting music for the cows in Marshall's example, the same principles apply. Music, or perhaps a career in popular music, has several outputs, including recordings and concerts. If demand for purchased recordings is reduced to zero, then the production of music becomes less profitable and the supply will be reduced. Even if one granted the dubious assumption that *no* musician makes any money from recordings, record labels still serve the function of financing the cost of production. If the recorded music business no longer pays its part of the costs in the joint production of music, then that cost must be borne by the live concert business.[217] If performers are to continue to record music under these conditions, then they must either absorb costs or pass them on to consumers in the form of increased concert ticket prices.

2. The Superstar Problem

The concert market appears to be very lucrative simply in terms of impressively large numbers. In 2007, *Billboard* reported gross earnings of $2.6 billion for the concert industry, which was comprised of 3275 headlining artists.[218] It may appear that an industry of this size could support some kind of recording industry.

The distribution of rewards in the business is incredibly skewed, however, which makes it a less likely candidate for supporting the production of live recordings. The concert business is a superstar market: a handful of musicians at the top of the concert business make most of the money.[219] Moreover, these top earners have enjoyed dramatically increasing ticket prices in recent years.[220] These top earners tend to be older, established artists past the prime of their recording years.[221] Meanwhile, ticket

Id. at 390. The cost of the cow is defrayed in more than one market, as is the cost of making music. If one of those markets disappears, the cost of making music increases and supply decreases.

217. The costs may also be borne by other ancillary markets, such as merchandise or licensing.

218. Memorandum from Brad Powers, *supra* note 202. *Billboard*'s reporting year runs from November to November each year. *Id.*

219. *See generally* Sherwin Rosen, *The Economics of Superstars,* 71 AM. ECON. REV. 845, 845 (1981) (introducing and describing the concept of superstar markets).

220. *See infra* note 231–33 and accompanying text.

221. *See infra* notes 241–48 and accompanying text & figs. 2, 3.

prices for up-and-coming bands do not appear to be increasing at the same rate.[222]

These facts point to a difficult reality. Much of the talk about the increasing strength of the concert business does not necessarily apply to those performers who still need to record to develop fans. These newer performers would have a far less lucrative pool of earnings from concerts upon which to draw if they were required to finance their own recording costs from ticket revenue. If each act is its own vertically integrated business, it really does not matter much that top earners are doing well (except to those top earners).

Using statistics provided by *Billboard,*[223] I was able to determine the rather skewed distribution of rewards in the touring market for 2007. As observed above, there were gross earnings of $2.6 billion for 3275 headlining artists that reported to *Billboard*.[224] The top twenty-five grossing tours, which represent only 0.76%[225] of all reported tours, took home 53.25% of all reported earnings ($1,384,411,310).[226] The top twenty-five acts accounted for about 36% of all 51,000,000 tickets sold in 2007.[227] Figure 1 illustrates the skewed distribution.

222. *See infra* notes 234–40 and accompanying text & figs. 2, 3.

223. The numbers come mostly from the 2007 Year End Boxscores published in the December 22, 2007 issue. *Top 25 Tours*, BILLBOARD, Dec. 23, 2007, at 138 [hereinafter *Top 25 Tours—2007*]. However, *Billboard* was helpful in responding to inquiries regarding the certain details, particularly the total number of acts that comprised the market that *Billboard* measured. *Pollstar* was not forthcoming. I thus used *Billboard* numbers while Krueger's earlier study uses *Pollstar* numbers.

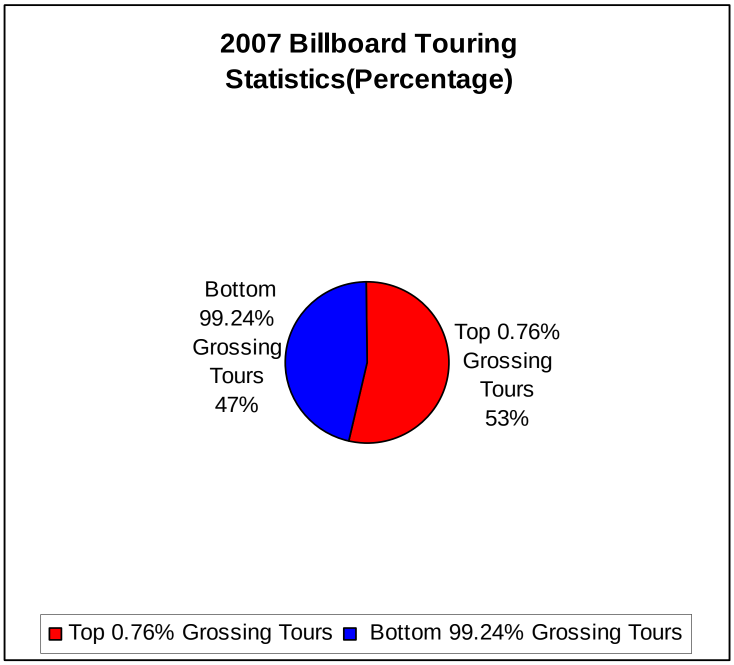
224. *See* Memorandum from Brad Powers, *supra* note 202.

225. The 0.76% is 25 top tours divided by 3,275 total tours. It is the percentage of top tours in relation to total tours.

226. See *Top 25 Tours—2007*, *supra* note 223, at 138. This reported earnings figure was calculated by adding the total gross of the top 25 tours as listed in *Billboard*. *Id*. The 53.25% is the reported earnings figure, $1,384,411,310, of the top 25 tours divided by the total gross of all tours, $2.6 billion, as reported by *Billboard*. *See supra* note 202 and accompanying text.

227. The 36% is calculated by dividing the total attendance of the top 25 tours, as reported by *Top 25 Tours—2007*, *supra* note 223, by the total tickets sold to all shows, as reported by Memorandum from Brad Powers, *supra* note 202.

Figure 1.



In a study that used 2003 data from *Pollstar* magazine, Connolly and Krueger reported a similarly skewed distribution.[228] In 2003, the top 1% of artists took in 56% of concert revenue.[229] The top 5% took in 84%.[230] In other words, the remaining 95% of artists in Connolly and Krueger's sample shared the remaining 16% of revenue. When looked at in this light, the initial magnitude of the revenue numbers no longer appears as promising as it did initially.

What about the high ticket prices that have been in the news? *Pollstar* reported the average price at $62.07 during the first six months of 2008.[231] Connolly and Krueger found that for their sample (a large sample of performers taken from *Pollstar* data), "From 1981 to 1996, concert prices grew slightly faster than infla-

228. Connolly & Krueger, *supra* note 206, at 11.
229. *Id.* at 19.
230. *Id.*
231. Randy Lewis, *No Downturn for Concert Industry,* L.A. TIMES, July 11, 2008, at E17.

tion: concert prices grew a compound 4.6 percent per year while overall the consumer prices grew 3.7 percent per year."[232] Things took a drastic turn from 1996 to 2003 when concert prices grew at 8.9% against 2.3% inflation.[233]

These high prices might appear to be good for an industry that has to make up its lost revenues from declining record sales somewhere. Perhaps live performance is a luxury or superior good—a good for which increases in income cause more than proportional increases in demand.[234] If that were the case, rising wealth in society would likely support ever-increasing concert prices.[235]

Unfortunately, further investigation of the numbers paints a less rosy picture. Bands in the middle tier—often the up-and-coming bands—probably are not enjoying the same ticket price inflation.

While it likely would be impossible to attempt to verify this supposition for all bands across all shows, I have found a rough, but useful and informative proxy. I examined ticket prices for five Chicago concert venues in 1998 and 2008 to determine the inflation in ticket prices during that period. The venues chosen were Schuba's, Martyr's, Metro, the Park West, and the Double Door.[236] These venues hold between 175 (Schuba's)[237] and 1,100

232. Connolly & Krueger, *supra* note, 206, at 13.

233. *Id.*

234. *See generally* JAMES HEILBRUN & CHARLES M. GRAY, THE ECONOMICS OF ART AND CULTURE 104 (2d ed. 2001) (discussing income elasticity and the arts).

235. *See id.*; *see also* Tyler Cowen & Robin Grier, *Do Artists Suffer from a Cost Disease?,* 8 RATIONALITY & SOC'Y 5, 20 (1996) (arguing that rising wealth, among other factors, ameliorates the cost disease); David Throsby, *The Production and Consumption of the Arts: A View of Cultural Economics*, 32 J. ECON. LITERATURE 1, 8 (1994) (discussing studies regarding income elasticity of demand for the performing arts).

236. A few more venues that fill this niche have opened in recent years, while others have closed, but these five venues have been open during the entire time period. A few others (for example, the Empty Bottle) also host smaller national acts, but have a preponderance of local acts and no-cover shows. Confining the sample to these five venues helps control several relevant variables (size of venue, type of acts booked, union/non-union, bar revenues) throughout the time period. The neighborhoods in which the venues reside have all become more upscale in the last ten years, but given the results, that fact does not appear to have influenced ticket prices. The sample includes 393 shows in the first eight months of 2008 and 176 shows from the entire calendar year of 1998. Prices were taken from the weekly concert announcement column in the *Chicago Sun Times* entitled "Ticket Line," obtained from the Lexis Nexis database. *See, e.g.*, *TicketLine*, CHI. SUN-TIMES, Jan. 18, 2008, at NC14. Shows with lower pre-sale prices were coded for that lower price in both years.

237. E-mail from Matt Rucins, Schuba's, to Katie Kohm, *University of Richmond Law*

(Metro).[238] These are the clubs in Chicago that for the last ten years have tended to host bands on the way up, on the way down, or stuck in the middle—indie rock acts, jam bands, singer-songwriters, local acts with followings, and newer acts in general. In other words, these venues play host to the middle class of popular music. Figure 2 shows the results.

Figure 2.

Ticket Prices at Smaller-Sized Popular Music Venues in Chicago 1998				
Average Price, All 5 Venues		Median Price, All 5 Venues		
$14.19382022		$12		
Schuba's Average	Martyr's Average	Metro Average	Park West Average	Double Door Average
$10.75	$12.65384615	$14.94737	$18.33696	$10.75
Schuba's Median	Martyr's Median	Metro Median	Park West Median	Double Door Median
$10	$12	$13.5	$16.5	$10

Review (Nov. 12, 2008, 2:28 EST) (on file with the *University of Richmond Law Review*).

238. Metro, General Info, www.metrochicago.com/info (last visited Dec. 20, 2008).

Ticket Prices at Smaller-Sized Popular Music Venues in Chicago 2008				
Average Price, All 5 Venues		Median Price, All 5 Venues		
$14.68193384		$14		
Schuba's Average	Martyr's Average	Metro Average	Park West Average	Double Door Average
$12.7391304	$15.44117647	$16.96196	$24.95238	$10.97115
Schuba's Median	Martyr's Median	Metro Median	Park West Median	Double Door Median
$12	$15	$16.5	$25	$10

Ticket prices in mid-level venues did not show the sort of inflation that Connolly and Krueger found in overall prices during earlier periods.[239] The average price rose only about fifty cents across all venues, and though the median price did rise $2 (from $12 to $14), that was well below the expected rise based on the change in the consumer price index (CPI) for the period.[240]

If ticket prices are skyrocketing, and if the increase is not occurring in the middle tier of acts, what is driving the increase? A common popular theory is that aging Baby Boomers and Gen-Xers are wealthier and thus more willing to spend money to see

239. *See supra* notes 232–33 and accompanying text.

240. *See* The Federal Reserve Bank of Minneapolis, http://www.minneapolisfed.org/ (last visited Dec. 20, 2008) (using the CPI calculator, goods or services worth $14.00 in 2008 would have only cost $10.58 in 1998).

the favorites of their youth. The Billboard top twenty-five touring act charts appear to support this theory.[241]

I checked career length of the top twenty-five touring acts in 2007 and 2008. I used the *Rolling Stone* magazine online discography for each of the acts in the top twenty-five[242] to determine career length, based on the performer's first album.[243] The results are shown in Figure 3.

Figure 3.

Average and Median Career Length of Billboard Top Touring Acts			
2006		2007	
Average	Median	Average	Median
21.35	16	22	15

There are few fresh, young acts among the top concert earners. With an average career length of just over twenty-one years in 2006 and an average career length of twenty-two years in 2007, these performers have had plenty of time to acquire a fan base. Most are no longer pumping out hit music, either; fans enjoy the older music they have long since acquired. As *Billboard* observed in 2006, "As has been the case for more than a decade, 2006 is top-heavy with veteran acts."[244] The acts, such as the Police, the Rolling Stones, Madonna, and Barbara Streisand, were, with a few exceptions, "past their record-selling prime."[245]

People in the music business do not call these acts old—the polite euphemism is "legacy act"—and the label is telling, as these bands are living off the legacy of the good-old, pre-Napster days. Concerns about paying for new recordings do not apply to most legacy acts, as their hit music is, in a sense, a fully depreciated

241. *See* text accompanying notes 223–30 & fig. 1.

242. I ignored four special productions—Cirque de Soleil in both 1998 and 2008, the American Idols Tour, and High School Musical.

243. There were a few judgment calls. For example, Justin Timberlake is credited for his time with 'N Sync and Roger Waters is credited for his time with Pink Floyd. In both cases, the performers gained tremendous fame through those associations. On the other hand, Rod Stewart's time in the Jeff Beck Group and Faces, which pre-dated his solo career, were not counted as those were not the source of his initial fame.

244. Ray Waddell, *Burning up the Road: Both Dollars and Attendance Prove Touring Is out of Its Slump*, BILLBOARD, Dec. 23, 2006, *available at* 2006 WLNR 22706812, at *5.

245. *Id.*

asset. With the bulk of their royalty-earning potential behind them, their interest is in getting exposure to advertise their tours. As a result, file sharing is not as much of a concern for them.

Def Leppard guitarist Vivian Campbell recently observed that Def Leppard's audience was getting younger due to re-discovery of the band through file sharing.[246] He noted that the band was "fortunate to have an absolute truckload of hits. It's actually very difficult for us because we have to decide which songs to play."[247] Of course, new bands do not have such a base upon which to build. As Campbell conceded, "When kids trade files, it's actually a good thing for classic bands such as us. It's not such a good thing for up-and-coming artists who need to sell records."[248]

Industry veterans thus wonder where the next generation of top touring acts will come from without years of industry promotion and blockbuster hits.[249] As one industry insider said, "There's a little bit of a problem to that for the future. . . . Where did our stars come from? They came from recorded music, from breaking on radio. We've got to find new ways to break talent or else we're going to run out of inventory."[250]

One answer might be the 360 deals discussed earlier, or other revenue sharing deals that allow the recording industry to share in the concert revenue success of older acts.[251] Such revenue sharing might allow the labels to cross-subsidize newer acts with a share of touring revenue, which is what the major labels currently do with recording revenue.[252] Eventually, those new acts might develop into well-established acts with significant touring revenue.

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246. Christina Fuoco-Karasinski, *Def Leppard Guitarist Sees the Bright Side of File Trading*, LIVE DAILY, Aug. 19, 2008, http://www.livedaily.com/news/14754.html.

247. *Id.*

248. *Id.*

249. *See* Ray Waddell, *The Year in Touring*, Billboard, http://www.billboard.com/bbcom/yearend/2006/touring/index.jsp (last visited Dec. 20, 2008).

250. *Id.*

251. See discussion *supra* Part II.C.

252. This has long been the model, although some have grown discontent with it. Earlier this year, the new Chairman of EMI Group, Guy Hands, complained that 85% of artists signed to major labels lose money for the labels, and that EMI made most of its money from a mere 200 of its 14,000 clients. Andre Paine, *A Final Chorus for Many at EMI,* HOLLYWOOD REP., Jan. 15, 2008, at 4.

Of course, established artists have observed the same facts, and many are concluding that their interests are diverging from the major labels and the new bands they are trying to break. Established artists are looking to places other than record labels for their new deals. Thus, acts such as the Eagles and AC/DC are cutting exclusive deals with Wal-Mart; Madonna, U2, Jay-Z, and others are looking to groundbreaking deals with organizations such as LiveNation.[253] It is not in the interest of these established acts to share revenue with record labels in order to subsidize the development of future acts.

In the end, the numbers discussed here show a touring business that is getting wealthier by getting older and living off established hits. Meanwhile, price growth for the newer part of the touring business that might support new recordings remains stagnant. The numbers do not necessarily show a touring business that is too poor to support a recording business, but the state of the touring business is less promising than it appears at first glance.

3. The "Cost Disease"

One more problem plagues the live concert business, making it a less likely candidate to save the ailing recording business. Live performance is a tough business, perhaps even tougher than all those clichéd rock songs about life on the road make it out to be. The cultural economics literature explains why this is so. William Baumol and William Bowen launched the cultural economics field with their 1966 study, *The Performing Arts—The Economic Dilemma.*[254] Their landmark work set out "to explain the strained economic circumstances which beset performing companies."[255]

Baumol and Bowen concluded that the economic challenges faced by the performing arts were not the result of historical accidents or institutional arrangements, but rather "something fundamental in the economic order."[256] According to Baumol and Bowen, the economic dilemma of the performing arts is, at heart,

253. *See supra* notes 30–34 and accompanying text.

254. *See* BAUMOL & BOWEN, *supra* note 25.

255. William J. Baumol & William G. Bowen, *On the Performing Arts: The Anatomy of Their Economic Problems,* 55 AM. ECON. REV. 495, 496 (1965).

256. *Id.* at 496–97.

a productivity problem; the performing arts lag behind other sectors of the economy in productivity growth.[257]

The stagnant productivity of the performing arts results from the fact that the labor of the performer is itself "the consumers' good."[258] The problem is often stated in terms of the performance of a Mozart quartet. In the eighteenth century, Mozart's Quartet for Strings no. 19 in C major, K 465 took four performers around forty minutes to perform.[259] In the intervening two hundred years, there have been no "improvements" in the efficiency of the live performance this piece, as it still takes four performers about forty minutes to play it. More importantly, Baumol and Bowen contended that the nature of the act of performance prevents productivity gains.[260] In other industries, consumers typically welcome innovations that reduce the hours of labor or resources required to produce the final product because they ultimately reduce the cost. Not so with respect to live performance, because "[a]ny change in the training and skill of the performer or the amount of time he spends before the audience affects the nature of the service he supplies."[261] As a result, "the arts cannot hope to match the remarkable record of productivity growth achieved by the economy as a whole."[262]

The more or less stagnant productivity of the performing arts stands in stark contrast to the rest of the economy. For example, the labor needed to produce an automobile has fallen dramatically in recent years. In 1983 it took General Motors about 135 man hours to produce a car.[263] Twenty-five years later, that number had fallen to 32.29 hours per vehicle, marking fifteen consecutive years of improvement in productivity.[264] By contrast, it took the band Lynyrd Skynyrd 1.07 man hours to produce a performance

257. *See id*. at 500.
258. BAUMOL & BOWEN, *supra* note 27, at 164.
259. *Cf. id.* (discussing a 45-minute Schubert piece).
260. *See id*. at 165.
261. *Id.* at 164.
262. *Id.* at 165.
263. *See* Michael Brody, *The Labor Showdown of the Decade*, FORTUNE, Apr. 16, 1984, at 128.
264. Press Release, Oliver Wyman, Lean Improvements, Worker Buyoutrs Bring Detroit Three Productivity Closer to Asian Rivaals, Says Oliver Wyman's Harbour Report 2008 (June 5, 2006), *available at* http://www.oliverwyman.com/content_images/OW_EN_Automotive_Press_2008_HarbourReport08.pdf (summarizing proprietary report).

of the song *Freebird* in 1977.[265] Today, a band duplicating the performance would still take 1.07 man hours. As Baumol and Bowen observed, "[H]uman ingenuity has devised ways to reduce the labor necessary to produce an automobile, but no one has yet succeeded in decreasing the human effort expended at a live performance of a forty-five minute Schubert quartet much below a total of three man-hours."[266]

Critics often decry this single-minded focus on the act of performing, as productivity gains in other factors employed in putting on a production may offset rising unit labor costs. For example, computerized lighting and air conditioning, which allow for longer seasons, might cut costs.[267] This analysis also disregards the contribution of factors such as capital investments in performance technology and the productivity of set designers, builders, marketers, ticket sellers, light operators, stagehands, and managers. Tyler Cowen and Robin Grier have also observed that more subtle improvements in the productivity of performers is possible, as technology has fostered better communication among artists, easier travel, improved health, easier access to training, and recording technology that allows one to listen to, and correct, practice performances more quickly.[268]

Baumol and Bowen did not, however, wholly ignore the contribution of other factors to the activity of staging a performance—they just saw them as unable to ameliorate the inexorable cost increases in the central, essential factor of the performer's labor.[269] For example, they noted that technology had improved the efficiency of support activities like management and travel during touring and had even improved activities that directly affected

265. The Freebird example was suggested by its use in a speech given by Alan Krueger. *See* Alan B. Krueger, Bendheim Professor of Econ. and Pub. Affairs at Princeton Univ., Rockonomics: Economics & Public Policy in the Rock & Roll Industry (2002), *available at* http://www.krueger.princeton.edu/columbia.ppt.

266. BAUMOL & BOWEN, *supra* note 25, at 164.

267. *See* HEILBRUN & GRAY, *supra* note 234 at 139.

268. Cowen & Grier, *supra* note 235, at 11. Douglas Dempster similarly speculates that the unit productivity of symphony orchestras may be increasing because of an influx of highly skilled musicians resulting from the "absurdly large number of American music students (i.e., something on the order of 8,000 music students graduate from accredited music programs each year) being trained for the profession of orchestral performance, and trained at higher and higher levels . . . ." Douglas J. Dempster, *The Wolf Report and Baumol's Curse: The Economic Health of American Symphony Orchestras in the 1990s and Beyond,* 15 HARMONY 1, 20 (2002).

269. *See* BAUMOL & BOWEN, *supra* note 25, at 163.

the performance, such as lighting and scene changes.[270] They contended, however, that the benefit of all such cost-saving measures is limited by the inability "to increase the hourly output yield of the performer himself."[271] The salaries of performers "constitute the bulk of outlays of the performing organization."[272] Moreover, unlike other economic endeavors where labor is employed to create a product, the work of the performer is the product and is thus irreducible.[273]

In later work, Baumol concluded that the irreducible centrality of the performer's work to the business of live performance would ensure that live performance remained "asymptotically stagnant."[274] As the costs of factors other than the performer's labor fall—the factors capable of productivity improvement—they become less significant.[275] The performer's labor once again comes to make up a higher portion of costs, thus restarting the cost disease.[276]

The stagnant productivity of the performing arts would not present a challenge in a generally stagnant economy.[277] However, in a growing market economy where other sectors are enjoying increased productivity growth, the imbalance between the performing arts and other sectors of the economy creates costs pressure in the performing arts sector.[278] The more productive sectors of the economy enjoy real wage increases, thus increasing the opportunity cost of choosing a career in less productive sectors like the performing arts.[279] Although highly trained, dedicated per-

270. *Id*. at 163–64.

271. *Id.*

272. *Id.* at 164.

273. *See id.*

274. *See* Hilda Baumol & William J. Baumol, *The Mass Media and the Cost Disease*, *in* ECONOMICS OF CULTURAL INDUSTRIES 109, 112 (W.S. Herndon et al. eds., 1984); William J. Baumol et al., *Unbalanced Growth Revisited: Asymptotic Stagnancy and New Evidence,* 75 AM. ECON. REV. 806, 807–08, 815–16 (1985) [hereinafter Baumol et al., *Unbalanced Growth*].

275. Baumol et al., *Unbalanced Growth*, *supra* note 274, at 807–08.

276. Baumol later broadened his claims regarding the cost disease, contending that it affected other mass media, such as television. Baumol & Baumol, *supra* note 274, at 120. Tyler Cowen criticizes the breadth of this claim, observing that the cost disease is a long time coming in such industries: "The potential for marketing and distributional improvements is exhausted only when the product is no longer scarce." Tyler Cowen, *Why I Do Not Believe in the Cost Disease,* 20 J. CULTURAL ECON. 207, 209 (1996).

277. *See* BAUMOL & BOWEN, *supra* note 25, at 167.

278. *See id*. at 171.

279. *Id*.

formers may be less willing to switch careers than many other types of workers, rising economic expectations and attractive alternatives are likely to have some effect on the salaries musicians are willing to accept.[280]

In light of real wages rising in the general economy, organizations employing performers face three choices:

1. Raise wages only if justified by increased productivity gains. Given the lagging productivity of the performing arts, performers' wages would quickly fall behind wages for the rest of the economy.
2. Keep up with increased wages in the general economy. In the absence of productivity gains in the work of performers, this strategy will cause unit labor costs to increase inexorably.
3. Employ a compromise strategy where wages rise, but do not keep up with the general economy. Both real wages and unit labor costs will increase. In the end, performers and their employers share the burden of lagging productivity.[281]

Baumol and Bowen argue that the third strategy is the one that happens most often in practice.[282] Wages must increase some, lest opportunity costs motivate current performers to change careers and potential performers to choose more remunerative work.[283] However, performers seem to derive a great deal of "psychic income" from their jobs and are thus willing to forego some monetary income.[284]

Given constant productivity, however, "any increase in wage rates, however modest, must lead to a corresponding increase in costs."[285]

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280. *Id.* at 168. As Baumol and Bowen observe, performers seem to derive great satisfaction from their careers. *Id.* at 169.

281. *See id.* at 168–69.

282. *Id.* at 169.

283. *See* Dempster, *supra* note 268, at 9.

284. BAUMOL & BOWEN, *supra* note 25, at 169. There is widespread anecdotal evidence for this contention. It also follows from the relatively low return most performers receive (low wages) for a very large investment in training, formal education, and practice. *Id.* Performers receive a tremendously low return on human capital relative to other skilled professions.

285. *Id.* at 170 (emphasis omitted).

> The central point of the argument is that for an activity such as the live performing arts where productivity is stationary, every increase in money wages will be translated automatically into an equivalent increase in unit labor costs—there is no offsetting increase in output per man-hour as there is in a rising productivity industry.[286]

Technological progress thus becomes a curse, rather than a blessing, for lagging industries like the performing arts, as it raises their costs by creating wage pressure from rising wages everywhere else.

According to Baumol and Bowen, the allegedly grim consequences of the cost disease are an inevitable reduction in the quantity of artistic production, absent some government intervention.[287] The cost disease theory has led many to follow Baumol and Bowen's call for government subsidy of the arts. As noted earlier, Baumol and Bowen's cost disease study launched the field of cultural economics, much of it devoted to the need for government subsidy.[288] Policymakers have followed this lead. Throsby noted in his 1994 survey of cost disease literature:

> In the 25 years following its initial presentation, this proposition [the cost-disease] has been widely seized upon in a number of countries as spelling doom for the live arts unless governments intervened, and both government funding agencies and the companies they support have made much of the cost disease hypothesis in pressing for ever more generous subsidies.[289]

Empirical evidence collected by Baumol and Bowen at the time of their study, and since, appears to support their contention—costs have indeed risen in the business of live performance.[290] Productivity gains in support services do not seem to have made up the difference.[291] However, rising costs have not necessarily

286. *Id.* at 171.

287. There are a number of reasons this reduction occurs. First, there is a limit to the increased costs that promoters can or are willing to absorb. Baumol and Bowen were particularly focused on non-profit arts groups, which typically have ambitious missions and perennially strapped budgets. *See id*. at 15–32. For-profit promoters face even greater pressures and also face the lure of more remunerative ways to employ capital. There is also presumably a limit to the increased prices that ticket buyers will accept. Demand cannot be completely inelastic. Moreover, in the non-profit world on which the original study focused, organizations resist increasing ticket prices as their mission is to increase public exposure to the arts.

288. *See supra* note 25 and accompanying text.

289. Throsby, *supra* note 235, at 15.

290. BAUMOL & BOWEN, *supra* note 25, at 182.

291. *Id*. at 163–64.

resulted in a decline in the supply of performances of the performing arts such as symphonies,[292] and certainly have not produced a decline in the arts generally.[293]

The reasons for this escape are not particularly mysterious. Performers have either found ways to sidestep the cost disease by finding subsidies (in the case of the traditional performing arts), been rescued by a greater willingness to pay on the part of consumers (as in the case of rock's legacy acts), or moved into new activities that use recording technology and other advances. The cost disease theory thus appears to have been accurate in predicting an apparent challenge—rising costs—but at least partly inaccurate in its prediction of consequences—declining production. It thus may be possible to escape from the "inevitable" consequences of the cost disease.

In the case of popular music, it is recording technology that has been most important in allowing performers to improve their status and escape the limitations of live performance. Copyright law has been essential to the task in most cases. The next section further considers the relative advantages and disadvantages of the copyright-driven direct appropriation business model versus the live-performance-based model for financing recordings.

V. LESSONS FOR THE LAW AND ECONOMICS OF COPYRIGHT IN THE MUSIC INDUSTRY

Closer examination of the proposed concert-based model for financing recordings reveals that it is likely less of a panacea than many might wish, but it also reveals two important lessons about copyright-enabled direct sales models. First, it is a useful reminder that copying is not always harmful and that productive business models can be built on freely available copyrighted works. Second, technology and copyright-based, direct sales models play a very important role in escaping the inherent limitations of live performance.

What emerges, I hope, is a fuller, more balanced understanding of the potential role of "free" business models for supporting the creation of recordings, particularly the ones that center on live

292. *See* Dempster, *supra* note 268, at 3.
293. *See* Cowen & Grier, *supra* note 235, at 20.

performance. Just because creators do not need to exploit copyright fully in some instances, it does not follow that copyright protection is unnecessary in *all* instances.

The following discussion examines these lessons in greater detail. It first examines the potential benefits of alternative models that tolerate or embrace copying. It then considers the essential role of copyright in escaping the limitations of live performance. Next, it considers which types of music might survive and which types would wither in an industry that relied primarily on live performance revenue. Finally, it concludes by placing this article's analysis in the broader context of trends in the music industry, looking beyond the viability of live performance alone for supporting the creation of recordings.

A. *Copying Is Not Always Harmful*

The literature on the economics of copyright offers important lessons regarding the potential benefits of tolerating copying or sharing. Even if copying undermines the ability of the music industry to directly appropriate revenue by selling recordings to consumers, performers may still be able to capture revenue indirectly. These insights have important doctrinal implications for copyright law, as others have observed. In particular, Michael Meurer has pointed out these insights' relevance to fair use analysis.[294] When the effect of copying on the market for originals is analyzed, it is essential to consider whether the copyright owner is benefitting indirectly from copying.

Largely missing from the discussion thus far has been consideration of consumer welfare. This discussion has been concerned mainly with the viability of a proposed business model. Nevertheless, it is worth noting that having a cornucopia of music freely available would vastly increase consumer welfare. The dynamic effects of the free model, however, need to be considered as well; if the model is not sustainable or reduces incentives, then there will be less music produced and perhaps less variety. As discussed below, these dynamic effects ought to be considered when assessing consumer welfare as well.

294. *See* Meurer, *supra* note 113, at 932.

Whatever their benefits, however, free business models cannot magically transform lost revenue in one line of business into gains in another. Theoretical models should not be embraced too quickly without careful examination of the institutions and business models that prevail in a particular market. This article's examination of the live performance business shows that it is likely difficult to capture increased value from copying recorded music via live performance. It is thus a poor candidate for supporting the production of recordings through indirect revenue effects.

There are, however, instances where practice confirms theory, as "free" models do benefit some acts. Older, legacy acts with a large base of hits—such as Def Leppard—are finding that file sharing increases their live concert business, although it does not necessarily encourage them to create new music.[295] Radiohead appears to have benefitted from its experiment with tip jars.[296]

Rather than passively hoping that freely available recordings will prove to be a complement to the recording business, the music business might try a more proactive approach. It could take some inspiration from the success of bundling models such as the popular children's toy Webkinz—if performers were to create explicit bundles of recordings and live performances or other goods, they might be able to capture more revenue while inspiring fan loyalty. Just as the Webkinz game serves to promote the sale of Webkinz toys,[297] music fans may become more loyal if a relationship is built with access to secure download sites and other perks. For example, fans who purchase recordings could receive secure codes that provide access to benefits such as exclusive downloads of new songs or videos, streaming video of performances, opportunities to communicate with performers via chat or e-mail, or an opportunity to purchase better concert tickets, merchandise, and other memorabilia.

Such bundling strategies would need to overcome the threat created by a potential flood of copying. However, my earlier work indicates that fans may be more likely to respect the proprietary rights of bands when they perceive a reciprocal connection.[298]

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295. *See* Olga Pierce, *Hair Metal Grows Back on the Net*, SEATTLE TIMES, May 5, 2008, at C6.

296. Eduardo Porter, *Radiohead's Warm Glow*, N.Y. TIMES, Oct. 14, 2007, at 11.

297. *See supra* notes 169–73 and accompanying text.

298. *See* Schultz, *supra* note 13, at 681.

Webkinz is the more likely example than Redhat. Fans do not need bands like corporate customers need Redhat, but they might develop a bond of affection and loyalty if it is explicitly encouraged.

B. *Escaping the Limitations of Live Performance*

Almost uniquely among creators, and long before copyright existed, musicians had a continuing revenue stream from their own work available to them. They could perform their music and works created by others. For example, Mozart and Beethoven were not only great composers; they were renowned performers. The opportunity to make money by performing has helped ensure that musicians always had a way to earn a living. Seen in this light, copyright is a very late development in the history of music.[299]

Nevertheless, we should not be too quick to dismiss the additional opportunities copyright brings. Live performance is a tough business for the performer.[300] It is also often disappointing for the potential fan. The opportunities to enjoy a live performance can be very limited, depending on where one lives and what one can afford. Copyright has helped performers to overcome and transcend the limitations of live performance. A new perspective opens when copyright is considered in light of the cost disease's productivity analysis and the other inherent limitations on live performance. Escaping the strictures of live performance created vast opportunities for popular musicians, both economic and artistic, as the following discussion considers.

1. The Vast Expansion of Popular Music Fueled by Technology and Copyright

During the twentieth century, recording and broadcast technology vastly and dramatically expanded the potential audience for a particular performance, to the great benefit of both performers and consumers. Starting in the 1920s, radio and phonographs brought music performed by professionals into people's

299. *See* Michael W. Carroll, *Whose Music Is It Anyway?: How We Came To View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1408–09 (2004).

300. *See supra* notes 254–57 and accompanying text.

homes.[301] As F.M. Scherer describes it, the consequences were radical for both musicians and their audiences:

> Those technological developments made music available and affordable to virtually all citizens of industrialized nations and transformed the enjoyment of music by the middle classes from what had been preponderantly a self-activated endeavor to a passive activity. Instead of making music oneself, one could listen at home to music performed by the best professionals.[302]

Although popular music certainly existed before mass media technology, it was a small-scale, homely affair. Performances took place in the home, at local social gatherings, and at traveling shows. Most performances were by amateurs. Audiences typically were not large.

The result was a vast new market. As Scherer observed, eighteenth- and nineteenth-century composers generally did not aim their efforts at the mass-market, "if not because of an aversion to popularization per se, then because the media for reaching those audiences were so limited."[303] Technological change enabled composers and performers to reach these markets for the first time, vastly expanding their reach and the productivity of, and potential reward for, their efforts.

No longer is the listener constrained in place, or even in time. As a result, some performances recorded decades ago continue to be heard daily and likely have been replayed billions of times. Such productivity gains are almost unfathomably vast over the days when performances could only be heard live. Even today's huge concerts, held in arenas, pale in comparison to the numbers reached by a modest hit song. Those art forms, performers, and organizations that take advantage of technology have enjoyed vast benefits by creating new markets, embracing new forms of creativity, and finding new audiences.

Copyright played a role in this story of technological transformation. The basic contours of the account are extremely familiar: copyright protects a creator's ability to appropriate value from her work, thus ensuring that she has sufficient incentives to create more work. This account is fine as far as it goes, but the

301. *See* F.M. SCHERER, QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES 199 (2004).

302. *Id.*

303. *Id.*

cultural economics literature puts copyright's role in a slightly different light by illustrating the role of copyright in a dynamic economy. Copyright enables musicians to reach ever-broader audiences by securing a potential return to the investment in production and distribution technology.

While technology deserves most of the credit for the productivity gains in twentieth-century music, it is difficult for performers to exploit the benefits of new technology without effective copyright laws and enforcement. The Copyright Act[304] in the United States and effective copyright laws in other countries following the Berne Convention played a key role in the technological success story of twentieth-century music.

The importance of copyright to enabling musicians to exploit the benefits of technology is underscored by the plight of musicians in countries without effective copyright enforcement.[305] Several African nations, notably Ghana and Zambia, once boasted substantial recording facilities and record-pressing plants.[306] Those facilities were out of business in the late 1980s in the face of a flood of cassette tape piracy.[307] Outside of South Africa, most African music is now recorded in Paris or London.[308] Those artists who stay home in Africa—most of them—rely on performance, which is an ever-more difficult, less rewarding business in many countries.[309] Most African musicians make less on average than their already poor countrymen.[310] Without effective copyright enforcement enabling high-productivity opportunities, the music business remains a poorly compensated, labor intensive activity.

Copyright thus has the virtue of making it worthwhile for composers, performers, and distributors of music to employ new recording and distribution technology. These technologies enable

304. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541–98 (codified as amended at 17 U.S.C. §§ 101-810 (2006) amending 18 U.S.C. § 2318 (2006) and 44 U.S.C. §§ 505 & 2113) (2000)).

305. *See generally* Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79 (forthcoming 2009).

306. *See id*. at 129.

307. *Id*.

308. *Id*. at 126, 129.

309. *Id*. at 133 ('Dou Dou' Sow, a well known musician in Senegal . . . who lives in deplorable condition in Dakar, [said] 'there are less live performances today than in the old days because there isn't enough money [to perform].'").

310. *Id*. at 126.

enormous productivity gains over the next-best alternative for supporting the creation and dissemination of music: live performance. A broadcast or recording can potentially reach millions. A recording can be replayed countless times. The output of a single performance is thus potentially infinite. Moreover, unlike live music where the size of a concert hall is ultimately limited, there really is no reason to expect productivity improvements to cease until recordings are essentially costless to distribute. As Cowen and Grier observe, "[T]he potential for capital-intensive innovations is exhausted when the product is no longer scarce."[311] The key, however, is to ensure that it is worthwhile for producers of music to invest in these capital-intensive technologies.

Copyright is the linchpin that makes investing in and employing these recording and distribution technologies worthwhile. It allows producers of music to appropriate a small part of the vast gains in productivity resulting from the use of these technologies. With copyright, it becomes worthwhile to shift music production from a labor-intensive industry to a capital-intensive one.

There is thus something anachronistic and perhaps ironic about the advocacy of business models that rely on live performance to support the recording business. It turns on its head a business model that brought great progress and turns back the clock.

2. The Artistic Opportunities Created by Direct Sales Business Models

When musicians can sell recordings of their performances directly to consumers (with the support of copyright), it expands the variety of music that is possible. In short, it allows performers to become recording artists. Not all music or performers are well-suited to the medium of live performance. Therefore, technology creates new opportunities for such music and performers. It both frees them from the limitations of live performance and gives them new opportunities to craft sounds not easily reproducible on the live stage.

The Beatles' *Sgt. Pepper's Lonely Hearts Club Band* ("*Sgt. Pepper's*") is a great example of how recording technology creates a

311. Cowen & Grier, *supra* note 235 at 13.

greater variety of artistic and commercial opportunities for artists. The Beatles decided to leave touring behind forever in August 1966.[312] After a few years on the road playing to legions of screaming fans, the Beatles wearied of poor quality performances in which they could not hear themselves play. As George Harrison recalled, "The sound at our concerts was always bad and we would be joking with each other on stage just to keep ourselves amused. It was so impersonal. We were sick of it."[313]

Recording technology allowed the Beatles to perform in a different way for their fans, creating a sound that could not be reproduced on the road. *Sgt. Pepper's* was something new in popular music, marking a transformation from performers into recording artists. As Paul McCartney said, it was their declaration that "[w]e were not boys, we were men . . . artists rather than just performers."[314] *Sgt. Pepper's* took months to record—over 700 hours of studio time[315]—an effort with little precedent for popular performers. The result was "an unsurpassed adventure in concept, sound, songwriting, cover art and studio technology."[316]

Sgt. Pepper's may have been, as *Rolling Stone* proclaimed, the greatest rock album of all time,[317] but it was most certainly not an album to be duplicated on stage. With its strings, sound effects, and other demanding parts, it was truly a studio project. The album was an artistic and technological masterpiece, not an advertisement for a touring band. Indeed, the band never went on tour again. If their only way to earn a return on that investment were to tour, *Sgt. Pepper's* would have been a waste of time. Sound effects and string sections are poor advertising for what a four-piece band can do on the stage. Using recordings as a free sample to advertise a tour is a difficult way to justify expensive studio recordings.

312. *See* The Guardian, Beatles—Key Dates, http://www.guardian.co.uk/thebeatles/page/0,11302,607848,00.html (last visited Dec. 20, 2008).

313. MARK HAYWARD & KEITH BADMAN, THE BEATLES UNSEEN 201 (2005).

314. BARRY MILES & PAUL MCCARTNEY: MANY YEARS FROM NOW 303 (1997).

315. ROLLING STONE: THE 500 GREATEST ALBUMS OF ALL TIME 10 (Joe Levy ed., 2005).

316. *Id.* at 9.

317. *Id.*

C. *Relying on Live Performance: Survivors, Winners, and Losers*

The music business would hardly cease to exist if it had to rely entirely on live performance. Some artists thrive on live performance; some do not. It is quite plausible that those artists who benefitted from touring, or the organizations that employed them, would continue to produce recordings. Madonna's deal with concert promoter Live Nation is built on exactly such a model. Nevertheless, there would certainly be losses beyond just a reduction in the quantity of recordings.[318] Certain types of performers and music would do better than others, thus curtailing the variety of music. Highlighting some of these possible changes helps to further point out the role of direct sales and copyright in sustaining a diverse music industry.

1. Survivors and Winners

In a music business that relied primarily on touring, winners—or at least survivors—still recording would likely include virtuoso performers who tour extensively with large followings of fans. A number of rock bands, especially jam bands, fit this description. These performers and their fans value large repertoires, great improvisational skill, and ever-changing set lists.[319] For example, the Grateful Dead was a top-earning touring act with studio albums that were relatively few and far between and frequently derided as disappointing.[320] The Grateful Dead benefitted from a loyal following of fans known as Dead Heads who attended multiple shows, some of them willing to forego mainstream jobs to follow the band.[321] Today, the Dave Matthews Band occupies a similar niche, consistently among the top twenty-five touring acts, with fans greatly enamored with their live playing.[322] Such bands play many types of music: progressive rock, Americana-tinged

318. As discussed earlier, supporting the cost of joint production (recordings and performance) with one revenue stream instead of two would likely reduce the quantity of recordings, especially where the remaining revenue stream—performance—is a fraction of the size of the abandoned revenue stream—recordings. *See supra* Part IV.

319. Schultz, *supra* note 13, at 668–75.

320. *See generally* DENNIS MCNALLY, A LONG STRANGE TRIP: THE INSIDE HISTORY OF THE GRATEFUL DEAD (2002).

321. *See id.* at 385–90.

322. *See Top 25 Tours—2007*, *supra* note 223; *Top 25 Tours*, BILLBOARD, Dec. 23, 2006, at YE-90 [hereinafter *Top 25 Tours—2006*].

country rock, bluegrass, and jazz are among the more favored styles.[323] Regardless of genre, when they produce recorded music, it tends to be of two types: recordings of concerts or studio recordings that focus on sophisticated instrumentation and jamming (or "noodling," to critics). Many enjoy this style of music, but not all, and in any event it only represents a small subset of the recorded music available today.

Performers who have built up "brands" would likely continue to produce recordings to maintain visibility and popularity as they toured. As discussed earlier, many well-established acts with large catalogs of hits—a legacy from the days of large record sales—make money from touring and sometimes still produce new records to aid in promoting their tours.[324] Arguably, top performers like the Police and the Rolling Stones are now just as much brands as bands: people buy concert tickets, t-shirts, DVDs, and other band-related paraphernalia as part of their devotion to the "brand." Although some legacy performers continue to produce compelling new music, others are accused of resting on their laurels.[325] In any event, a long-running question is where such artists would come from without the opportunity to build up a career with revenue from recordings and promotional support from a record business that earns money from those recordings.

Other performers who build brands through celebrity status, sex appeal, savvy marketing, and investment might also continue recording to maintain their fame. Such performers make money from touring and ancillary revenue, with recording often a secondary or tertiary source of income. Pop idols, divas, and hip-hop impresarios such as Jay-Z, Jessica Simpson, Jennifer Lopez, Beyoncé Knowles, Sean "Diddy" Combs, 50 Cent, Céline Dion, and Miley "Hannah Montana" Cyrus build lucrative multi-media empires by starring in movies and commercials, releasing their own lines of clothing, cosmetics, fragrances, and jewelry, building production companies, and otherwise exploiting their brands.

323. *See generally* DEAN BUDNICK, JAMBANDS: THE COMPLETE GUIDE TO THE PLAYERS, MUSIC, & SCENE (2003).

324. *See supra* Part IV.B.2.

325. *See, e.g.*, Jim Farber, *Guns 'N Roses' Long-Awaited Album 'Chinese Democracy' Finally Arrives*, N.Y. DAILY NEWS, Nov. 22, 2008, http://www.nydailynews.com/entertainment/music/2008/11/22/2008-11-22_guns_n_roses_longawaited_album_chinese_d.html ("So Big Foot has finally arrived—that mythic beast few believed they'd ever see in their lifetimes.").

These ancillary lines of revenue can prove quite lucrative.[326] For example, rapper 50 Cent's career as a celebrity investor paid off handsomely in 2007 when he made $100 million—after taxes—from the sale of VitaminWater brand manufacturer Glacéau to Coca-Cola.[327]

The type of music created by celebrity performers is hard to categorize, as celebrity is a serendipitous phenomenon. Still, two clear trends are apparent. First, some brand-name performers, particularly hip-hop artists, built their fame and initial fortunes on recording revenue, and many still earn large amounts from recording.[328] It would be harder for such artists to gain initial traction without recording revenue. Second, many brand-name performers are female vocalists whose recordings tend to put their vocal prowess front and center, for example, Beyoncé or Céline Dion, or whose images are built on sex appeal, for example, Jessica Simpson. As with bands that improvise heavily, many consumers enjoy this type of music, but not all. In addition, these performers only represent a subset of what is currently available in the market for recordings.

Musical spectacles or media events such as the Fox network's *American Idol* singing competition also do not depend on direct sales to consumers to build and sustain their audience and commercial success. Over the last several years, *American Idol* has enthralled tens of millions and launched the careers of several pop stars.[329] *American Idol*'s formula for success is similar to that of a sporting event—the excitement and immediacy of watching a competition, plus the shared communal experience of watching it unfold with millions of other people. Because the experience is enjoyed live, much like a sporting event, there is little point in rewatching old episodes. *American Idol* also launched a fairly suc-

326. The performers in this category regularly are found in *Forbes'* annual list of the 100 most powerful celebrities. *See* Matthew Miller, The World's Most Powerful Celebrities, FORBES, June 11, 2008, http://www.forbes.com/2008/06/11/most-powerful-celebrities-lists-celebrities08-cx_mn_0611c_land.html.

327. *See* Michael Miller, *The Celebrity 100: 50 Cent*, FORBES, June 11, 2008, http://www.forbes.com/lists/2008/53/celebrities08_50-Cent_M80Q.html.

328. For example, Kanye West has made a great deal of money from his own hit records and the hit records he has written for others. *See* Michael Miller, *The Celebrity 100: Kanye West*, FORBES, June 11, 2008, http://www.forbes.com/lists/2008/53/celebrities08_Kanye-West_TDFX.html.

329. *See* Jonathon Berlin, *Is Idol Still a Hitmaker?*, CHI. TRIB., Jan. 13, 2008, at 65. The show started in 2002. *Id*.

cessful live touring show—in 2006, the "American Idols Live" tour, featuring performers from that year's show, took in over $35 million.[330] Although studio versions of contestant performances are currently released on iTunes, *American Idol* produces very little truly new music—the songs performed are almost all old standards or popular hits from the past five decades.[331] Nevertheless, *American Idol* and similar events have served to launch a few lucky artists, such as Carrie Underwood, into superstar status, quickly developing their "brands" and allowing them to forego years of building a catalog of hits.[332]

Patronage might even make a comeback of sorts via corporate sponsorship of recordings, regardless of touring. Recently, the William Wrigley Jr. Co. paid pop stars to record and release songs that were extended jingles for its DoubleMint gum.[333] Chris Brown's "Forever" reached number four on the charts and was only later revealed to be a commissioned song.[334] The use of popular music in TV shows as theme songs and background music has also become a more important source of revenue for popular music.[335] Although such opportunities are lucrative, they may reduce the variety of music, as artists who work under commission tend to lack artistic freedom.[336]

Finally, plenty of part-time and amateur musicians would still record music. With recording tools like DigiDesign's Pro Tools

330. *Top 25 Tours—2006*, *supra* note 322.

331. *See 'Idol' on iTunes*, CHI. TRIB., Feb. 19, 2008, at 36. Many American Idol contestants go on to recording careers, but they then face the same issues as all other recording artists.

332. Berlin, *supra* note 329.

333. Ethan Smith & Julie Jargon, *Chew on This: Hit Song Is a Gum Jingle,* WALL ST. J., July 28, 2008, at B1.

334. *Id.*

335. Noel Holston, *Pop Goes the Soundtrack for Prime-time Shows; Memorable Music Replacing Orchestral Cues*, CHI. TRIB., Dec. 26, 2002, at N8.

336. During an earlier era of patronage, many composers chafed under the strictures of patronage. For example, the composer Joseph Haydn once celebrated leaving behind the patronage of the Esterhazys, which was rather secure and relatively undemanding. For him, artistic independence trumped economic security:

> How sweet this bit of freedom really is! I had a kind Prince, but sometimes I was forced to be dependent on base souls. I often sighed for release, and now I have it in some measure. I appreciate the good sides of all this, too, though my mind is burdened with far more work. The realization that I am no bond-servant makes ample amend for all my toils.

Scherer, *supra* note 301, at 93.

software selling for prices accessible to the average consumer,[337] more music than ever is being recorded out of passion, vanity, and the hope of starting a career. Modern tools allow fairly professional-sounding music to be recorded by amateurs. Still, amateurs do not have the benefit of services of recording engineers, session musicians, or other professionals.

2. Losers

Some types of musical recordings would likely suffer in a world without copyright. Not every type of music or performer does well on the stage.

The most certain casualties would be performers who do not tour. Just as some performers are better live than recorded, some are better studio performers than they are live ones. The Beatles are not the only example of an act that chose to spend its time in the studio rather than on tour.[338] For example, Kate Bush, one of the most successful singer/songwriters of the last three decades, toured only once in her career, in 1979.[339] Not only is the lush instrumentation of her albums unsuited to the road, but also she simply is not comfortable performing.[340] Instead, she spends years in the studio perfecting her work.[341]

One might conclude that in a world where touring is king, acts like the Beatles and Kate Bush might simply be forced to tour, but the results would not be so limited. If recorded music is, at best, an advertisement for live performance, then it simply does not pay to spend countless hours in the studio polishing an album that cannot be duplicated on stage. There is not much point in indulging a band like the Beatles to create an album such as *Sgt. Pepper's,* or motivation to create any of Kate Bush's work. There simply is not enough time to spend many months or years in the studio if an act needs to get on the road to make money.

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337. Pro Tools is the standard software currently used by most professionals and amateurs for digital recording. *See* JOHN KEANE, THE MUSICIAN'S GUIDE TO PRO TOOLS xxi (2004). It is available in consumer editions that sell for less than $100, with various professional versions and equipment packages selling for more.

338. See *supra* note 314 and accompanying text.

339. *See* Kate Bush News & Information: Frequently Asked Questions, http://www.katebushnews.com/faq.htm (last visited Dec. 20, 2008).

340. *Id.*

341. *Id.*

Certain types of music would also not be supported well by live performance, as they do not draw live crowds. While media spectacles like *American Idol* do well, conversely, music that is not visually compelling falls flat on the stage. Electronic music is a difficult sell to live audiences. Similarly, rap music is rarely a top seller on the touring circuit.[342]

Finally, consumers might be the losers. Although consumer surplus[343] would seemingly increase from free access to recordings, consumer welfare suffers when the variety of choices available to consumers is reduced. As Christopher Yoo has argued, copyright theory ought to account more fully for the implications of products differentiation.[344] The market for recorded music consists of differentiated rather than homogenous products. As Yoo observes, in such a market, "works compete not only by offering cheaper prices, but also by incorporating attributes that come closer to particular customers' ideal preferences. The multidimensionality of this competition makes simple price-cost comparisons an incomplete way to determine social welfare."[345] For a product like music, variety is thus an important benefit to consumers that ought to be considered in discussing welfare.

The benefit of variety is hard to measure, but one study that attempted to do so underscores its importance to consumers. Erik Brynjolfson and his colleagues attempted to measure the gains from e-commerce in 2000.[346] They concluded that the gain in variety from the larger stock of online bookstores such as Amazon.com produced far more consumer surplus than the lower prices—variety increased consumer surplus by up to ten times as much as lower prices.[347] There were two primary reasons that increased variety was so beneficial: first, consumers were able to purchase books when they might have made no purchase at all;

342. Don Waller, *Who's the Hottest Star on Rap's Biggest Tour?*, USA TODAY, July 13, 2008, at 50.

343. Consumer surplus is the difference between what a consumer is willing to pay and what they actually pay for a good.

344. *See generally* Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y. U. L. REV. 212 (2004).

345. *Id.* at 252.

346. Erik Brynjolfsson et al., *Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers* 1 (MIT Sloan, Working Paper No. 4305-03, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=400940.

347. *Id.* at 25.

second, consumers found more satisfying choices, for which they would have been more willing to pay.[348]

Similarly, consumer welfare could very well suffer from the decrease in variety of recordings that would likely result from relying solely on touring to finance the production of recordings. The potential gain in consumer surplus from free recordings seems great if one assumes that the recording market could remain the same size after prices dropped to zero. If the number and variety of recordings decreased, however, the gain likely would be less. If a consumer could not find music he liked, then the zero price would not generate any surplus. If a consumer were less satisfied with the music that is available for free, and thus likely less willing to pay, the gain in consumer surplus would also be reduced or perhaps negated.

The net effect on consumer surplus would depend on how the gains from reduced cost would balance against the losses from reduced variety. Regardless, a move to a market where recordings are free would not be entirely without cost to consumers. To put the result in qualitative terms, a music business without recordings such as *Sgt. Pepper's* would be seen by many as greatly diminished.

D. *A More Complete View of the Music Business*

The discussion in this article has critically analyzed assertions that touring is the future of the music business. By necessity, it has taken seriously the idea that recordings would be given away freely with touring revenue supporting the production of recordings. This exercise is worthwhile. Considering the music business in this light highlights the weaknesses of live performance as a sole means of support for the music business. It also shows how the music business and consumers benefit from the existence of a direct market for recordings, supported by copyright. Too often, the harm from file sharing and the benefits of copyright enforcement have been dismissed with glib assertions about making up the revenue with more touring.

Nevertheless, I ought to observe that portraying the future of the recording business as a choice between selling recordings to

348. *See id.* at 25–27.

consumers on the one hand and the proposed live performance business model on the other is far too stark and far from complete. For one thing, the pop music business relies on many revenue streams besides selling recordings and concert tickets. Royalties to composers for performances from radio stations, TV networks, retail establishments, bars, and restaurants are an important and significant revenue stream.[349] Synchronization rights for commercials, televisions shows, video games, and movies are another significant source of revenue.[350] Ringtones have proven lucrative.[351] Ancillary products, like t-shirts and other merchandise, are an increasingly important source of revenue for all performers.[352] The presence of these many alternate revenue streams ensures that the music business will never be faced with the difficult task of supporting the production of recordings solely through touring revenue.

In addition, whatever the future of the recording business might be, it is unlikely to be dominated solely by today's fading incumbents or to rely on only a few, clear business models, as it once did. Although times are difficult, it is also a time of great opportunity. Many new players are rising and many new business models are possible with lower production costs, cheap distribution, and easier connections with fans. Some acts may indeed find it helpful at various stages of their careers to release their music free of charge and rely only on concert revenue. Other acts may find it useful to rely on 360 deals with record labels, promoters, or managers to develop their careers. As long as consumers are persuaded to pay for music by some means—moral persuasion, legal enforcement, bundling, or technological measures—both performers and consumers will benefit from the increased variety and possibilities. If the direct sale model fails completely, then some

349. David Bernstein, *Music Royalties Rise, Even as CD Sales Fall*, N.Y. TIMES, May 8, 2006, at C6.

350. *See* Eric Pfanner, *Advertisements with a Pop Beat Bring Fresh Revenue to Singers Young and Old*, N.Y. TIMES, May 8, 2006, at C6.

351. Edna Gundersen, *Mastertones Ring Up Profits: With Millions Sold Every Week, Record Labels Are Reveling in Revenue, Promotional Potential*, USA TODAY, Nov. 29, 2006, at 1D.

352. For example, U2 signed a deal with Live Nation in April 2008 that covers promoting U2's concerts, licensing the band's name and image, and manufacturing and marketing U2-related merchandise. Ethan Smith, *Promoter Expands Reach with U2,* WALL ST. J., Mar. 31, 2008, at B4.

second-best solution, like blanket licensing, likely will be necessary.[353]

The future of the record business cannot be assured, however, simply by giving away recordings as advertising for concert tours. As much as this proposal may seem to be a straw man when subjected to thoroughgoing analysis, it is asserted repeatedly by fans, commentators, and scholars.[354] This article shows the argument for what it is: wishful thinking at best, and a cynical rationalization at worst. While giving away music as advertising can help some acts in some circumstances, it is not likely to lead to a large, diverse supply of recordings. The live performance business model thus does not justify disposing with copyright. It also cannot justify widespread, systemic copying as fair use, or provide a policy justification for not imposing secondary liability for such copying.[355]

A great virtue of copyright is that it does not preclude any alternative business model that makes a virtue of giving up some or all control over copying or distribution of creative works. Copyright, like all other property rights, leaves a vast amount of discretion to the owner. If free distribution of recordings makes sense, then performers are free to embrace such a model. If free distribution does not make sense, then performers ought to be able to reject the model.

VI. CONCLUSION

While live performance could support some kind of music industry, it would be much more difficult than some seem to think. Many celebrate the benefits of the creative destruction unleashed by digital technology, and there are indeed vast benefits, but the costs are often understated. The purpose of this article is to high-

353. *See supra* notes 51–52 and accompanying text.

354. *See supra* notes 59–75 and accompanying text.

355. As noted earlier, the existence of concert revenue has been cited as a reason for treating file sharing as fair use or at lease avoiding secondary liability. *See supra* notes 85–92 and accompanying text. In very specific instances, benefits from copying or sharing might provide a policy or doctrinal justification for excusing copyright liability. For example, if consumers' willingness to pay for a CD contemplates ripping the CD for use on an MP3 player, then that use does not harm the market for CDs, as record labels are already indirectly appropriating the value of that use. It would thus seem to be a case of fair use, or even implied licensing. Such case-by-case analyses are necessary, however, rather than blanket excuses based on the theoretical economic benefits of copying or sharing.

light the costs of less effective copyright protection. We might lose some of the variety and vitality of the music market—both present and future artists who are unable to benefit from touring revenue or other alternative support.

The links between freely available music and the touring business probably are not strong enough to support the production of substantial recorded music. Moreover, the structure of the live performance business does not make it a promising cash cow. A handful of aging artists make the lion's share of the money made touring. Touring also experiences rising costs.

The challenging economics of the live performance business hardly doom it. For nearly one hundred years, performers have enjoyed increasing revenues and greater prestige by exploiting the market for recordings. Current proposals stand this model on its head by forcing a business product created using new technology (digital copying and the Internet) to depend on very old technology (live performance). Instead, experience seems to show that the performing arts are most likely to prosper if they can ride the same wave of technological progress that the rest of society is enjoying. This may be where the music industry has really failed thus far—it has been slow to figure out how to exploit the increased productivity and expanded opportunities enabled by new technology.