

Howard Hertz, Hertz Schram PC

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Recorded music sales have plummeted over the last ten years, largely because of the P2P technologies and a significant number of end-users' increasing attitude that music should be free. While P2P technologies are often blamed as being at the root of the recorded music business' problems, it is the failure to find a method for monetizing the peer-to-peer technologies that is the true cause of the industry's problems. It has been my belief for quite some time that the eventual result will be music by subscription or free music that is advertising based, but I am coming to believe that some form of collective licensing at the ISP level would be the most workable solution.

From the consumer's side, while the opt-in to a collective licensing system may be voluntary, once a user downloads content through its ISP, the licensing should then become mandatory so that the rights owners and artists are being compensated. The technology appears to be developed which would allow an ISP to determine whether one of its users is downloading content which would otherwise go uncompensated. At such time, in order for the end-user to continue using the services of the ISP, the ISP must issue a license to the end-user at the current monthly or annual rate. Considering the millions of end-users that download music content, it is estimated that a monthly fee of between \$5 and \$10 per month will fairly compensate the artists and rights owners. Consumers are used to spending greater amounts for landline telephones, cellular telephones and cable television. Furthermore, as many people are now downloading music through their mobile phones, the end-user would have to show the mobile distributor that it is already paying the license fee to its ISP or, alternatively, pay the licensing fee to the mobile phone carrier. Thus, the system would be "voluntary" to the extent that if you do not download musical content through either your mobile phone or ISP, you will not have to pay the license fee.

As to the content providers, I also believe that this system can be voluntary. If an independent artist or a label believes that it can prevent the free downloading of its music by use of the proper technology, it would be free to "opt-out" of the system. However, if the system becomes as widespread as many anticipate, most artists and labels will likely "opt-in" in order to collect for their fair share of the royalties paid out.

The license fees collected by the ISPs and mobile phone companies would then be paid to a government authorized, but not government run, collection agency. This agency could be SoundExchange or a similarly established organization. SoundExchange currently collects license fees in the United States from entities such as online radio stations and satellite radio and passes the license fees along to artists and rights owners.

As the Internet is a worldwide computer network there may be difficulties in bringing all countries on board to collect the license fees and distribute the funds to the appropriate parties.

This is also true with respect to the collection of mechanical licenses and performing rights fees and, while not perfect, systems have been set up for collecting and paying out these fees throughout the world. There is no reason to believe that a similar system could not be established for collective licensing at the ISP level.

Perhaps the most difficult aspect of the collective licensing plan is determining how the payment to artists and rights holders would be based. To fairly compensate the various artists and rights holders, a combination of counting both downloads and streaming plays in some proportion to each other would most likely be developed. There would also need to be some combination of a census and sampling methodology developed in a way to best reduce “cheating” by the artists and rights owners. Similar to the methods used for performance rights organizations to pay the publishers and songwriters for radio play and other performances, a system of surveys will have to be developed that will best protect both the large players and the independent, smaller players in the field.

Prepared by Howard Hertz, Hertz Schram PC
with research by Joseph Bellanca, Esq.

Howard Hertz established the law firm of Hertz Schram PC in 1979. He specializes in entertainment law and represents numerous artists and entities including recording artists, publishers, songwriters, producers, managers, record labels and filmmakers. In addition to serving on several entertainment related boards of directors, Howard Hertz teaches entertainment law at both the University of Michigan and Wayne State University Law Schools.