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CREATIVE COMMONS, CC-PLUS, AND HYBRID INTERMEDIARIES: A STAKEHOLDER'S PERSPECTIVE

*Guido Russi**

I. INTRODUCTION

The Creative Commons licensing system is a non-profit organization that was founded to promote free use of creative works. Since its launch in 2001, this system has inspired a great number of spin-off projects: Flickr,¹ Wikicommons,² and ccMixer,³ to name but a few. These projects relate to many different fields, including music, movies, photographs, scientific articles, and others. While some unique features characterize each of these spin-offs, all of these new business ventures initially relied on “traditional” Creative Commons licenses.⁴

Recently new types of enterprises, such as Beatpick and Jamendo, have been launched that use Creative Commons licenses in a slightly different way—they rely on the CC-Plus scheme. The CC-Plus scheme involves the use of Creative Commons licenses *extended* to simplify commercial use of the newly created works.⁵

It appears that no systematic evaluation of these new business models has been carried out. Therefore, the purpose of this work is to try to fill this gap by analyzing these new enterprises to better understand what drives their success and what their main weaknesses are. Specifically this study will focus on the digital music market in which the CC-Plus protocol may be used to develop a solution to the illegal file-sharing problem, a problem which has caused some of the most critical litigation in the history of copyright.⁶

In particular, Parts II and III will introduce the Creative Commons project and the CC-Plus scheme. Part IV will then present a few relevant case studies regarding the digital music market. Based on the facts presented in Part IV, Part V will attempt to give a critical evaluation of these new business ventures, taking into account the viewpoints of all of the main stakeholders. Finally, Part VI will discuss some of the issues

* I am much indebted to Federico Morando and Luigi Russi for their helpful suggestions on previous drafts of this paper.

¹ See Michael W. Carroll, *Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 45, 56; *Who Uses CC?*, CREATIVE COMMONS, <http://creativecommons.org/who-uses-cc> (last visited Apr. 28, 2011).

² See *What Is Wikimedia Commons?*, CREATIVE COMMONS, <http://commons.wikimedia.org/wiki/Commons:Welcome> (last modified Mar. 5, 2011, 10:00 AM); Luciano Paccagnella, *La gestione della conoscenza nella società dell'informazione: il caso di Wikipedia [Managing Knowledge in an Information Society: the Wikipedia Case Study]*, 2007 RASSEGNA ITALIANA DI SOCIOLOGIA 653, 659 (It.).

³ See Carroll, *supra* note 1, at 55.

⁴ See *infra* Part II.

⁵ See *infra* Part III for a more detailed description.

⁶ See, e.g., *MGM Inc v. Grokster Ltd.*, 545 U.S. 913 (2005).

that seem to be limiting the actual development and implementation of CC-Plus systems.

II. WHAT IS CREATIVE COMMONS?

Creative Commons is a non-profit organization that was founded in 2001 with the primary purpose of facilitating free use—including re-use and modification—of creative works.⁷ To do so, a set of licenses is issued at no charge to the public, empowering the author of a creative work to “keep ... copyright while allowing certain uses”⁸ of his creation. In other words, Creative Commons enables protection of creative works under a “some rights reserved” copyright instead of the default “all rights reserved” copyright that automatically accrues on a work under the current intellectual property regime. Under this new system, individuals who are interested in uses of the work that have been explicitly permitted by the author are no longer required to separately secure an individual license. As a result, they encounter lower transaction costs in the process of using and reusing the works of others.⁹ This system is meant to increase “the body of work that is available to the public for free and legal sharing, use, repurposing, and remixing.”¹⁰

In particular, Creative Commons licenses are characterized by “modular contractual terms.”¹¹ These terms can be arranged together to create six different types of licenses,¹² each one allowing different royalty-free uses of the work. The six available options¹³ are (1) Attribution, (2) Attribution Share Alike, (3) Attribution No Derivatives, (4) Attribution Non-Commercial, (5) Attribution Non-Commercial Share Alike, and (6) Attribution Non-Commercial No Derivatives.¹⁴ These licenses are made up of three parts:

⁷ See Description of Creative Commons' Vision and Mission, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited Apr. 28, 2011); Niva Elkin-Koren, *Exploring Creative Commons: A Skeptical View of a Worthy Pursuit*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 325, 325 (Lucie Guibault & P. Bernt Hugenholtz eds., Kluwer Law International 2006).

⁸ CREATIVE COMMONS, *supra* note 7.

⁹ Elkin-Koren, *supra* note 7, at 325.

¹⁰ *What is Creative Commons?*, CREATIVE COMMONS, http://wiki.creativecommons.org/images/3/35/Creativecommons-what-is-creative-commons_eng.pdf (last visited Apr. 28, 2011).

¹¹ Elkin-Koren, *supra* note 7, at 330.

¹² For a list of the licenses, see *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Apr. 28, 2011).

¹³ For a detailed description of each of these licenses, see *id.*

¹⁴ Additional licenses may be tailored to suit the needs of particular communities (for example, the *sampling* licenses for musicians). See Carroll, *supra* note 1, at 47.

1. human-readable language (the Commons Deed), which sets out the key aspects of the license in a language that is universally intelligible;
2. lawyer-readable language (the Legal Code), which has been drafted by a network of lawyers from all of the fifty-two jurisdictions where Creative Commons has so far spread; and
3. machine-readable language (the Digital Code or metadata), which enables search engines to identify the licensed work.¹⁵

The choices of these contractual terms give the owners greater flexibility as they make their work available to the public. In addition to the greater flexibility provided by Creative Commons, one of the slogans under which Creative Commons is currently being promoted is “Skip the Intermediaries.”¹⁶ As stated by Michael Carroll, one of the co-founders of Creative Commons, “Creative Commons licenses act as a disintermediating force because they enable end-to-end transactions in copyrighted works.”¹⁷ To better evaluate this benefit, it is helpful to separate the two potential classes of creative works uses into non-commercial and commercial uses.

Non-commercial use of a work seems to be greatly simplified by the Creative Commons system. Since none of the six available licenses requires potential users to separately secure an individual license for non-commercial activities, persons interested in such activities are not involved in negotiations and, therefore, no longer need the assistance of intermediaries. Hence, looking at non-commercial activities, the Creative Commons project seems to be successfully cutting intermediaries out of the market by lowering transaction costs for all types of operations.

On the other hand, the situation becomes more complicated with commercial use of creative works. Depending on the license chosen, commercial uses are regulated in different ways under the Creative Commons regime. While three of the six licenses permit free commercial exploitation of a work,¹⁸ the remaining three contain a *Non-Commercial* clause, which requires individuals to secure a separate license if the work is to be used for commercial purposes. While the former situation does not seem to pose significant problems to potential licensees, the latter may be slightly problematic. With *Non-Commercial* licenses, a direct

¹⁵ See *Frequently Asked Questions*, CREATIVE COMMONS, http://wiki.creativecommons.org/Frequently_Asked_Questions (last visited Apr. 28, 2011).

¹⁶ *Get Creative!*, CREATIVE COMMONS, <http://creativecommons.org/videos/get-creative> (last visited Apr. 28, 2011).

¹⁷ Carroll, *supra* note 1, at 47.

¹⁸ These are the *Attribution*, *Attribution Share Alike*, and *Attribution Share Alike No Derivatives* licenses.

bargaining between the author of the work and the potential licensees is required, even though such a bargaining process might not always be a viable option.

This problem is especially clear in the case of an extremely valuable work with a strong market demand. In this case, the number of would-be licensees might be very large. If the author of such a work licenses his creation under the Creative Commons regime using a *Non-Commercial* clause, he will be required to carry out a negotiation with each one of the aspiring licensees, facing all the associated transaction costs. This might decrease the financial reward for the author with respect to the traditional combination of ordinary copyright and reliance on collecting societies. As a result, the two primary functions of copyright—rewarding the investment of the author and incentivizing dissemination of the work¹⁹—might be frustrated. That is where the CC-Plus scheme comes in.

III. WHAT IS CC-PLUS AND HOW DOES IT WORK?

As discussed above,²⁰ when an individual author chooses one of the Creative Commons licenses containing the Non-Commercial clause, transaction costs associated with the negotiation of commercial licenses may increase. In this context, Michael Carroll's assertion that "intermediaries are necessary to all kinds of transactions in commerce, culture, and news"²¹ seems to be confirmed. New kinds of intermediating bodies that give assistance to the author in the process of negotiating commercial licenses might actually be a way to limit the increase in transaction costs. In his article, *Creative Commons and the New Intermediaries*, Carroll describes this process of re-intermediation.²² Search engines, archives, libraries, producers, and publishers are some of the examples given by Carroll of entities that have started acting as intermediaries in the management of works licensed under the new Creative Commons regime. Since the publication of Carroll's article in 2006, however, the re-intermediating process has not stopped and one of the main reasons for this is the introduction of the CC-Plus scheme.

¹⁹ See Maria Lillà Montagnani & Maurizio Borghi, *Positive Copyright and Open Content Licenses: How to Make a Marriage Work by Empowering Authors to Disseminate Their Creations*, 12 INT'L J. COMM. L. & POL'Y 244, 248–49 (2008).

²⁰ See *supra* Part II.

²¹ Carroll, *supra* note 1, at 45.

²² *Id.*

CC-Plus is a beta²³ protocol launched in 2007 to provide the intermediaries mentioned above with a legal infrastructure that they may operate within.²⁴ *Traditional* Creative Commons licenses enable authors to retain copyright over their works, while granting specific types of free uses. What happens however, if a user wants to acquire rights that extend beyond those granted by Creative Commons licenses? An example is the commercial use of a creation licensed with a Non-Commercial Creative Commons license. The CC-Plus protocol empowers the author to license his work with Creative Commons and at the same time specify, for example, a broker that would handle rights that go beyond the scope of a Creative Commons license.²⁵ Technically, this is done by adding a “more permissions” link to the *traditional* Creative Commons icons that usually accompany a work, which leads to the site of a broker. The broker offers an infrastructure to channel the demand for rights of *commercial* exploitation over the author’s creation, so as to increase standardization and to lower transaction costs.²⁶ This way, the author manages to offer his work to the public free of charge for non-commercial use, but at the same time he is provided with an easy way to issue commercial licenses to those interested in the work for commercial uses.²⁷ The architecture of the CC-Plus scheme enables a *commercial* economy to co-exist with, or be grafted onto, the *sharing* economy created by the Creative Commons system.²⁸

The potential applications for this protocol are countless. In fact, the model has already been adopted by several companies operating in different domains such as Blip.tv in the field of video sharing, or Pump Audio in the field of musical compositions.²⁹

IV. A FEW CASE STUDIES FROM THE DIGITAL MUSIC MARKET

Since the release of the CC-Plus protocol in 2007, many new ventures have tried to build business models that offer this licensing

²³ In this article, the term *beta* is used to describe a protocol that is undergoing a test phase. A beta version of software is described as “the first working version distributed to external customers.” Alan MacCormack, *Product-Development Practices that Work: How Internet Companies Build Software*, 42 MIT SLOAN MGMT. REV. 75, 79 (2001).

²⁴ See *CC and CC+ Overview for the World Wide Web*, CREATIVE COMMONS, http://wiki.creativecommons.org/images/3/37/Creativecommons-ccplus-overview-for-the-world-wide-web_eng.pdf (last visited Apr. 28, 2011) [hereinafter *CC and CC+ Overview*].

²⁵ *Id.*

²⁶ See Press Release, Creative Commons, Creative Commons Launches CC0 and CC+ Programs (Dec. 17, 2007), <http://creativecommons.org/press-releases/entry/7919>.

²⁷ *Id.*

²⁸ See *CC and CC+ Overview*, *supra* note 24.

²⁹ See Press Release, Creative Commons, *supra* note 26.

scheme. Looking at the domain of music, several different websites have been launched in an attempt to successfully adopt the protocol.

A few case studies are reported below as further evidence of how the CC-Plus protocol has been implemented in practice. The business ventures listed below are just some of the projects that have been launched. They have been preferred over their competitors³⁰ in this work because more information and data is currently available for them, perhaps because of the greater visibility acquired by these websites. Moreover, the three Internet sites hereafter analyzed present most of the key features of these developing business models. Thus, they also provide a good summary of the core structure of open music licensing systems. The following analysis casts some light upon the possible future evolution of the digital music market.

A. *Beatpick.com*

Launched in February 2006,³¹ Beatpick.com is an Internet site whose core business is music licensing.³² Since its inception, Beatpick has undergone considerable development. The available data attests to this progress. Besides opening international offices in the United Kingdom and Italy, Beatpick has provided licenses for over 3,000 music tracks produced by 120 artists,³³ and has partnered with important brands such as Mercedes Benz, Ralph Lauren, and 20th Century Fox.³⁴ It has even launched a spin-off project, called SoundReef.³⁵

To better understand the determinants of this intensive growth, it is useful to examine its key features carefully and break down the website's structure to point out its key functioning principles.

1) *How Users Benefit*

³⁰ Other websites include Youlicense, www.youlicense.com; Pumpaudio, www.pumpaudio.com; and Opsound, www.opsound.org. See *id.*; Michael W. Carroll, *Creative Commons as Conversational Copyright*, in 1 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 445, 454 (Peter K. Yu ed., Greenwood Publishing Group 2007).

³¹ *Does the World Still Need a Beatpick?*, BEATPICK (Oct. 7, 2008), <http://blog.beatpick.com/does-the-world-still-need-a-beatpick/>.

³² *Beatpick Study*, CREATIVE COMMONS, http://wiki.creativecommons.org/Beatpick_study (last modified Sept. 3, 2010, 8:22 PM) [hereinafter *Beatpick Study*].

³³ The data refers to October, 2007. See *id.*

³⁴ *FAQ*, BEATPICK, <http://www.beatpick.com/intro/faq> (last visited Apr. 28, 2011) [hereinafter *FAQ*].

³⁵ See *BeatPick.com presents... SoundReef!!!*, BEATPICK (Nov. 14, 2008), <http://blog.beatpick.com/2008/11/>.

Beatpick has built its end-user appeal on a few important aspects. First of all, even though the website supports a very wide variety of artists and genres, a thorough quality control is carried out over music tracks. Beatpick generally accepts only 10% of over two hundred submissions per month.³⁶

Besides quality and diversity, another important aspect of Beatpick is its pricing policy. While the website does not charge for non-commercial uses, rights for commercial use can be secured at prices that are up to 70% lower³⁷ than those offered by collecting societies for licenses encompassing the same uses.

Finally, like all works licensed with Creative Commons, Beatpick's music compositions are distributed with no technological measures of protection. The absence of digital rights management (DRM) protective measures, together with other services offered by the site, such as the possibility to preview all works and the option to re-download tracks after the initial purchase, facilitate quick and easy access to the database of songs.

In summary, Beatpick's four main selling points are quality, diversity, pricing, and quick and easy access to the database.

2) *How Artists Benefit*

As outlined by Beatpick's CEO David d'Atri, "artists are in different segments of the market depending on the status of their careers."³⁸ Beatpick tries to address their specific needs and goals by providing them with "an extra tool"³⁹ to earn money and to gain exposure.⁴⁰ This is achieved by offering artists non-exclusive agreements, which can be terminated anytime with a thirty-day notice. Beatpick uses Creative Commons *Attribution Non-Commercial Share Alike* licenses by default. According to d'Atri, these serve as the "perfect legal framework for the label"⁴¹ because they balance "the need to make a living with the need for advertisement."⁴² These licenses are characterized by a flexibility that

³⁶ See *FAQ*, *supra* note 34.

³⁷ For example, webradios to be broadcasted in public or private spaces. See *Beatpick Study*, *supra* note 32.

³⁸ David d'Atri, CEO, Beatpick.com – SoundReef.com, Powerpoint Presentation at Bocconi University: *Intellectual Property—Legal Management of IPRs* (Nov. 11, 2008), http://www.antitrustisti.net/component/option,com_docman/task,doc_view/gid,912/Itemid,32/.

³⁹ *FAQ*, *supra* note 34.

⁴⁰ See *id.*

⁴¹ *Beatpick Study*, *supra* note 32.

⁴² *Id.* With the expressions "need to make a living" and "need for advertisement," d'Atri seems to be referring to the situation of those artists that choose to sacrifice their short-term gains to

could be appealing not only to amateur musicians, but perhaps even to professional artists.

In addition, artists profit from contributing to the website in many different ways: earnings from a track distributed through Beatpick are split evenly between the site and the artist, backend royalties belong entirely to the musician, and artists gain free advertising from participating in the project.⁴³

3) *Philosophy*

Naturally Beatpick shares the vision that lies behind the Creative Commons project. Indeed, they give support to “people who remix, podcast, or create multimedia projects with [their] music and disseminate it on the web.”⁴⁴

An important reason for participating in the Creative Commons project is that Beatpick understands that “non-commercial uses simply would not happen[—]or worse[,] would happen illegally[—]in today’s music market.”⁴⁵ Hence, its developers prefer to “encourage correct name association/credits and adapt to these situations, which may well turn into commercial opportunities in the future.”⁴⁶ Thus, Beatpick’s implementation of the CC-Plus protocol might also be due to a belief that Creative Commons could actually be a valid response to illegal file sharing.

However, in implementing the Creative Commons system, Beatpick follows a rather prudent line. The website still exercises some control over free downloading of tracks for allegedly non-commercial uses. In such circumstances, users are required to provide Beatpick with their name, email address, and a description of the intended use of the song. Moreover, in browsing Beatpick’s website, it appears that the download of certain tracks for specific non-commercial uses, like *Listening Pleasure*, are not permitted at all even upon payment. Therefore, it looks like Beatpick has taken several different precautionary measures to prevent abuse of the Creative Commons licensing scheme.

B. *Jamendo.com*

acquire greater visibility and, yet, need to offset these short-term losses with subsequent forms of remuneration.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *FAQ*, *supra* note 34.

⁴⁶ *Id.*

The second business venture that deserves a more detailed analysis is Jamendo. This music platform—founded in Luxembourg in May 2004—offers the largest catalog of tracks licensed with Creative Commons.⁴⁷ At the time of this writing, Jamendo has published over 40,000 albums and has over 600,000 active members.⁴⁸ The website's persistent development is also attested by the fact that Jamendo's customers include names such as Ducati and Skoda.⁴⁹ In July 2007, this business venture was even targeted by Mangrovia Capital Partners, a Luxembourg-based venture capital company that decided to invest in this project.⁵⁰ The reasons behind Jamendo's prosperity are numerous, and an analysis of its key features is useful in trying to single them out. Even though Jamendo's model presents many similarities to Beatpick's, several important differences exist between the two websites that should be noted.

1) *How Users Benefit*

From a user's point of view, Jamendo offers free, simple, and quick access to a very large database of musical compositions, which may either be downloaded through a peer-to-peer system or be accessed via streaming.⁵¹ For such purposes, users are not required to register with the website, even though they do have an option to do so. Furthermore, just like Beatpick's tracks, files downloaded from Jamendo are not protected with DRM technologies.⁵²

One unique feature of Jamendo which deserves emphasis is its community rating system.⁵³ To grant a quality service to users, Jamendo provides them with a set of tools to distribute, catalog, and rate music.⁵⁴ These tools facilitate the selection of tracks by website visitors.

2) *How Artists Benefit*

⁴⁷ See *FAQ*, JAMENDO, <http://www.jamendo.com/en/faq> (last visited Apr. 28, 2011) [hereinafter *Jamendo FAQ*].

⁴⁸ See JAMENDO, <http://www.jamendo.com/en/> (last visited Apr. 28, 2011).

⁴⁹ See *Jamendo PRO FAQ*, JAMENDO, <http://pro.jamendo.com/en/faq/41> (last visited Apr. 28, 2011).

⁵⁰ See CREATIVE COMMONS CLINIC ET AL., BUILDING AN AUSTRALASIAN COMMONS: CREATIVE COMMONS CASE STUDIES, VOLUME 1, at 24 (Rachel Cobcroft ed., Creative Commons Clinic, Austl. Research Council Ctr. of Excellence for Creative Indus. & Innovation 2008), available at <http://www.scribd.com/doc/35020016/Building-an-Australasian-Commons-Case-Studies-Volume-1>.

⁵¹ See *Choose Streaming and Downloading Options*, JAMENDO (Feb. 21, 2008), <http://blog.jamendo.com/2008/02/21/choose-streaming-and-download-options/>.

⁵² See CREATIVE COMMONS CLINIC ET AL., *supra* note 50, at 25.

⁵³ See *id.* at 23.

⁵⁴ See *id.* at 25.

Unlike Beatpick, Jamendo does not have a default license. Artists have the opportunity to choose any of the existing Creative Commons licenses, and they may even resort to Free Art licensing, “a French copyleft [license] applying to works of art.”⁵⁵ The reasons for employing Creative Commons licenses, according to Chief Technology Officer Sylvain Zimmer, are the flexibility offered to the artists, the clarity of the Commons Deed and the quality of the Legal Code and the Digital Code, and the unceasing expansion of the community supporting Creative Commons.⁵⁶

For these reasons Creative Commons licenses constitute Jamendo’s legal framework, which represents a useful tool for musicians to publish their works in the way that most suits their needs. This is an aspect of the website that should be very appealing to artists.

In addition, there are several features that have been designed to attract musicians to the website. In particular, Jamendo emphasizes three aspects of its Internet site:⁵⁷

1. It is a non-exclusive platform. While contributing to Jamendo’s database, artists have the option to enter agreements with other licensing companies, even involving the same tracks.
2. It is a zero-cost platform. Thanks to its peer-to-peer distributing system, Jamendo manages to keep the costs of hosting files rather low. This enables the website to offer free hosting services to musicians and, at the same time, limits the volume of advertisement required to fund the site, keeping it at a minimal level.
3. It is a free platform. Artists are free to terminate their agreement at any time, and remove their music from Jamendo.com. This leaves the artist free, for example, to sign an exclusive contract with other recording companies.

However, it is important to point out that use of this hosting service is not always possible for artists registered with certain collective rights societies, such as the Italian *Società Italiana degli Autori ed Editori* (SIAE), whose contracts might be exclusive and might therefore prevent artists from making their music available for free on the Internet.⁵⁸

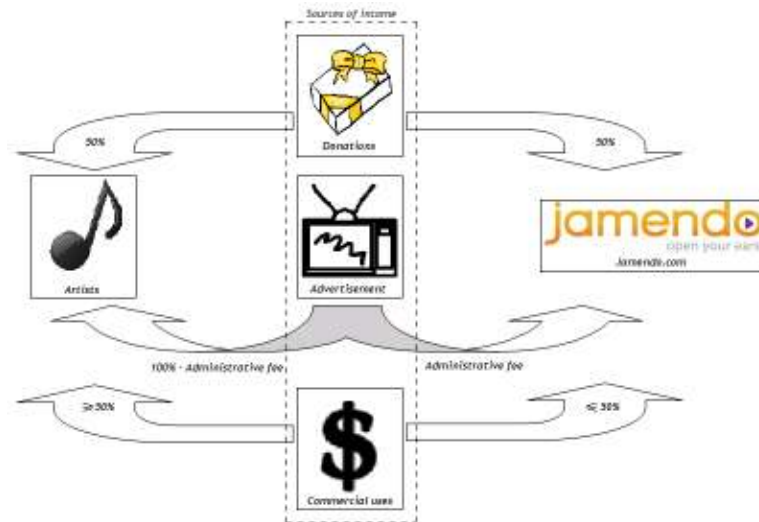
⁵⁵ *Case Studies: Jamendo*, CREATIVE COMMONS, http://wiki.creativecommons.org/Case_Studies/Jamendo_Study (last modified Dec. 16, 2010, 7:49 PM).

⁵⁶ See CREATIVE COMMONS CLINIC ET AL., *supra* note 50, at 26.

⁵⁷ See *id.* at 23.

⁵⁸ See *Jamendo FAQ*, *supra* note 47; *infra* Part V.E. It is important to specify that such an incompatibility between the mandates of some collecting societies and individual licensing choices of authors is not specific to Jamendo, but applies, in general, to Creative Commons and similar licensing schemes.

Artists have economic incentives to contribute to Jamendo’s database besides the simplicity and versatility of the website and the potential visibility that may be acquired by participating in the project. For instance, the website grants three forms of financial reward for artists⁵⁹ (see also picture 1 below):



Picture 1. Jamendo.com: sources of revenue for the artist.

1. Donations: members of Jamendo.com are encouraged to support their favorite artists by making donations. The minimum donation allowed is five dollars and Jamendo retains an administrative fee on each donation. The fee is set to a level that allows artists to earn at least 90% of the original donation.
2. Advertisements: Jamendo shares 50% of the revenue generated through advertising with its contributors, according to each user’s statistics such as page views.
3. Commercial uses: artists have the option to enter the commercial programs set up by the music platform. In this situation, a minimum of 50% of the associated licenses fees are paid to the artist.

⁵⁹ See Michael Jonathan Todosichuk, *Understanding Musical Artists’ Motivation to Share Creative Commons Licensed Musical Works: Applying Social Capital and Social Cognitive Theory* (June 2009) (unpublished master’s thesis, National Cheng Kung University), available at <http://etd.ncku.lib.ncku.edu.tw/ETD-db/ETD-search/getfile?URN=etd-0719109-173414&filename=etd-0719109-173414.pdf>; *Jamendo FAQ*, supra note 47.

Even though each of these three channels is designed to remunerate artists, it is important to point out the fact that, in practice, donations tend to be a minor stream of income for musicians.⁶⁰

3) *Other features*

One of the website's main strengths is the community that has formed around it through the interaction between artists and users. For example, artists can create their own profile on Jamendo.com where they can post photos or announce events. In turn, users submit reviews, create playlists, signal their favorite works to the community, and much more.⁶¹ These activities play a key role in Jamendo's business model.

Users' activities also contribute to building up a valuable database of information about visitors' preferences and artists' performances on the website. Their comments and discussions help assess the value of a work, at least as perceived by the website's visitors. The statistics gathered based on their feedback are made available to the public and represent a valuable asset for the site's future development. By interacting with each other, users start understanding that they are part of a collaboration space and regard themselves as part of a community. This message could be critical in supporting sharing activities like those promoted by Jamendo.

4) *Philosophy*

This music platform has been designed to encourage the circulation of creative works, foster exchange, and promote creativity.⁶² Jamendo's founder and CEO Laurent Kratz described the website's activity as "economically supporting and promoting the long tail of music."⁶³ This is accomplished by promoting diversity in the music industry. This vision matches the Creative Commons objectives. Furthermore, the website's considerable development provides empirical evidence that the Creative Commons system may be a viable alternative to the traditional

⁶⁰ See CREATIVE COMMONS CLINIC ET AL., *supra* note 50, at 24.

⁶¹ See *Case Studies: Jamendo*, *supra* note 55.

⁶² See *FAQ: How it Works*, JAMENDO, <http://www.jamendo.com/en/faq> (last visited Apr. 28, 2011).

⁶³ See *Case Studies: Jamendo*, *supra* note 55. The term *long tail of music* refers to a business theory developed by Chris Anderson. According to this theory, "in an era without the constraints of physical shelf space and other bottlenecks of distribution, narrowly targeted goods and services can be as economically attractive as mainstream fare." CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 52 (Hyperion ed. 2008).

copyright system or a form of sustainable evolution of the traditional system.

C. *Magnatune.com*

Magnatune is the final example of a music platform adopting the CC-Plus scheme. It is the oldest venture of those discussed. Founded in 2003 by John Buckman, Magnatune.com is an online record label that “has been a leader in the implementation of the CC-Plus protocol.”⁶⁴ Like its competitors, Magnatune has managed to acquire great visibility and build a valuable open-music database. Magnatune currently has 328 artists that have used Magnatune’s platform for the distribution of 10,079 songs.⁶⁵

1) *How users benefit*

Magnatune’s first selling point is diversity. The website is meant to be a platform for “music that gets little radio airplay or major record distribution, but has a fairly large audience.”⁶⁶ In fact, the Internet site hosts tracks from many different genres—from “Electronica” to “New Age” music.

What distinguishes Magnatune from other music platforms, however, is the pricing model used. Fares on Magnatune vary depending on multiple factors. For commercial uses, Magnatune acts as a broker in setting the prices for such licenses. On the other hand, dealing with non-commercial licenses is slightly more complicated. In this case, users have two options: they may choose a free download of a 128k mp3 file that contains advertising, or they may purchase a higher quality download or a physical CD, both advertisement free.

In the latter situation, the buyer decides how much to spend on the album.⁶⁷ Payments range from \$5 to \$18, but the suggested price for a purchase is \$8. Surprisingly, a recent study showed that users pay an average of \$8.20 per album—a price that is higher than both the minimum price and the suggested price.⁶⁸

⁶⁴ CREATIVE COMMONS CLINIC ET AL., *supra* note 50, at 29.

⁶⁵ *Magnatune Statistics: What Sells?*, MAGNATUNE, <http://www.magnatune.com/info/stats/> (last visited Apr. 28, 2011).

⁶⁶ *The Business Model: How We (and Our Artists) Pay the Rent*, MAGNATUNE, <http://www.magnatune.com/info/model> (last visited Apr. 28, 2011).

⁶⁷ See *What Is “Open Music”?*, MAGNATUNE, <http://www.magnatune.com/info/openmusic> (last visited Apr. 28, 2011); *Key Attributes of Magnatune.com for Various Audiences*, MAGNATUNE, <http://www.magnatune.com/info/attribs> (last visited Apr. 28, 2011) [hereinafter *Key Attributes*].

⁶⁸ Tobias Regner & Javier A. Barria, *Do Consumers Pay Voluntarily: The Case of Online Music*, 71 J. ECON. BEHAV. & ORG. 395, 397–98 (2009).

This variable pricing system also plays an important role in orienting consumers. By choosing what amount of money to spend, customers unveil their willingness to pay and, as a result, statistics on the best-selling albums are available on the website and act as signals for potential buyers to assist them in their purchases.

In addition, Magnatune's developers have designed other mechanisms to ensure quality of service: a peer editorial approval process carried out by artists already on the label,⁶⁹ and a quality assessment performed by the website's administrators. This selection is meant to "[give] credibility to musicians who are accepted"⁷⁰ and guarantees a predefined quality standard for the works distributed through the music platform.

Another mechanism used is a service of free "webradios" that plays a significant role in guiding the audience in its buying process. Unlike Jamendo, Magnatune does not rely heavily on a community rating system, even though the site does host discussion forums. Finally, another feature that might be appealing to Magnatune's users is that downloaded files have no DRM protections attached to them and there is no review of the use of licensed music.⁷¹

2) *How artists benefit*

Magnatune describes one of the big concepts behind its experiment by saying "[t]he systematic destruction of musician[s'] lives is unacceptable."⁷² One of Magnatune's purposes is to "help artists get exposure, make at least as much money they would make with traditional labels, and help them get fans and concerts."⁷³

In particular, artists collaborating with Magnatune have three main sources of income: 50% of the price of each album, 50% of the revenue derived from any commercial sub-licensing, and 50% of the merchandising revenues.⁷⁴ These channels should represent a form of "incremental income"⁷⁵ for contributors.

⁶⁹ See *The Plan: Problems With the Music Industry and How Magnatune Is Trying to Fix Them*, MAGNATUNE, <http://www.magnatune.com/info/plan> (last visited Apr. 28, 2011).

⁷⁰ *Key Attributes*, *supra* note 67.

⁷¹ *See id.*

⁷² *The Big Ideas*, MAGNATUNE, <http://www.magnatune.com/info/ethos> (last visited Apr. 28, 2011).

⁷³ John Buckman, *Founder's Rant*, MAGNATUNE, <http://www.magnatune.com/info/why> (last visited Apr. 28, 2011).

⁷⁴ *The Business Model: How We (and Our Artists) Pay the Rent*, *supra* note 66.

⁷⁵ *See Key Attributes*, *supra* note 67.

The music platform offers its artists the opportunity to license their works under a Creative Commons *Attribution Non-Commercial Share Alike* license and to sign a non-exclusive agreement with Magnatune with a standard duration of five years.⁷⁶ As Magnatune itself acknowledges, this “[n]onexclusive relationship with musicians means lower Magnatune investment in artists, more investment in promoting itself and the entire catalog.”⁷⁷ The website actually invests money in advertising⁷⁸ and all tracks distributed for free for non-commercial uses contain advertisements for the website. Through its actions, Magnatune.com manages to make non-exclusive agreements⁷⁹ convenient both for its artists and for the netlabel itself.

D. Summary

For ease of comparison, the chart in the Appendix summarizes the main features of the three websites’ business models.

V. A STAKEHOLDER’S PERSPECTIVE

Having presented these three business ventures it is critical to evaluate their structures based on the viewpoints of the main stakeholders: artists, users, recording companies, the legal system, collection societies, and society as a whole.

A. Artists

It is difficult to accurately evaluate artists’ motivations for turning to these new intermediaries for aid in the commercial exploitation of their creations. As Beatpick’s CEO David d’Atri observed,⁸⁰ the artist category is very broad and includes different classes of musicians, each with different needs and goals. Nevertheless, it is important to assess their perspective, taking into account the diverse composition of this

⁷⁶ See Mike Linksvayer, *Beatpick Flatters Magnatune Business Model*, CREATIVE COMMONS (Mar. 6, 2006), <http://creativecommons.org/weblog/entry/5810>.

⁷⁷ *Key Attributes*, *supra* note 67.

⁷⁸ See *What We Do for Our Musicians*, MAGNATUNE, <http://www.magnatune.com/info/whatwedo> (last visited Apr. 28, 2011).

⁷⁹ The generic version of a Magnatune contract is characterized by a non-exclusivity clause. The generic terms of the contract are available at http://magnatune.com/artists/license/license_template.html (last visited Apr. 28, 2011). The platform, however, allows artists to negotiate custom agreements with Magnatune too. See *License Music at Magnatune*, MAGNATUNE, <http://magnatune.com/info/license> (last visited Apr. 28, 2011).

⁸⁰ See d’Atri, *supra* note 38.

category of stakeholders. Using d'Atri's typology, musicians can be classified into five categories:⁸¹

1. "Quality professionals"—these are famous artists with substantial bargaining power in their negotiations with customers. Exhibition sales for these artists are strong.
2. "Professionals"—these are non-famous artists with limited bargaining power in their negotiations with customers. These musicians are still capable of making a living out of their careers.
3. "Developing professionals"—these are non-famous artists with very weak bargaining power in their negotiations with customers. Exhibition sales for these artists are not strong enough to enable them to live off their artistic career. The main concern for these artists is that of acquiring visibility.
4. "Students"—these are artists who still need to complete a specific learning process to become professionals. These non-famous artists do not have any bargaining power in their negotiations with customers and do not make a living out of their artistic activity.
5. "Amateurs"—these are artists who compose and perform music just as a hobby or as a passion.

Of these groups, quality professionals in particular are a very critical category for the ultimate success of these new business models. Famous musicians might be the market players that are less willing to change the current situation, which presently favors them. This is due to music being an informational good.⁸² Because of this feature of music, a "superstardom effect" characterizes the music market. Consumers tend to minimize their search and sampling costs by listening primarily to works of artists with a well-established reputation.⁸³ The Creative Commons system and the CC-Plus protocol would lower search and sampling costs and might therefore undermine the superstardom effect.

On the other hand, studies have shown that this sampling might also have a positive effect for artists. Because music is an informational good, and because sampling enables consumers to make a more informed purchase decision, consumers might be more willing to pay more for the tracks they desire if they can sample the tracks before they purchase them.⁸⁴ Therefore, if sufficient incentives to purchase a paid version of

⁸¹ *Id.*

⁸² See Sudip Bhattacharjee et al., *The Effect of Digital Sharing Technologies on Music Markets: A Survival Analysis of Albums on Ranking Charts*, 53 MGMT. SCI. 1359, 1362 (2007).

⁸³ See Moshe Adler, *Stardom and Talent*, 75 AM. ECON. REV. 208, 212. (1985).

⁸⁴ 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, 912 (2006).

the song were created,⁸⁵ it would be possible to leverage a financial return out of sharing and sampling activities. This is exactly what Magnatune does—it offers lower quality versions of the songs for free for non-commercial use, thereby providing a means for sampling. Then, it proposes higher quality versions, which are sold using a variable pricing system.

Thus, the introduction of the CC-Plus protocol may have two opposite effects on famous artists' revenues: the erosion of the "superstardom effect," which leads to lower revenues, and the increased "willingness-to-pay" effect, which can be leveraged to increase revenues. Depending on the relative strength of the two contrasting effects, the publication of works using the CC-Plus protocol may or may not be advantageous for well-known artists. Predicting which one of the two effects will be dominant is difficult because the outcome depends on the specific artist and the specific features of the music platform chosen.

A curious experiment carried out by the famous band *Radiohead* is an example of a real-life situation in which making an album available to the public for sharing purposes actually turned out to be a profitable initiative for a well-known group of musicians. In 2007, Radiohead decided to make their album *In Rainbows* available for download directly from their own website, giving their fans an option to pay whatever amount of money they wanted for it, including nothing.⁸⁶ This downloading option remained available for exactly two months.⁸⁷ The initiative facilitated sharing and sampling of the album by consumers and, surprisingly enough, overall revenues from the campaign exceeded revenues from previous albums.⁸⁸ Even though no Creative Commons license was used by the band, this experiment constitutes a valid example of artists sharing their works with the public and leveraging value in a way that empowers them and actually increases their income.

For the lesser-known categories of artists—"professionals," "developing professionals," "students," and "amateurs"—the analysis becomes much more straightforward. From their viewpoint, the erosion of the "superstardom effect" does not have a negative effect on their revenues. In fact, by lowering searching and sampling costs, Creative

⁸⁵ See Sudip Bhattacharjee et al., *Whatever Happened to Payola? An Empirical Analysis of Online Music Sharing*, 42 DECISION SUPPORT SYSTEMS 104, 118 (2006).

⁸⁶ Jon Pareles, *Pay What You Want for This Article*, N.Y. TIMES, Dec. 9, 2007, at B1.

⁸⁷ *New Radiohead Album Coming Out October 10th*, ROLLING STONE (Sept. 30, 2007), <http://www.rollingstone.com/music/news/new-radiohead-album-coming-out-october-10th-20070930>; *The End of the Beginning*, RADIOHEAD (Dec. 5, 2007), <http://www.radiohead.com/deadairspace/071205/The-End-of-The-Beginning>.

⁸⁸ Paul Thompson, *Radiohead's In Rainbows Successes Revealed*, PITCHFORK (Oct. 15, 2008, 11:30 AM), <http://pitchfork.com/news/33749-radioheads-iin-rainbowsi-successes-revealed/>.

Commons and the CC-Plus protocol will only benefit unknown artists by helping them become known by potential consumers.

Furthermore, CC-Plus intermediaries may be a way for unknown artists to gain exposure and promote live events, which constitute a main source of income for *non-bestselling* artists.⁸⁹ Hence, implementation of the CC-Plus protocol does not seem to threaten obscure artists' revenues. Indeed, lesser-known artists may be the market players benefiting the most from these new business models.

So far only artists' financial or economic motivations in licensing their works under a Creative Commons license have been discussed. However, they may also have non-economic motivations for creating new works. For example, a 2006 study suggests that "[i]nnovation in the creative commons is driven by a set of motives (desire for excellence, self-expression, altruism and sheer enjoyment) that may be broadly classed as creative rather than monetary or organizational."⁹⁰ These creative motives may well encourage artists—both famous and obscure—to share their works for non-monetary reasons.

To explain artist's motivations for sharing their works, Michael Todosichuk has applied social cognitive theory to explain artists' motivation to share. He found that four factors appear to be "positively associated with the Quantity of Creative Works Shared."⁹¹ These are (1) "Identification with the Creative Commons virtual community,"⁹² (2) "Shared Vision"⁹³ within the community, (3) "Positive Personal Outcome Expectations"⁹⁴ within the community, and (4) "Positive Community-related Outcome Expectations" within the community.⁹⁵

According to Todosichuk, to motivate artists it is important to act on these four levels. To do so it is crucial to build a thriving community behind the music platform. Jamendo is a good practical example of an Internet site with such community support.

Business models implementing the CC-Plus protocol may, from a monetary perspective, primarily be attractive to non-famous artists. They may also become interesting to well-known artists if such business ventures adequately manage to leverage value out of these new channels

⁸⁹ See Martin Peitz & Patrick Waelbroeck, *An Economists' Guide to Digital Music*, 51 CESIFO ECON. STUD. 359, 365 (2005).

⁹⁰ John Quiggin, *Blogs, Wikis and Creative Innovation*, 9 INT'L J. CULTURAL STUD. 481, 482 (2006).

⁹¹ Todosichuk, *supra* note 59, at 51.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

of distribution. Moreover, non-monetary factors may also be valuable tools in motivating both famous and non-famous artists to contribute to these new hybrid economies.

One article suggests that the market for music items might display network externalities, such as fan clubs sharing information.⁹⁶ Taking this idea into account, the CC-Plus scheme can also be thought of as a means for authors to facilitate the initial diffusion of their creations. This initial diffusion is a critical phase of the commercialization process in industries that exhibit network externalities.⁹⁷

B. Users

All of these business ventures offer several benefits for users and visitors of the music platforms. First, the websites provide their visitors with free access to their content for non-commercial purposes. Even Beatpick, whose developers appear to be controlling access to the tracks to prevent abuse of the Creative Commons licenses,⁹⁸ allows free, specifically non-commercial uses of its database.

Second, with these new intermediaries being launched, commercial use of creative works is substantially simplified as well. Besides offering lower fares for music licensing, these Internet sites standardize the negotiation process for acquiring rights to a work. As Creative Commons founder Lawrence Lessig pointed out, “costs of negotiating and clearing the rights”⁹⁹ are currently noteworthy.¹⁰⁰ Purchasing music through these new intermediating entities might be a viable way to reduce such costs.

Aside from offering simple and quick access to creative works, these new business ventures are characterized by another important strength: they distribute works which would otherwise be unavailable to the public and, consequently, they offer customers a great variety of content. Consumers benefit from having a wider choice, as they will be more likely to encounter tracks that cater to their musical tastes.

⁹⁶ See Ram D. Gopal et al., *Do Artists Benefit from Online Music Sharing?*, 79 J. BUS. 1503, 1504. (2006). A market for a product exhibits network externalities when “the value of [such] product to any one consumer increases as the number of other consumers using the product increases.” LYNNE PEPALL ET AL., *INDUSTRIAL ORGANIZATION: CONTEMPORARY THEORY AND EMPIRICAL APPLICATIONS* 637 (Blackwell Publishing ed., 2008).

⁹⁷ In particular, in markets characterized by network externalities, products need to reach an initial *critical mass* to survive in that market and to undertake a process of self-sustained expansion of sales. For a definition of *critical mass* and a more detailed description of this economic model, see Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 BELL J. ECON. & MGMT. SCI. 16, 29 (1974).

⁹⁸ See *supra* Part IV.

⁹⁹ LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 105 (Bloomsbury Academic 2008).

¹⁰⁰ See *id.*

Third, another advantage to the implementation of this new protocol is that it enables users to carry out sharing and sampling activities without violating the law and risking criminal conviction. This is a great incentive to use these new music platforms.

This form of licensing also increases possibilities for users to remix and repurpose creative works in a completely legal way as long as the terms of the Creative Commons license are respected. Easing remixing activities may help a new form of culture development, advocated by Lessig, called the “Read/Write culture.”¹⁰¹ It is a system in which users not only develop their knowledge through exposure to the existing culture, but also contribute to the bulk of works with their remixing activities.

The final advantage to users is that due to the absence of DRM protections on the distributed files, these ventures give greater opportunities for users to time- and space-shift the purchased material. This is an important point. As Lessig points out, “[t]he expectation of access on demand builds slowly”¹⁰² and “at a certain point, perfect access (meaning the ability to get whatever you want whenever you want it) will seem obvious.”¹⁰³ Thus, in the future, restrictions on the use of purchased songs might be perceived as unreasonable and might consequently lead to a drop in sales for the enterprises still applying such constraints. With this in mind, music platforms that do not use these technologies or restrictions, such as Beatpick, Jamendo or Magnatune, appear to better suit the needs of users.¹⁰⁴

The paragraphs above describe just some of the many potential user benefits. However, since these new business ventures operate in a hybrid economy which, to succeed, requires all of its players to benefit on balance,¹⁰⁵ it might be important to find out whether users not only benefit, but contribute in some way to this sharing economy.

To emphasize this critical feature of these new business ventures, the role of consumers must be examined. In using the music platforms, consumers do not only gain simple, and mostly free, access to musical content but also, as a by-product of their sampling activities, they must provide the website and the music market with important information about their listening habits. Since music is an informational good, music platforms and recording companies may use this consumer information

¹⁰¹ *Id.* at 28.

¹⁰² *Id.* at 44.

¹⁰³ *Id.*

¹⁰⁴ See Peitz & Waelbroeck, *supra* note 89, at 424.

¹⁰⁵ See LESSIG, *supra* note 99, at 146.

to better evaluate the true quality and expected sales of the tracks that they are planning to distribute. Just like their predecessors, Jamendo, Magnatune, and Beatpick may take advantage of the activities of their users. “Simply by listening to music, members generate value for the community.”¹⁰⁶

While consumers may benefit in many different ways from the use of the newly launched music platforms they would not be taking unfair advantage of the artists’ contributions because their activities provide these sharing economies with valuable information in return.

C. Recording Companies

As mentioned above, the Creative Commons project is campaigned as a way to “skip the intermediaries.”¹⁰⁷ Yet, the implementation of the CC-Plus protocol might indicate that intermediating bodies are actually necessary in the music market.¹⁰⁸ Several articles emphasize the need for entities that would help consumers filter the incredible amount of musical works available on the market.¹⁰⁹ In this re-intermediating process, however, it appears that recording companies might be replaced by a group of new online music platforms, including sites using the CC-Plus protocol. One commentator in particular suggest that “new online distribution technologies . . . are likely to decrease the role of labels,”¹¹⁰ taking up some of the functions that have been carried out by labels in the past.

However, the development of new business models does not have to be seen as a replacement of recording companies. Instead, these new ventures may be seen as a potential source of inspiration for traditional record labels, encouraging them to improve their own structure. According to one report, the music industry had a decline in the sales of physical formats and an increase in digital sales in 2009.¹¹¹ This report also noted that the increase in the weight of digital sales is not a new phenomenon, but rather constitutes an established trend.¹¹² This trend started eight years ago in the United States. If the music industry keeps

¹⁰⁶ *Id.* at 200.

¹⁰⁷ *See supra* Part II.

¹⁰⁸ *See, e.g.*, Carroll, *supra* note 1, at 45.

¹⁰⁹ *See, e.g.*, Helienne Lindvall, *Behind the Music: Is the Long Tail A Myth?*, GUARDIAN.CO.UK (Jan. 8, 2009, 5:29 PM), <http://www.guardian.co.uk/music/musicblog/2009/jan/08/long-tail-myth-download>.

¹¹⁰ Peitz & Waelbroeck, *supra* note 89, at 425.

¹¹¹ INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, IFPI DIGITAL MUSIC REPORT 2010: MUSIC HOW, WHEN, WHERE YOU WANT IT 10, <http://www.ifpi.org/content/library/DMR2010.pdf>.

¹¹² *Id.*

evolving in the same fashion in the coming years, the CC-Plus protocol might represent an interesting opportunity for recording companies to adapt to the changing environment.

Surprisingly, creating business ventures that enable legal digital download of music files might actually turn out to be a profitable strategy for major labels. Indeed, there are many reasons why the hybrid intermediaries analyzed in the previous paragraphs may actually generate net financial gains for recording companies.

First, by promoting lesser-known artists, these Internet sites offer great diversity. Using the “long tail principle,” Chris Anderson explained that in a market characterized by low inventory costs, such as the digital music market, offering variety may be an important factor in trying to outperform competitors.¹¹³

Second, the music industry has traditionally been characterized by a phenomenon where only a few albums turn out to be profitable out of all the albums released by a recording company. These new systems might actually help generate more profits for recording companies. According to a study published by the Los Angeles Times, only one act out of ten manages to generate profits.¹¹⁴ An extensive part of these profits goes to compensating losses derived from the release of the remaining unprofitable albums. Recording companies might decrease these losses in the new distributing systems, where information about users’ preferences is available. Recording companies might find it easier to effectively predict which albums are going to be successful, and thus be able to concentrate their investments on those acts that are most likely to succeed. This could lead to a less risky and more profitable business for the recording companies.¹¹⁵

Even though free and legal downloading systems are likely to cause a further decrease in the sales of recorded music, it is important to note that there are many ways in which financial return may be leveraged out of these new sharing economies; for example, by adding incentives to

¹¹³ See ANDERSON, *supra* note 63, at 130; LESSIG, *supra* note 99, at 129.

¹¹⁴ Chuck Philips, *Record Label Chorus: High Risk, Low Margin*, L.A. TIMES, May 31, 2001, at A1.

¹¹⁵ Incidentally, the possible objection has to be considered that concentration of investments on the more profitable tracks may, in the long run, lead to a less diverse offer on the part of recording companies. Yet, it has to be remembered that these new music platforms might actually help create a market demand for musical genres that have traditionally been ignored by recording companies. As a result, producing tracks belonging to these new genres might actually become a profitable strategy thanks to the exposure these other genres might gain from CC-Plus intermediaries. It might therefore be reasonable to expect a music market where more genres are actually offered by recording companies, which will, however, tend to focus only on the more profitable items within each genre.

pay for enhanced versions of the downloaded files. These solutions have been described above.¹¹⁶

In spite of all of these advantages to the recording companies, it would be unrealistic to say that they should be able to reach the same level of profits they had when online music sharing did not yet exist. With the launch of these new music platforms, the music market, which has historically been monopolized by only five major recording companies,¹¹⁷ would open up to a much larger number of intermediaries. The relinquishment of this oligopoly would probably lead to lower profits for the major labels controlling the market. Despite this, by integrating their own business models into this new protocol, recording companies might still be able to profit from their activity. Eventually, this change could actually help them compete with piracy effectively, by providing users with a legal downloading service. In the end, all of the above-mentioned factors could also help labels remove the negative image that certain individuals associate with the major recording companies.¹¹⁸

D. Legal System

One of the primary challenges for the copyright regime currently in force is balancing the two original functions of copyright, namely “rewarding creativity and ... disseminating knowledge.”¹¹⁹ By offering a way to reconcile commercial exploitation of a work with non-commercial dissemination, the CC-Plus protocol appears to be a significant step forward in that direction.

From a legal perspective the CC-Plus scheme also addresses some of the strongest critiques of the Creative Commons project. For example, Niva Elkin-Koren has argued that this new licensing system is “reducing the cost of licensing,”¹²⁰ and thus is providing individual authors “with an efficient mechanism to execute their intellectual property rights.”¹²¹ In her opinion, this will encourage individual authors using Creative Commons licenses to “set limits on the exploitation of their works.”¹²² In addition, she claims that such a new licensing system might be unnecessary since, before its inception, “many works were posted online without any restrictions, on the implicit presumption that re-use is

¹¹⁶ See *supra* Part V.A.

¹¹⁷ See Peitz & Waelbroeck, *supra* note 89, at 364.

¹¹⁸ See Todosichuk, *supra* note 59, at 16.

¹¹⁹ Montagnani & Borghi, *supra* note 19, at 247.

¹²⁰ Elkin-Koren, *supra* note 7, at 337.

¹²¹ *Id.*

¹²² *Id.*

permissible for non-commercial purposes.”¹²³ Creative Commons licenses and the CC-Plus scheme, however, are intended to lower transaction costs for users of creative works—not for creators of the works¹²⁴—by providing individual authors with an inexpensive tool to facilitate free use of their works. If an author wishes to make a profit out of his or her work, the most economical way to do so is still to rely on the traditional copyright, which automatically accrues on creative works and which does not require authors to invest time and money in trying to modify the contractual terms of its copyright with a Creative Commons license. The CC-Plus scheme also empowers authors who are not seeking immediate economic returns from their works to transform what was before just an implicit presumption into an explicit statement. This change may be very valuable in trying to reinforce the principle of legal certainty and, consequently, in simplifying the process of re-using creative works.

A second critique of the Creative Commons system raised by Elkin-Koren concerns the “lack of standardization,”¹²⁵ that results from the six different available licensing schemes available. She claims that such a lack of standardization increases “the cost of determining the duties and privileges related to any specific work.”¹²⁶ Her concern is that by providing authors with six different licensing options, the Creative Commons system is likely to lead to “information costs”¹²⁷ for third parties interested in creating derivative works without violating intellectual property law. This critique captures one of Creative Commons’ main weaknesses and the CC-Plus protocol does not specifically identify a solution. Yet, looking at the practical applications of the protocol that have been analyzed above, it seems that in practice business models complying with the CC-Plus protocol tend to circumvent the problem by adopting a single standard license. Magnatune and Beatpick, for example, do not give their users the ability to choose which Creative Commons license to use. Instead, all tracks hosted by these two music platforms have a standard *Attribution Non-Commercial Share Alike* license.

A final critique that has been raised against the Creative Commons licenses is that such licenses are of no use to individuals who enter an exclusive agreement with an intermediary and then decide to permit

¹²³ *Id.*

¹²⁴ *See supra* Part II.

¹²⁵ Elkin-Koren, *supra* note 7, at 341.

¹²⁶ *Id.*

¹²⁷ *Id.*

certain free uses of their works, for example because their works are not being disseminated by the intermediary for reasons of profitability. Once an exclusive transfer of rights has taken place, it is not possible for an author to sign other agreements with third parties, even if the subsequent agreements involve non-commercial use of the work.¹²⁸ While the CC-Plus protocol does not represent an ultimate solution to this problem, it does provide artists who anticipate such a risk for their own works with an instrument to exploit their works commercially and, at the same time, permit non-commercial use of their creations.

A final point that should be emphasized is that the legal downloading services that have been developed with under the CC-Plus model may contribute to solving the problem of piracy. In a research study published in 2006, Carlos Ruiz De La Torre suggested that in order to attract consumers, a model legal downloading service should have the following seven features: (1) “offer a larger catalogue of downloadable music”; (2) “allow for compatibility of devices used by consumers for downloading, playback and storage”; (3) “offer individuals songs in addition to albums”; (4) “set affordable prices for downloads”; (5) “allow for reasonable personal uses of downloads by consumers, including the ability to make limited copies of recordings”; (6) “offer incentives, like sponsored downloads and prizes”; and (7) “provide security from computer viruses.”¹²⁹

The three platforms analyzed above incorporate all of these features. Hence it is reasonable to expect that these websites might be able to compete with illegal downloading systems in the future. Should these new hybrid intermediaries become successful in attracting users, the volume of illegal sharing might significantly decrease. This should better enable authorities to enforce copyright law. At present, millions of users systematically infringe the law, despite being aware of their violation.¹³⁰ While it is harder to enforce the law with millions of infringing users, should the volume of piracy decrease significantly the risk of being sued for breach of copyright would probably increase. This might result in users being more respectful of the law. If so, the Internet community would probably start regarding the intellectual property regime as a set of rules that are effective in practice and not only in theory.

¹²⁸ See Montagnani & Borghi, *supra* note 19, at 266.

¹²⁹ Carlos Ruiz de la Torre, *Toward the Digital Music Distribution Age: Business Model Adjustments and Legislative Proposals to Improve Legal Downloading Services and Counter Piracy*, 8 VAND. J. ENT. & TECH. L. 503, 505 (2006).

¹³⁰ See Herkko Hietanen et al., *Criminal Friends of Entertainment: Analysing Results from Recent Peer-to-Peer Surveys*, 5 SCRIPT-ED 31, 47 (2008).

E. Collection Societies

Collection agencies were created in the nineteenth century by composers and publishers to help individual copyright holders enforce their statutory claims to exclusive use and remuneration. These organizations are primarily engaged in monitoring musical activity in a specific territory, so as to be able to handle collection and distribution of royalties accordingly.¹³¹ Collective management of copyright enables rights holders to benefit from economies of scale and scope, especially in the process of enforcing licenses. These scale and scope economies are positively associated with standardization of usage policies. Thus, if copyright owners could offer customized licenses to different users, collective management of rights would probably become more complicated and, consequently, more costly.¹³² Due to the fact that the Creative Commons licensing system is designed to empower authors to diversify contractual terms, several different collection agencies have been encountering problems while updating their structure in response to the rise of the Creative Commons licensing system.

The SIAE is still in the process of developing a scheme that would enable member artists to license their works with Creative Commons.¹³³ At present, SIAE members have the ability to permit certain free uses of their works and still rely on SIAE for the collection and consequent distribution of their royalties. However, the provisions contained in Article 11 of the SIAE General Regulations limit these possibilities.¹³⁴ According to Article 11, artists may only relinquish their rights of reproduction and communication to the public. These exceptions, however, only apply to uses through data telecommunications networks. Therefore, SIAE's statutory exceptions seem to differ in scope from the contents of Creative Commons licenses.¹³⁵ As a result, an artist willing to

¹³¹ See Roger Wallis et al., *Contested Collective Administration of Intellectual Property Rights in Music: The Challenge to the Principles of Reciprocity and Solidarity*, 14 EUR. J. COMM. 5, 5. (1999).

¹³² See Eric Brousseau & Christian Bessy, *Public and Private Institutions in the Governance of Intellectual Property Rights*, in INTELLECTUAL PROPERTY RIGHTS: INNOVATION, GOVERNANCE AND THE INSTITUTIONAL ENVIRONMENT 243, 255 (Birgitte Andersen ed., Edward Elgar Publishing 2006).

¹³³ In particular, artists that have granted SIAE an *ad hoc* mandate for the collection of revenues from commercial uses would be affected most by the introduction of such a scheme.

¹³⁴ See *Regolamento Generale della Società Italiana degli Autori ed Editori, approvato dall'Assemblea nella riunione del 13 giugno 2007* [General Regulation of the SIAE, as Approved by the Assembly on June 13, 2007], SIAE http://www.siae.it/documents/BG_Normativa_Regolamentogenerale13-6-07.pdf?41134 (It.).

¹³⁵ In particular, these statutory exceptions do not seem to address all rights which must be cleared for online distribution of digital contents. With reference to online file sharing, see *Creatività Remunerata, Conoscenza Liberata: File Sharing e Licenze Collettive Estese* [Remunerated

license his or her works under a Creative Commons may choose to do so, provided that he or she is willing to manage copyright directly.

A second possibility may exist; some of the new business ventures analyzed encourage their artists to join foreign collection societies, such as ASCAP or BMI, instead of joining SIAE.¹³⁶ If an artist decides to join a foreign collection society, SIAE should assist the foreign agency in collecting royalties over the Italian territory. However, this option is conditioned on two requirements. First, members of the foreign collection society must have the option to permit free uses of their works.¹³⁷ Second, the foreign collection society must have signed a reciprocal representation agreement with SIAE that does not preclude this practice.

Whether these conditions are satisfied depends on the specific collection agency and on the specific reciprocal agreement under consideration. For the purpose of this Article, it suffices that the actual viability of this second option is still a source of great debate.

Consequently, artists willing to follow the CC-Plus protocol to license their works are currently entitled to do so, except for the specific situations mentioned above, provided that they opt out of SIAE.¹³⁸ This situation puts musicians in a very burdensome position as it forces them to carry out all monitoring activities required to enforce their copyright. The status quo does not seem favorable for the Creative Commons licenses. Even for the CC-Plus protocol there is still much improvement expected. For example, the Creative Commons Italia working group is engaged in negotiations with SIAE to work out a mandate enabling artists to use the Creative Commons licenses, or at least some of these

Creativity, Freed Knowledge: File Sharing and Extended Collective Licenses], NEXA (Nov. 12, 2008), <http://nexa.polito.it/sites/nexa.polito.it/files/NEXA-filesharing-marzo2009.pdf> (It.). For an exhaustive description of the economic rights which must be secured, see Articles 12 through 19 of the Italian Law no. 633 of April 22, 1941, available at http://www.wipo.int/clea/docs_new/pdf/en/it/it112en.pdf (last visited Apr. 28, 2011).

¹³⁶ See, e.g., David d'Atri, *Perché Aspettare la SIAE?? Go ASCAP! [Why Wait for SIAE?? Go ASCAP!]* (Feb. 5, 2008, 3:26 PM), <http://lists.ibiblio.org/pipermail/cc-it/2008-February/003991.html> (It.).

¹³⁷ For instance, in 2008 ASCAP officially recognized the artists' right to decide when and where their "creative works may be used for free." AM. SOC'Y OF COMPOSERS, AUTHORS & PUBLISHERS, A BILL OF RIGHTS FOR SONGWRITERS AND COMPOSERS, available at <http://www.ascap.com/rights/pdf/BillofRights.pdf> (last visited Apr. 28, 2011).

¹³⁸ See Gaia Bottà, *SIAE e Creative Commons si Cercano, si Troveranno? [SIAE and Creative Commons Are Looking for Each Other, Will They Manage to Find Each Other?]*, PUNTOINFORMATICO (Dec. 2, 2008), <http://punto-informatico.it/2493116/PI/News/siae-creative-commons-si-cercano-si-troveranno.aspx> (It.).

licenses, and simultaneously take advantage of the intermediation of SIAE to collect revenues from commercial uses of their works.¹³⁹

Not all countries are encountering these same problems. In many jurisdictions artists affiliated with the local collection society already have the option to use Creative Commons licenses.¹⁴⁰ For example, the Dutch collection agency BUMA/STEMRA and the Danish KODA have already started to offer their affiliated artists the option of using Creative Commons licenses as an alternative to traditional copyright.¹⁴¹ Also, in May 2009, the Swedish collecting society Stim launched a two-year project aimed at testing the possibility of liberalizing the use of Creative Commons licenses. Consequently, Swedish artists are now allowed to license their works with Creative Commons and rely on Stim for the collection of their royalties.¹⁴²

F. Society as a Whole

By adopting customary licensing schemes based on traditional *all rights reserved* copyright, artists may have problems trying to reconcile their commercial interest in creating a work with their goal of getting their works distributed as widely as possible.¹⁴³ The CC-Plus protocol should help artists overcome this problem, providing them with a useful tool to give their works as much exposure as possible, thanks to the Creative Commons licenses employed, and simultaneously ensure an economic reward for their work, typically thanks to the role of some new intermediaries.

This should have a two-fold effect on the volume of works available to the public for use and re-use. On the one hand, by granting a financial reward to artists, the CC-Plus protocol will continue to foster creation of

¹³⁹ See Federico Morando, *Faccia a Faccia tra CC e SIAE – La Stampa e La Repubblica [CC and SIAE Meet – La Stampa and La Repubblica]*, CREATIVE COMMONS (Dec. 1, 2008, 4:30 PM), <http://www.creativecommons.it/node/693> (citing articles from both La Stampa and La Repubblica (It.)).

¹⁴⁰ See *Collecting Society Projects*, CREATIVE COMMONS http://wiki.creativecommons.org/Collecting_Society_Projects (last visited Apr. 28, 2011).

¹⁴¹ See Riccardo Bagnato, *Creative Commons e SIAE: Copyright al Tempo del Web [Creative Commons and SIAE: Copyright in the era of Internet]*, LA REPUBBLICA, (Nov. 27, 2008), http://www.repubblica.it/2008/11/sezioni/scienza_e_tecnologia/copyright/copyright/copyright.html (It.); *KODA's medlemmer får mulighed for at bruge Creative Commons [KODA's members are allowed to use Creative Commons]*, KODA (Jan. 24, 2008), <http://www.koda.dk/nyhedsbrev/nyhedsbreve-og-pm/presse/kodas-medlemmer-faar-mulighed-for-at-bruge-creative-commons/> (Den.).

¹⁴² See *Collecting Society Projects*, *supra* note 140; Swedish Performing Rights Society, *Stim först i Sverige med Creative Commons-licens [STIM is the first to adopt Creative Commons in Sweden]*, STIM (May 29, 2009), <http://www.stim.se/sv/PRESS/Pressmeddelanden/Stim-forst-i-Sverige-med-Creative-Commons-licens/> (Swed.).

¹⁴³ See Montagnani & Borghi, *supra* note 19, at 251.

new art. Therefore, on the market's input side, no significant changes should take place.¹⁴⁴ On the other hand, the more flexible legal framework in which these new music platforms operate should enable easier access to works hosted by them.

Implementation of the CC-Plus protocol might actually turn out to be good for the economy because sharing, sampling, and remixing activities have great economic potential through firms producing software and technologies that support these kinds of activities.¹⁴⁵ Because of the wider opportunities for re-use available to the public, a new market for innovative products that facilitate sharing activities—for example, through physical supports or software infrastructure—may open up.

Finally, the introduction of new intermediaries in the market might help break down the oligopoly currently controlling the music industry. With the development of digital music formats, economies of scale in the music industry have gradually vanished.¹⁴⁶ Consequently, one of the last rationales for an oligopoly has been weakened.¹⁴⁷ Therefore, society might benefit from an increase in competition. The deadweight loss for society resulting from just five labels controlling the market could be mitigated thanks to this change.

VI. CURRENT ISSUES: PROBLEMS IN IMPLEMENTING THESE NEW BUSINESS MODELS

To become established players in the digital music market, business ventures endorsing the CC-Plus protocol still have to overcome a few difficulties.

First, as described above, the music platforms examined might not always have the power to assist artists in the process of enforcing their licenses.¹⁴⁸ This might discourage musicians from contributing to these new projects. Second, artists willing to withdraw from collecting societies, like SIAE, might need assistance from these new music

¹⁴⁴ One might argue that financial reward for artists would not be as strong as it is under the traditional copyright system. Yet, ways in which artists could still keep profiting (or even increase their profits) with the CC-Plus protocol have already been exposed. *See supra*, Part V.A.

¹⁴⁵ *See* LESSIG, *supra* note 99, at 88 (discussing the great economic potential of consumer created content because of the large amount of technology that it is necessary to purchase in order to create such content).

¹⁴⁶ *See* Peitz & Waelbroeck, *supra* note 89, at 426.

¹⁴⁷ An oligopoly is defined as “an industry with only a small number of producers.” *See* PAUL KRUGMAN & ROBIN WELLS, MICROECONOMICS 388 (Worth Publishers ed. 2009). To understand why scale economies justify a small number of firms operating in a market, see Rabah Amir, *Market Structure, Scale Economies and Industry Performance* 3 (CORE Discussion Papers, Paper No. 65, 2003), available at <http://www.core.ucl.ac.be/services/psfiles/dp03/dp2003-65.pdf>.

¹⁴⁸ *See supra* Part V.E.

platforms to re-negotiate their previous contracts.¹⁴⁹ Third, music licensees, in practice, might still encounter difficulties in proving to the authorities that they have rights to the tracks they are using. In Italy, for example, SIAE regularly carries out inspections all over the Italian territory. Jamendo, Beatpick, and Magnatune have each encountered difficulties in avoiding fines when dealing with local representatives of SIAE.¹⁵⁰

These issues represent a significant obstacle to a widespread adoption of the CC-Plus scheme. To overcome these problems, intermediaries endorsing the new protocol have to face all of the costs associated with the protection of their customers—for example, provision of appropriate legal assistance—and the costs of the negotiations that have to be conducted with collection societies and other authorities.¹⁵¹

As with many innovative projects, one of the main hurdles for these new business models is that of gaining enough visibility to attract more artists and users to their websites. Despite evidence of prominent growth rates for these new websites, Creative Commons licenses are still unknown to many artists and users.¹⁵² The CC-Plus protocol, as well as the cost-saving opportunities offered by it, is just starting to be explored by players in the music industry. In regards to this issue, Magnatune's initiative of advertising its website through tracks made available for free downloading appears to be a suitable strategy to gain further exposure.

¹⁴⁹ See Gaia Bottà, *Musica d'Ambiente, Nuovi Intermediari* [*Ambient Music, New Intermediaries*], PUNTOINFORMATICO (June 5, 2009), <http://punto-informatico.it/2637979/PI/News/musica-ambiente-nuovi-intermediari.aspx> [hereinafter *Ambient Music*] (It.).

¹⁵⁰ *Id.* An example of a source of controversy is the SIAE sticker that physical carriers used for the distribution of musical contents have to display, no matter what the licensing terms are. See *Creative Commons, uso commerciale e SIAE* [*Creative Commons, Commercial Use and SIAE*], SELILI, <http://selili.polito.it/node/100> (last visited Apr. 28, 2011) (It.).

¹⁵¹ See *Ambient Music*, *supra* note 149.

¹⁵² See Andrew Murray, Powerpoint Presentation delivered at the London School of Economics and Political Science: Digital Content 32 (July 30, 2009) (on file with author).

APPENDIX

FEATURE	BEATPICK	JAMENDO	MAGNATUNE
DRM protections	No	No	No
Re-download option	Yes	Yes	Yes
Free non-commercial use	Controlled and, in certain situations, not available	Yes	Yes
Artists' revenue	<ul style="list-style-type: none"> • 50% of the earnings made by a track; • 100% of backend royalties. 	<ul style="list-style-type: none"> • 90% (at least) of the donations; • 50% of the website's advertising revenue; • a share of backend royalties. 	<ul style="list-style-type: none"> • 50% of the sale price of each album; • 50% of any commercial sub-licensing; • 50% of merchandise profits.
Commenting system	No	Yes, very developed	Yes, but limited
Licenses	Standard license: Creative Commons 'Attribution Non-Commercial Share Alike'	Choice among one of the six Creative Commons licenses or a Free Art license	Standard license: Creative Commons 'Attribution Non-Commercial Share Alike'
Exclusivity of the agreement	No	No	No
Possibility of termination of the agreement	Anytime	Anytime	5-year commitment required