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OPINION: LAWRENCE LESSIG

## Artful Dodges

**Record execs are crying for the rights of artists. But the real issue is innovation, not pay.**

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To most, the battle over online music is about whether artists should be paid. That's why 60 million Napster users watch meekly as the industry hacks their service to death. That's why the press mouths moralisms about "theft" and the need for artists to eat. But as the labels clearly know, this battle has little to do with whether artists get paid. The real issue is innovation, not compensation, and a lawsuit filed in California last week shows just why.

In that suit, a consortium of Webcasters led by the Digital Media Association (DiMA) asked a federal court to interpret a provision of the Digital Millennium Copyright Act. The provision gives Webcasters the right to stream music and other noninteractive content across the Net - as long as they pay a licensing fee. So far, so good. But the sites involved in the suit, unlike radio stations of the past, all use customer preference settings to influence the type of content that gets streamed. The United States Copyright Office has interpreted the law to permit at least some responsiveness to customer preference. DiMA wants a court to affirm that customer-influenced Internet radio is just what Congress meant when it enacted the compulsory right to broadcast streaming content over the Web. The labels disagree, of course, and they have launched yet another lawsuit against one of DiMA's members for giving listeners too much of what they want.

The issue here goes way beyond Internet radio. Five years ago, online music promised to become one of the most innovative and important new industries produced by the Web. Devices to capture and play music multiplied; whole sectors were born to supply these devices. Under the assumption that innovation would be allowed, the market valued this new, new thing at hundreds of billions of dollars. Here was a killer application that was fueling killer growth.

Then the recording industry let loose its killer lawyers. Venture capitalists soon got the message: Fund a new technology for delivering content across the Web and buy yourself a lawsuit. VCs hate lawyers. Funding for this innovation quickly dried up.

The DMCA's compulsory licensing provision was to be a limited compromise. Artists could get paid and innovators could invent. Indeed, here was a class of innovators who had a single message for the labels: Let us pay you. But - surprise, surprise - almost three years after the DMCA was passed, the labels have failed to agree on terms. The labels demand a price 30 to 40 times what Webcasters reasonably believe their content is worth. And now the labels have launched yet more lawsuits against the most innovative members of this struggling industry.

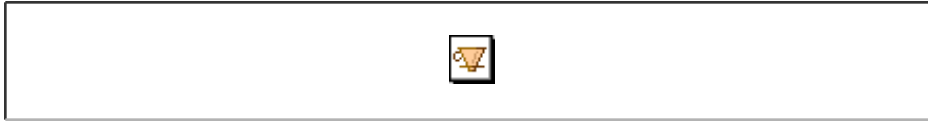
Hey Congress, the labels are playing you. They have no intention of allowing innovation in a means of distribution that they can't control. Sure, once all the venture capital has dried up and the labels have bought all the remaining "independent" distributors - and after MP3.com and EMusic.com, there aren't many left - then they'll begin to distribute music online. But that distribution will simply protect the power the labels already have. It will not be the radical change that the market first valued when companies like MP3.com took off. It will be the same old dinosaurs dressed in fast new Pentium 4s.

Congress should listen to what the market says. When innovators controlled the future of online music, billions flowed to that market. Once the courts made it clear that dinosaurs were in control, billions quickly evaporated. Congress could flip this market around in a single legislative

stroke: Pass a law setting compulsory rates for Webcasting of whatever form, as well as rates for downloading and distributing music. And if this debate really is about compensation, then while they are at it, Congress could require that 75 percent of the income from this new, wholly unexpected stream of revenue flow to the artists, and not to the labels. (Because everybody wants artists to get paid, right?) Free innovation from this sham about compensation and innovation would flow again in the Valley.

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