be to facilitate the access to this content, ideally in a way that returns something to the artist.

Again, the model here is the used book store. Once a book goes out of print, it may still be available in libraries and used book stores. But libraries and used book stores don't pay the copyright owner when someone reads or buys an out-of-print book. That makes total sense, of course, since any other system would be so burdensome as to eliminate the possibility of used book stores' existing. But from the author's perspective, this "sharing" of his content without his being compensated is less than ideal.

The model of used book stores suggests that the law could simply deem out-of-print music fair game. If the publisher does not make copies of the music available for sale, then commercial and noncommercial providers would be free, under this rule, to "share" that content, even though the sharing involved making a copy. The copy here would be incidental to the trade; in a context where commercial publishing has ended, trading music should be as free as trading books.

Alternatively, the law could create a statutory license that would ensure that artists get something from the trade of their work. For example, if the law set a low statutory rate for the commercial sharing of content that was not offered for sale by a commercial publisher, and if that rate were automatically transferred to a trust for the benefit of the artist, then businesses could develop around the idea of trading this content, and artists would benefit from this trade.

This system would also create an incentive for publishers to keep works available commercially. Works that are available commercially would not be subject to this license. Thus, publishers could protect the right to charge whatever they want for content if they kept the work

commercially available. But if they don't keep it available, and instead, the computer hard disks of fans around the world keep it alive, then any royalty owed for such copying should be much less than the amount owed a commercial publisher.

The hard case is content of types A and B, and again, this case is hard only because the extent of the problem will change over time, as the technologies for gaining access to content change. The law's solution should be as flexible as the problem is, understanding that we are in the middle of a radical transformation in the technology for delivering and accessing content.

So here's a solution that will at first seem very strange to both sides in this war, but which upon reflection, I suggest, should make some sense.

Stripped of the rhetoric about the sanctity of property, the basic claim of the content industry is this: A new technology (the Internet) has harmed a set of rights that secure copyright. If those rights are to be protected, then the content industry should be compensated for that harm. Just as the technology of tobacco harmed the health of millions of Americans, or the technology of asbestos caused grave illness to thousands of miners, so, too, has the technology of digital networks harmed the interests of the content industry.

I love the Internet, and so I don't like likening it to tobacco or asbestos. But the analogy is a fair one from the perspective of the law. And it suggests a fair response: Rather than seeking to destroy the Internet, or the p2p technologies that are currently harming content providers on the Internet, we should find a relatively simple way to compensate those who are harmed.

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The idea would be a modification of a proposal that has been floated by Harvard law professor William Fisher.[11] Fisher suggests a very clever way around the current impasse of the Internet.