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The Digital Music Dilemma: Protecting Copyright in the Age of Peer-to-Peer File Sharing

- By Natalie Koss*

The stakes are high for the music industry in light of peer-to-peer (P2P) file sharing, technology which allows computer users to search the contents of other computers for MP3 and other media files to download. In an age of expanding digital technology, the growth of the Internet, and the expansion of fair use, copyright holders are being deprived of their economic incentive to create works. In fact, nowhere is digital technology more destructive of copyright than in the pirating of music.[1] As a result of online copyright infringement, record labels have successfully shut down (at least for the time being) file sharing services such as Napster[2] and my.MP3.com[3]

However, unlike Napster, P2P-applications, such as FastTrack, have the promise to expand information flow in unprecedented and legitimate ways.[4] P2P technology allows individuals to share graphics, video clips, documentation and online support. A peer-to-peer capability would give individuals a private, locally controllable method of sharing information, with unlimited storage space.[5] Not surprisingly, the music industries have worked hard to stamp out P2P programs in courts. However, there are more advantageous routes to take in discouraging copyright infringement.

This paper seeks a resolution between the need to eliminate copyright infringement and the desire to encourage new technology. This paper will suggest that the music industry would be better off directing resources toward solutions such as compulsory licensing, royalty collection, and working with hardware manufacturers to discourage copyright infringement. These solutions would allow the industry to take advantage of file sharing now rather than expending resources in court where the desired result of ending P2P programs may never come.[6]

The Problem With the Current Fair Use Model

As copyrighted works have moved increasingly toward interactive digital distribution, the record industry and artists are looking for an increasingly reduced role for fair use. One of the major difficulties in creating a viable digital lending scheme is to determine a legal justification for it. For the most part, the fair use doctrine cannot justify lending of digital works under its current legislative formulation.[7]

Fair use is extremely limited and, in some cases, difficult to apply. The statutory definition includes four factors to help courts determine fair use cases: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; (4) and the effect of the use upon the potential market for or value of the copyrighted work.[8]

Courts have continued to apply the fair use doctrine despite its limitations, and despite its inapplicability to technological innovation. In 1984, Universal, which owned several copyrighted television programs, sued Sony, maker of the Betamax video tape recorder, for copyright infringement because consumers could use the Betamax to reproduce Universal's programs.[9] The Supreme Court ruled in favor of Sony, finding that the Betamax could be used for infringing uses, but was allowable because it also was capable of substantial noninfringing uses, such as time-shifting--watching a show at a later time.[10]

The *Sony* decision significantly expanded the scope of fair use.[11] In finding that private reproduction for purposes such as time-shifting, and creating a personal archive would not harm the potential market for the copyrighted program, the majority rather carelessly strained the definition of contributory infringement to allow devices that are "merely capable of substantial noninfringing uses," without carefully considering the infringing uses.[12] And since the Betamax was capable of such noninfringing uses, Sony could not be held liable for contributory infringement of Universal's copyrights.[13]

Following a traditional copyright analysis, the dissent was considerably more carefully reasoned than the majority opinion. The dissent vigorously argued that pri-

vate reproduction--home-recording--was not authorized by the fair use doctrine whatsoever. "Neither the [Copyright Act] nor its legislative history suggests any intent to create a general exemption for a single copy made for personal or private use." [14] But the result of *Sony* was that certain reproductions of copyrighted works for personal use were recognized as fair use, thus expanding the doctrine. In of the *Sony* decision, the Court emphasized the difference between commercial and noncommercial copying. [15] This sent a message that fair use allowed any kind of copying so long as the consumer did not sell the copy.

Since the *Sony* decision, consumers consider fair use a free-for-all, whereby interested consumers can make as many copies of a copyrighted work as they want, without infringing on a copyright. [16] However, the complete copying of a copyrighted work is not a fair use. If the court actually applied the fair use factors, it would not have found a fair use. In *Sony*, the Court should not have found a fair use because the fair use factors as written did not fit within the context of the Betamax. Because Sony had expanded the fair use doctrine in this way it would not be long before fair use would apply to peer-to-peer file sharing programs and other digital copying programs.

In granting and affirming the grant of a preliminary injunction against Napster's file-sharing service, both the district court and the Ninth Circuit walked through the four outdated fair use factors. The private sharing of files through Napster was nontransformative and commercial; it involved entertaining works "closer to the core of intended copyright protection;" and the entire work was copied.

If the Court in *Sony* had adequately reasoned the fair use factors it would have been similar to the decision in *Napster* in that the fair use doctrine did not apply. Moreover, with the rise of Napster and CD burners-- and the implementation of the Digital Millennium Copyright Act (DMCA)--it became even more obvious that the fair use legislation was already out of date. [17] It was out of date when *Sony* was decided.

Why P2P Will Survive

Now, there is a legal movement afoot to squash peer-to-peer file sharing. The music industry has filed suit against the peer-to-peer file sharing program, Kazaa. Of course, Kazaa defends itself using the same fair use arguments enunciated in *Sony* and *Napster*. However, what makes this lawsuit so unseemly is that the Kazaa peer-to-peer file sharing program has "substantial noninfringing uses" and is gaining legitimacy, unlike Napster, which makes it that much harder for the industry to label Kazaa as a rogue copyright infringer. Under the guise of fair use, the court will likely find in favor of Kazaa.

The industry's lawsuit against Kazaa is seeking to eliminate a new kind of information dissemination; however, the jurisprudence in this area does not side with copyright owners when the music industry tries to prevent these new means from gaining widespread public use. When courts do not deem the dissemination harmful to copyright owners, courts decline to find infringement, even though the legal and economic analyses that support those determinations often favor the copyright holder. [18] On the other hand, when copyright owners seek to participate in and be paid for the new modes of exploitation, the courts and Congress appear more favorable to the proposition. In addition, copyright owners believe they should get something for the new exploitation, and when the new market not merely supplements but also rivals prior markets, copyright owners can control that new market. This control permits copyright owners to refuse to license, and therefore to charge market prices.

SINCE others in the technology field are utilizing the software, the music industry should become involved in the distribution of the software while the technology is new, so copyright owners can have a say in how it is implemented and who can use it.

In this vein, Kazaa has been thriving in the open market by making deals with legitimate technology vendors since its inception. For instance, Kazaa inked a deal with a European ISP recently, despite the music industry's lawsuits against foreign Internet service providers, which allow access to Web sites that have pirated music. [19] More importantly, Microsoft is distributing some videos on Kazaa software using its new version of Media Player. [20] Videos are put on the Kazaa network by a company that uses Microsoft's digital-rights-management software to place electronic locks on the songs and videos its distributes. Those locks, in turn, deter unauthorized copying, enabling companies to take advantage of the virtually free distribution provided by Kazaa without losing the ability to demand payment and limit usage. [21] Since others in the technology field are utilizing the software, the music industry should become involved in the distribution of the software while the technology is new, so copyright owners can have a say in how it is implemented and who can use it. More importantly, copyright owners should recognize these technologies so they can negotiate royalties sooner rather than later. [22]

However, courts cannot provide adequate legal resolutions with the outmoded fair use doctrine, especially in the P2P context. Of course, courts will use the fair use doctrine, but ultimately decisions will be based more on preserving technology and encouraging interested parties to work out an arrangement with P2P software developers. Because of the judiciary's inability to fashion a more predictable regime for finding copyright infringement, Congress must take the necessary legislative changes to balance the protection of copyright and the needs of consumers and the public interest in the digital environment.[23] Unfortunately, the current legislative proposals are not finding the balance that is needed in this area.

Recommendations

The music industry's strategy of targeting P2P software will ultimately become ineffective as a copyright protection strategy. It is anathema to the evolution of new technology to encourage excessive controls of technology in the name of copyright protection. Even though the music industry has the Napster ruling on its side, and for good reason, peer-to-peer networks are increasingly being used by corporations and the government to disseminate perfectly innocent, noncopyrighted data. As those "substantial noninfringing uses" grow, the case for shutting down peer-to-peer programs becomes weaker.[24]

In the future there will no longer be individuals to target. In fact, P2P file sharing programs will become more ubiquitous, and the music industry will not have the means to eliminate infringers individually. Unlike Napster, peer-to-peer programs will no longer be maintained by a central server, thus making it harder for the music industry to target entities or individuals in lawsuits.

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The music industry must use its resources more efficiently because control will not be easy to exercise within the P2P context. This inability to control Internet pirates makes a compulsory license regime more attractive. Compulsory licensing is a regime that gives the new technology access to the copyrighted material, but it makes sure that the new regime pays for the access. Historically, where a new technology emerges that changes the interaction between protection and access, Congress has constructed laws that create a new compulsory licensing regime.[25]

One of the first examples of such a compulsory licensing regime is that of the player piano.[26] Before the player piano, copyright owners of music made their money by selling sheet music. The U.S. Supreme Court held that it was not a copyright violation to add sheet music to a piano roll and then sell the piano roll, which made it no longer necessary to buy the sheet music.[27] After the Court's ruling, Congress changed the law giving the sheet music manufacturer the right to make copies after an initial mechanical production has been made and pay a fixed rate for those copies. That was a way to make sure copyright owners got paid. Similarly, Congress created a compulsory licensing regime with respect to broadcasting content after cable television set up technologies to steal the content of broadcasters and then sell it to their customers after the Supreme Court ruled that it was not a violation of copyright law.[28] Consequently, establishing such a compulsory licensing regime for P2P software manufacturers would ensure that not one industry has control over the technology, so it can thrive or wilt in the Internet market.[29]

Perhaps one solution would be a publicly-funded, collectively-administered, blanket licensing scheme for the noncommercial, private use of digital works.[30] In American Geophysical Union v. Texaco Inc.,[31] the Court recommended a licensing scheme that was privately funded and administered by a copyright collective in much the same way as the Copyright Clearance Center works. The Audio Home Recording Act (AHRA) of 1992 provided for a levy on equipment to fund what was, in effect, a collectively-administered blanket license for private, digital audio tape copying.[32]

The AHRA was a compromise among copyright owners and hardware manufacturers that the distribution of digital audio recording devices be permitted, subject to a statutory royalty on the equipment so long as the devices allowed the recording only of a first generation copy.[33] Diverting costs to the manufacturers who have precipitated the increase in unauthorized reproduction and use of copyrighted works would supply the money for the collective fund.

The principal argument for the creation of a Digital Lending Right (DLR) is that if payment is made to copyright holders, then use of their works is removed from the realm of unauthorized use and piracy. This frees the music industry to concentrate on collecting money instead of spending it targeting individual users. A DLR policy would reduce the problems of policing and enforcement and reduce the costs of litigating on a case-by-case basis. The blanket

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license that would allow for the free lending of digital works would pre-empt future litigation. In sum, DLR would make it much simpler for both industry and consumers than the current model of enforcement and fair use.

This proposal has problems, too. Distribution of the collected sums and copyright owners may pose hurdles to successful implementation of this solution.[34] While direct downloads can be tracked, file sharing might not be so easy to track. Perhaps, the industry may be able to record which files are shared through statistical sampling.[35]

More practically, record labels need to provide added consumer convenience to curb copyright infringement. For instance, a licensed download or audio or video stream would need to be easier to find, faster to acquire, and give a better quality copy than a shared file or a hacked download.[36] The price, if low enough, would be worth the savings in transaction costs of finding the file or downloading the hack and using it, particularly if the downloading takes a long time.[37] Record label sites that charge per song are completely useless as maintained when individuals can file share elsewhere on the Internet and receive similar service. It is a waste of resources for the music industry to maintain these sites when they are virtually unused and underutilized.

The music industry's efforts to wean consumers from file-swapping—legal musician subscription services—are struggling. One reason is that these sites often limit where, when and how long music can be played.[38] Moreover, the majority of content from the major labels remains offline, thus making it vulnerable to the online file-sharing music mecca. The music industry must continue to offer alternatives to file-sharing and expand content, so consumers can decide which one will work—pirated or legitimate music.

Record labels should work more diligently to provide a higher quality of service for consumers either on the Internet through upgrading their sites or upgrading the content of CDs. Record labels have the means of implementing top-notch Internet web sites that may provide interviews with talent as well as pictures, videos, recording sessions, and a number of other creative ways to lure consumers to these web sites.

Further, record labels should include "extras" in the sale of CDs. For instance, providing consumers with exclusive access to online giveaways; rebates on concert tickets; fan club merchandise; attractive packaging; and autographed inserts. CDs can offer a host of value-added features, ranging from bonus tracks to CD extras and special web-based content that can only be accessed by purchasing the CD—acting as an inventive to spur music sales.[39] There is no limit to the auxiliary goods that can be offered.

Another way to protect content is to forge agreements with hardware and software industry leaders, such as Cisco Systems, Intel Corp. and Microsoft, to build copy protections into their network and consumer products. For instance, some programs that come with computers, like Microsoft Media Player, can disable illegal songs and videos on a user's computer.[40] Further, hardware manufacturers can also utilize DRM-wrapped digital files and streams or use Data-Play, DVD-Audio and SACD. Disabling copyright infringement through hardware is more workable because once the delivery system of songs is reduced to a "stream," any attempt to control the media becomes pointless.[41]

Another initiative that cuts to the heart of copyright infringement is the Recording Industry Association of America's (RIAA) initiative to combat piracy on the streets. The RIAA is working with the New York Police Department to utilize anti-nuisance laws to pursue music piracy activities. This effort includes placing investigators on the street to pursue infringers, and partnering with law enforcement to deploy anti-piracy rapid response teams. Already, the RIAA has helped New York City law enforcement bring 45 cases as part of the "Padlock Initiative."[42] With the addition of P2P file sharing to the sale of pirated CDs this adds significant financial losses to copyright owners.

Conclusion

P2P file-sharing programs have great promise outside the domain of digital music. P2P programs will become one of the most innovative technologies to date. However, P2P programs have proved damaging to the music industry because they undercut sales of CDs. But, P2P programs have legitimacy in the online world, and courts will be reluctant to find otherwise. In that spirit, the music industry must change its strategy and focus on initiatives combating piracy that will likely reap the most rewards for itself and the artists it represents, like compulsory licensing and royalty collection through the sales of certain computer and hardware. If the music industry can thrive after the innovation of the piano roll, then it can survive the digital revolution.

ENDNOTES

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[1] Press Release, *RIAA Releases Mid-Year Snapshot of Music Industry, New Survey Data on Piracy and Consumer Practices Help Explain Continuing Sales Decline*, August 26, 2002 (finding that total U.S. music shipments dropped 10.1 percent from the first half of 2001 to the first half of 2002).

[2] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (finding that Napster contributorily and vicariously infringed plaintiff's copyrights).

[3] UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding that fair use did not justify My.MPC.com's creation of a computer database consisting of unauthorized copies of compact discs).

[4] Lucas Van Grinsven, *Kazaa Says it Can't Comply with Copyright Ruling: Internet company says it can't prevent users of its software from swapping copyright music files*, TechTV [hereinafter Kazaa Copyright Ruling], *available at* http://www.techtv.com/news/politicsandlaw/story/0,24195,3362992,00.html (stating that FastTrack technology is legitimate file-swapping technology that aids as a business tool for corporations communicate with employee and clients around the world).

[5] Robin Smith, *Lair of Layers*, Remix, December 2002 at p. 12.

[6] See Brian Garrity, *The World of Digital Music — The Piracy War Wages on With New Emerging Strategies*, Billboard, July 13, 2002, at p. 71 (quoting industry executives as saying that the peer-to-peer file sharing needs to be confronted on the legislative, judicial, commercial and technological fronts).

[7] See e.g., Dellar v. Samuel Goldwyn, Inc., 104 F. 2d 661, 662 (Ca. 2d 1939) (calling the doctrine of fair use "the most troublesome in the whole of copyright law").

[8] 17 U.S.C. § 107 (1976).

[9] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 478-79 (1984).

[10] See Sony, 464 U.S. at 417 (1984).

[11] Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 Colum. L. Rev. 1613, 1624 (Nov. 2001) (concluding that the Sony majority was "extraordinarily forgiving" in its application of the fair use factors to the Betamax).

[12] *Sony*, 464 U.S. at 442 (finding that time-shifting of television programs constituted a noninfringing use).

[13] *Id.* at 620 (absolving Sony from contributory infringement because Sony had no direct involvement with individual Betamax users, did not participate in any off-the-air copying, and did not know that such copying was an infringement of the studios' copyright).

[14] *Id.* at 465.

[15] *Id.* at 440.

[16] *Napster*, 239 F.3d 1004 (9th Cir. 2001).

[17] See Benny Enangelista, *Copyright's Next Chapter: Latest Legislation tries to Control the Technology Itself*, San Francisco Chronicle, April 8, 2002, at E1.

[18] See e.g., *Sony*, 464 U.S. at 456 (1984) (refusing to enjoin sale of video tape recorders as violation of Copyright Act); Teleprompter Corp. v. CBS, 415 U.S. 394, 411-14 (1974) (determining that CATV transmissions are not performances within the meaning of Copyright Act); Fortnightly Corp. v. United Artists Television Inc., 392 U.S. 390, 399-402 (1968) (finding that the cable transmission of a program was more like "viewing" rather than "performing" and, thus, did not fall under Copyright Act); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 17-18 (1908) (refusing to restrain production of pianola rolls to play copyrighted songs); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072, 1076-81 (9th Cir. 1999) (denying request to enjoin production of Rio music player and holding that it does not fall under the Audio Home Recording Act of 1992).

[19] Kevin Washington, *Digital Content: The Entertainment Industry's Efforts to Prevent Copying and Sharing Music and Video Online Has Some Worried About Infringement of Consumers' Rights*, The Balt. Sun, Sept. 12, 2002, at 11C.

[20] Jon Healey, *Microsoft Using Kazaa as Marketing Portal*, LA Times.

[21] *Id.*

[22] Id.

[23] Washington, *supra* note 19.

[24] Paul Sweeting, *Legal Tender*, Video Business, January 7, 2002 at p. 12.

[25] *Controlling the Net: How Vested Interests are Enclosing the Cybercommons and undermining Internet Freedom*, Multinational Monitor, March 1, 2002, at p. 23.

[26] *Id.*

[27] White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908).

[28] Teleprompter Corp. v. CBS, 415 U.S. 394, 408-10 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 399-401 (1968).

[29] Multinational Monitor, *supra* note 25.

[30] Joshua H. Foley, *Enter the Library: Creating a Digital Lending Right*, 16 Conn. J. Int'l. L. 385, 369 (Spring 2001).

[31] 37 F.3d 881 (N.Y. 1994).

[32] 17 U.S.C. § 1001-1010.

[33] Foley, *supra* note 30, at 370.

[34] *Id.*

[35] *Id.*

[36] See *supra* note 19.

[37] *Id.*

[38] *Id.*

[39] Garrity, *supra* note 6, at 71.

[40] *Id.*

[41] Dave Rensberger, *Swinging the Big Bat: Power Versus Technology*, Searcher, October 1, 2001, at p. 18.

[42] *RIAA's Anti-Piracy Efforts Hit High Gear to Match 4th Quarter Finale of Great New Music Releases*, Dec. 11, 2001, available at http://www.riaa.org/PR_story.cfm?id=594.