

Filesharing: Friend or foe?

How filesharing could save the music industry

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Abstract:

Downloading music from the filesharing networks has become a very popular activity for many people. But as the number of users at those networks increase, the music industry faces a decline in CD sales. As a consequence the labels are pushing our legislators to make filesharing illegal. This paper tries to find out if the claims by the industry are valid and if this activity must be stopped with all possible means. The paper is based on previous research in this area and as many have found before, there seems to be a small correlation between filesharing and CD sales, but it is not a negative one. Rather the opposite: the correlation is positive. Hence more CDs of a single artist are sold due to filesharing and the general drop in CD sales can be explained by other circumstances inflicted by the labels themselves. This paper also takes a look at the inefficiencies with the present system and makes suggestions for a better one that would benefit all, even the music labels. That solution is based on the premise of making filesharing legal.

Keywords: Filesharing, downloading, copyright, CD sales, music industry, digital millennium copyright act, record companies, artists, musicians, illegal.

Background

“There are two futures in front of us, the one we are taking, and the one we could have. The one we are taking is easy to describe. Take the net mix it with fanciest TV, add a simple way to buy things, and that’s pretty much it. It is a future much like the present” - Lawrence Lessig¹

“Do you download? Well that’s ok!” - Bruce Dickinson²

Downloading music has become very popular as entertainment for many people. The number one P2P application, Kazaa estimates that it had over 140 million users by the end of 2002, twice as many as Napster at its peak. Kazaa typically reports 4.4 million simultaneous users on its network at any time. Further, Big Champagne estimates that every month you can find over 3.4 billion unique MP3 music files through Kazaa and Grokster, another popular file-sharing service (Snyder & Snyder, 2003). In the first six months of 2002, US CD sales fell 11 percent – on top of a 3 percent decline the year before. Sales of blank CDs jumped 40 percent over the same period, while the users of Kazaa tripled in number (Mann, 2003).

According to IFPI the Swedish music industry faced a decline of two percent of CD sales last year and the sales of singles fell almost 15 percent. This drop in sales would correspond to a net loss of 1,5 billion SEK. The music industry blames these downloads, which it perceives as piracy, for the decline (Snyder & Snyder, 2003). As a consequence filesharing is now becoming illegal. Thomas Bodström made an announcement in the first week of July 2003 saying that all copying of music, pictures and text would become illegal in Sweden from the first of January 2004. This would mean a harmonization with the EG legislation and that the people who continues to download could face up to two years of imprisonment. The motives behind the announcement are that Sweden has a considerable large music industry and that their interests, as well as the interests of the public, must be addressed (Reimegård, 2003).

In the United States this new law has already taken effect as the music industry has launched an aggressive plan for its fight against Internet piracy, threatening to sue hundreds of individual computer users who illegally share music files online. In May, the industry sued Jesse Jordan and three other college students for running campus networks similar to Napster. The recording industry hopes this new attack will kill off digital piracy once and for all (CBS News.com, 2003).

Purpose

The purpose of this paper is to find out if the claims made by the Music Industry are true: Is downloading really hurting the sales of CDs and consequently, their businesses? Moreover, it is also the aim of this paper to look deeper into the structure of this industry in order to find disadvantages as well as potential benefits. If we can find new ways beyond the lawsuits that can address the interests of the artists as well as the public and the record labels, our society would benefit a great deal.

¹ L. Lessig, 2001” The future of ideas: the fate of the commons in a connected world”. New York: Random House.

² Speech at the Iron Maiden Concert at Stockholms Stadium, June 2003.

Limitations

I have concentrated my efforts to take a closer look into the music industry and especially the US market and legislation. There are a lot of reasons behind this decision. The most important is that the industry of music, software, computer games and movies are a bit different to their character and an effort covering all those disciplines would dilute my conclusions as well as it would be beyond the scope of this paper. Nevertheless, all those markets are digital, thus a lot of my conclusions would be equally applicable to those businesses active in those areas. Some might ask why I have focused on the US legislation. The answer is quite simple: I'm not a law student and consequently do I have a limited insight in Swedish legislation. My understanding of the American legislation is somewhat better primarily due to the fact that the material I have prepared for this paper is gathered from American literature. Also, as we will see later, the US government is dictating much of the practice in this area thus making my arguments valid for Sweden as well as the European Union.

I have also totally disregarded the issue of cracking and take full comfort in the words of a Dutch cryptographer named Auguste Kerckhoffs who in 1883 warned that: "Anything that is widely distributed in an economical device will be subject to reverse-engineering". Watermarking presumes that the inner workings of a system remain secret and you can't call something a secret when you expect to deploy it to the homes of millions and millions of people. Finally, I have also disregarded the benefits of copyleft, free software and the Open Source movement. Those are really in my field of interest and this paper would have benefited a great deal if those perspectives were to be used. Nevertheless, they are also beyond the scope of this paper so you just have to settle with this for the moment. Hopefully can I come back with a modified version in a few years, but it is my belief that there will be no need for that paper at that time, as the problem will be gone by then.

Methodology

Since I'm writing a paper on the issue of copying, I myself have applied the practice by copying some of the words from others. The beauty with papers published on the web is that it simplifies the process of making another paper. Or by using the words of Richard Stallman: "Digital information contributes to the world by making it easier to copy and modify information" (Stallman, 2002). As such, I have found no argument for rewriting the sentences if they already were to fit this paper's purpose. Some people might give me less credit for this practice but it has saved me a lot of time and effort. Truth to be told, this paper would not have been possible to write in nine days without this practice. I have tried to be as careful as possible regarding the references and hopefully will the original authors give me credit for putting their words in a different context. Hopefully they will consider it as flattery and not as "theft", "shoplifting", "stealing" or any other word that this paper will come to mention later on. Finally, the point with this paper is not to sit and write letters for their own sake. It is to provide others with arguments that in total lead forward to a solution to the problem introduced above.

Arrangement of the paper

I will start off with a look at the issue of copyright - why it exists and its original purpose. Second, I will take a closer look at the music industry and its origins. As we will see, this is an industry that has faced similar threats many times before, and in all those circumstances have they walked out of the danger virtually unharmed. I will then turn to their present claims and see if they seem to be valid. Further on, I turn to the user i.e. the consumer of the music to see why they use these tools and why they are so popular. After that I will take a deeper look at

the motives behind the claims. And as you will see, there are a lot of motives, some publicity disclosed and some that are not. Thereafter, I take a new approach to the issue by explaining the disadvantages that the music industry is inflicting on themselves by struggling to defend the old system. These disadvantages affect both the artists as well as the public, so we naturally turn to those parties afterwards. Later on I will explain the main benefits with going digital in this industry and come up with a solution that has the potential to be of benefit to everyone.

Copyright

“Balance” is a wonderful word, but the trouble is determining what its content is.”³

Copyright exists to give the copyright holder control over his or her works, but this control is limited. While a poet or an author has the right to control copies of his or her work - that right is limited by the rights of fair use. Making a copy of a chapter of a novel for one’s private use is fair even if the copyright owner forbids it. Also for content to be controlled, it must be creative. Facts on their own are not creative, thus hard work does not entitle someone to a copyright. Further, after a limited time the work falls into the public domain – free of restraint, so that second comers might do a much better job than the originator with the original idea. Therefore copyright does not give a copyright holder control over all uses of his copyrighted work. Instead there has historically been a balance between assuring that copyright owners are compensated and assuring that an adequate range of material remains in the public domain for others to draw upon and use (Lessig, 2001).

The copyright system works by providing privileges and thus benefits to publishers and authors; but it does not do this for their sake. Rather it does this to modify their behavior: to provide an incentive for authors to write more and publish more. The government spends the public’s natural rights, on the public’s behalf, as part of a deal to bring the public more published works. Copyright law is meant to “strike a balance” between the interests of publishers and readers (Lessig, 2001). But copyright places the public first: benefit for the reading public is an end itself - benefits, if any, for publishers are just means toward this end (Stallman, 2002). Copyright exist only for the sake of promoting science and the goal is to have more written and published books which other people can read.

Copyright is believed to contribute to increased literary activity, and increased writing about science and other fields, and that society in turn will learn through this. That is the purpose to be served. The creation of private monopolies was a means to and end only, and the end is the public end (Stallman, 2002). Indeed under the US constitution copyright exists to benefit users – those who read books, listen to music, watch movies or run software – not for the sake of publishers or authors (Stallman, 2002). When Jefferson and his fellow comrades of the Enlightenment designed the system that became American copyright law, their primary objective was to assure the widespread distribution of thought, not profit. Profit was the fuel that would carry ideas into the libraries and minds of their new republic (Barlow, 1994). This objective now seems to be turned upside down. How did it happen? Let us take a closer look.

The history of copyright

Intellectual property rights were invented in the Italian merchant states and accompanied the spread of early capitalism to Netherlands and Britain. Early forms of what has become copyright can be traced further back into history, as is sometimes done by copyright champions (Söderberg, 2002). In Talmud tradition, for example, sources of information were thoroughly documented for the purpose of ensuring the authenticity of information (Bettig, 1996). But it was not until Gutenberg's press was invented in 1445 that copyright as we know it was formed. Prior to this time printing was impossible. In 1476 the first printing press was introduced into England and consequently, Great Britain developed the first advanced copyright law (Scott, 2001).

³ Rights, Limitations and Exceptions: Striking a Proper Balance, European Commission DG III, Esprit Project Consensus Forum 1997, s 49.

In 1556 the Stationer's Company was established and given a monopoly over printing. The key aspects of the monopoly were more concerned with censorship than they were with preserving the profitability of the publishers of books. They were certainly totally unconcerned with any rights that the author of such a work might have in the exploitation of that work (Scott, 2001). Printers were required to include their details and those of the author on their books not so much as to permit the consumers of those books to order their next copies but rather in order that the King knew whom to flog or hang if later events revealed the book as a work of dubious political quality (Scott, 2001).

In 1707 Scotland and England joined in a union. At the time of this union the printing of works within England was strongly under the control of the Stationers Company in that their members owned all of the printing presses and were colluding by not publishing a work if it was claimed by another of the members of the Company. As a result, people would travel to Edinburgh; have their material printed by a Scottish printer, and then return to England in order to sell those copies at a greater profit. The English printers, not being too keen on their Scottish rivals, sought to have the Scottish printers removed from competition. Such was the birth of the *Statute of Anne* in 1709 (Scott, 2001). Moreover, in 1837 the U.K. Parliament discovered that the works of its authors tended to be of some demand around the world. One parliamentarian remarked that "every work written by a popular author is almost co-instantaneously reprinted in large numbers both in France, Germany and in America" and in order to address this "leakage" the United Kingdom Parliament passed the *International Copyright Act* of 1844 (Scott, 2001).

Thus the copyright system grew up with printing – it was created in the age of the printing press, an inherently centralized method of mass-production copying (Stallman, 2002). In a print environment, copyright on journal articles restricted only journal publishers, requiring them to obtain permission to publish an article. It helped journals to operate and disseminate knowledge, without interfering with the useful work of scientists or students. These rules fitted that system well because it restricted only the mass producers of copies. It did very little harm to the individuals that read the books because it did not take any freedom away from them (Stallman, 2002). Nevertheless, things were about to change.

In 1878 the International Literary Association was created and after its meeting in Berne member countries were required to provide the same protection to authors from other member countries as it provided to its own authors. They were also required to put in place certain minimum levels of copyright protection, including setting the period of copyright protection at the life of the author plus 50 years (Scott, 2001). The rules of the Berne convention were quite simple - each country was accorded one vote without taking account of the relative economic power of that country or of the works produced by that country, nor whether the country was a net consumer or net producer of works. As a result, over time, as more developing nations became members to the Berne convention they formed voting blocks which were able to outvote the developed countries on resolutions. One consequence of this was the Stockholm Protocol in 1967 which gave developing countries broad access rights to copyright materials. Ultimately it was actions such as this which prompted the United States to shift copyright and similar negotiations out of this forum into other forums such as the GATT talks (Scott, 2001). This is somewhat ironic since when the United States was a developing country in the 1800's, the US did not recognize foreign copyrights (Lessig, 2001; Stallman, 2002).

Sensing the opportunity for U.S. firms to secure profits from its lead in the computer revolution, the United States, rushed to create its Task Force on Intellectual Property. The long term goal of that task force was the placing of copyright and similar negotiations within the GATT (Scott, 2001). United States then began to threaten the developing countries with economic sanctions and was later, at the 1994 Uruguay Round of GATT, able to remove the developing countries resistance to the Trade Related aspects of Intellectual Property Rights (TRIPS) initiative (Scott, 2001). TRIPS is perhaps now the single most important document for the creation of a legislation adapted to the new economy (Scott, 2001). However, it was signed when the Internet had existed for two decades as the research tool of academics and, in its next evolution, the World Wide Web had only barely begun to register on the general community's radar scopes. Furthermore, the TRIPS agreement was negotiated in the context of what is essentially a trading organization. In fact, the World Trade Organization has been widely criticized as poorly representing consumer interests (Scott, 2001).

The direct impacts of the TRIPS agreement have already begun to be felt, with the passage of legislation such as the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA was designed to make it illegal to break copy protection, or even publish information about how to break it. The law basically gives publishers the chance to write their own copyright law because it says they can impose any restrictions whatsoever on the use of a work (Stallman, 2002). These restrictions take the force of law provided the work contains some sort of encryption or license manager to enforce them.

As we have taken a closer look at the history of copyright we see that the new legislations are actually corporate controlled trade treaties that are carried out in the name of economic efficiency, which really are designed to give business power over laws and policies. They are about a transfer of power: removing the power to decide laws from the citizens of any country and giving that power to businesses (Stallman, 2002). Furthermore they have a direct effect on the citizens of that country. Actions for copyright enforcement have historically been taken against the distributors of a copyright work - people who produce vast quantities of counterfeited goods for sale at street stalls or from fly by night shop fronts. Where an individual comes to the attention of a copyright holder as being involved in an infringement of rights involving no for-profit redistribution, it is rarely worth the copyright holder's time, money or effort to pursue that individual (Scott, 2001). Not anymore it seems.

The history of the music industry

It was the gramophone that brought the music industry into existence (Kasaras, 2002). Invented by Emile Berliner, he immediately realized the possibilities for a new niche. At its first demonstration in 1888, Berliner prophesied the ability to make an unlimited number of copies from a single master, the development of a mass-scale home-entertainment market for recorded music, and a system of royalty payments to artists derived from the sale of disks (Schicke, 1974). Berliner's company - the Talking Machine Company - became in 1901 a leading force in the music business in the United States and a threat to the traditional entertainment business. As Martin (1995) explains, "the threat that this [recording industry] posed was soon apparent to piano-makers and retailers, music teachers, sheet music publishers, music hall and vaudeville artists, proprietors and so on".

Berliner's business plan was based on growth in two areas. First, on the practical side, the basic technology had to evolve to be easy to use and inexpensive to the consumer. Second, new musicians and music had to be discovered, and demand for that music had to be generated to sell gramophones and related technologies. Emile Berliner managed to succeed

in both areas and soon the music industry expanded, as many others followed his strategy. Until the new directions that Berliner created, the record-making activities were just an aspect of their marketing of record players and not a separate commodity (Garofalo, 1999). However, a new technological development - radio - would prevent this market from expanding and it would force the recording industry into its first decline. In the same way that recording techniques threatened the entertainment business of the nineteenth century, they themselves were challenged by the development of radio and its consequences (Kasaras, 2002).

The historical development of radio is of great importance in modern history. Beginning in the last decade of the nineteenth century, radio became one of the most important communications tools for national and international information (Garofalo, 1999). Although the first years after the First World War were characterized by a steady growth in the music industry, the late years of the 1920s and the early 1930s brought a decline. The main reasons were the economical crash of 1929 and the development of radio (Kasaras, 2002). Radio made music reproduction available in homes at a much lower cost so as a consequence radios replaced record players. People could now listen to music in their private spaces without having to purchase it (Firth, 1988).

However, new marketing efforts were responsible for the change in the music industry in the late 1930s. The installation of jukeboxes in thousands of bars and saloons became one of the best ways for the industry to promote and advertise its commodities and mold tastes (Kasaras, 2002). The second practice was related to what was called the star system, where the gramophone companies became less concerned to exploit big stage names as film stars, and more interested in building stars from scratch, as recording stars. Thus, they became less concerned to service an existing public taste than to create new tastes, i.e. to manipulate demand (Firth, 1988). In addition, radio and the industry tried to coordinate their efforts, with radio continuously promoting music 'stars' and their albums. As such, the music industry grew and became more profitable than ever as radio was becoming increasingly popular (Firth, 1988).

In 1948 two of the most important inventions in the music industry were developed - the transistor and the long-playing records (Kasaras, 2002). The combination of the transistor and the long-playing records was the greatest achievement in the history of the musical industry, because music as a commodity could now easily enter anyone's home. These new developments were greeted with great enthusiasm and the music industry experienced unprecedented expansion. In addition, musicians were profiting from these changes, since their music reached ever growing audiences. The music industry was safe from any type of piracy, since there was no other way to reproduce music, except via radio (Garofalo, 1999). But challenges were on the horizon for this profitable situation.

The introduction of the cassette-tape brought many new consumers to the music industry. It was an invention that was aimed at bringing music into one of the places that consumers spent many hours - the car (Garofalo, 1999). But the consumer was not just seeking music for private consumption; consumers were also looking for the least expensive way to acquire a product. The cassette technology may have enabled the transnational music industry to penetrate remote corners of the globe, but it was also responsible for the industry's two main financial headaches of the 1980's - piracy and home-taping (Garofalo, 1999). This technology emerged as a major threat to the music industry (Firth, 1988) but the industry responded by finding a way to profit from this technological development: The IFPI initiated an

international campaign to levy a tax on blank tape and equipment that could be used to compensate copyright holders for their loss of income (Garofalo, 1999).

The music industry has a historically pitiful track record of predicting apocalypses. It has not died in the face of radio or home tape recording. Rather it has continually seized new opportunities that the new technology provides. Indeed these developments have been means to prolong the profitability of a work by requiring a user to repurchase it in different formats every five to ten years. Records have gone through a number of stepped speed changes, 72RPM, 45RPM, 33RPM, before being replaced by tapes and CD audio disks which, in turn, are being attempted to be replaced by minidisks and portable digital players (Scott, 2001). As a consequence courts have historically responded cautiously to the claims that new technologies should be shut down because they facilitate copyright infringement. Only when a technology is not capable of legitimate uses does it make sense to outlaw it and rightly so.

The VCR was once called the “Boston Strangler” of the American film industry by Jack Valenti, president of the Motion Picture Association of America (Lessig, 2001). Though the VCR was designed to steal, the Supreme Court concluded that it could not be banned as an infringing technology unless there was no “potential” for a “substantial non infringing use”. Potential. For a substantial non infringing use. Notice what this standard does not say. It does not require that the majority of the uses of the technology to be non infringing. It requires only that a substantial portion be noninfringing. And it does not require that this noninfringement be proven today. It requires only that there be a potential for this noninfringing use. As long as one can demonstrate how the technology could be used in a way that was legitimate, the technology could not be banned in court (Lessig, 2001). This decision was fortunate for the movie industry considering that the sales of both videos and DVD’s are skyrocketing today (IFPI, 2003). The same arguments could have saved Napster but it didn’t. Nevertheless, they did save Kazaa in Netherlands. Here a court ruled that Kazaa could not be held responsible if people offered copyrighted materials on the service. Kazaa just supplies a vehicle, just like a newspaper and is not responsible if you try to sell stolen goods through the classifieds (Cnetnews.com, 2002).

As we can see advances in hardware and software have propelled the music industry ever since the radio and the cassette. In both cases, these "copying" devices enhanced their respective businesses. There is therefore no reason to trust those who have cried wolf in the past about new technology, especially when history has shown that advances in technology increase consumer spending.

Revising the claims by the music industry

“We've said it b4 and we'll say it again: the rise of digital technology and peer-2-peer file sharing has little 2 do with people's intrinsic respect 4 art and artists, and everything 2 do with the cynical attitude of big industry conglomerates, which have consistently pushed 4 more and more commercial, highly profitable products at the xpense of authentic art and respect 4 artists.”- Prince⁴

The holders of copyright monopolies have claimed that their losses are the result of illegal filesharing and as a consequence should both the users and the providers of these tools be brought to justice. Before we jump to any hasty conclusions we should bear in mind that it is very difficult to properly assess the loss suffered. Such figures are manufactured to serve

⁴ "Embrace file-sharing, or die" John Snyder and Ben Snyder, Salon.com, Feb. 1, 2003

different purposes, but methodologies which simply take the number of illegal copies and multiply them by the recommended retail price are misleading (Scott, 2001).

Not only do these methodologies largely ignore the price elasticity of demand they also ignore the fact that the costs of production, marketing, distribution and administration would not be involved in the sale of those copies. Further, where those copies are in the hands of a person who simply would not have had the means to pay for them it is hard to see how to sustain an argument that those copies actually represent a lost sale (Scott, 2001). Also, the music industry is particularly threatened by the possibilities of these peer-to-peer technologies because one of its key consumer groups, those under 18, are highly computer-literate and, typically, are not old enough to obtain a credit card, thereby ostensibly reducing their ability to make purchases over the Internet (Garlick, 2000).

There are also strong cases indicating that there is no proven correlation between downloaded music and the decline in CD sales (Snyder & Snyder, 2003). Napster rather became a way of increasing demand for music than a way of decreasing it (Shirky, 2001), so there seems to be other reasons for CD sales to be down. According to Forrester Research the main reasons are: "the economic downturn, competition from other forms of entertainment, including the yearly \$6 billion of video games and the rush to the new DVD video format" (Bernoff, 2002). Price is also a major reason for the decline in CD sales. Between the years 1991 and 2001, the average price of a CD went from \$13.01 to \$14.64, which is a 12.53 percent increase in price. The record companies seem to have raised prices precisely at the time costs were coming down. Indeed the Federal Trade Commission found that music labels had engaged in the practice of inflating compact disc prices and had denied those music retailers who sold compact discs at lower levels cooperative advertising payments (Pitofsky et al., 2000).

Further CD shipments went from 1.1 billion units in 2000 to 968.6 million in 2001; income went from \$14.3 billion to \$13.7 billion. That's a 10.3 percent decrease in units and a 4.1 percent decrease in sales. But if you look at the actual number of releases, there were 12,000 fewer albums put out by the major labels in 2001 than in 1999. That's a 25 percent decrease! (Hayine, 2003). So in fact, the industry has dramatically increased its per-album profit. It's pretty clear - labels cut back on new artist investments and raised album prices. You can go through all of the RIAA-posted statistics, and not only don't you find its lost \$4 billion, you can't even begin to find any loss not attributable to its own sales and marketing. Piracy isn't a factor (Hayine, 2003).

Finally the drop in sales could have something to do with the "McDonaldization" of radio. The shorter play lists on radio, partially a result of Clear Channel's control of 60 percent of rock radio listening and their style, leads to fewer new musicians becoming well known. Even MTV is playing fewer music videos, and in general, there is a record industry style to push a narrower range of musicians (Snyder & Snyder, 2003). What drives radio these days is advertising and money, not music. A lot of music gets left behind thanks to the current state of radio; that consumers are rejecting it shouldn't be surprising

The benefits of downloading

Why is it that record companies pay dearly for radio play and fight Internet play? What is the real difference between radio and the Internet? Perfect copies? If we look at the Internet as analogous to radio, the problem becomes one of performance rights, not the unlawful exploitation of intellectual property. People are creating their own "radio" on their hard drives,

and they are constantly changing it. Indeed downloading provides the users with a lot benefits compared to the present state of radio and tangible formats.

Downloading allows consumers to acquire only what most appeals to them (Gross, 1998). Hence, the typical focus in online music is the individual song, rather than the album (Gerbert, 2000). The music industry has historically forced consumers to buy music they do not desire so that consumers can hear the music in which they are interested (Berst, 2000), but these new technologies free consumers to choose the music that most interests them. One reason that consumers purchase music (as opposed to listening to it for free on the radio or elsewhere) is to gain temporal control, i.e., to control when and where we listen to music (Lacher, 1989). Consumers can now manipulate music, recombine different pieces, or even combine downloaded music with their own material (Fisher, 2000). The attraction for those individuals who download music is that they can more readily customize their collections than they can with music that is in a tangible medium (Berst, 2000). Digital music further enables consumers to manage their music collections in differing ways - for instance, they can group songs in a manner that makes sense to them (Cartwright, 2000).

Moreover, digital music allows for the potential delivery of music to multiple points, such as to a car, different rooms in a home, or to a mobile telephone (Smith et al., 2001). The advent of CD recordable (CD-R) devices heightened the desirability of downloading music from the Internet. Using these devices users can download music and "burn" it onto a recordable CD (Webb, 2000). This disc can then be played in a traditional CD player, for example, on a stereo, portable CD player, or in a motor vehicle (Fox, 2002). Also, portable CD players are being replaced by iPods. Instead of the 12 songs on a CD, there are 1,500 songs on an iPod and because items are stored in a virtual rather than a tangible form, consumers do not have worries about where to put their music collections within their home, office, or car.

The development and rapid adoption of peer-to-peer technologies - such as Napster, Freenet, Aimster, and Gnutella - have also provided music lovers with greater access to more music than ever before. Through these technologies, Internet users can search for music on the hard drives of other users, and then download this music to their own hard drives (Foege, 2000). Experts like Josh Bernoff at Forrester Research say that: "music pirates don't turn to file-swapping sites because they're looking for freebies. They go there because the services offer what online music lovers want: wide selections; reasonable pricing; and the ability to copy music files to computer hard drives, portable players, and CDs" (Bernoff, 2002). "The reason people use free services is because they didn't find what they were looking for-not that they didn't want to pay"(McLaughlin, 2003).

Indeed, the extraordinary feature of Napster was not so much the ability to steal content as it is the range of content that Napster made available. The important fact is not that a user can get Madonna's latest song for free, it is that one can find a recording of New Orleans jazz drummer Jason Marsalis's band playing "There's a Thing Called Rhythm" (Lessig, 2001). This ability competes with the labels, but it doesn't really substitute for the demand they serve. A significant portion of the content served by Napster is music that is no longer sold by the labels. This mode of distribution - whatever copyright problems it has - gives the world access to a range of music that has not existed in the history of music production. Once you taste this world of almost unlimited access to content, it is hard to imagine going back (Lessig, 2001). In sum, the advantages derived from the duplication of copyrighted music virtually guarantee that the practice will continue, since digital downloading provides a number of benefits for music listeners that recordings in traditional tangible formats (compact discs,

digital audio tapes, and audio cassettes) cannot, or do not. Why shouldn't CD sales be down? Truth be told, the record business is lucky to be alive.

People want what they want and they have made their choices. They will still buy CDs, but they want to download music. The failure of the music business to provide a comparable alternative to peer-to-peer networks is the most logical explanation for the "illegal" downloading of music. The conglomerates are reeling from the impact the Internet and digital downloads are having in changing how the consumer thinks. But it is not the downloads that are wrecking the music business, it is the inability of the conglomerates to adjust to the Internet and the new ways consumers want to consume music. AOL Time Warner just posted a year-end loss for 2002 of \$98.7 billion (Snyder & Snyder, 2003). Sony, the only multinational corporation to have interests in both the music and consumer electronics worlds, has relinquished its leadership in the portable market to Apple's iPod due to Sony's conflicting interests in music copyrights. Sony hardware comes with anti-copying features, making it cumbersome and inflexible.

Mark these words: The CD is going the way of the LP and the cassette. CD sales will eventually be coming down. Sales of CDs will not completely disappear. Some people will still be buying the tangible formats but consumers have made their choice. They want to listen to music while they're working at their computers, on a portable device like an iPod or MiniDisc player, or on a home theater jukebox. Digitally available music has given the consumer choices, and they like these choices. They don't want music just from commercial radio. They also want it from their hard drives and from the Internet. Yet record companies still want to force tangible, overpriced media on consumers who want to obtain data files and temporarily store them on their hard drives or on cheap, disposable discs (CD-Rs). If record labels don't start trying to be part of the future they will be bought up and converted to it by someone who is. And that's exactly the motives behind the lawsuits.

The motives behind the lawsuits

“Let's not call the major labels "labels." Let's call them by their real names: They are the distributors. They're the only distributors and they exist because of scarcity.” – Courtney Love⁵

The third party intermediaries do play substantive roles in the production of music. Recording companies support music production and distribution through their investments in the present value chain. They record, manufacture, promote and distribute the work of the artists. In particular, they play a "gatekeeper" role by selecting and identifying commercially viable content and giving it preferential treatment over non-viable content. Further, they provide an administrative function for the collection of royalties and other payments on behalf of the author of a work (Scott, 2001). As we have seen, downloading music is a very popular option for many people. This raises a question. Why don't the record labels have their own P2P networks? They have proven to be wildly popular. They don't require expensive investments in technology to start and maintain, and most importantly, the online community has embraced them wholeheartedly. The reason is control.

The major record labels, the so-called "Big Five" (BMG Entertainment, Sony, AOL Time Warner, EMI and Vivendi Universal Music Group), sell over 80 percent of popular music (Coats et al., 2000; Fox, 2002). Historically, the Big Five have effectively controlled most of

⁵ "Courtney Love Does the Math" Courtney Love, Salon.com, June 14, 2000

the music supply chain (Hill, 2000). Also, contractual arrangements between record labels and artists have formed a major barrier to entry in the music industry as well. These arrangements, in essence, provide labels with monopoly rights to the artistic output of individual artists from which the labels can then generate revenues. In particular, copyrights held by music labels comprise a key means by which music labels protect their economic assets, i.e. their investments in artistic talent (Sadler, 1997). Furthermore, the Big Five have made significant investments in the distribution infrastructure to support the manufacture, distribution, and retailing of music (Alexander, 1997; Selby, 2000; Fox, 2002). As one online music company, Emusic.com, observed in its 1999 *Annual Report*:

"Historically, the major record labels have been reluctant to participate in any alternative distribution model which would restructure the current music distribution hierarchy. This reluctance is due to their investment in the current physical distribution infrastructure and their relationship with the retail channel"⁶.

Put differently, technological changes have increasingly resulted in heightened competition for the major labels. In fact, the distribution of music over the Internet only requires a single master copy, whereas distribution of music as a product requires distribution of numerous physical items, i.e., CDs, audio cassettes, etc. When music is stored and sold as a computer file, disintermediation occurs (the cutting out of middle layers of distribution channels). This is particularly harmful to the Big Five, who are the major distributors of music to retail stores. (Alexander, 1994, 1997). Economies of scale in the distribution of physical music products have historically placed smaller players at a disadvantage to the Big Five (Alexander, 1997). However, the Internet significantly reduces the Big Five's market power in the area of distribution. As Coats et al. (2000) observe:

"The Internet's influence on the music industry is especially significant because it has the potential to change an industry controlled by a few record labels that have been consistently able to sustain high profit margins. These record labels seemed invincible due to significant statutory protection as well as a solid, tightly controlled method of distribution. However, digital distribution - the delivery of downloaded music from the Internet - is threatening to change this well-established system"

Simply put, recent market entrants that utilize digital downloading technology, represent a formidable potential threat to the labels control over the distribution of their artists' works. Downloadable music and its associated technologies have brought about a redistribution of power from major record companies to music consumers and, arguably, artists. In any event, digital technologies and the Internet have radically altered the value chain for the music industry in a number of ways that reduce costs and barriers to entry.

In sum, the fight over Napster, Kazaa, iMesh, Limewire and Morpheus is not just about revenues and profits. It is also about control and the resistance of some labels resistance to outsiders. The development of music videos and the creation of MTV in the 1980s cemented this attitude by the major labels (Kasaras, 2002). MTV provided music with direct influence of the top recording companies and was extremely popular and profitable. In addition, MTV's dominance forced the music companies to shoulder the expense of video production and then pay MTV to air the videos. The music industry was determined never to let anything like that ever happen again to their business (Shirky, 2001).

⁶ emusic.com, 1999, "Annual Report," at <http://www.emusic.com/about/investor/>

Disadvantages for the music labels

“Radio is not about music anymore” – Glenn Gardner, operations manager at rock radio WJJO in Madison Wisconsin.⁷

The efforts by record companies to stop the distribution of copyrighted recordings have proved to be a public relations disaster. Five years ago nobody gave a second thought about record companies - now they are one of the most hated corporate sectors in the world. The music industry makes companies like Exxon, Worldcom and Enron seem like a bunch of choirboys. Consumers don't hate movie companies, not yet anyway, but they do hate record companies. The question is: why is this happening and what is going to be done about it? Digital copy protection, known as digital rights management (DRM), will only add fuel to this fire and far from enhancing or securing the position of copyright holders, these moves by the legislatures may have only further soured an already cynical consumer population. In the end, it will be the music companies that run the risk of being consumed by it. Music companies have the opportunity to adjust to the new realities of digital distribution but instead they cling to their existing business models where they control as much of the distribution channel as possible. It is doubtful that this behavior will be rewarded with increased sales. But apart from this fact, the music industry is facing other drawbacks as well if they would to keep the present system.

Ask yourself: Does radio seem bad these days? Do all the hits sound the same, all the stars seem like cookie cutouts of one another? Listeners may not realize it, but radio today is largely bought by the record companies. Most stations play only the songs the record companies pay them to (Boehlert, 2001). Record companies need radio to play their artists because if the songs aren't played on the radio, chances are that it's not going to make the record company any money. Of course they're prohibited legally from paying stations directly so standing between the record companies and the radio stations is a legendary team of shadowy middlemen called independent record promoters, or "indies". Indies align themselves with certain radio stations by promising the stations promotional payments. Then, every time the radio station adds a Shaggy or Madonna or Janet Jackson song to its play list, the indie gets paid by the record label. The indies get paid \$1,000 on average for an "add" at a radio station, but as high as \$6,000 or \$8,000 under certain circumstances, guaranteeing a station in a medium-sized market roughly \$75,000 to \$100,000 annually (Boehlert, 2001).

For the record companies, the system costs big bucks. Launching a single at rock radio can cost between \$100,000 and \$250,000. If the song's a hit, if it gets played at hundreds of stations across the country, with added charges for multiple plays a day, the costs skyrocket. Mercury Nashville president Luke Lewis claims his label spent more than *\$1.5 million* on promotion for a Shania Twain single that crossed over to pop radio (Boehlert, 2001). “Labels are pissed off and want to cut back, but they're powerless to do anything about it. If a single seems to be cooling, programmers nationwide often suddenly lose interest. Without airplay, the chances of CD sales diminish greatly. So labels are desperate to maintain momentum behind new songs, often at any cost. And the indies know it” (Boehlert, 2001).

A problem with much of today's pre-recorded media art is the method of discovery. Introduction to new artists and their work is done through advertising, paid placement in radio and TV, and other mass marketing techniques. These are very expensive, and the difficulty of rising above the noise becomes more and more expensive. There is a self-fulfilling prophesy

⁷ "Pay for play: Eric Boehlert, Salon.com, March 14, 2001

here where only huge sellers bringing in large revenues are pursued. As a consequence a few big hits are viewed as more important than a myriad of small ones, each with a happy artist and happy fans. In the end it is only profitable to create a few "superstars" instead of many full-time artists. This is bad economics for everyone. The present system keeps artists from finding an audience because it has too many artificial scarcities: limited radio promotion, limited bin space in stores and a limited number of spots on the record company roster. The digital world has no scarcities. There are countless ways to reach an audience. Radio is no longer the only place to hear a new song. And tiny mall record stores aren't the only place to buy a new CD. How can anyone really defend a system which fails to deliver music to so many potential fans? That only expects of itself a "5 percent success rate" a year? The status quo gives us a boring culture. In the US, a society of over 300 million people, only 30 new artists a year sell a million records (Love, 2000). By any measure, that's a huge failure.

Moreover, the sale of illegal CDs increased 50 percent from 2000 to 2001. This translates into \$4.3 billion dollars in sales from 950 million illegally sold CDs (Snyder & Snyder, 2003). This strikes me as a much more serious and obvious problem than downloaded music. So serious in fact that the problem of MP3s pales by comparison. This is where the record companies and RIAA should be putting their moral outrage, their money and energy. Those bad guys really are bad guys, profiting from the mass counterfeiting of someone else's property, unlike 14-year-old kids, who download music because they can't afford \$18 for two songs. Then again, it's ironic that if the RIAA is successful in shoving everyone back into the CD market, almost half of the CDs they buy will be counterfeits.

Finally we must remember that intellectual property is both an input and output in the creative process; increasing the "costs" of intellectual property thus increases both the cost of production and the incentives to produce (Lessig, 2001). Which side outweighs the other can't be known a priori. An expansion of copyright protection might reduce the output of literature by increasing the royalty expense of writers (Posner, 1998). This cost would naturally be invoked on both the artist and the music label thus reducing the economic incentives even further. In sum, if the suggested legislations are to be approved we might be heading to a future where even less artists could make a living from their music and it is already bad as it is.

Disadvantages for the artists

"Today I want to talk about piracy and music. What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts." – Courtney Love⁸

The publishers call people who copy pirates, a term designed to equate sharing information with your neighbor with attacking a ship. Ironically this term was formerly used by authors to describe publishers who found lawful ways to publish unauthorized editions and not paying the author (Stallman, 2002). It seems like Courtney Love has recently reversed this term back to its original meaning. And she couldn't be closer to the truth. With the present system the record companies pay musicians 4 percent of the sales figures, on the average (Stallman, 2002). Of course, the very successful musicians have more clout. They get up to 10 percent of their large sales figures (Scott, 2001; Grimm & Petersell, 2000), which mean that the great run of musicians who have a record contract, get less than 4 percent of their small sales figures. Here is how it works: The record company spends money on publicity, as we have seen above, and they consider this expenditure as an advance to the musicians, although the

⁸ "Courtney Love Does the Math" Courtney Love, Salon.com, June 14, 2000

musicians never see it. So nominally when you buy a CD, a certain fraction of that money is going to the musician, but really it isn't. Really it's going to pay back the publicity expenses, and only if the musicians are very successful do they ever see any of that money (Stallman, 2002). The musicians, of course, sign their record contracts because they hope they're going to be one of those few who strike it rich. Essentially it is a lottery is that is being offered to the musicians. Although they are good at music, they may not be good at careful, logical reasoning to see through this trap. So they sign and then probably all they get is publicity.

Some musicians have declared bankruptcy to free themselves from truly evil contracts. TLC declared bankruptcy after they received less than 2 percent of the \$175 million earned by their CD sales. That was about 40 times less than the profit that was divided among their management, production and record companies. Toni Braxton also declared bankruptcy in 1998. She sold \$188 million worth of CDs, but she was broke because of a terrible recording contract that paid her less than 35 cents per album (Love, 2000). Artists want to believe that they can make lots of money if they are successful. But there are hundreds of stories about artists in their 60s and 70s who are broke because they never made a dime from their hit records. Story after story gets told about artists, some of them authors of huge successful songs that we all enjoy, use and sing now living in total poverty, never having been paid anything. Not even having access to a union or to basic health care. Artists who have generated billions of dollars for an industry die broke and un-cared for. And they're not actors or participators. They're the performers of original compositions (Love, 2000). Worst of all, the authors owns none of its work; rather it's the record companies that own their copyrights. Moreover, with the Sonny Bono Copyright Term Extension Act of 1998 this ownership is meant to last almost forever.⁹ From this perspective recording artists have essentially been giving their music away for free under the present system, so new technology that exposes their music to a larger audience can only be a good thing (Love, 2000).

Finally with the present legislation musicians are not allowed to control even their own website. You are for example not allowed to register a famous person's name as a web address without that person's permission. That's ok. But that same law also created an exception that allows a company to take a person's name for a web address if the artist is labeled as "work for hire" (which they are). In reality this means that the record companies own and control the artists' websites (Fielder, 2001). The labels view these rights as insurance, whether or not a given artist becomes a star upon signing, but at the same time it forces the artists to give up all control of their destiny. So there aren't really countless ways to reach an audience, rather the artists have become hostages in an economic and legal system controlled by the music labels. Nevertheless, it is not only the artists that suffer from the present system - it has serious implications for the public too.

Disadvantages for the public

To date, the beauty of the copyright monopoly, at least from the point of view of the monopoly holders, is that it has no real basis justifying its existence. Rather, the proponents of copyright make deft use, as the circumstances require, of a variety of different justifications, from innovation, to giving just rewards to the author, to promoting culture etc. Copyright proponents have said to legislatures something along the lines of, "protecting us as an industry is good for society as a whole, but we can't give you any evidence which supports us on this and, in fact, there's actually no way to even measure the benefit that such protection brings to

⁹ This bill extended the copyright on already published works written since the 1920s with 20 years. The bill also extended the copyrights of works yet to be written. For works made for hire, as in this case where musicians give their copyright to the publisher, copyright would last 95 years instead of the present 75 years.

society, so you're just going to have to trust us"(Scott, 2001). Of course, this is a similar argument made by all industry sectors seeking protectionist regimes. What is different about the copyright monopoly is that, while legislatures have been aggressively slashing protection for other industry sectors, they have been cheerfully increasing it for this sector.

Moreover, one of the traditional justifications for copyright has been that, after the expiry of copyright, the work of the subject of copyright enters the public domain and society receives a benefit in return for the monopoly rights it has granted to the copyright holder during the life of copyright. However, in many instances as the copyright work near the end of its useful life, copyright holders fail to maintain it and fail to maintain its prominence, because its profitability has fallen over time. These works may, as a result, simply disappear from history because they have not been properly archived, or that archive has not been made public. Historically there have been simple reasons of cost which have driven this behavior, although in some cases, old material is withdrawn in order not to cannibalize of the copyright holder (Scott, 2001). The consequence is that only 2 percent of works copyrighted between 1923 and 1942 are available to the general public (Snyder & Snyder, 2003). Also, since the Sonny Bono Copyright Term Extension Act extended the copyright on already published works since the 1920s, it has no possible benefit for the public. There is simply no way to retroactively increase the number of books published back then. Yet it cost the public a freedom that is meaningful today – the freedom to redistribute books from that era (Stallman, 2002).

Further, the extraordinary amount of money spent on promotions has a very important side effect: locking small labels off the mainstream, commercial airwaves. That is, the only people who can play that indie game are the ones with the deep pockets. Because of the established rules, even if the indies never even heard the song, let alone pitched it to programmers, the invoice would be sent out once the song was added to their stations. If a small label releases a single that becomes a runaway hit and is added to the stations across the country, almost overnight the fledgling record company would face a potentially fatal financial crush (Boehlert, 2001). Ironically, it is the *lack* of choice which breeds profitability for the holder of copyright. It is simply not profitable to attempt to cater for the wild profusion of submarkets and interests that proliferate in relation to any given object of copyright (Scott, 2001). In sum, the consequences are obvious – the public gets less diversity of published works, which is the opposite to the intentions of copyright.

To use the words of Richard Stallman: “If you’re trying to replace a very good system, you have to work very hard to come up with a better alternative. If you know that the present system is lousy, it is not so hard to find a better alternative and the standard today is very low” (Stallman, 2002). With that in mind we now turn to a future we could have -a future where all parties would benefit.

The potential of digital distribution

“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea... He, who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them... Inventions then cannot, in nature, be a subject of property.” - Thomas Jefferson¹⁰

¹⁰ "The Economy of Ideas" John Perry Barlow, Wired Magazine, Mar 1994

If we take a closer look at what Jefferson wrote to Isaac McPherson in 1813 about the character of the patent power, we see something interesting. An idea, like a digital copy, is non rivalrous. Your consumption does not lessen mine, as your lighting a candle at mine does not darken mine. This means that it is both impossible to “steal” “and “consume” digital copies. Hence, terms as “theft” or “shoplifting” do not apply in this world. Owners often say that they suffer “harm” or “economic loss” when users copy music themselves. But the copying has no direct effect on the owner, and it harms no one. The owner can lose only if the person who made the copy would otherwise have paid for one from the owner. As we have seen before a lot of people who download music neither would nor could have bought those copies.

Moreover, digital information contributes to the world by making it easier to copy and modify information. It is its purpose (Stallman, 2002). The copyright system grew up with printing, but digital technology is more flexible than the printing press: when information has a digital form, you can easily copy it and share it with others. This very flexibility makes a bad fit with a system like copyright. Further, the system of control that we erect for rivalrous resources (land, cars, computers) are not necessary appropriate for non rivalrous resources (ideas, music, expression). Indeed, the same system for both kinds of resources may do real harm. Thus a legal system must be careful to tailor the kind of control to the kind of resource. The lack of rivalrousness undercuts the justifications for governmental regulation and the extreme protections of property are neither needed for ideas nor is it beneficial. For here is the key: The digital world is closer to the world of ideas than to the world of things (Lessig, 2001).

Furthermore, a digital copy has nearly zero marginal cost, so in a free market, it would have nearly zero price. With this in mind it’s easy to show that the total contribution of information to society is reduced by assigning a owner to it (Stallman, 2002). Each potential user of the information, faced with the need to pay for it, may choose to pay, or may forgo use of the information. When a user chooses to pay, this is a zero sum transfer of wealth between to parties. But each time someone chooses to forgo use of the information, this harms that person without benefiting anyone. The sum of negative numbers and zeros must be negative. But this does not reduce the amount of work it takes to develop the information. As a result, the efficiency of the whole process is reduced. This reflects a crucial difference between copies of information and cars, chairs or sandwiches. With material objects a disincentive to use them make sense, because they often have substantial marginal costs - fewer objects bought means less raw material and work needed to make them. However, imposing a price on something what would otherwise bee free is a qualitative change. A centrally imposed fee for information distribution becomes a powerful disincentive. What’s more, central production as now practiced is inefficient even as a means as delivering copies of information. This system involves enclosing physical discs in superfluous packaging, shipping large numbers of them around the world, and storing them for sale. This cost is presented as an expense of doing business – in truth it is a waste (Stallman, 2002).

Yes, if I walk into record store and take a plastic disk and walk out without paying - that is shoplifting, but I have also inflicted damage on behalf of the record company, because they have to bear the expenses of distribution. Yes, when I download a copyrighted music file from the Internet without permission and without paying, I have infringed on the copyright holders rights. But in each of these cases, the music is not stolen. The supply has not decreased, in fact it has increased, and so has the demand (Carlsson, 2000; Fox, 2002). Moreover, it is I who bear the cost of distribution and not the record company. You often find people taking

about filesharing based on premises that do not apply to information. They are trying to transplant arguments from other areas of life where the premises may apply and the conclusions may be valid. They just take the conclusions and assume that they're valid for information too, but in reality they are not. We constantly have to remind ourselves that unbounded intellectual property is very different from physical property and can no longer be protected as though these differences did not exist. For example, if we continue to assume that value is based on scarcity, as it is with regard to physical objects, we will create laws that are precisely contrary to the nature of information, which may, in many cases, increase in value with distribution (Barlow, 1994).

With physical goods, there is a direct correlation between scarcity and value. While this is not always the case, the situation with information is often precisely the reverse. Most soft goods increase in value as they become more common. Familiarity is an important asset in the world of information. It may often be true that the best way to raise demand for your product is to give it away. Indeed, the filesharing tools are perhaps the greatest marketing tool ever to come along for the music industry. If your music is not being downloaded, then you're in trouble. If you can't give it away, you certainly can't sell it. It's been widely reported that the most downloaded album of all time was "The Eminem Show," by Eminem. It was downloaded so heavily that Interscope took the unusual step of releasing the album a week early due to the rampant online sharing of tracks from the album. Fast-forward to the end of 2002, and "The Eminem Show" is the best-selling album of the year (Snyder & Snyder, 2003). This seems to indicate the opposite of what the music industry would have you believe. When people share music, more music is sold, not less. Indeed, multiple research studies show that filesharing tools, in allowing music fans to share songs, can actually boost album sales (Cnetnews.com, 2002). The fact to be told is that MP3s are lessening the decline of the music business, not creating it – and the music industry knows it. They use MP3s in private while they deride them in public. If they're promoting a new band, they'll post the band's songs on P2P networks with the hopes that they'll be traded and talked about in chat rooms. But if it's an established act with a history of sales, they'll "spoo" the P2P networks with fake files (Snyder & Snyder, 2003).

Ask yourself this question: What would happen if downloading was to be a legal activity tomorrow? The answer is – nothing. There are already over 200 million people worldwide that download over two billion songs each month (Snyder & Snyder, 2003). That's a lot of music. Never in the history of the world has there been more music in the air and never have more people listened to music. Out of this incredible desire and need for music, surely some good must come. I think more opportunity than ever is available to the musician and songwriter, and the record company too. They just have to create new ways to deal with this opportunity, and it won't be by the old rules. The music industry must start to view individual, downloaded songs as advertisements for the albums they come from and for the artists in general. Record companies should encourage people to download songs. Part of it is just a change of mindset. Instead of viewing songs as protected property, companies should view them as commercials that help promote the album as well as other profitable products and services that the labels have to offer. If they would, their future would probably look a bit brighter.

Benefits for the music labels

If we can agree that advertising creates new needs, we can view filesharing as a special kind of advertising for the music industry (Kasaras, 2002). Napster functioned in many cases as the first, easily accessible album sampler for the consumer, and consequently did Napster become

a way of increasing overall demand for music (Shirky, 2001). As such, filesharing has created many new consumers and convinced existing ones to purchase music in traditional formats. Consumers download music with an educational purpose, to learn about recent developments in music, in order to evaluate products and make appropriate consuming decisions. Eventually many of these people come to buy the original albums. As long as traditional record companies are able to supply physical goods with authentic appeal, sales will not dwindle because digital music will not completely substitute traditional forms. The fetish character of the original continues to exist for consumers; digital copies are not immediate replacements for it (Dolfsma, 2000).

In turn, increased demand usually lowers prices when the producer has the capability to do so. In this case, the music industry can take advantage of technologies to lower the cost per unit impressively (Kasaras, 2002). May and Singer (2001) propose that of the \$15 that consumers typically spend on a CD, around \$9 has the potential to be "redistributed" if electronic distribution channels are used. Furthermore, downloadable music makes it easier for record companies in general, and smaller labels in particular, to compete without concerns about physical inventory. Simply put, online labels do not have the significant costs that major labels incur with regard to manufacturing, distribution, and retailer inventory-holding costs (Brull, 1999). By eliminating inventory concerns the music labels can give every garage band the ability to make its music available for purchase (Freund, 1997; Fox 2002).

Additional issues of relevance to the cost structure of music labels involves cost savings associated with having a more informed basis for deciding which artists careers to invest in. Music labels presently need to forecast how many copies of a compact disc that consumers will purchase. Inaccurate estimates can lead to over or under production, a problem that would not occur were music distributed digitally via the Internet (Fisher, 2000; Fox, 2002). Distributing music digitally could enable music labels to better estimate the likely success of artists whose careers they have chosen to promote (Lovering, 1998). In an online environment music labels would be better able to predict individual consumer preferences, thereby be able to make more informed decisions as to which artist's careers to develop to meet consumer needs. This, in essence, lowers the costs associated with activities that can be thought of as research and development by the music labels.

In summary, Internet-based business models appeal to the music industry because - even if they were to lower prices - they still could increase their present profit margins. Production, modification, storage and distribution of digital products is almost free of costs. In the long run the only relevant costs remaining will be creative talent and original production (Gerbert, 2000).

Further, the advent of the Internet is seeing the emergence of individuals as the key distributors of copyrighted works, with that "distribution" occurring purely to themselves. That is, there is no longer a need to buy counterfeits (Scott, 2001) But if there is no longer a need to buy counterfeits why should you buy anything at all? For the same reason that you will buy a book that you could borrow from the public library or buy a DVD of a movie that you could watch on television or rent for the weekend. Convenience, ease-of-use, selection, and for enthusiasts, the sheer pleasure of owning something you treasure. In order for the record industry to remain relevant it will have to determine how to get people to buy something they can get for free. In addition to the cable television business and print publications, there is an industry that has found a solution to this problem, and the music industry should take notice. And that industry is the bottled water industry.

Bottled water is a growth market (Snyder & Snyder, 2003). But common sense would indicate that when water is virtually free, people wouldn't want to pay for it. Yet, most of us frequently do just that. Why? Because it's convenient and because we have been persuaded that it is better than tap water. The bottled water industry is built on customer service. If the music business were to take this approach and ally themselves with consumers rather than fight them, it's quite possible that their profits would still be growing (Snyder & Snyder, 2003). Apple has recently launched a service called iTunes and in the first week of operation over a million songs were downloaded for 99 cents each. But the biggest gotcha for iTunes is that it works with Macintosh computers only. This fact makes the site's early success all that more remarkable considering that less than 1 percent of US homes have Macs (McLaughlin, 2003). It is still too early to say if this service is going to be a huge success but what it has shown is that the consumer is willing to pay a fair price for having access to music.

The future doesn't look completely dim for the music industry. They just have to try harder to be relevant to the consumer - like the rest of us. And if they opened their minds just a little bit more they would see other sources of revenues available to them: Downloads, bundles, memory sticks, DVDs, webcasts, and ring tones etc. With the advent of the Internet a billion people can have access to an artist and people that can give advice and technical value will be needed. People just crowding the distribution pipe and trying to ignore fans and artists have no value at all.

Benefits for the artist

"[Filesharing] makes artists ask why they are not in control of what they are doing. Artists of any worth of strength will rise up and take control of the situation" – Dave Stewart¹¹

"I'm a waiter. I'm in the service industry. I live on tips." – Courtney Love¹²

Digital technology and the Internet have brought us dramatic changes in the cost of production as well as distribution, and this will mean a world of change. Technology costing a few thousand dollars today, would have cost \$150 000 just five years ago (Lessig, 2001). The falling costs lowers the barriers of creativity and these changes could enable an extraordinary range of ordinary people to become part of a creative process. To move from the life of a consumer of music to a life where one can individually and collectively participate in making something new. Technology could enable a whole generation to create and then through the infrastructure of the internet share that creativity with others (Lessig, 2001). We could therefore be facing a future where the term artist applies to all of us and where we would have an abundance of music at our disposal to rip, mix and burn. This scenario could come true even if there were no monetary incentives whatsoever. We are already producing our own websites without any expectations of getting rich so exactly what's the difference?

Indeed. If the statement seems dubious we just have to look at the Internet, itself the largest single structure humans have ever built (Thimbleby, 1998). No modern phenomenon better demonstrates the importance of free resources to innovation and creativity than the Internet. To those who argue that control is necessary if innovation is to occur, and more control will yield more innovation, the Internet is the simplest and most direct reply (Lessig, 2001). Unix, Internet and the Web were all open systems built collectively, by collaborating parties

¹¹ Kostas Kasaras, 2002. "Music in the Age of Free distribution: MP3 and Society" First Monday, volume 7, number 1

¹² "Courtney Love Does the Math" Courtney Love, Salon.com, June 14, 2000

(Kahney, 2003). If the government or big corporations had been charged with building the Web, it could not have been built (Locke et al., 2000).

Nevertheless, for the time being, technology is making the cost of practicing this art less expensive. For example, recording and editing equipment of high quality that used to cost hundreds of thousands or millions of dollars is becoming something even a hobbyist can afford and use, thus technological developments have radically changed the entire process of creating music (Bricklin, 2003). Artists today can record their music in high quality digital audio, press their CDs and print color inserts, all inside their own home. They can also take control of the distribution of their own music and rather than turn over their music and rights to the industry, the artist has the opportunity to account for profits without middleman costs. And by being free from the restrictions that the music industry often set, they can become more creative (Kasaras, 2002).

Further, the Internet allows artists to communicate directly with their audiences. They don't have to depend solely on an inefficient system where the record company promotes their records to radio, press or retail and then sits back and hopes fans find out about their music (Love, 2000). Also, since artists are already giving their music away for free to the record companies, it would be much wiser to give that music to the potential fans instead. The benefits could be immense. The Grateful Dead are probably the most well-known example of a band with a high tolerance of pirated music. In order to secure a long-term popularity and the sales of diverse products, the band encouraged the distribution of their music via copied tapes. Rather focusing on the sale of CDs the band created an environment that people enjoyed and wanted to be a part of. Those that truly supported the Grateful Dead's ideas and music ensured that the music survived in one form or another and that the artists in the band never suffered financially. The Grateful Dead's marketing strategy proved that musical success, even longevity, could be achieved by encourage people to share music (Pfahl, 2001).

The Grateful Dead phenomenon clearly proves that if fans are pleased with the music they hear, they will support a musician financially. The fact that artists are willing to provide the music for free also adds an incentive for fans to treat the artists fairly and return their favor. Free downloads will also drive demand for an artist's music, which in turn will drive demand to see the performer live in concert. With the Internet, live appearances will take on greater value for the artist and their audiences. The more popular an artist becomes, the greater the demand for live performances, and with greater demand more people will pay for them to perform, which in turn generates revenues for the artist (Pfahl, 2001). Indeed, as John Perry Barlow, songwriter of Grateful Dead, has put it:

“In regard to my own soft product, rock 'n' roll songs, there is no question that the band I write them for, the Grateful Dead, has increased its popularity enormously by giving them away. We have been letting people tape our concerts since the early seventies, but instead of reducing the demand for our product, we are now the largest concert draw in America, a fact that is at least in part attributable to the popularity generated by those tapes. True, I don't get any royalties on the millions of copies of my songs which have been extracted from concerts, but I see no reason to complain. The fact is, no one but the Grateful Dead can perform a Grateful Dead song, so if you want the experience and not its thin projection, you have to buy a ticket from us. In other words, our intellectual property protection derives from our being the only real-time source of it.”¹³

¹³ "The Economy of Ideas" John Perry Barlow, Wired Magazine, Mar 1994

This economic model is not in any way unique nor new. In fact, until the late 18th century this model was applied to much of what is now copyrighted. Before the industrialization of creation, writers, composers, artists, and the like produced their products in the private service of patrons (Barlow, 1994). Without objects to distribute in a mass market, creative people will return to a condition somewhat like this, except that they will serve many patrons, rather than one. Maybe each fan will spend less money, but maybe each artist will have a better chance of making a living. The benefit to fans is obvious - free music, closer contact with their favorites, and access to a wide range of new talent. Eliminating the label concept means that fans can contribute directly to the artist, and thus provide the artist with a greater percentage of revenue than is possible under existing traditional contracts. Thus, the Internet can return music and creative control back to the performer while at the same time benefit the consumer and that is an encouraging thought that we must bear in mind when we discuss the issues of copyright.

Conclusions

The observant reader has probably noticed that we don't have two futures in front of us, but three. The one we are taking with tighter copyright protection is the worst of them all, not of any benefit to anyone - not to the artist, not to the public or to the music labels. The other two are much better both from a social and economic perspective, which one that will prevail - only the future can tell. My guess is that both arrangements will come to coexist. The music labels will come to have services where users for a small fee can download any songs they want, but at the same time will we come to see more musicians breaking free from the music contracts and starting their own businesses just as the Grateful Dead once did.

My point, which is the same as Lawrence Lessig's, is that artists should be paid, but it doesn't follow that selling music like chewing gum or bottled beer is the only possible way. People are different, and consequently do they have different needs. Sometimes I think that the era of massproduction has gotten us to forget that fact. Today you can have any car in any size and in any color, so why shouldn't this model be applicable in the music industry? A model where scarcity and lack of options is the norm is not in our society's best interest. Further, we are slowly moving away from the era of the printing press and into the era of computer networks. Therefore we must be very cautious about what laws we make. By listening to representatives from the recording industry, you would think that selling fixed artifacts is the only way that artists can get paid. That has never been the case, nor should it be the case in the future either; else both society and art itself will suffer.

A more modest legislation could probably come to benefit the music industry the most. We just have to look at the web to see why more music - not less music - is the solution to the problems. On the web there are billions of websites so where do people go? They go to the search engines. If more people would come to be musicians this is the business that would benefit the most. Of course this is just the business model of Kazaa, Imesh, Gnutella and the other file sharing networks, which the old music industry is trying to shut down. Nevertheless the record labels still have an opportunity to become the next big player in this market. The Kazaa music sharing software has been accused of containing different sorts of spyware (Stallman, 2002) so people are really looking for a better alternative. Though, if the labels want to make this happen they are in a big hurry, because with the path they're taking today they will certainly be the most hated players in this new market. Moreover, with their present track record, I doubt they will change their behavior and seize this opportunity. But that is no

reason for us or our legislators to keep them alive. As Lessig (2001) so excellent has put it: "The commitment of a society open to innovation must be to let the old die young."

Finally, just a short reminder for Thomas Bodström: People don't follow laws they don't believe in. If they would, we should not have seen any progress since the dark ages. How can over 200 million people simply be wrong? That same fact also makes the protection of intellectual property rights on the Internet difficult, if not impossible. Decentralized peer-to-peer networks have so many users who - even if they were identifiable by the music industry - would be extremely costly to pursue through the legal system (Band, 2001). Furthermore, efforts by record companies to stop the distribution of copyrighted recordings have proved to be a public relations disaster and you do not, just yet, deserve to be dragged down with them. Ultimately litigation will not prove effective in combating the distribution of free music on the Internet so you might just as well make it legal even though it wouldn't change anything. Also, if the music labels should continue to whine, just do as it has been done before. Initiate an international campaign to levy a tax on blank CDs and equipment that could be used to compensate copyright holders for their loss of income. It is not really fair to anyone so keep the numbers small ok?

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