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Intellectual Property law: the past, present and future of the controversy behind peer-to-peer file sharing and music

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By Celsy Rimmer

I. Introduction

Music is a part of everyone's life; whether you actively buy music or just listen to music on the radio, you cannot escape from hearing some type of music in your daily life. Although listening to music is an integral part our lives, most people do not consider the laws behind the ownership of music; however, with the introduction of the internet and peer to peer file sharing websites, the intellectual property laws that govern the ownership of music are tested. P2P file sharing was made possible by the development of the more compact song compression format— MP3. This new format compressed sound files into small enough files for them to be downloaded or streamed over the internet. The development of compressed sound files coupled with the faster internet connections allowed internet users to quickly and easily obtain music (Hopkins 153). Now, anyone can upload massive amounts of music to file sharing websites, like Napster, and then allow other users to download pieces of the shared files from other users. Soon after the development of the MP3, millions of people were engaging in peer-to-peer file sharing and illegally obtaining copyrighted music.

Since internet users all over the U.S. were copying sound recordings, the Recording Industry Association of America (RIAA) decided to retaliate. By 2005, the RIAA had filed lawsuits against 7,000 individuals for illegally downloading music on peer-to-peer file sharing websites (701 Hamdani and Klement). This astonishing number of people prosecuted for their activity on peer-to-peer file sharing websites only increased as the RIAA began to target many college students around the nation, including many students at the University of Tennessee. One student, whose identity remains unknown, tried to fight the lawsuit claiming that the way the RIAA obtained student information violated the Family Educational and Privacy Act. The court rejected his or her subpoena; however, and he or she was forced to pay a settlement fee (Eder 1). The number of lawsuits had increased to 30,000 by 2008 (Fritz 1). In each case, the RIAA would offer the defendant the option to pay a settlement fee, usually a few thousand dollars, for the tracks they illegally downloaded or to go to trial and risk paying much more in damages. Most people paid the settlement fee and moved on with their life, while others ended up paying more than $200,000 in damages (Fritz 1).

All of these cases brought a lot of media attention to the problems surrounding peer-to-peer file sharing, and until these cases, many did not realize that file sharing was illegal and that they could be prosecuted for downloads. Although the most recognized cases were the individual lawsuits, the problem and controversy runs much deeper. The underlying reason for the lawsuits is because the nature of peer-to-peer file sharing denies copyright holders and creators of revenue. Therefore, the controversy highlighted ongoing arguments of what many call the digital dilemma; should the laws push for more copyright enforcement in favor of the copyright holder or push for less enforcement in favor of the consumer? Raymond Shih Ray Ku

states, “We are in the midst of a great debate over the proper scope of copyright in the twenty-first century. At stake is the balance of power in the information age” (Shih Ray Ku 264).

As a consumer, knowing the importance of which direction the balance of power will shift is imperative to avoiding lawsuits. Although the future of the digital dilemma is unknown, a wealth of information is available about the past. The first part of this paper will explain the history behind copyright law and how it has gotten to the point it is at today. At this point in time, peer-to-peer file sharing litigation and law development is at a basically at a standstill. Although no new laws or controversial cases have emerged, many internet users are still illegally downloading music. The current situation highlights the arguments of the digital dilemma: more enforcement or less enforcement? Part II of this paper discusses these arguments in more depth. By viewing the fundamentals of the peer-to-peer file sharing controversy, we gain a well-rounded view of the argument. Part III applies these major arguments to the major cases involving peer-to-peer file sharing, and by examining these cases that emerged from the controversy, we can gain a better understanding of how the rulings affected the law and the consumer. Since we are at a crossroad in the new age of the digital dilemma, looking at other countries solutions to the same problem of music piracy will allow us to look to the future and offer solutions to the ongoing problem in America.

II. **History**

In order to gain a better understanding of the major controversy surrounding intellectual property and music on the internet, a basic understanding of the history of copyright law is essential in order to grasp why the topic is so controversial today. Intellectual

property was originally called copyright law and today the formal term in intellectual property, but the two names are interchangeable. Basically the law protects the illegal reprinting and selling of someone else's work. Naturally, copyright began with the protection of books. The United States' Copyright Act of 1790 developed laws for printed material such as books, charts and maps; but the term "book" was used loosely and included sheet music as well (Demers 18). By 1831, the copyright law was revised and protected musical composition against unlawful copying. However, this law only protected written music and not musical performance. It wasn't until twenty five years later that musical composition in dramatic performances was protected under the law, and then finally by 1895 musical performance in general was protected. Since the law progressed very slowly, it was especially hard to enforce. The law stated that venue owners were responsible for paying publishers and owners for any musical composition performed at their establishment (U.S. Copyright Office). The lack of enforcement led to the formation of groups such as Broadcast Music Incorporated (BMI) and The American Society of Composers, Authors, and Publishers (ASCAP). These groups collected royalties by enforcing the public performance right. With the introduction of player pianos and the piano roll, the law became even more muddled and then was changed again. In 1909, the U.S Congress issued a new act in order to protect music's copyright when played on a mechanical instrument (Demers 20). This new development led to the compulsory licensing fee. The copyright act of 1909 allowed anyone to perform or record their version of a song as long as they paid royalty fees to the copyright holders.

In the early twentieth century, copyright laws were very succinct and aligned with the technology of the times; however, as time passed and technology advanced rapidly, the

protection of most new technologies were not covered until the seventies when Congress passed the Sound Recording Act of 1971. This act federally protected all sound recordings published after February 1972 in any type of media form. Since this major change, the protection of composers' music was expanded to their lifespan plus seventy years (U.S. Copyright Office). Next, the Digital Performance Rights in Sound Recordings Act of 1995 addressed the need for digital public performance rights for sound recordings. This applies to sound recordings performed by digital audio transmission, like webcasting (Demers 22).

From this brief history, it's apparent that intellectual property law has had a very slow progression. On the other hand, technology has been rapidly changing in the twenty-first century, and many problems developed with the introduction of the internet—such as peer-to-peer file sharing.

No Electronic Theft Act

The next major change, which was a step toward the RIAA's individual lawsuits for peer-to-peer file sharing, was the introduction of the No Electronic Theft Act (NET) in 1997. The act began with the court case *United States vs. La Macchia*. La Macchia was a college student charged with illegally distributing copyrighted software on the internet. He had basically acted as a system operator by making many different software programs available on an online bulletin board. Users could upload software and download software for free. La Macchia's case was different because the court could not prosecute him for the current provisions of copyright infringement since he did not use the bulletin board for monetary gain. However, the court found La Macchia guilty by using precedent from *Dowling v. United States* where a trucker was

convicted for illegally transporting Elvis records via the interstate. This decision brought attention to the obvious loophole in copyright law. In response to this case, the Clinton administration later enacted the No Electronic Theft Act ("The Criminalization of Copyright Infringement in the Digital Era" 1713-1714). The act basically incriminates anyone who reproduces or distributes copyrighted work electronically. The key element being that there is no need to have used the copyrighted work for commercial use or monetary gain—closing the LaMacchia loophole. This act enforced the crime of copying any digital material. The user could be prosecuted even if they are acting with no intention of financial gain and without any expectation of personal gains ("The Criminalization of Copyright Infringement in the Digital Era" 1715). More specifically, provisions of the act include the total value of infringed copyrighted material must be more than $1,000 total and within a 180 day period (Grosso 24). Also under the act, the defendant commits a misdemeanor if he or she causes more than $1,000 in damage; however, if the total is more than $2,500, the defendant may be charged with a felony (26). Now the public could not only be prosecuted for simply downloading and making digital copies to sell, but the NET act also allowed prosecution for any type of distribution. So what does this mean for consumers? For committing a misdemeanor and copying one or more work maximum penalty is one year in prison, paying a $100,000 fine, or both. For a felony (coping ten or more works), maximum penalty is three years in prison, pay a $250,000 fine, or both. Many opposed the enforcement of such provisions arguing they would deter from technological creativity, while others said it was necessary in order to keep order and allow electronic commerce on the Internet ("The Criminalization of Copyright Infringement in the Digital Era" 1714). Although the necessity of such an act was debated, the NET Act most definitely has its

place in copyright history, and the arguments over such a law are still a fundamental issue today with new technology and the need for new provisions and laws. The act was undoubtedly a catalyst for many more lawsuits and much more controversy.

After the NET Act, the RIAA began their anti-piracy campaign to sue individuals who pirated music from peer-to-peer file sharing websites. In 1998, they began not only prosecuting individuals but also took action against a slew of groups: operators of search engines who enabled the online users to search for pirated music, the manufacturers who made MP3 players, and operators of websites who made pirated music available (Hopkins 153). While all four types of cases are important, the one unsuccessful type of lawsuit was against player manufacturers. In the *RIAA v. Diamond Multimedia*, the RIAA wanted to prevent the manufacturing and selling of the Rio MP3 player because they said that it violated the Audio Home Recording Act. However, the court ruled against this accusation, and the court ruled that an MP3 player did not have protection under this act. Therefore, the decision meant that computers and MP3 players' manufacturers did not have to pay royalties since it was not considered a "recording device." Also, this decision gave no protection to consumers. Not only are the consumers of MP3 players liable for any infringement, but also the manufacturers could still be sued as well (Hopkins 153).

Digital Millennium Copyright Act

The Digital Millennium Copyright Act was enacted in 1998 after the Clinton administration and his study of the National Information Infrastructure set in motion a push for more specific copyright laws to address the internet and growing digital technology. Also, since

the internet is linked to the rest of the world, the administration adopted two World Intellectual Property Organization (WIPO) treaties in 1996. In order for the U.S. to comply with the treaties there needed to be more direct changes addressing digital piracy. Only after many attempts from Congress to pass bills necessary for the U.S. to fulfill requirements for the WIPO treaties, did the DMCA finally pass (Lutzker 88). Copyright owners and the music industry also pushed Congress to pass the DMCA; they felt that more protection was needed to reduce piracy of digital copies. The DMCA was a major change to copyright law overall, and it added two new chapters to the Copyright Act (Barker 49). The DMCA was a massive change; however, not all of the additions have had a direct effect on music. The major provision that gave online service providers protection against being held accountable for any copyright infringement by their users is the most relevant to music and file sharing. Internet users were already able to illegally copy music files and the fault is supposed to fall on the user, but since the perpetrator could be untraceable or even outside the U.S., the online service providers were fearful of liability from vicarious or contributory infringement. The online service providers are the intermediary between file sharing websites and the users, and provisions for vicarious infringement state that the party might not even know about the infringement. Contributory infringement could also hold OSPs accountable because they are contributing to the illegal copying of digital works (Lutzker 89). With this information in mind, the DMCA outlined four different “safe harbors” so they cannot be sued or prosecuted for assisting in copyright infringement. The four safe harbors protect different types of infringement: the first one gives protection from peer-to-peer file sharing under the network, the second gives protection from temporary file storage in caches, the third gives protection from the user distribution of

copyrighted materials and the fourth protects search engines from being accountable for helping infringers find incriminating websites (Lesser 359). Of course there are certain requirements for a provider to be protected by the safe harbor. They cannot know about the infringement, have any financial gain from it, and must remove the copyrighted work as soon as they are notified of infringement. In order for the court to grant the provider, they must comply with all of the provisions (Lesser 362).

From the perspective of a consumer, the DMCA puts more pressure on the consumer to not illegally copy material. Major proponents of the DMCA were, in fact, record companies and online service providers; therefore, they usually have their own economical interests at heart. Researchers Cassandra Imfield and Victoria Ekstrand argue that the politics of making policy definitely can have a negative effect on consumers:

> "The RIAA's involvement in the drafting of the DMCA and its recent efforts to use the DMCA as a weapon against online piracy typifies how powerful interest groups influence copyright policy" (Imfield 293).

Essentially, the DMCA was another step in expanding the scope of copyright law and giving copyright holders a wealth of defenses against infringement, which leads to the ongoing debate about further expanding the reach of the copyright laws (Imfield 311). The DMCA was a significant step toward expansion; however, the question of whether or not more protection is needed to keep up with the new technology is still relevant.

III. Arguments

"I have been dismayed and frustrated by the extraordinary traction in the marketplace and public attention awarded to companies that disrespect the law, or do not respect the copyrights of creators and producers."

-Gerald Kearby, president and executive officer of liquid audio, inc (Online Entertainment and Copyright law: Coming Soon to a Digital Device Near you 53)

"Most artists don't see a penny of profit until their third or fourth album because of the way the business is structured. The record company gets all of its investment back before the artist gets a penny, you know. It is not a shared risk at all.[1]*"*

-Don Henley of The Eagles ()

The quotes above reflect the vast differences in the debate over copyright law. As mentioned in the introduction, record companies and copyright owners are not happy about how easy the internet allows users to blatantly "disrespect the law." On the other hand, critics of copyright law are not happy about feeding the corporate mouth of the record industry through royalties in order to "promote creativity," and some feel that digital works should be free and hardcore pirates have and will never have a willingness to pay for their music (Machado 48). However, in order to fully understand the scope of each side of the argument, a basic understanding of the foundation of copyright law is necessary.

<u>The Fundamentals</u>

[1] http://www.pbs.org/newshour/bb/entertainment/july-dec02/musicrevolt_7-4.html

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries (United States Constitution, Article I, Section 8).

As demonstrated above, the Constitution gives congress the right to promote creativity, and they do so by making laws—copyright laws. The law allows the owners of the work to have the exclusive right to copy their work, hence the name copyright law. The law gives the owner rights as long as they allow the public access to their work. At first, the creator has the right to do as they please with their work, but then after a certain point (seventy years after the life of the creator), the public may use the work freely. This is considered a viable bargain that is a necessary outcome of the law (Shih Ray Ku 279).

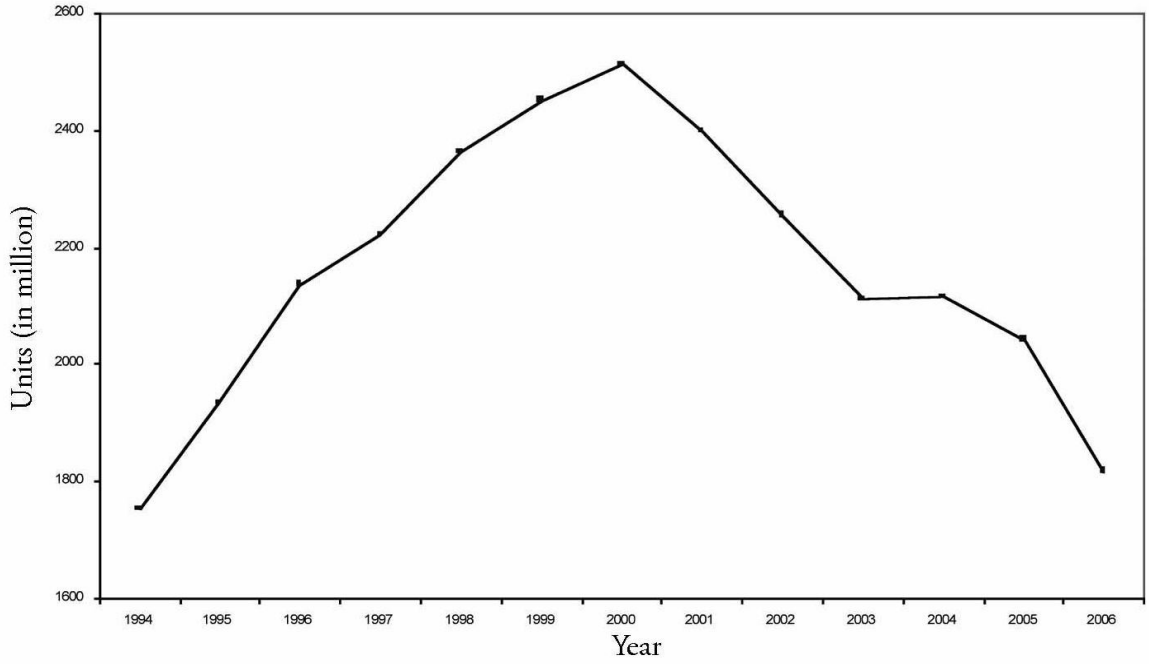
Expand Copyright

The RIAA is one of the largest players in the argument to push for more copyright law. Proponents for this argument state that the economic factors and the decline in CD sales is a huge downfall of not enough copyright protection. The RIAA has done massive amounts of research on the decline in music sales and on their website claim that since the development of Napster music sales have dropped 47 percent. In 1999, music sales were around $14.6 billion and in 2009 they were an estimated $7.7 billion (Recording Industry Association of America). Many statistical studies have been done on the decline of record sales and its correlation to the increase of peer-to-peer file sharing. One study analyzed the correlation between computer owners and music sales. The data determined that during Napster's heyday, from 1999-2003, CD sales dropped about 13 percent. Furthermore, using Consumer Expenditure Survey data,

there is a correlation between a computer ownership and a decline in album sales. The most important part of his data being that the biggest drop in sales occurred in the category of historically "heaviest music purchasers" (Michel 3).

On a global level, the music industry research claims that file sharing piracy is at fault for a decline in global CD sales of 22 percent from the year 1999 to 2004. The sales still were on a steady decline as shown by the table below even after 2004. (Janssens 81)

Figure 1: Global CD sales in million units



Source: IFPI, 2004 and IFPI "The recording Industry" 2000-2007 <www.ifpi.co.uk/content/section_statistics/index.html>.

[2]

The data produced by this table and much of the research does provide some substantial evidence about the impact that peer-to-peer file sharing had on the music industry (Janssens

[2] Source: Janssens

83). Because of such research, the record industries feel the need to further limit the fair use of copyright. The major point of the argument behind the economic problems with peer-to-peer file sharing is that by adding more protection the law in turn protects the copyright owners and gives them more of an incentive to create more; therefore, the security of a guaranteed financial benefit from the law will in turn "increase the public good" (Shih Ray Ku 279-280). Furthermore, another part of the economic argument for the extension of copyright is that the expansion will lower the transaction cost of the "commodity." Additionally, it will increase the tangibility of the copyright owners' property.

Lockean Theory

A less technical, more theory driven argument against file sharing discusses the fundamental ideas of John Locke and argues that file sharing is indeed theft. Since intellectual property is not always tangible property, there is a lot of debate over the fundamental scope of intellectual property and copyright law. The Lockean Theory of intellectual property suggests that any intangible work is able to fall under the idea behind intellectual property. In order to back up this idea, proponents of the theory invoke the proviso of John Locke, " 'For this labor being the unquestionable property of the laborer, no man but he can have a right to what is once joined to, at least where there is enough and as good left for others.'" (Moore 106). The philosophy's basic principle justifies the value of intangible goods and supports the argument of file sharing as theft. The value of something, tangible or intangible, can be owned as long as the idea helps the well-being of others and the person has labored to make the "property" (Moore 112). The entire argument is extremely dependent on whether or not the creation "worsens"

the well-being of another. Therefore, if you take use the creation of someone else and the usage does not benefit the creator; the usage is not justified. No matter the reasoning behind the usage of the creator's work "it does not alter the fact that a kind of theft has occurred" (Moore 117). This theory applied to the law would push to protect copyright more since theft of digital copies is not justifiable under its logic. Locke's proviso is essentially a push to extend copyright laws.

Fair Use and the First Amendment

On the other side of the spectrum, advocates of fair use fight for less protection of copyright. Fair use is the so-called "safety net" of copyright law and is in place to keep courts from suppressing creativity, since that would be counter-productive. The fair use doctrine protects copying for a limited amount of purposes: criticism, comment, news reporting, teaching, scholarship or research, and parody (Slotnick 211). Next there are four factors that the court will compare the usage to in order to determine whether or not it's falls under the protection of the fair use doctrine. The four factors look at whether or not the usage was for educational or commercial purposes, the nature of the work, the amount of the work used, and the economic effect on the work taken (212). When it comes to peer-to-peer file sharing, many of the cases were not granted the protection of the fair use defense because they did not meet the requirements. These guidelines are not at all set in stone, and more often than not do peer-to-peer file sharing cases not get the protection of this doctrine. However, proponents of the fair use doctrine do not agree with the many previous expansions on the scope of copyright law and protection. As discussed above, the No Electronic Theft Act was an expansion on copyright

law. One point of contingency that the No Electronic Theft Act emphasized was the debate over the Audio Home Recording Act of 1992. Until the NET Act, the Audio Home Recording Act was supposed to give consumers "immunity from suit for personal uses of analog and digital audio recording devices" (Greenstein 358). However, with the introduction of the NET Act the litigation over the Rio MP3 player decided that the device was used to record music and not just audio. Therefore, the "digital musical recording device" could not be protected. The ambiguity from the Rio case decision about the Audio Home Recording Act still is an issue today because of computers and other hardware devices that store specifically musical recordings (359). Before the NET Act, consumers could also fairly share music with others, and resell music after the initial purchase, as pointed out by Lawyer and researcher Seth Greenstein. He argues:

> *"Ultimately, consumers will demand the rights and privileges to which they have become accustomed fair use recording rights, first sale resale rights, the right to share their music with friends and, as a result, the right to listen to digital music where they want it, how they want it, and when they want it" (Greenstein 369).*

Furthermore, another part of the argument against the expansion of copyright laws in the digital world relates the first amendment and the fair use doctrine. Some argue that copyright is a direct suppression of free speech since it limits expression of copyrighted works. However, historically the courts have decided that the copyright law does align with the principles of the First Amendment because of the balance that copyright law creates between the creators and the consumers. Arguably this balance is created by the fair use doctrine and the "idea/expression dichotomy" (McGinty 1112). Essentially, the dichotomy that McGinty

points out is that the Copyright Act protects expression of ideas and not the idea itself. Also, since the expression of an idea is limited to only so many possibilities, ideas eventually run together and this will lead us to have ideas that are no longer able to be copyrighted because all of the possible ways of expression have been used. The court has recognized this dichotomy by providing leeway; "That is, there is a First Amendment right to express any particular idea even if someone else has had that idea first" (1113). Like the fair use doctrine, however, the usage of the First Amendment as a defense is not a guaranteed protection, and they are more like an arsenal of defense against Copyright accusation. The outcomes are never consistent. According to McGinty, Congress should revisit the alignment of the First Amendment and the copyright laws, the ambiguity behind the so-called "safe guards" of copyright law they do more harm than good. He argues that our right to expression and the First Amendment rights outweigh the creative destruction theory. "It cannot be, therefore, that copied speech is automatically less worthy of First Amendment protection than original expression" (1124).

Other radical copyright critics, David Lange and Jefferson Powell are extreme enough to argue that the First Amendment should be given preference over any other law (Thatcher 290). They also discuss how intellectual property does not need to exist in order for our society to function and they go so far as to claim that no real damage would be done to the economy either (291). In regards to music, Lange and Powell reference the Grateful Dead as perfect examples of why copyright law is not needed to promote creativity, since the Grateful Dead were one of the most successful bands at creating a successful bottom-up business model.[3]

[3] http://www.theatlantic.com/magazine/archive/2010/03/management-secrets-of-the-grateful-dead/7918/

Furthermore, they offer a counter argument to the statistics of how much money the music industry has been losing on CD sales; they offer a statistic of how "digital music sales have more than doubled since 2005" (Thatcher 299). Like McGinty, Lange and Powell believe that the idea/expression dichotomy does not provide a balance. Using examples from Martin Luther King's "I Have A Dream Speech" they convey the idea that such an expression of ideas is so powerful that there is no other way to express the same idea without copying the words and ideas of King. The arguments of Lange and Powell are very extreme and they are often referred to as favoring the "copyleft."

Less on the side of the "copyleft" is journalism professor Kathleen Olsen. She argues that the fair use rights and the First Amendment are not given an equal amount of importance by the courts. Despite the fact that there should be a fundamental balance between the two in order for the system to work how it was intended. She points out that the court puts too much emphasis on meeting the factors of the fair use doctrine and not enough emphasis on the First Amendment. Olsen argues that the First Amendment should bear more weight in cases than fair use because it is an essential part of our Constitution. The underrepresentation of the First Amendment in the delicate balance of copyright is shifted. They copyright laws are supposed to preserve the First Amendment, not undermine it. Furthermore, she criticizes the inconsistency in the usage of the fair use doctrine, and she claims that this inconsistency further impedes freedom of speech and expression. Pointing out the recent expansions of digital copyright laws with the introduction of the DMCA, Olsen criticizes how it further weakens the First Amendment balance because it essentially gives copyright owners more control over their work. However, unlike her radical counterparts, Lange and Powell, Olsen doesn't believe that

the solution is getting rid of copyright law all together (Olsen 189). She promotes a more balanced approach of reining in the digital freedoms and possibly applying a more liberal stance on the fair use doctrine (Olsen 190).

A more subdued copyright scholar Jessica Litman argues against expansion of copyright but pushes for the renegotiation of it to focus less on limiting the direct copying of people's works and more on limiting exploitation. Focusing on the public interest is the common ground amongst all advocates of the fair use argument. Many refer to the metaphor of balancing copyright owners' interests with the public's interest and the fundamental purpose of the Copyright Act and the fair use doctrine (Shih Ray Ku 285).

Summary of Arguments

Although there are a wide variety of arguments against the expansion of copyright and countering the Lockean Theory, both sides have their place in the copyright debate. The expansion of copyright law rests on the argument that copyright owners have an inherent right to their creation and should in turn be compensated for their labor. The music industry, represented by the RIAA, feels the need to expand copyright in order to promote creation and protect the industry from theft. A more radical, fundamentalist theory uses Locke's proviso to justify how stealing digital copies of music (or any idea) is undoubtedly theft. However, most proponents of copyright law want one thing—to end theft and bring the proper revenue to creators.

On the other hand, the major players in the argument to reel in copyright cover much more of a wide spread spectrum of opinions. With various angles, ranging from elimination of

the copyright laws in lieu of First Amendment rights, to simply renegotiating the law, the proponents against strict copyright laws have the consumer and the public interest in mind.

While there is undoubtedly a need for copyright laws, there has been a shift in the delicate balance between the First Amendment rights and fair use. File sharing is theft; however, the scope of the newer copyright legislation, like the DMCA do not fully have the public's interest at heart. In order for there to be a better balance, each side must compromise some of the more extreme arguments because the radicals will most likely never win their case. Copyright is not going away, but neither is the First Amendment. There needs to be a middle ground where both sides can meet. A collaboration of ideas seems to be the best solution to the ongoing copyright debate. However, a happy medium seems to only exist in a perfect world. So looking at historically important cases involving file sharing, and the rulings involved with each, is a necessary step to find a viable solution to the ongoing problem of the digital dilemma.

IV. Major Cases

The major cases surrounding the peer-to-peer file sharing debate include a wide range of decisions. In the previous years, a lot of new information has been decided about courts' stance on copyright infringement through peer-to-peer file sharing networks. This information is very relevant to anything that happens in the future since courts look to the past for precedent.

First, understanding the different types of copyright infringement involved in these types of cases is essential. After a lawsuit occurs, there are two different types of infringement

that the defendant can be found guilty of: direct infringement and secondary infringement. In order for a plaintiff to claim they have a case for direct infringement, they must be able to prove the defendant is guilty of two things. First, they must show that they are the owner of the illegally copied material and second, be able to show that the work was indeed copied without prior knowledge of the plaintiff. Secondary infringement involves proving one of three indirect ways to copy work. The first one is contributory infringement, which seeks to prove the defendant guilty of infringement through three key essential violations:

> (1) direct copyright infringement by a third party
>
> (2) knowledge or reason to know by the defendant that the third party was directly infringing; and
>
> (3) substantial participation by the defendant in the infringing activities
>
> (Gray 165)

Vicarious liability is when the defendant is held liable for infringement when they can supervise the infringing activity but also gain some kind of financial benefit from doing so. The DMCA, as discussed in part I made special provisions to eliminate the Online Service Providers' liability through contributory infringement, as long as they meet the necessary requirements (Gray 165).

Another important case to know, before moving onto the file sharing and music cases is *Sony Corp of America v. Universal Studios Inc*. This case was over whether or not Sony was liable for contributory copyright infringement since it sold recording devices such as VCRs and the courts have used the outcome of this case as precedent in most of the following cases.

Universal Studios sued for infringement because these devices were being used to make copies of copyrighted material. The VCR was considered a "dual use" technology, however, because of its ability to be used either legally or illegally. There are many other technologies that can be used to infringe copyright and/or to follow copyright, Lemely uses the example of a musical instrument being a dual use technology. With this consideration in mind, the court believed that since Sony was just the producer of the technology they could not be held liable for contributory infringement (Lemely 1355). Although technology had changed rapidly by the first case on peer-to-peer file sharing, the Sony v. Universal case was used by the defendants in many of the following cases.

Napster

One of the first major cases that sparked debate about peer-to-peer file sharing, and probably the most memorable, was *A&M Records, Inc. v. Napster, Inc.* in 1999. Napster was a network that allowed its users to share the music files on their hard drive with other users on the network. Users were able to download an infinite number of music files and share their digital music library free of charge. Because Napster enabled the public to share copyrighted files the RIAA filed a lawsuit. They claimed Napster was guilty of contributory and vicarious infringement. Napster wanted to be considered under the safe harbor provisions of the DMCA and be seen as simply a medium between the music and the users. The court decided, however, that since the structure of file sharing on Napster enabled the users to transfer their songs directly to and from their hard drives, they could not be protected. Furthermore, the requirements of the safe harbor provision require the online service provider to make a policy

to remove any repeat infringers from the network. Napster was seen as the sole facilitator of illegal file sharing. Napster's defense relied on fair use and precedent from *Sony Corp. of America v. Universal City Studios, Inc.* (Koenigsberg 19). The court ruled against the fair use defense because Napster was not considered sampling. They ruled in favor of the evidence that Napster did harm the "market for copyrighted musical works" (Koenigsberg 20).

In the eventual outcome of the case, the court decided that Napster should be held liable for contributory infringement because they were in fact, facilitators for the users to illegally download copyrighted music. Napster was also held liable for viable infringement because the court decided that since they had claimed to block users they did have control over them and had financial interests at heart. Napster appealed the decision by the court and later announced an alliance with two record companies, BMG Music and Edel Music AG (Lupo 20).The court of appeals decided the district courts' ruling was fair and that Napster was not considered fair use (Slotnick 218). Napster was not required to shut down, but they were not allowed to facilitate the peer-to-peer file sharing of users and copyrighted music. In 2002, the court ruled that Napster had to "block 100 percent of unauthorized songs from being downloaded via the Internet" (Hopkins 154). Now under new ownership, Napster is a paid music service. This outcome of this decision did not affect the general consumer, even if they regularly participated in file sharing. By the time the litigation for Napster was concluded many other file sharing website services for music had been created—like Grokster and Limewire (Hopkins 154).

MP3.com

Another website that emerged in the midst of controversy over peer-to-peer file sharing was MP3.com. Although this website was not a file sharing website, the courts verdict did set a precedent for copyrighted music on the internet. The website allowed its users to either upload their music content to the website by "ripping" it from the purchased CD or they would have to buy the music from a third party online vendor. "MP3.com purchased and copied tens of thousands CDs onto its servers without authorization from the copyright owners" (Koenigsberg 17).

The RIAA filed a lawsuit against MP3.com on January 21, 200 and claimed they were committing copyright infringement by making the digital versions of CDs available to its users, and very early in the case, by April 28, 2000, the court decided that this was in fact, copyright infringement.

However, the arguments behind the claim are important. MP3.com's argued that since users did have to verify their ownership of the music, the website was more of a storage place for its users to upload content and listen to their CDs. MP3.com also argued that the website caused no economic damage to the industry and relied on the fair use defense. By May 4, 2000 the court rejected all of MP3.com's claims and sided with the industry on all counts. The court examined each of the fair use factors and found that in each instance the factor did not fit the claims of MP3.com (Koenigsberg 17).

Although MP3.com is not a file sharing service, like Napster, the implications this ruling had on copyright law and its relation to music is very important. The courts decisions, as Shih

Ray Ku points out, are less about favoring the consumer's ability to use new technology and more about the interests of the copyright holders.

Grokster

The case of *MGM Studios v. Grokster* was a pivotal case for the peer-to-peer file sharing debate. Grokster's technology was different than Napster's software and changed the way files were shared. Grokster was merely a provider who would distribute the file sharing software and then the software would connect the users directly in order to transfer files (Hopkins 155). The district court originally concluded that that, since Grokster was not the same type of software as Napster (the users connected and transferred their files directly while Napster's software was the intermediary between users) they were not liable for contributory infringement and applied the precedent from the Sony v. Universal case differently than with the Napster case (Lemley 1356).

The case was then revisited by the Supreme Court in June 2005, which unanimously decided the earlier ruling to be in error. According to the Court, the lower courts did not consider how Grokster had not only known of the copyright infringement happening through their website, but Grokster had also advertised such uses of their software. The Court also took into account that Grokster was responsible for a very large amount of copyright infringement and therefore the Court found this to be the most problematic part of the lower court's decision. Grokster had not taken any action to invent ways to reduce the infringement either. Therefore, despite the lower courts siding with "promoting technological innovation by limiting

infringement liability," the Court decided that indirect liability was very fitting for the case (Hopkins 155).

Since the Court changed the decision of the Grokster case, file sharing companies are held more responsible for infringement. This decision did not necessarily make the knowledge of infringement a liability for file sharing companies but it did determine that promoting any infringing activities would make them liable (Slotnick 292).

RIAA v. Individuals

Since the DMCA, record companies have been able to notify Internet Service Providers of any consumer infringement. After the lower court ruled in favor of Grokster, the RIAA decided to take action against individuals, as previously discussed. The one problem with these lawsuits was the inability of the RIAA to find the names of the individuals. So they would subpoena the internet service providers for the names of the users. The amount of material infringed by the individuals ranged from a very small amount to large amounts (Hopkins 157). However, the aspect of these cases that is most important to note is the widespread deterrence the RIAA wanted to create by the individual suits. They prosecuted a large amount of individuals who usually ended up settling by paying a large sum of money in order to avoid any litigation that would result in massive amounts of court fees (Hamdani 699). Therefore, the outcome of these lawsuits was undoubtedly in favor of the music industry. The RIAA website states:

> *Prior to the lawsuits, only 35 percent of people knew file-sharing was illegal, but after the initiation of the end-user legal campaign, that number quickly rocketed to more than 70 percent.*

They definitely succeeded in getting media attention and spreading awareness of the legality of file-sharing copyrighted material. Although internet users are now more aware of the issues with the legality of file sharing, the problem has not stopped.

Conclusion from cases

One notable, common theme from all of these cases is how the court in all instances sides with the music industry because of the economic impact that peer-to-peer file sharing has on the industry. Therefore, as new technology becomes more readily available, users and innovators alike must keep in mind the possible liability at stake when copyrighted music is involved. Therefore, the rulings from these cases are undoubtedly problematic for future innovation.

Current Issues

Currently there has been ongoing litigation between the recording industry and Limewire over their peer-to-peer file sharing software in the case *Arista Records et al. v Limwire LLC et al.* since 2006 when the record companies filed a lawsuit against Limewire. On December 31, 2010, the court forced Limewire to shut its system down (Sisario). The court ordered a preliminary injunction, which means Judge Wood decided that Limewire was guilty of copyright infringement and should have to stop the infringement immediately. Therefore, all file sharing

software that Limewire distributed ceased to work after this court order (document 334). Since this shutdown, the next major decision occurred on April 28, 2011. Judge Wood granted summary judgment, or decided based on the facts without trial, that evidence implied Limewire was guilty of "inducing" copyright infringement, common law infringement, and unfair competition (document 742, 2). However, Judge Wood would not grant summary judgment of contributory or vicarious infringement.

The court used the Grokster case as precedent for this case and because of this precedent Judge Wood granted summary judgment. As for direct infringement, the court decided that Limewire showed a clear intent of infringing copyrighted materials through their network, and they also had knowledge of such intentions (29). Limewire was found to attract users through advertisement regarding this feature and never showed any intention of stopping the infringement. As for contributory infringement, both sides wanted Judge Wood to decide whether or not Limewire was guilty of this based on the current evidence (40). However, the court decided that, despite Limewire's knowledge and material contribution to the infringement (requirements of contributory infringement), with the current amount of evidence it was unable to decide either way due to Limewire's defense's claim that the technology was capable of many different non-infringing activities (43). Using the Sony v. Universal case as precedent for their argument, Limewire's defense claims that the peer-to-peer networking would be better used for distributing books in the public domain, historical documents and films, as well as music from independent artists. The judge did not grant judgment on vicarious infringement either. Limewire moved for judgment on this aspect of the case, but the court found the evidence to lean toward the side of the recording industry (44). Therefore, the court

did not grant judgment in favor of Limewire because there was evidence that Limewire was able to control its users and received financial gains from the program. Lastly, the court ruled in favor of the recording industry regarding Limewire committing common law infringement and unfair competition. Judge Wood made this decision based on the evidence showing direct infringement and a marketplace where Limewire's infringement harmed the industry (45).[4]

What will happen?

Based on the previous decisions by the district courts, most likely the court will favor the recording industry. Evidence is similar to that of the Grokster case, and since the Supreme Court ruled against Grokster in that instance, the Limewire case will most likely follow in the footsteps of the Grokster decision and be found guilty of vicarious and contributory infringement. Although the real decisions are unknown, the summary judgment currently demonstrates how the evidence available and previous court cases will persuade Judge Wood to find Limewire guilty. However, since the court did not grant summary judgment based on the claim for Limewire's possible non-infringing activities there is still the possibility the court will go against precedent and find Limewire not guilty.

Despite the courts efforts to put an end to illegal file sharing of music on peer-to-peer networks, many file sharing software applications still exist and are easily downloadable. In fact, two weeks after the court ordered Limewire to shut down an online article discusses the availability of a new program—Limewire Pirate edition. The article says the program does not

[4] doc. 721 Arista Records v. Limewire LLC case 06 CV 5936 (KMW)

use Limewire LLC as a server and that word of this new program is spreading fast through social networks like Twitter (Peoples).

Future and Possible Solutions

With a new file sharing website in operation, along with many more facts showing that music file sharing over peer-to-peer networks will not end easily, an alternative solution to suing facilitators for this type of infringement must be determined. A study done on internet usage in January of 2011 concluded that 86.4 percent of the material on peer-to-peer networks contained infringing material, and globally, the peer-to-peer file sharing network is 5.8 percent of traffic on the internet (envisional doc 3). Technology has even developed more ways that internet users can share copyrighted materials more easily. For example, digital "cyberlockers" exist online and are accessible without any downloaded software, like with peer-to-peer sites. These types of sites are not widely used to distribute infringing material now; however, peer-to-peer file sharing did not bring massive amounts of piracy until after they had been around for a while (15). Therefore, based on the facts, piracy online will never completely cease to exist. New technology will always bring new ways to infringe copyrighted material. In order to manage this online piracy, there are many suggestions that lawmakers and critics should consider to keep the illegal file sharing at bay. A few of the major and important suggestions to consider for peer-to-peer file sharing websites are targeting massive uploaders and levies.

Targeting Massive Uploaders

This solution would focus more on deterrence like the RIAA did with their lawsuits against individual users. While the RIAA sued various levels of infringers, this solution proposes

targeting the uploaders who contribute to infringement (Lemely 1400). With Napster, before the lawsuit, more than 97 percent of files were only uploaded by 3 percent of users. Since the users contribute so much content, they are easily identifiable. The major problem with this type of deterrence, however, is finding the names of the individuals uploading the content. This solution is the one most similar to action already taken against file sharing infringement, and since it is obviously still a problem, it has a lower possibility of being effective (Lemely 1399).

Levies

The idea behind levies is that payment of the copyright owners would be compensated through "taxes" that consumers will pay for at the time of purchasing technology: like the computer, service of a particular ISP, or downloading software. Having this type of payment would essentially make file sharing legal and therefore allow technology to continue to flourish. This type of payment has already been implemented in Candada and Germany when the citizens purchase a computer (Lemely 1407). Furthermore, there is precedent to implement such a decision already. For example, with the decision that resulted in the Audio Home Recording Act, the court decided that there would be a tax implemented into the sale of blank media for recording devices (1408). One law professor, Neil Netanel, has proposed a "Noncommercial Use Levy" and outlined a plan for how to implement levies into the law.

> *The NUL stands alongside two well-established mechanisms for allowing unhindered uses of copyright-protected material while still compensating copyright holders. These are: (1) levies on equipment and media used to make personal copies; and (2) compulsory licenses for distributors of copyright-protected material, such as those*

> *available to record companies for producing cover recordings, cable and satellite TV operators for transmitting off-air broadcasts, and web-casters for transmitting sound recordings* (Netanel 3).

His proposition to combine licenses and levies in order to minimize harm is a very viable plan that could make everyone, the consumer and the industries, happy. The litigation against facilitators would then be obsolete and allow technology to continue to develop.

Conclusion

No matter what the solution—something needs to change. The internet's new technology allows the problem to grow. Like the articles' study found, hardcore pirates will always be hardcore pirates and find a way to get their music for free. Therefore, I think the implementation of levies would be the best possible solution for the consumers and the copyright owners. This is a well thought out and planned middle ground and would not stifle technology or creativity while allowing copyright holders to receive payment for their labor. In my opinion, the individual suits have greatly deterred file sharing have stifled the possible usage of the technology.

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