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Legal Environment of Business

Music Copyright Infringement – MP3s Alter the Future

In a world of exponentially developing technology and mass communications through the Internet, the ability to harness or limit interactions between different parties seems to be but a hopeful thought. There was a time when the phrase “copyright infringement” might have made someone jump, but today with the emergence of the Internet, we do it everyday with blatant disregard for the law. With Respect to copyright infringement, the Internet has become a virtual wild, wild west of data exchange because it facilitates free distribution with little to no difficulty and practically no consequences.¹ In this age, technologies are developing faster than the government can act to regulate them. The Copyright act of 1976 failed to anticipate future technology such as VCR’s and CD burners, little less the Internet. In the past, there has been little motivation to violate music copyright law, for reasons such as signal degradation and expediency. In the digital age, these concerns no longer exist. Today, duplication is perfect.²

CD’s are recorded in a very data consuming WAV format that would take hours to transfer over the Internet. However, with the advent of the MP3³, a compression technique that does not cause significantly loss to the audio signal, and the increasing

¹ Barlow, John Perry (1994), “*The Economy of Ideas: Selling Wine Without Bottles of the Global Net*,” (accessed September 13, 2001) [available at www.eff.org/~barlow/economyofideas.htm].

² *RIAA v. Diamond Multimedia Systems Inc.* 1999.

³ (A shortened version of MPEG Layer 3 - Motion Picture Experts Group – 1, Audio Layer 3)

bandwidth of the internet, music piracy has been dramatically catalyzed. Millions of copyrighted works are now available free on the Internet.

Web-based distribution is typically done on a non-for-profit basis, resulting in scattered distribution networks that are nearly impossible to trace. Even if the direct infringers are prosecuted, penalties are greatly reduced.⁴ Copyright holders are then forced to sue countless offenders engaged in minor infringements, thus creating nearly an impossible task. Additionally, there are three main formats in which MP3 exchange takes place each with different liabilities, requirements, and defenses, further increasing the difficulty of Musicians to combat violators.

The first MP3 exchange method takes place through “Direct Download Sites” where anyone can access a web page and download free songs from the server. Direct download sites are for the most part cut and dry when it comes to the law. If one has permission from a copyright holder to post their music on your site for free downloading, then one is more than welcome to do so under the law. However, if one does not have permission of the copyright holder, and you are making copies of music and publicly distributing them, your actions constitute a direct copyright infringement.⁵

The next type of MP3 exchange facilitator is the MP3 search engine. Search engines search the web for preexisting MP3 files that they can link their visitors too. Some of these engines include Palavista.com, Audiofind.com, and MP3Board.com. The site operators of search engines are most assuredly aware of the illegality of the material that they are linking to. However, their involvement in committing actual violations is

⁴ Langenderfer, Jeff; Cook, Don Lloyd. “Copyright Policies and Issues Raised by *A&M Records v. Napster*: ‘The Shot Heard ‘Round the World’ or ‘Not with a Bang but a Whimper?’”, *Journal of Public Policy & Marketing*, Vol. 20 (2), Fall 2001, 280-8

⁵ 17 U.S.C. §106

limited to linking alone. Unlike other sites, search engines do not engage in the copying, or distributing of the music files they locate for their visitors, which excludes them from being liable for direct copyright infringement.⁶ The question that remains to be answered is if linking alone can be grounds for liability. Several cases have attempted unsuccessfully to set precedence in this area. The issue is currently being fought over in the chess game of our legal system. Most of the actions in this area can be found in the multiple cases involving MP3Board Inc. and the RIAA. The final verdict of the liability associated with linking is very much in the dark.

The final exchange facilitator and probably the most publicly recognized is the peer-to-peer exchange service. Peer-to-peer services operate by having users log onto a system that scans their hard drive for MP3 files and then allows the files located to be downloaded by other users on the system. Subsequently, while the user is logged onto the system they can download songs as well. After clicking on a song, your selection is copied from one user's hard drive to another, without passing through the server.⁷ Due to the highly public trial and eventual shut down, Napster is one of the most recognized sites with regard to peer-to-peer file transfer, at its peak having an estimated 75 million active users.⁷ The legal difference between a peer-to-peer network versus other exchange mediums is that services such as Napster are able to control and supervise the infringements taking place by its users and as such has the ability to deny the infringers

⁶ Langenderfer, Jeff; Cook, Don Lloyd. "Copyright Policies and Issues Raised by *A&M Records v. Napster*: 'The Shot Heard 'Round the World' or 'Not with a Bang but a Whimper?'" , *Journal of Public Policy & Marketing*, Vol. 20 (2), Fall 2001, 280-8

⁷ Anestopoulou, Maria. "Challenging Intellectual Property Law in the Internet: An Overview of the Legal Implications of the MP3 Technology", *Information & Communications Technology Law*, Oct 2001, Vol. 10 Issue 3, Page 319-38

access to Napster's server.⁸ The intentional failure to ban repeat offenders from its server amounted to vicarious copyright infringement. Additionally, Napster was also engaged in a contributory copyright infringement by providing the necessary infrastructure, and encouraging users to engage in copyright infringement, a violation of the Copyright Act.⁹

In an attempt to combat file sharing, the Recording Industry Association of America (RIAA), a non-profit organization of music industry interests, is entering litigation directed at the companies seeking to profit from the activity, rather than the masses of individual infringers. The most recognized example of the RIAA's actions is the highly public Napster case, where the RIAA filed suit against Napster alleging contributory and vicarious copyright infringements and sought damages of not less than \$100,000 for each work infringed.¹⁰ The RIAA was eventually successful in shutting down Napster's website through an injunction and the site remains in a "Testing" stage currently.

Amazingly though, even before the stone slab was slid over the sarcophagus that was Napster, other file transfer systems were debuting and in various stages of development. It seems that the Napster case had little to no effect on nation wide peer-to-peer file exchange facilitators. The lawsuit only boosted the public acknowledgement of free music on the web. Now everyone has a favorite MP3 downloading site and it is fast becoming obvious to the music industry that the public will go to any means necessary to insure the free downloading of music. Today countless sites are in operation that almost

⁸ Anestopoulou, Maria. "Challenging Intellectual Property Law in the Internet: An Overview of the Legal Implications of the MP3 Technology", *Information & Communications Technology Law*, Oct 2001, Vol. 10 Issue 3, Page 319-38

⁹ 17 U.S.C § 501

¹⁰ *A&M Records v. Napster 1999*.

mirror the idea of Napster. Sites such as Gnutella, iMesh, Napigator, KaZaA, Morpheus, Aimster, Freenet, and AudioGalaxy all have their own legal twist on the Napster system.

There are, however, defenses for these numerous types and degrees of violations. One form of protection comes in the DMCA which grants OSP's (Online Service Provider's) protection from monetary damages incurred by copyright infringements. In order to meet the qualifications to reap protection, an OSP must adopt and implement a policy providing for termination of users who are repeat infringers¹¹ and refrain from interfering with any technical measures implemented by copyright owners.¹² The DMCA also provides protection from being liable due to linking to an infringing site. The OSP must, however, not know that the material is infringing, and if notified that the material is infringing they must work expeditiously to remove the link or block access to the material.¹³ If the OSP does not meet one of the two prior criteria, they can have their DMCA protection removed. Though it appears to be a way around the law, MP3 search engines, know that the material they are linking to is infringing, therefore are not afforded protection by the DMCA. Napster also tried to use this defense unsuccessfully, but because the material traveled over the Internet rather than through Napster's network, the court ruled against its use.

Another defense is Fair Use, which essentially "permits courts to avoid the rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."¹⁴ When determining whether the fair use defense is

¹¹ 17 U.S.C. § 1203[I][1][A]

¹² 17 U.S.C. § 512[I][2]

¹³ Langenderfer, Jeff; Cook, Don Lloyd. "Copyright Policies and Issues Raised by *A&M Records v. Napster*: 'The Shot Heard 'Round the World' or 'Not with a Bang but a Whimper?'" , Journal of Public Policy & Marketing, Vol. 20 (2), Fall 2001, 280-8

¹⁴ Iowa State University Research Foundation v. American Broadcasting Company 1980.

applicable, the court looks at four factors: (1) the nature of the use as educational or commercial, (2) the nature of the copyrighted work as creative or factual, (3) the portion of the work used, and (4) the effect of the use on the market for the work.¹⁵

Unfortunately for service exchange providers, the files being downloaded are for commercial purposes, creative in nature, duplications of the entire work, and have dramatic effects on the market, so Napster and similar services do not even qualify for a single factor for fair use.

Another possible defense is the Audio Home Recording Act of 1992, enacted as a compromise between the RIAA and manufactures of DAT (Digital Audio Tape) recorders. In the statute, companies who manufacture DAT recorders or CD burners as well as the manufactures of the writeable media pay royalties into a fund that is distributed to copyright holders. In exchange, manufactures are given limited immunity from copyright infringements.¹⁶ The AHRA defines “digital audio recording devise” as a machine “marketed for the primary purpose of ... making a digital audio copied recording for private use”¹⁷ in effect, excluding computers and their hard drives from being considered.

The future of MP3s and music is uncertain. The RIAA knows that if too many lawsuits take place that the services will simply move their servers out of the United States. Now people will go to any measure to insure the free exchange of music. It would be in everyone’s interest to attempt to come to some sort of compromise instead of attempting to ban exchange entirely.

¹⁵ ¹⁵ Langenderfer, Jeff; Cook, Don Lloyd. “Copyright Policies and Issues Raised my *A&M Records v. Napster*: ‘The Shot Heard ‘Round the World’ or ‘Not with a Bang but a Whimper?’”, *Journal of Public Policy & Marketing*, Vol. 20 (2), Fall 2001, 280-8

¹⁶ 17 U.S.C. § 1008

¹⁷ 17 U.S.C. § 1001[3]