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The Beat Goes On:  
Music downloading more prevalent than ever despite prosecutions

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Communication Law  
Dr. Mulcrone  
April 15, 2009

I understand that in the interest of shared scholarship the University of Portland and its agents have the non-exclusive license to archive and make accessible my work in whole or in part in all forms of media in perpetuity. Further, I understand that my work, in addition to its bibliographic record and abstract, may be available to a wider community of scholars and researchers through electronic access.

For hundreds of years courts have struggled with the balance between the rights of creators of intellectual property to protect their material and society's right to access these creations. The Copyright Act includes an exception to the copyright owner's exclusive rights that is reserved for teachers, journalists, critics, and scholars to use the material for the benefit of society.<sup>1</sup> This exception, known as Fair Use, is vague and uncertain in theory and application, making it difficult to apply to specific situations, such as file sharing.<sup>2</sup> For instance, people are allowed to buy copies of a musical artist's album, but are they permitted to import this music in digital form onto their computers or burn copies of the music?

Courts have been grappling with these questions since technology has made it possible for music to be contained in physical form and transported that way.<sup>3</sup> Now that music can be copied with the click of a mouse, the question becomes even more complex. Where is the balance now? Technology has knocked the system off balance as users now have more power to do whatever they would like with the material that they did not create while the creators have little power to stop these actions.<sup>4</sup>

Although copyright law has been a part of common law for almost 500 years,<sup>5</sup> courts are still defining the meaning of this protection of property, with a new version of the law as recent as 1976 with the 1976 Copyright Act.<sup>6</sup> Courts have traditionally dealt with situations of print media, but the growth of the Internet has expanded copyright into even hazier areas such as file sharing of music and videos. Musical compositions were first placed under the protection of

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<sup>1</sup> Michael J. Madison, "Fair Use and Social Practices," in *Intellectual Property and Information Wealth, Volume One Copyright and Related Rights*, ed. Peter K. Yu (Westport, Connecticut: Praeger Perspectives, 2007), 177.

<sup>2</sup> Madison, 177.

<sup>3</sup> Dannenberg, Ross, "Copyright Protection for Digitally Delivered Music: A Global Affair," *Intellectual Property & Technology Law Journal* 18 (2006): 12.

<sup>4</sup> Dannenberg, 12.

<sup>5</sup> Don R. Pember and Clay Calvert, *Mass Media Law* (New York: McGraw-Hill Higher Education, 2008), 487.

<sup>6</sup> Pember, 496.

copyright almost two centuries ago in 1831, and since then technological developments have challenged the interpretation of the law.<sup>7</sup> In the late 1990s, the music industry attempted to stop the manufacture and sale of MP3 players, claiming that it would halt the illegal sharing of files. However, the courts ruled that the players were simply space shifters and not audio recording devices in that the player merely makes copies to render portable files that are already in the user's possession.<sup>8</sup> Under a federal statute adopted in 1998, an online service provider acting merely as a conduit for illegal reproduction of copyright works will not be held liable for the illegal act in most situations.<sup>9</sup> These cases opened the door for music fans to hold music in their hands and also have the ability to reproduce the files, albeit illegally.

In attempting to provide a compromise between the competing interests, the courts will have to decide how to handle the situation and create a precedent to guide future decisions. The access theory of the First Amendment provides a lens through which to interpret the circumstances. Access theory mandates that citizens have the right to access information and has traditionally expressed that citizens should have the means to retrieve information from various perspectives and also to create and express messages themselves.<sup>10</sup> Applied to this situation, citizens should have the right to access musical property so that they can then be inspired to make music themselves and further the art form.

The preferred position balancing theory could also provide a perspective on the issue. This theory is based on the idea that the constitutional freedoms guaranteed in the First Amendment are fundamental to a free society and should receive more judicial protection than

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<sup>7</sup> Lydia Pallas Loren, "Understanding the Complexity of Music Copyrights in the United States," in *Intellectual Property and Information Wealth, Volume One Copyright and Related Rights*, ed. Peter K. Yu (Westport, Connecticut: Praeger Perspectives, 2007), 161.

<sup>8</sup> *Recording Industry Association of America v. Diamond Multimedia Systems*, 9th Cir., No. 98-56727, 6/15/99.

<sup>9</sup> Pember, 497.

<sup>10</sup> Pember, 46.

other constitutional values.<sup>11</sup> In this situation, it could be said that it is important that the music be expressed and available for citizens to access it because the right to expression is more valuable than the right for others to own the material. The preferred balancing theory gives the advantage to the freedom of expression, which benefits the creative musical expression in this case.

In this environment with the developing definition of copyright and intellectual property, music file sharing is prevalent.<sup>12</sup> Peer-to-peer file-sharing devices, which are servers that provide an arena for peers to share music with each other, are discovering new ways to get around the current laws involving this issue, making it necessary for the courts to redefine the law.<sup>13</sup> Music aficionados have even found alternative solutions to peer-to-peer servers, such as sharing files over instant messaging devices or e-mail, aggravating the legal issue.<sup>14</sup> With the technology continuing to evolve to make it easier for users to avoid lawsuits, the courts will also need to adapt, either by reigning in the technology or by loosening the copyright restrictions.

Considering the fact that technology is already far outside of the control of either the government or the music industry, the courts will have to compromise the right to protect intellectual property.<sup>15</sup> Other countries are currently exploring ways to reimburse musicians and their labels for their work while also permitting citizens to freely trade the music on the Internet or through other digital means, and the United States will also need to incorporate an alternative business model like this.

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<sup>11</sup> Pember, 44.

<sup>12</sup> Alan Chen. "Copy Locally, Share Globally: A Survey of P2P Litigation Around the World and the Effect on the Technology Behind Unauthorized File Sharing," *Intellectual Property and Technology Law Journal* 19 (2007): 1.

<sup>13</sup> Chen, 4.

<sup>14</sup> Chen, 4.

<sup>15</sup> Dumenco, Simon, "How the Music Business Spent the Summer Killing Itself," *Advertising Age* 79 (2008): 62.

**RQ:** How can the courts and statutes balance musical artists' and record labels' rights to protect their intellectual property through copyright and individuals' rights to access this material?

### **Copyright balances desires of artists and the public**

Copyright itself gives a copyright owner the exclusive rights to manage the property, meaning that he or she can use the copyrighted work or allow another person to use it.<sup>16</sup> The owner of a copyrighted work has the right to reproduce the work, make derivative works from it, distribute copies, and perform and display the work publicly.<sup>17</sup> People that do not own the copyright for property cannot legally make copies of a copyrighted work, which is in essence the current tension between music copyright owners and those that share the material without permission. The copyright owner of musical content is generally either the creator of the content, meaning the songwriter, or the record label representing this individual.<sup>18</sup>

Until the invention of the printing press in the 1400s, mass production of books, leaflets, newspapers, and certainly music, was not possible. Therefore, copyright was not necessary and did not evolve into common and statutory law until later.<sup>19</sup> The U.S. Constitution empowered Congress to form laws regarding copyrights, and the first Copyright Act was enacted in 1790. The Act was then adapted and transformed for technological developments, resulting in revisions in 1909 and the latest one in 1976.<sup>20</sup> The 1976 Copyright Act is the current guideline for issues regarding the protection of intellectual property as it set the law, abolishing common law for the issue. The Copyright Term Extension Act of 1998 also extended the amount of time

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<sup>16</sup> Mavis Fowler, *The Law of Copyright* (New York: Oceana Publications, Inc., 1996), 17.

<sup>17</sup> Fowler, 17.

<sup>18</sup> Fowler, 24.

<sup>19</sup> Fowler, 2.

<sup>20</sup> Fowler, 4.

that copyrights could last. Under the Copyright Act of 1909, sound recording copyrights were not protected until the Sound Recording Amendment of 1971.<sup>21</sup> The 1976 Act contains added provisions for musical content, including the Limitation on Public Performance Rights. This section allows people to perform in public literary or musical works that they did not create, thus permitting musicians to play covers of other musicians' works.<sup>22</sup>

The 1976 Act also includes a section entitled the doctrine of Fair Use that allows the public to access copyrighted works for the benefit of art. According to patent attorney Mavis Fowler, "Fair Use is like an easement of right of way through private property for the public's benefit. In that sense it is really an extension of the public domain."<sup>23</sup> Fair Use permits teachers to make copies of copyrighted work for classes under certain guidelines. For instance, people are allowed to make multiple copies of works for criticism, comment, news reporting, research, and scholarship.<sup>24</sup> However, the doctrine is unclear about peer-to-peer music file sharing. The Copyright Act specifically articulates that several factors must be considered to judge whether an action is legal under fair use. These are the purpose and character of the use, the nature of the copyright act, the amount of the portion used in relation to the work as a whole, and the effect of the use upon the market for or value of the copyrighted work.<sup>25</sup> The fourth factor must be considered with particular importance in this case because illegal file sharing can indeed harm the market for copyrighted music, and the courts must find the balance between acceptable fair use of the music and illegal sharing that bridges these factors.<sup>26</sup>

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<sup>21</sup> Fowler, 9.

<sup>22</sup> Fowler, 10.

<sup>23</sup> Fowler, 59.

<sup>24</sup> Fowler, 59.

<sup>25</sup> Congress, *Copyright Act of 1976*, U.S. Code 17, (1976) Public Law No. 94-533, 90 Statutory 2541.

<sup>26</sup> Dumenco, 62.

The Copyright Act of 1976 established a section mandating a compulsory license for mechanical reproductions of musical works, often called simply “mechanicals,” that was initially applicable to player piano rolls in the early twentieth century and now applies to compact discs, cassettes, and any other type of copy that mechanically reproduces a musical work.<sup>27</sup> This license requires anyone who copies copyrighted music to be manufactured or distributed to pay a statutory royalty fee of 9.1 cents per phonorecord or 1.75 cents per minute of playing time, whichever is greater.<sup>28</sup> This means that people are allowed to use musical works created by someone else, but they must pay the price to do so. This statute was amended in 1995 to include digital downloads.<sup>29</sup> Sharing through peer-to-peer networks is thus skipping over the royalty step, resulting in no income for the record industry or musical artist.

### **Technology transforms the music industry**

Technology has recently changed many industries as the world has shrunk by the globalization of the Internet, and the music industry is certainly not excluded from this revolution.<sup>30</sup> However, the World Wide Web is not the first technological development to challenge the existing music market. Thirty years ago industry executives were in a state of alarm over the possibility that home taping of copyrighted music was cutting into record sales.<sup>31</sup> In the late 1970s, American record companies were struggling with sales of their music that had previously been steadily high. A slumped economy and stagnant musical climate contributed to the struggles, but the cassette tape had also become a widespread way to tape records, radio shows, and other copyrighted works.<sup>32</sup> The music industry, represented in the form of the Record

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<sup>27</sup> Loren, 163.

<sup>28</sup> Loren, 163.

<sup>29</sup> Loren, 168.

<sup>30</sup> Chen, 1.

<sup>31</sup> Steve Jones, “Music and Copyright in the U.S.A.,” in *Music and Copyright*, ed. Simon Frith, (Edinburgh: Edinburgh University Press, 1993), 67.

<sup>32</sup> Jones, 68.



Industry Association of America, Inc. (RIAA), began advertising home taping as theft and urged Congress to amend copyright laws to clearly articulate it as theft. These lobbying efforts were not fruitful, though.<sup>33</sup>

In the early 1980s, several home electronics manufacturers began marketing dubbing cassette decks, which enable cassette duplication with just one machine, making music sharing even easier than in the past. The RIAA again lobbied the government with ambitions to create a tax on these devices, with money collected going straight to recording artists.<sup>34</sup> The organization presented a bill before Congress in 1985 called the Home Audio Recording Act, encompassing a penny per minute tax on blank tapes, a tax of 10 percent on tape recorders, and a tax of 25 percent on dubbing tape decks. The money collected would be distributed among record companies and copyright owners but did not clearly explain the mechanisms to enforce these new requirements.<sup>35</sup> Consequently, the bill failed.

As of this point in the development of music copyright issues, multiplication of copyrighted music resulted in a decrease in musical quality. However, the development of Digital Audio Tape allowed users to copy the material without distortion from copy to copy, producing an exact replica of the music, spurring the RIAA to lobby with even more strength.<sup>36</sup> This technology also gave way to the easy replication that compact discs provide, as they also produce perfect replications of the material, unharmed by distortion or hissing.<sup>37</sup> Like other technologies, compact discs were initially expensive, and the ability to make digital copies of them was nearly impossible and very costly. However, costs initially dropped, permitting users

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<sup>33</sup> Jones, 68.

<sup>34</sup> Jones, 68.

<sup>35</sup> Jones, 68.

<sup>36</sup> Jones, 69.

<sup>37</sup> Jones, 69.

to copy the music inexpensively and without decrease in quality, opening the door to the current file sharing controversy.<sup>38</sup>

In 1995, the potential capabilities for digital delivery of music caused Congress to reconsider the issue of musical copyrights. Record labels were worried that revenues from record sales were going to be significantly damaged by the new ways to transfer music digitally, and Congress consequently enacted the Digital Performance Right in Sound Recordings Act of 1995.<sup>39</sup> This act gave copyright owners the additional right to perform copyrighted material publicly through digital audio transmission. This right allows copyright owners to send a sound recording via digital technology somewhere else as a part of the owner's public performance right.<sup>40</sup> However, this right is explicitly given to only the owner of the copyright — not anyone who has access to the material.

Currently, anyone with a computer — not just copyright owners — has the capability to duplicate and share music, albeit illegally. At the end of the 20th century, peer-to-peer file sharing networks became prominent.<sup>41</sup> These networks originally sought to empower users of a certain network to share resources, but soon large networks enabled people to share files throughout the world. Peer-to-peer networks such as Napster, Grokster, Kazaa, Aimster, Bit Torrent, and Lime Wire were media through which users could share files. As more of these systems sprang up throughout the world and music sales began to drop, the recording industry began to take a more aggressive approach to preventing this illegal activity, beginning by

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<sup>38</sup> Jones, 70.

<sup>39</sup> Loren, 167.

<sup>40</sup> Loren, 168.

<sup>41</sup> Chen, 1.

targeting the networks themselves as well as Internet service providers that make available the means for users to share files.<sup>42</sup>

The 2002 case *A&M Records v. Napster* was one of the first of this nature when the Ninth Circuit ruled in favor of the recording industry, finding Napster liable for contributory and vicarious copyright infringement.<sup>43</sup> This case set the precedent for future copyright infringements involving peer-to-peer networks as the court ruled that because Napster had the capability to track users and files within its network, it could have tracked and controlled illegal file sharing.<sup>44</sup> Indeed, Napster used a centralized server so that the network could tell where a certain file was at any given time, meaning it was technologically capable of preventing illegal file sharing. After this event, other peer-to-peer networks learned from the network structure of Napster, and networks like Kazaa and Lime Wire restructured their own systems and created decentralized file-indexing solutions.<sup>45</sup> However, in June of 2002 a group of recording industry executives joined together to file a copyright infringement claim against Grokster and Kazaa.<sup>46</sup> Three years later the court ruled once again in favor of the recording industry by finding that peer-to-peer networks are liable for their users actions if they provide a service that encourages such copyright infringement.<sup>47</sup>

In 2005, the court ruled in *MGM v. Grokster* that a company cannot be held liable for its users' copyright infringement if the service is also capable of substantial noninfringing uses.<sup>48</sup> The recording industry was also fighting for the Supreme Court to make illegal multitechnology

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<sup>42</sup> Chen, 1.

<sup>43</sup> *A&M Records v. Napster*, 284 F.3d 1091 (2002). Academic, Lexis Nexis, <http://www.lexisnexis.com/academic>.

<sup>44</sup> *A&M Records v. Napster*.

<sup>45</sup> Chen, 1.

<sup>46</sup> Chen, 1.

<sup>47</sup> Chen, 1.

<sup>48</sup> *MGM v. Grokster*. 04,480 (2005).

designs, meaning networks that were capable of supporting illegal file sharing.<sup>49</sup> However, the court did not comply to this request. From this decision, the court established a new type of copyright infringement liability called inducement, meaning a server encourages users to duplicate copyrighted material.<sup>50</sup>

Currently, the recording industry is focusing on controlling individual users' downloading habits by suing individuals rather than the corporate networks like Napster. On September 8, 2003, the RIAA sued 261 Americans for sharing songs on peer-to-peer networks, commencing a long process of targetting individuals.<sup>51</sup> Since then the industry has filed cases against more than 30,000 people.<sup>52</sup> The RIAA generally files claims against an individual, offering to settle the case with a sum of about \$4,000, which is less than attorney fees would be.<sup>53</sup> As a result of this, many people choose to pay their way out of the situation instead of battling it in the court.

Some defendants choose to challenge the claims, though, such as Minnesota resident Jammie Thomas who fought back against the RIAA and ended up having to pay a penalty of \$220,000 in damages.<sup>54</sup> This 2007 verdict was the first jury trial in the music industry's attempt to control individual users' illegal file sharing. This case involved only 24 songs, and the verdict called Thomas to pay \$9,250 in damages for each.<sup>55</sup>

However, other defendants have escaped the RIAA's lawsuits by arguing that the industry could not prove that the illegal activity actually occurred and that the defendant was at

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<sup>49</sup> Electronic Frontier Foundation.

<sup>50</sup> *MGM v. Grokster*. 04.480 (2005).

<sup>51</sup> Electronic Frontier Foundation.

<sup>52</sup> Electronic Frontier Foundation.

<sup>53</sup> Jeff Leeds, "Labels Win Suit Against Song Sharer," *The New York Times*, 5 October 2007 [online]; Available from <[http://www.nytimes.com/2007/10/05/business/media/05music.html?\\_r=1&scp=1&sq=Jammie%20Thomas&st=cse](http://www.nytimes.com/2007/10/05/business/media/05music.html?_r=1&scp=1&sq=Jammie%20Thomas&st=cse)>; Accessed 19 March 2009.

<sup>54</sup> Leeds.

<sup>55</sup> *Capitol Records Inc. v. Thomas*, civil file No. 06-1497 (2007), Academic, Lexis Nexis, <http://www.lexisnexis.com/academic>.

fault. In *Andersen v. Atlantic Recording Corp.*, Beaverton resident Tanya Andersen challenged the RIAA when they accused her of illegal file sharing in 2005, claiming that they could not prove that she was the individual that shared files illegally.<sup>56</sup> The technology that the RIAA uses to gather information is from Internet protocol addresses, consisting of a series of numbers, and the association can then see what files the computer has downloaded. However, in this case Andersen's attorney claimed that the industry could not decipher whether the files on a certain computer are copyrighted recordings, inoperative files, or decoys.<sup>57</sup> A few months later, the RIAA dropped the case, supposedly after finding that it truly could not know for certain whether or not Andersen had participated in illegal file sharing. A few days later, Andersen filed a suit against the agency for malicious prosecution in suing her in the first place.<sup>58</sup> This case was the first in which the defendant argued against the RIAA and the association consequently dropped the charges.<sup>59</sup>

The fact that the RIAA's search for those that have downloaded copyrighted music illegally is faulty has been brought up by others as well, though. A 2008 study by University of Washington professors suggests that the industry's strategies for finding thieves are based on wrong information.<sup>60</sup> In the study the researchers introduced software agents into peer-to-peer file sharing networks to monitor the traffic. Those software agents did not download any files, but the researchers received more than 400 notices from the RIAA accusing them of downloading illegally.<sup>61</sup> The researchers conducted this experiment two times—in August 2007

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<sup>56</sup> *Andersen v. Atlantic Recording Corp.* No. 3:2007cv00934 (2007), Academic, Lexis Nexis, <http://www.lexisnexis.com/academic>.

<sup>57</sup> *Andersen v. Atlantic Recording Corp.*

<sup>58</sup> Stephanie Francis Ward, "Plaintiff to RIAA: Download This!" *ABA Journal* 93 (2007), 14.

<sup>59</sup> Ward, 15.

<sup>60</sup> Brad Stone, "Flaws Seen in Hunt for File Thieves," *The New York Times*, 9 June 2008 [online]. Available from <<http://query.nytimes.com/gst/fullpage.html?res=9B00E4DF1030F93AA35755C0A96E9C8B63>>. Accessed 20 March 2009.

<sup>61</sup> Stone, "Flaws."

and May 2008—and found flaws in the music industry’s system both times. They found that the enforcement agencies are capable of identifying the Internet protocol address of the accused file sharers but not whether or not they actually downloaded or uploaded any songs.<sup>62</sup> While conducting the study, the researchers discovered that this system could be manipulated so that it appeared that a different user or even an inanimate object was responsible for the file sharing. They even manipulated the system to make it appear that three laser printers had participated in the illegal activities. The RIAA sent the printers letters accusing them of downloading illegal copies of the films *Iron Man* and the latest *Indiana Jones*.<sup>63</sup>

Nonetheless, the RIAA is still pushing forward in its campaign to abolish illegal file sharing. While continuing its targeting of individuals like Thomas and Andersen who are suspected of the illegal activities, the RIAA has more recently also turned to college campus networks for information on illegal downloaders.<sup>64</sup> On February 28, 2007, the association announced this new focus of its campaign in which it communicates with the universities themselves instead of individual file-sharing students. Instead of suing an individual student, the RIAA sends hundreds of pre-litigation letters to colleges nationwide each month, requesting that the institutions forward the letters to the unidentified students.<sup>65</sup> Students are told that they must pay a settlement of about \$3,000 within 20 days.<sup>66</sup> If students fail to pay within 20 days or choose to challenge the RIAA in court, the association files a traditional lawsuit against the individual alleged downloader. Within a year of beginning this campaign, the RIAA had sent over 5,400 letters to 160 different schools.<sup>67</sup>

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<sup>62</sup> Stone, “Flaws.”

<sup>63</sup> Stone, “Flaws.”

<sup>64</sup> Electronic Frontier Foundation.

<sup>65</sup> Electronic Frontier Foundation.

<sup>66</sup> Electronic Frontier Foundation.

<sup>67</sup> Electronic Frontier Foundation.

Universities' responses to the RIAA's campaign have been mixed, as some are willing to enforce these rules upon their students while others are not. The letters are sent under threat of legal consequences but before the lawsuit enters the court, so the schools are not legally obligated to forward these letters to their students.<sup>68</sup> The University of Wisconsin, the University of Kansas, and the University of Maine have refused to forward the pre-litigation letters to students simply because they do not want to be the RIAA's legal agent.<sup>69</sup> In contrast, Stanford University has chosen to not only pass the letters to the students but also fine them for having to do so, with an increasing fine with each letter that a student receives.<sup>70</sup> Locally, the University of Oregon has been resisting subpoenas with the help of the state attorney general, who also argues that perhaps the RIAA's strategies are illegal under state law.<sup>71</sup> The situation with the University of Oregon involved 17 students, and the school was hesitant to comply with the RIAA. Meanwhile, the attorney general was skeptical of the business practices and the ways that the organization attempts to rein in illegal file sharing.<sup>72</sup>

The RIAA has supplemented this campaign against students sharing files illegally by creating a website that answers questions for those involved in a file sharing lawsuit and also offer instruction as to how to download legally.<sup>73</sup> The site includes a phone number for the RIAA's "Settlement Information Line" and allows those accused of file sharing to pay their settlement by credit card directly on the Web site.<sup>74</sup> The website's information on legal downloading leads to the homepage of Music United, where the title "Piracy hurts the music

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<sup>68</sup> Electronic Frontier Foundation.

<sup>69</sup> Electronic Frontier Foundation.

<sup>70</sup> Electronic Frontier Foundation.

<sup>71</sup> Eric Bangeman, "Oregon Attorney General Criticizes RIAA's Conduct in P2P Cases," *Ars Technica*, 29 November 2007 [online]. Available from <<http://arstechnica.com/tech-policy/news/2007/11/oregon-attorney-general-criticizes-riaas-conduct-in-p2p-cases.ars>>. Accessed 22 March 2009.

<sup>72</sup> Bangeman.

<sup>73</sup> Recording Industry Association of America, Inc., "P2P Lawsuits," 2007 [home page]. Available from <<http://www.p2plawsuits.com>>. Accessed 22 March 2009.

<sup>74</sup> Recording Industry Association of America, Inc.

community!” spreads across the top of the screen.<sup>75</sup> Music United is an organization that is comprised of many other groups within the music industry, including the RIAA as well as the Alliance of Artists and Recording Companies, the Recording Academy, and the Songwriters Guild of America. The site is focused on convincing the public to buy music illegally. The home page says: “The theft of music has comprised the industry’s ability to invest in the new bands of tomorrow. We are trying to do all we can – most important, offer exciting legal options – to encourage fans to enjoy music legally.”<sup>76</sup> The organization also advocates that downloading files illegally is equal to shoplifting a CD from a store.<sup>77</sup>

The RIAA’s campaign against file sharers has been extensive and costly to many involved. However, people within and outside of the music industry are still questioning whether any of these techniques have worked. According to the Electronic Frontier Foundation, virtually all studies have discovered that illegal file sharing has steadily increased since the RIAA began actively seeking out file sharers six years ago.<sup>78</sup> Additionally, the education by lawsuit strategy seems to be failing as well, as 89 percent of high school students have continued to download music even though they knew it was against the law.<sup>79</sup> The current techniques have not worked according to these standards, and the court must deal with the consequences of this. The court must find how to balance the need for musical artists to protect their compositions while allowing the public to access this copyrighted work, all the while accommodating new technology and adapting to it.

### **The future of music sharing and buying**

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<sup>75</sup> Music United. Home page. Music United for Strong Internet Copyright. 2009 [home page]. Available from <<http://www.musicunited.org>>. Accessed 22 March 2009.

<sup>76</sup> Music United.

<sup>77</sup> Music United.

<sup>78</sup> Electronic Frontier Foundation.

<sup>79</sup> Electronic Frontier Foundation.



Sales of music have decreased steadily in the last few years. Total album sales in the United States, including CDs and complete-album downloads, dropped 14 percent from 2007.<sup>80</sup> Since the industry's peak of success in 2000, album sales have declined 45 percent.<sup>81</sup> While the RIAA sues more individual file sharers in an attempt to control the situation, more and more people from all walks of life share files illegally, whether through peer-to-peer networks, by copying and sharing digital files between friends, burning copies of CDs, or even sending files via e-mail or instant messaging. With the technology available, the RIAA has created a very inefficient and perhaps inaccurate system to catch users of illegal peer-to-peer file sharing networks. However, the technology only allows them to find peer-to-peer users, and the organization does not have the ability, money, or resources to track down people that illegally copy CDs or send a few songs through an e-mail.

What's more, the younger generation has grown up in a culture dictating that it is acceptable to burn a copy of a CD to share with a friend. Mix tapes and CDs have become a crucial part of our culture so that people tend to think that they have the right to combine songs that they own, whether legally or not, onto one playlist that they have created uniquely and copy it. People often then give these CDs as a gift to a friend, inviting that person to share in a particular musical experience. In this culture and mindset where illegally copying this copyrighted music is accepted as the norm, it is obvious that the recording industry needs to adapt. Whether or not it is fair to protect this copyrighted material, the industry is unable to contain the situation, proving that something needs to change in some way.

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<sup>80</sup> Ben Sisario, "Music Sales Fell in 2008, but Climbed on the Web," *The New York Times*, 31 December 2008 [online]. Available from <<http://www.nytimes.com/2009/01/01/arts/music/01indu.html?scp=2&sq=music%20sales&st=cse>>. Accessed 5 April 2009.

<sup>81</sup> Sisario.

Many different organizations, businesses, recording artists, and individual people have suggested certain strategies to monitor the situation, and some have even taken steps to advance these efforts. Outside of the United States, other countries have also struggled with this issue and have begun enforcing their own ways to control music file sharing. Therefore, U.S. courts as well as the music industry as a whole have several options in handling the situation to attempt to reimburse creative artists for their work while allowing the public to benefit from the art and adapting and perhaps giving in to technological advances.

iTunes is a digital media player application that allows users to download music for a fee — generally \$.99 per song. This legal way to acquire music digitally originally gave music lovers an alternative to peer-to-peer networks like Napster. Listeners could purchase music and own it in digital format on their computers, and the program even allowed users to share these files with up to five different computers. Sharing the files beyond this, though, was impossible due to a lock that iTunes placed on its music, rendering it impossible to share files through peer-to-peer networks. This system was far from perfect, though. Many iTunes users soon discovered that when they purchased a track from iTunes then burned it to a CD using their computers, they could then give this CD to friends. These friends could import the CD into their computers, and instantly have digital format of the formally locked song, now unlocked and in their possession. Nonetheless, from iTunes' launch in 2001 up until the end of 2008, each song came with this lock to theoretically prevent reproduction of copyrighted materials.<sup>82</sup>

In early 2009, though, iTunes owner Apple announced that the program would no longer place a restriction on any song, claiming that the reason is to allow users to freely shift the songs

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<sup>82</sup> Brad Stone, "Want to Copy iTunes Music? Go Ahead, Apple Says," *The New York Times*, 6 January 2009 [online]. Available from < [http://www.nytimes.com/2009/01/07/technology/companies/07apple.htm?\\_r=1&scp=1&sq=Want%20to%20Copy%20iTunes%20Music? %20Go%20Ahead,%20Apple%20Says%20&st=cse](http://www.nytimes.com/2009/01/07/technology/companies/07apple.htm?_r=1&scp=1&sq=Want%20to%20Copy%20iTunes%20Music?%20Go%20Ahead,%20Apple%20Says%20&st=cse)>. Accessed 14 April 2009.

bought on iTunes to other computers, phones or other digital devices.<sup>83</sup> However, this move could also be interpreted as the music industry surrendering one battle in the war of copyrighted music. iTunes is the largest dealer of legal music downloads, but this recent change in its business practices makes it even easier to dodge around the system and duplicate copyrighted music illegally.

Meanwhile, individual musical artists are turning to other music outlets to get their music to their fans legally, inexpensively, and easily. Irish band U2, known for its marketing strategies and huge commercial success spanning 30 years, seemed to give into the pressures upon the release of their newest album, *No Line on the Horizon*. The band released the album on February 27, 2009, digitally, in CD format, and on vinyl, using several different retailers. For the first week, though, the album was available to download through the mp3 downloads section of Amazon.com for only \$3.99, \$6 cheaper than iTunes. Most albums range in price from ten to twelve dollars, but for one week, the band with a reputation to be focused on commercial gain sold its album for less than half that price.

Another example of one of the world's most successful bands giving into the chaos of the industry was when alternative rock band Radiohead chose to release its latest album, *In Rainbows*, for pay-what-you-will digital download.<sup>84</sup> Radiohead announced it would be releasing its first new album in four years in digital form on its web page, asking listeners to choose their own price for the music — including free. In the first month, a million fans downloaded the album, and about 40 percent paid for it.<sup>85</sup> Of those that paid, the average price was \$6, earning the band nearly \$3 million in total. Radiohead vocalist and songwriter Thom

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<sup>83</sup> Stone, iTunes.

<sup>84</sup> Wired Magazine, "David Byrne and Thom Yorke on the Real Value of Music," *Wired Magazine*, 18 December 2007 [online]. Available from < [http://www.wired.com/entertainment/music/magazine/16-01/ff\\_yorke?currentPage=all](http://www.wired.com/entertainment/music/magazine/16-01/ff_yorke?currentPage=all)>. Accessed 14 April 2009.

<sup>85</sup> Wired Magazine.

Yorke said, “The way we termed it was ‘our leak date.’ Every record for the last four — including my solo record — has been leaked. So the idea was like, we’ll leak it, then.”<sup>86</sup> Instead of waiting for fans to get their hands on copyrighted music illegally, either before it is even scheduled to be released in stores, as Yorke is describing, or once it is available, Radiohead chose to skip over the record label process and take the matter into their own hands. This model, often referred to as “the Radiohead model” was successful for Radiohead, but other bands that aren’t as well situated financially may have more trouble using this risky strategy to distribute their recorded music to their fans.

In a similar but even more drastic example, New York indie rock band the Damnells recently made their newest album available for free download on their web site.<sup>87</sup> Lead vocalist and guitarist Alex Dezen offered an explanation for this seemingly reckless action in a release statement on the band’s homepage:

I suppose the hardest thing to explain to people is why I’m giving this record away. ‘You’re just going to give it away?’ seems antithetical to the human brain. ‘Is this just a bunch of B-sides or something? Some ‘give away’ material you don’t mind releasing into the ether?’ No. Quite the contrary. I have never worked so hard or put so much of myself into a collection of recorded songs. It is for just this reason that I want to give it away. To me it makes perfect sense. I just want people to hear this music, and I don’t want them to have to enter into some kind of contractual agreement with a third party to do so. Download the record, copy it and give it to your friends, lovers, and enemies.<sup>88</sup>

While all musicians can’t be expected to follow this model, it does provide an example of how one band has adapted to the current music industry and chosen to discard the idea of copyright altogether, choosing to make their living with live performance ticket sales.

These examples exhibit one extreme in which the musical artists themselves try to forego the issue of copyright altogether and offer their music at a discounted price or free, as U2,

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<sup>86</sup> Wired Magazine.

<sup>87</sup> Alex Dezen, “New record, ‘One Last Century,’ Free from thedamnells.com. Out Now!!” The Damnells, 8 January 2009, [web page] available from <<http://www.thedamnells.com>>. Accessed 14 April 2009.

<sup>88</sup> Dezen.

Radiohead, and the Damnwells have done. These bands are ignoring the court system and the music industry giants that have been struggling with this issue for more than a decade. But other musicians may want a way to guarantee a more stable income from their musical releases or to protect their creative works through copyright. Several other possibilities have been discussed as ways that the music industry can adapt to technology as well as the tension between music listeners and copyright owners.

The government of the Isle of Man, an island in the Irish Sea, has chosen to embrace digital piracy instead of making a futile attempt to stifle it, like the United States. The Isle's government is in the process of instilling a system to charge all Internet users a nominal fee of about \$1.38 a month to pay to their Internet service providers.<sup>89</sup> The funds collected through this tax would be sent to a special agency that would distribute the money to the copyright owners. Musicians and record labels would receive money based on how often their music was downloaded or streamed online.<sup>90</sup> This idea isn't new or restricted only to the Isle of Man. The concept has been discussed since the chaos of Napster ensued, and the French Parliament even looked at a similar proposal in 2006 before it was rejected with a strong force of the lobbying of copyright owners.<sup>91</sup> The music industry has responded to the Isle of Man's efforts claiming that the public won't like to be forced to pay this extra fee, but their opponents are quick to compare the situation to a childless citizen paying taxes for public schools or an automobilist paying taxes supporting public transportation.

After so many years of struggling through the controversy and with the RIAA still looking for new strategies to sue different participants in the ordeal to no real success, more and

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<sup>89</sup> Eric Pfanner, "Isle of Man Plans Unlimited Music Downloads," *The New York Times*, 25 January 2009 [online]. Available from < <http://www.nytimes.com/2009/01/26/business/worldbusiness/26music.html>>. Accessed 14 April 2009.

<sup>90</sup> Pfanner.

<sup>91</sup> Pfanner.

more people are downloading illegally. The idea is becoming more accepted by society as something that citizens have the right to do. Many college campuses, despite once being an RIAA target, have actually turned to helping their students avoid trouble when sharing and receiving copyrighted files. Duke University, for instance, offers its students advice on how to keep their computers safe, avoid congesting the university's network, and evade legal repercussions when using peer-to-peer downloading networks.<sup>92</sup> The university certainly does not promote illegal duplication of copyrighted items, but its guidelines leave ample room for students to interpret.

With society accustomed to having music at its fingertips in the form of music downloads and technology far more advanced than the schemes of the RIAA, the courts and Congress are going to have to step into the middle and set the policy straight. If the situation does not immediately resolve in jurisdiction, the government may have to take a legislative step such as the one the Isle of Man is considering because the current policies are failing.

Several options exist, such as those previously mentioned, for stakeholders in the situation to dodge the issue of copyright and choose the step that works best for their individual interest. However, the court still needs to revisit the issue of copyright to create a more lasting, universal solution to the problem. Returning to the fundamentals of copyright, the 1996 Act states that copyright must "be fixed in a tangible medium."<sup>93</sup> With music now available entirely digital, able to be copied with the click of a mouse, is it truly a tangible medium? Another factor to consider is the public's need for the copyrighted information. According to Fowler, "When the public need for certain information is deemed more important than the imaginative contribution

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<sup>92</sup> Duke Office of Information Technology, "What to Do About Your p2p Application," Duke University. [web page]. Available from < <http://www.oit.duke.edu/comp-print/filesharing/steps.html>>. Accessed 14 April 2009.

<sup>93</sup> Congress, *Copyright Act of 1976*, U.S. Code 17, (1976) Public Law No. 94-533, 90 Statutory 2541.

of the artist, the artist simply loses.”<sup>94</sup> The Copyright Act does not specify how to define exactly what the public need is or how to scale these two competing interests, but since technology has rendered the situation outside of all control, perhaps the most just option remaining would be to redefine what copyright means in the digital age and provide an umbrella-type solution such as that of the Isle of Man. This would change how the music industry functions on the most fundamental level, but with a technological development as radical as the Internet, the music industry may be the first of many trades to change their practices dramatically in response.

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<sup>94</sup> Fowler, 20.

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