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Michigan Computer Lawyer is published bi-monthly. If you have an article you would like considered for publication, send a copy to:

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Message from the Chair

This is the last paper issue of the Computer Law Section Newsletter. In effort to save money, we recently voted to publish the journal electronically. It costs a dollar per copy to print and mail the journal, making that one of the largest expenses of the section.

OPT OUT

Some members have asked to continue to receive paper copies. After consulting with the State Bar, which prints and mails them, we are pleased to offer members the ability to “opt out” of receiving the copies electronically.

SECTION LISTSERV

We also do not have current e-mail addresses for all section members. If you have not been receiving electronic notice of the Section meetings, and other topics of interest, then you are not on the Section list-serv. If you do not contact us by e-mail, then you will not receive future issues of this publication. To receive future issues, you will need to send us your e-mail address, even if you want to opt-out and receive a paper copy.

CONTACT INFORMATION

To (a) add or change your e-mail address, or to (b) opt out of receiving the Newsletter electronically, please send an e-mail to me, Fred Schuchman (sfesiii@aol.com); Bernie Lourim (bernie.lourim@fanucrobotics.com), or Matt Jakubowski (mjakubowski@brookskushman.com).

Message from the Editor

This issue of the newsletter is dedicated to the Spring Networking Luncheon, scheduled for May 20, 2004, noon, at the Livonia Marriott at Laurel Park Place. I want to thank Kimberly Paulson for her generous help in assembling the articles and information presented herein. You will find two articles that relate to the topic of discussion at the luncheon, e.g., Perspectives on Peer to Peer Music Sharing. Please note that the articles do not necessarily reflect the views or policies of the State Bar of Michigan or the Computer Law Section. Also included in the newsletter are short biographies of the speakers and a registration form. Please join us at the luncheon for an afternoon of networking and thought-provoking commentary.

—Matthew M. Jakubowski Editor

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The aim and purpose of the Michigan Computer Law Section of the State Bar of Michigan is to provide information relative to the field of computer law, and other information that the section believes to be of professional interest to the section members.

Unless otherwise stated, the views and opinions expressed in the Michigan Computer Lawyer are not necessarily those of the Computer Law Section, or the State Bar of Michigan.



A BETTER WAY FORWARD:

VOLUNTARY COLLECTIVE

LICENSING OF MUSIC FILE SHARING

“LET THE MUSIC PLAY” WHITE PAPER

By *Electronic Frontier Foundation*

The current battles surrounding peer-to-peer file sharing are a losing proposition for everyone. The record labels continue to face lackluster sales, while the tens of millions of American file sharers – American music fans – are made to feel like criminals. Every day the collateral damage mounts – privacy at risk, innovation stymied, economic growth suppressed, and a few unlucky individuals singled out for legal action by the recording industry. And the litigation campaign against music fans has not put a penny into the pockets of artists. *We need a better way forward.*

The Premises

First, artists and copyright holders deserve to be fairly compensated.

Second, file sharing is here to stay. Killing Napster only spawned more decentralized networks. Most evidence suggests that file sharing is at least as popular today as it was before the lawsuits began.

Third, the fans do a better job making music available than the labels. Apple’s iTunes Music Store brags about its inventory of over 500,000 songs. Sounds pretty good, until you realize that the fans have made millions of songs available on KaZaA. If the legal clouds were lifted, the peer-to-peer networks would quickly improve.

Fourth, any solution should minimize government intervention in favor of market forces.

The Proposal: Voluntary Collective Licensing

Electronic Frontier Foundation has spent the past year evaluating alternatives that get artists paid while making file sharing legal. One solution has emerged as the favorite: voluntary collective licensing.

The concept is simple: the music industry forms a collecting society, which then offers file-sharing music fans the opportunity to “get legit” in exchange for a reasonable regular payment, say \$5 per month. So long as they pay, the fans are free to keep doing what they are going to do anyway – share the music they love using whatever software they like on whatever computer platform they prefer – without fear of lawsuits. The money

collected gets divided among rights-holders based on the popularity of their music.

In exchange, file-sharing music fans will be free to download whatever they like, using whatever software works best for them. The more people share, the more money goes to rights-holders. The more competition in applications, the more rapid the innovation and improvement. The more freedom to fans to publish what they care about, the deeper the catalog.

The Precedent: Broadcast Radio *It has been done before.*

Voluntarily creating collecting societies like ASCAP, BMI and SESAC was how songwriters brought broadcast radio in from the copyright cold in the first half of the twentieth century.

Songwriters originally viewed radio exactly the way the music industry today views KaZaA users – as pirates. After trying to sue radio out of existence, the songwriters ultimately got together to form ASCAP (and later BMI and SESAC). Radio stations interested in broadcasting music stepped up, paid a fee, and in return got to play whatever music they liked, using whatever equipment worked best. Today, the performing-rights societies ASCAP and BMI collect money and pay out millions annually to their artists. Even though these collecting societies get a fair bit of criticism, there's no question that the system that has evolved for radio is preferable to one based on trying to sue radio out of existence one broadcaster at a time.

Copyright lawyers call this voluntary collective licensing. The same could happen today for file sharing: Copyright holders could get together to offer their music in an easy-to-pay, all-you-can-eat set. We could get there without the need for changes to copyright law and with minimal government intervention.

The Money: Collecting It

Starting with just the 60 million Americans who have been using file-sharing software, \$5 a month would net over \$3 billion of pure profit annually to the music industry – no CDs to ship, no online retailers to cut in on the deal, no payola to radio conglomerates, no percentage to KaZaA or anyone else. Best of all, it's an evergreen revenue stream – money that just keeps coming, during good times and bad, so long as fans want digital music online. The pie grows with the growth of music sharing on the Internet, instead of shrinking. The total annual gross revenues of the music industry today are estimated at \$11 billion. But that's

gross revenues. A collective licensing regime for file-sharing can promise \$3 billion in annual profits to the record labels – more than they've ever made.

How do we get filesharers to pay up? That's where the market comes in – those who today are under legal threat will have ample incentive to opt for a simple \$5 per month fee. There should be as many mechanisms for payment as the market will support. Some fans could buy it directly through a website (after all, this was what the RIAA had in mind with its “amnesty” program). ISPs could bundle the fee into their price of their broadband services for customers who are interested in music downloading. After all, ISPs would love to be able to advertise a broadband package that includes “downloads of all the music you want.” Universities could make it part of the cost of providing network services to students. P2P file-sharing software vendors could bundle the fee into a subscription model for their software, which would neatly remove the cloud of legal uncertainty that has inhibited investment in the P2P software field.

The Money: Dividing It Up

The money collected would then be divided between artists and rights-holders based on the relative popularity of their music. Figuring out what is popular can be accomplished through a mix of anonymously monitoring what people are sharing (something companies like Big Champagne and BayTSP are already doing) and recruiting volunteers to serve as the digital music equivalent of Nielsen families. Billions in television advertising dollars are divided up today using systems like this. In a digital environment, a mix of these approaches should strike the right balance between preserving privacy and accurately estimating popularity.

The Advantages

The advantages of this approach are clear: Artists and rights-holders get paid. What's more, the more broadband grows, the more they get paid, which means that the entertainment industry's powerful lobby will be working for a big, open, and innovative Internet, instead of against it.

Government intervention is kept to a minimum: copyright law need not be amended, and the collecting society sets its own prices. The \$5 per month figure is a suggestion, not a mandate. At the same time, the market will keep the price reasonable – collecting societies make

more money with a palatable price and a larger base of subscribers, than with a higher price and expensive enforcement efforts. Broadband deployment gets a real boost as the “killer app” – music file sharing -- is made legitimate. Investment dollars pour into the now-legitimized market for digital music file-sharing software and services. Rather than being limited to a handful of “authorized services” like Apple’s iTunes and Napster 2.0, you’ll see a marketplace filled with competing file-sharing applications and ancillary services. So long as the individual fans are licensed, technology companies can stop worrying about the impossible maze of licensing and instead focus on providing fans with the most attractive products and services in a competitive marketplace.

Music fans finally have completely legal access to the unlimited selection of music that the file-sharing networks have provided since Napster. With the cloud of litigation and “spoofing” eliminated, these networks will rapidly improve.

The distribution bottleneck that has limited the opportunities of independent artists will be eliminated. Artists can choose any road to online popularity, – including, but no longer limited to, a major label contract. So long as their songs are being shared among fans, they will be paid.

Payment will come only from those who are interested in downloading music, only so long as they are interested in downloading.

How Does This Help Artists?

Artists benefit in at least three ways. First, artists will now be paid for the file sharing that has become a fact of digital life.

Second, independent artists no longer need a record deal with a major label to reach large numbers of potential fans – so long as you have any fans who are sharing your music online, others will be able to access your music on equal footing with major label content. In other words, digital distribution will be equally available to all artists.

Third, when it comes to promotion, artists will be able to use any mechanism they like, rather than having to rely on major labels to push radio play. Anything that makes your works popular among file sharers gets you paid. There would still be a role for the record industry – many artists will still want help with promotion, talent development, and other supportive services. With more options for artists to choose from, the contracts

will be more balanced than the one-sided deals offered to most artists today.

What About Antitrust?

Because a collective licensing solution will depend on a single collecting society issuing blanket licenses covering all (or nearly all) music copyrights, there will need to be some antitrust regulation of the collecting society to ensure that it does not abuse its market power. Both ASCAP and BMI, for example, have been subject to a court-administered antitrust consent decree for many decades. The regulation need not be extensive, as the collecting society will essentially be selling only a single product at a single price to all comers. Regulators will keep a close eye on the collecting society to make sure that it deals fairly with artists and copyright holders, most of whom will rely on the collecting society for compensation for noncommercial filesharing.

How Do We Ensure Accurate Division of the Money?

Transparency will be critical – the collecting society must hold its books open for artists, copyright holders, and the public to examine. The entity should be a nonprofit, and should strive to keep its administrative costs to a minimum. There are examples of similar collecting societies in the music industry, such as ASCAP and SoundExchange. We should learn from, and improve upon, their example. Giving artists a bigger voice should help ensure that their concerns with the current collecting societies are addressed.

When it comes to actually figuring out relative popularity, we need to balance the desire for perfect “census-like” accuracy with the need to preserve privacy. A system based on sampling strikes a good balance between these goals. On the one hand, in a public P2P network, it is relatively easy to find out what people are sharing. Big Champagne already does this, compiling a “Top 10” for the P2P networks. This kind of monitoring does not compromise user privacy, since this monitoring does not tie songs shared to individually identifiable information. At the same time, this general network monitoring can be complemented by closer monitoring of volunteers who will serve as the “Nielsen families” of P2P.

By combining these two methods, it should be possible to attain a high degree of accuracy, protect privacy, and prevent “cheating.” What if the music industry won’t do it? The music industry is still a long

way from admitting that its existing business models are obsolete. But the current effort to sue millions of American music fans into submission is destined to fail. After a few more quarters of lackluster sales, with file-sharing networks still going strong and “authorized services” failing to make up for sliding revenues, the music industry will be needing a “Plan B.” We hope they will see that voluntary collective licensing is the best way forward.

If, instead, they continue their war against the Internet and continue inflicting collateral damage on privacy, innovation and music fans, then it may be time for Congress to take steps to force their hand. Congress can enact a “compulsory license” and create a collecting society to move us toward a sensible solution. Government involvement, however, should be a last resort – the music industry has the power to implement a sensible, more flexible solution right now.

What About Artists Who Won't Join? How Do We Gather All the Rights?

Artists and rights-holders would have the choice to join the collecting society, and thereby collect their portion of the fees collected, or to remain outside the society and have no practical way to receive compensation for the file sharing that will inevitably continue. Assuming a critical mass of major music copyright owners joins the collecting society, the vast majority of smaller copyright owners will have a strong incentive to join, just as virtually all professional songwriters opt to join ASCAP, BMI or SESAC.

The complexity of music industry contracts and history make it very difficult for record labels and music publishers to be sure what rights they control. Accordingly, by joining the collecting society, copyright owners will not be asked to itemize rights, but will instead simply covenant not to sue those who pay the blanket license fee. In this way, music fans and innovators are not held back by the internal contractual squabbles that plague the music industry.

What About File Sharers Who Won't Pay?

The vast majority of file sharers are willing to pay a reasonable fee for the freedom to download whatever they like, using whatever software suits them. In addition to those who would opt to take a license if given the opportunity, many more will likely have

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STATE BAR OF MICHIGAN

COMPUTER LAW SECTION'S

ANNUAL SPRING NETWORKING LUNCHEON

MAY 20, 2004, NOON

*“The Day the On-line Music Died
– Perspectives on P2P music sharing,
the lawsuits, and those caught in the
middle.”*

A distinguished panel consisting of Howard Hertz, of Hertz, Schram & Saretsky, Cindy Cohn, of the Electronic Frontier Foundation, Jack Bernard, of the University of Michigan, and Moderator, Gary Graff, a music industry writer, will present divergent perspectives on the ongoing legal battles over P2P sharing of copyrighted music, including offering advice for avoiding liability and resolving current disputes.

Complete Information & Registration
on page 6.

YOU ARE INVITED TO

STATE BAR OF MICHIGAN COMPUTER LAW SECTION'S ANNUAL SPRING NETWORKING LUNCHEON

MAY 20, 2004, NOON
(REGISTRATION BEGINS AT 11:30 A.M.)

LIVONIA MARRIOTT AT LAUREL PARK PLACE
17100 LAUREL PARK DRIVE
LIVONIA, MICHIGAN

THIS YEAR'S TOPIC IS:

“The Day the On-line Music Died – Perspectives on P2P music sharing, the lawsuits, and those caught in the middle.”

A distinguished panel consisting of Howard Hertz, of Hertz, Schram & Saretsky, Cindy Cohn, of the Electronic Frontier Foundation, Jack Bernard, of the University of Michigan, and Moderator, Gary Graff, a music industry writer, will present divergent perspectives on the ongoing legal battles over P2P sharing of copyrighted music, including offering advice for avoiding liability and resolving current disputes.

To register for this luncheon, complete the form below and send with a check to the State Bar of Michigan, Attn: Seminar Registration, 306 Townsend St., Lansing, MI 48933, or fax (only if paying with credit card) to (517) 367-6433. Payment must be received before your place will be reserved. Deadline for registration is May 7.

If you have any questions, contact Kimberly Paulson at paulson@millercanfield.com.

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Please check one ONLY if you require a special meal: Kosher Vegetarian

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DISTINGUISHED PANELISTS FOR SPRING LUNCHEON



Cindy Cohn
Electronic Frontier
Foundation

Cindy Cohn is the Legal Director for the Electronic Frontier Foundation, where she is responsible for overseeing the EFF's overall legal strategy. A graduate of the University of Michigan Law School, Ms. Cohn has been with the EFF since 1995. She has been directly involved in legal action opposing the RIAA's subpoenas to identify alleged on-line infringers, including leading a coalition of 44 amici. Ms. Cohn has testified before Congress, been interviewed and quoted by numerous publications and news shows, and named one of the "Lawyers of the Year" by California Lawyer magazine.



Howard Hertz
Hertz, Schram & Saretsky

Howard Hertz specializes in entertainment law and is the lead attorney in the Entertainment Practice Group of Hertz, Schram & Saretsky. Since receiving his law degree from Wayne State Law School in 1976, Mr. Hertz has represented numerous artists and entities in the music industry, including George Clinton, The Romantics, Eminem, Marilyn Manson, Jack White, CDNow and Atlantic Records. Mr. Hertz is a member of the Board of Directors and President of the Motor City Music Foundation, a member and former chairperson of the Arts, Communications, Entertainment and Sports Section of the State Bar of Michigan, counsel to and a member of the Board of Directors of ArtServe Michigan, and a speaker and member of the National Association of Recording Arts & Sciences. Mr. Hertz has participated on panels and lectured on various entertainment-related topics for numerous organizations and schools.



Jack Bernard
University of Michigan

Jack Bernard is Assistant General Counsel at the University of Michigan. His primary practice areas are intellectual property, computer and cyber law, student matters, privacy, security, and media law. Of late, he has dedicated significant time to issues raised by P2P file-sharing both on his campus and others. He currently teaches a course entitled Intellectual Property and Information Law. He is a graduate of the University of Michigan Law School and is currently finishing a Ph.D. in the field of Higher Education at the University of Michigan, where he has been a Spencer Fellow with the National Center for Postsecondary Improvement.



Gary Graff
Music Journalist

Gary Graff is an award-winning music journalist based in suburban Detroit. He regularly contributes to the New York Times Features Syndicate, UPI, Launch Radio Networks, the Cleveland Plain Dealer, the Oakland Press, Billboard.com, Guitar World, Revolver, Music Connection, Red Flag media and other publications. His "Classic Rock Insider" reports are heard weekly on Detroit's WCSX-FM (94.7), and he does a weekly music news report for WLZR-FM in Milwaukee. A co-producer of the annual Detroit Music Awards, he is the founding editor for the MusicHound Essential Album Guide series and is currently working on a Bruce Springsteen reference book.



EXCERPTS OF AUGUST 14, 2003 RIAA LETTER TO THE CHAIRMAN OF THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

...The decision to enforce our rights against egregious infringers was taken only after suffering years of mounting harm. The music industry first tried to use an aggressive public education campaign to discourage the unauthorized distribution of recordings, by explaining to the public that online piracy is not only illegal, but robs songwriters and recording artists of their livelihoods, stifles the careers of up-and-coming musicians, and threatens the jobs of tens of thousands of less celebrated people in the music industry. The music industry also pursued lawsuits against the peer-to-peer systems, which are knowingly facilitating the illegal distribution of copyrighted recordings on a massive scale. Most important, the music industry has aggressively licensed legitimate online music services to offer legal alternatives to consumers. Only after these steps did not stem the tidal wave of illegal conduct has RIAA resorted to its current course, pursuing the users of peer-to-peer networks who are distributing substantial amounts of unauthorized copies of recordings. And there is one point on which all of the courts have agreed: these users are violating the copyright laws. Our heightened enforcement efforts are deliberately occurring now: when, as a result of the music industry's extensive educational efforts, the public is more aware than ever before of the illegality and consequences of online piracy and, at the same time, the number of legitimate online music sources is exploding, giving music lovers a multitude of options for legally obtaining music online.

The Piracy Problem Facing the Music Industry

In the past three years, shipments of recorded music in the United States have fallen by an astounding 26 percent, from 1.16 billion units in 1999 to 860 million units in 2002. And worldwide, the recording industry has shrunk from a \$40 billion industry in 2000 down to a \$32 billion industry in 2002. Hit records

– which are critical to the long-term health of the music industry and enable investment in new artists and new music – have suffered most dramatically. In 2000, the ten top-selling albums in the United States sold a total of 60 million units. In 2001, that number dropped to 40 million. Last year, it totaled just 34 million.

The root cause for this drastic decline in record sales is the astronomical rate of music piracy on the Internet. Computer users illegally download more than 2.6 billion copyrighted files (mostly recordings) every month. At any given moment, well over five million users are online offering well over 1 billion files for copying through various peer-to-peer networks. Peer-to-peer networks allow a user to make media files, including recordings, stored on that user's computer available for copying by others; to search for media files stored on other users' computers; and to transfer exact copies of the contents of other users' media files to that user's own computer. A song can be copied and distributed in this manner an unlimited number of times, without any degradation in sound quality. And unlike traditional music piracy, piracy through networks is viral: unless the user takes affirmative steps to prevent it, the user automatically and immediately begins offering the files that the user copied to millions of other users. Moreover, the overwhelming majority of the distribution that occurs on peer-to-peer networks is unauthorized.

It is widely recognized and acknowledged that individuals who engage in such unauthorized distribution – either by making recordings available for others to copy or by making copies of others' files – are committing a clear violation of the copyright laws. The courts have been unanimous on this point. As the Ninth Circuit explained in the Napster case, “a majority of Napster users use the service to download and upload copyrighted music. . . . And by doing that, . . . the uses constitute direct infringement of plaintiffs’

musical compositions, recordings.” Judge Wilson quoted this language in the recent *Grokster* case, and similarly recognized that many *Grokster* and *Streamcast* users were downloading copyrighted music, “thereby infring[ing] [copyright owners’] rights of reproduction and distribution.” Most recently, in a case involving *Aimster*, Judge Posner of the Seventh Circuit noted that *Aimster* users who were distributing or making copies of copyrighted music were copyright infringers, and that there was no evidence in the record before him that *Aimster* “has ever been used for a noninfringing use.”

According to a November 2002 survey by Peter D. Hart Research, by a nearly 2-to-1 margin, consumers who say they are illegally downloading more music report that they are purchasing less music. The same survey found that the main reason consumers are not buying more music is that they get a lot of what they want for free by illegally downloading or copying it from others. In a similar study conducted in May 2002 by Peter D. Hart Research, among 12- to 18-year-olds, 35 percent say the first thing they will do after hearing a new song that they like is download it, versus just 10 percent who will buy it. Among 19- to 24-year-olds, 32 percent download the new song first, versus 9 percent who will buy it.

These findings are bolstered by a June 2003 Edison Media Research report which found that “among the heaviest downloaders, 48% say they no longer have to buy CDs because they could download music for free over the Internet” – an increase of 61 percent in just one year. It is thus not surprising that, while sales of music CDs are dropping, sales of blank CDs (onto which downloaded recordings can be copied) have increased dramatically, by more than 30 percent in 2002. Sales of blank CDs now outstrip sales of music CDs by a more than 2-to-1 margin.

These findings are consistent with the skyrocketing number of users of peer-to-peer networks. As of July 2002, *KaZaA* – the most popular peer-to-peer network by far – boasted 100 million registered users. By May 2003, *KaZaA* had become the world’s most downloaded software program of any kind, with 230.3 million downloads.

Although these peer-to-peer networks are well aware of the rampant illegal copying that occurs over their systems, they have taken no concrete steps to stop it, and in fact, they encourage and enable that

conduct, while at the same time taking steps to shield themselves from liability. They provide no meaningful warning to their users that uploading or downloading copyrighted recordings violates the law. They provide no filter to prevent exchange of copyrighted material, even though many provide filters that at least attempt to block pornography and viruses. And the peer-to-peer networks establish “default” settings that, unless affirmatively changed by the user, automatically make the files on the user’s hard drive available for copying by anyone else on the network. As Judge Wilson observed in the movie and music industries’ case against *Grokster*, *Streamcast*, and *KaZaA*, these peer-to-peer networks “may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares.” Indeed, *KaZaA* has established itself in the country of Vanuatu, while the illegal activities on its network are causing the loss of numerous jobs in the music industry in the United States.

The Availability of Legal Online Music

The widespread availability of free illegal copies to download through these peer-to-peer networks has greatly interfered with the development of legitimate online sources of music. But music lovers need not break the law to obtain their favorite music online. The music industry continues to respond to consumer demand by making its music available to a wide range of authorized online subscription, streaming, and download services that make it easier than ever for fans to get music legally on the Internet. There are now many legal and inexpensive ways to get music online. In the United States market alone, there are dozens of excellent legitimate online services that offer a variety of choices to enjoy and purchase online music. Indeed, the number of legitimate online sources of music is continuing to increase. Additional major retailers and software companies – including companies that are household names – plan to enter the online market within the next six months.

The Music Industry’s Massive Educational Campaign

The music industry has, for a number of years, undertaken a massive campaign to educate consumers regarding the illegality of the unauthorized distribution of copyrighted music online. Recording industry leaders, along with an unprecedented coalition of other

groups like the National Music Publishers' Association, the Country Music Association, the Gospel Music Association, the American Federation of Television and Radio Artists, American Federation of Musicians, ASCAP, BMI, SESAC, the Songwriters Guild of America, Nashville Songwriters Association International, National Association of Recording Merchandisers, and many others, as well as individual songwriters, recording artists, retailers, and record companies have been educating music fans that the epidemic of illegal distribution of music not only robs songwriters and recording artists of their livelihoods, but also undermines the future of music itself by depriving the industry of the resources it needs to find and develop new talent. In addition, it threatens the jobs of tens of thousands of less celebrated people in the music industry, from engineers and technicians to warehouse workers and record store clerks.

The message of this campaign has been very clear: copying or distributing copyrighted music over the Internet without permission is stealing, plain and simple. Downloading illegal copies is no different than shoplifting CDs out of a record store, and uploading those recordings for others to illegally copy is no different than handing out stolen CDs on the street corner – and the act of downloading or uploading music on peer-to-peer networks is not an anonymous one. This message has been conveyed to the public in a series of print and broadcast ads featuring more than a hundred major artists and songwriters who ask their fans to stop stealing their music. These ads have appeared in a wide variety of outlets, including USA Today, BET, and MTV. The Grammy award-winning artists participating in this campaign range from country artists Brooks & Dunn and Martina McBride to rock artist Peter Dinklage to Christian artist Steven Curtis Chapman to opera star Luciano Pavarotti to hip hop artists DMX and Missy Elliot to legends Stevie Wonder, Brian Wilson, Don Henley and Elton John, among many others. Other participants include songwriters, session musicians, and retail store owners discussing the impact of music piracy in terms of lost sales, lost jobs, and closed stores.

This antipiracy message is also featured on a music industry website, www.musicunited.org, which contains a number of clips from this educational campaign. The website also includes a wide array of pertinent information, including a description of the governing

law, a list of legal online music sources, a guide for parents, as well as step-by-step instructions on how to disable or uninstall peer-to-peer software used to illegally offer music for copying.

Since April 2003, RIAA has been sending Instant Messages – and has now sent well over 4 million – directly to infringers on peer-to-peer networks. These messages inform infringers that their actions are illegal and direct them to the Music United website (www.musicunited.org) for information on how they can avoid breaking the law. While some users are responding to RIAA's messages by ceasing their illegal conduct, others have chosen to react by questioning RIAA's enforcement campaign rather than their own conduct. KaZaA, far from cooperating with this attempt to educate its users about the law, reconfigured the newest version of its software to disable the instant messaging system, thereby preventing RIAA from sending messages to KaZaA's newest users. KaZaA did not, however, change its "default" settings, which, as noted above, automatically make each user's files available for copying by others.

Moreover, prior to beginning our efforts to collect information on substantial infringers, RIAA publicly announced its intent to do so, giving infringers another opportunity to discontinue their illegal conduct. Since that announcement, virtually every major newspaper and television news channel, and hundreds of local news outlets, has covered RIAA's heightened enforcement efforts.

...No industry likes to be in the position of suing those it hopes to convert to paying customers. But education alone has not worked, and we are faced with a massive problem that threatens not only the industry and everyone who works in it, but the very future of music itself. Just like any retailer who pursues those who shoplift merchandise from their stores, the music industry is simply enforcing its property rights against those who are stealing its music. And our efforts are having an effect. The same day we brought suits against several college students who had set up and were running the unlicensed peer-to-peer systems on their college networks, many other students voluntarily shut down their similar networks on other campuses. We recognize that we cannot eradicate all illegal online copying – just as brick-and-mortar stores cannot prevent all shoplifting – yet we hope to create an environment where legitimate services can and will flourish.

“Let the Music Play”...

Continued from page 5.

their license fees paid by intermediaries, like ISPs, universities, and software vendors.

So long as the fee is reasonable, effectively invisible to fans, and does not restrict their freedom, the vast majority of file sharers will opt to pay rather than engage in complex evasion efforts. So long as “free-riding” can be limited to a relatively small percentage of file sharers, it should not pose a serious risk to a collective licensing system. After all, today artists and copyright owners are paid nothing for file sharing. It should be easy to do much better than that with a collective licensing system. Copyright holders (and perhaps the collecting society itself) would continue to be entitled to enforce their rights against “free-loaders.” Instead of threatening them with ruinous damages, however, the collecting society can offer stragglers the opportunity to pay a fine and get legal. This is exactly what collecting societies like ASCAP do today.

What About Other Countries?

Non-U.S. rights-holders would, of course, be welcome to join the collecting society for their fair share of the fees collected from American file sharers. As for file sharers in other countries, there is every reason to believe that if a collective licensing approach is successful in the U.S., it will receive a warm welcome and enthusiastic imitation abroad.

A relatively small number of countries today account for almost all of the revenues of the music industry. So establishing a collective licensing system in just a few countries could turn around the downward spiral in music industry revenues. The music industry already has an international “clearing” system for apportioning payments between countries.

What About The Authorized Music Services?

The “authorized music services” like Apple’s iTunes and Napster 2.0 would be free to compete against the P2P services, just as they do today. In addition, they could themselves adopt elements of P2P architectures, thereby dramatically expanding the music inventories they could offer music fans.

What’s to Stop the Music Industry from Charging Sky-high Fees?

The enforcement costs faced by a collecting society for file sharing will keep prices in line. After all, if the society attempts to charge too much, intermediaries won’t be able to bundle the fees into the cost of their products (\$5/mo. license on a \$50/mo. broadband account makes sense; trying to tack \$100/mo. license, in contrast, won’t work) and file sharers will likely rebel in droves. For example, when movie studios charged \$90 for a VHS movie, they faced widespread piracy. They learned that, by lowering prices, they made more money and eliminated much of the piracy problem. In other words, reasonable pricing makes the system work for everyone.

What about movies, software, video games, and other digital content?

The music industry is the only industry that appears to be unable to adjust their business models to take file sharing into account. And it is the music industry that has been leading the way in suing ISPs, software companies, and individual music fans.

The movie industry, in contrast, is having its most profitable years in history. The software and video game industries also continue to show strong growth and profitability. Each one of these industries has taken steps to adapt their business models to the realities of file sharing.

Of course, if other industries want to form voluntary collecting societies and offer blanket licenses to file sharers, there is nothing to stop them from doing so. Individuals would then be free to purchase the license if they were interested in downloading these materials from the file-sharing networks.

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