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Taking the Pirate Out of Piracy

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Abstract

In this paper, the author traces the history of music piracy back to the pre-digital era. It shows the development of technology and how laws have had to change over time as a reaction to changes in music technology, as well as predicts what the future of digital piracy and legislation might be.

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As time goes on, there will always be crime. No matter how many benefits are given, how low prices drop, or how convenient it is to follow laws, there will always be people who choose to break the laws set by governments for one reason or another. Some criminals do it for profit, others for personal convenience, and some even do it for sport. Whatever the reason, crimes will always occur. As technology develops and changes, new definitions of crime must be defined and policed. People will always find a way to break a current rule with a new or changed tool. The internet is the greatest example of a tool that changed the face of crime and spawned many new issues of policy, many of which have gone all the way to the Supreme Court. The biggest and most famous example of Internet crime that has changed and developed over time is music file sharing. File sharing is the broadest crime ever committed in the history of the United States. It is committed by members of every race, able age group, economic level, religious sect, and political party in the United States. Every day millions of songs are illegally obtained by men and women alike. The Recording Industry Association of America (RIAA) has prosecuted normal everyday consumers, including minors, for thousands of dollars, and yet the crime continues. File sharing has gone on so rampantly and for so long that the RIAA is starting to lose hope. When looking at the history of music distribution and the course that the United States is taking to address the issue, it can be predicted that file sharing will eventually become legalized.

Music piracy did not start with the Internet. The music industry has been claiming theft of their content since the early 1900s. Ironically, the first “pirates” included the recording industry itself. Artists of the time complained that the recording industry was ignoring their copyrights on

sheet music, the original medium for storing songs. Artists complained that inventions such as the gramophone, player piano, and other audio recording and playing devices would stifle creativity and steal profits from the artists (Goldsmith 113). This is one of the earliest examples of new technology improving the distribution of music and undercutting the contemporary distribution powers. Eventually the courts ruled in favor of recording technology and that became the new legal power of music distribution. Today, the music distribution power is the RIAA. The RIAA's entire music empire is based on a market that was once known as piracy itself. Just as the recording industry replaced the sheet music system in distribution through the creation of new technology, the computer spawned a new technology that seems to be replacing the recording industry.

File sharing did not start with the Internet. It started with the recording industry's own creations, namely CDs. The creation of songs in digital format was an extremely convenient technological development, as it made it very inexpensive for the recording industry to mass-produce albums on a medium that costs close to nothing and in a format that is fast and easy to use. At the same time, the format maintained the music's quality and only cost the public \$20 a CD. A digital copy is convenient because it maintains the same quality as the original (Lessig 46). When CDs were first released, it was impossible for the public to copy them; computers were not yet able to rip audio files from CDs. The only way to copy them was to record them onto analog tapes, which did occur, but not in a high enough volume to affect the industry. The loss of quality in tapes protected sales. Eventually the code was cracked and regular consumers would be able to rip and burn CDs. At first, this could only be done as exact copies, but as technology has advanced, people can rip full albums into their computers and then copy only the tracks they want. Congress initially worked to protect the music industry by limiting the number

of copies a person could make by putting limits on the technology. Nonetheless, this could not last too long, because someone always cracks the code (Lessig 46-47). With the invention and development of the internet, digital piracy finally reached a level that the RIAA no longer felt it could accept.

The biggest means of digital piracy is file sharing. When the internet was first created, this was impossible to do. In addition to the fact that it was not yet possible to rip music files from CDs, the Internet's bandwidth, connection speed and stability was not yet strong enough either. One thing about the Internet and piracy that was true from the beginning, however, was the knowledge that file sharing would eventually occur. The Internet was not built for commerce, but rather the free exchange of ideas for research purposes. It was invented by members of universities as a means to freely share ideas. Commerce was not even allowed on the internet until 1991 (Lessig 39). At its beginning, the internet was terrible at hiding and protecting information. Files could easily be stolen and intercepted just like knowledge in general. It was obvious that such a medium would eventually be used for freely distributing copyrighted material.

File sharing, in the sense that it is used today, began in the late 1990s by a college student named Shawn Fanning. He created a program that was able to amass all of the songs located on the hard drives of fellow students, allowing people to quickly search through that collection and download songs to their own hard drives (Goldsmith 107). Napster was programmed to be centralized and organized in a fast and efficient way. This program took off and within months, thousands of people were pirating music. The Supreme Court finally shut down Napster in 2001, arguing that the program did too much to help people download music illegally. By this time, millions of students were file sharing, and they were not willing to give up their access to free

music even if they had to give up Napster. A number of replacements were created, which individuals migrated to in rapid succession. Through the mixture of many different file sharing programs and ideas, a piracy solution had finally been found. In 2001, Kazaa was released. This was a digital pirate's haven. It had the ability to share everything from music to movies. Even books were shared through this program. Instead of using a centralized computer, Kazaa chooses computers in different areas to act as hubs for that general location. This made the software much faster, useful, and harder to find for the RIAA to prosecute. By 2004, Kazaa was downloaded more times than any other program in history (Goldsmith 109). Kazaa, like most technologies that offend big business, was eventually beaten. This did not happen in court as with Napster and many of its copies, but slowly and indirectly one step at a time. Kazaa actually won in court, but the consumers did not. Once the RIAA realized they could not stop Kazaa through litigation, they snuffed its user base. The RIAA began prosecuting users for thousands of dollars as punishment for illegal file sharing. "By June 2005, the industry had sued nearly twelve thousand Americans" (Goldsmith 115). This was also the same year that the Supreme Court changed the ruling of the lower courts and ruled all file sharing firms illegal (Goldsmith 121). The reason for these lawsuits was not to try and catch every music pirate, just to scare down the numbers, which it did. No one was left safe from the onslaught of litigation. Students, children, parents, and every other type of person could be sued for file sharing. The prospect of a heavy lawsuit bill stopped many people from using the software. Ultimately, the lawsuits did not stop all people from file sharing, but they did make them angry. In response to the lawsuits, new file sharing programs were created through a system called Torrenting. It is much faster than Kazaa and uses layers of encryption and anonymity to protect its users' identities from being discovered

(Goldsmith 123). This also makes sharing more difficult for the users as well, but it does not stop them.

The real problem with the file sharing debate is the structure of the argument. When file sharing is discussed in most circles, including the courts, it is always stated as a battle between only two groups. The recording industry as represented by the RIAA and the consumers who want music, but do not necessarily feel the need to pay for it. This is not an accident. The RIAA is a conglomerate of the five most powerful recording labels. These firms are Sony, EMI, UMG, Time Warner, & BMG (Stop). The RIAA is their lobby super power. If it were not for the fact that many other people involved with members of Congress or the members themselves were not pirating music themselves, file sharing and anything pertaining to or helping it occur would have probably already been hunted down and destroyed. The RIAA keeps the division of parties involved limited to these two entities because it knows that the consumers have the least amount of lobbying power. If other powers were allowed to get involved, the RIAA knows that it would lose some footing and have to allow piracy that much more. The language used is carefully thought out and organized to allow as little liberty and assistance to the consumer as possible. The truth is that there are many more parties involved than just these two. The artists are the most obvious example. There are also digital/online record labels that are not involved with the RIAA and other music distribution entities such as radio and digital music player corporations like Microsoft and Apple.

Just like in all forms of commerce, there are many intermediaries that need to be discussed when talking about digital music, the artists first and foremost. The RIAA only has the power it does because it owns the biggest music artists and stands to lose the most. For the most part, artists do not make that much from the recording industry. Through the use of stronger

powers of the attorney and classic structure, most new artists are given close to nothing for their albums. They make most of their money on live performances, memorabilia, and endorsements. Only the most famous names that have been in the business long enough to make demands of the industry really make any money. Within the last few years, artists have stopped signing with the RIAA and have started to do business with digital record labels. “In 2007 RIAA released, according to their statistics, only 1,773 CDs, while Napster in four months of 2000 signed contracts with nearly 18,000 artists and bands” (Stop). The stores are also an important intermediary in the file sharing debate. There are only two widely used ways of legally obtaining and owning music. A person can either go to a store, such as Wal-Mart, and purchase a CD, or he can go to an online music catalogue, such as Apple’s iTunes or Microsoft’s Zune Marketplace, and purchase music through their systems. Most people do not buy CDs anymore not only because of file sharing, but also because the ability to purchase songs one by one from the massive collections of legal online music catalogues which are easily transferred to a portable mp3 player, the current leading technology in personal music use (Protalinski). The RIAA keeps these intermediaries out of the legal equation as much as possible so that they can continue selling CDs at full price. The Association does not like iTunes and other such legal online music intermediaries. It simply struck a deal out of exhaustion and realization that times have changed and CDs are no longer the music medium of choice.

The big question is why is the RIAA allowed to sue consumers for file sharing? The laws actually do not prohibit file sharing technology, only the sharing of copyrighted content. What this essentially means is that any files that are not copyrighted can be shared and the software that does it does not actually matter. The only reason the RIAA was even able to go after Napster and Kazaa was that these mediums were created with the idea of music sharing at the forefront

and because digital music is the most widely shared file type. The software itself actually does not break any laws. There are plenty of files shared over the internet that do not have copyrights such as private videos, pictures, and the songs of amateur artists. The RIAA was able to sue consumers because they were the ones actually illegally sharing copyrighted music. Is this policy of suing consumers really effective though? It turns out that many people who were called to court for illegal file sharing ignored their subpoenas. The ironic thing is that the amount of traffic of such trials is so high, that the federal judge presiding over many of the case passed out default judgments for people who did not show up. These judgments consisted of fines of \$7,500. This is still an arbitrarily high amount, but it is nothing compared to what many people who have attended the trials end up paying, especially when including their own legal bills in the equation (Anderson, Ignoring). This just shows how far the RIAA's claims against illegal file sharing have fallen.

An issue that has never really come up until recently is the following question: is what the RIAA doing to consumers legal? Of course the suing of people for copyright infringement is legal. That is the point of the copyright system. It is also legal to sue people for theft of content, as long as file sharing is defined as theft. The RIAA is not necessarily all that innocent though. There are many issues that have never been asked or answered within this debate about the RIAA's lawsuits to consumers. How much do the RIAA's lawyers make? Why are sharing settlements now averaged to a specific fine of about \$5000 without taking into account the amount of shared content? Where does all of this money go and why do certain people get sued and others not? It turns out that not every person the RIAA has sued was guilty of file sharing. One woman, Tanya Andersen, finally stood up and countersued the RIAA for such a wrongful allegation against herself. She is holding the RIAA guilty for a long list of infractions (RICO

violations, fraud, invasion of privacy, abuse of process, electronic trespass, violation of the Computer Fraud and Abuse Act, negligent misrepresentation, the tort of ‘outrage,’ and deceptive business practices) (Buskirk). Of course the courts and the RIAA are making it very difficult for Miss Andersen’s countersuit to go anywhere, but her lawyer is fighting and could get somewhere very important and world changing even if she does not win the case. If the case progresses further, the RIAA will be forced to release possibly incriminating information that answers many of the aforementioned questions. Additionally, depending on those answers could lead to a class action suit against the recording industry (Buskirk).

Whether this Andersen’s lawsuit is successful or not, the RIAA has clearly been shaken. The RIAA recently made a deal with major Internet service providers that it hopes will gradually, yet drastically bring a halt to file sharing. The deal is completely voluntary on both parts, but it will have negative results on the users and causes the Internet Service Providers (ISPs) to hassle their customers. “The RIAA notifies ISPs about suspected infringement using IP addresses; the ISP then privately looks up its subscriber information and forwards a notice telling the person to stop” (Anderson, No more). The deal has no official backing and will not have the ISPs turning over user information to the RIAA. The punishments for the notified users have not yet been decided, but account suspension will be a potential punishment for continual users. There are some downsides to this deal for the consumer, but it will finally bring an end to the onslaught of lawsuits. Users will be given cease and desist notices before any real punishment is dealt, no Internet filtering will occur, and private information about users supposedly will not be handed to the RIAA (Anderson, No more). This may not be paradise, but it is a step in the direction for peace between the recording industry and the consumers.

It is important to see where online music and file sharing stands today as a means to help predict where it will go in the foreseeable future. As far as piracy goes, Torrenting is still very strong. It is a system based on complete anonymity and decentralized files, where people get their files directly from other users with those files. The system is able to tap multiple users at the same time, and it makes downloading shared files very fast. Files can also be downloaded in mass. Napster and Kazaa limited users to one file per a download. Torrenting allows multiple folders at the same time in one large download. A person can now download a whole album or collection of albums in one shot. Torrenting is used around the world and allows a person to get files in any language, definition, or file type they want as long as they can find someone else who already has it.

As for legal channels of digital music, there are a number of choices. Apple's iTunes is an online store that allows a person to purchase any song in the catalogue for just 99 cents. It has sold more than eight billion songs since its creation by Steve Jobs in 2002 (Goldsmith 119-121). The only problem with iTunes is that the music files and software are locked into an Apple specific format that limits what can be done with them. For the average user this is not a problem, because most people own an iPod anyway. The new alternative to iTunes is Microsoft's Zune Marketplace. This is a similar system that allows people to legally acquire music and many other types of digital content for the low price of just \$14.99 a month. There are no limits to how many songs one downloads, nor are there any extra costs. The same issue as with iTunes stands, which is that the file types are Zune-specific. Zune does allow ten songs per month to be kept in open file types, however. This fact and their comparative low price constitute their marketing ploy against iTunes, which currently leads the market in online music purchasing (Chartier).

There is also an ever-increasing number of means to enjoy digital music without paying such as online radio stations, like Pandora, and user run content sites, like YouTube. There are hundreds of different types of software that allow people to record or copy content straight from these legal sites that are completely untraceable and legal. If file sharing ends, it will not be because of the RIAA and other authorities forcing it, it will be because of the creation of new technologies that make the older process obsolete and inconvenient.

The future of file sharing and digital piracy in general is hard to precisely predict, but it is easy to see in general terms. No matter what laws are passed, piracy will always be possible unless the laws are based and enforced in every single part of every single Internet using area around the world. Location-based government will never be able to stop the Internet from benefitting consumers, because the internet is not limited to geography. If an online act is deemed criminal in one place, the intermediaries need only to move to another place where the activities are not illegal and the users will still be able to access it, because except for in places like China, the Internet is not censored for the most part (Lessig 54-55). Piracy is here to stay because governments will never have the funds and cooperation to police everybody everywhere. Piracy is also a necessary evil for many people. There are just some things that cannot be obtained through legal channels. Many things cannot be gotten in a certain place, even if they are legal. The only way around this is piracy, usually through file sharing. Many songs are not offered on iTunes or Zune because artists will not allow them to be or the music just was not deemed important enough to offer. Many consumers who see this as unfair will pirate the music or other content if they really want it, whether it is copyrighted or not.

In reality, file sharing or some form of it will eventually become legal on its own right. This will not be on account of consumers, but most likely because of businesses provide the

means. First, music cost \$20 per CD; next, it became about \$1 a song; and finally, it dropped to \$14.99 for as much as a person wanted. It is only a matter of time until someone offers all the music you want for less and another company does the same with no file restrictions on it. People will not need to illegally share files, because the prices will eventually drop so low that they will be free and unlimited and completely legal to take. Chances are that some new technology will be created that makes the current systems and mediums obsolete and this new system will be deemed piracy and then the cycle will repeat itself all over again.

Free music and other digital content already exist through legal everyday technology. If a person can go to YouTube or Pandora and hear virtually any song they want whenever they want on a portable device that has a high-speed Internet connection such as an iPhone, Blackberry, or many other types of portable devices including laptops themselves, then music does not need to be owned because it is at one's fingertips anyway. If a person wants to own the music, there are many legal means of recording or copying that legally heard music already. As the amount space available on smaller, more portable equipment emerges, people will be able to access larger and higher quality files wherever and whenever they want, free of charge. File sharing will no longer be used, because it will no longer be necessary. It will become legal, because it would be stupid to prosecute someone for doing it anyway, just as it is no longer illegal to record movies from television on a VCR, as long as you do not sell it to anyone else. File sharing will reach the same level of legality in the not too distant future.

Music piracy and file sharing in general are best summed up by this quote by David Johnson and David Post: The rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily, by any current

territorially based sovereign (Lessig 24). Following that quote should be another sentence stating: Digital crime is not outlawed for good, but only for a time, because crime becomes the legal norm and is replaced by a new crime which more convenient than its predecessor.

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