

## Section 1 – The Devil is In The Details

### Copyright Law and the Internet

The *Harvard Business Review* journal of August 1992, in an article entitled “The Parable of Leadership”<sup>i</sup>, retold a story of a prince being sent out into the forest on his own by his teacher, and told to report back to him all the things he heard. The young student recounted his experience, saying he heard the grass drinking in the morning dew, and the flowers opening. His sage nodded approvingly, and said that a great leader must learn to “hear the unheard” in order to be a successful one. The story highlighted the importance of paying attention to the intangibles of the world around us, for they are the details in which the devilry of most social problems lies hidden.

While this paper is not about the intangibles of leadership, it places focus on the intangibles of modern business law – intellectual property – which has spawned its own plethora of problems and complications. Intellectual property, the generalized term used to refer to the product of a creative process (for example – books, music, art etc.), has long been at the forefront of legal debate in the United States. To some extent, this debate has been settled by the development and passing of the Copyright Act of 1976 which provides protection on forms of intellectual property such as architectural work, audiovisual work, written material and other forms of artistic expression. The law itself has been very clear on the nature of what constituted copyright infringement in these cases. As quoted in the Act- “*Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*”<sup>ii</sup>

The Copyright Act protects the originality of such content, and with some degree of success – for it is relatively easy to know when an author plagiarizes another’s work, or when a musician hears his own music being performed by another artiste.

The stabilizing nature of the Copyright Law, then, rested on the laurels of the fact that there was no obvious way of perfectly copying such tangible matter. An author could not, with any degree of success, replicate J.R.R Tolkien’s *Lord Of The Rings* perfectly and pass it off as his own – nor receive the benefits of doing so. Photocopying books, blueprints, or artwork renders a copy – but an imperfect one and lacking the quality of the original. Although the Copyright Act provides for remedies against such actions, they are relatively unlooked for because of the integral inferiority introduced via the replication process. Intellectual property, it seemed, could be adequately protected and managed by the existing laws.

The introduction of the Internet and modern-day computing has radically changed that perspective. The area of books and other physical artwork has, of course, been relatively unscathed – since reading a book and reading a text file on a computer screen are two very different experiences – almost incomparable. However, the spheres of music and multimedia, are not as fortunate. Their intangible nature renders a greater ease by which they can be stored or communicated via the digital medium. The advent of mp3 encoding has crystallized this fact for the music industry. “MP3” is a shortened name of the format “MPEG-3” given to a type of compression used to convert an audio file (presumably from a pre-recorded compact disc, and therefore extremely large and difficult to manage on a computer) to a smaller manageable data file with an almost imperceptible loss of audio quality to the end user.

The development of MP3 technology has raised some extremely notable concerns for the music industry. Firstly, it packages a large audio file into a small compressed format that allows it to be easily transferred over data networks. Secondly, the music standard set in the 1990's that allowed the compact disc to become the distribution medium of choice meant that there was more than adequate source material for easy encoding of mp3s by 1999. Thirdly, the development in Internet communication that paralleled the rise of mp3 technology spawned the offspring of music file sharing clients – most notably, Napster and Kazaa Media Desktop. More and more users found it possible to search for their favorite song and receive an almost pristine-quality copy of that song on their computer.

The anonymity, speed of file transfers and the general “free” nature of the Internet has now made it possible for multiple copies of a single multimedia file to spread, unchecked, across a large global network such as the Internet at a rapid and exponential rate. Such a development has spurred a slew of lawsuits from the studios and producers of such content – who argue that their copyrights have been infringed by the mass duplication of such near-perfect copies of their original works.

Herein lies the innate weakness of the Copyright Act. While it may be easily enforced for the tangible expressions of intellectual property, the provisions of the Act do not adequately provide for the attainment of remedies for a file that is shared between two computers. Furthermore, the act of enforcing such copyrights has been seen to involve considerable infringement on the anonymous nature of the Internet and, therefore, the privacy of the individuals initiating the communication of data. Does this, then, outweigh the perceived damages sustained by sharing copyrighted works over networks? Some attempt has been made to address these issues, including the passing of the Digital Millennium Copyright Act as well as the older Audio Home Recording Act, passed in 1992.

The advocates of rights management and copyright control insist that file sharing is equivalent to stealing. The Recording Industry Association of America says on its website that such sharing of files is equivalent to piracy. *“The pirate’s credo is still the same--why pay for it when it’s so easy to steal? The credo is as wrong as it ever was. Stealing is still illegal, unethical, and all too frequent in today’s digital age.”*<sup>iii</sup> On the other hand, free speech advocates, such as those represented by the Electronic Frontier Foundation (EFF) have this to say about the Copyright Act – *“It’s time to face the fact that in today’s world, copyright law is broken. Our current copyright regime makes criminals out of music lovers. Worse, it makes suspected criminals out of all Internet users.”*<sup>iv</sup>

Alarming to movie executives, too, is the quickening pace of the transfers of entire feature films and movies over the same peer to peer models that allow mp3 transfers. Made possible by the increasing levels of bandwidth speeds over a larger proportion of the Internet customer base in the US, transfers of extremely large movie files are now feasible. The development of DVD (digital versatile disks) as the standard home distribution format eventually precluded the development of tools designed to circumvent the protection measures included on the DVD to prevent unauthorized copying. One of the more important cases on this matter, Universal vs. Reimerdes, involves the defendant posting on his website code for an open source software known as DeCSS – the use of which allowed users to create perfect digital copies of a DVD movie for use on a personal computer – free of any rights management that would have hampered the execution of such files on non-supported systems, (for example, computers using operating systems other than Microsoft Windows, which is the standard by which most DVD’s are set to be compatible with). The background facts described on the appellate papers for this case define the core problem facing both these industries –

*“the improved quality of a movie in a digital format brings with it the risk that a virtually perfect copy, i.e., one that will not lose perceptible quality in the copying process, can be readily made at the*

*click of a computer control and instantly distributed to countless recipients throughout the world over the Internet.*<sup>v</sup>

This last example describes the crucial problem for the future, for it postulates an environment where the DVD, previously thought of as inherently complex and thus too difficult to be converted into something intangible, is now in a position to be easily converted to such. Does the Copyright Act, then, lose its power with the onset of this sort of technology? Can it sufficiently account for the rapidly changing distribution models of multimedia? There is a very likely probability that it cannot.

## Section 2 – The Blasphemy of File Sharing The Napster Effect

The term has left a bitter taste in the mouths of record label executives everywhere. The activity is responsible for over billions of megabytes worth of music to be transferred around the world. It has spawned countless activist groups, divided the ranks of the music industry, and spurned lawsuits against dozens of children and grandparents alike. Everywhere on the Internet is the dispute about file-sharing.

When the original Napster was shut down in 2002, the intricacies of the Copyright Act were tested thoroughly. Napster, the pioneer peer-to-peer file sharing software was the marquee program for obtaining and distributing music for millions of Internet users worldwide. The music labels responded with fearsome alacrity, suing Napster for massive sums in copyright infringement damages. The case, eventually brought before the Ninth Circuit, was filed by A&M records in 2001. The plaintiffs alleged great losses stemming from the claims contributory and vicarious copyright infringement stemming from Napster's peer-to-peer music file sharing service.<sup>vi</sup> David Boies, lawyer for Napster at the time of the appeal, reiterated the requests to the court on October 2<sup>nd</sup>, 2000:

*“Plaintiffs are making four unprecedented requests: to hold a company liable for contributory infringement when direct infringer is not engaged in commercial activity and has no commercial relationship with users; find liability for supplying technology capable of significant non-infringing use; agree that consumers violate copyright law when they share recorded music on a non-commercial basis; and find that an ISP is liable for the activity of its users when the ISP had not knowledge of the unlawful activity.”<sup>vii</sup>*

Napster brought the argument that it was merely the service provider, and while its software facilitated the connections between two parties to implement the file transfer, the actual connection would be made on the Internet. This is an important point to note, for section 512(a) of the Digital Millennium Copyright Act states that the liability of an internet service provider is limited for *“infringement by reason of the [service] provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections”<sup>viii</sup>*. In other words, therefore, Napster claimed to be immune from infringement on the argument that it did not in itself provide the actual content to the end user.

There are, however, certain restrictions in the DMCA to entitle an ISP (Internet Service Provider) to receive protection under Section 512(a). Visiting professor for State University of New

York, Shubah Ghosh, describes in an article for GigaLaw the criteria that must be met in order for the applicability of the law:

*“...five conditions have to be met for subsection 512(a) to be applicable. An ISP's liability is limited if:*

- \* the user, not the service provider, initiated the transmission;*
- \* the service provider automatically provides the material sought by the user without selection of the material;*
- \* the service provider does not select the recipients of the material;*
- \* the service provider does not maintain a permanent copy of the material for longer than a reasonable period necessary for the recipient to retrieve the copy; and*
- \* the service provider does not modify the content of the material.”<sup>x</sup>*

These arguments were debunked when a district court in Northern California denied Napster's motion for summary judgment. In making the ruling, the court declared that Napster did not possess the characteristics of an Internet Service Provider:

*“...the court finds that Napster does not provide connections "through" its system. Although the Napster server conveys address information to establish a connection between the requesting and host users, the connection itself occurs through the Internet. The legislative history of section 512 demonstrates that Congress intended the 512(a) safe harbor to apply only to activities "in which a service provider plays the role of a 'conduit' for the communications of others." H.R.Rep. No. 105-551(II), 105th Cong., 2d Sess. (1998), 1998 WL 414916, at \*130<sup>x</sup>”*

Napster lost the fight versus the Recording Industry of America because of its distribution model. However, the new generation of P2P applications (such as Kazaa or Gnutella) do not suffer from the same weakness. Users now directly search other computers using these types of software, and can download files with direct connections through no intermediary process by the software vendor. The RIAA was forced in 2003 to begin suing individual end users of these applications, something that had not been done before because of the large scale of application use and the inefficiency of the process. To date over two thousand individuals and groups have been targeted for lawsuits by the RIAA.

Nevertheless, the question remains of whether possessing mp3's in themselves is tantamount to copyright infringement – a detail that had not been worked out in the Napster case. MP3's can also be obviously be created from non-copyrighted content, and the P2P applications themselves were created to transfer more than just music files. Indeed, the Metro-Goldwyn-Mayer vs Grokster case' noted that the defendants brought evidence to show that their software was being used by many to obtain information in the public domain – such as the works of Shakespeare or open source software, or non-copyrighted music<sup>xi</sup>. Does possession of a single copyrighted mp3 file for personal use, then, constitute copyright infringement? Napster, Kazaa and other defendants against the RIAA have repeatedly tried to say that it is not. The core of these arguments inextricably lies in the landmark Sony vs Universal case of 1987<sup>xii</sup>.

Everyone remembers Betamax as the precursor to modern VHS videocassette recorders. The emerging technology then of videotaping was much akin to the digital era of today. Universal Studios took Sony to court over the fact that the Betamax VCR could record television shows and movies (also copyrighted works) and be used by consumers without the payment of royalties for each viewing (television shows are paid for by advertising) and thus constituted copyright infringement for

every videotape recorded with a television show. The courts ruled in favor of Sony, citing the following:

*“Selling a staple article of commerce -- e. g., a typewriter, a recorder, a camera, a photocopying machine -- technically contributes to any infringing use subsequently made thereof, but this kind of ‘contribution,’ if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management. . . . . Commerce would indeed be hampered if manufacturers of staple items were held liable as contributory infringers whenever they ‘constructively’ knew that some purchasers on some occasions would use their product [p.427] for a purpose which a court later deemed, as a matter of first impression, to be an infringement.”<sup>xiii</sup>*

This ruling has been the basis of many defenses against the opposers of mp3 technology. The widespread use of mp3’s today (indeed, there are hundreds of known models of mp3 players, and the market for mp3 based online subscription services has grown expansive within the last year) precludes the very high probability that copyright infringement will occur. Nevertheless, the widespread use and the “staple” nature of digital music today indicates that pursuing copyright infringement reparations for this will also extend “beyond judicial management”.

The RIAA has learned this the hard way. Its methods of suing thousands of song swappers have raised the ire of the general public, as well as that of some district courts. The RIAA vs Verizon case of 2003 provides a strong example – where Verizon was sued by the RIAA for refusing to disclose the names of consumers who used Verizon as an ISP, and who were allegedly downloading copyrighted works using Kazaa. The court ruled in favor of Verizon, stating that the company itself was protected under the aforementioned Section 512 of the Digital Millennium Copyright Act. Martin Samson of Philips Nizer LLP quotes the court’s ruling as follows:

*“An individual, utilizing Verizon as his Internet service provider, allegedly used the peer-to-peer software Kazaa to download approximately 600 copyrighted recordings by well-known artists from computers of third parties. This material was not stored on Verizon's network. Rather, Verizon's involvement was limited to providing this individual's connection to the Internet... Court rejected the RIAA's contention that Verizon can "disable access" to the infringing material within the meaning of § 512(c)(3)(A) by terminating the offending subscriber's Internet account. The Court premised this determination on the statute's distinction between "providing access to infringing material" 512(j)(1)(A)(i) and "providing access to a subscriber or account holder ... who is engaging in infringing activity ... by terminating the accounts of the subscriber or account holder." 512(j)(1)(a)(ii).”<sup>xiv</sup>*

This is only one of the many times that the RIAA has been found guilty of using improper procedures, bases and channels for filing such subpoenas. However, it indicates the very large probability of millions of alleged copyright infringers going unpunished because of the untenable nature of bringing all such individuals to court. The crucial matter of being enforceable - the same argument that has been brought up in the question of marijuana legalization - brings the very nature of the law into question on this particular issue. Is the statute of the Copyright Act enforceable to a degree where it can adequately address the sixty million estimated users of p2p song sharing software in the United States? The answer is – most likely not. Indeed, the chances of being targeted by the RIAA for a lawsuit are in themselves slim, and only if one shares a large number of music files on a consistent basis – a profile that fits only a miniscule percentage of the Internet user population.

## Section 3 – Fair is Fair

### The Fair Use Doctrine and Relevant Copyright Act Provisions

Can mp3 possession be, then, considered fair usage of copyrighted works? Indeed, the trend in the file sharing world is not one that is motivated by commerce or profit. Users do not “sell” the files, but are altruistic in the uploading and downloading of music. The argument would be quite clearer were users actively selling mp3 files to make personal profit, but this not the case. What, then, is the difference between a user in Los Angeles sharing a copy of Madonna’s “Like a Virgin” with her friend in New York City, and the same person lending her neighbor a book by Stephen King?

The RIAA contends that is the scale of peer to peer transfer that makes it commercial, and has cited various independent studies saying that it hurts CD sales worldwide – implying that every file downloaded is another song not bought. The Napster case brought this point up, and a reference was made to the Campbell vs Acuff-Rose, Inc. case in which members of 2 Live- a rap group- were sued for making a parody version of a song whose copyright was owned by the plaintiff. The Acuff-Rose case was brought before the Supreme Court, who cited :

*“The Court of Appeals erred in resolving the fourth §107 factor, “the effect of the use upon the potential market for or value of the copyrighted work,” by presuming, in reliance on Sony, supra, at 451, the likelihood of significant market harm based on 2 Live Crew’s use for commercial gain. No “presumption” or inference of market harm that might find support in Sony is applicable to a case involving something beyond mere duplication for commercial purposes. **The cognizable harm is market substitution, not any harm from criticism.**”<sup>xv</sup> (emphasis added)*

Indeed, the aspect of market substitution was one that afforded the RIAA victory against Napster on the grounds that ownership and trading of mp3 files was not “fair use”. The doctrine of Fair Use is one that was included in the Copyright Act to ensure that activities such as criticism, education and parody could be still had using copyrighted woks without a legal backlash against the otherwise-infringer. The Copyright Act of 1976 states four factors that are considered when determining if an activity construes fair usage<sup>xvi</sup>:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The Ninth Circuit decision against Napster found that the defendant’s arguments that the mp3 trading was analogous to sampling was not upheld. Moreover, the court decided that although there was no exchange of money, the trading of copyrighted mp3’s was not “personal use” – argued mainly by the point that a user uploading a song to another anonymous user is not held to be “personal”. The decision included the following statement of opinion by the court:

*“Contrary to Napster’s assertion that the district court failed to specifically address the market impact of sampling, the district court determined that “[e]ven if the type of sampling supposedly done on Napster were a non-commercial use, plaintiffs have demonstrated a substantial likelihood that it would adversely affect the potential market for their copyrighted works if it became widespread.” Napster, 114 F. Supp. 2d at 914. The record supports the district court’s preliminary*

*determinations that: (1) the more music that sampling users download, the less likely they are to eventually purchase the recordings on audio CD; and (2) even if the audio CD market is not harmed, Napster has adverse effects on the developing digital download market”.*<sup>xvii</sup>

Yet, the body of law put forth on this topic, by this particular case, is tenuous at most. The Court fails to acknowledge the similarity between this case and the events that took place to spur the development of the Audio Home Recording Act in 1992. This Act mandates that a Serial Copy Management System<sup>xviii</sup> be programmed into all digital recording devices that allows a user to create an exact replica in a first generation copy from the master, but that no second generation copy would be equivalent in quality to a first generation copy. In addition, manufacturers of digital recording equipment pay a royalty tax of \$8 per machine and 3% of all audio and video recording material (discs, cassettes etc.) Although personal computers are excluded from this requirement, it is clearly because Congress could not foresee that, in a decade, the explosion of digital replication media that was galvanized by the advent of the Internet would occur. Indeed, is this scenario so different from the days when 90 minute cassettes were traded in school hallways and street corners?

Perhaps an amendment to this Act (an extension to Chapter 10) may do some good in offering reparations to copyright owners much in the way of the royalty tax system levied on audio hardware manufacturers in 1992. The tax however, would fall on computer manufacturers – for while Internet services may vary across the world – it is computers that drive the storage and sharing of digital media. Yet this is a large and ubiquitous step that seems far fetched to the current industry.

What, too, are the legal repercussions of enforcing the law for copyright infringement in these cases? The legalities of transmission methods have clearly not been successful to the RIAA as demonstrated in the Verizon case. Does the answer, therefore, lie in monitoring transmissions of Internet packets that travel on networks? Discrimination in the flow of information based on content brings up fundamental First Amendment issues. Does the answer lie in simply banning the development of file sharing applications? This too, impinges on programmer’s freedom of speech and the right to develop core technology. Whilst these are topics that have been thrown back and forth in the arena around illegal music, they have been more directly addressed in another developing storm in the troubled horizon of copyrighted works – movies and digital versatile disks (DVD).

## Section 4 – The Wrath of Hollywood

### The Case of DeCSS, DVD Copying and the First Amendment

Just as CD’s have become the bread and butter medium of choice for record labels, the technology of DVD has emerged to become the new standard for home movie distribution for production companies everywhere. An article in CNET during November 1999 estimated that DVD sales would come close to 100 million units by 2002.<sup>xix</sup> This has been proven over and over, with the Consumer Electronics Association stating that over 15 million units DVD players and DVD compatible products had been sold in the year 2003.<sup>xx</sup> DVDs have become the standard format for film distribution, and have allowed a versatile group of viewers to engage in more interactive film experiences.

The threat of piracy, however, was a small one. Indeed, the chances of someone downloading an entire movie over the Internet was at one time very remote. Multimedia files with the length and complexity of a movie are enormous in size – one movie of a fairly viewable quality and of feature length 90 minutes may occupy somewhere between 200MB and 600MB of space. By contrast, a

regular three minute audio mp3 would only occupy approximately 2MB – 4MB of space. Clearly, the task of downloading a copy of *Star Wars*, for example, could take anywhere from several hours to several days over a standard dial-up connection. Even so, the quality of the file would be substantially reduced – allowing the viewer to watch the movie only on a very small screen (such as a reduced window on a computer), with unclear, sometimes muffled, audio – hardly the perfect film experience. The quality issues stem from the source material. Converting video signals from a videocassette to digital format involves a certain loss of quality, usually because of the inability of analog videotapes to show up respectably on the sophisticated home computer systems that are commonplace in today's average household.

Despite the imperfect substitutes for purchased home movies, DVD manufacturers and motion picture developers took no chances when releasing DVD versions of their films. A system known as CSS – Content Scrambling System – was programmed on each disc to prevent unauthorized copying of the DVD, and was first widely used in 1996 – long before the DVD revolution hit the consumer market. The program was, at the time, sufficient enough to discourage copying. However, it meant that the DVD could only play on certain types of computers – mainly Windows based. In 1999, an unknown group of programmers cracked the code behind CSS and released an open source software known as DeCSS – which allowed a user to circumvent the CSS on any DVD, thus rendering the DVD playable on any computer and (more importantly) opened to unlimited copies of the disc's contents.

This code was taken, modified by a then-teenager from Norway, Jon Johansen, who then released his version of DeCSS to the public via a website as a way of playing DVDs on the Linux operating system.<sup>xxi</sup> The legal notices came quickly. After being ordered to remove the code by a Norwegian firm, another website operator posted the same code elsewhere. The issue was brought to a head in the United States with the advent of the *Universal vs. Reimerdes* case of 2001 after Universal Studios sued one Emmanuel Goldstein (aka Eric Corley) of 2600 Enterprises, Inc. after the defendant posted a hyperlink to the DeCSS code on his website as well as a short description of what it accomplished and the steps the movie industry was taking to have it banned.

Corley argued that his article and website posting were protected by his free speech rights under the First Amendment, and for good reason. The US Second Circuit Court of Appeals affirmed that computer code itself, such as the DeCSS code, was regarded as speech, and thus afforded some protection under the First Amendment. Indeed, the Court notes the following – “*that if someone chose to write a novel entirely in computer object code by using strings of 1's and 0's for each letter of each word, the resulting work would be no different for constitutional purposes than if it had been written in English.*”<sup>xxii</sup> Nevertheless, the Court upheld that the provisions of the Digital Millennium Copyright Act were engendered to prevent such circumvention of copyrighted works – and that such code designed to decrypt encrypted content without the authorization of the copyright holder effectively invalidated the code's First Amendment protection:

*“...just as the realities of what any computer code can accomplish must inform the scope of its constitutional protection, so the capacity of a decryption program like DeCSS to accomplish unauthorized--indeed, unlawful--access to materials in which the Plaintiffs have intellectual property rights must inform and limit the scope of its First Amendment protection.”*<sup>xxiii</sup>

The First Amendment, it seems, gives way to the DMCA if the speech in question effectively leads to copyright infringement. Yet how is this different from a consumer purchasing a stock Ferrari, and customizing it and reverse engineering it to fit his or her own needs? The modification to the car's design is there, but the car is still undoubtedly a Ferrari. To cite another, perhaps more relevant

situation – what if there are no possible ways for a consumer to view the DVD on his own system, unless it was first DeCSS-ed? Does the free flow of information and additional knowledge about increasing compatibility not outweigh the potential losses due to copyright infringement? This argument also arises in the *Universal vs Reimerdes* case with respect to hyperlinks. Linking is a core technology of the Internet. It is, in fact, what makes the World Wide Web achieve the connotation of “web”. The Web today is a web of linked documents. It’s unique way of transmitting information that far exceeds the best cross referencing system any librarian can come up with. Would not an article about a decryption technology such as DeCSS – regardless of potential market hazards – be logically supplemented with a link to a site displaying the code (or part thereof?)

The 2<sup>nd</sup> Circuit held that it was not so, and that the provision of means to circumvent the CSS was folly enough to invalidate the freedom of speech afforded to the logic within the program’s source code as well as the hyper linking code used to send users to the page that contained it. An extract from the appeal documents state:

*“Judge Kaplan adapted the standards of New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964), to fashion a limited prohibition against linking to web sites containing DeCSS. He required clear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology”*

As can be seen, the DMCA has strict guidelines for what it considers to be anti-trafficking and anti-circumvention of copyrighted works<sup>xxiv</sup>. Circumvention technology is crucial for DVDs however – in that users may wish to archive backups of their current DVDs. Consider the case of 321 Studios.

321 Studios is a small company made famous by the sale of their product “DVD Copy Plus” which allows users to copy and archive their data from CD’s, DVDs or Hard drives. MGM studios perceived the potential for copyright infringement and sued the company for creating and selling circumvention technology – and endeavored to get an injunction to prevent the sale of such software. The Courts ruled in the favor of the movie industry and 321 was ordered to stop selling their software.<sup>xxv</sup>

This case demonstrates a few key weaknesses of the Digital Millennium Copyright Act, in that it fails to realistically address the current market situation. DVD’s are extremely fragile pieces of hardware, and are prone to substantial performance degradation if scratched – even if the scratch is miniscule. Having a backup copy is a natural safeguard that most computer owners take to ensure the safety and integrity of their own data. Indeed, having a home movie collection based on the fragile DVD format lends itself to the fact that it is substantially harder to keep such a collection intact and physically safe from harm (accident-wise or heat damage, for example.) *Wired Magazine*, in an article cited from Associated Press, gives this important contrast of opinion:

*“...The Chesterfield, Missouri-based 321 had argued that its products merely give consumers fair use of the movies they've purchased, including backing up expensive copies of children's movies in case the originals get scratched.*

*Jack Valenti, head of the Motion Picture Association of America, has suggested that consumers have no legitimate need for such software, telling The Associated Press in November, "If you buy a DVD you have a copy. If you want a backup copy you buy another one.”*<sup>xxvi</sup>

Mr. Valenti's defense of the DMCA here, however, is flawed. What about consumers who cannot buy another copy of the DVD because they have been taken off the shelves? Indeed, this is a practice carried out by Disney with most of its animated movies, such as *The Little Mermaid* (known unofficially as placing them in "the Vault"). This particular DVD has been off the shelves since 1995 and currently fetches a staggeringly high resell price of \$60 – far above the asking price for a movie that is almost 20 years old.

Then, too, is the case with non-copyrighted material. Should software that allows a user to backup their own personal data be refused from entering the marketplace simply because it has a possibility of infringing copyrighted works? This brings us back to the point of the copyright law overriding First Amendment ideals of ensuring a free and unrestricted flow of information – which in the long run are more crucial to the operation of society.

## Section 5 – Conclusion

### The Fate Of the Copyright Act

Technology is ever changing, and has been more dynamic with every passing year. Indeed, artists and creators of artistic works should be compensated for their efforts, for it is this which drives them to produce more art for society to enjoy. The Copyright Act aims to protect these interests, which it does quite well outside the field of the Internet. However, the problem remains of enforcing the copyright infringement policy for the average user who connects to the Internet, downloads a song in 30 seconds using the current standard of high-speed Internet, disconnects and listens to it in the privacy of his or her own home. It is far easier to use the basis of commerce – tangible commerce where money is involved – to form the basis of such infringement. If the user downloaded fifteen copyrighted songs from popular artistes, created a copied CD with them and sold it to a friend then some manner of infringement has occurred and should be enforced. Altruistic file sharing, however, through peer to peer applications is an activity that requires heavy monitoring (jeopardizing privacy issues) of Internet transmissions should the Copyright Act be wished to enforced properly.

The other important issue to understand is asking whether the level of stated loss to the music industry an accurate measurement. The RIAA cites numerous "independent studies" that have enforced the conclusion that file sharing does, indeed, hurt music sales. However, a recent study done by two professors, one from Harvard and another from the University of North Carolina, Chapel Hill, has suggested that file sharing, in no way, hurts music sales by any significant amount. The study has cited the following logical flaws in the previous "independent studies":

*"An additional problem is the accuracy and the population sample of the data. Those who agree to have their Internet behavior discussed or monitored are unlikely to be representative of all Internet users."*

This study was done, therefore, by analyzing transmissions of downloads, a far better premise for judgments than personal surveys (indeed, the study correctly points out that phone surveys – used in the past for studies supporting file sharing data – were unlikely to be accurate as individuals would not want self incriminate themselves by saying they had downloaded music). The results are quite surprising. Indeed, the paper details that – at worst case scenario – it would take 5000 downloads of a song to reduce that album's sale by one unit on the real world market<sup>xxvii</sup>. The logic lies in that people who download music are not users who would have bought the music if it was offered to them for a price.

The study indicates what a large number of economists have been saying over time – that “the single bullet” approach by industry executives to target one source for all sales problems is a flawed one.

Given, then, that no consequential damage occurs to the music industry because of file sharing – why enforce a law that needlessly creates litigation and hampers the flow of information on the Internet? One might also say that the DeCSS case proves that the exact replica of a movie is reason enough to protect the owner’s copyrights. Yet, even the DeCSS system proves an imperfect copy – for DVDs contain dual layers – one of which is the only one that can be read by DVD burners on the market. This means that copied DVDs are without such extras as bonus features, additional audio tracks and other software packages that make it a more convenient purchase for the average American consumer to buy the DVD from a store rather than spend the effort recompiling all the contents into an imperfect package.

The Copyright Act and the provisions for the Digital Millennium Copyright Act should therefore be amended to allow the altruistic trade of mp3 files, and the free speech of decryption software. Industries that have protected interests should not seek one-size-fits-all methods of protecting their investments. In the long run, art and knowledge are of far greater value to a society. They are what move a society forward and the expression of that art is indeed a more important matter than the means of recouping perceived losses from a harmless distribution model, or blocking software that hampers the study of computer science. The eight track gave way to the audio cassette, which in turn gave way to the compact disc. The videocassette gave way to the DVD. The future of the entertainment industry inextricably lies in how well it can adapt its business models to the new technology - and the law must be kept relevant to reflect these irreversible changes in the society of today.

#### End Notes

- 
- i Kim, Chan W. and Mauborgne, Renee A. (1992) “Parables of Leadership”, *Harvard Business Review*, July - August, p. 124
  - ii United States Copyright Act, Section 102a. as quoted on <http://www4.law.cornell.edu/uscode/17/102.html>
  - iii Recording Industry Association of America on its stance against file sharing. Located at <http://www.riaa.com/issues/piracy/default.asp>
  - iv Electronic Frontier Foundation (EFF) on its stance on file sharing. Located at <http://www.eff.org/share/>
  - v United States Court Of Appeals For The Second Circuit, **Docket No. 00-9185**. Appeal for Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 346 (S.D.N.Y. 2000) (“Universal II”). Located at [http://www.eff.org/Legal/Cases/MPAA\\_DVD\\_cases/20011128\\_ny\\_appeal\\_decision.html](http://www.eff.org/Legal/Cases/MPAA_DVD_cases/20011128_ny_appeal_decision.html)
  - vi United States Court of Appeals for the 9th Circuit. affirming injunction for (In Re: Napster Copyright Litigation) (March 25, 2002). Found at <http://news.findlaw.com/hdocs/docs/napster/napster032502opn.pdf>
  - vii Oral Arguments Before the U.S. Court of Appeals for the Ninth Circuit. Located at <http://news.findlaw.com/legalnews/lit/napster/index5.html>
  - viii THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 - U.S. Copyright Office Summary, Title II, Page 8. Located at <http://www.copyright.gov/legislation/dmca.pdf>
  - ix Ghosh, Shubah – “MP3 v. the Law: How the Internet Could (But Won't) Become Your Personal Jukebox”. Located at <http://www.gigalaw.com/articles/2000-all/ghosh-2000-07-all.html>
  - x *A&M Records, Inc. v. Napster, Inc.*, U.S. District Court, Northern District of California - May 12, 2000, 114 F. Supp. 2d 896 (N.D. Cal. 2000). Located at <http://www.gigalaw.com/library/am-napster-2000-05-12.html>

- 
- xi “Order Granting Defendants Grokster, Ltd.’S And Streamcast Networks, Inc.’S Motions For Summary Judgment And Denying Plaintiffs’ Motion For Summary Judgment With Respect To Defendants Grokster, Ltd. And Streamcast Networks, Inc.” *Metro-Goldwyn-Mayer Studios vs. Grokster Ltd.*, CV 01-08541-SVW, United States District Court, Central District of California. Located at [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/030425\\_order\\_on\\_motions.pdf](http://www.eff.org/IP/P2P/MGM_v_Grokster/030425_order_on_motions.pdf)
- xii “Opinion of the Majority” in *Sony Corp. v. Universal City Studios* 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984). Argued on January 18, 1983; Reargued October 3, 1983. Located at [http://www.eff.org/Legal/Cases/sony\\_v\\_universal\\_decision.php](http://www.eff.org/Legal/Cases/sony_v_universal_decision.php)
- xiii “Opinion of the Majority” in *Sony Corp. v. Universal City Studios* 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984). Argued on January 18, 1983; Reargued October 3, 1983. Located at [http://www.eff.org/Legal/Cases/sony\\_v\\_universal\\_decision.php](http://www.eff.org/Legal/Cases/sony_v_universal_decision.php)
- xiv Samson, Martin H. “Recording Industry Association of America v. Verizon Internet Services Case No. 03-7015 (D.C. Cir., December 19, 2003)”
- xv *Campbell v. Acuff-Rose Music* (92-1292), 510 U.S. 569 (1994). Located at <http://supct.law.cornell.edu/supct/html/92-1292.ZS.html>
- xvi “Limitations on exclusive rights: Fair use “US Code, Title 17, Chapter 1, Section 107 - The Copyright Act of 1976. Located at <http://www4.law.cornell.edu/uscode/17/107.html>
- xvii Opinion Of The Court - *A&M records V. Napster*, United States Court of Appeals for The Ninth Circuit, Case No. 00-1640. Located at <http://www.ce9.uscourts.gov/web/newopinions.nsf/0/c4f204f69c2538f6882569f100616b06?OpenDocument>
- xviii Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code, Chapter 10, Subchapter B, Section 1002. Located at <http://www.copyright.gov/title17/92chap10.html#1002>
- xix Wilcox, Joe – “DVD Sales See Hot Growth Projections”. December 30, 1999. Located at [http://news.com.com/2100-1040\\_3-235034.html?tag=mainstry](http://news.com.com/2100-1040_3-235034.html?tag=mainstry)
- xx Consumer Electronics Association, “DVD Sales Continue to Rise in Anticipation of Holiday Season”. 11<sup>th</sup> November 2003. Located at <http://www.tri-vision.ca/documents/2003/CEA%20October%20DTV%20Sales%202003.pdf>
- xxi Full details of the case can be found in the “Complaint for Injunctive Relief Against Misappropriation of Trade Secrets” filed by the DVD Copy Control Association against the infringing website operators at the time. Located at <http://www.2600.com/dvd/docs/1999/1227-dvdcccomp.pdf>
- xxii Page 16, Line 26 - US Second Circuit Court of Appeals Decision affirming District Court ruling against defendants, in *Universal v. Reimerdes* (Nov. 28, 2001), **Docket No. 00-9185**. Located at [http://www.eff.org/Legal/Cases/MPAA\\_DVD\\_cases/20011128\\_ny\\_appeal\\_decision.html](http://www.eff.org/Legal/Cases/MPAA_DVD_cases/20011128_ny_appeal_decision.html)
- xxiii Page 18, Line 36 - US Second Circuit Court of Appeals Decision affirming District Court ruling against defendants, in *Universal v. Reimerdes* (Nov. 28, 2001), **Docket No. 00-9185**. Located at [http://www.eff.org/Legal/Cases/MPAA\\_DVD\\_cases/20011128\\_ny\\_appeal\\_decision.html](http://www.eff.org/Legal/Cases/MPAA_DVD_cases/20011128_ny_appeal_decision.html)
- xxiv For a more detailed look at the Anti-Circumvention provisions of the DMCA, please go to <http://thomas.loc.gov/cgi-bin/query/F?c105:1:/temp/~c105cvhRnj:e11962:>
- xxv “Court Endorses Ban on DVD Copy Technology”. Located at the Electronic Frontier Foundation website - [http://www.eff.org/IP/DMCA/MGM\\_v\\_321Studios/20040220\\_eff\\_pr.php](http://www.eff.org/IP/DMCA/MGM_v_321Studios/20040220_eff_pr.php)
- xxvi “321 Studios Forges Ahead” – Wired News (via Associated Press), February 23<sup>rd</sup> 2004. Located at <http://www.wired.com/news/digiwood/0,1412,62397,00.html>
- xxvii Oberholzer, Felix and Strumpf, Koleman. “The Effect of File Sharing on record Sales – An Empirical Analysis”. March 30, 2004 – Page 23. Located at [http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf)