

Dirty Deeds Done Dirt Cheap: Technology and the Issue of Music Piracy

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May 2, 2002

Introduction

Canadian singing sensation Celine Dion recently came out of retirement and just released a new album. But don't plan on buying her album and then copying the tracks to your favorite MP3 player. In fact, don't even think of putting the CD into your computer because it will likely cause your computer to crash.¹ Why? Because the music industry thinks that you want to steal their product and will prevent you from using your purchased music in the ways you are accustomed to.

New technologies allow people to use their music in new methods. By converting tracks into the MP3 computer format, songs can be played on computers or portable MP3 players, which are beginning to replace portable CD players. These uses are protected under the "fair use" rule that allows people to copy copyrighted material as long as it is for noncommercial purposes. Music can also be shared using computer programs that connect thousands of users worldwide. Because the technology is digital, reproduction of music is flawless, and each copy is as good as the first. The music industry sees these technologies as threats to their copyrights, since users can download music instead of buying it. As a result, music firms are moving to curb how people use the music they purchase. The industry shut down the immensely popular "Napster" music-sharing software, and passed legislation that makes it illegal to override copy protection. Now, a pending bill wants to require makers of computer and MP3 equipment to prevent copyright violations.

One can understand why the music industry wants to eliminate these abilities. Essentially, a user with the right equipment can become his own music store and never have to buy another album again.

The music industry currently suffers from huge losses across the board, to include concerts, radio ads, and CD sales. Additionally, artists are organizing under the leadership of Don Henley to ask serious questions of their labels on the issues of royalties and the length of contractual obligations.² Given the current situation in music and consumer technology industries, one must ask the following ethical questions:

1. What obligation or responsibility do the makers of these technologies have to preserving copyrights?
2. What right do content providers have to eliminating "fair use" provisions?
3. Is it right to restrict the technology industry so that the music industry can protect its earnings?

Background

A Technology Primer

In order to use (or abuse) digital music, one must gather the tools. Building the toolkit starts by installing a CD-RW (compact disk – read write) drive into a desktop computer. This is used to "burn," or record, music onto a blank compact disk (CD). This CD will work in your car

stereo, or anywhere else a regular CD can be played. This drive can also “rip,” or extract, the music from the regular CD you purchased at the music store and store it on your computer. The music is typically saved as an “MP3ⁱ” file. A reasonable drive costs around \$140, and the blank CDs cost about \$1-3 apiece. In order to share music tracks, one must download a free file-sharing program, such as Morpheus, Kazaa, or Limewire. These programs connect your computer to other people’s computers in order to swap music. Add to this system a broadband connection (e.g. DSL or cable modem) for around \$50 per month and that will enable a user to download a song from times varying from 1-10 minutes each. (Alternatively, use your work computer and their fast Internet connection for free.) Finally, you could purchase an MP3 player if you want to take this music with you, starting around \$150.³

One can quickly see that once the tools are gathered, you can create a CD with all your favorite songs for a few dollars. By using the CD-RW drive, you can copy a CD exactly. If you don’t have your favorite songs on a CD, you can download them from someone else using a file-swapping package. Users with music on cassette tapes can transfer the tracks to CDs. Also, a user can transfer their music from their CDs to their MP3 player for use at the gym. A pirate (one who copies work with illegal intent) can simply reproduce hundreds of CDs exactly and sell them significantly less than the \$19 listing price for Celine’s new release, for example.

The Recording Industry’s Response

Seeing the menace, the music industry acted to contain the MP3 risk. Web sites such as MP3.com enabled users to download songs. These central sources of copyrighted material were quickly shut down for copyright violations. Napster, a program written by Shawn Fanning in 1999, was the first to enable song swapping on a grand and decentralized scale. The program stored the catalogs of its users in a central location to facilitate searching. The band Metallica, joined by the recording industry, sued Napster and was able to effectively shut them down.⁴ Since Napster was shut down, more decentralized peer-to-peer file sharing methods have developed. Software such as Kazaa and Morpheus establish connections to users without the use of a centralized computer to manage the transfers. The music industry turned their attention to these programs. Unfortunately for them, these methods won’t be easy to terminate, and even now other methods are appearing or reappearing, such as a 14-year old file transfer program originally intended for academics.⁵ In order to stop music file transfers, the music industry, probably realizing that they can’t control the Internet, found another route.

History of Copyright Law

Copyright law is based on the U.S. Constitution that states in Article 1, Section 8: “Congress shall have power to... promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The issue of protecting music involves a balance between the artist, the copyright holder, the consumer, and the public good. This is based on the intent of the copyright, which is to protect the right for artists to reap the benefits of their labor while allowing the public to benefit and build upon the work. According to Siva Vaidhyanathan, historical scholar of copyright history, the intent of the copyright has been to promote the following safeguards:

ⁱ “MP3” represents the computer file type identifier for a music track. MP3 is the compression method developed by the Moving Picture Experts Group that allows a music track to be stored on a computer efficiently.

- A guarantee that all works would enter the public domain once the copyright term expired.
- A collection of purposes that consumers could consider “fair use,” such as limited copying for education or research.
- The principle that after the “first sale” of a copyrighted item, the buyer could do whatever he or she wants with the item, save distribute unauthorized copies for profit.
- The concept that copyright protects specific expression of ideas, but not the ideas themselves.⁶

Since then, the law has balanced the rights of the public and the copyright of the author/publisher and has produced the notion of “fair use.” The Audio Home Recording Act allows a user to make copies of music for noncommercial purposes. In the *Betamax* case, the Supreme Court found that recording copyrighted television material is also protected under “fair use.”⁷ Clearly, these protections are no longer afforded if a user wants to make a noncommercial copy of his new Celine Dion CD.

In 1998, the government enacted the Digital Millennium Copyright Act. Under this law, it is a crime to circumvent copy protection that the copyright holder uses to prevent the unlawful reproduction of their work.⁸ Interestingly, the law makes it a crime even if circumventing the protection is done to exercise the user’s rights under previous copyright law.⁹

In March 2002, Senator Fritz Hollings introduced the Consumer Broadband and Digital Television Act. This legislation proposes to require the content and technology industries to devise copy protection. Then, all “digital media devices” would be required to have these measures installed.¹⁰ Essentially, this act will stop duplication of music files at the source. Unfortunately, what happens to those who make noncommercial duplicates for their own use? What happens to older equipment that doesn’t have the copy protection features?

Analysis

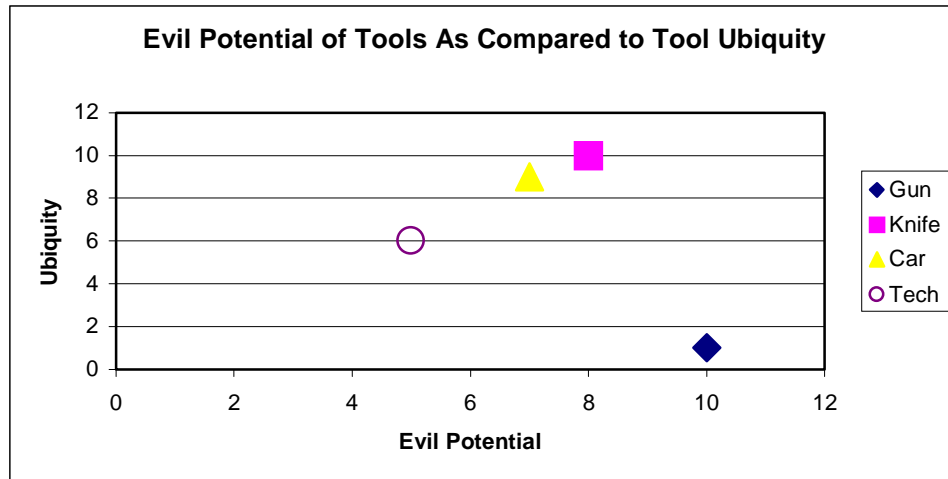
What obligation or responsibility do the makers of these technologies have to preserving copyrights?

We see that computer equipment can be used legally as well as illegally. A user can copy a music CD under “fair use” just like they can record a television show with their VCR. A user can also duplicate the same CD and sell them to his friends. Clearly, the technology is a tool to performing good and evil deeds. We can compare the technology to a rifle, which is also a tool that can be used for good and evil. Rifles and weapons are not banned because of the evil they commit. Therefore, the much less harmless music duplication technology should not be banned as well, no more than one can ban knives or hammers or cars.

One can argue that these tools are legal but are regulated in proportion to the evil they can facilitate. Weapons require permits and training. Handgun companies now provide trigger locks. Cars are dangerous weapons, so drivers require training and licensing. Knives are not regulated, probably due to their ubiquity and their usefulness in everyday life, combined with their relatively lower danger to society. These tools infer that there is a sliding scale based on the maximum evil the tool can facilitate, combined with a sense of intrusiveness on everyday life. Applying the concept of utilitarianism to this question as a social problem, we desire to find the greatest good for the greatest number of people.¹¹

Comparing the ubiquity of a tool with its potential to harm society, we can see what tools need the most regulation (high ubiquity/high evil potential) and the least (low ubiquity/low evil

potential). The graph below enables us to see what tools might need the most regulation, based on *assumptions* of ubiquity and evil potential for each tool, each on a scale of one to ten. This graph considers “tech” to be the music copying/sharing setup described above, to include a broadband connection. Evil potential considers harm to society in terms of what causes the most damage. Clearly, killing people with weapons represents more perceived societal harm than lost music earnings. (One can argue that one life could be worth less than earnings, perhaps \$10 million, but for this argument we suggest that the loss of any life, if traded off for money, is an evil in itself.)



The low position of “tech” relative to other tools with evil potential suggests that music copying technology should be lightly regulated. Therefore, it is reasonable to expect that technology companies ought have their equipment somewhat regulated.

As with any regulation, what happens when such measures infringe on existing rights? Again, regulation is a utilitarian exercise, weighing the benefit derived from rules, as compared to the evils they commit. In the case of guns, regulations are tight, but the impact of regulation is small, given the lower number of people with guns who will be annoyed by regulation, and the few people that stand to be refused permission to own a gun. In the case of music technology such as CD-RW drives, music CDs, and computers, these items are very common, so regulation will have a much larger impact. The high level of intrusion of anti-music pirating regulation can be seen in Celine’s CD, that prevents people from utilizing their property in the fashion of their choosing, thus violating the “fair use” principle.

What right do content providers have to eliminating “fair use” provisions?

Determining the fair amount of regulation depends on balancing the good the regulation does along with the harm it causes. Clearly, the direction the music industry has taken on copyright protection indicates that they intend to curtail user rights. The Celine Dion music CD won’t work in a computer like all other previously produced CDs would. If the user purchased the music for the purposes of playing the music on their computer, the regulation has done them

great harm.ⁱⁱ One can argue that the music industry is free to market their product the way they want and if they reduce their own sales by a large share due to these restrictions then that is their right. This conflicts with the original intent of copyright law, which is to “protect specific expression of ideas, but not the ideas themselves.”¹² By restricting access to their work, it keeps society from the work. The intention of copyright is to permit maximum access to art, so that others may be inspired to build upon the work, not to restrict work to a select few. Where would music be today if modern artists couldn’t listen to and be inspired by The Beatles?

In the short-term, restricting fair use has also resulted in being unable to even fast-forward through commercials and trailers placed on DVDs. Although the social cost in being subjected to commercials may be minor in and of itself, the suggestion that people will now have to be forced to watch commercials on a product they purchased for their own use seems distasteful. Stricter regulation of music copyright has short- and long-term negative social repercussions, so there must be a great good to offset these sacrifices.

What good will restricting fair use do for society? Will these measures prevent piracy? Given the history of the war between copyright holders and pirates, these measures won’t work for long. Norwegian programmers successfully reverse-engineered the encryption on DVDs so that they could play movies on computers using the Linux operating system (ironically, in pursuit of their fair use rights).ⁱⁱⁱ The music industry’s past behavior, to include the shutting down of Napster and MP3 websites, as well as limiting fair use, is painting them to be a perfect target for music-hungry youth. Stealing from a friend is one thing, but stealing from a faceless corporation who is trying to restrict access to the music you love is another. For every measure the music industry installs, there will be hundreds of hyper-intelligent “Robin Hoods” worldwide who will find ways to remove the measures, not including the actual pirates themselves. Security measures have also been a classic tradeoff between access and protection. Perfect security results in no access, and vice versa. Given that the intent of copyrights is to promote access to material, increasing security violates the Constitution’s intent.

Ultimately, the music industry may be permitted to override “fair use” if new legislation permits them, assuming the new legislation is not overturned for violating previous case law, and the general spirit of copyright law. Morally, the music industry is certainly not permitted, because curtailing this right does not go to the heart of their problem –preventing music piracy – and merely curtails consumer rights. Sensibly, the music industry ought not to further incense intelligent young programmers, many from overseas, into attacking their security measures. They also should not incense the few people who did buy the music legitimately. Music companies need to attack the problem of piracy, but yielding the moral high ground to do so – ineffectively at that – makes little sense.

Is it right to restrict the technology industry so that the music industry can protect its earnings?

Analysis of the preceding question determines that the music industry doesn’t have a moral right to eliminating rights previously guaranteed. This question adds the question of the music companies’ right to protect their earnings. Considering utilitarianism, we balance the

ⁱⁱ Ironically, the consumer could not obtain a refund for the album since no returns of opened CDs are accepted, because of – you guessed it – previous anti-piracy regulation. Otherwise, people would buy a CD, open it, duplicate it, and return it.

ⁱⁱⁱ Because Linux is an open-source operating system, no one makes money from it, other than in distribution. The code is open for everyone to see and play with. Linux is written by programmers essentially for free, so naturally the DVD industry would not be able to sell its secrets to Linux like they could to Windows or Apple.

needs of the recording firms with the rights of all music listeners. Given the importance of preserving the rights of people, compared with a percentage of earnings of an industry, one should choose the rights of the people.

Recording companies have the ability to adapt to the new technology. Music firms have not made any attempts to embrace MP3 technology, and have uniformly seen it as a threat. On the other hand, the ability of people to adapt to the loss of fair use rights is not so simple. Under the Hollings bill, their computer equipment's usefulness will be reduced. As far as earnings, they are not lost, but diminished. The music industry's current earnings malaise is blamed on music piracy, but how can they establish this as the definitive cause? Perhaps low sales are due to their poor marketing of music. Concert ticket prices are so high that people can't afford to experiment with new groups.¹³ The bluegrass soundtrack for the movie "'O Brother, Where Art Thou?" hit triple platinum without radio airplay, while the movie made a relatively low \$40 million.¹⁴ Meanwhile, big name artists such as Macy Gray, Michael Jackson, George Strait, Paul McCartney, Snoop Dogg, Jessica Simpson, Tori Amos, Sisqo, RZA, R.E.M., Mick Jagger, Rod Stewart, Lenny Kravitz, Prince and Mariah Carey all had under-performing releases in 2001.¹⁵ This suggests that the music industry doesn't know what people want. Without a clear link between poor earnings and MP3 technology, there is no ground to handcuff one industry under the false pretense of protecting another.

Conclusion

The music industry can fairly expect an entitlement to some regulation in order to protect their copyrights. There is a well-established balance between the artist and copyright holder with the property owner and the social good. As long as copyrights can be respected, artists and the companies that sponsor their efforts must be rewarded fairly in order to promote artistic development. The music industry can ethically ask for regulation to be imposed on the technology industry that facilitates music piracy.

However, before blaming poor earnings on MP3 pirates, CD-RWs, and software such as Morpheus, perhaps the music industry should figure out how a sleepy bluegrass CD could outperform huge musical brand names and big marketing budgets. The industry is also likely blaming their poor performance on Napster and CD-RWs, because it is an easy scapegoat that can't respond to such challenges. These excuses are clearly the pretext required for the music industry to take hold of right previously guaranteed to the people, in direct conflict with the intention of the Constitution. The utility the music industry would gain by the ill-conceived plan to control music piracy is much less than the subsequent loss of fair use rights. Ironically, some feel that more music sales are actually generated by music sharing.¹⁶ This suggestion would fit the explanation of how an unpromoted bluegrass CD could go triple platinum. The music industry ought to find less confrontational and more ethically acceptable ways to protect their business.

Instead of infringing on the well-established fair use rights of owners of copyrighted material, the music industry ought to find more creative ways to turn around their industry. By embracing the MP3 format instead of fighting it, they may find opportunity. One proposal is to switch the industry to the MP3 format, and move away from song-by-song copyright, and have users purchase a single license that permits access to a catalog of music. Moving digitally would also allow the music firm to gather demographic information that can be used to improve their poor marketing.¹⁷ Firms also should develop content to attack the weakness of the music downloader: Internet bandwidth. Music and even movies can be downloaded, but unless you

have infinite patience or a fast Internet connection, it can take a long time (hours if either you or the source of the file have a regular 56k modem). By bundling music CDs with content that is “must-have^{iv}” and not easily downloadable, the user would rather purchase the CD than download the music. Including an inexpensive DVD with music videos of the featured act would be a value-added that can’t be replicated with the music download.

Music CDs already offer additional content only accessible with a computer. The problem is that most users don’t know this content is there. If you take a CD you recently purchased, and put it in a computer, you may be surprised at what happens. Insert the “O Brother, Where Art Thou?” into a computer and these “Enhanced CD” features will spring to life, permitting you to install screensavers, view art, and listen to the CD. Improving these features and marketing them better provides a value-added not obtained by copying and downloading tracks.

The music industry ought to use the same technology to offer more value to their customers. A kiosk in a music store can enable a user to pick and choose tracks to burn on their own CD. Since many music lovers don’t have the time, equipment, or patience to burn their own CDs, this kiosk would offer them the advantages of music technology, and the copyright holders would be rewarded with revenue.

Unfortunately, the music industry doesn’t recognize the opportunity, and would rather control music in the same ways they did in the 20th Century. Unfortunately, times change, and firms must adapt. Music firms need to earn revenues while giving music the widest possible access. Even Nietzsche said, "Without music, life would be a mistake."

¹ Marlowe, Chris, “Dion's new CD crashing party for some users,” *The Hollywood Reporter*, April 3, 2002.

² Boehlert, Eric, “Music industry in the pits!” Salon.com, December 19, 2001.

³ CDW Website (www.cdw.com).

⁴ *The Industry Standard*. February 12, 2001.

⁵ Healey, John, “Pirates Make New Use of Old Technology,” *Los Angeles Times*, Business; Part 3; Page 11, March 3, 2002.

⁶ Vaidhyanathan, Siva, “Copyrights and Copywrongs: Why Thomas Jefferson would love Napster,” MSNBC.com, July 3, 2001.

⁷ www.digitalconsumer.org website, April 7, 2002.

⁸ Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary.

⁹ Address by Rep. Rick Boucher (D-VA), Proposals for changes to the fair use doctrine in the context of digital and Internet media, *Tech Law Journal*, March 6, 2001.

¹⁰ Borland, John, “Anti-piracy bill finally sees Senate,” CNet News, March 21, 2002.

¹¹ Hooker, J.N., “Three Kinds of Ethics,” Carnegie Mellon University, October 1996.

¹² Vaidhyanathan, Siva, “Copyrights and Copywrongs: Why Thomas Jefferson would love Napster,” MSNBC.com, July 3, 2001.

¹³ Boehlert, Eric, “Music industry in the pits!” Salon.com, December 19, 2001.

¹⁴ Washington Times Entertainment Guide, April 7, 2002.

¹⁵ Boehlert, Eric, “Music industry in the pits!” Salon.com, December 19, 2001.

¹⁶ Ebert, Roger, “Don't Confuse Fans With Pirates,” *Yahoo Internet Life*, April 2002.

¹⁷ Hellweg, Eric, “A Proposal for the Recording Industry: Embrace MP3!” *Business 2.0*, April 3, 2002.

^{iv} Determined by the improved marketing methods suggested above.