

THE DEATH OF THE RECORDING INDUSTRY?

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ABSTRACT

[273] In recent years, a great deal of attention has been paid to the impact of convergent media such as the internet on the capacity of copyright to serve its intended purpose of stimulating creative activity. Fears that copyright law was being rendered useless have led to moves, particularly in the United States, to adapt and fortify the doctrine to allow it to operate in cyberspace. This article assesses the effectiveness of such changes through the lens of the proliferation of online distribution of music and its economic impact on the music industry. It is argued that events to date point in the direction of the 'death' of copyright, and a consequent need for the music industry to reconsider its dependence on the doctrine. In order to continue its role in supporting musical production, the record industry must find alternative business models which will allow it to capture the huge popular market for music.

Laws and institutions must go hand in hand with the progress of the human mind.

Thomas Jefferson.

Imitation is not the sincerest form of flattery — Money is!

Author unknown.

Don't steal music.

Advertisement for the Apple iPod.

Introduction

With its origins dating back as far as 1469 when John of Speyer was granted the exclusive right to reproduce the letters of Pliny and Cicero for five years,² the protection of the proprietary interests in the works of authors and artists has a long and distinguished history.³ As a branch of intellectual property law, copyright was

¹ BA, LLB (Hons) (Syd), LLM (Harv). An earlier version of this paper was written in conjunction with the course *Entertainment, Media, and the Law*, taught by Professor Paul C Weiler at Harvard Law School.

² Dwight L Teeter and Bill Loving, *Law of Mass Communication — Freedom and Control of Print and Broadcast Media* (10th ed, 2001) 792.

³ David Lange et al, *Intellectual Property — Cases and Materials* (1998) 644.

developed to serve the purpose of encouraging intellectual and artistic creation, [274] which are 'basic prerequisites of all social, economic and cultural development'.⁴ The development of this 'law of ideas'⁵ was seen as so important to the framers of the United States Constitution that they granted the federal government legislative authority in this area:

The Congress shall have power ... to promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.⁶

A consequence of constitutional and government sponsorship of legal rights to exclusive exploitation of literary and artistic works has been the rise of 'copyright industries'.⁷ In particular, copyright law has promoted the business of entertainment since it serves as 'the bridge that connects artistic creation, technological distribution, and economic returns between producers and consumers of entertainment works'.⁸ At a societal level, as individuals have been encouraged to dedicate their energies to the advancement of culture through the production of creative works, the production of such works has taken on a professional and commercial character.⁹

However, developments in the 1990s suggested that 'the progress of the human mind' of which Jefferson spoke may have brought technology to a state where copyright could no longer effectively serve its intended purpose.¹⁰ In a sense, intellectual property law may have been its own undoing: through protection of the fruits of the mind and the promotion of the exchange of ideas, the law has enabled technological developments which call into question the capacity of intellectual property regimes to

⁴ A N Dixon and M F Hansen, 'The Berne Convention Enters the Digital Age' [1997] *European Intellectual Property Review* 604, 607.

⁵ Peter A Alces and Harold F See, *Commercial Law of Intellectual Property* (1994) 17.

⁶ *United States Constitution* Art I, § 8, Cl 8.

⁷ Paul Goldstein, *Copyright, Patent, Trademark and Related State Doctrines — Cases and Materials on the Law of Intellectual Property* (4th ed, 1999) 15. See also Joseph H Sommer, 'Against Cyberlaw' (2000) 15 *Berkeley Technology Law Journal* 1145.

⁸ Paul C Weiler, *Entertainment, Media, and the Law* (1997) 234.

⁹ Melvin Simensky et al, *Entertainment Law* (2nd ed, 1997) 485; Michael Pearlstein, 'Music Publishing' in Howard Siegel (ed), *Entertainment Law* (2nd ed, 1996) 47.

¹⁰ See Jane C Ginsburg, 'Putting Cars on the 'Information Superhighway: Authors, Exploiters, and Copyright in Cyberspace' (1995) 95 *Columbia Law Review* 1465; Jessica Litman, 'Revising Copyright for the Information Age' (1996) 75 *Oregon Law Review* 19.

continue their very role.¹¹ This, in turn, threatens the entertainment industry as it is currently organised.¹² The fear is that with the rise of new communications media, which make reproduction and distribution of works far easier than they have been in the past, the reward for the effort spent in creating literary, artistic and musical works can no longer be guaranteed to individual authors or artists.¹³ In other words, the pervasiveness of infringement of copyright on the internet could tear down the bridge [275] between creators and consumers of entertainment products.¹⁴ The focus of this paper will be on the recording industry. Although other forms of work are affected by the issues herein discussed, events of the last few years have demonstrated that the ease with which recordings of songs can be made available to be downloaded means that the recording industry is presently the most at risk, and is thus presently the most interesting case study for discussion.¹⁵

The challenges to intellectual property law brought about by the advent of the internet and other digital media has consumed a great deal of academic,¹⁶ industry,¹⁷

¹¹ Robert T Baker, 'Finding a Winning Strategy Against the MP3 Invasion: Supplemental Measures the Recording Industry Must Take to Curb Online Piracy' (2000) 8 *UCLA Entertainment Law Review* 1; Simon Fitzpatrick, 'Copyright Imbalance: U.S. and Australian Responses to the WIPO Digital Copyright Treaty' [2000] *European Intellectual Property Review* 214, 214; Robert P Benko, *Protecting Intellectual Property Rights — Issues and Controversies* (1987) 24. Cf E Gabriel Perle and Christopher A Meyer, 'Copyright and New Technologies' in Howard Siegel (ed), *Entertainment Law* (2nd ed, 1996) 301.

¹² Noah Robischon, 'Free for All', *Variety* (New York) 20 March 2000, 40.

¹³ See Kristine J Hoffman, 'Fair Use Or Fair Game? The Internet, MP3 and Copyright Law' (2000) 153 *Albany Law Journal of Science & Technology* 11; A Bowne, 'Trade Marks and Copyright on the Internet' (1997) 2 *Media & Arts Law Review* 135.

¹⁴ T C Vinje, 'A Brave New World of Technical Protection Systems: Will There Still be Room for Copyright?' [1996] *European Intellectual Property Review* 431.

¹⁵ See National Research Council (US), *The Digital Dilemma — Intellectual Property in the Information Age* (2000) 76; Jonathan Bing and Janet Shprintz, 'New Rights Fight', *Variety* (New York) 5 March 2001.

¹⁶ Eg, Yochai Benkler, 'Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment' (1998) 11 *Harvard Journal of Law and Technology* 287; Kenneth D Suzan, 'Tapping to the Beat of a Digital Drummer: Fine Tuning US Copyright Law for Music Distribution on the Internet' (1995) 59 *Albany Law Review* 789; Dan Thu Thi Phan, 'Will Fair Use Function on the Internet?' (1998) 98 *Columbia Law Review* 169; April M Major, 'Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the World Wide Web' (1998) 24 *Rutgers Computer & Technology Law Journal* 75; Raymond A Kurz and Celine M Jimenez, 'Copyrights On-Line' (1996) 39 *Howard Law Journal* 531; Robert C Denicola, 'Freedom to Copy' (1999) 108 *Yale Law Journal* 1661.

¹⁷ Eg, Noah Robischon, 'The Byte Goes On; The continuing Napster onslaught — and defense — fuels the digital-download debate' *Entertainment Weekly* (New York) 16 June 2000, 94; Ty Burr, 'As Easy as MP3', *Entertainment Weekly* (New York) 8 October 1999, 8; Noah Robischon et al, 'Sounding Off; Napster rocks and roils the music world. Our A-to-Z guide to the debate', *Entertainment Weekly* (New York) 31 March 2000, 72; Ann Donahue, 'MP3 Web Site: Piracy Made Easy', *Variety* (New York) 5 March 2001, 29.

governmental,¹⁸ and popular¹⁹ attention in the United States over at least the last decade. Moreover, concrete steps have been taken to address the issues raised. The clearest examples of measures taken to adapt American copyright law to the new media world have been the enactment of *Digital Millennium Copyright Act 1998* (DMCA),²⁰ and prominent law suits against defendants that were seen to be participating in or assisting the infringement of copyright online.²¹ The entertainment industry has been a highly active participant in these legal developments. First, it lobbied heavily in relation to the enactment of the DMCA²² and, second, organisations such as the Recording Industry Association of America (RIAA)²³ have conducted litigation [276] in representative capacities.²⁴

In light of the apparent strategy of the music industry to seek to fortify copyright protection of works and protect its traditional business model through the courts, it is now appropriate to examine the success of that approach in the face of the fundamental problems faced by copyright law. If the enforcement of copyright is no longer able to serve as a link between artists and authors on the one hand and consumers on the other, and is overtaken by other legal or technical protections, then for all practical purposes the doctrine is 'dead'.²⁵ The question addressed in this paper

¹⁸ Eg, Vice President Al Gore, 'Bringing Information to the World: The Global Information Infrastructure' (1996) 9 *Harvard Journal of Law and Technology* 1; Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* (1986); Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995).

¹⁹ Eg, 'MP3: Can't We All Just Get Along?' *Los Angeles Times* (Los Angeles) 1 August 2000, B8; Renee Graham, 'Life In The Pop Lane; My Torrid Love Affair With Napster', *Boston Globe* (Boston) 13 March 2001, E1; Clea Simon, 'Napster Is Stirring Debate on Art and Ethics', *New York Times* (New York) 19 February 2001, C3.

²⁰ Public L No 105-304, Title I, § 102(a)(4), 112 Stat 2861 (1998).

²¹ Eg, *UMG Recordings, Inc v MP3.com, Inc*, 92 F Supp 2d 349 (SD NY, 2000); *A & M Records, Inc v Napster, Inc*, 239 F Supp 3d 1004 (9th Cir, 2001).

²² Jessica Litman, 'Digital Copyright and Information Policy' (1999) <<http://www.msen.com/~litman/carip.html>>; Laura M Holson, 'Conducting Music's Digital Shift; A Top Lobbyist Seeks Harmony In a Time of Discord', *New York Times* (New York) 20 August 2001, C1; Connie Bruck, 'Jack Valenti has fought Hollywood's battles in Washington for thirty-five years. Can he still get his way?', *New Yorker* (New York) 13 August 2001.

²³ The RIAA is a not-for-profit trade association formed over fifty years ago to 'foster a business and legal climate that supports and promotes its members' creative and financial vitality around the world.' See Ted J Barthel, 'RIAA v Diamond Multimedia Systems, Inc: The Sale of the Rio Player Forces the Music Industry to Dance to a New Beat', (1999) 9 *DePaul Journal of Arts and Entertainment Law* 279, 279-80.

²⁴ Eg, *Record Industry Association of America v Diamond Multimedia Systems, Inc*, 180 F 3d 1072 (9th Cir 1999).

²⁵ Cf Grant Gilmore, *The Death of Contract* (2nd ed, 1995).

is whether the legal institution of copyright can endure the present challenge and, if not, whether the music industry can find alternative means by which to finance its survival.

The structure of this paper is as follows. First, we shall make an overview of the theoretical and economic dimensions of this field. This section covers the history of copyright (with a focus on the role it is intended to serve), and the way in which the entertainment industry has traditionally depended on the existence and enforcement of copyright protections. Second, the changes to the media environment as a result of the digital revolution will be analysed with particular reference to the impact of these technological changes on copyright's capacity to continue its role in providing incentives to authors and creators. The third section will examine four significant copyright cases involving online music services to assess how well copyright is coping in the war over digital music. The fourth section examines the industry's response to the rise of digital distribution of music. We conclude with observations on the trajectory of an area of law and commerce which promises to remain in flux for at least the immediate future.

Innovation and incentive: theoretical and practical framework

History and rationale of copyright protection

Copyright is the exclusive grant of limited exploitation rights to the author of a wide variety of expressive and creative works.²⁶ The bundle of rights which are accorded to the owner of copyright in a work include the rights of reproduction, distribution, performance and display.²⁷ Although the common law recognised some protections for authors,²⁸ copyrights are now, and have historically been, creatures of statute.²⁹ For example, the *Statute of Anne*³⁰ passed in England 1709 is cited as the first modern copyright law.³¹ That piece of legislation, entitled 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or purchasers of

²⁶ Lange et al, above n 3, 644.

²⁷ Melville B Nimmer, *Copyright and Other Aspects Of Law Pertaining To Literary, Musical and Artistic Works* (2nd ed, 1979) 178. See 17 USC §§ 114–115 (1994).

²⁸ See *Millar v Taylor* (1769) 4 Burr 2303.

²⁹ Donald A Gregory et al, *An Introduction to Intellectual Property Law* (1994) 2.

³⁰ 8 Anne c 19, 1710.

³¹ Jayashri Srikantiah, 'The Response of *Copyright* to the Enforcement Strain of Inexpensive Copying Technology' (1996) 71 *New York University Law Review* 1634, 1647–8; Benko, above n 11, 21.

such Copies, during the Times therein mentioned', gave the creators of books, maps and charts certain proprietary entitlements for a 14 year term that could be renewed once.³²

Following independence from Great Britain, 12 of the 13 American colonies quickly enacted copyright legislation.³³ However an absence of uniformity among these separate regimes made it difficult for [277] authors to protect their interests in widely disseminated works.³⁴ This problem was overcome when the Constitution replaced the Articles of Confederation in 1787, and the enactment of federal copyright legislation was made possible by Article I, Section 8, Clause 8.³⁵ Since that time, federal law has governed the field of copyrights and patents.³⁶

On the inclusion of copyrights and patents among the enumerated powers of Congress, James Madison wrote:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases.³⁷

The 'public good' to which Madison referred was the encouragement of creativity and innovation, which were seen as vital as the federal Union began developing a national identity and economy.³⁸ However, from some modern day discussion (especially the

³² Margreth Barrett, *Intellectual Property — Cases and Materials* (1995) 354.

³³ Alan Latman et al, *Copyright for the Eighties* (1985) 4. Internationally, copyright very quickly gained acceptance in numerous countries of the world. In fact, there has been a multilateral treaty in place to allow authors to protect their works internationally since the late 1800s, although the United States did not join until 1988. Barrett, above n 32, 354. See *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as last revised at Paris, 24 July 1971, Treaty Doc 99–27, 828 UNTS 221.

³⁴ Lange et al, above n 3, 645.

³⁵ Earl W Kintner and Jack Lahr, *An Intellectual Property Law Primer* (1982) 2–3.

³⁶ *Ibid.*

³⁷ Quoted in Lange et al, above n 3, 645–6.

³⁸ Gregory et al, above n 29, 165.

rhetoric of members of copyright industries),³⁹ it might be thought that copyright is an impenetrable proprietary interest.⁴⁰ In this respect, it should be noted that intangible property, such as the ideas of inventors and the creations of authors, are in fact ‘public goods’.⁴¹ Unlike tangible property, such as a bottle of wine, use of a copyrighted work by one person does not diminish the amount available to others.⁴² Therefore, in light of the ‘pervading public policy against according private economic monopolies in the absence of overriding countervailing considerations’,⁴³ the basis for copyright must be explained more deeply.

The reason copyright aims to ensure appropriate reward to authors is as an incentive for the creation of literary, artistic and scientific works which help to define society.⁴⁴ In seeking to address market failure,⁴⁵ copyright provides a grant of a monopoly as a ‘stimulus to creativity’.⁴⁶ Copyright is intended not merely to protect a natural right in the product of intellectual effort,⁴⁷ but to provide ‘reward for effort and incentive to continue it’.⁴⁸ This rationale for copyright protection has been strongly reflected in the doctrine’s development in the United States.⁴⁹ In interpreting the ‘copyright clause’, the United [278] States Supreme Court said in 1932 that:

The copyright law, like the patent statute, makes reward to the owner a secondary consideration ... ‘The sole interest of the United States and the primary objective in conferring the monopoly lies in the general benefits derived by the public from the labors of authors.’⁵⁰

That sentiment was reiterated by the Court a generation later:

³⁹ Dan Cox and Jill Goldsmith, ‘Eisner Talk Tech as Tool or Terror for Biz’, *Variety* (New York) 10 April 2000; Erich Boehm, ‘Industry Orgs Pitch EU on New Antipiracy Plan’, *Variety* (New York) 8 March 1999.

⁴⁰ ‘Markets for Ideas’, *The Economist* (London) 14 April 2001.

⁴¹ Patricia Loughlan, *Intellectual Property — Creative and Marketing Rights* (1998) 11.

⁴² Weiler, above n 8, 235; Keith Maskus, *Intellectual Property Rights in the Global Economy* (2001).

⁴³ Nimmer, above n 27, 26.

⁴⁴ Benko, above n 11, 21.

⁴⁵ *Ibid.*

⁴⁶ Perle and Meyer, above n 11, 301.

⁴⁷ Cf *Donaldson v Beckett* (1774) 4 Burr 2408.

⁴⁸ Samuel Ricketson, *Law of Intellectual Property* (1983) 8.

⁴⁹ Stephen Breyer, ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs’ (1970) 84 *Harvard Law Review* 281, 282.

⁵⁰ *United States v Paramount Pictures*, 334 US 131, 158 (1948) quoting *Fox Films Corp v Doyal*, 286 US 123, 127 (1932).

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts'.⁵¹

However, perhaps ironically, despite the policy basis of encouraging information flow, copyright law allows a copyright holder to impede the spread of his or her works, and thereby curb the dissemination of knowledge.⁵² For example, in *Harper & Row Publishers, Inc v Nation Enterprises, Inc*,⁵³ copyright law was used to prevent the revelation of part of the memoirs of President Ford before they appeared in bookstores.⁵⁴ Thus, even where distributing copyrighted information would benefit society, a copyright holder may restrict society's access to that information.⁵⁵ Some commentators argue that this capacity to restrict speech (if it would amount to infringement of a copyrighted work) makes copyright law 'the most significant and omnipresent mechanism of control within the sphere of artistic expression'.⁵⁶ However, the drafters of the Constitution clearly saw this as a necessary evil in serving the function of encouraging people to create works.⁵⁷ As some evidence of this, Teeter and Loving note that the Congress's power to grant copyrights made its way into the body of the Constitution, whereas the guarantee of free speech is found in an amendment.⁵⁸

Before moving to the music industry's reliance on copyright it is worth noting parenthetically that copyright scholars would maintain that despite the potential for restrictions on speech, the doctrine nonetheless 'works to ensure the free flow of creativity that ultimately benefits society'.⁵⁹ Two important aspects of copyright law

⁵¹ *Mazer v Stein*, 347 US 201 (1954).

⁵² L Ray Patterson and Judge Stanley F Birch, Jr, 'Copyright and Free Speech Rights' (1996) 4 *Journal of Intellectual Property Law* 1.

⁵³ 471 US 539 (1985).

⁵⁴ Weiler, above n 8, 235.

⁵⁵ Michael B Rutner, 'The ASCAP Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement' (1998) 39 *British Columbia Law Review* 1061.

⁵⁶ Donald E Lively et al, *Communications Law — Media, Entertainment, and Regulation* (1997) 638.

⁵⁷ Fred H Cate, 'The Technological Transformation of Copyright Law' (1996) 81 *Iowa Law Review* 1395, 1396; S P Meyer, 'Intellectual Property: Basic Forms' in Joseph E Gortych (ed), *Intellectual Property Issues Facing High-Tech Industries* (2001) 2.

⁵⁸ Teeter and Loving, above n 2, 792.

⁵⁹ *Ibid.*

achieve the balance between the rights of the copyright holder to the exclusive use of the work and society's interests in the free exchange of ideas and expression.⁶⁰ First, the 'idea-expression' [279] dichotomy maintains that copyright will protect expression but does not entrench a monopoly over ideas.⁶¹ For example, in the entertainment context, '[a]n idea for a [movie] plot cannot be protected by copyright; but as the idea takes form and becomes embodied in a concrete expression, the product is copyrightable.'⁶² Secondly, the defense of 'fair use'⁶³ allows individuals to use copyrighted material in certain circumstances without incurring liability for infringement.⁶⁴ Use of a work for educational purposes,⁶⁵ criticism or comment,⁶⁶ and parody and satire⁶⁷ are examples of uses that have been considered 'fair'.⁶⁸

Copyright and the music industry

The entertainment industry is a paradigm example of 'commerce stemming from products of people's minds'.⁶⁹ After 200 years of statutory and doctrinal evolution, copyright law has become the base for a vast recording and movie industries across the world, but most prominently in the United States.⁷⁰ Indeed, the United States'

⁶⁰ *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 US 539, 558, 560 (1985). See Goldstein, above n 7, 15; R Denicola, 'Copyright and Free Speech: Constitutional Limitations on the Protection of Expression' (1979) 67 *California Law Review* 283; Paul Goldstein, 'Copyright and the First Amendment' (1970) 70 *Columbia Law Review* 983; M Nimmer, 'Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?' (1970) 17 *UCLA Law Review* 1180; Patterson, 'Private Copyright and Public Communication: Free Speech Endangered' (1975) 28 *Vanderbilt Law Review* 1161.

⁶¹ *Baker v Selden*, 101 US 99 (1871); *Feist Publications, Inc v Rural Telephone Service Co, Inc*, 499 US 340 (1991).

⁶² Robert Fremlin, *Entertainment Law* (1990) 338. See *Nichols v Universal Pictures Corp*, 45 F 2d 119 (1930); *Time, Inc v Bernard Geis Associates*, 293 F Supp 130 (SD NY 1968); *Hospital for Sick Children v Melody Fare Dinner Theatre*, 516 F Supp 67 (ED Va 1980); *Gibson v CBS, Inc*, 491 F Supp 583 (SD NY 1980); *Smith v Weinstein*, 578 F Supp 1297 (1984); *Zambito v Paramount Pictures Corp*, 613 F Supp 1107 (ED NY 1985); *Silva v MacLaine*, 697 F Supp 1423 (ED Mich 1988).

⁶³ See 17 USC § 107; *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 US 539 (1985); Nimmer, above n 27, 380.

⁶⁴ Fremlin, above n 62, 342.

⁶⁵ Eg, *Williams & Wilkins Co v United States*, 487 F 2d 1345 (1973).

⁶⁶ Eg, *Karll v Curtis Publishing Co*, 39 F Supp. 836 (1941).

⁶⁷ Eg, *Campbell v Acuff-Rose Music, Inc*, 510 US 569 (1994).

⁶⁸ Gregory et al, above n 29, 194–5.

⁶⁹ Kintner and Lahr, above n 35, 1.

⁷⁰ Weiler, above n 8, 237.

strong commitment to intellectual property protection has helped make it the world's largest producer of copyright content,⁷¹ and in particular recorded music.⁷²

However, modern day entertainment is both an expensive and a risky business.⁷³ On the one hand, artistic expression requires huge financial resources to facilitate its creation and dissemination.⁷⁴ On the other, as the audience's appetite is fickle and hard to predict, entertainment products have a very high probability of failure.⁷⁵ For example, the average record label loses money on 90–95 per cent of artists it signs, and has to rely on a handful of 'mega-hits' to make a profit.⁷⁶ As a result of the dynamics of the market, large entertainment businesses have been created which are able to command the necessary resources, and weather inevitable failures.

The right to creative works is the stock-in-trade of the entertainment industry,⁷⁷ thus intellectual property law plays an 'indispensable' role in the world of entertainment performers, producers and fans.⁷⁸ Although American society also encourages the composition and performance of music through well attended musical performances, and public and private funding,⁷⁹ copyright remains 'the central [280] core of legal protection for entertainment assets'.⁸⁰ That copyright serves as the nexus between the production and communication of art and the financial resources behind that production is 'compelling and undeniable'.⁸¹

It is crucial to the economic value of an entertainment work that its author has exclusive prerogative to decide whether, and on what financial terms, the work can be reproduced, distributed, and performed.⁸² As owners of the copyright in the sound

⁷¹ Patricia Loughlan, 'Music on Hold; The Case of Copyright and the Telephone' (1996) 18 *Sydney Law Review* 342, 344.

⁷² Julian Warner, 'Information Society or Cash Nexus? A Study of the United States as a Copyright Haven' (1999) 50 *Journal of the American Society for Information Science* 461.

⁷³ Simensky et al, above n 9, 32.

⁷⁴ Lively et al, above n 56, 736.

⁷⁵ Simensky et al, above n 9, 32.

⁷⁶ 'Big Music Fights Back', *The Economist* (London) 16 June 2001.

⁷⁷ Simensky et al, above n 9, 485.

⁷⁸ Weiler, above n 8, 237.

⁷⁹ Bernard Korman and I Fred Koenigsberg, 'Performing Rights in Music and Performing Rights Societies' (1986) 238 *PLI/Pat* 9, 38, 41.

⁸⁰ Weiler, above n 8, 405.

⁸¹ Lively et al, above n 56, 737.

⁸² Weiler, above n 8, 237.

recordings of songs, record companies derive income from the exploitation of songs from mechanical royalties for public performance, and synchronisation on television and in film.⁸³ However, individual unit sales remain a large earner.⁸⁴ Therefore, since getting the most out of successful songs and artists is essential to the survival of the industry, widespread infringement of copyrighted works strikes fear into the hearts of record companies because of the lost sales such infringement represents.⁸⁵ For this reason, it has been said that copyright as applied to the entertainment industry differs from the mainstream law because of these 'special economic considerations'.⁸⁶

The size of the entertainment industry, and its economic power in the United States economy, gives it substantial political influence.⁸⁷ Consequently, copyright doctrine 'reflects the results of hard-fought negotiations and industry-specific compromises'.⁸⁸ Some argue that the result of this has been too great an influence exerted by the industry heavy-weights. For example, Poquette asserts that in the entertainment industry copyright places a strangle-hold on the market forces that normally set the price in other industries.⁸⁹ That is, the industry sets higher prices than the market would normally allow because consumers cannot legally go anywhere else to obtain the desired product.⁹⁰ Of course, that is the direct result of government sponsored monopoly power to serve a societal end. However, we now turn to the question of whether that monopoly will hold much longer in light of the advent of the internet.

Copyright and the challenge of cyberspace

Technological change and copyright law

As the Supreme Court has observed, copyright's history is marked by reactions to changes in the technological capacity to copy the works of authors:

⁸³ Perlstein, above n 9, 55; Korman and Koenigsberg, above n 79, 38, 41.

⁸⁴ Topaz Amore, 'Music Hits a £750m Note', *Sunday Telegraph* (London) 18 September 1994, 1.

⁸⁵ 'Markets for Ideas', above n 40.

⁸⁶ Simensky et al, above n 9, 3.

⁸⁷ Holson, above n 22, C1.

⁸⁸ National Research Council, above n 15, 47.

⁸⁹ Bruce R Poquette, 'Current Public Law and Policy Issues: Information Wants to be Free' (2000) 22 *Hamline Journal of Public Law & Policy* 175.

⁹⁰ *Ibid.*

From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment — the printing press — that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.⁹¹

[281] Moreover, Perle and Meyer argue that the manner in which Congress has exercised its power under the copyright clause has been 'remarkably contemporary, robust and efficacious' in dealing with technological innovation and progress.⁹² Bowrey contends that copyright has exhibited its nature as a complex, organic body of law, containing possibilities for development, re-development and reform.⁹³ As Pike points out, history teaches us that every generation or so a new technology emerges that many people view as a threat to the copyright system.⁹⁴ From this perspective, the point is made that although the internet is a new medium for transmitting information, the content remains words, sounds, images — the only difference is that they are conveyed as zeros and ones.⁹⁵ The fundamentals of copyright — the protection of works of authors, artists and composers — remain the same regardless of the format in which the works are recorded or reproduced.⁹⁶ However, this apparent academic confidence in the continuing effectiveness of the doctrine is in stark contrast to the position of commentators who see cyberspace as a powerful challenge to copyright.

Copyright's weaknesses exposed

It is true that copyright, although based on a model devised for print media, has in the past been expanded to cover live, filmed and taped performances and broadcast media.⁹⁷ However, the change to communication via digital (compared to analog) media is a quantum leap, rather than a small step, in the capacity to reproduce and

⁹¹ *Sony Corp of America v Universal City Studios*, 464 US 417, 430–1 (1984), rehearing denied, 465 US 1112 (1985) (footnotes omitted).

⁹² Perle and Meyer, above n 11, 301.

⁹³ K Bowrey, 'Who's Writing Copyright's History?' [1996] *European Intellectual Property Review* 322, 328.

⁹⁴ Andrew Pike, 'Symposium Beyond Napster: Debating The Future Of Copyright On The Internet: Introductory Remarks' (2000) 50 *American University Law Review* 355.

⁹⁵ Bowrey, above n 93, 328.

⁹⁶ J Bannister, 'Is Copyright Coping with the Electronic Age?' (1996) 4 *Australian Law Librarian* 11, 11.

⁹⁷ Litman, above n 10, 19; Weiler, above n 8, 236.

disseminate copyrighted works.⁹⁸ It has been observed that copyright law has never been effective at preventing all infringement;⁹⁹ however the digital shift exacerbates some of copyright's traditional weaknesses to an extent that the law may no longer be able to serve its role of providing authors with reward for their effort. This would diminish the incentive for individuals to create works, leaving society with fewer books to read, songs to listen to, and art to view.¹⁰⁰

The force of the challenge brought by the internet can only be understood in terms of the world existing before the 'digital revolution'.¹⁰¹ In the analog world, books came as hardback and paperback; sound recordings came on vinyl records or magnetic tape; motion pictures came on film; radio and television programs were recorded on film or magnetic tape, and transmitted via analog signal to a limited geographic region simultaneously.¹⁰² In this analog world, the threat to copyright owners was limited because analog technology by its nature constrained infringement since the large-scale reproduction and dissemination of a work usually involved tremendous resources.¹⁰³

However, things have changed in the digital, networked world. First, although it has always been [282] possible to copy another author's expression, the digitisation of intellectual property allows it to be used in many different media, to be manipulated and distorted, to be copied at the same quality as the original, and to be distributed throughout the world cheaply, easily and speedily.¹⁰⁴ Now almost anyone with basic computer equipment can produce a virtually limitless supply of perfect copies of works.¹⁰⁵ Therefore, copyright owners are facing unprecedented and uncompensated use and misuse of their works.¹⁰⁶

⁹⁸ Litman, above n 22, 2.

⁹⁹ L A Kurtz, 'Copyright and the National Information Infrastructure in the United States' [1996] *European Intellectual Property Review* 120, 120.

¹⁰⁰ William Fisher, 'Digital Music: Problems and Possibilities' (2002) <http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/Music.html>.

¹⁰¹ Gregory Hunt, 'In a Digital Age, The Musical Revolution Will Be Digitalized' (2000) 1 *Albany Law Journal of Science & Technology* 181; 'Thrills and spills', *The Economist* (London) 7 October 2000.

¹⁰² Dixon and Hansen, above n 4, 604.

¹⁰³ Eric J Bakewell et al, 'Computer Crimes' (2001) 38 *American Criminal Law Review* 481, 496-7; see also Vinje, above n 14, 431.

¹⁰⁴ Vinje, above n 14, 431.

¹⁰⁵ Rebecca J Hill, 'Pirates of the 21st Century: The Threat and Promise of Digital Audio Technology on the Internet' (2000) 16 *Computer and High Technology Law Journal* 311.

¹⁰⁶ Bowne, above n 13, 135.

Second, the traditional problem faced by copyright of locating an infringing party is magnified in cyberspace.¹⁰⁷ As with finding an infringing public performer of copyrighted plays or music, identifying parties who place copyrighted photographs, files or documents on the internet is extremely difficult.¹⁰⁸ Unlike the bootlegger on a street corner with a suitcase of video cassettes, the cyber-pirate is difficult to catch red-handed. Since anyone anywhere can access the World Wide Web, anyone anywhere can infringe a creator's copyright at any given moment. Moreover, the breadth and anonymity of the internet make 'policing' extremely difficult without serious incursions upon every user's privacy, and a radical change in the free and open ethos that has formed the basis for cyberspace.¹⁰⁹ Although technologically possible, the internet's code has been written to promote a de-centralised environment, not the tracking of copyright infringement.¹¹⁰

Third, since 'none of the new technologies respects national boundaries',¹¹¹ the difficulty of preventing infringement on an international scale is problematic from both a practical and a jurisdictional perspective. As communications technology makes the world a smaller place, the 'parochial' nature of sovereign legal regimes remains.¹¹² Since material is so easily transmitted electronically across national boundaries, municipal law can be rendered irrelevant.¹¹³ As Dixon and Hansen state, 'the issue of applying national copyright law to acts that physically take place in another country, and the problem of "piracy havens", have been thrown into bold relief'.¹¹⁴ This problem also compounds the previous one: in addition to the difficulty of detecting copyright beyond national boundaries, determining whose law applies

¹⁰⁷ Jonathan I Edelman, 'Anonymity and International Law Enforcement in Cyberspace' (1996) 7 *Fordham Intellectual Property, Media and Entertainment Law Journal* 231, 294.

¹⁰⁸ *Ibid.*

¹⁰⁹ Barbara Cohen, 'A Proposed Regime for Copyright Protection on the Internet' (1996) 22 *Brooklyn Journal of International Law* 401.

¹¹⁰ Donald J Karl, 'State Regulation of Anonymous Internet Use After *ACLU of Georgia v Miller*' (1998) 30 *Arizona State Law Journal* 513.

¹¹¹ Perle and Meyer, above n 11, 310; Ginsburg, above n 10, 1467.

¹¹² Colin Tapper, 'Genius and Janus: Information Technology and the Law' (1985) 11 *Monash University Law Review* 75, 85.

¹¹³ Bannister, above n 96, 11.

¹¹⁴ Dixon and Hansen, above n 4, 607.

under conflict of law rules can be difficult,¹¹⁵ and asserting jurisdiction even more so.¹¹⁶

The ease of reproduction and dissemination and the difficulties of enforcement have a direct impact on the marketability of copyrighted works in the 'real world'.¹¹⁷ The ability to download a perfect copy [283] of your favourite song with minimal chance of detection rationally diminishes the imperative to buy it. The risk of legal sanction in operating a website which makes songs available for others to download can be readily outweighed by the ability to earn advertising revenue from providing such a service. If copyright no longer encourages artistic creation by providing an effective legal weapon against infringement, it serves no useful purpose. Therefore, the fundamental change to the technological dimensions of the world in which the law is required to operate threatens copyright at its core.¹¹⁸ However, before declaring copyright dead, we must consider the changes that have been made to copyright law in an attempt to help it respond to the dimensions of cyberspace.

Adjusting copyright for the internet

Copyright law has not been abandoned in attempts to regulate conduct on the internet. In response to these newly defined technological circumstances, copyright holders urged legislatures to strengthen their position.¹¹⁹ The legitimacy of their concerns was without doubt.¹²⁰ As Ginsburg observed, 'if all kinds of works of authorship, particularly those of intense creativity and imagination, are to embark on the cyber-road, then authors require some assurance that the journey will not turn into a hijacking'.¹²¹

¹¹⁵ E Ustaran, 'Web Sites and Copyright Infringement' (1998) 9 *Computers and Law* 32, 32. See *Mecklermedia Corp v DC Congress GmbH* [1998] 1 All ER 148.

¹¹⁶ Kurtz, above n 99, 125.

¹¹⁷ Sonia Das, 'The Availability of the Fair Use Defense in Music Piracy and Internet Technology' (2000) 52 *Federal Communications Law Journal* 727.

¹¹⁸ Fleischmann, 'The Impact of Digital Technology on Copyright Law' (1988) *Journal of Patent and Trademarks Office Society* 5, 5.

¹¹⁹ Pamela Samuelson, 'Does Information Really Have to be Licensed?' (1998) 41 *Communications of the ACM* 15; Litman, above n 22, 2.

¹²⁰ Vinje, above n 14, 439.

¹²¹ Ginsburg, above n 10, 1466.

Although there were those who advocated an anti-intellectual property response to the internet,¹²² the view which prevailed among law-makers was that they must be wary of 'being too willing to view cyberspace as a new world requiring different rules, when the ones we already have seem to work reasonably well'.¹²³ Rather, it was decided that the digital format of works and networked dissemination did not radically undermine the bases of copyright laws conceived in an analog world.¹²⁴ It was argued that all that was needed was 'fine-tuning' before copyright could apply to the information society.¹²⁵

This updating of copyright law occurred in two ways. The first was by common law development of existing municipal copyright norms. For example, both the right of authors to control digital reproductions of their works,¹²⁶ and their right to control digital transmissions of their works to the public,¹²⁷ have been recognised in American courts.¹²⁸ Second, the United States has signed and implemented a coordinated response developed by the international community.¹²⁹ The 1996 convention negotiated in World Intellectual Property Organisation sought to bring copyright law into the digital age,¹³⁰ and [284] provoked the enactment of the DMCA.¹³¹ The most important provisions of the DMCA for present purposes are those which immunise internet service providers from liability for infringement by their customers,¹³² and those which proscribe interference with digital protection measures (such as encryption) that can be used to technically protect copyrighted

¹²² John Perry Barlow, 'The Economy of Ideas: Selling Wine Without Bottles on the Global Net', <<http://www.eff.org/~barlow/EconomyOfIdeas.html>>; D Johnson and D Post, 'Law and Borders — The Rise of Cyberlaw' (1996) 48 *Stanford Law Review* 1247.

¹²³ M de Zwart, 'Copyright in Cyberspace' (1996) 21 *Alternative Law Journal* 266, 270.

¹²⁴ Ginsburg, above n 10, 1468.

¹²⁵ See, eg, W Rumphorst, 'Fine Tuning Copyright for the Information Society' [1996] 2 *European Intellectual Property Review* 79.

¹²⁶ See *Sega Enterprises, Ltd v MAPHIA*, 857 F Supp 679 (ND Cal 1994).

¹²⁷ See *Playboy Enterprises, Inc v Frena*, 839 F Supp 1552 (ND Fla 1993).

¹²⁸ Hugh Paynter and Ross Foreman, 'Liability of Internet Service Providers for Copyright Infringement' (1998) 21 *University of New South Wales Law Journal* 578, 585–6.

¹²⁹ See Fitzpatrick, above n 11.

¹³⁰ WIPO Document CRNR/DC/94, <<http://www.wipo.org/eng/diplconf/distrib/94dc.html>>. See generally Sir Anthony Mason, 'Developments in the Law of Copyright and Public Access to Information' [1997] 11 *European Intellectual Property Review* 636.

¹³¹ Hoffman, above n 13.

¹³² 17 USC 512 (1998).

works.¹³³ In addition, there have been other pieces of domestic legislation, such as the *No Electronic Theft (NET) Act*.¹³⁴

However, the effectiveness of these measures to help copyright law cope with the new technology is far more important than the fact of their implementation. Therefore, we now turn to an examination of examples of infringement litigation which directly bear upon copyright's capacity to serve its purpose in an online world.

The music industry's battle with cyberspace

Music and the digital maelstrom

Of all the content industries affected by the digital environment, the music industry has been 'thrown first into the maelstrom'.¹³⁵ There are four principal reasons why music became 'intellectual property's canary in the digital coal mine'.¹³⁶ First, files containing digitised high fidelity music can be compressed into Moving Picture Experts Group-1 Layer 3 (MP3) format, which retains high sound quality while being sufficiently small to allow transmission via widely available computer equipment.¹³⁷ Second, sources of such files are abundant. Digital recordings on most compact discs (CDs) are not encrypted, so can easily be transferred to MP3 format ('ripped') using digital audio extracting software.¹³⁸ As a result, there were quickly numerous websites that provided access to MP3 files.¹³⁹ Third, music is popular with a demographic group which is internet-literate (for example, high school and college students).¹⁴⁰ Fourth, music downloaded from the web can be enjoyed using existing technology, so there are no additional costs required before the owner of a personal computer can listen to their favourite songs.¹⁴¹ In sum, the ease with which copyrighted music can

¹³³ 17 USC 1202 (1998).

¹³⁴ Public L 105-147, 1997.

¹³⁵ National Research Council, above n 15, 76.

¹³⁶ *Ibid.*

¹³⁷ Paul C Weiler, *Entertainment, Media, and the Law* (2nd ed, forthcoming).

¹³⁸ Hill, above n 105.

¹³⁹ National Research Council, above n 15, 76.

¹⁴⁰ Matthew Mirapaul, 'A Marriage of Music and Creativity at 3 New Web Sites', *New York Times* (New York) 14 May 2001, E2.

¹⁴¹ Edmund L Andrews, 'Fighting Free Music, Europeans Take Aim at Personal Computers', *New York Times* (New York) 14 February 2001, A1.

be distributed via the internet and enjoyed by individuals makes the potential for massive copyright infringement all the more real.¹⁴²

In light of digital music's place at the cyber-vanguard, this section will consider the impact of the World Wide Web on the recording industry as an example of the challenges to traditional industry structures and business models the internet has brought. It should be mentioned at this point that the interesting and difficult questions of how the 'fair use' doctrine will apply to the downloading of digital music will not be addressed directly.¹⁴³ Rather, the focus is on what the result or current posture of four key cases tells us about copyright's vitality as a means of rewarding artists.

[285] *The MP3.com case*

The first significant intersection between traditional copyright principles and cutting-edge technology and consumer practice on the internet concerned the website MP3.com. The situation here was that the internet start up company MP3.com purchased nearly 45,000 CDs, copied the songs from them onto its computer servers, and permitted subscribers to its 'My.MP3.com' service to draw upon these over the internet.¹⁴⁴ However, before being able to download a song, the user had to prove he or she already owned the album on CD (by placing it in the computer's CD-ROM drive and using the 'Beam-It' function),¹⁴⁵ or was about to buy from one of MP3.com's e-commerce partners.¹⁴⁶

As a 'virtual CD player',¹⁴⁷ this service allowed people to have access to their music collections through their computers from any internet connection in the world.¹⁴⁸ This proved a very popular product as My.MP3.com had over half a million users within

¹⁴² Peter Brown and Richard Raysman, 'Napster Threatens Copyright Law' (2000) 224 *New York Law Journal* 3, 3.

¹⁴³ See Hoffman, above n 13, 153; Weiler, above n 137.

¹⁴⁴ 'RIAA v MP3.com' <<http://www.mp3.com/news/533.html>>.

¹⁴⁵ Hill, above n 105.

¹⁴⁶ Fisher, above n 100.

¹⁴⁷ Hill, above n 105.

¹⁴⁸ Peter K Yu, 'From Pirates To Partners: Protecting Intellectual Property In China In The Twenty-First Century' (2000) 50 *American University Law Review* 131, note 287.

its first four months of operation.¹⁴⁹ However, the major record companies were not so impressed and sued the website, asserting that it had infringed the copyright in the music it was making available for download. In April 2000, Judge Rakoff of the United States District Court ruled that, by copying the CDs without permission, MP3.com had violated s 106 of the *Copyright Act 1976*.¹⁵⁰ Further, the defendant's arguments based on 'fair use' were rejected.¹⁵¹

Upon a finding of liability, MP3.com settled its cases with four of the five major record labels, paying US\$20 million to each.¹⁵² The fifth label, Seagram, pursued an assessment of damages, and won an award of US\$25,000 for each of its CDs that had been copied — US\$53 million in total.¹⁵³ Despite this result and hostility between the service and the entertainment industry, MP3.com was bought by Vivendi Universal later in the year 2000.¹⁵⁴

The result in this case stands as a clear vindication of the rights of the music industry, and a blow to the online distribution of musical content. In its first test in the online world, copyright appeared to have done its job in protecting the investment of the record companies, and providing incentive for them to continue producing songs. Moreover, the industry was able to take advantage of the innovation of the business, as it was bought out by an established member of the recording label club.

The Napster case

Certainly the most prominent character in the story of digital music is 'the infamous music-swapping service', Napster.¹⁵⁵ Named after its creator Shawn Fanning, whose nickname was 'Napster' because of his 'nappy' hair under an omnipresent baseball cap,¹⁵⁶ the service was based on a different technological model to the single database of songs held by MP3.com. On Napster, the user had access to a search function

¹⁴⁹ Weiler, above n 137.

¹⁵⁰ *UMG Recordings v MP3.com*, 92 F Supp 2d 349 (SD NY 2000).

¹⁵¹ *Ibid*, 352.

¹⁵² Weiler, above n 137.

¹⁵³ *Ibid*.

¹⁵⁴ Leslie Walker, 'Can't See The Forest for The Falling Trees', *Washington Post* (Washington DC) 28 December 2000, E1.

¹⁵⁵ 'Putting It In Its place — Geography and the Net', *The Economist* (London) 11 August 2001.

¹⁵⁶ 'People Who Mattered: Class of 2000', *Time Magazine* (New York) 25 December 2000, 122.

allowing him or her to type in the name, word or phrase of the title, or the author of a song, [286] and 'find it' in a list of songs maintained by the website.¹⁵⁷ The search engine would then give the user a list of files held by other users that contained those search words.¹⁵⁸ The user could then select the song he or she wished to download from another user, and the system would connect the two directly and a copy of the song would be transferred from one user to the other.¹⁵⁹ The important technical distinction from the highly centralised model employed by MP3.com was that Napster (and its clones, Gnutella and Aimster) allowed internet users to swap music files and other data among themselves.¹⁶⁰

The Napster service was tremendously popular and at its peak had 50 million users around the world.¹⁶¹ However, fresh from its victory against MP3.com, the recording industry sought to shut down what it saw as widespread copyright infringement by Napster users.¹⁶² In this regard, it should be noted that Napster did not do any copying itself. Therefore, the record companies' legal proceedings did not allege direct infringement of copyright against the website, but rather liability for contributory infringement.¹⁶³ Essentially they sought to hold Napster responsible for the illegal copying of their works by its users.¹⁶⁴ In response, Napster raised a number of defences. It argued that it fell under the DMCA 'safe harbor' protections given to service providers in s 512(a) of the *Copyright Act 1976*.¹⁶⁵ Furthermore, Napster relied on the Supreme Court's famous contributory infringement case dealing with the sale of video cassette recorders (VCRs), *Sony Corp of America v Universal City Studios*.¹⁶⁶ Napster argued that trading songs on the Web was like lending CDs

¹⁵⁷ Poquette, above n 89.

¹⁵⁸ Baker, above n 11.

¹⁵⁹ Poquette, above n 89.

¹⁶⁰ 'Gathering Steam', *The Economist* (London) 14 April 2001.

¹⁶¹ Christopher Stern, 'Napster Settles Lawsuit Filed by Music Publishers', *Washington Post* (Washington DC) 25 September 2001, E12.

¹⁶² *A & M Records v Napster, Inc*, 114 F Supp 2d 896 (ND Cal 2000).

¹⁶³ Fisher, above n 100. See the Complaint at <http://www.riaa.com/PDF/Napster_Complaint.pdf>.

¹⁶⁴ Carol Noonan and Jeffery Raskin, 'Intellectual Property Crimes' (2001) 38 *American Criminal Law Review* 971, note 224.

¹⁶⁵ Hoffman, above n 13.

¹⁶⁶ 464 US 417 (1984).

between friends, and that such 'space shifting' was a fair use similar to 'time shifting' television programs with a VCR.¹⁶⁷

However, Judge Patel of the United States District Court held that an infringement action was sustainable, and was unconvinced by the defence arguments.¹⁶⁸ She therefore imposed a preliminary injunction preventing the continued operation of the website, and later (after the injunction was confirmed on appeal)¹⁶⁹ refused to allow it to recommence operation until Napster could prove that no infringement was taking place.¹⁷⁰ Napster eventually settled the cases with the record companies for US\$26 million, in addition to giving music publishers a US\$10 million advance against future royalties.¹⁷¹ Moreover, Napster's re-launch as a subscription service is subject to payment of one-third of its royalties to music publishers and two-thirds to record labels.¹⁷² Despite the apparently crippling impact of such remedies, media giant Bertelsmann saved Napster with a US\$60 million loan, which can [287] be converted into a 58 per cent stake in the company.¹⁷³

From the perspective of doctrinal effectiveness, the outcome of this case can also be seen as a victory for the music industry. Napster was shut down, and copyright infringement on this very popular service was stopped. Again, the copyright claims of the industry were vindicated despite the new technological setting. And again, the industry was able to capture the innovator by subsuming it into an existing powerhouse.

The pending Aimster litigation

Aimster, named for its creator Johnny Deep's daughter Aimée,¹⁷⁴ is an online service which operates as a layer on top of America Online's popular Instant Messenger

¹⁶⁷ Neil Weinstock Netanel, 'From the Dead Sea Scrolls to the Digital Millennium; Recent Developments in Copyright Law' (2000) 9 *Texas Intellectual Property Law Journal* 19; Fisher, above n 100.

¹⁶⁸ *A & M Records v Napster, Inc*, 114 F Supp 2d 896 (ND Cal 2000).

¹⁶⁹ Matt Richtel, 'Appellate Judges Back Limitations On Copying Music', *New York Times* (New York) 13 February 2001, A1.

¹⁷⁰ Matt Richtel, 'Record Labels Move To Short-Circuit Trial', *New York Times* (New York) 9 August 2001, C6.

¹⁷¹ Stern, above n 160, E12.

¹⁷² 'The Week', *Variety* (New York) 1 October 2001.

¹⁷³ Walker, above n 154, E1.

¹⁷⁴ Chris Taylor, 'Going Deep After Napster', *Time Magazine* (New York) 28 May 2001, 72.

service.¹⁷⁵ Among other things, Aimster allows the exchange of MP3 files between users.¹⁷⁶ Fearing a protracted legal battle with the record companies similar to that suffered by Napster, Aimster filed a lawsuit in federal court, seeking a ruling that its encrypted network did not run afoul of the law.¹⁷⁷ Aimster's declaratory judgment action argues that its terms of service, which instruct users not to trade infringing files, bring the company within the requirements of the DMCA safe harbor provisions.¹⁷⁸ Unimpressed, the entertainment industry countered soon after with its own suit, stating that 'Aimster provides the same functions as Napster, which currently is subject to a preliminary injunction as a result of its contributory and vicarious copyright infringement.'¹⁷⁹

Although this case is still working its way towards court,¹⁸⁰ it is noteworthy that Aimster was sufficiently scared by the record industry's earlier successes to attempt to head-off legal proceedings which may have been brought against it. This strategy at the very least indicates that the service viewed a copyright infringement action as a very real threat to its business. On the other hand, the continuing existence of this service and audacity of Aimster's legal strategy indicates that shutting down MP3.com and Napster has not deterred the rise of other music services. Indeed, it has been said that the music industry's successes have not had a dramatic impact on the trading of MP3 files on the internet as alternative services taken the place of Napster.¹⁸¹ As was noted by *Time Magazine* (which is owned by AOL-Time Warner, which has its own music branch, Warner Music) there are more than 50 post-Napster file-sharing services.¹⁸² Thus, it would appear that like the mystical hydra killed by

¹⁷⁵ Brad King, 'Napster Clone's Curious Terms', *Wired News*, <<http://www.wired.com/news/technology/1,1282,42105,00.html>>.

¹⁷⁶ John Borland, 'RIAA Sues Aimster Over File Swapping', <<http://news.cnet.com/news/0-1005-200-6033575.html>>.

¹⁷⁷ Brad King, 'File Traders Take Aim at RIAA', *Wired News*, <<http://www.wired.com/news/mp3/0,1285,43496,00.html>>.

¹⁷⁸ King, above n 175.

¹⁷⁹ Quoted in Matt Richtel, 'Aimster Heads Down a Path Already Taken by Napster', *New York Times* (New York) 1 June 2001, C2.

¹⁸⁰ See <<http://mini.aimster.com/takeaim2.html>>.

¹⁸¹ 'Falling', *Entertainment Weekly* (New York) 26 October 2001, 72.

¹⁸² Chris Taylor, 'It's a Musical Zoo in Headphones', *Time Magazine* (New York) 26 February 2001, 50.

Hercules, as soon as the industry cuts off one head of the free music trade, another grows in its place.¹⁸³

The pending FastTrack litigation

The latest generation of music websites poses a different technological model for the recording industries to combat. Rather than provide a centralised server index which users tap into like Napster, websites such as www.musiccity.com, www.kazaa.com, and www.grokster.com provide software named [288] 'FastTrack', which was developed by a Netherlands-based company, Consumer Empowerment.¹⁸⁴ Commentators have described this system as 'more robust and harder to sue' than the earlier services because the websites do not play a role in the exchange of files after the software has initially been downloaded by a user.¹⁸⁵ Unlike on Napster, where users would send their searches to a bank of servers, which contained a list of the music files on members' hard-drives, the newer services rely on a 'distributed' network, meaning that users connect to each other directly rather than via a central hub.¹⁸⁶ Thus, it has been said that the latest 'peer-to-peer' sites leave their foes without a target to shut down or sue.¹⁸⁷

From a legal perspective, the key point made by Gnotellaco-founder and chairman Jonathan Levinson, is that a company providing software that helps users connect with each other cannot be aware of, and therefore legally liable for, how they communicate once they are connected.¹⁸⁸ As one writer has asked provocatively, 'when the technology connects my computer directly to yours to get a file, how can you sue a company?'¹⁸⁹ A second point is that bringing legal proceedings against the designer of the software would also be more difficult since the Dutch licensor of FastTrack is outside the jurisdiction of US Copyright authorities.¹⁹⁰

¹⁸³ Poquette, above n 89.

¹⁸⁴ Robert O'Harrow, 'Music Industry Will Offer Songs Online', *The Washington Post* (Washington DC) 25 July 2001, E1.

¹⁸⁵ Justin Oppelaar, 'Music's Net Gains', *Variety* (New York) 3 September 2001.

¹⁸⁶ Justin Oppelaar, 'Majors Fight Napster Spawn', *Variety* (New York) 30 July 2001.

¹⁸⁷ Daffyd Roderick, 'File It Under Sharing', *Time Magazine* (New York) 4 June 2001, 48.

¹⁸⁸ Oppelaar, above n 185.

¹⁸⁹ 'Operating System Battles', *The Bangkok Post* (Bangkok, Thailand) 28 November 2001.

¹⁹⁰ Oppelaar, above n 185.

However, optimism about the FastTrack system being action-proof was short-lived: 'the inevitable lawsuits have been filed'.¹⁹¹ In October 2001, 29 of the world's largest entertainment companies sued MusicCity, the Nashville-based developer of the leading peer-to-peer file-sharing products Morpheus, Grokster, KaZaa, and Consumer Empowerment in federal court in Los Angeles.¹⁹² The entertainment companies claim that the defendants should be held responsible for the alleged copyright infringements committed by users, thus adopting the contributory liability theory which was successful in the Napster case.¹⁹³ One difference to the previous suits is that the Motion Picture Association of America has joined the recording industry in this fight since the FastTrack-based services allow the exchange of digital copies of movies as well as songs. The case, captioned *Metro-Goldwyn Mayer v Grokster* (No 01-CV-8541 SVW), will be heard by Judge Wilson, United States District Court Judge for the Central District of California.¹⁹⁴

This suit was 'inevitable', regardless of the perceived legal difficulties for the plaintiffs, because the FastTrack-based services are taking Napster's place in terms of the number of users they have attracted. Together, Morpheus, KaZaa and Grokster have surpassed the popularity of Napster at its peak.¹⁹⁵ In September 2001, the number of users swapping files at any given moment on three new file-sharing networks had reached one million.¹⁹⁶ Moreover, these figures were still growing: in the first week of October 2001, 1.7 million people downloaded the software to connect to MusicCity alone.¹⁹⁷ The rise of [289] FastTrack provoked *The Economist* to ask whether the record companies had once again lost their grasp of music on the internet.¹⁹⁸

¹⁹¹ 'Operating System Battles', above n 189.

¹⁹² 'MP3 Lawyer Defends Napster Clone', *San Francisco Chronicle* (San Francisco) 8 November 2001, B2.

¹⁹³ 'EFF Defends MusicCity Peer-to-Peer Technology Tests Hollywood's Control of Content Delivery Technology' (2001) <http://www.eff.org/IP/P2P/MGM_v_Grokster/20011106_eff_musiccity_pr.html>.

¹⁹⁴ Ibid.

¹⁹⁵ Matt Richtel, 'Free Music Service is Expected to Surpass Napster', *New York Times* (New York) 29 November 2001, C4.

¹⁹⁶ 'In a Spin', *The Economist* (London) 13 October 2001.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

The new world order

Copyright is dead, long live copyright?

Although the music industry is yet to lose an online music court case, there are two inescapable observations from the preceding overview of online infringement litigation to date. First, innovation is one step ahead of the law (or at least its enforcement). The lag time between commencing a copyright infringement action and its resolution does not well serve the online protection of legal rights since infringement is occurring literally around the clock. Moreover, even though the music companies were successful in shutting down MP3.com and Napster, the speedy up-take of other services means that substantial damage is done before copyright owners are aware of, and have a chance to mobilise a legal action against, the infringement.

Second, it is becoming harder to find the appropriate defendant. In MP3.com there was a single corporation actually copying copyrighted material, however Napster, Aimster and now FastTrack can only be charged with contributory infringement. While Napster's centralised index played a very strong role in the assisting its users to locate and copy protected works, FastTrack provides only search software, which will make it harder to tag the company with responsibility for the conduct of millions of individuals. Moreover, even if this suit is successful, the FastTrack case will raise an interesting issue as to the appropriate remedy. Shutting down the MP3.com and Napster sites by injunction had the effect of discontinuing the infringing conduct (because of the central database and central search function respectively), but users of FastTrack are already armed with the software they need to continue trading songs among their already established community. Therefore, the efficacy of an injunction against the present defendants is questionable. Further, quantifying monetary damages for infringement by FastTrack users would be difficult. Without a central hub it cannot be known precisely how much infringing conduct is actually taking place, and to whom royalties are due. It should be noted that actions against individual users are not feasible (in light of their number), nor would they be a good strategy from a public relations perspective.¹⁹⁹

¹⁹⁹ Fisher, above n 100.

Additionally, if one were to speculate, one would guess that online infringement is only likely to grow in future. First, the notoriety that the legal proceedings discussed above have brought the websites has acted as very effective advertising. Use of such services is likely to increase as more and more people discover how easy it is to download the software required to begin finding free music. Second, the connection is often made between college students and the use of music services because the speed of university computer networks, intended to assist in educational goals, makes downloading music conveniently quick.²⁰⁰ Therefore, as the digital communications infrastructure improves (for example, with the rise of digital broadband cable television to individuals' homes), the number of people with the technological capacity to become serious copyright infringers will also grow.

The conclusion to be drawn from this analysis is that it would not be unreasonable to suggest that as long as people want to trade songs for free on the internet, there will be ways to do so.²⁰¹ And there will be many of them. Despite the success of copyright claims that have been made, under current technological conditions the damage to record companies is likely to continue indefinitely. The adjustments made to copyright at the behest of the music industry have not had an appreciable impact on infringement, and if the entertainment companies are not successful in the FastTrack litigation then [290] the law will have been proved completely ineffectual. In this sense, we are not far away from declaring that copyright, which as a doctrine is unable to effectively provide incentive for creativity in light the impossibility of policing infringement, is dead.

Is the music industry dead too?

The recording industry asserts that the damage it is suffering as a result of lost copyright royalties from MP3 downloading is sizeable: 'theft of intellectual property is rampant, and the music business and its artists are the biggest victims.'²⁰² The size of the settlement and damages awards in the MP3.com and Napster cases provides

²⁰⁰ Weiler, above n 137.

²⁰¹ Paul Bond, 'Napster to Fall Silent', <http://dailynews.yahoo.com/h/bpihw/20000718/en/panel_napster_to_fall_silent_1.html>; Hoffman, above n 13.

²⁰² Statement by the Recording Industry Association of America quoted in Paul C Weiler, 2000 *Supplement to Entertainment, Media, and the Law* (2000) 65.

some evidence of this. However, it has been suggested that even if the use of free online music services is significant, the impact upon music sales has not been great, or has been off-set by attracting new purchasers through free access to artists' songs.²⁰³ For example, Weiler notes that in 2000, at the height of Napster's power, sales of compact disc albums in fact rose by nearly 5 per cent in the United States, and by 3 per cent worldwide (although 'singles' sales dropped by 35 per cent in America and by 14 per cent internationally).²⁰⁴

However, more recent data paints a bleaker picture. In the first half of 2001, music sales worldwide fell by 5 per cent over the same period of 2000, 'after five already-flat years'.²⁰⁵ Moreover, investment bank Merrill Lynch predicted that music sales would drop by 5.5 per cent over the year.²⁰⁶ Further, profits at Warner Music, part of the AOL-Time Warner media conglomerate, were down by 21 per cent compared with the first half of 2000, making music the media giant's worst-performing division.²⁰⁷ Bertelsmann, the German media group, recently revealed that BMG, its music subsidiary, had lost money in the year to June 2001.²⁰⁸ Britain's EMI, one of the big five record companies, gave warning in October 2001 that full-year profits would be 20 per cent lower than the previous year.²⁰⁹ Although there may be other contributing factors (such as the overall state of the world economy and its impact on the sales of non-essential consumer items such as music), the fact that the music business appears to be doing worse than other entertainment fields, at the same time that online music services are proliferating, should not be treated as a coincidence.

Nonetheless, some commentators are hopeful that the internet has not fundamentally undermined the music industry: 'the copyright issues are a red herring; they will get sorted out, if only because Napster's very existence depends on a system in which [artists] gets paid enough to make tracks for kids to steal'.²¹⁰ However, if this 'sorting

²⁰³ Litman, above n 10, 29.

²⁰⁴ Weiler, above n 137.

²⁰⁵ *In a Spin*, above n 196.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ James Surowiecki, 'Can the Record Labels Survive the Internet?', *New Yorker* (New York) 5 June 2000, 35.

out' takes time, some writers question whether the record industry as we know it will be around by the time it has occurred.²¹¹

'Napster', which is used as the label for the digital music revolution, was clearly 'one of the most important things to happen on the internet'.²¹² Its impact on the music industry was probably equally important: 'Napster's real significance is to have proved that downloading music isn't merely a fad, as [291] most music execs had hoped'.²¹³ The deeper concern for the industry is that, as a result of what has happened over the last few years, the public has grown accustomed to gratuitous entertainment on the internet.²¹⁴ Consequently, venture capitalists, who were eager to jump on the internet entertainment bandwagon in the 1990s, are beginning to realise that the entertainment industry and the internet are not of the same generation, and a swift, seamless meld is unlikely, if not impossible.²¹⁵ On the other hand, Brown and Tsung make the point that what the recording industry should take from recent events is that there is a vast untapped audience of potential consumers, and whoever finds a way to open the door to profit-taking will hold the keys to the largest market the world has yet to know.²¹⁶

From the preceding discussion it should be clear that the current approach of the entertainment businesses relying on changes in copyright law which can be enforced in courts will not be effective into the future. However, Hilary Rosen of the Recording Industry Association of America appears to retain her focus on intellectual property enforcement: after the Napster court win, she stated that the entertainment industry's 'fight for copyright' had only just begun.²¹⁷ In contradistinction, it is submitted that the real challenge for the music business is in determining how it can adapt the existing business model and existing industry structure in the face of the new

²¹¹ Ibid.

²¹² Adam Cohen and Jennifer L. Schenker, 'In Search of Napster II', *Time Magazine* (New York) 26 February 2001, 50.

²¹³ Surowiecki, above n 210, 35.

²¹⁴ Zachary James Brown and Bernadine Tsung, 'If 'Information Wants to be Free', How Are We Supposed to Make Money?' (2000) *UCLA Journal of Law and Technology* 3.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Quoted in Pamela McClintock, 'DC Spin', *Variety* (New York) 12 March 2001.

technology.²¹⁸ We now turn to an assessment of the likelihood of success of the model adopted by the major record companies — the creation of pay-for-play online music services.

Can the Empire strike back?

Wolpert notes that every industry based on intellectual property, from software to movies, must confront some element of copyright infringement.²¹⁹ Yet these industries manage to run a viable business catering to law-abiding customers.²²⁰ The ‘first line of defense’ against pirates is a business model that combines pricing, ease of use, and legal prohibition in a way that minimises the incentives to deal with bootleggers.²²¹ As Hoffman notes, ‘the best way to stop piracy is to make music so cheap it isn’t worth copying’.²²²

There has been discussion for some time of the development of an internet-based ‘celestial jukebox’.²²³ Such a proposal would operate on a subscription basis, much like cable television.²²⁴ However, the nature of music as a public good means that some form of monopoly is required for it to be commercially exploited, and such a system would not rely copyright protection for its efficacy. Rather, it would be based on the service provider’s technological capacity to distinguish between those who have and have [292] not paid for access to the product. Thus, movement towards such a system provides further evidence of the diminished significance of copyright to the entertainment industry, and perhaps the realisation of that fact.

While technology may take away legal protections, it can also provide technical ones.²²⁵ Specifically, the use of ‘encryption devices’ and ‘cyber monitors’ may allow

²¹⁸ National Research Council, above n 13, 83.

²¹⁹ Quoted in Oppelaar, above n 185.

²²⁰ Ibid.

²²¹ Lacy et al, ‘Music on the Internet and the Intellectual Property Protection Problem’, in *Proceedings of the International Symposium on Industrial Electronics* (1997).

²²² Gene Hoffman quoted in Tom Abate, ‘Record Labels Fear Move to Digital Format Will Encourage Piracy’, *San Francisco Chronicle* (San Francisco) 10 September 1998, B1.

²²³ N Jansen Calamita, ‘Coming to Terms With the Celestial Jukebox: Keeping the Sound Recording Copyright Viable in the Digital Age’ (1994) 74 *Boston University Law Review* 505, 505.

²²⁴ June Chung, ‘The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music’s New Form of Distribution’ (1997) 39 *Arizona Law Review* 1361.

²²⁵ Vinje, above n 14, 431.

the music industry to protect the digital music that it puts into circulation.²²⁶ For example, a 'water mark' can be placed in the digital code of recordings of songs which, although not affecting the playback of the songs to the human ear, can be used to assess the authenticity of a copy of a sound or video file.²²⁷ Such watermarks can be combined with microchip technology in computers and other playback equipment to create a system which discriminates between legal and illegal copies, refusing to play infringing files.²²⁸ As noted earlier, technical protection of copyright material is legally reinforced under the DMCA, which imposes stiff penalties for tampering with such devices.²²⁹ Moreover, legislation which would require the installation of authentication devices of this kind in all computers, home video and audio players was supported by Senator Hollings in 2001.²³⁰

In addition, Sony, the RIAA and others in both the music and technology industries have proposed products for preventing unauthorised copying and creating secure formats that can encrypt and track digital files.²³¹ Promisingly for the industry, the next generation of file format combined with software could limit the possibility of infringement in higher quality transmissions: the major record companies are backing Microsoft's Windows Media and RealNetworks' RealAudio, both of which do offer copy protection.²³² McNealy, a senior analyst at research firm Gartner, says, 'If the big record companies start distributing music digitally using another format, MP3 will start to lose its base.'²³³ However, a key question is whether it is feasible to develop an industry-wide combination of record watermarks and computer downloading equipment that will effectively bar listeners from copying music off the internet.²³⁴ The music industry has taken steps to develop such a standard.²³⁵ The Secure Digital Music Initiative (SDMI) has brought together technology companies and members of

²²⁶ Brown and Raysman, above n 142, 138.

²²⁷ Weiler, above n 137.

²²⁸ Raysman and Brown, above n 142, 138.

²²⁹ National Research Council, above n 15, 83-4.

²³⁰ Weiler, above n 137.

²³¹ Kent D Stuckey, 'MP3: How Recording Industry Is Handling the Threat' (1999) 8 *Multimedia & Web Strategist* 1, 1; Barak D Jolish, 'Scuttling the Music Pirate: Protecting Recordings in the Age of the Internet' (1999) 17 *Entertainment and Sports Law* 9; Sara Beth A Reyburn, 'Fair Use, Digital Technology, and Music on the Internet' (2000) 61 *University of Pittsburgh Law Review* 991.

²³² See *RealNetworks v Streambox*, 2000 US Dist LEXIS 1889 (WD Wash, 18 January 2000).

²³³ Lucy Fisher and Hugh Porter, 'Tech Watch', *Time Magazine* (New York) 2 July 2001, 14.

²³⁴ Weiler, above n 137, 66.

²³⁵ Hoffman, above n 13.

the recording industry to create a secure format for the distribution of music via the internet.²³⁶ However, there is no consensus on the adoption of an SDMI standard. Moreover, there is always the danger that the market will induce the sale of equipment that gets around these protections, irrespective of legal sanction.²³⁷

Despite these potential difficulties, the major record companies have decided to join the online music game. MusicNet, a joint venture of RealNetworks, AOL Time Warner, Bertelsmann AG, and the EMI [293] Group, promised to usher in 'the era of secure and convenient distribution of music over the internet, [that] will transform how consumers discover and experience music'.²³⁸ PressPlay, a stand-alone joint venture equally held by Sony Music Entertainment and Universal Music Group, offers consumers 'on-demand access to a vast catalog of digital music through an array of affiliates, including Yahoo! MSN and MP3.com'.²³⁹ In addition, Listen.com, a San Francisco-based start-up, has begun a subscription service called 'Rhapsody'.²⁴⁰

However, the question remains whether Napster's once-devoted legions of fans will be willing to pay for music that is still available elsewhere on the internet for free.²⁴¹ To attract customers, subscription sites have to prove they are significantly better than the free services. MusicNet and PressPlay say they will win customers by offering a higher-quality service: 'the key product is not just the song; it is also the speed, reliability, and convenience of access to it.'²⁴² Each service claims it will offer speedier download times, songs that are properly labelled, and promotions with big-name artists.²⁴³ In addition, both plan to allow fans to not only download music files, but stream them — that is, listen to them over the internet without having to wait for the song to be copied onto the user's hard-drive.²⁴⁴ However, the challenge these services face is recognised by the CEO of Music Net: 'it will be up to us to put out a

²³⁶ See Jennifer Sullivan, 'RIAA Unveils Anti-MP3 Plan', <<http://www.wired.com/news/print/version/culture/story/16853.html>>.

²³⁷ Weiler, above n 137, 66.

²³⁸ See <http://www.musicnet.com/Frame_about.html>.

²³⁹ See <<http://www.pressplay.com>>.

²⁴⁰ Richtel, above n 195, C4.

²⁴¹ 'The Week', *Variety* (New York) 3 September 2001; 'Profit from Peer-to-Peer', *The Economist* (London) 23 June 2001.

²⁴² National Research Council, above n 15, 76.

²⁴³ Richtel, above n 195, C4.

²⁴⁴ Neil Strauss, 'By Way of Iceland, Nigeria and the Net; After Napster, Lots of Limits', *New York Times* (New York) 9 September 2001, 73.

product that's so interesting and compelling that people will be motivated to pay for it.²⁴⁵

Obviously, the critical factor will be price. The new subscription services will attract a critical mass of paying customers only if the charges, at least initially, are low. A survey by Webnoize, an internet research firm, suggested that American students, who listen to music on their computers nearly as much as they do on a stereo system, would be ready to pay only about US\$10 a month.²⁴⁶ This is reflected in the initial pricing strategy from MusicNet's 'RealOne Music' service, which was launched in December 2001. The basic charge was US\$9.95 per month for 100 downloads and 100 streams.²⁴⁷ For US\$19.95 per month for the 'RealOne Gold' service, users were offered 125 download and 125 streams plus 'premiere programming' and 'advanced features'.²⁴⁸ However, it has been observed that prices so low would not be sustainable by current industry standards: even at US\$20–30 a month the record companies would face a steep drop in revenues per track since consumers in America now pay over US\$1 per track on a CD album, which often contain songs they would never choose to pay for.²⁴⁹

Furthermore, early returns from MusicNet and PressPlay have not been promising. A recent issue of *Rolling Stone* reported that traffic at the two site could 'generously be described as a trickle.'²⁵⁰ Specifically, some estimates put the amount of digital downloads through the industry services at less than 0.1 per cent of all downloads, with Morpheus, KaZaa and Grokster retaining the vast bulk of users. In [294] addition to the criticism that the services are not effectively winning back consumers, artists are beginning to complain that MusicNet and PressPlay are not providing them with sufficient royalties. This controversy centres around the way in which the record labels are treating the websites: as records on which royalties are paid (once costs have been deducted), rather than as licenses for the use of the artists' music.

²⁴⁵ Quoted in Tom Kirchofer, 'So Far, Pay Sites Music to No One's Ears; Pay Music Web Sites Face Difficult Path to Success', *Boston Herald* (Boston) 5 November 2001, 27.

²⁴⁶ 'Big Music Fights Back', above n 76.

²⁴⁷ See <http://www.musicnet.com/Frame_realnetworks.html>.

²⁴⁸ Ibid.

²⁴⁹ 'Big Music Fights Back', above n 76.

²⁵⁰ David Thigpen, 'The Digital War', *Rolling Stone* (New York) 23 May 2002, 29.

Prominent music groups such as Offspring have gone to the length of withdrawing their songs from the labels' online sites. Indeed, some stars, such as Alanis Morissette, are going it alone (selling songs through their own websites), rather than allowing MusicNet or PressPlay access to their work.²⁵¹

Another significant difficulty the two industry-sponsored services will face is that they will be in competition, and thus will not have each other's material. This is problematic as there was clear evidence that access to more files attracts users.²⁵² Ironically, the free services may be able to provide a more complete catalog of songs than either of the two industry consortia, and the cost and inconvenience of a user subscribing to more than one service would likely be prohibitive. On the other hand, given their connections with the world's five largest producers of music, there would certainly be antitrust concerns if the MusicNet and PressPlay came to an agreement to trade catalogs, or combine. Indeed the legality of the current joint ventures has already been questioned from a competition law perspective on both sides of the Atlantic.²⁵³

A third problem for MusicNet and PressPlay in their attempt to win users from the free services is that the record labels appear determined to avoid the popular MP3 format, understandably favouring the Real Audio and Windows Media Audio formats, which allow them to control the conditions of music use.²⁵⁴ Analysts have dim expectations for the new ventures because their music will remain largely chained to the computer desktop and only for as long as subscribers pay to 'rent' it.²⁵⁵ That is, even songs which are downloaded will not be accessible after their defined period of use (one month on RealOne Music).²⁵⁶ In contrast, MP3 is a very flexible format which allows users to enjoy their music files in various ways. For example, an

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ 'No More Mr Nice Guy', *The Economist* (London) 20 October 2001. An interesting question from an antitrust perspective would be whether MusicNet and PressPlay would be able to define the market in which they compete as one that includes illegal operators for the provision of music over the internet in order to resist the suggestion of a violation of s 1 of the *Sherman Act*.

²⁵⁴ Ron Harris, 'Let The Online Music Games Begin', *Sydney Morning Herald* (Sydney) 5 December 2001.

²⁵⁵ Ibid.

²⁵⁶ Richtel, above n 195, C4.

estimated 1.4 million portable MP3 players have been sold in the United States,²⁵⁷ and these days, 'it's hard to find a class of gadget that doesn't play MP3s'.²⁵⁸ Musgrove notes that there are MP3-playing CD players, DVD changers, handheld organisers, cell phones and digital cameras.²⁵⁹ The advent of such products indicates that a feature that many people want from an online music service is 'the ability to listen to downloaded songs on any device.'²⁶⁰ In contrast, Real Audio files currently do not work in Apple's new iPod, Creative Labs' Nomad Jukebox, or SonicBlue's family of Rio players.²⁶¹ The tension for the industry is that 'security' is directly opposed to 'usability'.²⁶² Although the hope for the recording industry was that the use of protected music files would return to them their monopoly over [295] distribution, it would seem that in order for the industry to compete with the free music services it cannot use a format which will allow it greater control than MP3.

Nonetheless, the most important point to be made in relation to the commencement of MusicNet and PressPlay is that the music industry has finally taken steps to address the popularity of downloading song files, and has now provided access to music online to those who do not wish to infringe copyright. However, there are serious question marks as to how popular the industry-based online subscription services will be given that they will be more expensive and provide a less flexible service than those which they want to supplant. If the services are not able to attract a substantial proportion of the online market for songs (or if the MP3 format is not successfully replaced by a secure one), the industry will continue to suffer, with eventual consequences for the amount of music that is produced. However, before concluding we will make a brief overview of other commercial opportunities that the internet offers to artists who may not be able to recoup as much from music distribution online as they were from CD sales in the past.

²⁵⁷ Harris, above n 254.

²⁵⁸ Mike Musgrove, 'Everything Seems to Play MP3s Lately', *Washington Post* (Washington DC) 7 December 2001, E1.

²⁵⁹ *Ibid.*

²⁶⁰ Jennifer L Schenker, 'Time Digital Europe 25; The Tech Leaders Who Are Changing How We Work, Live And Play', *Time Magazine* (New York) 29 October 2001, 37.

²⁶¹ Harris, above n 254.

²⁶² *Ibid.*

New hopes

In August 2000, a 15 year old child wrote to *The Los Angeles Times* expressing his view on the music industry's position:

Music is eventually going to be free. Musicians are just going to have to find a way to make money in other ways such as through concerts and merchandise. Technology is changing so fast.²⁶³

Indeed, some argue that stars could 'still expect to get rich' even if their music were free on the internet since there are other ways of cashing in, including live performances and merchandising.²⁶⁴ For example, Fisher points to the example of David Bowie's innovative 'bowienet'.²⁶⁵ Through this website, David Bowie sells T-shirts, posters, videos, and sheet music, but also internet access, Bowie's paintings, prints, and sculptures, and financial services in conjunction with USABancShares.com.²⁶⁶ In trading off the his artistic reputation, Bowie is making money by selling his fans products in markets linked to greater and lesser extents to his music.

This model is more sophisticated than the most basic of advertising strategies. If websites which provide an artist's music attract a large number of users, there is the potential to earn revenue from selling access to that audience to advertisers. Whereas, the subscription services described above take their inspiration from the success of cable television,²⁶⁷ 'free' entertainment services paid for by advertising are analogous to broadcast radio and television.²⁶⁸ Even the most casual internet-surfer would have noticed the proliferation of advertising which pays for the vast majority of the Web's current content. It appears that if an audience is attracted, there will be people willing to pay to reach it with their message.²⁶⁹

²⁶³ 'Napster Shouldn't Be Banned', *Los Angeles Times* (Los Angeles) 3 August 2000, C8.

²⁶⁴ 'Markets for Ideas', above n 40.

²⁶⁵ Available at <<http://www.davidbowie.com>>.

²⁶⁶ Fisher, above n 100.

²⁶⁷ Cf Teeter and Loving, above n 2, 659.

²⁶⁸ Michael Collyer, 'Television and Television Program Development', in Howard Siegel (ed), *Entertainment Law* (2nd ed, 1996) 241.

²⁶⁹ 'Bucking the Internet 'Doom and Gloom' Trend', *PR Newswire*, 7 December 2001.

Additionally, online music has already proved it can serve as a promotional vehicle for CD sales. For example, Tom Petty made songs available online before his album release in 1999 as an advertisement to potential purchasers.²⁷⁰ The success of this approach was also demonstrated by the group Creed, which [296] in the same year gave away the first single off its new album, and saw its CD jump to number 1 on the Billboard Charts.²⁷¹ Another example is The Smashing Pumpkins, who realised the power of free distribution and have released a whole album free via the internet and MP3 format.²⁷² This is what is sometimes referred to as a 'clicks and mortar strategy' — using the internet to promote real world products.²⁷³ A subtle variation on this model is exemplified by the longstanding practice of the band The Grateful Dead. The group has always allowed the taping and trading of recordings of its live performances (although not the commercial use of those recordings), and has benefited from increased revenue in auxiliary markets for concert tickets and studio-made recordings.²⁷⁴

It is not suggested that any of the options discussed here are capable of fully funding the music industry. Notably, in coming to the decision to adopt the subscription approach, the record industry considered and abandoned the idea of employing an advertising-based model.²⁷⁵ Furthermore, the analogy with the broadcast TV should not be too heavily relied upon since the television industry itself has fears concerning how the networks are going to be able continue financing production when their audience is being lost to other entertainment vehicles (principally video games and the internet), thus diminishing their capacity to charge high advertising rates.²⁷⁶ However, they do stand as examples of commercial opportunities which did not exist before the internet, and which can play some part in providing a financial basis for musical creation.

²⁷⁰ Sharon Cleary, 'Music Sites Dish Out Songs, Stats, and Bios', *Wall Street Journal* (New York) 29 April 1999, B10.

²⁷¹ Chuck Philips, 'Label Gets Top Spot with Online Spin', *Los Angeles Times* (Los Angeles) 7 October 1999, C1.

²⁷² Poquette, above n 89.

²⁷³ National Research Council, above n 15, 82.

²⁷⁴ Stephen Buel, 'The Grateful Dead Lets Fans Swap Concert Recordings on the Web', *San Jose Mercury News* (San Jose) 12 May 1999, 1A.

²⁷⁵ Schenker, above n 260, 37.

²⁷⁶ Simon Fitzpatrick, 'Protecting Australian Culture in the 21st Century — Television Content Regulation in a Globalising World' (2000) 5 *Media and Arts Law Review* 223, 240.

Conclusions

It has been observed that all new entertainment technologies ‘bring new opportunities, new legal issues, and new failures.’²⁷⁷ In 17th century England, the emergence of lending libraries was seen as the death knell of bookstores; in the 20th century, photocopying was seen as the end of the publishing business, and videotape the end of the movie business. Yet in each case, the new development produced a new market far larger than the impact it had on the existing market. Lending libraries gave inexpensive access to books that were too expensive to purchase, thereby helping to make literacy widespread and vastly increasing the sale of literature. Similarly, the ability to photocopy made printed material more valuable to consumers, while videotapes have significantly increased viewing of movies.²⁷⁸ However, in each case the original market was transformed, bringing a new cast of players and a new power structure.²⁷⁹

If the trend of history is repeated, the question will be whether the record industry missed the greatest marketing opportunity of all time. In failing to promptly add online services to physical CD sales and thus immediately provide an alternative to ‘stealing’ music, the industry provided a market for those more innovative and more daring. Now it is faced with the very difficult task of dragging people back to paying for something they have become used to getting for free.

The tale of music on the internet is a work in progress. It will not be possible to predict with any certainty what will occur until the repercussions of the events of the last few years are better [297] understood.²⁸⁰ However, it is already clear that digital distribution will become a crucial new window for content of all kinds — whether the creators ‘like it or not’.²⁸¹ It is submitted that it is also clear that copyright law will not be able to protect the industry that it helped to create. Despite attempts to update the doctrine for application in the digital world, the scale of infringement appears too great for the threat of lawsuits to continue to serve the purpose of providing creators

²⁷⁷ Simensky et al, above n 9, 3.

²⁷⁸ Carl Shapiro and Hal R Varian, *Information Rules: A Strategic Guide to the Networked Economy* (1998).

²⁷⁹ Ibid.

²⁸⁰ Oppelaar, above n 185.

²⁸¹ Justin Oppelaar, ‘Biz Facing Digital Path, Like it or Not’, *Variety* (New York) 5 March 2001.

with a monopoly over their products as an economic incentive to creation. In this regard, legally backed technical protection measures may be the industry's only hope.

Nonetheless, in order to survive the record industry is 'going to have to reinvent itself.'²⁸² With the commencement of the MusicNet and PressPlay services, something is about to happen, 'but will it be disaster or opportunity?'²⁸³ If these services fail, one consequence is the possibility of a radical shift in power.²⁸⁴ One of the fundamental changes brought about by the Web is the availability of inexpensive publishing and distribution medium with worldwide reach.²⁸⁵ For example, Napster is credited with giving unsigned artists the opportunity to reach broad audiences by providing 'a global arena for thousands of wanna-be rock stars'²⁸⁶ without having to fight with the big labels to get it.²⁸⁷ If the music industry giants are not successful in retaking control of music on the internet, they may suffer the same fate as copyright law.

The National Research Council argues that the key question for the future focus on three fundamental factors: technology, business models, and the law.²⁸⁸ The legal system sets the basic rules on what may be controlled; technology and business models then work in tandem. Surowiecki notes that over the past century, entertainment has generally become cheaper and more widely accessible.²⁸⁹ Despite the pessimistic view advanced thus far, we should not lose sight of an overarching truth which recent developments have demonstrated: people enjoy listening to music. If that were not the case, the explosion of infringement of music files would not have occurred. Thus, there will always be a market for artists, even if it is not structured as it has been in the past.

²⁸² Surowiecki, above n 210, 35.

²⁸³ National Research Council, above n 15, 78.

²⁸⁴ Ibid, 90.

²⁸⁵ Richard Horrman et al, 'What to Surf', *Entertainment Weekly* (New York) 14 September 2001.

²⁸⁶ 'Notebook', *Time Magazine* (New York) 25 June 2001, 12.

²⁸⁷ Hoffman, above n 13, 153.

²⁸⁸ National Research Council, above n 15, 86.

²⁸⁹ Surowiecki, above n 210, 35.