



# THE DAY THE (FREE) MUSIC DIED

BY THOMAS E. ANDERSON

**THE LEGALITIES  
OF DIGITAL  
ENTERTAINMENT  
ARE CHANGING  
QUICKLY**



Hold on to your old tape recorders and VCRs if you like to record music and TV. Unless Congress takes action, the only way individuals will be legally able to record music and TV programs for free will be with analog equipment. Entertainment in digital form, such as CDs, digital TV, DVDs, etc. will be available only on a pay-for-use basis. The legal framework and technological tools are in place that will require that consumers obtain a license and/or a new digital file to load on an MP3 player or to view a digital TV program at a time after it was broadcast. The new file or license may have to be purchased at an additional cost. Whether pay-for-use occurs depends on the outcome of a battle over new legislation in Congress to strike a balance in the control of technology. The entertainment industry is seeking more muscle in its war against digital piracy, while consumers are trying to protect the right to copy digital material for personal use. However, it may be difficult to appease both sides.

Digital piracy is rampant. Between 12 and 18 million movie files and 2.6 billion music files are downloaded for free each month.<sup>1</sup> Although some of the files are public domain, the entertainment in-

dustry has seen a substantial decrease in revenue over the last few years. The entertainment industry points to digital piracy as the cause. While much of the piracy is committed by ordinary consumers, some of the piracy is organized through music services like Napster. Napster provides a service by which digital music that resides as files in individual computers is indexed in a host computer and shared with others. A member logged into the service is allowed to access files and download the files into the member's computer.

Seventeen music companies sued Napster for copyright infringement and sought a preliminary injunction. Napster argued that there was no infringement because it did not copy and that it only provided access to another's legitimate files. Napster also relied on the "first sale" doctrine, which allows one to loan a book to a friend. The "first sale" doctrine permits a purchaser of a copyrighted work the freedom to transfer the work.<sup>2</sup> Thus, someone owning a copy of a book can loan or sell the book to a third party who can read the book without violating the copyright laws. In affirming the district court's ruling that Napster infringed, the Ninth Circuit dismissed Napster's "first sale" argument noting that there was only one copy of the book and once the owner loaned a book out, the owner no longer had the possession, use, or enjoyment of the book.<sup>3</sup> The Ninth Circuit ruled that there was copying and that Napster was infringing on the copyrights of the music companies. The Ninth Circuit affirmed the district court's order to disable Napster until Napster met the conditions of an injunction; however, the Ninth Circuit did narrow the original injunction to ban Napster from disseminating works that plaintiffs identified as theirs. Despite the victory, new peer-to-peer services, such as Morpheus, KaZaA, and Grokster, sprang up in Napster's place. These services have a slightly different decentralized structure, making enforcement more difficult.

An even bigger problem for the industry is the "fair use" mentality of individual consumers. Over the years, many consumers have become accustomed to taping music and TV shows. The copyright laws permit copying of material if the copying amounts to "fair use." In *Sony Corp v Universal City Studios, Inc.*<sup>4</sup> the Supreme Court ruled that it is "fair use" for an individual to use a VCR to make a personal recording of a TV show. Many younger consumers regularly download and file share music. These consumers see nothing wrong in copying and sharing digital entertainment, even though many of these consumers would not take a CD or DVD from a store. Like the music industry, the movie industry is also a victim of piracy. Hackers have placed pirated digital movies on-line for anyone to download. The movie studios fear that services similar to Napster could provide movies in the same way.

Faced with piracy from services and millions of individuals, the entertainment industry pushed Congress for stronger weapons to fight piracy. In 1998, Congress passed the Digital Millennium Copyright Act (DMCA).<sup>5</sup> Among other things, the DMCA made it illegal to disable anti-copying devices, which may be used to prevent copying. The entertainment industry then began to utilize anti-theft devices such as robots and disabling devices. Robots travel the Internet to seek out and destroy illegal files. Disabling devices are

## FAST FACTS:

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installed in machines, CDs, or DVDs to prevent the copying of digital material. Every digital cable TV box already has a disabling device that could be activated to prevent viewers from recording certain programs.<sup>6</sup> Analog TV is being forced out by the government's need for the frequencies.

But the DMCA was just the start. The entertainment industry is pushing for legislation that would require all makers of digital equipment to install disabling devices in the equipment. Because of the resistance from equipment manufacturers, Sen. Hollings introduced legislation that would give the creators of content and the makers of equipment a year to agree on standards.<sup>7</sup> Because of concerns that enforcement of the DMCA might violate state laws, HR 5211 was introduced by Rep. Howard Berman that would provide immunity to content providers when using technological measures to fight digital piracy.<sup>8</sup>

In order to facilitate a pay-for-use program, the entertainment industry is adopting a licensing program like that of the software industry. Consumers will no longer own a CD or DVD, but merely have a license to use the content on the CD or DVD. This fundamental change in distribution allows the entertainment industry to control the use of the material under the terms of license. The terms of these licenses are even more restrictive than those of the software providers. A software consumer has the right to make back-up copies and to even modify the code in some circumstances. These rights have been conferred by the judicial construction of the "fair use" exception.<sup>9</sup> The courts have recognized these rights because of business necessities in using software. Unfortunately, these rights have not been extended to digital entertainment. Even if one could argue that "fair use" permitted copying, there is no way to legally access material protected by anti-copying devices because the DMCA makes it illegal to disable such devices.

The industry is also pushing the FCC to require the insertion of a digital tag in every television program.<sup>10</sup> Each tag would include instructions about whether the program could be recorded. Because of the problems with Napster and peer-to-peer file sharing, the recording industry is preparing to put anti-copying devices on CDs this year. If files cannot be copied, there will be no easy access to unauthorized use. A skilled hacker will still be able to avoid some of the devices, but the average consumer will be deterred from piracy.

However, critics charge that the DMCA has gone too far so that content creators will be able to maintain total control over their works. Rep. Boucher argues that content now freely available on library will eventually be available on a pay-per-use basis.<sup>11</sup> Besides loss of the right to copy for personal use, the DMCA prevents first amendment use of material for criticism and comment. Nevertheless, the DMCA has survived constitutional challenges, including one on first amendment grounds.<sup>12</sup>

Consumers and manufacturers of equipment such as MP3 players are pushing Congress for protections for consumers. Last October, representative Zoe Lofgren introduced the "Digital Choice and Freedom Act" (HR 5522) (DCAFA), which would affirm the principal of "fair use." The DCAFA is intended to restore "fair use" and permit consumers to copy digital works for personal use. The

DCAFA would amend the copyright laws to specifically provide "fair use" and "first sale" exemptions to consumers of digital works. The "fair use" exemption would permit consumers to make copies for archival purposes and for a "preferred digital media device" such as an MP3 player. The "first sale" provision permits an owner of a work in digital form to sell or dispose of the work by means of a single transmission of the work so long as the owner does not retain a copy. The DCAFA also includes an amendment to the DMCA, which permits those who have lawfully obtained digital works to circumvent anti-copying measures if it is necessary to do so to make a non-infringing copy under the act. A day after introduction of HR 5522, Rick Boucher introduced a similar bill (HR 5524).

In the months ahead, Congress will be forced to deal with these many issues as it deals with the legislative proposals and resolutions that are before it. Disney and the other entertainment companies have great economic power. Entertainment is a large component of the GNP and a large percentage of U.S. exports. Consumers are seeking the ability to obtain and enjoy entertainment as they have in the past. Congress will be forced to make some difficult choices.

Some consumers suggest that the record industry should permit low cost or free music to individuals in order to enhance its position in the marketplace. However, this is unlikely to be adopted by the recording industry. One solution would be to have the entertainment industry set up a distribution network that would provide copies of works to consumers for "fair use" activities, such as loading on an MP3 player or as backup for "crashed" equipment. If the distribution network was "user" friendly and widely accessible, the legitimate concerns of the consumers would be addressed while preserving the integrity of the anti-theft devices to prevent unauthorized copying. ♦



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## FOOTNOTES

1. Howard Coble (R-NC), Vol 64 PTCT 480 (BNA 10/4/02).
2. 17 USC 1709.
3. *A & M Records et al. v Napster, Inc.*, 239 F3d 1004 (CA 9, 2001); *A & M Records et al. v Napster Inc.*, 284 F3d 1091 (CA 9, 2002).
4. *Sony Corp v Universal City Studios, Inc.*, 464 US 417 (1984).
5. 17 USC 1201-1205.
6. *Studios Using Digital Armor to Fight Piracy*, New York Times, No. 52, 354 Jan. 5, 2003, p 1.
7. S 2048 introduced 2002 by Ernest Hollings (D SC).
8. 9.64 PTCT 480 (BNA 10/4/02).
9. Nimmer on Copyright, 8.08[c] p 8-130.
10. 64 PTCT 373 (BNA 8/16/02).
11. 64 PTCT 1573 (BNA 5/17/02).
12. *United States v Elcom, Ltd.*, 2002 LW 1009662 (ND Cal, 2002).