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FILM PIRACY IN THE DIGITAL ENVIRONMENT: IS IT THE WILD, WILD WEST?

INTRODUCTION

*Laura Tunberg**

Copyright infringement on P2P networks is a massive problem for the movie industry. According to some experts, over 400,000 to 600,000 movies are downloaded daily. Kazaa, a P2P network, bills itself as the world's most popular file-sharing network, stating on its website, "Join the revolution!". Apparently, over 180 million people have, realizing that is the number of copies Kazaa claims have been downloaded worldwide—and that is just one P2P network! What are people trading on these sites? Term papers? Recipes? Wedding videos? Vacation photos? No, they are trading copyrighted movies, music, games, software and pornography. In this symposium issue of the Loyola of Los Angeles Entertainment Law Review, four diverse articles are set in the "wild-wild west" world of the Internet, focusing on the vexing problems of copyright infringement on P2P networks and content protection from an economic and legal perspective. It is a polarizing debate, with each side firmly entrenched in its view point. So, is it a revolution or is it grand theft?

Such wholesale swapping is creating a generation of computer-savvy media consumers who either disregard copyright or do not understand it. Advocates of file-swapping networks cite the Internet trope that "information wants to be free."[1] If the content owner wants to control distribution, they argue, that control impedes free speech, innovation and competition, damping progress in an exciting new media universe. But

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1. *See* Roger Clarke, *"Information Wants to be Free..."* (Feb. 24, 2000), *at* http://www.anu.edu.au/people/Roger.Clarke/II/IWtbF.html (tracing the lineage of the phrase).

copyright holders argue that the movie business is already a hugely expensive, hugely risky endeavor requiring the investment of tens or hundreds of millions of dollars per project. Although the business remains profitable overall, very few movies recoup their investment, at least in the first six months after their release, when piracy is most likely to happen. To recoup those massive investments, studios have created a series of carefully delimited release "windows," periods when a film is available for a given price on a given platform such as home video, pay-per-view systems or broadcast television. Every time a movie is pirated, the economic viability of that project diminishes, especially in its "downstream" windows. The MPAA estimates piracy losses at $3 billion annually, an estimate that does not include impacts of online file-swapping.[2]

Illegal Internet distribution of movies and other files will only worsen unless education and other efforts effectively persuade file-swappers their behavior is wrong and consequences are enforced. The MPAA Member Companies—MGM, Fox, Paramount, Universal, Warner Bros, Disney and Sony—have financed a massive, multi-pronged worldwide anti-piracy program that includes education, enforcement, technology and litigation. In this issue's first article, David Corwin discusses how the ruling that shut down the original Napster site applies to generally similar litigation against next-generation file-sharing network Grokster. The trial judge's ruling in the *Grokster*[3] case deeply distressed industry observers, who believed it was wrong on several counts. The ruling was appealed to the Ninth Circuit, which heard arguments on February 3, 2004.[4] Mr. Corwin's writes that under *Napster*[5], Grokster should have been found liable for copyright infringement on a contributory and/or vicarious theory because Grokster's system meets both elements of the *Napster* legal test: knowledge and material contribution.

Enforcement of our copyrights has always been a major component of the movie industry's overall anti-piracy efforts. With the *Verizon*[6] case in the Internet arena, enforcement just became a little more difficult and cumbersome. Thomas Owen and Benjamin Katz discuss the *Verizon* decision along with the legislative history of the DMCA and the careful

2. *Anti-Piracy, at* http://www.mpaa.org/anti-piracy/content.htm (last visited Apr. 18, 2004).

3. Metro-Goldwyn-Mayer, Inc. v. Grokster Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

4. Jon Healey, *Morpheus Maker Upping the Ante*, L.A. TIMES, Feb. 4, 2004, at C1; Metro-Goldwyn-Mayer, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir., 2004).

5. A&M Records, Inc. v. Napster, 239 F.3d 1004 (9th Cir. 2001).

6. Recording Indus. Ass'n of America v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

balancing Congress tried to achieve between consumers and the content owners in the digital world. The authors focus on the mechanics of how section 512(h) once worked and its current obsolescence. The end result is that, thankfully, it does not prevent the content owner from getting the end user's information; it just takes longer to get there and it will be more expensive.

In the issue's third article, Fred von Lohmann discusses the efficacy of anti-circumvention measures in the DMCA. He concludes that section 1201 of the DMCA should be repealed as an ineffective curb against piracy that also has caused serious collateral damage, inhibiting free speech, competition and innovation. Critics, however, may be hard-pressed to find in the vibrant and fast-developing Internet industry much evidence of von Lohmann's claims. The author blames the entertainment industry when people steal its content. He argues that the industry does not give customers what they want, in the ways they want it. In fact, he argues, copy protection induces legitimate customers to embrace illegitimate access to content. So, too, does my speedometer encourage me to speed? In other words, use this argument at your own risk of being either fined or jailed.

Finally, the entertainment industry spends considerable time researching and developing new copy-protection technologies, which hold the promise of keeping valuable content safe yet accessible to paying digital customers. Lawrence Hadley and Philip Corwin's article "P2P: The Path to Prosperity" discusses the money making aspects of P2P technology. I must note that at this time, the path has only been prosperous for the creators, operators and distributors of the P2P software- *not* the content owners! It is shameless to build a business on the back of another industry and then demand that the industry embrace your business model. They claim that copyright infringement on P2P networks is unavoidable. I would strongly disagree: it is the end user's choice whether or not to steal content. If a camcorded version of "Walking Tall" is available on Kazaa *and* it is still in the theaters, clearly the version on Kazaa is illegal. Hadley and Corwin correctly call P2P networks a phenomenal distribution channel, but that promise is lost if the content owner has no choice whether to distribute on that network. "Phenomenal" is not the word movie makers use when their content is distributed worldwide in perpetuity without copy protection or authorization.

The debate over "file-sharing" or "online theft" is not likely to dissipate soon, nor will the technology disappear and wipe infringing files from the hard drives of the users of P2P networks. In fact, the conversation may continue well into the 21st Century. It is only the beginning of a long

discussion among the content providers, consumers, Congress, and, ultimately, the courts.