

6-1-2009

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Recommended Citation

David A. McGill, *New Year, New Catch-22: Why the RIAA's Proposed Partnership with ISPS Will Not Significantly Decrease the Prevalence of P2P Music File Sharing*, 29 Loy. L.A. Ent. L. Rev. 353 (2009).

Available at: <http://digitalcommons.lmu.edu/elr/vol29/iss3/1>

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NEW YEAR, NEW CATCH-22: WHY THE RIAA'S PROPOSED PARTNERSHIP WITH ISPS WILL NOT SIGNIFICANTLY DECREASE THE PREVALENCE OF P2P MUSIC FILE SHARING

David A. McGill*

I. INTRODUCTION

In 2003, the Recording Industry Association of America (RIAA) launched its user litigation initiative, which instituted lawsuits against individuals who used peer-to-peer (P2P) file sharing software to download copyrighted digital music files online.¹ By 2008—nearly five years and approximately 35,000 lawsuits later—many critics asserted that the RIAA litigation plan “did little to stem the tide of illegally downloaded music.”² For example, one report conducted by the NPD Group found that 19% of Internet subscribers in the United States downloaded copyrighted music using P2P services—only 1% less than the 20% reported when the RIAA first began its campaign.³ Further, the number of files shared on P2P sites increased in 2008.⁴

In mid-December 2008, the RIAA announced that it had not initiated any new lawsuits since August 2008 because it had decided to end its user litigation campaign against consumers.⁵ While the RIAA will continue

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1. Susan Butler, *Casting the Net: The RIAA Provides an Inside Glimpse into its Battle Against Illegal File Sharing*, BILLBOARD, June 14, 2008, at 10.

2. Sara McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, PITT. POST-GAZETTE, Dec. 20, 2008, at C8.

3. Butler, *supra* note 1.

4. Antone Gonsalves, *RIAA Taps ISPs to Fight Illegal Downloads*, INFORMATION WEEK, Dec. 19, 2008, <http://www.informationweek.com/story/showArticle.jhtml?articleID=212501507>.

5. Editorial, *A New Tune: Lawsuits Against Music Pirates Too Often Miss Their Mark. So the Major Labels Are Changing Tactics*, L.A. TIMES, Dec. 20, 2008, at A30 [hereinafter *A New*

tracking P2P file sharing, the RIAA's proposed new plan will involve notifying an individual's Internet service provider (ISP) via e-mail when it learns an ISP subscriber has made copyrighted files available online for others to download.⁶ After an ISP receives an e-mail from the RIAA, the ISP will either forward the RIAA's message to the ISP subscriber or ask the ISP subscriber to stop illegally downloading music.⁷ Should the ISP subscriber continue to use P2P file sharing, additional warnings may be given, followed by slower Internet speed, Internet disconnection, or litigation.⁸

While this proposed method may increase the RIAA's communication with ISP subscribers, it does little to decrease the prevalence of online music piracy.⁹ To understand why this method does not successfully address the root of P2P music file sharing, consider the following two scenarios:

Scenario # 1:

John watches Britney Cheers' performance on the "Late Show With David Numberman." Following Britney's performance, John runs to his PC and uses a common P2P file sharing website to download the single he just heard. Months later, John receives a letter from his ISP notifying him of his illegal file sharing activity and the obligation to stop. If John does not stop, his ISP suggests he may face consequences such as slower Internet speed, Internet disconnection, or litigation. However, John does not take the letter as a serious threat. After all, John is an unemployed college student who knows he is judgment proof – *even if* he fails to cease illegal downloading and is sued, he would not pay one dime.

Scenario # 2:

After hearing Britney Cheers' newest single, Betsy visits her neighborhood Best Buyers. She decides she must have the latest Britney single, but does not want to spend the

Tune].

6. McBride & Smith, *supra* note 2.

7. *Id.*

8. *Id.*; see also Gonsalves, *supra* note 4.

9. See Lars Brandle, *ISPs to the Rescue? Legislation to Curb File Trading Gains Momentum*, BILLBOARD, Mar. 15, 2008, at 19; see also Nate Anderson, *RIAA Graduated Response Plan: Q&A with Cary Sherman*, ARS TECHNICA, Dec. 21, 2008, <http://arstechnica.com/news.ars/post/20081221-riaa-graduated-response-plan-qa-with-cary-sherman.html>.

\$1.99 listed on the sticker price. Betsy brazenly steals the CD, but to her dismay is later charged with and convicted of petty theft. Not only has Betsy's shoplifting conviction become public knowledge, but she is also assessed a \$150 fine and sentenced to five days in jail. Betsy has no idea how her misdemeanor for petty theft may affect her future employment opportunities.

Though these scenarios are fictitious, they illustrate two important issues. First, in both scenarios, Britney Cheers (and her record label) will never be financially compensated for her creative work.¹⁰ The second, and more critical issue for the purpose of this paper, is the striking contrast in punishment. While John's actions will constitute civil liability only if he does not cease his illegal file sharing,¹¹ Betsy's actions are immediately criminal (i.e., she will not receive the benefit of a "warning" before prosecution). Furthermore, while John is unscathed following his initial warning letter, Betsy now has a criminal record and a tarnished reputation in her community.

Consumers, like John, will receive multiple warnings before any legal action is taken under the proposed plan.¹² P2P file sharing, which is essentially online shoplifting, will *increase* as consumers realize file sharing is the pseudo-legal way to avoid jail time and/or fines for music theft. Accordingly, the RIAA's proposed plan to work with ISPs in 2009 is nothing more than a catch-22—an effort that will only add more fuel to the digital download fire.

Despite the reality that Internet piracy will probably never cease,¹³ the future is not entirely grim. There is a potential solution which involves congressional legislation and a modification to the way music is purchased online. But before this solution can be discussed, it is important to first address how the P2P file sharing problem arose.

II. RIAA LAWSUITS: PAST AND PRESENT

Before the RIAA began its user litigation initiative, Congress implemented the Digital Millennium Copyright Act of 1998 (DMCA).¹⁴

10. See MusicUnited.org, Copying FAQ's, http://www.musicunited.org/7_faq.html (last visited Mar. 5, 2009).

11. McBride & Smith, *supra* note 2.

12. *Id.*

13. *Industry's Lead Counsel in Music-Sharing Suits Discusses Procedural Aspects of Campaign*, INTERNET L. & STRATEGY (ALM LAW JOURNAL NEWSLETTER), Feb. 2008, at 1.

14. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2861 (1998).

The goal of the DMCA was to encourage copyright owners to fix their work in a digital format that could be disseminated via the World Wide Web.¹⁵ Prior to the enactment of the DMCA, some copyright owners had been reluctant to introduce their work in digital formats for fear that the integrity of their work would be compromised or their exclusive rights¹⁶ (e.g., right to reproduce, right to distribute, etc.) would be violated. To address this problem, copyright owners were encouraged to utilize digital rights management (DRM), which is “the application of technical, legal, and business methods to protect and add value to intellectual property sold and licensed in digital formats.”¹⁷ For example, Apple’s iTunes currently sells copyrighted music in a digital format; however, an artist’s record label (formerly) utilized DRM to limit the number of times an iTunes customer may reproduce his or her purchase.¹⁸

Copyright owners were not the only individuals concerned about the dissemination of copyrighted files online—ISPs were also reluctant because they feared copyright litigation.¹⁹ To address this issue, the DMCA included a safe harbor provision to protect ISPs from copyright infringement lawsuits if they quickly respond to take down notices (i.e., notices from copyright owners requesting ISPs to remove infringing material).²⁰ Thus, even if a site, such as Google, provides access to copyrighted material, it would not be found liable of direct or secondary liability if it promptly removed, or blocked, consumers’ access to the copyrighted material.

With copyright owners and ISPs on board, digital music (and other copyrightable subject matter) became easily accessible online; so accessible that P2P file sharing software websites such as Napster, Morpheus, Grokster, and KaZaA gave consumers the ability to download free music with the tap of a few keys and mouse clicks.

From the start, record labels did not file lawsuits against ISPs in an effort to eliminate P2P file sharing websites. Instead, major record labels such as Universal, Sony Music, Warner, and EMI sued file sharing

15. See Mitch Glazier & Fred Von Lohmann, *Happy Birthday?*, BILLBOARD, Nov. 8, 2008, at 6.

16. See 17 U.S.C. § 106 (2006) (providing a detailed list of exclusive rights granted to copyright owners).

17. Richard Raysman & Peter Brown, *Digital Rights Managing, Content Identifying Via Hi-Tech*, 240 N.Y. L.J. 3, 3 (2008).

18. *Id.* (reporting the last of the four major music labels offered its respective catalog for digital download to Amazon.com with no digital copy protections, giving users the ability to freely transfer songs).

19. Glazier & Von Lohmann, *supra* note 15.

20. *Id.*

software companies.²¹ However, just as one file sharing website was dismantled, another would emerge to replace it.²² To combat this problem, the RIAA entered the picture and began sending take down notices to commercial ISPs.²³ Further, the RIAA began monitoring the frequency of P2P file sharing.²⁴ Despite take down notices, P2P file sharing continued to be such a growing problem that the RIAA decided to target individual file sharers in 2003.²⁵

In a recent interview, Richard L. Gabriel, lead counsel for the RIAA in its national user litigation campaign, described its targeting process in the following way:

[W]e capture data and detect infringers with the help of a company called SafeNet that the record companies have retained. SafeNet logs on to file-sharing services in much the same way as anyone else could. It then searches for our clients' sound recordings. Once it finds a user distributing files, it collects a wide array of data . . . and other information showing the communications between SafeNet's computer and the computer that is distributing the record companies' sound recordings. SafeNet will also download a sampling of the sound recordings that the target user is distributing to the public, so that the record companies can confirm that these recordings are, indeed, their copyrighted works. Through this process, SafeNet is able to determine the so-called Internet Protocol or IP address, which is a series of numbers and dots that Internet service providers are able to use to identify their own customers. The IP address works much like a post-office address or a telephone number. It is a unique identifier at a given moment in time. This is important because illegal file sharers connect to the Internet anonymously or through the use of aliases.²⁶

Gabriel's detailed description of the method used to identify P2P file sharers highlights the RIAA's main problem—illegal file sharers enjoy the benefit of Internet anonymity. Thus, the only way to obtain the true identity of the file sharer was to contact the ISP. While some ISPs willingly cooperated with the RIAA, some refused to identify their

21. *A New Tune*, *supra* note 5.

22. *Id.*

23. See Butler, *supra* note 1.

24. *Id.*

25. *A New Tune*, *supra* note 5.

26. *Industry's Lead Counsel in Music-Sharing Suits Discusses Procedural Aspects of Campaign*, *supra* note 13, at 2.

subscribers,²⁷ fearing privacy rights would be violated²⁸ or that the process would be overly burdensome.

To obtain relevant subscriber contact information from uncooperative ISPs, the RIAA served them with subpoenas.²⁹ Though some courts believed the RIAA had the legal right to obtain the contact information of accused file sharers, other courts were more reluctant to grant RIAA's subpoenas.³⁰ Thus, in some instances, the judiciary appeared more inclined to protect consumers from the RIAA's mass campaign.³¹

In situations where the RIAA was able to obtain the contact information of the accused file sharer, the accused routinely agreed to settlement offers.³² To date, only one case has gone to trial.³³ Despite the frequency of settlements, some district courts found the RIAA's litigation plan to be an abuse of power against accused file sharers who were unable to garner legal representation or unaware of their valid defenses to infringement.³⁴

Adding more insult to injury were the colleges and universities that refused to forward "pre-settlement" letters to college students who had been identified as infringers.³⁵ According to the RIAA, P2P file sharing is disproportionately high on college campuses—more than half of all college

27. *Id.* at 3.

28. *ISPs, Music Industry Battle Over Duties to Combat Piracy*, IP NETWORK POL'Y REP., Feb. 1, 2008, http://www.aspenpublishers.com/product.asp?catalog_name=Aspen&product_id=9111141279, available at 2008 WL 1942604.

29. *Industry's Lead Counsel in Music-Sharing Suits Discusses Procedural Aspects of Campaign*, *supra* note 13, at 8 (discussing serving subpoenas pursuant to Federal Rule of Civil Procedure § 45).

30. *Compare* *Atlantic Recording Corp. v. Does 1–3*, 371 F. Supp. 2d 377 (W.D.N.Y. 2005) and *Arista Records LLC v. Does 1–4*, *Interscope Records v. Does 1–6*, 589 F. Supp. 2d 151, 153 (D. Conn. 2008), with *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 158 (D. Mass. 2008).

31. *London-Sire Records* 542 F. Supp. 2d at 158.

32. See Editorial, *Stopping Music Piracy*, CHI. TRIB., Dec. 27, 2008, at 28.

33. *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1228 (D. Minn. 2008) (overturning the lower court's decision that the defendant was liable for direct copyright infringement, and ordering a new trial).

34. See *Elektra Entm't Group, Inc. v. O'Brien*, CV 06-5289 SJO (MANx) (C.D. Cal. Mar. 2, 2007) (Judge S. James Otero holding, "The concern of this Court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants.").

35. Tamara Loomis, *Naming Names*, CORP. COUNS., May 2008, at 92 (including University of Wisconsin-Madison, University of Maine, University of Oregon, University of Kansas, and the University of Washington).

students download music illegally.³⁶ Thus, it may be possible for the RIAA to significantly reduce the prevalence of music piracy if it eliminated file sharing on college campuses. Despite this belief, “the number of users of file sharing service has more than tripled to 9.4 million” since the RIAA launched its campaign in 2003.³⁷ While the RIAA may have hoped settlements would help offset the estimated \$12.5 billion the music industry loses per year to illegal music sharing,³⁸ the cost of settlements for college students file sharers averages about \$5,000.³⁹ Many college students are “young [and] poor,”⁴⁰ and unable to pay high settlement costs.

III. WHY THE RIAA’S PROPOSED PLAN WILL NOT WORK

Given the aforementioned ineffectiveness of the user litigation campaign, the RIAA announced in mid-December 2008 that it had developed “agreements in principle” with “leading ISPs” to unleash a new method to fight P2P file sharing.⁴¹ Although the RIAA has only developed “preliminary agreements,”⁴² if adopted, the RIAA would work with ISPs to track Internet accounts that appear to be illegally downloading the largest number of digital music files.⁴³ When the RIAA detects a large number of files are being shared, it will send an alert to the subscriber’s ISP.⁴⁴ The ISP will then contact the subscriber and ask the subscriber to stop downloading music.⁴⁵ If the subscriber fails to comply, the ISP will potentially decrease the speed of the subscriber’s Internet service, or disconnect the subscriber’s Internet service.⁴⁶ Regardless of the measures taken by the ISP, the RIAA will maintain the right to file a lawsuit against an alleged file sharer.⁴⁷

This plan, while not implemented, faces clear opposition.⁴⁸ For example, one major ISP, Verizon Inc., reportedly is not interested in

36. *Id.* at 95.

37. *Id.*

38. *Stopping Music Piracy*, *supra* note 32.

39. Jonathan Mattise, *Villanova Warns Students: Stop Illegal Downloads*, PHILA. INQUIRER, Apr. 26, 2008, at B04.

40. Loomis, *supra* note 35, at 95.

41. Greg Piper, *ISPs to Deliver RIAA Notices, Cut Off Suspects, at Cuomo’s Prodding*, COMM. DAILY, Dec. 22, 2008.

42. McBride & Smith, *supra* note 2.

43. *Stopping Music Piracy*, *supra* note 32.

44. *Id.*

45. *Id.*

46. *Id.*

47. Gonsalves, *supra* note 4.

48. Anderson, *supra* note 9.

working with the RIAA to monitor the online activity of its subscribers.⁴⁹ Although the RIAA may view Verizon and other ISPs who decide not to cooperate as “enablers of criminal activity,”⁵⁰ ISPs currently have no obligation to assist the RIAA in its new initiative. A similar plan was adopted by the recording industry and ISPs in Great Britain and France, but it remains unclear whether these measures will decrease the prevalence of P2P file sharing.⁵¹

To combat the RIAA’s new plan, perhaps file sharers may hop from ISP to ISP to avoid being monitored. Or a law abiding ISP subscriber may be accused of file sharing, even though a third party is the true culprit of the infringing activity. It is also possible a file-sharer will only stop downloading songs once his Internet has been disconnected and he already has downloaded the music files he wanted. Last, the RIAA may realize that even if consumers are aware that file sharing is “wrong,” nothing will stop infringers until a punishment makes the costs outweigh the benefits.

IV. SOLUTION: CRIMINALIZATION OF P2P FILE SHARING

P2P file sharing will substantially decrease if congressional legislation makes file sharing a criminal, rather than a civil, matter. Given that the main goal of criminal law is to deter specified conduct, criminalizing P2P file sharing would not only force infringers to recognize the serious consequence of their actions, but would also make P2P file sharing just as serious as shoplifting a music CD from a retailer.

Currently, 17 U.S.C. § 501 serves as the civil statutory basis for those who believe their digital copyright files have been infringed.⁵² In relevant part, § 501 states:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be.⁵³

Civil litigation may have been a sufficient way to address copyright

49. *Id.*; see also Anne Broache, *Verizon: We Don't Want to Play Copyright Cop on Our Network*, CNET NEWS, Jan. 30, 2008, http://news.cnet.com/8301-10784_3-9861402-7.html?part=rss&subj=news&tag=2547-1_3-0-20.

50. *ISPs, Music Industry Battle Over Duties to Combat Piracy*, *supra* note 28.

51. Brandle, *supra* note 9.

52. See 17 U.S.C. § 501(a) (2006).

53. 17 U.S.C. § 501 (2006).

infringement when § 501 was enacted in 1976. However, because Congress could not foresee the widespread availability of digital music files and P2P file sharing in the 1970s, the transition of music from its phonorecord to digital form necessitates this legislative change.

Richard Gabriel, on behalf of the RIAA, reported that before the user litigation initiative began in 2003, approximately 37% of those surveyed believed file sharing was illegal.⁵⁴ By 2008, however, 73% believed file sharing was illegal.⁵⁵ The critical takeaway is that P2P file sharing is not recognized as a statutory “crime,” therefore file sharing is not technically illegal.⁵⁶

Accordingly, the law needs to share the view held by a majority of the public—that file sharing is an illegal action that deprives artists of financial compensation.⁵⁷ If this problem is not addressed, file sharing could subsequently impede the incentive to create and/or introduce new musical expression. File sharing is disproportionately high among college students,⁵⁸ yet if this audience knew file sharing came with potential criminal penalties it would be less likely to illegally download because of the risk of jail time and/or a lasting damaged reputation. If file sharing became a federally recognized crime, college students would be more likely to spend their money to purchasing legally authorized digital music files rather than purchasing additional memory to store their LimeWire or KaZaA downloads.

While critics of this plan will rush to suggest legislative changes are difficult to come by, they should know that the Copyright Act currently recognizes some conduct as criminal. For example, if an individual sought to remove encryption or some type of DRM from a digital music file, she could be criminally liable under 17 U.S.C. § 1204.⁵⁹ Section 1204 states in relevant part:

(a) Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain—

(1) shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and

54. *Industry's Lead Counsel in Music-Sharing Suits Discusses Procedural Aspects of Campaign*, *supra* note 13, at 8.

55. *Id.*

56. *See id.* (explaining that illegal downloads may never be eliminated, but we can create a marketplace that is dominated by recordings that are legally made and distributed).

57. *See id.* (stating that 73% of those surveyed believe file sharing is illegal).

58. Loomis, *supra* note 35, at 95.

59. 17 U.S.C. § 1204 (2006).

(2) shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

(b) Limitation for Nonprofit Library, Archives, Educational Institution, or Public Broadcasting Entity—Subsection (a) shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity (as defined under section 118 (g)).

(c) Statute of Limitations—No criminal proceeding shall be brought under this section unless such proceeding is commenced within 5 years after the cause of action arose.⁶⁰

Thus, significant lobbying by the RIAA could garner the votes needed to enact new legislation that would make file sharing an issue of the past.

In addition to criminalizing P2P file sharing, the RIAA should consider modifying the way in which consumers purchase music online. For example, the RIAA could encourage its members to allow only select records (i.e. select tracks from an album) to be available for download. Prior to the creation of digital music files, artists only released “hit” songs as singles. If the consumer wanted to purchase a record that had not been released as a single, she would have to buy the artist’s entire CD. However, with the introduction of digital music files on sites such as iTunes, Amazon, and Yahoo, consumers can pick and choose the songs they want to buy. While this method gives consumers more freedom to choose the music they want, overall album and record sales should naturally have been expected to decrease.

If these proposed solutions are implemented in tandem, not only would consumers be less likely to use P2P file sharing, but artists and music labels would be more likely to enjoy increased album sales. Likewise, because record sales are the source of the RIAA’s campaign against file sharing, its problem will be solved once and for all.

60. *Id.*