STUDENTS, MUSIC AND THE NET: A COMMENT ON PEER-TO-PEER FILE SHARING

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¶1 As most of the public now know, the recording industry has lately filed civil suits alleging copyright infringement against hundreds of individual defendants across the country, many (I think most) of them college students and campus hangers-on.[2] Hundreds more such suits are said to be in the offing. The nature of the infringements? Peer-to-peer file sharing via the Internet: a kind of piracy, to use the term favored by the industry, or downloading, as it is generally thought of by the students themselves – but from either perspective, the practice of recording music from the Net while making it available in turn to others, using any of a growing number of computer programs designed to make the practice work.

¶2 Whether these suits are well advised is debatable. No similar litigation against individuals has ever been attempted by any of the copyright industries (publishers, motion picture proprietors or the music business). I think it correct to say that no industry of any sort has ever tried to use mass litigation against individuals in an effort to control the market for its products. The recording industry may prevail in these suits. It is an open question, however, whether the industry will survive its victory.

¶3 But then there is the rub: as scores of accounts in the popular press have reported in recent months, it is an open question whether the recording industry can survive, period. The music business has changed in the last century, and so has copyright. One hundred years ago, the business of music was chiefly about compositions, sheet music and public performances for profit, with the sale of a few piano rolls and Victrola discs thrown in from time to time for good measure. Copyright law protected the musical compositions but provided no protection for recordings as such, and even compositions were subject (after the adoption of the Copyright Act of 1909) to a compulsory license that meant in effect that every song, once recorded by its proprietor, could also be recorded ("covered") by others upon the payment of two cents per cut. It was 1971 before Congress provided copyright protection for recordings themselves, and that protection was hedged about with limitations that made its coverage less comprehensive than was the case with virtually every other form of copyright.

¶4 Even so, the music business flourished – right up to the moment when cheap and widespread copying technologies made their appearance on the scene, circa 1960's. Commercial piracy began to flourish then in

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[2] *See e.g.* Monthy Phan, *Recording Industry Sues Swappers—Record industry files 261 lawsuits to target 'major offenders,'* NEWSDAY.COM, Sept. 9, 2003, *at* http://www.newsday.com/news/printedition/ny-bzmusi09q3447135sep09,0,6628480.story?coll=ny-news-archive.

places like Taiwan, but closer as well: in Phoenix, Arizona, as I recall, one pirate operated openly under a Jolly Roger flag. (Remember: sound recordings were not yet protected, and musical compositions could be covered in theory upon the payment of a modest fee, though in fact the pirates rarely bothered to comply with that nicety in the law.) Meanwhile, with the advent of the personal audio cassette, and the increasing frequency with which everybody under thirty dubbed music from somebody's sister's boyfriend's tape, commercial piracy began to lose ground to the practice (as it was sometimes called) of "private copying for personal use". Congress looked upon this latter practice as harmless in that time. The recording industry, grateful for the few crumbs beginning to be thrown its way, managed to smile grimly while saying little and doing less to stop the practice in its tracks

¶5 The appearance of the digital technologies wiped that uneasy smile off the industry's face, permanently. It is generally understood, I think, that what makes digital copying different from the analog copying that earlier audio cassette technology allowed is that digital copies are virtually indistinguishable in quality from the master copies from which they are struck. Given adequate bandwidth, digital copying is fast. Given the technical proficiency of young people today, digital copying is easy. Given the nature of the Net, digital copying is omnipresent. And the result? Well, from the recording industry's perspective, the result is that piracy is flourishing, while sales of legitimate CDs are declining; the prospects for the future seem grim. As the saying goes, "How do you compete with free?" The defeat of MP3.com[3] and Napster,[4] yesterday's victories for the industry, now seem hollow in the face of Kazaa and other programs like it. A federal judge's refusal this spring to enjoin Grokster as a contributory infringer has brought fresh pain to the fray.[5] Something must be done. That something is this summer's wave of lawsuits against a bunch of college students and their ilk whom the industry hopes to make individual examples of in order to dampen the contemporary wave of piracy that threatens the industry with extinction.

¶6 Note that "piracy" here is not the sort of commercial piracy that flourishes still in Taiwan and elsewhere. I do not doubt that a handful of students are engaged in that kind of piracy, but they are exceptions rather than the rule. Downloading is not just about making or saving money. The majority of the industry's youthful targets are immersed in an evolving experience of sharing among their peers. The fact that the experience is free undoubtedly contributes to its appeal, as does the fact that there is about it an unmistakable aura of dissidence and illegitimacy. Even so, I suspect that something more important is involved than money or the romantic allure that outlawry always holds for the young. I shall not try to define exactly what that "something more important" is, however, for though I have no doubt that it involves substantial elements of

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[3] *See, e.g.*, UMG Recordings, Inc. v. MP3.com, Inc., 2000 U.S. Dist. LEXIS 17907 (S.D.N.Y. Nov. 16, 2000); Country Rd. Music, Inc. v. MP3.com, Inc., 2003 U.S. Dist. LEXIS 15005 (S.D.N.Y. Aug. 18, 2003).
[4] A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).
[5] MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

creativity I do not intend to defend it here. Let's just call it a convergent love of music and technology, commingled with a new sense of creative freedom, and a wish to share the products of that love with others.

¶7 Is this sort of sharing illegal? Is it unethical? Is it immoral? The editor of an undergraduate student magazine at Duke asked me to reflect on these issues earlier this year, and though ultimately I declined to publish the shorter piece that journal had room for, I did continue to think about the problem along the lines originally requested. What follows, though, applies not merely to students at this University but to others who find themselves in similar circumstances.

¶8 I think the question of legality is not quite as clear or one-sided as some copyright lawyers suppose. A question of law (any law) may be affected by the facts in a case, and this is true in copyright as elsewhere. Any copyright lawyer worth his or her salt could mount a respectable argument against a finding of infringement in a number of circumstances that copyright proprietors might find objectionable, including file sharing. On the other hand, some forms of the peer-to-peer file sharing that students and others engage in these days are likely to be held infringing by lower court judges under the Copyright Act of 1976 (as amended),[6] and on multiple grounds at that. The particular targets of the first wave of suits this summer, as I understand them, are those individuals who have not only downloaded music but who also continue to upload it so that others are free to browse their files and copy them indiscriminately. A finding of infringement, though still not inevitable, is more likely on this latter ground than on the former.

¶9 As for the ethics of the matter, and its morality, more needs to be said. And here I want to draw upon what I understand to be a commonplace distinction between these two measurements of conduct, a distinction that may not pass muster in the Philosophy Department or the Divinity School at Duke, and perhaps not in the Law School either, but one which is readily understood and acknowledged by most of us nevertheless, including those who have written or spoken publicly about these matters before me. I profess no superior or original expertise here, but this is at least what I think.

¶10 Sometimes in life we are subject to codes devised collectively or by others, codes that do not have the force of positive law, but ones to which we must conform as a condition of participating in some endeavor or as a member of some community. The canons of ethics of lawyers, physicians, accountants or the clergy are examples of these ethical codes. They may or may not reflect our individual sense of what is right and just, but we conform to them nevertheless, for indeed we must if we are to continue to do whatever it is that otherwise we might be barred from doing.

¶11 The morality of a matter, meanwhile, is a separate measure or dimension of conduct, in which what we think personally is of greater consequence. Morality is a function of either of two forces, in my experience: the power of rhetoric and culture to claim our allegiance; or (as I believe) the power of those few ideas and impulses to which we are subject as if by nature born. The latter is at best a debatable point, of

course, and is especially unfashionable in contemporary academic circles, but I think there are acts toward which we are drawn and others from which we are inclined to shrink, in either case by nature – among the former, an innate urge to share; and among the latter an aversion to the act of theft, which is not only forbidden by our culture but also seems wrong in itself.

¶12 Thus viewed, it is a relatively straightforward question whether peer-to-peer file sharing of the sort we have been discussing is unethical for students, whether at Duke or elsewhere. Duke does not yet have a policy that touches upon the matter in an immediate or plenary way. The ethical constraints upon the Duke student are indirect. Other campuses do have such codes, however. Sources in the recording industry tell me that they have the tacit approval and encouragement of a number of unidentified college and university administrators in bringing the suits against students this summer. These administrators, who include presidents among them, do not wish to be seen openly as encouraging litigation against their students. But the fact is that file sharing clogs the campus networks, so that cutting down on the practice would be welcome for parochial reasons having to do with bandwidth, never mind the administrators' enthusiasm for eliminating the practice on grounds having to do directly with copyright infringement. I have not been advised that anyone associated with the Duke administration is among these silent enthusiasts for the suits, and I have no reason to suppose that anyone is. (At least one university administration elsewhere has previously expressed opposition to the idea of suits against students.)

¶13 The more difficult question is in the morality of file sharing as I have defined it. Is this practice wrong? Are the rhetorical arguments against it persuasive? Does it violate a decent sense of justice or fair play? Is it possible, to the contrary, that file sharing may be morally acceptable, or even something to be encouraged? Is there a middle position of some sort, something apt to the inquiry that might serve to modify the practice along lines acceptable to all sides?

¶14 The rhetorical arguments against downloading music have not succeeded as deterrents. Those who make them usually do so more or less along these lines: Taking property without permission is wrong. Recorded music is property. Taking recorded music without permission is therefore wrong as well. The difficulty with this proposition is that many to whom it is addressed do not concede the minor premise. Recorded music is property in the view of those who claim to own it, but for those who reject that claim the very assertion of a property interest in music can itself appear to be a kind of theft. I do not mean to take sides here or to express my own view as to where the moral center in this dispute lies. It is enough to observe that insofar as rhetoric is concerned the proponents of the argument have failed to carry the day. And of course it follows that their most ardent antagonists cannot be expected to see that they are engaged in wrong-doing: they are more likely to see themselves as a modern Robin Hood or perhaps a Till Eulenspiegel, engaged in acts of liberation or merry pranks, than as a common thief. For others, meanwhile, downloading

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[6] 17 U.S.C. §§ 101-1332 (2002).

and sharing music can be experienced as expressive acts, affirmatively moral in themselves, and meanwhile as deserving of first amendment protection as other acts of public defiance arguably in prima facie violation of unjust laws, such as flag or draft card burning and the like.

¶15 But then these are the views of the two sides at their extreme. The fact is, I think, that there is some softness in the positions on either side, and gradations in the points of view at large that suggest the plausibility of compromise on grounds that do not require a principled stance in any direction.

¶16 Copyright proprietors and their lawyers are not monsters, nor are they fools. They have long known that the moral legitimacy in their property claim is more clouded than they profess it to be when it comes to interests in artistic or intellectual expression. Thomas Jefferson, writing in a letter to Isaac McPherson in 1813, observed that insofar as property interests are concerned, the analogies between intellectual and tangible property are misplaced. Jefferson was thinking at the time of patents and the utilitarian ideas embodied within them, but the thoughts he expressed in that letter are no less apt in the case of copyright and artistic expression:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will of the society, without claim or complaint from any body.[7]

¶17 There is, in other words, no natural claim to the recognition of property rights in patent law, nor, Jefferson might have added, in copyright; the proprietor has only what society concedes. Where musical compositions and sound recordings are concerned society has conceded these rights slowly and cautiously, and with no real participation in the process by the public. Copyright has only lately come into widespread contact with individuals, and the issue of its legitimacy in that setting is still very much unsettled. It may yet

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[7] Thomas Jefferson, *Letter to Isaac McPherson of Aug. 13, 1813*, *in* ANDREW A. LIPSCOMB & ALBERT ELLERY BERGH, THE WRITINGS OF THOMAS JEFFERSON, vol. 3 (1905), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html.

be that the idea of property and exclusivity will prove unable to withstand the popular will. But consider this: would that matter if the recording industry were able to earn "the profits arising" from that business? Perhaps it would to some in principle, but probably not to most in practice.

¶18 If there is softness on the proprietors' side, I see it on the other side as well. Students often appear to be ambivalent about the practice of downloading. As I have said, an undergraduate student editor asked me to write about these things some months ago; I did not volunteer. I imagine his interest in the subject reflected a wider concern among his classmates at Duke and elsewhere. If there is ambivalence and division of opinion among these students, I also suspect that it is not truly centered at the level of some absolute morality touching upon property, rhetorical or otherwise, but rather is located in that realm of conduct in which one asks, "What is it that I am doing, and what will its consequences be for others and myself if I keep doing it?"

¶19 This is in essence the morality of the Golden Rule, and here, surely, there may be room for hope and compromise. For the fact is that students do love music. Music is at the center of their lives. They like to hear it, to share it, to experience it as they work and play and (I have learned as the father of five children now grown) even as they study. Students love music. They love it to death. The problem is that they may be loving it to death in a literal sense – as younger children sometimes love their Easter bunnies to death. The recording industry thinks this is the case. And I sense that students themselves are beginning to fear it as well. There is reason to worry. Again: Revenues from sales of recorded music are in decline, while individual instances of downloading and sharing are still on the rise. This may all be beyond law or ethics or morality at this point; this may now be a matter of survival, exactly as the industry fears. And the curious thing is that, for both sides, the question of survival is almost certainly of equal consequence. For I have no sense at all that very many students actually want to see the music die.

¶20 But what is to be done? Decades ago Supreme Court Justice Louis Brandeis, among the greatest figures ever to sit on the Court, and an architect of opinions equally splendid in matters touching upon both intellectual property and freedom of expression, offered three paradigms for addressing and resolving issues conceptually akin to (though factually distant from) the ones involved in this dispute.[8] First, he suggested, it would be possible to conclude that freedom of appropriation should prevail absolutely, even at the acknowledged expense of private interests such as those advanced by the music industry.[9] Second, it would be possible to allow appropriation at will, but only upon the payment of compensation adequate to insure a continuing investment.[10] Or third, it would be possible to erect barriers against appropriation at will, but with the condition that the subject thus protected be made available upon terms reflecting something in the nature of a public trust.[11] Note that he did not endorse either of the more extreme positions in the downloading

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[8] Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 248-267 (1918) (Brandeis, J., dissenting).
[9] *Id.* at 264-65.
[10] *Id.* at 266.
[11] *Id.* at 266-67.

dispute: neither the arbitrary exclusivity of copyright-as-property, nor the absolute right to appropriate reflected in the actions of those who download and share without thought of compensation, would have played any role in Brandeis's three paradigms.

¶21 Of the three, it seems to me, the middle position suggests the practical solution here. Students should be able to download and, within reasonable limits (measured mainly by provisions for compensation), to share what they have found with others. This is surely moral insofar as it goes. The music business should be assured meanwhile – not merely by law, but by an emerging consensus among students that the assurance is fair and just – that it will recoup its investment in the music it produces and records. This too seems moral. Together these terms appear to define the dimensions of a compromise that is taking shape and gaining notice in the popular press. Whether in the example afforded by PressPlay[12] or iTunes[13] or one of the other emerging licensed and commercially-sanctioned programs for downloading music from the Net, the recording industry and its file-sharing adversaries seem to have hit upon an uneasy truce-in-the-making, one that Justice Brandeis would have understood and approved. Obstacles and issues remain. Students will be tempted to withhold commitment until the new services have had an opportunity to prove themselves in the marketplace. The industry continues to think that what it has to offer is property. For both sides, however, what is really at stake are service and value added. This is how one competes with free. For that matter it is how most of the free market works and always has worked

¶22 In my view, then, the important question in the matter of peer-to-peer file sharing is not about legality or ethics or morality, but whether there is still time and room for compromise. I would have little doubt about that if things remained as they have been, for the shape of the compromise at hand seems clear and its essential fairness attainable. The prospect of the recording industry's suits this summer and beyond does raise doubts. This is, in my view, a misguided and dangerous strategy, and one that has the potential to inflame a controversy now within a year or two of being over. It savors of the counsel of desperation and though I understand it I deplore it nevertheless, for the plain fact is that the industry cannot win unless it secures the willing cooperation of students. Indeed, I believe it to be an historic fact that no regime of any sort anywhere ever secured its position in the long term by attacking students. But students will also have to understand that the kind of downloading and file sharing they have engaged in simply cannot continue without thought of compensation if the recording industry is to survive intact.

¶23 For students and the industry alike, the goal now should be to draw together, to find common ground in a shared love of music that is neither deadly nor destructive. The industry's amnesty program is a step in that direction, but more than that will be needed if the controversy is to be resolved in satisfactory fashion. Perhaps a summit should be mounted, to which representatives from all sides might be invited in a search for

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[12] http://www.pressplay.com/.
[13] http://www.apple.com/itunes/.

a lasting accord. Universities might play a useful role in that endeavor, acting as honest brokers, but then so might Congress or even the industry itself. What is needed in any event, or so it seems to me, is a clear understanding on all sides that in the context of this controversy winning may mean losing, and losing may mean bringing on the day the music dies.