

A Hard Day's Night Music Faces The Digital Divide

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We've all heard by now. The Recording Industry Association of America is suing users of illegal peer-to-peer ("P2P") file sharing networks. And we've heard the popular retort, "It's an outrage! How can record companies sue teenagers? Or the grandparents whose computers they use to trade music files?!" More extreme factions get more to the point, saying "Give the people what they want. They obviously want free music, so we should let them have it. Well, maybe we should let people volunteer to pay \$5 a month for all they can download, if they want to pay."

We all like free stuff. If someone offered us a free dinner at our favorite restaurant, we'd take it. But without that offer, how many of us would eat a lovely meal and dash out without paying? Would it be a more acceptable proposition to shoplift the ingredients for a meal from our local grocery store? We don't believe it's right to steal from others and the law prohibits it. But there's a disconnect when it comes to copyrighted music. Copyrights belong to songwriters, musicians, record labels and music publishers. Making unauthorized copies is the same as stealing, but that concept hasn't sunk into the collective conscience.

The physical embodiment of music—the CD and the package—comprises a very small portion of the purchase price of an album. Most of the purchase price is the purchaser's payment for the right to own a copy of copyrighted intellectual property, i.e. the copyrighted musical compositions and sound recordings. That money pays for a lot of different things. When you pay for a meal in your favorite restaurant, pieces of that money go to the produce man, the butcher and the dry goods salesman. But some of the meal price pays for things that don't end up on the plate: rent on the restaurant, the chef, waiters, busboys, dishwashers and marketing costs—advertising and public relations—things that keep patrons flowing through the doors. Without money to pay those costs, you would one day find your favorite restaurant closed. The same principle applies to the purchase price of a record, even one purchased over the Internet.

The retail price of a record is split among the retailer, record label, songwriters and recording artist. All four of them spend some of that money on salaries and rent. Record labels also pay for third party costs of marketing, advertising and public relations. Artists pay for instruments, rehearsal space, a tour vehicle, gasoline and simple recording equipment to use as a tool in their creative process. Put together, all of these things keep music flowing and give us the opportunity to know about it.

The practical effects of stealing often don't enter the minds of habitual thieves. Either they really need the stuff they're stealing or they just don't care about the consequences. We may consider these people to be conscienceless cretins, but at least they usually travel alone or in small packs. Millions of illegal P2P file sharers, the folks who make the software for illegal P2P file sharers to use and their defenders in the legal community are acting as though it's okay to "dine and dash" or, more accurately, to shoplift the digital ingredients of recorded music. Why is there so much resistance to the RIAA pointing a finger and saying "Shame on you!"?

Does it seem like a victimless crime, not worthy of applying "Thou shalt not steal?" There are victims, starting with the musician. Let's look at it from a personal point of view. If a 17-year-old broke into your house and stole your computer, your t.v., the extra keys to your car, your favorite jewelry and your bank account number, you'd want that kid to be found, stopped and prosecuted. You undoubtedly worked hard for those valuables and your savings. And yet, a thief took it all for himself in only a few moments, leaving you with an AM radio and a bus pass. Angry? Think it's unfair? Feel violated? Would you feel any better if a couple dozen gang members fenced it all and split the contents of your bank account between them? What about a few million? Each of the millions might come away with a fraction of a penny, but the effect on you would be the same as if one 17-year-old had cleaned you out. None of us want to endure that experience. Yet musicians are enduring it at the hands of P2P file sharers, who will often hereafter be referred to as "music thieves."

"Music thieves" may seem to be a laughably harsh semantic choice. After all, the softer sound of "file sharers"



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“We all like free stuff. If someone offered us a free dinner at our favorite restaurant, we'd take it. But without that offer, how many of us would eat a lovely meal and dash out without

paying?"

is more consistent with our modern culture's otherwise fuzzy approach to the value of intellectual property. At present, the general public doesn't value the protection of intellectual property as strongly as the protection of physical goods. If someone routinely steals cars, we call them a "car thief." We don't call them a "car sharer." These bland feelings about intellectual property have left an opening for organizations like the Electronic Frontier Foundation to refer to themselves as "digital rights organizations." One "digital right" that the EFF effectively protects is the right of P2P network users to be music thieves. They say "give the people what they want."¹ They invoke the First Amendment and copyright "fair use" defenses to defend the proprietors of software that permits illegal P2P file sharing² just as they do for the makers of commercially available devices that circumvent DVD copy protection and allow the user to make unlimited copies of major motion pictures.³ Case law and arguments in recent motion filings effectively challenge the EFF's application of First Amendment and fair use principles.⁴ However, that's a topic for a different, more academic article.

The point is that the EFF's activities serve to protect the interests of illegal P2P file sharers. They're supported by donations, and their existence hasn't caused a public outrage. In contrast, local news reporters would provide plenty of coverage if a notorious gang gathered donations to support a "Car Liberation Frontier Foundation" whose lawyers filed amicus briefs claiming that their clients had a right to keep liberated cars. It's an absurd thought. If twenty or thirty guys got together, overran the nearest Mercedes dealership and were able to drive every last Mercedes off the lot, who would stand for the Car Liberation Frontier Foundation saying the dealership needs to "Give the people what they want"? I'm beating an obvious point to death, but I'm doing so to make a point. We who work in the music business, the film business, the software business or any other intellectual property pursuit face a challenge to educate the public that intellectual property is as valuable as tangible property.

There are public relations hurdles in the quest to educate the public about illegal P2P file sharing. One problem is that rich rock stars don't make sympathetic victims. That's what Metallica learned when the group brought its copyright infringement action against Napster in 2000.⁵ Metallica was vilified by its own fans, and Metallica's fans are some of the most loyal fans around. These same fans had previously spent their time in Metallica chat rooms and on Metallica message boards discussing every nuance of the band's music and lyrics, sharing what it meant to them as fans. They were devoted. Then Metallica threatened the illegal supply of free music to which the fans had become addicted, and a violent reaction occurred. For a short time, anger blotted out the connection that these fans had made with Metallica, a band that clearly inspired them. The fans wanted free music so much that they were determined to knock down anyone who got in their way, including the band they so revered. These fans needed their music, and they badly wanted it to be free and unlimited. But our economy doesn't offer free and unlimited food, shelter, clothing, vehicles, gasoline, health care and all the other things that musicians need to survive, just like the rest of us.

Metallica was one of very few artists who had the public notoriety and the financial wherewithal to stand up for the welfare of many musicians who couldn't afford to stand up for themselves. A less wealthy, less famous artist probably couldn't afford to bring a copyright infringement lawsuit or get the press attention that Metallica got. Metallica and their fans had over 15 years of music together, free of massive music thievery. Fans bought 15 years' worth of Metallica albums and paid for tickets to 15 years' worth of concerts. The legal exploitation of protected copyrights allowed Metallica to prosper.

Metallica's lawsuit had the intended effect for a while, and the media briefly covered the fact that musical artists were being hurt by illegal file sharing. But the popular press turned its focus to a more sensational topic: Why does Metallica worry about illegal file sharing when they're already "big rich rock stars"? They don't need the money. Kids without money need free records more than Metallica needs a few more bucks, right? In the end, that angle seemed to overshadow the big picture. The same laws apply to protect the works of all musical artists, and Metallica was speaking up for all of them. There are many beloved musicians and authors of valued songs who haven't had the commercial fortune of Metallica, not to mention new musicians who are still practicing in the garage. If we care about music, we have to care about musicians.

For musicians and songwriters, there is a direct link between the protection of intellectual property and the more tangible goods and services that they need to survive. If their intellectual property—the fruits of their labor—are free for the taking, musicians and songwriters have been effectively laid off. They have to do something else to pay the bills. It's worse than just losing a job. Musicians have taken a large risk to be musicians. They have invested a lot of money, time, sweat and frustration.

Musicians face a mountain of challenges before most people hear their first recorded note. There are irresponsible bandmates, "star makers" who promise to make kids famous in exchange for their life's earnings once they become famous, producers who record "demos" (demonstration recordings) that sound like he recorded them on a home tape recorder. The day-to-day challenge amounts to competing with a hundred other local bands for the attention of closed-minded club talent-buyers and the skeptical writer for the free weekly press who highlights the shows that people should attend each week. And throughout it all, there's the stress of wondering whether they have enough talent.

Then, there are the financial realities. We'll go with a typical rock band as an example. To get decent gear, an electric guitar player could spend \$3,000 or \$4,000 on a guitar and a good amplifier. Most guitarists need at least two guitars, if not three. They can start with less expensive gear, but it'll probably be well used (and abused) gear that will break down easily. The band needs a vehicle to haul their gear and themselves from place to place. That's another \$6,000 for a smelly van with many miles on it. Some day, when the drive shaft falls off, it will be patched together with duct tape to save the cost of a tow. Then there's practice space rent, around \$600 per month. A band can share a rehearsal space with other bands to defray costs. A shared practice space is often the size of a large bedroom, in an unsafe industrial neighborhood, that is so crammed with equipment that the band members have to climb over one another to get out of the room. And eventually, the new drummer of the other band who shares their space will accidentally leave the door open, allowing everything to get stolen.

Before bands can even start to make money, they have to spend a lot of time in the cramped rehearsal space writing songs, learning them and rehearsing them. Then they must pay to record four or five demos to send out to club talent buyers. Recording those demos could cost another \$2,500 at a cheap recording studio. If the band is talented, lucky, persistent, and has a lot of friends, they'll have an opportunity to play in local clubs. An opening band at a local club might get paid \$200 per show, if they get paid at all. Club show headliners might make \$1,500, and it'll take a couple of years to get there. It isn't lucrative.

Adding to the near-comical martyrdom of aspiring rock musicians, they give up other opportunities that might lead to lucrative and stable careers. It's hard to go on regional tours when you have a responsible job, so musicians often support themselves, initially, with the kind of work that someone else can do while they're gone. They are plumbers, bicycle messengers, hot dog salesmen, forklift drivers, busboys, dog washers and apple pickers, to name a few. VH-1 devoted a whole show to the day jobs of previously downtrodden, now famous musicians, called "Before They Were Rock Stars." It's all fun and games until someone doesn't "make it" with their music. Then they remain a plumber, forklift driver or delivery guy, teaching guitar lessons on the side. With illegal P2P file sharing in the picture, there are far more stories like that than there used to be.

Once a band gets a record deal, they are not out of the woods. People talk about the big bucks of record deals with major, recognizable record companies like Warner Bros., Columbia, Atlantic, Virgin, Capitol and RCA. But getting a deal only puts a modest amount of money in each band member's pocket. In a healthy record deal for a rock band, a major record label may give the band a \$400,000 advance against the group's future record royalties to record an album and "keep the change." (The record label doesn't actually give musicians that much money. The musicians get about 20%, and the record label directly pays the recording costs out of the balance.) After deducting the costs of recording the album, management commissions, legal fees, business management commissions (accounting fees) and taxes, each member of a four-person band keeps about \$12,500.

The entire \$400,000 fund is charged against the band's record royalties, along with half of the video production costs, money to help pay tour expenses (like \$3,000 per week for a tour bus plus gasoline, and about \$4,500 in crew salaries) and half of the infamous "independent radio promotion" costs that are still necessary to get them on the radio. The band may be entitled to \$1.50 in record royalties per record, but all of those charges mean that they won't actually start to receive record royalties until they've sold around 500,000 copies of their album.

The songwriters in the group will split somewhere between 70 and 93 cents per album in mechanical royalties that the record label pays for the right to reproduce their musical compositions. Those royalties are payable from the first record sold. On 500,000 records, that's about \$400,000. They've finally made some money! But not if the records aren't sold because everyone got them for free on illegal P2P file sharing networks. It could all end right then and there.

Musicians can't pay their bills for long without intellectual property protection. Neither can record labels. Unabated, illegal P2P file sharing has already brought the music industry to massive layoffs and consolidation. Federal Reserve Chairman Alan Greenspan recently noted that value in our economy is increasingly embodied in ideas, rather than tangible capital.⁶ Nowhere is that more apparent than in the music business. The continued existence of the recorded music industry rests heavily on the protection of its copyrights against the ravages of illegal P2P file sharing. One of the attorneys representing the RIAA against illegal P2P file sharers, Jeff Knowles, proposes a three-pronged approach: education, enforcement and a viable alternative to illegal P2P file sharing.⁷ Litigators can enforce. The record business is trying to provide viable alternatives. With luck, there will be simultaneous technological developments. The rest of us can educate.

¹ Gwen Hinze, EFF Staff Attorney; oral comment at "Digital Divide" Symposium, March 4, 2004, UC Davis Law School.

2 *Ibid.*

3 Brief Amicus Curiae of Electronic Frontier Foundation, Public Knowledge, and Computer Professionals for Social Responsibility In Support of Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment, 321 Studios v. Metro-Goldwyn-Mayer Studios, Inc., USDC, ND CA, San Francisco Div., Case No C 02-1955 SI; Section II, "Argument" lines 19 and 20; and Section IV, "The DMCA Unconstitutionally Restricts Fair Use," Section A, lines 5 and 6.

4 See Reply Memorandum of Points and Authorities of Defendants and Counterclaimants in Support of Motion for Partial Summary Judgment, *Ibid.*

5 Metallica v. Napster, Inc. 2001 WL 777005 (N.D.Cal. 2001).

6 Remarks by Chairman Alan Greenspan, Intellectual property rights, at the Stanford Institute for Economic Policy Research Economic Summit, Stanford, California, February 27, 2004.

7 Jeffrey G. Knowles, Coblenz, Patch, Duffy & Bass, LLP, oral comment at "Digital Divide" Symposium, March 4, 2004, UC Davis Law School.

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