Good peer to peer onslaught - how does the entertainment industry defend its copy...

Law, Criminal Justice

Arunabha Banerjee
Senior Associate, Corporate & Compliance Solutions, Thomson Reuters

Abstract

Advancing technology has hit the entertainment industry really hard, as music and video files are transferred between computers at the speed of current. Peer to peer downloads have become the norm of this information age and are threatening to take over the copyright regime which has customarily secured the economic rights of artists and producers in equal measure. This article examines the developments in copyright law in its fights against piracy and suggests the possible way forward to restore parity.

Keywords: Copyright, Peer to peer, P2P, piracy, audio, video, music, film, download, Napster, Aimster, Grokster, Sony.

Per the U. S. copyright law, Section 501, any person who infringes any of the exclusive rights of the holder of a copyright as given under sections 106 to 122 or of the author as illustrated in section 106A(a), or who imports, copies or phonorecords into the country in breach of section 602, is an infringer of the copyright. (Turner, 2007)

Congress initially passed the 1998 Digital Millennium Copyright Act (DMCA) with the intent to protect copyright holders' digital works from Internet piracy. Congress was concerned that the Internet provided an easy, quick, and inexpensive way for digital works to be transferred between large groups of people. However, the DMCA's anti-circumvention provision leaves courts with little flexibility in balancing the rights of copyright holders against consumer choice and technological innovation. Digital cable, cable on

demand, and direct-to-home satellite already use Digital Rights Management (DRM) technology to prevent digital or analog copies of protected content. Section 1201 of the DMCA directs courts to focus on whether a DRM scheme is being circumvented, but seems to ignore the arguably more important issue of whether DRM protection is actually preventing piracy. As a consequence, digital content providers can misuse DRM as a legally enforceable means of restricting competition by preventing interoperability between downloaded music and a competing company's digital music players. (Ali, 2008)

MP3 files are readily distributable on account of the comparatively low size and bit rate. An uncompressed stereo audio song at compact disc quality amounted to 44. 1kHz with 16-bits per unit has a bit rate of ~1. 5Mbit per second, leading to a file size of roughly 10MB per minute. A complete album with 20 MP3 files can be downloaded in less than 10 minutes on the Internet. MP3 audio files are readily reproduced with same quality. MP3 files can be copied from purchased CD's using software available in market. By reason of the small size and high quality, MP3's become vulnerable to stealing. The music industry has been compelled to counter digital file based copyright violation on a huge scale. (Turner, 2007)

The effect on innovation of putting indirect liability for copyright infringement is specially significant in connection with dual use technologies. Dual use technologies are products or services which can be utilized by the consumer in a manner which does not infringe but that can also be used to breach copyright. So, the question which naturally arises is whether the developer or supplier of this technology can be held responsible for infringements of

copyright committed by the buyer. This happened to be the moot question in Supreme Court's 1984 decision in Sony Corp. of America v. Universal City Studios, Inc. The Sony decision was the first United States Supreme Court case to analyze the doctrine of contributory infringement with respect to new technology and its impact on copyright. The Court based its decision on the application of copyright law to technology that afforded consumers the opportunity to copy television shows directly to videocassette. The issue before the Court was whether the sale of the Betamax recording machine violated any rights conferred by the Copyright Act on copyright holders of television programming when users videotaped copyrighted television programs. While this issue seemed to be straightforward, Universal's argument that Sony was engaging in contributory infringement of copyright complicated the matter. The Court determined that a VCR could lead to substantial infringement and Sony could not be held liable for the infringement committed by individuals owning VCR just because it had manufactured and sold the device. The Sony principle clearly provides a considerable amount of protection for invention of technologies that are connected to the utilization of materials which enjoy copyright protection. However, in the context of peer to peer networks, judicial decisions have reduced the protection that the Sony doctrine provided to the creators of dual-use technologies. It remains difficult to ascertain however, what is the ambit of the court's ruling in restricting the scope of the doctrine. The Ninth Circuit's decision in A&M Records, Inc. v. Napster Inc., and the Seventh Circuit's decision in In re Aimster symbolize this pattern (Lemley and Reese, 15) -

- Napster - Napster distributed software that enabled users to connect directly to someone else's computers and transfer audio files. When a Napster user was connected to the network, the computer servers indexed the audio files. Any Napster user looking for a particular file could search the index of available files on server and then connect directly to a second user to transfer the file. Copyright owners of music filed a lawsuit against Napster, alleging that users of the Napster P2P network were violating their copyrights and Napster was liable for the infringing acts of the users. The Ninth Circuit Court, however, interpreted the Sony ruling in a narrow manner. The Sony opinion, the court reasoned, merely prevented a court from assigning to a defendant constructive knowledge of another party's default if the defendant was the manufacturer of the infringing equipment that could substantially be used for non-infringing purposes. The Court found that Napster was aware that infringement had taken place on its network and that Napster facilitated such infringement. It was therefore liable as a co-infringer.

- Aimster - Pursuant to the Napster ruling, Aimster filed for declaratory relief and the record companies countersued for copyright violation. When Aimster later applied for insolvency, the court ordered an immediate ruling on the copyright holders' pending motion for a preliminary injunction. The Court ruled that Aimster could continue its business but ordered it to avoid allowing any uploading or downloading of the copyrighted works.

- Grokster - A district court adopted a novel approach to applying the Sony doctrine to p2p services, in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., involving companies providing p2p software. Music and movie copyright

holders filed lawsuits against a number of defendants, contending that users of their software breached the plaintiffs' copyrights. The defendants, as licensors of the software, were secondarily liable for the violation. In April 2003, the Court granted summary judgment to a couple of defendants, Grokster and StreamCast. In applying the ratio laid down in Napster to the providers of p2p software, the Grokster Court appears to have provided creators of dual use technologies more leeway. The Court observed that the defendants' software is capable of such use, including distribution of materials with the prior permission of the holder of the copyright and disseminating information not secured by the copyright. The defendants offered proof of actual use by purchasers. As a result, the court applied the Napster standard and applied it to impute liability for operators of computer system only in situation where they had actual knowledge of a particular breach, could have acted to prevent the breach, and failed to act appropriately. The court therefore reasoned that Grokster and StreamCast did not offer active and material contribution to infringements by end-user in a manner that substantiated imputing liability to the company as contributors to those acts of breach. The Grokster decision thus provides creators of dual-use peer to peer facilities considerably added security against the threats of secondary liability for their subscriber' acts of violation of copyright than the Napster or Aimster judgments, where the inventor of the technology creates a product having double usage and does not have a continuing business relationship with the subscriber.

The film industry is a gigantic business. The key copyright industries generate 5% of the United States Gross Domestic Product. In the year 2001,

consumers in America spent $8. 4 billion to view over 480 fresh releases on more than 35, 000 screens. Outside the United States, theatrical movie shows led to generation of a figure exceeding $11 billion. Roughly 4, 000 titles have been issued thus far on the digital DVD format. If we take an average estimate, each one of these movies amounted to sums over $80 million to produce and promote commercially. The studios have asserted continuously that if one could not secure his own, then the ownership becomes futile. The studios claim that over $3. 5 billion every year is misplaced owing to piracy of content on concrete media, for instance VCR tapes and DVDs. (Grossman, 2005).

Piracy is an international concern for the music and movie business, and the new creators of P2P technology are on rampage, maintaining a discrete manner of operation, at the same time. Considering that unauthorized downloading is so widely prevalent, the application of DRM will have no impact on piracy in totality because legitimate downloads constitute an insignificant portion of all downloads that take place in Internet. At grass root level, DRM provides no meaningful protection against piracy because the barriers are in most cases very easy to circumvent. DRM does not counter piracy or provide the audio industry with any advantage. DRM merely penalizes individuals who have downloaded the audio files legitimately by putting restrictions in the manner they use such music. This provides a boost to illegal downloading through means of several illegal P2P systems. On a concluding note, we can consider two ways of looking at this problem -

- Consumer's view point - Buyers should be given the liberty to reasonably save and administer content on local systems. Onerous protection will

inevitably lead to purchaser's opposing technical improvements and slackening the advancements of new markets. Apple iTunes is a classic instance of creation of a good equilibrium of content rights protection and an acceptable level of flexibility, has only augmented Apple's brand value and commercial success.

Peer to peer technology should therefore perform a delicate balancing act in adjusting the interests of the copyright owner to the demands of information hungry masses.

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