

MP3: The Beat Bytes Back

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Abstract

MP3 has become the first major buzzword of the 21st Century. Love it or hate it, MP3 is here to stay, but will it lead to the death of the popular music as we know it, or will it revitalise an industry that many believed was already in a state of decline. The early evidence suggests that it is unlikely that MP3 will cause the demise of either the record industry or of copyright law, but it is certainly the case that MP3 and its associated technologies will have a transformative effect upon both. This article explores the debates that MP3 has given rise to and evaluates the role that law is playing in shaping the future of contemporary popular music.

By 1999 the word "MP3" had eclipsed "pornography" as the number one target for internet search engines², a position which the latter had held for almost a decade. The phenomenal growth in the availability of freely distributed digital music via the WWW at no cost to the consumer has spawned a new revolution in popular music in ways that surpass the invention of the "78", the "LP", the 45rpm single, the cassette tape and the invention of the CD and Mini Disc. Not since the "indie" revolution of the late 1970s, have we witnessed such freedom in the distribution of popular music. Indeed, it could be argued that MP3 is far more transformative than the previous format changes and marketing revolutions in that it changes the relationship between artist and record company.

Opinions on MP3 are divided, on the one hand the record companies and a few rock bands are pointing at MP3 as the Grim Reaper of popular music, giving away for free hard-earned and expensive properties, thus denying the authors the rewards that they deserve.

On the other hand, others see MP3 as the saviour of a culture that was already in a state of decline. Not only can bands now obtain immediate exposure to a much broader section of the public without having to become entwined with record companies. But it has been argued that MP3 has generally stimulated the market for popular music by exposing both old and new music to new markets. CD sales, it is alleged are going up and not down.

As soon as the technology of MP3 began to gain popularity the legal cases emerged and these cases have greatly shaped the debates over MP3 in often contradictory ways. Particularly as the cases tend to be settled out of court rather than in it. Thus the "law in action" prevails over "the law in the books" suggesting that the MP3 revolution caught the music industry napping, quickly becoming so significant that the record companies cannot afford to kill it, rather they want to live with it and use it. In this way, MP3 is having a profound effect upon popular music cultures by putting more byte into the beat.

But how long will MP3 last? what is the MP3 about? why is it so popular and why is it so contentious? More importantly are we actually witnessing the decline of the hegemony of the record company or are we simply seeing their reconfiguration in the face of a changing market.

¹ Formerly Department of Law, University of Leeds. The authors would like to thank Charlotte Acock.

² D Bedell 'Record Giants Battle It, Aspiring Artists Embrace It, Millions Can Use It. Love It Or Loath It, MP3 Is A Hot Issue' *South China Morning Post*, 19 August 1999.

The first part of this article will explore the issue of MP3, part two will look at the legal implications, part four at the response of the music industry and at what the music industry can do about it. Finally in the fifth part the discussion will explore the implications of MP3 for popular music culture and it will sum up the role that law has played in shaping the future of popular music.

MP3 and the issues that it raises.

The MP3 (full name MPEG-1 Audio Layer 3) is an audio compression format, which works by using “psychoacoustic masking” to exploit the fallibility of the human ear, drowning out various tones which are imperceptible to a human listener³. It thereby compresses the file without any noticeable deterioration in sound quality and digitally codes the remainder for storage.⁴ This is significant as it facilitates the process of supplying music on the Internet, by improving on old forms of digitalisation in terms of time and memory space.⁵ This means that as long as the appropriate free software is available, then the music can be downloaded from the Internet to either be played through the computer’s sound system or downloaded to a portable MP3 player or onto a CD Rom or Mini-disc. The recording of music files has previously been possible, however devices, such as the Rio Diamond MP3 player, have been specifically designed to play MP3 files⁶.

Piracy

There are currently hundreds of thousands of MP3 (both legal and illegal) sites on the Internet, and the number is increasing. Lycos, one of the first search engines to spot the potential of MP3, currently locates over 500,000 MP3 files on the Internet. Most of these files can be downloaded free of charge.⁷ It is useful to split these sites into legal and pirate⁸ types of MP3 distributor.

The legal, professionally-run Internet music providers, such as GoodNoise⁹, which is an Internet record company, are not perceived as a threat to the major record labels because they neither infringe their copyrights nor do they have the commercial appeal that the major labels seek.¹⁰ Of much greater concern to the major record labels are the pirate sites, which post unlicensed recordings of copyrighted material in MP3 file format, and it has been suggested that these sites constitute the majority of MP3 sites.

With the right software, a programme called a CD Ripper “rips” or encodes a music CD and converts it into an MP3 file. Akin to the process of recording purchased music to a blank cassette, “ripping” is a perfectly legal act if the “ripped” music is being used for private listening purposes¹¹, it is covered by private copying provisions. The legality of the action is challenged when MP3 are uploaded to the Internet and the copyrighted piece of work is offered for public consumption, without the copyright holder’s permission. Also, once the file has been downloaded, they can be easily passed between computers in the form of e-mail attachments.¹² This new generation of piracy has made the mass copying and distribution of copyrighted material both cheaper and also much easier. The sheer volume of sites, combined with the flexibility of the Internet, has severely challenged the ability of the record companies and their associated organisations, such as the Recording Industry Association of America (RIAA) and the Mechanical Copyright Protection Society (MCPS), to halt the operation of these sites.¹³ The pirate MP3 sites move around the Internet, posting files for only a day and communicating through newsgroups and many use FTP (File Transfer Protocol) sites which are harder to search for than regular WWW sites.¹⁴

³ A Thomas ‘MP3-Devil or Angel: An Analysis of Compression’ *Entertainment Law Review*, 1999, p 202.

⁴ Digitalisation is the process of converting information which is comprehensible to a human into information which can be understood by a computer, i.e. in the form of Binary data.

⁵ The standard WAV file took a long time to download (a whole album could take up to seven hours) and would occupy 30MB of memory (a whole album would take up most of the memory of an average PC), the same recording in near CD quality from a MP3 file would be about 2MB in size ‘MP3: What a Racket!’ *net.magazine*, Feb. 1999, p 41.

⁶ *Ibid.*

⁷ A Thomas, *op. cit.*

⁸ The term “pirate” is used here because there is frequently doubt as to the illegality of their operations, see later.

⁹ See <<http://www.goodnoise.com>>.

¹⁰ N Miller ‘Pop Goes the Business: The Rise of Digital Delivery Systems’ *Entertainment Law Review*, 1999, p 247.

¹¹ *net.magazine, op. cit.*, p 41.

¹² N Miller, *op. cit.*, p. 247.

¹³ *net.magazine, op. cit.*, p 41.

¹⁴ D Bedell, *op. cit.*

The record companies, understandably, are very critical of digital piracy,¹⁵ and they argue that commercially sold (legitimate) hardware devices, such as the Rio Diamond player, give illegal music a voice appearing to legitimise the appropriation of copyrighted music.¹⁶ Consequently, the argument goes, MP3 deprives artists and producers of any income due to them from the legitimate exploitation of their copyrighted work.¹⁷ It is estimated that unauthorised exploitation of copyrighted music accounts for 5-7 per cent of the value of world trade. The RIAA claim that there has been a corresponding fall in CD sales by 15-24 year olds, from 32 per cent of the total market in 1996 to 28 per cent in 1998. Identifying increasingly easy access to MP3 files via the Internet as a contributing factor to the decline.¹⁸ However, as will be shown later these claims are contestable.

Control Issues

MP3 not only threatens the record industry's profits, but it poses an equally serious threat to their control over both their markets and also their copyrighted interests, the artists. Aside from the issues of copyright piracy, the significance of digital downloading is that it enables artists to trade their music without the need for the manufacturer/distributor/retail models which have allowed the traditional record companies to gain dominance.¹⁹ MP3 has facilitated a change in the fundamental architecture of the music business, as the Internet provides a practical method of distributing it to a mass public audience. This loss of dominance, is therefore of considerable concern to record companies who fear that some of their established talent²⁰ will, cease to want to be associated with the traditional model of record companies, favouring their own operations. There is already some evidence of a trend in this direction as major artists such as Smashing Pumpkins²¹, Radiohead²², Offspring and Chumbawumba²³ have defied their record companies to release recorded materials. The main question remaining is how the record companies will respond; will they try to continue to hold on to their existing business, or will they develop new forms of WWW based operations - perhaps promoting and representing artist's interests in a vast plural market, rather than shaping them for particular markets, as at present. This role will form part of the later discussion.

Copyright Law Relating To MP3

In *RIAA v Diamond Multi-media Systems Inc*²⁴ Judge O'Scannlain summed up the current state of law in relation to the Internet when he stated that, "*The brave new world of Internet music distribution was built on technologies which did not mesh perfectly with existing law.*" This broad statement plants some seeds of doubt about the validity of the record industry's claim that the unauthorised copying of copyrighted material in the MP3 file format actually infringes copyright law. This section will examine the position the issue of copyrighted material in the MP3 file format.

UK Law

Copyright laws in the UK are embodied in the Copyright, Designs and Patents Act 1988 (CDPA). The CDPA establishes that the owner of the copyright in a work has the exclusive right to do, or to authorise, "the acts restricted by copyright" which are set out in section 16(1).²⁵ Copyright is infringed by any person

¹⁵ N Miller, *op. cit.*, p 247.

¹⁶ *net.magazine, op. cit.*, 41.

¹⁷ A Thomas, *op. cit.*, p. 203.

¹⁸ RIAA annual report; A Thomas, *op. cit.*, p 203.

¹⁹ N Miller, *op. cit.*, p 247.

²⁰ A problem which was evidenced by the splitting of Public Enemy from their record label, Def Jam, after they were prevented from releasing tracks in a MP3 file format on their web site, even though the record company were not releasing them.

²¹ M Ward 'Smashing the music business' (2000), 18 September, <http://news.bbc.co.uk/hi/english/sci/tech/newsid_930000/930289.stm>.

²² 'Radiohead take Aimster' (2000), 2 October, <http://news.bbc.co.uk/hi/english/entertainment/newsid_953000/953151.stm>.

²³ 'Chumbawumba's MP3 blast', (2000), 25 October, <http://news.bbc.co.uk/hi/english/entertainment/newsid_990000/990207.stm>.

²⁴ *RIAA v Diamond Multi-media Systems Inc, US Court of Appeal*, Ninth Circuit 15th June 1999.

²⁵ These can be summarised as; The reproduction right; the distribution right; the rental and lending right; the public performance right; the broadcast right; the cable programme service inclusion right and the adaptation right. See A.

“who without the licence of the copyright owner does or authorises another to do any of the acts restricted by copyright law.”²⁶ A compact disc contains three distinct copyrights and three respective copyright owners,²⁷ each of whom are entitled to the exclusive rights set out above with relation to their portion of the CD.²⁸

Section 17 of the CDPA grants the copyright owner the exclusive right to copy. Section 17(2) states that copying includes storing the work in any medium by electronic means, however sound recordings, which include MP3s, are not listed under the section and there is some uncertainty as to whether or not they are included. If they are not included by the CDPA this does not necessarily mean they are permitted, because section 17(6) provides that “transient” copies are considered as “copying” under the CDPA. Therefore, the transient copy made when an MP3 file is transmitted via the Internet would constitute copying²⁹ and will be unlawful if it is not authorised by the copyright owner. In addition, private copying is not allowed within the UK except when it counts as “fair dealing”, a concept that is explored later, or as “Time shifting” (s.70). This latter exception allows for the making of copies “for private and domestic use of a recording of a broadcast or cable programme”, which *prima facie*, includes an Internet transmission³⁰: “solely for the purposes of enabling it to be viewed at a more convenient time”³¹. However, MP3s would not be covered by this provision as they have to be copied in order to be listened to - in other words the copy is made out of necessity, rather than for convenience. Therefore, s.70 of the CDPA does not apply to MP3 and therefore the making of copies will be an infringing act.³²

It would appear that the exclusive right to reproduction is only effectively maintained on-line. This is because the distribution right that is granted by s.18 of the CDPA only refers to physical distribution and therefore does not apply. Neither does the rental and lending right found in s.18A, as “inclusion in a cable programme service” is excluded and the definition requires that the items “will or may be returned”,³³ which is not applicable to downloading. The broadcasting right under s.20 is also non-applicable on-line as “Broadcasting” is defined in s.6(1) as “Transmission by wireless means”, thereby excluding the Internet. Finally, s.135(A-G) is applicable, yet limited as it provides the right to remuneration when a sound recording is included in a broadcast, which is inapplicable for MP3, or a cable transmission. The *Shetland Times Ltd v Wills*³⁴ case looked at whether or not cable transmissions applied to the Internet and it was decided that the application turned on the nature and operation of the web site, thus excluding genuinely interactive sites from the definition. So with respect to interactive sites, the producers of recorded music have no explicit rights to authorise inclusion nor to receive compensation. This means that because MP3 sites are interactive, there is a gap in the current law, which is of considerable concern to copyright holders and owners.³⁵

So, in the UK copyright owners have limited, effective protection in the online environment other than their exclusive right to reproduction. However, this protection is enough to make illegal the “ripping” of CDs and the putting up and downloading of unauthorised material via the MP3 file format. Also, when the content provider places unauthorised illicit material on the Internet site, that person infringes copyright by his/her own act of copying and by authorising the host ISP computer to make its copy.³⁶

WIPO Treaties

Ross ‘The Future of EU Copyright Law: The Amended Proposal For A Directive On Copyright And Related Rights In The Information Society’ *Communications Law*, Vol 4, No 4, p 128, 1999.

²⁶ Section 16(2).

²⁷ Firstly, there is the music composition (s 3(1)), secondly, the lyrics, these words are protected as ‘literary works’ (s.3(1)) and belong to the lyricist, finally, once it is recorded there is the actual sound recording (5A(1)(a)-(b)) the author (or owner) being the producer which invariably will be the recording company.

²⁸ V Espinel ‘Harmony on the internet: the WIPO Performances and Phonograms Treaty’ *Entertainment Law Review*, p 23, 1998.

²⁹ V Espinel, *op. cit.*, p 24.

³⁰ A Ross, *op. cit.*, p 131.

³¹ s. 70.

³² M Rennie ‘EU Copyright Directive V Espinel, *op. cit.*, p 25.

³³ s. 18A(3).

³⁴ E.M.L.R, p 227, 1997.

³⁵ V Espinel, *op. cit.*, p 26.

³⁶ WR Cornish *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* 4th Ed, Sweet and Maxwell, London, p 539, 1999.

Different legal systems approach the copyright issue in different ways. The global nature of the Internet suggests that there is a need for universal accord on this matter.³⁷ The World Intellectual Property Organisation (WIPO)³⁸ treaties; the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty 1996, were an attempt by the international community create a common understanding.

EU Legislation

In 1999, the European Union amended the “Copyright And Related Rights In The Information Society Directive” (the “Directive”),³⁹ which was intended to harmonise the European stance upon copyright and to ensure that the Member states ratified and met the main requirements of the WIPO treaties. It also intended to re-assess and clarify the existing European rights of reproduction and the authorised exceptions to them in order to address electronic acts of reproduction.⁴⁰ It also sought to strike a balance between the interests of right-holders and the interests of information-carriers.⁴¹ The Directive contains most, but not all of the amendments sought by the European Parliament in its February 1999 opinion on the Commission’s original proposal.⁴² The governments of all the member states will subsequently be required to amend their copyright acts⁴³ in order to implement the directive.⁴⁴

Reproduction rights are at the core of copyright law⁴⁵ and have always played a key role in protection; the drafters of the Directive envisaged this role as increasing in the “digital age”, as it saw material being more vulnerable to exploitation than ever before once it has been converted into an electric format and has been transmitted digitally.⁴⁶ Article 2 of the Directive requires the widening of the exclusive right of reproduction to include: “... direct or indirect, *temporary* or permanent reproduction and in any form, in whole or in part.” A right that is granted to authors and also to related or neighbouring right holders.⁴⁷ This is of great importance to the issue of MP3, as the definition includes temporary copies and makes clear that all unauthorised digital copying is unlawful.⁴⁸

However, these reproduction rights are subject to the exceptions contained in article 5 of the Directive, especially article 5(2), the private copying exception, which is an optional exception from the exclusive right of reproduction.⁴⁹ This exception is good news for the music industry as it distinguishes between analogue and digital copying⁵⁰ and recognises the impact of large-scale, digital copying upon the music industry. The Directive states that analogue, private copying may be permitted in every case, provided right-holders receive fair compensation, however where operational and reliable copyright protection and royalty reporting systems have been put into place by web-site operators, the digital copying exception should, probably, not apply.⁵¹ The wording here does clearly state that the exemption should not apply to this situation, and this issue will no doubt be the subject of further lobbying.⁵² Consequently, the large majority of MP3 web-sites would be excepted as extensive watermark technologies are not yet in place. However, when the Directive

³⁷ V Espinel, *op. cit.*, p 21.

³⁸ WIPO was established pursuant to the Stockholm Convention 1967.

³⁹ Amended proposal for a directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Final COM(99), p 250, 1999.

⁴⁰ M Rennie ‘EU Copyright Directive: May 1999 Amendments To Appease Some Industry Sectors’ *C.T.L.R.*, p 123, 1999.

⁴¹ A Ross, *op. cit.*, p 128.

⁴² Final COM (97), p 628 [dated 10.12.97].

⁴³ The Copyright Designs and Patents Act 1988 in the UK.

⁴⁴ The directive requires implementation by the Member States by June 2000, however, this date is likely to slip due to the delay in approval by the council of ministers.

⁴⁵ A Ross, *op. cit.*, p 129.

⁴⁶ ‘Copyright And Related Rights In The Information Society – Proposal of Directive/Background’ (10 December 1997) <<http://europa.eu.int/comm/dg15/en/intprop/intprop/1100.htm#repro>>.

⁴⁷ For example, to performers for recordings of their performances and to record companies for their record, see A Ross, *op. cit.*, p 129.

⁴⁸ *Ibid.*

⁴⁹ For: ‘... reproductions on audio ... recording media made by a natural person for private and strictly personal use and for non-commercial ends ... on condition that the right holders receive fair compensation.’

⁵⁰ Which the first draft made no mention of.

⁵¹ ‘... Without prejudice to operational, reliable technical means capable of protecting the interests of the right holders’ 5(2)(b)(a).

⁵² A Ross, *op. cit.*, p 131.

comes into force in the future, digital watermarks and the Secure Digital Music Initiative (SDMI)⁵³ specification⁵⁴ may be more standard. A levy system, which would take the probable form of a tax on Blank CDs and mini-discs, is proposed as a method to provide fair compensation. It will discourage the making of illegal copies and, to compensate the right holders. Similar systems have been in place in eleven of the member states for some time.

The music industry has reacted to this provision and its opponents argue that it will do little to prevent piracy and will probably further encourage MP3 technology, prompting calls for a technical, rather than tax, solution.⁵⁵ The UK government is unlikely to adopt this exemption and the compensatory levy system, as it would require a major change to UK copyright law.⁵⁶ According to the Three Step Test which is set out in the Directive, the exceptions only apply in certain specific cases, where it will not conflict with the right holder's normal exploitation of the work, and will not unreasonably prejudice the legitimate interests of the right holder. The private copying exemption falls short of the Three Step Test because in theory, it is quite possible to control all of the uses of works on-line so they are "normal" and, therefore, the exemption should not be allowed.⁵⁷

On top of these optional exceptions there is a mandatory exception under Article 5(1) for temporary acts of reproduction.⁵⁸ This is the most controversial element of the Directive⁵⁹ because it is a departure from the WIPO treaties. Its inclusion is justified as being necessary for temporary acts of reproduction, such as caching⁶⁰ and browsing, which are "dictated by technology".⁶¹ It achieves a balance of interests between the copyright holders and the content deliverers⁶², but it is also the case that the omission of such an exception would "significantly risk impeding the free movement of works and services in Member States."⁶³ Originally it was proposed that the "temporary acts of reproduction" exception should include a provision which dictated that authorisation should be gained from the copyright holder, however this was deemed unworkable because the issues of ISP liability⁶⁴ that this would throw up, should in fact be dealt with under the E-Commerce Directive, as it relates to all types of Internet activity.⁶⁵

Another important element of the Directive is the anti-piracy provision in articles 6 and 7. 6(1) which require Member States to provide adequate legal protection, subject to a knowledge test⁶⁶, against circumvention without authority of any effective technological measures⁶⁷ that are designed to protect copyright⁶⁸. Furthermore, article 6(2) requires protection to be afforded against any activities⁶⁹ that are carried out without authority and which enable or facilitate the circumvention of effective technological measures. This section imposes absolute liability and applies no knowledge test. Article 7 legislates against the removal or altering of any electronic rights management⁷⁰ without authority or making unauthorised use of copyrighted work which has had its electronic rights management information altered or removed. These Articles of the

⁵³ An alliance of the biggest players in the recording, technology and communications industries

⁵⁴ Which contains watermarks and in its second phase includes screening technology.

⁵⁵ Denton Hall 'Briefing Note - EU Draft Copyright Directive', February, 1999.

⁵⁶ A Ross, *op. cit.*, p. 131.

⁵⁷ *Ibid.*

⁵⁸ Article 5(1) provides there should be a mandatory exception for: 'Temporary acts of reproduction... Such as transient and incidental acts of reproduction which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmission systems, whose sole purpose is to enable use to be made of work or other subject matter and which have no independent economic significance'.

⁵⁹ A Ross, *op. cit.*, p 130.

⁶⁰ The process which enables ISPs to store frequently- requested content closer to the users of the ISP's service. This permits quicker access and reduces the use of expensive transatlantic leased lines.

⁶¹ Comment 3, para 2 on Article 5: A Ross, *op. cit.*, p 130.

⁶² Comment 1, para 2 on Article 5: *Ibid.*

⁶³ Comment 3, para 2 on Article 5: *Ibid.*

⁶⁴ This issue will be considered later.

⁶⁵ *Ibid.*

⁶⁶ Provided the person does so knowingly or has reasonable ground to know he is circumventing such measures.

⁶⁷ "Technological Measures" means any technology, device or component which is designed to prevent or inhibit the infringement of copyright or related rights.

⁶⁸ M Rennie, *op. cit.*, p 126.

⁶⁹ Including the manufacture or distribution of devices or provision of services.

⁷⁰ Any information provided by the copyright which identifies the work (e.g. ©2000 (right holders name)).

Directive attempt to impose the protection required by WIPO for watermarking and copyright management systems⁷¹ and in fact they go beyond these requirements by outlawing not only circumvention itself, but also any activities that are connected to it.⁷² Including the circumvention of digital watermarking and the technologies which, it is claimed, can circumvent SDMI.⁷³

It seems clear that the Directive will not be applied retrospectively, so acts of exploitation before the date of ratification will not be affected by the Directive.⁷⁴ The revised English Copyright act is likely to extend to copyright owners the exclusive rights for: reproduction in both analogue and digital media; communication to the public⁷⁵; protection against circumvention.⁷⁶ The exclusive reproduction right is likely to be qualified by an exemption of temporary copies, where they comply with the requirements of Article 5.⁷⁷ There will be an erosion of the Exclusive reproduction right elsewhere in Europe through the private copying exception, however, it is not likely to be introduced in the UK, as it would require the setting up of a levy system.⁷⁸ It is clear that this will go some way to filling in the gaps of the UK law in relation to digitalisation and will grant more solid protection to copyright holders on the Internet.

The enforcement of copyright laws

The discussion in the previous chapter demonstrates how the unauthorised copying of copyrighted material as MP3 files infringes the copyright laws. Clearly, this poses a threat to the interests of the music industry, to their own profits and to their artists' income, and, more controversially, to their dominance within the market place. Consequently, legal action can be taken where the identity of the original infringers can be determined and evidence is available to show they posted infringing material on to a site.⁷⁹ The International Federation of the Phonographic Industry (IFPI) promised a "global crackdown" on illegally-copied music and claimed to have shut down over 30 sites during the latter months of 1999.⁸⁰ In 2000, the British Phonographic Institution (BPI) took action against upwards of twelve sites a week, compared to twelve a month in 1999.⁸¹ In America, the Recording Industry Association of America (RIAA), the US equivalent of the BPI, have long been shutting down MP3 sites, however the RIAA has more recently been taking a slightly harsher line against the users as well. In one example, the RIAA approached the University of South Carolina regarding a student who was creating illegal MP3 files. The Carnegie Mellon school was also threatened with a lawsuit, which led to 71 students being disciplined for illegal MP3 use.⁸² As well as actions against pirate sites, Internet Service Providers (ISP) have also been targeted. ISPs infringe copyright law if they do not take down the infringing content once they have become aware of its illegal content, therefore, organisations like the IFPI enforce laws through notification and take-down procedures.⁸³ The ISP's have to either delete the infringing content directly or they contact their customers in order to do so.

⁷¹ A Ross, *op. cit.*, p 132.

⁷² *Ibid.*

⁷³ The issues of which will be discussed later.

⁷⁴ *Ibid.*

⁷⁵ Article 3, which widens the existing right, granted by the Rental Directive (1992) and the Satellite Directive (1993). However it is unlikely that this will apply to MP3 due to the ambiguity in the meaning of 'public' as Internet access is generally on an individual basis therefore not public.

⁷⁶ A Ross, *op. cit.*, p 132.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ N Bortloff, 'Internet Piracy - notice and take-down'

<http://www.ifpi.org/antipiracy/internet_piracy.html>.

⁸⁰ 'Crackdown On Web Music Pirates', *The Scotsman*, 1 Nov 1999,

<<http://www.globalarchive.ft.com/search-components/index.jsp>>.

⁸¹ 'UK music must tackle internet' (2000)

<<http://news2.thls.bbc.co.uk/hi/english/business/newsid%5F663000/663845.stm>>.

⁸² J. Sullivan. 'RIAA Suing Upstart Start-up' (1999),

<<http://www.wired.com/news/business/0,1367,32559,00.html>>.

⁸³ The IFPI's procedure is: the site is firstly checked in order to identify illegally posted sound files: the Service Provider (SP) is identified, then where possible (this is rarely the case) the site operator is identified: a cease and desist notification is sent to the SP with the inquiry to disclose the site operator's contact details and, where possible, also sent to that site operator, if the SP does not comply they are contacted again demanding action and announcing legal steps against the SP should he not comply within 24 hours. N Bortloff, *op. cit.*

It is clear that the main driving force against the “battle” against piracy in the USA is the RIAA. As can be seen through case law, which will be examined later, the RIAA have sought to attack different aspects of MP3 technology in order to arrest its development. They have had varying degrees of success and the cases have thrown up some interesting and potentially damaging precedents.

RIAA v Diamond Multi-media Systems Inc.

The case of *RIAA v Diamond Multi-media Systems Inc.*⁸⁴ concluded in 1999. In this case the music industry regarded MP3 players as legitimising the MP3 file and therefore as a tool of piracy and a threat to themselves. Diamond Multi-media had previously developed and produced the Diamond Rio PMP 300, a lightweight and portable device that can download and store MP3 files from a computer’s hard drive and play them back without a computer. Much like a Sony Walkman.⁸⁵

The RIAA applied to the US District Court in California for a preliminary injunction to prohibit the distribution of the device pending trial. The RIAA claimed that the Rio was a “digital audio recording device” which violated the Audio Home Recording Act 1992 (AHRA), a federal statute which prohibits the import, manufacture or distribution of any such device or equivalent, which does not incorporate a “Serial Copyright Management System (SCMS)”⁸⁶. The district court refused to issue the injunction,⁸⁷ and the RIAA appealed.

The Ninth court affirmed the denial of the injunction, holding that the Rio did not fall within the definition of a digital audio recording device. This was because the AHRA requires the device to be capable of making “a digital audio copied recording for private use”. Under the Act the recording is defined as a reproduction, made either “directly” or “indirectly from a transmission”, of a “digital musical recording,”⁸⁸ which is “a material object in which are fixed ... only sound and material, statements or instructions incidental to those fixed sounds.” The Rio can only directly reproduce music files stored on the hard drive of a standard personal computer and, therefore, this is not a “digital music recording” as it contains other information. Hard drives are also excluded by the AHRA as they contain other fixed programmes, such as word processors and spreadsheets.⁸⁹

Thus a loophole is created where music files can be “laundered” through home computers.⁹⁰ However, the court recognised this loophole with Judge O’Scannlain stating that it was an intentional circumvention. It was also held that the Rio can not indirectly reproduce a digital music recording from a transmission.⁹¹ The outcome was that the AHRA did not apply to the Diamond Rio in either circumstance and there was no statutory basis on which to interfere with its importation and sale. The Diamond Rio player would also be legal under the US Digital Millennium Copyright Act (DMCA), because it does not fit under its anti-circumvention provisions⁹² in the ways that were discussed above. Even though Diamond Multi-media were

⁸⁴ *RIAA v Diamond Multi-media Systems Inc, US Court of Appeal*, Ninth Circuit 15th June 1999. Hereinafter referred to as *RIAA v Diamond*.

⁸⁵ A Thomas, *op. cit.*

⁸⁶ As required by section 1002 the SCMS prevents serial copying of copyright works which carry corresponding SCMS codes.

⁸⁷ It found that the Rio would qualify as a digital audio recording device, however the judge was not satisfied that the device infringed the Act’s anti-copying provisions as it was incapable of making serial copies and MP3 files do not carry SCMS codes.

⁸⁸ News Section, *Entertainment Law Review*, 1999, n 120.

⁸⁹ ‘Digital music recording’ does not include ‘a material object in which one or more computer programs are fixed’ unless such programmes are incidental to the music sounds stored on the hard drive (s.4, Audio Home Recording Act (AHRA) 1992, 17 U.S.C. (5)(B)(2). Cited in *RIAA v. Diamond Multimedia Systems, Inc.*)

⁹⁰ News Section, *Entertainment Law Review*, 1999, n 21.

⁹¹ As it records from the hard drive and even if it was stored there as a result of a transmission it is not recording from the transmission only from a recording of it. Therefore, it falls outside of the act.

⁹² P Veravanich ‘Rio Grande: The MP3 Showdown at High Noon in Cyberspace’, UCLA Online Institute for Cyberspace Law and Policy (1999) <<http://www.gseis.ucla.edu/iclp/veravanich.htm>>.

victorious, they nevertheless agreed to incorporate a serial copying prevention mechanism into the Rio⁹³, even though both sides were probably that it would have little practical effect.⁹⁴

The situation in the UK is similar as the case of *CBS Songs Ltd and others v Amstrad Consumer Electronics plc and another*⁹⁵ illustrates. The focus of this case was a tape-to-tape recorder and CBS argued that Amstrad had “sold the machines in such a way as unlawfully to incite members of the public to commit an offence under s.21 (3)(a) of the copyright act of 1956, which prohibited the making of infringing copies of a copyright work.”⁹⁶ The House of Lords rejected CBS Song’s case,⁹⁷ on the basis that “there was no liability on a manufacturer of a device which was capable of being used for unlawful purposes, where the device was capable of being used lawfully and where the manufacturer neither had control over the device after sale nor was actively encouraging unlawful use”.⁹⁸

CBS Songs v Amstrad is analogous to *RIAA v Diamond* as it centred around the record industry seeking to obtain an injunction on technology that facilitates copying of copyrighted material.⁹⁹ In his judgement, Lord Templeman took an approach that still finds a resonance today in relation to MP3 and other recording devices in-so-far-as he addressed the issue of the court’s ability to allow such injunctions.

In these proceedings the court is being asked to forbid the sale to the public of ... the tape recorder ... The court has no power to make such orders and judges are not qualified to decide whether a restraint should be placed on the manufactures.¹⁰⁰

Lord Templeman then went on to observe that it is the role of Parliament to place such limitations. He also made the point, which has been echoed in the discussion over the Copyright and related rights directive, that; “Parliament might take the view that any such restraint and prescriptions would constitute an unwarrantable interference with the development of the electronic industry and be ineffective.”¹⁰¹

Judging by the response to the decision in *CBS Songs v Amstrad*, it is highly likely that an injunction would be prevented in the UK. Therefore it would appear that actions against manufacturers of hardware designed to record, but which can also be used for lawful application, have little chance of success.¹⁰²

The failure of the decision in *RIAA* not to prevent the distribution of copyrighted MP3 files has a number of ramifications. This “hastily conceived lawsuit”¹⁰³ has weakened the American Home Recording Act (AHRA), which was drafted to control particular devices, not necessarily the information that the devices processed and used. Furthermore, statutes like this run the risk of becoming obsolete due to technical innovations, however it is claimed that this will not happen with the DMCA or, in fact, the EU legislation as they regulate information rather than devices.¹⁰⁴

⁹³ A Thomas, *op. cit.*, p 203.

⁹⁴ There has been another interesting postscript to this case; as was noted, one of the main defences was that the Rio player was not itself capable of making copies. However shortly after the release of the player a ‘hack programme’ was created which allowed users to do just that, it allowed users to ‘port’ out of the device. News Section, *Entertainment Law Review*, 1999, N 121.

⁹⁵ [1988] 2All ER 484, hereinafter *CBS Songs v Amstrad*.

⁹⁶ *Ibid.*

⁹⁷ ‘Every tape recorder confers on the operator who acquires a blank tape the facility of copying... No manufacturer and no machine confers on the purchaser authority to copy unlawfully. The purchaser or other operator of the recorder determines whether he shall copy and what he shall copy. By selling the recorder Amstrad may facilitate copying in breach of copyright but do not authorise it.’ *Ibid.* at 492.

⁹⁸ A Bebawi ‘Pandora’s Digital Jukebox - The Dematerialisation of an Art Form’ *In House Lawyer*, Feb., 1999.

⁹⁹ ‘Facilities for recording and reproducing incorporated in machines...are capable of being utilised by members of the public to copy published works of the entertainment industry and thus reduce the demand for the original works and recordings of the entertainment industry itself.’ *op. cit.*, p 487.

¹⁰⁰ *Op. cit.*, p 498.

¹⁰¹ [1988] 2All ER, p 498

¹⁰² A Bebawi, *op. cit.*

¹⁰³ R Menta ‘RIAA Strikes Again! Sues MP3.com’ (2000)

<<http://www.mp3newswire.net/stories/2000/riaavmp3.html>>.

¹⁰⁴ P Veravanich, *op. cit.*

Lycos/FAST Cases

In addition to the Diamond Rio case the legal actions against Lycos and FAST are important in determining the legal position regarding MP3 technology. Lycos, the well-known search engine company, spotted the potential of MP3 and updated its service to search for MP3 files. "MP3 search" offers links to over 500,000 files and uses the database of a Norwegian company called FAST search and transfer (FAST). However, the facility attracted the unfavourable attention of the London branch of the International Federation of the Phonographic Industry (IFPI), who brought an action against FAST for contributory infringement of copyright, which occurs when a party knows of the infringing act and either furthers that act or contributes the means to infringe.¹⁰⁵ This, in effect, held Lycos responsible for the material which it locates.¹⁰⁶ An IFPI spokesperson suggested that virtually none of the files that were posted by Lycos had the permission of the copyright owners¹⁰⁷ and that "FAST had developed its search engine software to encourage systematic copyright piracy by searching all MP3 files world wide."¹⁰⁸ To succeed in this case, the IFPI would have had to prove that FAST has knowledge of the direct copyright infringement and participated substantially in it.¹⁰⁹ This, however, could be proved because that the Lycos service includes a web-site with links to MP3 files that have been compiled by the company, furthermore the Lycos server would have carried out reliability tests to check out the servers on which users find MP3 files.¹¹⁰

A few weeks later, Lycos was sued by the RIAA for contributory copyright infringement. This was brought in Europe¹¹¹ because US search engines are protected under one of the "safe harbors" of the Digital Millennium Copyright Act.¹¹² The "harbor" applies to "Information Location Tools" which covers search engines and protects from liability a service provider who uses these tools to refer users to a site that contains infringing material if, once it has been notified of material, promptly removes or disables access to the material.¹¹³ In addition it is apparent that the RIAA will also encounter problems of evidence in prosecuting the case, as it is necessary to show that Lycos are not only linked to infringing sites, but that they also downloaded them, which will be difficult to prove.¹¹⁴

This case, along with *RIAA v Diamond*, strikes at the heart of the efficient working and development of the MP3 file format. It is apparent that in all of these cases the record industry are witnessing that Internet music is occurring either with or without them and that the "suits are their way of trying to slow down the Internet so that they can control it"¹¹⁵ to scare off potential infringers, such as "Rio Port.com" that purports only to list links to legal MP3 files.¹¹⁶

Recent Cases

The following two cases, *MP3.com* and *Napster* are recent actions that illustrate RIAA's new line of legal attack which is to focus efforts on the application of the MP3 file within a commercial environment. This approach throws up issues of consumer rights and the RIAA's true motives.

MP3.com

RIAA brought an action against the MP3.com site for copyright infringement by their new services. "My MP3.com", for example, is an online collection of CDs owned by the members, to which can be gained

¹⁰⁵ J Adermann and M Paez 'Down and Dirty with The DMCA' (1999)

<<http://www.mp3.com/news/267.html>>.

¹⁰⁶ R Lemos 'Music industry takes shots at MP3' (1999)

<<http://cst.net/chris/Music%20industry%20takes%20shots%20at%20MP3.htm>>.

¹⁰⁷ T Morris 'Music Boxes In Cyberspace' (1999) *The Times*

(April) <<http://www.marriottharrison.com/mh13-2.htm>>.

¹⁰⁸ IFPI statement, R Lemos, *op. cit.*

¹⁰⁹ A Thomas, *op. cit.*, p 203.

¹¹⁰ *Ibid.*

¹¹¹ R Lemos, *op. cit.*

¹¹² Title II of the 1998 Digital Millennium Copyright Act, the "On-Line Copyright Infringement Liability Limitation Act" 17 U.S.C. § 512.

¹¹³ J Adermann and M Paez, *op. cit.*

¹¹⁴ It has not been possible to locate the outcome of these cases but judging by the fact both companies still offer and advertise MP3 searches, it can be assumed that they were victorious.

¹¹⁵ Lorraine Comstock, a spokes person for Diamond Rio Multimedia, see R Lemos, *op. cit.*

¹¹⁶ *Ibid.*

anywhere in the world through a networked computer. The collections are compiled by using two services; “instant access”¹¹⁷ and “beam it up”¹¹⁸ which appear to be valid and innovative ways of accessing music that customers own on the net whilst actually promoting the sale of CDs: which is just what the RIAA should support.¹¹⁹ However, the problem lies in the fact that the music files transferred into the individual’s computer are actually from MP3.com’s database of 45,000 copyrighted CDs and not from the actual CD recordings that are owned by individual customers. The company bought the individual CDs and translated each one into MP3 format. The RIAA’s claim is that: “it is not legal to compile a vast database of our members’ sound recordings with no permission and no licence. And whatever the individual’s rights to use their own music, you cannot exploit that for your company’s commercial gain.”¹²⁰

In America, the exclusive copying right of the copyright owner¹²¹ is contained in the Copyright Act 1976. The rights of user lie in the Audio Home Recording Act of 1992, which states that a customer is entitled to make a digital copy of a piece of copyrighted material for personal use.¹²² However, this defence was not available to MP3.com because it was doing the copying and not the customer,¹²³ therefore: “MP3.com cannot stand in the shoes of its users”.¹²⁴ Instead, MP3.com invoked the fair use defence in copyright law, which permits commercial parties to make copies of copyrighted works under certain circumstances, such as the broadcast of a movie clip in order for it to be reviewed.¹²⁵ However, MP3.com’s claim to “fair use” was torpedoed in Judge Rankoff’s judgement which discredited the four main factors of the defence. First, was “purpose and character of use”¹²⁶. The purpose if My MP3.com was commercial in that it had taken money from sponsors, plus the defendant had simply repackaged the recordings to facilitate their transmission through another medium. Second, the recordings were too close to the copyright protection. Third, was “the amount and substantiality of the portion [of the copyright work] used [by the copier] in relation to the copyrighted work as a whole.” It was undisputed that the defendants copied and replayed the entirety of the copyrighted work and therefore fell outside the fair-use doctrine, which “... frowns upon copying whole works”.¹²⁷ Particularly where the exact reproduction of thousands of copyrighted works in their entirety, for a commercial profit purpose¹²⁸ has taken place. The fourth part of the fair use doctrine focuses in upon the “potential market for or value of the copyrighted work. This part addresses MP3.com’s argument that its service actually promotes the sale of CDs because the person has to prove that they own a copy of the recording already. Judge Rankoff dismissed this argument stating that:

Any allegedly positive impact of the defendant’s activities on the plaintiff prior market in no way frees [the] defendant to usurp a further market that directly derives from reproduction of the plaintiff’s copyrighted works.

In addition to these four factors, the defendant attempted to advance a consumer rights argument, claiming that it provides a useful service which would otherwise be served by pirates and that the public would therefore be denied access to alternative technology.¹²⁹ This was unequivocally denied by the judge who

¹¹⁷ Where CDs that the customer has purchased online through several of MP3.com’s partners, can be instantly transferred, as soon as the credit card is authorised, to their “My MP3” account, even before the CD is delivered. See M Learmonth ‘Analysis: Why the RIAA sued MP3.com’, (2000), January 26, <<http://www.cnn.com/2000/TECH/computing/01/26/riaa.mp3.suit.idg/index.html>>.

¹¹⁸ Which allows the customer to put an already-owned CD into a computer’s CD-ROM drive which recognises the CD, and its songs are then transferred to the customer’s account, *ibid*.

¹¹⁹ J C Dvorak at Forbes.com ‘piracy, bootlegging and theft’, <<http://askj.about.com/main/metaAnswer.asp>>.

¹²⁰ A letter sent to Mr Robertson, MP3.com’s chief executive, by Hilary Rosen the Chief executive of the RIAA. See S Robinson ‘3 Copyright Lawsuits Test Limits of New Digital Media’ (2000) 24th January, <<http://www.nytimes.com/library/00/01/biztech/articles/24onli.html>>.

¹²¹ This prohibits anyone but the copyright owner from making a copy of a recording.

¹²² L Anderson ‘Can MP3.com survive the lawsuits?’ (2000), February 2, <<http://www.cnn.com/2000/TECH/computing/02/02/mp3.survival.doubts.idg/index.html>>.

¹²³ *Ibid*.

¹²⁴ FAQ About RIAA’s Lawsuit Against MP3.com, <<http://www.riaa.com/tech/press/022500.htm>>.

¹²⁵ L Anderson, *op. cit*.

¹²⁶ Whether its use is of a commercial nature or is for non-profit educational purposes.

¹²⁷ Neil Rosini, in L Anderson, *op. cit*.

¹²⁸ FAQ About RIAA’s Lawsuit Against MP3.com, *op. cit*.

¹²⁹ As suggested by Andrew Bridges the attorney in the Rio Diamond case, L Anderson, *op. cit*.

ruled that copyright is not designed to “afford consumer protection or convenience, but to protect the copyright holder’s property interest”. He stated that the consumer protection argument is nothing more than a claim that copyright can be infringed if there is a consumer demand for it, which, it could be argued, is the underlying justification for my MP3 and the Napster service.

An interesting postscript to the *MP3.com* case, showing the fickle nature of the industry, is the decision of MP3.com to settle out of court with the major labels, and then to enter into a licensing agreement to run the “my MP3.com” service. Furthermore, and more controversially, MP3.com turned from being “champion of the people” to openly criticising the Napster service, stating that “any such distribution would cause potential detriment to both MP3.com and the artists who upload their music to the website.”¹³⁰

Napster

The most important MP3 related action was brought by the RIAA against Napster, a music file sharing Software Company. The outcome of the case is expected to define how books and movies, as well as music, are distributed on the net. The RIAA sued Napster for contributory and vicarious copyright infringement and related state law, alleging that the system enables and encourages piracy, either by downloading pirated songs or by sharing illegal files.¹³¹ Described as a “giant online pirate bazaar,”¹³² Napster software is run like an MP3 file sharing chat room, enabling users to talk to other users, explore their music collection, and to trade and collect MP3 files.¹³³ In addition to this, it has a search facility which can list all the songs of a particular artist contained in the libraries.¹³⁴ Napster does notify its users about copyright issues,¹³⁵ although the RIAA alleges that this is not enough and that “virtually all file traffic is unauthorised”.¹³⁶ This case raised the question as to whether or not the product manufacturers are liable for the way in which their devices are used.¹³⁷ Napster argue that they do not participate in piracy because the songs are never on their server - they come directly from other users accounts.¹³⁸ The RIAA response to this point is that, “Copyright law has long recognised that someone who materially contributes to infringing activity, with knowledge of that activity, is liable for copyright infringement as if that person did the copying him or herself.”¹³⁹ In fact, it was decided that Napster would be held liable for damages. The court denied Napster the protection, against the liability of users, offered to Internet service providers under the Digital Millennium Copyright Act, making them [Napster] liable for the action of its users.¹⁴⁰

However, this was only the first chapter of the Napster litigation. In a highly criticised move, the artists, Metallica and Dr Dre, brought their own actions against Napster, for copyright infringement. Metallica claimed that 1.4 million copies of their material were downloaded in a 48-hour period.¹⁴¹ They then provided a list of 300,000 screen names, which had been involved in downloading material, which Napster then had to take off and ban from the service: “Never before has a single move by a band disenchanting so many hardcore fans - ones who may have bought CDs and merchandise anyhow.”¹⁴² This action has had the double impact of making the artists look greedy, and Napster look like the heroes of the public cause.

¹³⁰ ‘Napster Closure Threat’ (2000), 13th June,

<<http://news6.thdo.bbc.co.uk/hi/english/business/newsid%5F789000/789123.stm>>.

¹³¹ D Reece ‘RIAA Sues Napster’ (1999), <<http://www.mp3.com/news/471.html>>.

¹³² *Ibid.*

¹³³ JC Dvorak, *op. cit.*

¹³⁴ *Ibid.*

¹³⁵ As a condition of taking an account, users have to agree that they ‘will not use the Napster service to infringe the intellectual property rights of others in any way.’ They are warned that, ‘Napster will terminate the accounts of users who are repeat infringers of the copyrights, or other intellectual property rights, of others.’

<<http://www.napster.com/dmca.html>>.

¹³⁶ Lynda Pelliccia (RIAA spokes person). See J Sullivan ‘RIAA Suing Upstart Start-up’ (1999),

<<http://www.wired.com/news/business/0,1367,32559,00.html>>.

¹³⁷ J Sullivan, *op. cit.*

¹³⁸ JC Dvorak, *op. cit.*

¹³⁹ ‘FAQ About RIAA’s Lawsuit Against Napster’ (2000),

<<http://www.riaa.com/piracy/press/031300.htm>>.

¹⁴⁰ ‘Court Blow for Napster’ (2000) 9th May,

<http://news6.thdo.bbc.co.uk/hi/english/entertainment/newsid_741000/741824.stm>.

¹⁴¹ ‘MP3 sites accused of music hijack’ (2000), 12th July,

<<http://news6.thdo.bbc.co.uk/hi/english/world/americas/newsid%5F829000/829668.stm>>.

¹⁴² B Hammersley ‘Music For A Song’ (2000), 14th July,

In June 2000, pending the appeal of the first judgement, the RIAA filed for an injunction against Napster to shut down its service until the trial. For the site to be shut down, the RIAA had to show that the industry would suffer “irreparable harm” if Napster were allowed to continue. The second part of this action was the main point of contention in the whole of the MP3 debate, and this was whether or not it causes harm by taking away sales? A study by Peter Fader showed that 70 per cent of Napster users use the service to sample the music before buying the CD, backing the classic argument of pro-MP3 campaigners.¹⁴³ In addition to this, Courtney Love, who uses MP3 to showcase her material, stated that “there were one billion downloads last year, but music sales are way up, (approximately 8 per cent according to the head of Napster, Hank Barry) so how is Napster hurting the music industry”¹⁴⁴. This sentiment was backed up by Limp Bizkit who performed free gigs sponsored by Napster, arguing that “MP3s are only helping the band sell more records and reach more people.”¹⁴⁵

Second, the RIAA had to overcome Napster’s defence, which invoked the AHRA, the same law that had previously protected Diamond Rio. The AHRA prevents copyright suits from being brought when they are based on the “non-commercial use by a customer of a digital recording device or medium,”¹⁴⁶ therefore downloading through using the Napster is legal. However, the RIAA argued that even if it is legal for the users: “it is entirely different for a commercial entity to create a business that induces users to do that.”¹⁴⁷ In their defence, Napster used the same argument that decided the Betamax case in 1994¹⁴⁸; that a device is lawful if it can be used for legal as well as illegal purposes. The final and most adventurous defence echoes the Microsoft case¹⁴⁹. Napster’s defence team attempted to advance an anti-trust defence in which they argued that the RIAA is “misusing copyrights for anti-competitive purposes” and therefore they should lose the right to enforce the copyrights.¹⁵⁰ The RIAA counter-argued by stating that they were not the plaintiffs in the case, instead the real plaintiffs were the: “Individual music publishers and record companies ... all of whom have partnerships with multiple legitimate technology companies.”¹⁵¹

In July 2000, Judge Patel denied Napster’s defence arguments and granted the RIAA a temporary injunction against Napster, which ordered the site to remove, all copyrighted material from its service. In order to comply with this instruction, Napster would have to shut down its service. However Napster appealed, and were granted a temporary stay of the injunction, allowing the company to continue to provide its file swapping service to its alleged 38 million users.

If the RIAA do succeed at trial they will have to cover a final hurdle; the fact that it is going to be very hard to shut Napster down. While Napster’s central servers can be ordered to go off-line by the court, the distribution network which allows users to share files online, would be far harder to close down. To close this network down would require thousands of injunctions against individual users to halt the widespread trading of online content.¹⁵² Furthermore systems such as Gnutella will be almost impossible to close because they are totally decentralised, so even the original copyright owners cannot shut them down.

It has long been believed that a smarter move for the RIAA, rather than to force Napster’s closure, would be to seek co-operation with a view to incorporating simple encryption technology so that music could be

<<http://www.the-times.co.uk/interface/insight/archive/story566.htm>>.

¹⁴³ M Learmonth ‘Napster Leaps to Its Own Defence’ (2000), 3rd July,

<<http://www.thestandard.com/article/display/0,1151,16593,00.html>>.

¹⁴⁴ M Ward ‘Doing The Rights Thing’ (2000), 30th June,

<http://news.bbc.co.uk/hi/english/sci/tech/newsid_809000/809831.stm>.

¹⁴⁵ *Ibid.*

¹⁴⁶ J Borland ‘Napster: Downloading Music for Free is Legal’ (2000), 3rd July,

<<http://news.cnet.com/news/0-1005-200-2198482.html>>.

¹⁴⁷ *Ibid.*

¹⁴⁸ Sony v. Universal City Studios, 464 U.S. 417 (1984).

¹⁴⁹ United States of America v. Microsoft Corporation, C.A. 98-1232; State of New York, ex rel. Eliot Spitzer, et al., v. Microsoft, Corporation <<http://usvms.gpo.gov/>>.

¹⁵⁰ M Learmonth, *op. cit.*

¹⁵¹ *Ibid.*

¹⁵² ‘Napster Closure Threat’ (2000), 13th June,

<<http://news6.thdo.bbc.co.uk/hi/english/business/newsid%5F789000/789123.stm>>.

distributed legitimately. By closing down Napster the RIAA face the distinct possibility that they will be shooting themselves in the foot. This is because Napster has already shaped consumer behaviour significantly and there is no guarantee that MP3 users will return to their previous patterns of solely consuming legitimate music products.¹⁵³ Evidence of this shift in consumption can be found in the upsurge of interest in Napster's competitors, Gnutella, during the short period during which the injunction was in force - MP3 consumers merely sought new sources of files. This indicates that users are unlikely to return to the traditional consumption model for recorded music. It also suggests that the record companies, are therefore denying themselves access to a market comprising of 38million customers. This observation was recognised by Bertelsmann AG¹⁵⁴, the media group which owns BMG. On October 31st 2000 they broke ranks from the RIAA to propose an alliance with Napster in order to create a membership-based system. The terms of the agreement state that once Napster implement the membership system, with the BMG financial support, then it (BMG) will part with the other three companies who are involved in the action and withdraw. Once this takes place, then BMG will make its music catalogue available to Napster.¹⁵⁵ The aim of the membership system will be to obtain a balance between keeping the in place the existing user-base and creating a system that is acceptable to record industry. BMG hope to achieve this solution by providing Napster members with a high quality file sharing system, with added convenience and features, that will preserve the Napster experience while at the same time providing payments to the copyright-holders. This move will, however, have no immediate effect upon the case against Napster because the remaining members, although welcoming the principles of collaboration still argue that "the current Napster model ... continues to infringe and as such, the announcement does not affect the lawsuit."¹⁵⁶

It is clear that the proposed membership system will develop at the expense of the availability of free music on the file sharing system, because members will have to pay for their subscription, however Napster claim that there will still be some free downloads available. Two possible outcomes arise here, the first is that Napster's supporters will accept the benefits of the proposed membership system and remain loyal. The second outcome is that as the BMG/ Napster proposal effectively undermines the basic ethos of the Napster project then the users/ consumers will migrate to the other systems and the whole legal process will more than likely start again.

But the question has to be asked as to how long Napster could have survived without making some kind of move. Not only was there a fair to good chance of Napster losing the RIAA court case against them, but there were also queries over the continued financial viability a free system that relied solely upon advertising for its survival. It was clear that if Napster wanted to develop alternative income streams then developing an amicable working relationship with the music publishers was really the only way to achieve it.¹⁵⁷ Finally, there were concerns about how long the MP3 community system itself could continue to work in its original form.

As described earlier, file sharing communities, such as Napster, rely on their customers sharing each other's files and not drawing the files from the Napster server, and therein lies the problem. Recent research on the Gnutella system showed that 70 per cent of users were contributing nothing to the service, just consuming. A minority of users were supplying the majority of the millions of users¹⁵⁸ and it is highly likely that a similar proportion is also true for Napster. This trend fundamentally undermines the whole of the file distribution system and could be damaging in three significant ways. Firstly, it will stagnate the service because so few people cannot continue to supply the consumers' voracious thirst for quality downloads, therefore reducing the future attractiveness of the service. Secondly, this small group of active providers will eventually become

¹⁵³ B Hammersley (2000),

<http://www.the-times.co.uk/interface/insight/archive/story731.htm>.

¹⁵⁴ Bertelsmann's newly formed e-commerce group, BeCG, includes web based media heavyweights such as BOL.com and CDNOW and the company is the world-wide leading Internet provider among media companies.

¹⁵⁵ 'Bertelsmann and Napster Form Strategic Alliance' (2000),

<http://www.dealinfo.com/BeCG-Napster/>.

¹⁵⁶ 'Napster in Bertelsmann Deal' (2000),

http://news.bbc.co.uk/hi/english/business/newsid_1000000/1000463.stm.

¹⁵⁷ A Yeates 'Personal view' *The Daily Telegraph*, 8th November 2000, p 4E.

¹⁵⁸ M Ward 'Why Napster could be a tragedy for the net' (2000), October, <http://news6.thdo.bbc.co.uk/hi/english/sci/tech/newsid%5F948000/948448.stm>.

overwhelmed if the burden is not shared and will lead to much longer download times, thus removing the attractiveness of both the service and the technology. Thirdly, this trend could leave services such as Gnutella, vulnerable to attack, as the relatively small group of active users providers means that there is a more manageable number of users against which injunctions could be enforced. It is, however, likely that the overall number will remain fairly substantial,¹⁵⁹ but this substantiality did not, for example, deter Metallica, who enforced its action against 300,000 users.

Although it is possibly that this trend will turn off many users of the free services, if the fundamental basis of the system remains and the price remains reasonable then a lot of the users will stay with the service and other users may be attracted to the more professional, and legitimate, site.¹⁶⁰ But if the revised Napster service merely turns out to be an extended advertisement for BMG, or the downloads are set a high price, for example, similar to that of a CD, then the users will move elsewhere.

MP3 file sharing systems like Napster will clearly play an important part in the future of digital distribution of music and indeed other media such a films over the Internet. *RIAA v Napster* is therefore an interesting test case as its repercussions are not just limited to music. They will, for example, also shape the future of new digital formats like MP4, which allows films to be “ripped” and distributed in much the same way as MP4.¹⁶¹ Unfortunately, the early indications suggest that the film industry have not learned the lessons of the Napster cases.

The Motion Picture Association of America (MPAA), which is a coalition of the major film companies and the film industries equivalent of the RIAA, have along with the RIAA, initiated a lawsuit against Scour, a file sharing service that includes the distribution of video files. The precedent of *RIAA v Napster* would suggest that the opposite effect will be realised on Scour to that which was intended. The action may, in fact, have the consequence of introducing millions of new users to a new system that cannot be shut down let alone controlled. The lessons learned from *Napster* would suggest that the better option for the MPAA would be to form coalitions with systems such as Scour, to gain the confidence of the user base from the outset thereby providing the basis for a legitimate file sharing system, which will dissuade people going to the illegal sites that will inevitably emerge.

Alternative Methods of Regulating MP3.

The previous chapter demonstrated that the music industry faces an uphill battle in trying to rid the Internet of illegal MP3 web sites. Similar problems have been discovered in cracking down on pornography online, indeed, it could be argued that the existence of new, illegal, systems of distribution is the price to be paid for the freedom that the Internet brings.¹⁶² It is also clear that the legislators cannot keep up with developments. The WIPO treaties, for example, were agreed in 1996 and, four years later, they are now being ratified. There is also the danger that the treaties will made obsolete with new technology, as was the case with the AHRA. Technology is moving faster than the law.¹⁶³ This observation, combined with the lack of success in the courts, suggests that the music industry should perhaps consider alternative, non-legal methods to control, harness or at least tame this contentious technology. This section will consider their options, exploring any issues and the suggestion’s chances of success.

Digital Watermarking

Digital Watermarks, such as Liquid Audio “Genuine Music Mark”, embed each frame of a digital recording with an indelible binary code which cannot be copied.¹⁶⁴ It therefore allows copies to be traced back to their

¹⁵⁹ *Ibid.*

¹⁶⁰ At the time of writing the pricing was set at \$4.95 (£3.40) per month, plus \$2 per download, see ‘Napster lawsuit continues’, (2000), 1 Nov., <http://news.bbc.co.uk/hi/english/business/newsid_1000000/1000463.stm>.

¹⁶¹ Albeit with improved security.

¹⁶² B Heese (Senior Executive of People sound.com) ‘*Crackdown On Web Music Pirates*’ *The Scotsman*; (1999), 1 Nov., <<http://www.globalarchive.ft.com/search-components/index.jsp>>.

¹⁶³ ‘Some of the Legal Issues Involved with the Rio, MP3s and RIAA’ (1999), <<http://www.lclark.edu/~loren/cyberlaw99/projects/spector/1.html>>.

¹⁶⁴ N Miller, *op. cit.*, p 248.

original source(s).¹⁶⁵ This technology does not actually prevent copying,¹⁶⁶ but it is an indispensable tool in policing piracy as authentic and unauthorised MP3 files can be distinguished.¹⁶⁷ Digital watermarking is also important as it has a legislative backing within the UK,¹⁶⁸ once the EU Copyright Directive is ratified, and also in America. While this legal framework will not stop a determined pirate from removing the mark, because, the marks do not hamper the workings of the MP3 file, it does complicate the piracy process.¹⁶⁹ Whilst not the total answer to the problem, this technology is essential if the music industry is to even have a chance to protect copyright in music from MP3.¹⁷⁰

Secure Digital Music Initiative (SDMI)

The industry's response to the problem of developing technology that protects their interests comes in the shape of the Secure Digital Music Initiative (SDMI).¹⁷¹ The SDMI is an attempt to establish an encrypted on-line music distribution delivery standard for copyrighted music in order to rival MP3, thereby allowing payment systems an which could be used in all existing and emerging digital formats.¹⁷² Last year,¹⁷³ the SDMI adopted a two-phase specification for a portable player to rival the Rio.¹⁷⁴ Phase two relies on presently unavailable screening technology, which will filter out pirate files of new releases¹⁷⁵, but allow the playing or copying of official releases.¹⁷⁶ This in effect will make customers choose between releases authorised by the record company or unauthorised releases

The SDMI could be seen as a positive step by the record industry to try and regain control over MP3. Some feel that the SDMI is not the saviour of the industry, which it is being hailed as because of three problems. First, it appears that there is already a programme which can beat the SDMI system even before it has been released.¹⁷⁷ Second, the technology may not be as secure as was originally thought.¹⁷⁸ Third, SDMI will, allegedly, be slow, according to inside sources, so work on Phase two is progressing very slowly.¹⁷⁹ It is clear that MP3 has already happened and millions already use it and it is "far more compelling to the

¹⁶⁵ These marks are transparent to the customer and do not effect the functioning of the MP3 player, which will still be able to play back non-marked files. See P Veravanich, *op. cit.*

¹⁶⁶ However it has been suggested that a recording device could be designed to recognise the absence of the watermark in unauthorised material and will refuse to copy it.

¹⁶⁷ This is especially important in America where DMCA has shifted the burden of monitoring the Internet to the copyright owners.

¹⁶⁸ Section 7 and 8 of the directive stipulates that Member States should provide adequate legal protection for circumvention, tampering and removal of such technologies.

¹⁶⁹ P Veravanich, *op. cit.*

¹⁷⁰ Indications, such as the likely adoption by the SDMI, suggest that they will be a big player in the effort to control MP3 in the future.

¹⁷¹ Which was formed by a coalition of the major players in the industry, including the RIAA, the IFPI, the major record labels and many prominent technology companies.

¹⁷² A Thomas, *op. cit.*, p 204.

¹⁷³ Agreed on 28th June 1999.

¹⁷⁴ 'Secure Digital Music Initiative Agrees Portable Device Standard', *Music and Copyright*, News Section, No 162, p 2, July 1 1999.

¹⁷⁵ It should be noted that the SDMI will not reject all pirate files, meaning that back catalogue material already in circulation will be tolerated. This is because the screening technology would detect encrypted files and it is too large a job to encrypt the millions of CDs already available, *Ibid.*

¹⁷⁶ Many fear that it could push out independent artists which have benefited so much from the MP3 format, because the filter could be used against MP3 files from groups that are outside an organised chain of distribution even though they are authorised by the copyright owner. This has been denied by the SDMI but critics remain sceptical, see A Thomas *op. cit.*, p 204.

¹⁷⁷ This is possible as the files have to pass through the computers 'sound card', the programme pretends to be the sound card and can therefore capture and store the music intended for the card which then can be converted into a MP3 file. This makes it possible to render any secure music format insecure and copyable. However, such programmes will fall under Articles 6 and 7 of the Directive and by provisions in the DMCA protecting against anti-circumvention measures. See DE Weekly 'Why SDMI Will Fail' (2000), <<http://david.weekly.org/writings/sdmi.php3>>.

¹⁷⁸ M Ward 'How to produce pirate-proof pop' (2000), 18 October, 2000, <http://news.bbc.co.uk/hi/english/sci/tech/newsid_976000/976366.stm>.

¹⁷⁹ *Ibid.*

consumer than an investment in new technology for the explicit purpose of restricting their access to the music”¹⁸⁰

Royalty System

A levy system such as that proposed by the Copyright Directive could be applied to portable MP3 players such as the Rio. This would guarantee that the industry, and the artists, would receive some financial compensation for the use of their copyrighted music.¹⁸¹ However, this suggestion is problematic for a number of reasons. First, as noted earlier, there is a resistance in the UK to a levy system. Second, on a technical point, even though the MP3 player has popularised the format, you do not actually need to possess one to play MP3 files, they can still be played through a computer. Third, the levy will not produce as much revenue as traditional systems, because players do not need any type of media to function,¹⁸² such as a blank cassette, CD-R, or mini-disc, therefore creating only one source of income.

Encode Original Recordings

A more aggressive tactic would be to encode CDs in a manner that would prevent users copying from the original, the use of DVDs has suggested as they already allow for special encoding.¹⁸³ Alternatively, the industry will simply try and control copying, as suggested by the Green Paper on “Combating Counterfeiting and Piracy in The Single Market”.¹⁸⁴ The paper proposed that CD’s produced in the EU should be embedded with a source identification code; this would facilitate tracking down pirate copies.¹⁸⁵ These measures will, however, probably hinder the general user and it is highly conceivable that determined hackers will find ways to circumvent such devices.¹⁸⁶ Also, as mentioned, the devices needed to perform such acts are legislated against in the EU Directive and the DMCA.

Industry-Owned Web Sites

A final alternative way of regulating MP3 would be for the industry to implement its own distribution channels, setting up industry-owned sites that offer authorised copies of music files.¹⁸⁷ They could either allow the songs to be downloaded for free,¹⁸⁸ or implement a number of ways to control the access to the files. Done by allowing unlimited downloading of files for a membership fee, or adopting an approach the similar to that of IBM’s Madison Project, which allows record companies to sell songs one at a time.¹⁸⁹ Although this is an excellent method to ensure that the artists receive some kind of compensation, it may not be that well received by an MP3 culture which has been developed on the basis of free music. For this to work, the industry will have provide something more than the other unauthorised sites such as official art work, fan club membership and otherwise unavailable releases such as live recordings and demos.

Conclusion.

This article has illustrated the ways in which the MP3 format and its associated delivery technologies are challenging some of the basic tenets of popular music culture, particularly the relationships between the artist, the record company and the public.

The various music industry responses and legal actions that were illustrated earlier clearly depicted a music industry that was trying to regain the level of control that it previously enjoyed over both its products and artists. However, the nature of the exploitation of MP3 technologies and their popularity indicate that the horse has probably bolted before the stable door could be locked.

¹⁸⁰ *Ibid.*

¹⁸¹ P Veravanich, *op. cit.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Green Paper on “Combating Counterfeiting and Piracy in The Single Market” (1998), <http://europa.eu.int/comm/internal_market/en/intprop/indprop/922.htm>.

¹⁸⁵ T Morris ‘Music Boxes In Cyberspace’ (1999), <<http://www.marriotharrison.com/mh13-2.htm>>.

¹⁸⁶ P Veravanich, *op. cit.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Which is unlikely to happen judging by their reaction so far.

¹⁸⁹ *Ibid.*

Although the probable intention of the legal actions was to slow down the progression of the technology and its various applications so as to allow the music industry to catch up¹⁹⁰, the actions have largely backfired on the music industry, regardless of any legitimate legal rights and obligations that it may have. For example, record companies, like ISPs, have a duty to act under the US DMCA to “gatekeep” the Internet with regards to copyright protection.¹⁹¹ Instead of restoring the music industry's control over its copyrighted material, the legal actions have given MP3 much broader publicity and have thus introduced it to a much broader market. In doing so, they have increasing its appeal and they have further popularised its consumption. Furthermore, the unfortunate timing of the actions, whilst MP3 was in its infancy, have led the defendants to be seen as the “champions of the cause” and the music industry plaintiffs as greedy.

The immense popularity of MP3 has left the record companies reeling. Whilst it is likely that the music industry will continue pressing legal actions for some time, if only to clarify their own legal positions, it is also clear that they will also seek to enforce their rights of control over copyrighted materials by developing new secure technologies. However, there is currently a question as to whether such security can keep up with the MP3 technology.¹⁹² Morris has questioned whether or not the effort of introducing such security measures is actually worthwhile, particularly as "each new development that defeats a new pirating technique with legal and technological countermeasures ... have built in obsolescence."¹⁹³

The future development of the MP3 debates during the next few years are going to be interesting, as is their impact. The most logical solution to the music industry's concerns is the development and adoption of new technology with in built copyright protection systems that will eradicate the problem of piracy. Although the technology may be developed, it is unlikely that it will overtake MP3 because consumer behaviour has already favoured MP3.

More importantly, the popularity of MP3 actually lies in its ability to enable music fans to distribute their music, and not so much a deliberate attempt to undermine the music industry. An analysis of the legal actions that were mentioned previously suggests that MP3 is not so much a threat to the market, but an indication of an increase within it. This would suggest that the music industry will, instead of opposing MP3, seek to develop new and quite radical marketing strategies that will include developing MP3 technology for the sale and distribution of their own products. There is a historical precedent here and in-time it is likely that computers will merely join other music copying methods like mini-discs, CD-Roms and tape cassettes as a means of enabling fans to make copies of music¹⁹⁴. Similar fears for the death of the music industry and of copyright, that were thrown up by concerns over previous new forms of technology, never materialised.¹⁹⁵ Consequently, should MP3 piracy therefore simply be factored in to the record company budget as a marketing expense on the basis that it frequently converts to an eventual sale¹⁹⁶ with fans generally wanting to own an authorised copy for the artwork, information about the band and/or to support their favourite artist.¹⁹⁷ Some evidence of this can be found in the fact that tape and CD bootleggers mainly, but not always, trade in recordings that are not already available such as live recordings and unreleased material.

It is clear that at one level MP3 levels the playing field by opening up previously restricted markets to artists, both old and new. At another level this increased market availability will undoubtedly have a knock-on effect for the future of music, as record producers, and record companies who provide funding, may find it harder to recoup the substantial investments that are currently necessary to develop new artists. Yet, this argument can develop in one of two directions, either there will be a lack of new artists coming through that conform to industry models of what makes a successful act. Alternatively, and importantly, artistry could

¹⁹⁰ These tactics certainly worked especially in relation to the Rio case where stores selling electrical goods, especially in Britain were reluctant to sell the players for fear of reprisals. P Veravanich, *op. cit.*

¹⁹¹ *Ibid.*

¹⁹² The suggestions were: the use of digital watermarking, the SDMI, establishing a royalty system, encoding original recordings and the setting up of industry owned web sites.

¹⁹³ T Morris ‘Has Age of Copyright Passed?’, *The Lawyer*, November 1999.

¹⁹⁴ A Bebawi, *op. cit.*

¹⁹⁵ *Ibid.*

¹⁹⁶ JC Dvorak, ‘piracy, bootlegging and theft’ (2000),

<<http://askj.about.com/main/metaAnswer.asp>>.

¹⁹⁷ P Veravanich, *op. cit.*

become much more diverse and ephemeral than it is at present with the record company tending focus less upon shaping acts and more upon marketing and representing the artists overall interests.

It is highly unlikely that MP3 spells the complete demise of either the record company or of the concept of copyright, however it is certain is that MP3 and its associated technologies are likely to have a transformative effect upon both. Copyright will have to become more adaptable to the issues the technologies throw up. Also the industry will have to review the relationship between record company, the artist and the public as it is likely that MP3 technology will forge a new relationship between these three key players.

Postscript

On 12th of February 2001, the 9th Circuit Court of Appeals dissolved the stay on the injunction against Napster that was ordered by Judge Marilyn Patel in July 2000, pending completion of the appeal process. The injunction will take effect once it has been modified by Judge Patel. The ruling does not order the Napster site to be shut down, however it does require Napster to prevent its users from gaining access to copyrighted material.¹⁹⁸

The judgement rejected Napster's defence and ruled that the four fair use factors, under the Digital Millennium Copyright Act, tipped the balance in the record companies' favour.¹⁹⁹ The judgement also dismissed Napster's defence, under the Audio Home Recording Act, that the Napster service was characterised by: "non-commercial use by a customer of a digital recording device or medium". The court ruled that the activities of the users are "commercial" in nature, even though the file sharing system is free. This is because "Direct economic benefit is not required to demonstrate a commercial use, rather repeated and exploitative copying of copyrighted works."²⁰⁰ The court also held that Napster did in fact harm the market for copyrighted music by causing lost CD sales and rejected survey findings to the contrary. Finally, the court dismissed the defence that Napster had always relied upon, namely that it should not be held responsible for the (infringing) conduct of its users. It ruled that Napster either "knew or had reason to know" that its users were exchanging copyrighted files and therefore could be held responsible as a "contributory" copyright infringer.²⁰¹ An appeal against the judgement will be lodged. However, it is unlikely to be successful and, unless it is settled, the case will go to full trial. Post has argued that Napster's remaining life-line in this case could be a defence based upon *Sony v. Universal*²⁰², see earlier in this article, whereby a device is lawful if it can be used for legal as well as illegal purposes.

It is unclear what the long term impact the Court of Appeal decision will have upon Napster's future, or for that matter, upon the future of the recording industry. On the one hand, it seems likely that the arrangement with Bertelsmann (BMG) will continue, so that even if the Napster is shut down, then it is likely that it will quickly return as a (legitimate) subscriber-based service. However, on the other hand, there are concerns that the decision may deter more record companies from signing up to the initiative. It is also very possible that Napster's existing users will be reluctant to sign up to Napster's new subscription service and will drift towards the many clone services, such as Gnutella.

Yet, a legitimate subscription service could provide distinct advantages to subscribers in the form of higher quality downloads and protection against fake or poor quality MP3 files through fingerprint systems. Rather than weaken Napster, a subscription service could, in fact, strengthen the reputation that it has established through its ease-of-use and its well-established network and library. Characteristics, which, so far, have outperformed competing services. It is clear that Napster's future hangs in the balance and that only its users can ensure its ultimate survival and success.

¹⁹⁸ K Anderson 'Q&A: What next for Napster?' 13/02/01

<http://news.bbc.co.uk/1/hi/english/business/newsid_1167000/1167124.stm>

¹⁹⁹ D Post 'Napster ruling: The legal issues' 13/02/01

<http://news.bbc.co.uk/1/hi/english/business/newsid_1167000/1167483.stm>

²⁰⁰ A&M Inc. *et. al.* v Napster, INC. United States Court of Appeals for the Ninth Circuit, Feb. 12, 2001, p 14.

²⁰¹ Post 'Napster ruling: The legal issues'.

²⁰² *Ibid.*, and *Sony v. Universal City Studios* 464 U.S. 417 (1984)