

# Illegal File Sharing Enhances the Future of the Music Industry

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*What Is the Future of the Music Industry?*, 2009

Sean Silverthorne, "Music Downloads—Pirates or Customers?" *Harvard Business School Working Knowledge*, June 21, 2004. Reproduced by permission.

*Sean Silverthorne is editor of HBS Working Knowledge, the publication for Harvard Business School.*

Contrary to the alarming claims of the music industry, illegal peer-to-peer (P2P) file-sharing can actually boost compact disc (CD) sales. For example, research shows that a major segment of file-sharers, or "samplers," usually purchase an album on CD after downloading a few songs. It also demonstrates that P2P promotes albums as radio stations do: file-sharers typically download chart hits. It is recommended that music companies and record labels monitor P2P—instead of discouraging it—to devise new, effective promotional and marketing strategies.

Internet music piracy not only doesn't hurt legitimate CD sales, it may even boost sales of some types of music.

Those were the counterintuitive findings released in March by Harvard Business School [HBS] professor Felix Oberholzer-Gee and his co-author Koleman Strumpf, of the University of North Carolina at Chapel Hill. Their paper, "The Effect of File Sharing on Record Sales," caused a ruckus in the music industry not seen since the British invasion of the Beatles.

Many recording executives were not singing "Yeah, yeah, yeah," however. Convinced that illegal downloading and file sharing has robbed them of billions of dollars after four consecutive years of falling music sales, they criticized the team's methodology, which consisted of monitoring 1.75 million downloads over 17 weeks in 2002, scouring through server logs from OpenNap (an open source Napster server), and comparing the sales of almost 700 albums as reported by Nielsen SoundScan. Oberholzer and Strumpf concluded that there was almost no relationship between the two.

The number of illegal music downloads continued to increase—but so did music sales.

How could this be? The researchers believe that most downloading is done over peer-to-peer networks by teens and college kids, groups that are "money-poor but time-rich," meaning they wouldn't have bought the songs they downloaded. In that sense, the music industry can't claim those downloads as lost record sales. In fact, illegal downloading may help the industry slightly with another major segment, which Oberholzer and Strumpf call "samplers"—an older crowd who downloads a song or two and then, if they like what they hear, go out and buy the music.

Interestingly, the first half of this year saw the release of numbers seemingly supporting this theory: The number of illegal music downloads continued to increase—but so did music sales.

## The Strategic Implications

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If in fact the research is correct, the strategic implications for the music industry are profound. Instead of conducting a high-profile campaign against pirates, should the industry instead target "samplers" to encourage them to buy more music? Should the industry consider peer-to-peer services as marketing tools rather than the enemy? Should online pricing be different from in-store pricing? What happens when broadband makes it as easy to illegally download an entire CD as an individual track or two? HBS professor Felix Oberholzer-Gee recently spoke to *Working Knowledge* about these issues.

*Sean Silverthorne: The draft of your paper with Koleman Strumpf came out almost three months ago, and caused quite a stir both inside the entertainment industry and out. What are your impressions of the reactions so far?*

Felix Oberholzer-Gee: Two recent developments are important. Our study provides the first serious evidence that file sharing cannot explain the decline in music sales in the last couple of years. In addition, in the last two quarters, music sales increased while file sharing has become even more popular. BigChampagne.com, an Internet monitoring firm, estimates that there are now [in 2004] up to 9 million simultaneous file sharers, up from about 4 million in early 2003.

In view of our evidence and these new trends, even the Recording Industry Association of America (RIAA) now states that file sharing is only "one factor, along with economic conditions and competing forms of entertainment that is displacing legitimate sales." The industry is rethinking its position, although change occurs slowly.

*Let's talk strategy. What have been the recording companies' strategies to date for combating their loss of property rights via illegal downloading? And how effective has that strategy been? For example, is it a good thing to sue potential customers?*

Suing potential customers is not exactly a standard entry in the book of good CRM [customer relationship management]. More importantly, the RIAA's legal strategy is hopeless and smacks of short-sighted panic.

Our research shows that only 45 percent of music files downloaded in the United States come from computers in the U.S. More than 100 countries supply files to the U.S. file-sharing community, and many of these countries do not have strong records of protecting copyrighted materials. The RIAA does not stand a chance to implement an effective legal strategy in all these countries.

Those who dream of legal solutions do not recognize the truly global nature of the peer-to-peer (P2P) phenomenon. Even worse, the RIAA's legal strategy does not even seem to work here in the United States. Despite the lawsuits—the RIAA has sued about 2,000 individuals to date—file sharing is more popular than ever.

## Stimulating Sales

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*Assuming your conclusion is right—that there is no evidence that illegal music downloads erode CD sales—and in fact might help top-selling record sales—what are the implications for the recording industry in terms of strategy?*

Our research shows that people do not download entire CDs. They download a few songs, typically the hits that one would also hear on a Top 40 station. This suggests that P2P is much like the radio, a great tool to promote new music. The music industry has of course long recognized that giving away samples of music for free over

the airwaves can stimulate sales. The same seems to hold for P2P.

The problem with radio as a promotional tool is that it can be quite expensive for labels to get radio stations to play their music. P2P networks are promising because they make the market for music promotion more competitive. From the perspective of the music industry, the more competition among P2P services, the less costly it will be to promote music.

*Apple's iTunes has seemingly validated the concept that people will purchase music online. But it seems the recording companies themselves have done little on their own to experiment with models here, such as tiered pricing (hits cost more) and bundling.*

The classic business model was a teaser model: The music labels provided one or two hit songs for free by promoting them on the radio and on MTV. If consumers liked the samples, they purchased a dozen songs at a price of \$15. We now have gone from one extreme to the other. While inflexible bundling was the rule, services such as iTunes now completely unbundle CDs and offer all music by the song. The difficulty with this approach is that the economics of producing music are characterized by significant fixed costs. It is not much more expensive to promote an entire album than to promote an individual song. With complete unbundling, the revenue streams generated by a new album are likely to be much lower. How many consumers will pay a dollar for song number thirteen?

Clearly, there is a profit-enhancing role for some type of bundling even with digital distribution. For example, consumers might be willing to pay full price for the core songs on an album if they get the rest at a discount. We need systematic experiments to find out which types of bundling are economically most attractive.

## Appropriate in the Digital Age

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*What's the current state of your research? Where does it go from here?*

A key uncertainty relates to our finding that file sharers do not download entire CDs. We do not know why they sample only a few songs. One possibility is that the current patterns of file sharing reflect consumer preferences. Consumers do not know the quality of new music and sampling one or two songs is good enough to assess quality and make a purchasing decision. If this view is correct, the radio model is well and alive, and P2P offers great opportunities to promote new content.

However, it is also possible that the observed behavior is due to technical difficulties. In our data, only one out of three downloads is completed successfully. File sharing is fairly cumbersome for many consumers with poor Internet connections. If this is the reason for highly selective sampling, we can expect consumers to download entire CDs when broadband connections become more common. This is a less rosy scenario for the music industry because downloads of CDs are likely to be closer substitutes for CD purchases.

If poor Internet connections explain file-sharing patterns, general access to broadband would have profound strategic implications, suggesting that music companies ought to pursue a strategy of selling complements to recorded music. We see some examples for this strategy even today: Apple sells songs to promote its iPods. Prince gives away his most recent release to promote his concerts. We need careful continuous monitoring of the effects of P2P to know which strategies are most appropriate in the digital age.

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## Further Readings

### Books

- Chris Anderson *The Long Tail: Why the Future of Business Is Selling Less of More*. New York: Hyperion, 2006.
- Moses Avalon *Confessions of a Record Producer: How to Survive the Scams and Shams of the Music Business*, 3rd ed. San Francisco: Backbeat Books, 2006.
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- Ed Christman "Paper or Plastic: Jewelboxes Lose Their Luster," *Billboard*, March 29, 2008.
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- Adam Smith "The Music Industry: Lost in the Shuffle," *Time*, March 19, 2008.
- Joanne Taffe "TME: DRM and Copyright: Rights Issues," *Total Telecom Magazine*, April 1, 2008.
- John C. Tanner "Cracking the Mobile Music Puzzle," *Wireless Asia*, June 2006.
- Lance Ulanoff "DRM-free Music Spells Trouble," *PC Magazine*, March 2008.

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# Illegal File Sharing Threatens the Future of the Music Industry

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Recording Industry Association of America, "Piracy: Online and On the Street," [riaa.com](http://riaa.com), 2008. Reproduced by permission.

*Recording Industry Association of America (RIAA) is the trade group that represents the U.S. recording industry.*

The unauthorized sharing of MP3s and other copyrighted digital music files is piracy. It amounts to stealing music and copyright infringement. This includes uploading and downloading copyrighted music through peer-to-peer (P2P) services, making and giving away copies of albums on compact disc (CD), and even e-mailing MP3s to your friends without the permission of the copyright holders. Because of the serious nature of these crimes, those who engage in illegal file-sharing and are found guilty may face huge fines and possible time in prison. Technology today may make it easy—and tempting—to share and get music for free, but it is illegal and harms the music industry.

Copyright law protects the value of creative work. When you make illegal copies of someone's creative work, you are stealing and breaking the law.

Most likely, you've seen the FBI warning on a movie DVD or VHS cassette—well, the same applies, with equal force, to music. If you have been illegally reproducing or distributing copyrighted music, maybe you should give it a closer read.

Federal law provides severe civil and criminal penalties for the unauthorized reproduction, distribution, rental or digital transmission of copyrighted sound recordings. The FBI investigates allegations of criminal copyright infringement and violators will be prosecuted.

You won't find these messages on music you've downloaded illegally, but the full weight of the law applies just the same.

The courts have consistently ruled that P2P and other unauthorized uploading and downloading inherently amount to copyright infringement and therefore constitute a crime.

So you really should find out:

- What the law says and what it means.
- How you could be breaking the law.
- How severe the penalties can be.
- What the courts say.
- What's okay ... and what's not.

## What the Law Says and What It Means

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If you make unauthorized copies of copyrighted music recordings, you're stealing. You're breaking the law, and you could be held legally liable for thousands of dollars in damages.

That's pretty important information to have, considering how serious it would be if you were caught and prosecuted by the authorities or sued in civil court. It's even more important that you understand that when you illicitly make or distribute recordings, you are taking something of value from the owner without his or her permission.

You may find this surprising. After all, when you're on the Internet, digital information can seem to be as free as air. But the fact is that U.S. copyright law prohibits the unauthorized duplication, performance or distribution of a creative work.

That means you need the permission of the copyright holder before you copy and/or distribute a copyrighted music recording.

### *What the Courts Have to Say*

For all the public confusion, a long series of court rulings has made it very clear that it's against the law both to upload and download copyrighted music without permission.

It doesn't matter whether you're dealing with sound recordings, pictures, software or written text. The courts have consistently ruled that P2P [peer-to-peer] and other unauthorized uploading and downloading inherently amount to copyright infringement and therefore constitute a crime.

If you make digital copies of copyrighted music on your computer available to anyone through the Internet without the permission of the copyright holder, you're stealing.

Don't you have a better way to spend five years and \$250,000?

### *Examples of easy ways you could violate the law:*

- Somebody you don't even know e-mails you a copy of a copyrighted song and then you turn around and e-mail copies to all of your friends.
- You make an MP3 copy of a song because the CD you bought expressly permits you to do so. But then you put your MP3 copy on the Internet, using a file-sharing network, so that millions of other people can download it.
- Even if you don't illegally offer recordings to others, you join a file-sharing network and download unauthorized copies of all the copyrighted music you want for free from the computers of other network members.
- In order to gain access to copyrighted music on the computers of other network members, you pay a fee to join a file-sharing network that isn't authorized to distribute or make copies of copyrighted music. Then you download unauthorized copies of all the music you want.
- You transfer copyrighted music using an instant messaging service.
- You have a computer with a CD burner, which you use to burn copies of music you have downloaded onto writable CDs for all of your friends.

# Do the Crime, Do the Time

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If you do not have legal permission, and you go ahead and copy or distribute copyrighted music anyway, you can be prosecuted in criminal court and/or sued for damages in civil court.

- Criminal penalties for first-time offenders can be as high as five years in prison and \$250,000 in fines.
- Civil penalties can run into many thousands of dollars in damages and legal fees. The minimum penalty is \$750 per song.

The "No Electronic Theft Law" (NET Act) is similar on copyright violations that involve digital recordings:

- Criminal penalties can run up to 5 years in prison and/or \$250,000 in fines, even if you didn't do it for monetary or financial or commercial gain.
- If you did expect something in return, even if it just involves swapping your files for someone else's, as in MP3 trading, you can be sentenced to as much as 5 years in prison.
- Regardless of whether you expected to profit, you're still liable in civil court for damages and lost profits of the copyright holder.
- Or the copyright holders can sue you for up to \$150,000 in statutory damages for each of their copyrighted works that you illegally copy or distribute.

If you make digital copies of copyrighted music on your computer available to anyone through the Internet without the permission of the copyright holder, you're stealing. And if you allow a P2P file-sharing network to use part of your computer's hard drive to store copyrighted recordings that anyone can access and download, you're on the wrong side of the law.

Having the hardware to make unauthorized music recordings doesn't give you the right to steal. Music has value for the artist and for everyone who works in the industry. Please respect that.

## The Courts on Illegal Uploading, Downloading, and Copyrighted Sound Recordings

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"As stated by Record Company Plaintiffs in their brief, 'Aimster predicates its entire service upon furnishing a "road map" for users to find, copy, and distribute copyrighted music.' ... We agree. Defendants [Aimster] manage to do everything but actually steal the music off the store shelf and hand it to Aimster's users." *Aimster Copyright Litigation*. 01-C-8933, MDL # 1425 (Memorandum Opinion and Order, September 4, 2002).

"... they [Aimster] apparently believe that the ongoing, massive, and unauthorized distribution and copying of Record Company Plaintiffs' copyrighted works by Aimster's end users somehow constitutes 'personal use.' This contention is specious and unsupported by the very case on which Defendants rely." *Aimster Copyright Litigation*. 01-C-8933, MDL # 1425 (Memorandum Opinion and Order, September 4, 2002).

"Napster users infringe at least two of the copyright holders' exclusive rights.... Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.... Virtually all Napster users engage in the



unauthorized downloading or uploading of copyrighted music..." *A & M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

"Although defendant [MP3.com] seeks to portray its service as the 'functional equivalent' of storing its subscribers' CDs, in actuality defendant is re-playing for the subscribers converted versions of the recording it copied, without authorization, from plaintiffs' copyrighted CDs. On its face, this makes out a presumptive case of infringement under the Copyright Act..." *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

## The Courts on Copyrighted Images

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"Distributing unlawful copies of a copyrighted work violates the copyright owner's distribution right and, as a result, constitutes copyright infringement.... [Unlawful distribution occurs where] [f]iles of [copyrighted] information are stored in the central system, and subscribers may either 'download' information into their [computers] or 'upload' information from their home units into the central files...." *Playboy Enterprises v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997).

"[The Copyright Act] provides that an owner of a copyrighted work has the exclusive right to reproduce the work in copies ... [and] to distribute copies of the work to the public.... Anyone who violates any of the exclusive rights of the copyright owner ... is an infringer of the copyright." *Playboy Enterprises v. Webworld Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997).

## The Courts on Copyrighted Software

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"Uploading is copying. Downloading is also copying. Unauthorized copying is an unauthorized use that is governed by the copyright laws. Therefore, unauthorized uploading and unauthorized downloading are unauthorized uses governed by the copyright laws...." *Ohio v. Perry*, 83 Ohio St. 3d 41, 697 N.E. 2d 624 (Ohio 1998).

"The unauthorized copying of copyrighted computer programs is ... an infringement of the copyright.... Unauthorized copies ... are made when such games are uploaded to the BBS [bulletin board service] ... [and] when they are downloaded to make additional copies by users...." *Sega Enterprises v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994).

## The Courts on Copyrighted Text

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"'Copying,' for the purposes of copyright law, occurs when a computer program is transferred from a permanent storage device to a computer's random access memory. In this case, copies were made when the Sega game files were uploaded to or downloaded from [the defendant's] BBS [bulletin board service]." *Sega Enterprises v. Sabella*, 1996 U.S. Dist. LEXIS 20470 (N.D. Cal. 1996).

"Defendant Free Republic is a 'bulletin board' website whose members use the site to post news articles to which they add remarks or commentary.... The Plaintiffs' [Los Angeles Times and Washington Post] complaint alleges that unauthorized copying and posting of the articles on the Free Republic site constitutes copyright

infringement.... Plaintiffs' motion for summary adjudication with respect to fair use is granted...." *L.A. Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669 (C.D. Cal 2000).

By doing the right thing, you'll be doing your part to make sure that the music keeps coming.

"When a person browses a website, and by so doing displays the [copyrighted] Handbook, a copy of the Handbook is made in the computer's random access memory (RAM), to permit viewing of the material. And in making a copy, even a temporary one, the person who browsed infringes the copyright. Additionally, a person making a printout or reposting a copy of the Handbook on another website would infringe plaintiffs' copyright." *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999).

## Copying Music: What's Okay ... and What's Not

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Technology has made digital copying easier than ever. But just because advances in technology make it possible to copy music doesn't mean it's legal to do so. Here are tips from some record labels on how to enjoy the music while respecting rights of others in the digital world. Stick with these, and you'll be doing right by the people who created the music.

### *Internet Copying*

- It's okay to download music from sites authorized by the owners of the copyrighted music, whether or not such sites charge a fee.
- It's never okay to download unauthorized music from pirate sites (web or FTP [file transfer protocol]) or peer-to-peer systems. Examples of peer-to-peer systems making unauthorized music available for download include: Kazaa, Grokster, WinMX, LimeWire, Bearshare, Aimster, Morpheus, and Gnutella.
- It's never okay to make unauthorized copies of music available to others (that is, uploading music) on peer-to-peer systems.

## Copying CDs

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- It's okay to copy music onto an analog cassette, but not for commercial purposes.
- It's also okay to copy music onto special audio CD-Rs, mini-discs, and digital tapes (because royalties have been paid on them)—but, again, not for commercial purposes.
- Beyond that, there's no legal "right" to copy the copyrighted music on a CD onto a CD-R. However, burning a copy of CD onto a CD-R, or transferring a copy onto your computer hard drive or your portable music player, won't usually raise concerns so long as:
  - The copy is made from an authorized original CD that you legitimately own.
  - The copy is just for your personal use. It's not a personal use—in fact, it's illegal—to give away the copy or lend it to others for copying.
- The owners of copyrighted music have the right to use protection technology to allow or prevent copying.
- Remember, it's never okay to sell or make commercial use of a copy that you make.

Are there occasionally exceptions to these rules? Sure. A "garage" or unsigned band might want you to download its own music; but, bands that own their own music are free to make it available legally by licensing it. And, remember that there are lots of authorized sites where music can be downloaded for free. Better to be safe

than sorry—don't assume that downloading or burning is legal just because technology makes it easy to do so.

Enjoy the music. By doing the right thing, you'll be doing your part to make sure that the music keeps coming.

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## Further Readings

### Books

- Chris Anderson *The Long Tail: Why the Future of Business Is Selling Less of More*. New York: Hyperion, 2006.
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