

1-1-2003

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Recommended Citation

Stephen Keating, *File-Sharing Copyright, and Privacy*, 25 HASTINGS COMM. & ENT.L.J. 697 (2003).
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol25/iss3/6

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File-Sharing, Copyright, and Privacy

by

STEPHEN KEATING*

The Recording Industry Association of America (RIAA) in 2003 filed lawsuits against 261 people for allegedly using their personal computers as a pirate jukebox, downloading copyrighted music files and sharing them with others.

If proven, such piracy could cost offenders dearly: \$750 to \$150,000 for each downloaded song. Brianna LaHara, a 12-year-old New York City honors student, became one of the first targets named when her mother paid a \$2,000 fine to settle the case.

“I got really scared,” Brianna told the New York Post. “My stomach is all turning. Out of all people, why did they pick me?”

There are many troubling aspects to this situation, including the legal tactics used to track down offenders, the acknowledged piracy of copyrighted material, the future of intellectual property in a digital age, the openness of the Internet, and the desire of computer users to engage in so-called peer-to-peer (P2P) file sharing.

Yet, what’s missing in this debate is the knowledge that we’ve been here before. And the lessons from that conflict may show how the P2P piracy issue may be defused.

The relevant history concerns the satellite TV industry, which now claims 20 million paying subscribers in the U.S.

In the mid-1970s, however, home satellite TV dish owners were the epitome of piracy. That black market arose when Home Box Office, the Christian Broadcasting Network, ESPN, C-SPAN and Ted Turner’s networks, to name a few, began beaming their programming up to satellites for national distribution to cable operators.

At the same time, hobbyists like Stanford University professor Taylor Howard were pointing backyard satellite dishes toward the

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southern sky and pulling down that very same programming.

Simultaneously conscience-stricken and amused at having pirated HBO's signal in 1976, Howard wrote the network a letter and mailed it off. "I understand it's a pay service," he wrote. "I would like a monthly subscription." He never heard back.

Within 10 years, however, there were more than one million satellite dish owners, many of whom freely downloaded copyrighted TV programming "from the bird." The cable TV industry claimed to be losing \$10 million a month in subscriptions from such piracy. Lawsuits were filed and the cable industry also began encrypting their satellite signals. A furor arose from satellite dish owners – many of them in rural, uncabled areas – who claimed they couldn't get TV programming any other way.

Encryption "is one of the most emotional issues I've dealt with since coming to Congress," said a Utah congressional representative in 1986.

Does this sound familiar? An innovative communications technology disrupts the old order, giving millions of people free access to new media, which causes economic damage to copyright holders, who seek legal and technological remedies.

So, how did the home satellite TV industry go legit? It was a long, drawn-out battle that involved Congress, the courts, plenty of copyright attorneys, and technological innovation. In short, new rules allowed satellite TV companies to buy access to programming controlled by cable companies, and thus compete head-on with cable. The home satellite TV industry developed its own signal encryption, along with descrambler boxes available to paying subscribers.

Those changes, along with the development of 18-inch satellite dishes, helped create one of the most successful consumer electronics products of all time. When DirecTV launched in 1994, it sold one million units in the first year.

A bonus was that piracy was marginalized. It still exists, of course. Some analysts estimate one pirate for every six legitimate satellite TV subscribers. The piracy of hard-wired cable service is thought to be somewhat less, because it is harder to steal. Yet, the totality of such piracy is clearly on the margins rather than at center stage as it is with the online music industry.

There is a key difference, of course, between satellite TV piracy and P2P piracy on the Internet. Satellite TV piracy, though it may happen many thousands of times, is a series of isolated instances. P2P piracy on the Internet is exponential. Someone who hosts a copyrighted digital music file on their computer can make it instantly

available to millions of other people on the Internet through free software such as KaZaa and Grokster.

Nonetheless, given the evolution of the satellite TV industry and the current P2P piracy problems, a few conclusions may be drawn:

- Many people will pay for content, if given the opportunity. The online Apple iTunes service sold its ten millionth song in September of 2003, and is averaging 500,000 paid downloads per week, at 99 cents a pop. A version for Windows computers is promised soon.
- Lawsuits are a means, not an end. The RIAA could file lawsuits from now until the end of time and still not crush online piracy. The music industry's failure to embrace new download technology has spurred the pirates.
- Congress should revisit the laws governing intellectual property and copyright in a digital age. The Digital Millennium Copyright Act of 1998, which the RIAA used as a basis for filing its lawsuits, may itself need an upgrade.
- Disruptive communications technologies like satellite TV, P2P and whatever comes next should be embraced for the innovations they provide, not disdained for the headaches they cause along the way.

That last point has a history all its own. Every time new media has arrived on the scene, the old guard has cried foul, only to discover later that the human appetite for communication is ever-expanding and new markets have been created. Radio feared the dawn of talking pictures. The movies feared broadcast television. Broadcast TV feared cable, which feared satellite TV. The movie studios feared VCRs, then found that a whole new billion-dollar market in home entertainment had been created.

Several years from now, when a new legitimate industry of music, movie and media downloads has transformed the Internet, the music industry's current fusillade of lawsuits will sound like the echo of a fear unfounded.

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