Managing Pirate Culture: Corporate Responses to Peer-to-Peer Networking

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Introduction

Nowhere does the Internet provide a more vigorous challenge to existing media culture than in the distribution of recorded music. The Internet facilitates a much more direct relationship between creative producers and consumers than was previously possible and threatens the position of the established record companies as key players in the music value chain. In particular, the existence of peer-to-peer (P2P) networking services that allow for the illicit swapping of music files online raises the possibility that the current centres of industry power may be marginalised in the new digital music environment. In particular, the existence of peer-to-peer (P2P) networking services that allow for the illicit swapping of music files online raises the possibility that the current centres of industry power may be marginalised in the new digital music environment. This is the fear of the current record company executives and the hope of the new digital entrepreneurs, both of whom are attempting to fathom the implications of the potential for widespread disintermediation of distribution structures.

The music industry provides a particularly rich illustration of the ways in which the Internet is influencing current media systems because the Internet has already transformed the consumption habits of millions of music fans and contributed to a new listening culture based on peer exchanges rather than corporate structures. The success of first-generation P2P services like Napster and MP3.com and second-generations ones like Gnutella and Morpheus has forced the industry to draw up new business models for the delivery of music. For some executives the impact has been overwhelmingly negative. The Internet has exacerbated the problem of piracy and fostered a culture of disrespect towards the sacred principle of the record industry: copyright. Illegal digital downloads from P2P networks together with unlicensed ‘burning’ (copying) of CDs via new recordable CD machines (CD-Rs) is costing the industry billions of dollars in lost sales and hurting artists through reduced royalty payments. This position was put most succinctly and energetically by Michael Greene, CEO of the National Academy of Recording Arts and Sciences in his opening address to the 2002 Grammy Awards.

No question the most insidious virus in our midst in the illegal downloading of music on the Net. It goes by many names and its apologists offer a myriad of excuses. This illegal file-sharing and ripping of music files is pervasive, out of control and oh so criminal. Many of the nominees here tonight, especially the new, less established artists, are in danger of being marginalized out of our business. Ripping is stealing their livelihood one digital file at a time, leaving their musical dreams hopelessly snared in this World Wide Web of theft and indifference (Greene, 2002).

Abstract

The Internet provides a challenge to existing media structures and cultural values, particularly in the distribution of recorded music. Peer-to-peer (P2P) file-sharing sites like Napster and KaZaA have facilitated the widespread downloading of unlicensed music and the creation of a new kind of shared culture. In response, the established music industry is simultaneously attempting to undermine the impact of these exchanges (describing them as theft) and to take advantage of the possibilities of the Internet in reducing distribution costs and offering the possibility of a more direct relationship between labels and consumers. By drawing on both historical and contemporary analyses of the music industry, this article critiques the argument that digital downloads are necessarily hurting ‘legal’ record sales and then problematises dominant definitions of piracy. The article then evaluates the evolving strategies of the major record companies as they try to come to terms with P2P culture and concludes that, while they may have the resources and the legal clout to withstand the challenge, they lack the cultural capital embodied in these new decentralised systems of cultural distribution and consumption.

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This is the attitude that underpinned the Recording Industry Association of America’s (RIAA) successful lawsuit against the P2P network Napster in June 2000, alleging widespread and damaging copyright infringement. It is an attitude adopted by policymakers who, after extensive industry lobbying, are seeking to extend copyright legislation across digital platforms and to instill an understanding amongst (especially young) consumers about the need to respect intellectual property.

It is also the attitude that underpins the industry’s reaction to declining sales figures. In April 2003, the recording industry’s worldwide trade body, the International Federation of Phonogram and Videogram Producers (IFPI) revealed a 7% drop in value and a 8% decline in actual units sold across the globe and argued that while demand for music remained as strong as ever, ‘[m]ass downloading from unauthorized file sharing on the internet and the massive proliferation of CD burning continues to be a major cause of the fall in CD sales globally’ (IFPI, 2003). Newspaper headlines seized on the Internet as the key reason for declining record sales. ‘CD sales damaged by illegal internet downloads’ wrote the Independent (10 April 2003) while the Financial Times highlighted ‘rampant illegal internet downloading’ (Burt, 2003: 7) as the cause of the collapse in CD sales.

Faced with the challenge of an increasingly popular culture that has developed its own conception of property and its own distribution networks, the established industry has sought to manage this threat through what Siva Vaidhyanathan (2003) calls a ‘clampdown strategy’. This consists of a range of public and private initiatives aimed at criminalizing piratical uses and re-asserting corporate control through the development of new business models and new legal frameworks for distributing music. The strategy also relies on public acceptance of a very partial and ahistorical account of the reasons for the decline in sales together with a reading of digital music innovations that is based on a narrow market-led conception of private property and piracy.

To put it somewhat crudely, the objective of the record industry is to ‘clean up’ the Net, drive out the pirates and re-establish property relations that are favourable to corporate interests, whether these be new or existing ones. It is a strategy that puts a very powerful but inflexible form of organisational culture up against a dispersed but highly dynamic mode of cultural distribution and consumption. This article examines the arguments used and initiatives taken by the record industry and reflects on the problems posed for corporate owners by those who are committed to a very different understanding of ‘shared’ culture.

Why do record sales decline?

The characterisation by the IFPI that demand for records is fundamentally strong and that Internet piracy is to blame for falling sales is a simplistic reaction to a complex problem. Demand for and sales of music are shaped by a range of factors including the impact of the wider economy, levels of creativity, the scale of corporate innovation (or conservatism), the pace of technological development and the unpredictability of individual consumer taste. Throughout its history the music industry has been subject to cycles of boom and slump, none of which have been caused by a single identifiable factor (such as piracy). We have seen periods of boom in the 1920s, 1940s, late 1950s, 1960s and 1990s – all of which have been followed by periods of slump in the 1930s, late 1940s and early 1950s, 1970s, and now today. Each ‘fall’ in the cycle has been followed by an environment in which discussions of musical creativity, technological innovation and corporate behaviour have been central.

For example, the end of the ‘rock boom’ in the late 1970s witnessed both a substantial fall in sales, some 40% in the USA and 20% in Europe between 1978 and 1983 (Frith, 1987b: 59), and the identification of a new villain: home-taping using new audiocassette recorders. While the British Phonographic Industry (BPI) argued that a blank tape sold was a record not sold, the IFPI argued at the time that ‘private copying is seriously affecting the profitability of the phonogram and videogram industries’ (quoted in ibid.). Despite the apparent logic of the claim, Frith argues that there was a far more complex bundle of reasons than home-taping. ‘The rock business faced a crisis at the end of the 1970s not because of punk or the cycle of business competition but because of “outside” technological and social changes’ (Frith, 1987a: 70) including a fall in the number of teenagers, rising youth unemployment and an increase in the number of home-base leisure activities (e.g. computer games, VCRs as well as cassettes). ‘What home taping signifies’, Frith concludes, ‘is the changing place of music in leisure generally. Records are being replaced not by tapes as such but by other leisure activities; music is being used differently and in different, more flexible forms’ (ibid.: 73).

This is particularly true today when music is consumed in a growing number of contexts (from TV commercials and films to clubs, lifts and shopping malls) and via an ever-changing array of technologies (including mobile phones, PCs, MP3 players as well as traditional hi-fi). Simplistic narratives of technological succession – that Internet technologies will necessarily undermine hard carrier sales – is as misplaced as previous assertions that film would kill off photography or that TV would kill off film.

There is no single explanation for the recent decline in global record sales. To place the burden wholly or partly on illegal downloads from the Internet is...
to ignore a host of other reasons, including:
- a slowing global economy
- the maturing of the CD market and consumer perception of the high cost of CDs
- the popularity of rival leisure activities such as video games and DVDs
- the continuing ‘corporate concentration’ of the music industry leading to a reliance on formulae and a reluctance to invest in new artists
- a lack of major musical innovations.

The willingness of the industry as a whole to identify P2P services like Napster and Gnutella as the major cause for declining sales suggests that the record companies are reluctant to investigate their own responsibility. In particular, this involves a renewed focus on the protection of private property in the music industry and the challenging of piracy.

**Who are the pirates?**

*It is extremely worrying that on the internet there is a philosophy that everything is free. The fact that people might even begin to think that music should also be free is doubly worrying* (Crispin Evans, senior VP at Universal Music Publishing, quoted in Brindley, 2000: 58).

For government and corporate interests, copyright is the key foundation on which any viable enterprise in the creative industries is based. According to the British culture department’s report on the impact of new technologies, the music industry ‘is built on copyright and its success is dependent on the value attached to music by end consumers and intermediate business users’ (DCMS, 2000: 25). From the perspective of the industry, unlicensed digital downloading is proof that ‘end consumers’ are degrading the value of music by refusing to respect established copyright regimes and are thus undermining the current business model of recorded music. There are allegedly two sets of losers in this situation: firstly, the ‘legitimate market’ (see IFPI, 2001: 8) and secondly individual artists who lose out on royalty payments and thus would have less incentive to produce new works. Worried by the diminishing respect for corporate ownership, the major labels, according to Harvard business scholar Deborah Spar, ‘had to become more aggressive. They had to reconstitute some structure of property rights in cyberspace and some means – either technical or legal – of defining pirates and stopping them’ (Spar, 2001: 350).

Defining piracy is not the straightforward practice the industry claims it to be. In the introduction to its 2001 Music Piracy Report, the IFPI reports that ‘commercial pirate recordings today range from the traditional cassette to the manufactured CD, and from the CD-R disc replicated in a garage or laboratory to the audio file distributed on the Internet’ (IFPI, 2001: 2) and account for some 40% of the entire market (IFPI, 2002: 2). ‘Internet piracy’ as such does not figure in these statistics which are for hard carrier copies and yet the phenomenon of digital downloading is named as a central (and growing) part of the illegal music trade. It is possible that the original source for an unlicensed copy may be a digital download, but it is far more likely to be a CD – often purchased legally and which offers better sound quality. The point of lumping together the organised mass pressing of pirate copies (often undertaken in commercial plants and monitored by law enforcement officials) with either an individual ‘burning’ a copy of a friend’s CD or P2P downloads with no commercial value is to expand the definition of piracy and who constitutes a pirate. From now on, individual students on ‘wired’ college campuses, office workers circulating a new CD for ‘burning’ and organised gangs producing and distributing mass pirated copies on the streets of Mexico City or Manila are all pirates, responsible for jeopardising ‘legitimate’ music sales and artists’ royalties. Such a conception makes further copyright legislation more necessary and less controversial.

Indeed, copyright laws have been revised in recent years to deal with digital technologies and, in particular, unlicensed downloads, in terms that clearly favour the major music companies. Two treaties agreed by the World Intellectual Property Organisation (WIPO) in 1996, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), were finally ratified in March and May 2002 respectively. These treaties, which form the basis of the European Union’s Copyright Directive and the US Digital Millennium Copyright Act (DMCA), confirm the authorship of recorded music in the digital environment and protect against copyright infringements by non-rights holders. Article Fourteen of the WPPT, for example, gives record companies the ‘exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means’ (WIPO, 1996). Corporate control and limitations on ‘fair use’ (where copyrighted material can legally be used for private consumption) have been institutionalized in these pieces of legislation and further laws are set to follow (see Pew, 2003: 3 for details of draft bills that have been introduced in the USA).

Once again, there is nothing new in this response. Frith (1987b) shows that whenever the music industry was faced with technological uncertainty or declining sales, it turned to discourses concerning copyright and intellectual property as a means of controlling its environment and adapting to changing market conditions. From the threat of radio in the 1920s to the challenge of home-taping in the 1970s, copyright law ‘has never ... been about absolute rights, but has always involved pragmatic decisions about who should benefit from musical work and how ...' Copyright is a political and economic,
not a moral matter’ (ibid.: 73). Copyright is as much a strategy for maintaining corporate control as it is a means for rewarding artists for their creativity.

The Internet is not the first digital technology to challenge to corporate conceptions of cultural ownership. Schumacher (1995) assesses how the use of digital audio sampling, in which sounds from one song are re-integrated into another song, threatened the whole basis of contemporary copyright law when it emerged in the 1980s. Sampling is particularly popular with hip-hop music and is related to an African-American folk tradition of intertextuality where phrases from older songs are incorporated into newer ones. According to Schumacher, it is ‘rap’s very flaunting of its intertextuality that poses the challenge to copyright law’ (ibid.: 265) and that landed many of its proponents in court defending lawsuits. The fact that the vast majority of cases were decided in favour of existing copyright holders and against ‘textual poachers’ leads Schumacher to conclude that ‘copyright is enabling of certain forms of discourse while prohibiting others in the ideological balance of “free expression” and profitability’ (ibid.: 254). The cultural forms facilitated by sampling could not be accommodated within existing intellectual property regimes. Such is the pattern that is now evolving with P2P systems.

**What are the record companies doing about pirate culture?**

The music industry is pursuing a range of strategies simultaneously to marginalise and emulate P2P culture. It has lobbied for sympathetic copyright legislation to criminalise P2P networks and users and developed copy protection systems to outwit potential pirates. On the other hand it has also attempted to hack into unlicensed music files in what it calls ‘spoofing’ and even to buy up selected digital ventures that would complement existing digital portfolios. There are three other ways in which the major labels and their trade associations are confronting the threat of P2P: through education, litigation and the development of new online services.

**Education**

Educating the public about copyright issues is a key priority for an industry that is keen to tackle the growing perception, facilitated by P2P networking, that consumers do not necessarily have to pay for all their music. The notion that music can be free is, evidently, a serious problem for the industry and one that needs rebuttal. A British study of the digital music economy that is otherwise sympathetic to the possibilities of new technology, argues that there is an urgent need to educate young people about the value of copyright and the need to respect private property in the creative industries. ‘The internet culture of “free” content sharing is clearly a potential disincen-
tive to future investment in all copyright industries. There is considerable concern that a significant proportion of the younger generation in places like California ... is growing up to believe that music is essentially a “free” commodity’ (Brindley, 2000: 74). Such an idea – that music should be shared and effectively de-commodified – is out of place in the contemporary music economy.

The key vehicle for re-educating the public about the need to pay for music and to respect copyright legislation is the MUSIC Coalition (at www.musicunited.org). This RIAA-led group of artists, labels and intellectual property owners launched a series of high-profile advertisements in September 2002 in major press and broadcasting outlets that sought to equate downloading and burning with theft. ‘Who really cares about illegal downloading?’ asked the ad. ‘We do’, answered a motley crew of stars including Steve Wonder, Britney Spears, Shakira and Luciano Pavarotti. In the section of the website entitled ‘why you shouldn’t do it’, the coalition insists that to ‘assert that music should be free is the same as saying it has no value – that music is worthless’. This is absolutely contrary to the cultural values that underpin much P2P downloading, that music is a crucial communicative entitlement independent of its economic worth, in other words that its use value supersedes the rather arbitrary exchange value which is allocated to it.

Nestling underneath the positive educational messages is a more threatening approach that is linked to the litigious stance of the industry. For example, a section of the website dedicated to parents warns that ‘civil liability can extend to the parents of underage offenders, even if they were unaware that their child had been stealing. It’s a chilling thought. While you’re downstairs watching TV, thinking your teenager is upstairs studying, he or she could be doing something illegal that could land you in court.’

This rather clumsy attempt to shame downloaders into abandoning their activities without offering an equally attractive alternative offers more insight into the minds of the RIAA than it does hope for the industry to curb the popularity of P2P networks. The efforts by MUSIC Coalition supporters like Madonna and Mary J. Blige to persuade consumers to turn their backs on unlicensed downloads and to hand over more money for CDs, a majority of which goes to bloated record companies and millionaire superstars, may yet require some fine-tuning.

**Litigation**

Litigation has, thus far, been the most publicised and, apparently, the most successful strategy to stamp the power of the current major players onto an evolving industry. Firstly, the RIAA’s
lawsuit against Napster was settled in the industry’s favour while later in 2001 MP3.com was forced to pay Universal Music $25,000 for each of the CDs it had illegally made available to downloaders, a settlement potentially worth up to $250 million (see Alderman, 2001: 131-153). Since October 2001, the RIAA has filed further suits against a range of post-Napster services like MusicCity.com, KaZaA, Grokster and Audiogalaxy.

The euphoria of the initial victory against Napster has since died down. This is mostly because recent figures show that the popularity of P2P networking has increased since the decline of Napster and despite the introduction of more stringent copyright legislation and educational initiatives. A report by the Pew Internet Project in July 2003 found that 35 million American adults download music files, up five million in two years, while 67 per cent of downloaders stated that they did not care whether the music was copyrighted or not (Pew, 2003: 1-2). However, according to a front-page article in Billboard, this is unlikely to prevent future lawsuits because the industry ‘is as much concerned with the establishment of legal precedents as building as win-loss record against specific peer-to-peer services’ (Garrity, 2002: 86).

Perhaps this explains the industry’s recent behaviour as it has widened the definition of those it believes to be guilty of piracy. The RIAA has moved away from targeting P2P sites and, using provisions of the DMCA, has focused its attention on Internet Service Providers (ISPs) and, in particular, their customers: individual internet users. In June 2003, the RIAA announced that it would be gathering evidence in preparation for lawsuits against individual file-sharers. By the end of July, it had issued approximately one thousand subpoenas to ISPs demanding that they reveal the names of individual users who could then be sued for up to $150,000 for each unlawfully downloaded song (Pew, 2003: 2). Although the industry is aware that such lawsuits may be both controversial and unproductive, they are a useful way of ensuring that industry arguments dominate the legal agenda. ‘Litigation’, claims RIAA general counsel Cary Sherman, ‘is an essential ingredient of a strategy – we need these court rulings that basically set limits on what peer-to-peer networks can do – but it can never be a strategy in and of itself. We obviously need to have complementary strategies’ (quoted in Garrity, 2002: 86).

The development of new services

One such strategy involved the decision by the major record labels to offer licensed downloading services. In an effort to meet the demand for the culture of downloading, the companies came together to launch Pressplay, a joint venture between Universal Music and Sony Music International, and MusicNet, a partnership between the remaining three of the ‘big five’ companies, Warner Music, BMG and EMI. However, both services have performed very poorly for four main reasons. Firstly, while P2P networking allows users to build up their own private digital music libraries, the licensed subscription services were prepared initially only to rent music to the public, privileging streaming and downloads, the latter of which cannot be kept by the end user after a particular period of time, over ‘burning’. Secondly, whereas P2P sites are undiscriminating in what content they make available, the ‘legal’ services can only carry songs that the record labels have agreed to license. In the case of independent labels, desperate to open up new revenue streams and to adopt a more positive attitude to licensing even their most popular tracks to rival services and the reluctant abandoning of a ‘rental only’ policy for downloads.

Record companies are now more open to licensing even their most popular tracks to competing distribution platforms and are starting to pursue a wide variety of partnerships to distribute their music in digital form. For example, since the summer of 2002, most of the majors have agreed to sell single tracks, including Top 20 singles, via e-retailers like E-Music, FullAudio, Liquid Audio and America Online for between $0.99 and $1.49. The trade magazine Music & Copyright (2002: 4) concluded that ‘previously the majors seemed instinctively opposing it as many of their previous initiatives suggest. This has necessitated a strategic shift in two key areas: the licensing of artists and songs to rival services and the reluctant abandoning of a ‘rental only’ policy for downloads.

Schwarz

rated. Now they seem more concerned to work co-operatively with others.’ This new attitude to the Internet has even extended to the growing willingness of the majors to permit users to burn a limited number of tracks and to transfer songs to portable systems like MP3 and minidisk players. Perhaps not surprisingly, the most popular legal service has not been a subscription package but one which allows consumers to buy individual tracks from all the major companies. Apple’s iTunes platform saw 6.5 million songs downloaded in the three months since its launch in April 2003 providing a glimmer of hope to the ‘legal’ industry but also a reminder that consumers respond to flexibility and diversity, attributes with which the major labels are not normally associated.

Conclusions

The major labels are simultaneously vilifying P2P sites and attempting to develop new services based on the demand for online music generated by P2P networking. They blame ‘digital downloaders’ for the decline in record sales and deliberately confuse the organised mass duplication of pirated music with the individual consumption and non-profit exchange of unlicensed music so as to secure more favourable forms of copyright protection. They initiate costly legal proceedings against organizations and individuals involved in unauthorised copying yet acknowledge that there is little they can do to undermine the popularity of P2P sites.

In these circumstances we can offer a few tentative conclusions. Firstly, it seems highly likely that the commercial subscription services will be unable to replicate the culture of the highly decentralised and user-led P2P sites. Services like pressplay and MusicNet are structured according to corporate imperatives and not fan preferences and are subject to the strategic needs of their parent companies that see digital music as simply one element of a broader cross-media portfolio. It is also unlikely that the major labels will be able to shut down P2P sites in the near future so that there may well have to be a period of co-existence between the licenced and unlicensed sectors of online music distribution.

Given that this is the case, the labels would do well to shift attention from litigation to issues of promotion and marketing and to develop strategies to take advantage of the increased exposure that P2P sites provide for their artists. Despite their frequent complaints, the major record companies are not the ‘poor cousins’ of the music industry and are instead highly profitable subdivisions of wealthy entertainment conglomerates that own the most popular back catalogues, dominate budgets for advertising and marketing and are best placed to withstand short-term losses in search of long-term profits.

Digital downloading and P2P networking have transformed the listening habits of significant numbers of music fans. They have facilitated a grass-roots movement of musical exchange and education and laid the basis for a new model of music distribution. In response, we have seen the established record industry adopt strategies of opposition, adaptation and co-option that have so far failed to curb the enthusiasm for unofficial, unlicensed downloads. The official music industry has the resources and the legal precedents to dominate the future of recorded music but, more than ever, it lacks the cultural capital best expressed by the credibility and flexibility of peer-to-peer networking.

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