



**In the Money:
The Pirating of Music on Websites, Its Prevention, and How the Industry is Able to Make Money from it.**

A. The Many Faces of Music on the Internet

Just as music has evolved over the years so too has the medium in which it is delivered. Long past the days of cassette tapes and records, the medium of music delivery has ventured into the World Wide Web. Since the legal downfall of peer-to-peer software programs such as Napster, music piracy has taken a slightly different form-website posting. Such networking websites as MySpace and Facebook allow artists to post their copyrighted works for promotional purposes. Although at first glance this promotional tool appears to be a great asset for musicians, it is also a great tool for pirates. The abuse of websites that allow the uploading of music creates a significant problem for record labels and the artists on the labels' roster- loss of revenue. When the artist's full album is available to stream online not by the promotional choice of the artist, there is no longer a need to purchase the album in stores or through online merchants¹.

In order to boost the revenue of the music industry there must be a legal analysis of the requirements of posting copyrighted music to the internet, as well as an analysis of the websites that undermine the purchasing of music. Furthermore, technological implementations used to prevent the unlicensed uploading and streaming of music from otherwise legitimate websites must also be explored to in order to find a reasonable means of creating new sources of revenue for the copyright holder.

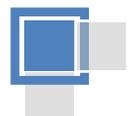
By using the very technology that music pirates have used to steal copyright content, the entertainment industry has a chance of using websites that rely on user-generated content to its advantage. There have been many attempts to prevent the piracy of music via the internet such as digital rights management encryption (DRM); however the public outcry against past uses of the technology has been overwhelming. Instead, technology must be created to monitor the uploading of music on the internet as well as the use of the music once it is posted.

B. Following the law: Music Copyright and Licensing

A song is more than just notes on a page, sound waves, radio signals, or bits of information transmitted over the internet- as song is property. This concept of creative property was first witnessed in the Drafting of the Constitution of the United States of America. The framers of the Constitution engaged to "promote the progress of science and the arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."² This concept further evolved

¹ iTunes, Mp3.com, CdBaby, etc.

² U.S. Const. art. 1, § 8, c.8.



much later in history with the passing of the United States copyright act which grants rights to the authors of creative works.³ These rights include:

to reproduce the copyrighted work in copies or phone records; to prepare derivative works based upon the copyrighted work; to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁴

The copyright holder of a song has the right to determine for what purpose the song will be used and in the case of internet music, has the power to determine when it may digitally transmitted.⁵ For the purpose of the Copyright Act “A digital transmission is a transmission in whole or in part in a digital or other non-analog transmission.”⁶ Thus, music posted on the web and played is therefore considered a digital transmission since the song is transmitted digitally over the phone or cable lines connected to the user’s computer.

1) The Digital Millennium Copyright Act

It was in 1998 when the United States of America adapted its copyright law to the technological evolution with the introduction of the Digital Millennium Copyright Act.⁷ The United States adopted this law in order to not only protect copyrighted works on the internet, but also in order to protect the copyright holders of citizens’ works abroad.⁸ The demand to adopt these technological measures was made in part by the World Intellectual Property Organization (WIPO) Copyright Treaty.⁹ The Copyright Treaty provisions pertaining to the DMCA read as follows:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.¹⁰

The United States also had to comply with the World Intellectual Property Organization’s Performance and Phonogram Treaty.¹¹ The fundamental basis of Digital Millennium Copyright

³ 17 U.S.C. § 106 (2002).

⁴ *Id.*

⁵ *Id.*

⁶ 17 U.S.C.A. § 101 (2002).

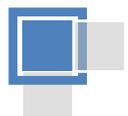
⁷ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (amending title 17 of U.S.C.).

⁸ Copyright Office, U.S. Library of Congress, Summary, The Digital Millennium Copyright Act 1 (1998).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*



Act is law protecting against copyright infringement on the internet.¹² Provisions of the DMCA also provide law governing the liability of internet service providers, webcasting of sound recordings, and computer software copyright protection.¹³ The law protects service providers from liability based upon the copyright infringement of its users; provided that the service providers meet certain criteria.¹⁴ First, the entity must meet the broad definition of service provider as defined by the DMCA. This definition is as follows:

an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.¹⁵

As well as:

a provider of online services or network access, or the operator of facilities therefore.¹⁶

Courts have held that the DMCA's definition of "service provider" extends to individual websites as well. The Court in *Hendrickson v. Ebay, Inc.* investigated the "safe-harbor" provision of the DMCA and held that websites such as Ebay qualify as a service provider.¹⁷ In the case, the plaintiff held copyright to the video documentary "Manson", pirated copies were being sold on Ebay even after the plaintiff sent the website a cease and desist letter informing the company of the copyright infringement.¹⁸

The court held that not only was Ebay a service provider as defined by the DMCA, but the court also held that Ebay was not liable for the copyright infringement of site members because it met the safe harbor requirements.¹⁹

A. DMCA Safe Harbor

The requirements for safe harbor are set out in the DMCA as follows: 1) the website does not profit directly from the infringing work, 2) the website can control the content posted, 3) and has created a procedure whereby it can take down infringing content when lawfully notified.²⁰ If the website maintains these three requirements, as well as taking down the copyright infringing content, the website is able to protect itself from copyright infringement liability.

Although there is no requirement for websites to monitor every single image, music file, or sentence posted on its website, it must also not interfere with any digital rights management encryption placed by the copyright holder in the music.²¹ That is to say that should a website create some type of

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 17 U.S.C. 512(k)(1)(A).

¹⁶ 17 U.S.C. 512(k)(1)(B).

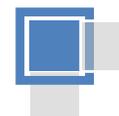
¹⁷ 165 F.Supp.2d 1082, 1088 (C.D.Cal. 2001).

¹⁸ *Id.* at 1084-1085.

¹⁹ *Id.* at 1096.

²⁰ 17 U.S.C. § 512 (c) (B)- (c) (2).

²¹ 17 U.S.C. § 512 (i) (1) (B), (i)(2).



user-generated content monitoring software it must not override any other digital coding or device used for additional security.

2) Licensing Music

Placing copyrighted music on the internet comes at a price. The United States Copyright Act requires that copyrighted sound recordings to be used by someone other than the copyright holder receive a license.²² A “sound recording”, for the purpose of copyright law, is “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as discs, tapes, or other phonorecords, in which they are embodied.”²³

When a legal entity wishes to place a song on a website for the enjoyment of others that entity must obtain a number of licenses just for that one song and depend greatly upon how the song will be used. For use on the internet, the website must maintain at least two licenses. The website must maintain the license for the sound recording and a license for the underlying musical work as well.²⁴ Since the website allows for the playing of the sound recording it must maintain a license for the performance of the sound recording.²⁵ The United States Copyright Act defines performance both generally and with the use of technology as follows:

To perform a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or audiovisual work, to show its images in an sequence or to make the sounds accompanying it audible.²⁶

The defining questions to ask are whether the website allows for the song to be downloaded and saved or if the music is simply streamed over the internet for the website user to hear.²⁷ Also, can the user listen to the song on request or is the song simply played without the interaction of the user?²⁸ The level of interactivity is important because it is the determinative factor in whether not the website qualifies for a statutory license.²⁹ By allowing the visitor of the website to choose the music to be played, there is a large risk to the copyright owner that the user will never need to purchase the music since the recording is freely available on demand.

When a website is considered interactive as defined by the United States Copyright Act it must gain a number of licenses from the actual copyright holder of the music or a performance rights societies.³⁰ Since music streamed on the internet is considered by the United States Copyright Act to be a public performance, the website must acquire a public performance license.³¹ Since there is copyright in the sound recording itself, the website must also acquire a license in the sound recording it.³²

²² 17 U.S.C. § 106

²³ 17 U.S.C. § 101.

²⁴ Lauri S. Thompson, Music in Cyberspace, The State Bar of Nevada, Feb. 2002, at 11.

²⁵ *Id.*

²⁶ 17 U.S.C § 101.

²⁷ Steven J. Pena, Licensing Music for Use on the Internet, 5 Internet Law Inst. 525, 530 (2001).

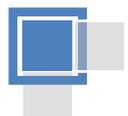
²⁸ *Id.*

²⁹ An interactive service is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. 17 U.S.C. §101.

³⁰ Performance rights societies include BMI, ASCAP, and SESAC.

³¹ See *supra* note 27 at 533.

³² *Id.*



If the website makes available the music as part of a video, the website must also acquire a synchronization license.³³ A synchronization license is required due to the copyright holder's exclusive right in the reproduction of their work.³⁴ A prime example of a website that displays videos that are synchronized with music is YouTube.

Based upon the nature of digital transmission of music over the internet, the website must also acquire a license for ephemeral copies. These ephemeral copies are the temporary copies of the music that are essential in the transmission of the music while maintaining its quality.³⁵ This license is likely to come from the Harry Fox Agency.³⁶

If the website displays music for the user in a form other than audio recordings, the website must gather a different set of licenses. For example, if a website allows for the uploading of guitar tablature or sheet music, the website must maintain a license for the copying of the musical work and a license for the display of the work.³⁷

3) The Licensing Agencies

When a website acquires a license it must first contact the proper performing rights organization in order to apply. The purpose of a performance rights organization is to ensure that the artist-members are compensated for the use of their music.³⁸ There are many performing rights organizations throughout the world but the most recognized are BMI, ACAP, and SESAC.

Broadcast Music International (BMI) currently licenses over 6.5 billion compositions for use and represents over 350,000 songwriters, music publishers, and composers.³⁹ It was in 1995 that BMI posted its then 7.5 million songs database on the internet.⁴⁰ Since the uploading of its song database, BMI's digital licensing operation has grown exponentially. Now BMI licenses over 90 percent of its licenses through the internet.⁴¹

The American Society of Composers, Authors, and Publishers (ASCAP) was created in 1914 and has since become a well known performance right society.⁴² It currently has music from all genres that it licenses to the public and represents such artists Garth Brooks and Madonna.⁴³ ASCAP also provides members with insurance benefits for instruments, and medical purposes.⁴⁴

The Society of European State Authors and Composers was founded in 1931 and is the second oldest (behind ASCAP) performance rights organization.⁴⁵ The society started out representing only Gospel and Country music, however, in 1973 SESAC began representing other genres of music.⁴⁶ Unlike the other major performance rights societies, SESAC is extremely selective in whom it represents.⁴⁷

³³ See *supra* note 27 at 532.

³⁴ 17 U.S.C. 106(1).

³⁵ Pena, *supra* note 27 at 529.

³⁶ *Id.* at 536.

³⁷ Thompson, *supra* note 24 at 36.

³⁸ SESAC About Us, <http://sesac.com/aboutsesac/about.aspx> (last visited Apr. 7, 2009).

³⁹ About BMI, <http://bmi.com/about/?link=navbar> (last visited April 7, 2009).

⁴⁰ About BMI, <http://bmi.com/about/entry/533108> (last visited April 7, 2009).

⁴¹ *Id.*

⁴² About ASCAP, <http://www.ascap.com/about> (last visited Apr. 7, 2009).

⁴³ *Id.*

⁴⁴ ASCAP Membership Benefits, <http://www.ascap.com/benefits/> (last visited Apr. 7, 2009).

⁴⁵ Al Kohn & Bob Kohn, *Kohn on Music Licensing* 907 (Aspen Publishing, 3rd ed. 2002).

⁴⁶ *Id.*

⁴⁷ SESAC- How to Affiliate, <http://www.sesac.com/writerpublisher/howtoaffiliate.aspx>, (last visited Apr. 7, 2009).



Sound Exchange was created in response to the recording industry's growing concern over music on the internet. Since its inception Sound Exchange is now recognized by Congress as the official entity to administer the subscription services' statutory licensing fees.⁴⁸ It must be noted however that Sound Exchange only collects royalties from websites where subscribers pay to have access to listen to the music.⁴⁹ Such sites as MySpace, Face book, and YouTube do not require a paid subscription to listen to the music.

The Harry Fox Agency was founded in 1927 and has evolved so much that it currently licenses the most mechanical licenses in the United States.⁵⁰ The agency also licenses the use of lyrics and tablature.⁵¹

The Legal Acquisition of Music on the Internet

1) CD Baby.com

CD Baby.com acts as an online music merchant where musicians can sell their music directly to fans. The musician's revenue is enhanced greatly when dealing with the music store itself rather than with the record label and distributor⁵². CD Baby does not just sell physical Cds to fans, but it also has over two-million digital music tracks available for online purchase⁵³.

CD Baby.com adheres to copyright and licensing law. The online music store requires that all music sent in for sale meets the appropriate standards of copyright and licensing law by requiring that the artist pay the appropriate licensing fees if the song is a cover song⁵⁴. The website explains the licensing requirements and process in an easy to understand manner for individuals having no prior knowledge of music law, as well as having contact information posted should the artist need further guidance from an attorney.⁵⁵

2) Apple iTunes

Apple's iTunes digital music store has revolutionized digital music. Integrating the iTunes Music Store to the software in July of 2004, Apple effectively offered a legal alternative to peer-to-peer networks while generating income for artists and record labels⁵⁶. Simply search for a song or artist and you can find it on iTunes. The iTunes Music Store allows users to purchase music, ringtones, audio books, episodes of television shows, games for phones, and the user may also rent and buy movies. Although the music downloaded on iTunes is at a cost⁵⁷, the user no longer is at risk for lawsuit from the RIAA which was a large risk when downloading songs illegally through peer-to-peer networking software such as Napster and Aimster.

A. Apple's introduction of Digital Rights Management Encryption

⁴⁸ Sound Exchange, <http://www.soundexchange.com/> (follow About hyperlink) (last visited Apr. 7, 2009).

⁴⁹ *Id.*

⁵⁰ About HFA, <http://www.harryfox.com/public/HFAHome.jsp> (last visted Apr. 7, 2009).

⁵¹ Licensee Digital Licensing, <http://www.harryfox.com/public/licenseeServicesDigital.jsp> (last visited Apr. 7, 2009).

⁵² Artists usually make 1-2 dollars when with a record label, but CD Baby pays the artist 6-12 dollars. Since 1998, CdBaby.com has paid out "104,988.963" to artists. CD BABY: about, <http://cdbaby.com/about> (last visited Apr. 7, 2009).

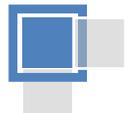
⁵³ CD Baby: cdbaby.net, <http://www.cdbaby.net> (last visited Apr. 7, 2009).

⁵⁴ CD Baby: How to Legally Sell Downloads of Cover Songs, <http://www.cdbaby.net/dd-covers> (last visited Apr. 7, 2009).

⁵⁵ *Id.*

⁵⁶ Apple- Investor Relations, <http://www.apple.com/investor/> (follow 2008 10-K Annual Report hyperlink , pg 6) (last visited Apr. 6, 2009).

⁵⁷ Usually .99 per song downloaded and the average cost per album is \$9.99



The use of iTunes software has grown exponentially just over the short period of time and has a large fan base. Apple introduced digital rights management (DRM) encryption to prevent the pirating of music sold through the iTunes store as was required in the licensing agreement's Apple entered into with numerous record labels.⁵⁸ This agreement allowed for Apple to limit the number of computers that were licensed to play the music purchased through iTunes.⁵⁹ The DRM was initially used as a security lock against music pirates but ultimately acted as a security lock against legitimate music uses such as download the songs to multiple mp3 players owned within the same household.

Apple as well as the record labels utilizing iTunes faced litigation based upon anti-trust charges as a result of the use DRM encryption.⁶⁰ These anti-trust lawsuits alleged among other things that through the use of the DRM encryptions, the defendants effectively prevented the purchaser to listen to the music as they see fit and instead have to listen to the music either on the computer the song was licensed to play on or on Apple's own digital music player the iPod.⁶¹ The lawsuits also alleged that Apple and the record labels worked together to place unreasonable restrictions on the user.⁶² In response to the harsh criticism that Apple faced both in and out of court, Apple founder Steve Jobs issued a statement on the Apple.com website explaining the reasoning behind the use of DRM.⁶³ The reasoning given included the negotiations between Apple and the record labels and that it was Apple that fought the ability to allow a maximum of five computers to store the music.⁶⁴ The statement claimed that it was the requirement of the record labels that Apple use DRM, not the choice of Apple.⁶⁵ Apple acknowledged the arguments made that they maintained a monopoly over the online music stores through their use of DRM.⁶⁶ In response, Apple made light of the fact that very few songs on the average user's iPod consists of songs purchased through the iTunes software.⁶⁷ Mr. Jobs also explored alternatives to the DRM usage at the time of the lawsuit.⁶⁸ Of these alternatives, Mr. Jobs explored the idea of licensing its Fairplay DRM technology to other MP3 makers so that they can allow the music purchased on iTunes to be played on their MP3 players.⁶⁹ The biggest issue with this idea, Job said, is that the company would have to release its security secrets to other companies.⁷⁰ Instead of releasing its DRM secrets to other developers, Apple would rather discontinue using DRM Encryption, which they ultimately did.⁷¹

iTunes has not only argued with potential customers over its business practices, but with the very record labels that license the music which iTunes sells.⁷² Due to the monetary challenges facing the four major record labels on iTunes in 2006, the labels demanded that Apple increase the price of the songs sold in order to allow the labels to increase its licensing fees.⁷³ Apple refused to increase its prices and,

⁵⁸ Apple- Thoughts on Music, <http://www.apple.com/hotnews/thoughtsonmusic/> (last visited April 3, 2009).

⁵⁹ *Id.*

⁶⁰ 2008 WL 5574487 (N.D.Cal.), 2009-1 Trade Cases P 76,474. See also Supp.2d 2008 WL 4531821 (S.D.N.Y.), 2008-2 Trade Cases P 76,338.

⁶¹ See in re Digital Music Anti-trust Litigation, 2008-2 Trade Cases P 76,338 at 341.

⁶² *Id.*

⁶³ See *supra* at note 57.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Only three-percent. *Id.*

⁶⁸ *Id.*

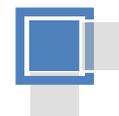
⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Apple wins iTunes pricing battle against record companies, http://money.cnn.com/2006/05/02/technology/apple_itunes/index.htm (last visited Apr. 1, 2009).

⁷³ *Id.*



thanks in part to the fact that it accounted for eighty- percent of the digital music sales in the U.S; Apple maintained it 99 cents per song standard.⁷⁴

As of May 2007, Apple unveiled its DRM free initiative which allows users to purchase songs without the licensing restrictions and with higher song quality.⁷⁵ Apple iTunes teamed up with Electric and Music Industries Ltd (EMI) to allow users to purchase songs in the EMI catalogue without DRM for \$1.29 per song.⁷⁶ To accommodate iTunes customers who had previously purchased and downloaded EMI songs, the internet music store allowed users to re-download each song DRM-free for 30 cents.⁷⁷ As of today, Apple has expanded its catalogue of DRM-free music to include of one-million songs from the major record labels and has termed the new DRM-free iTunes experience “iTunes Plus”.⁷⁸ Whether users are willing to pay the additional fee for DRM-free music remains to be seen, but it most assuredly has silenced the DRM critics for the time being.

C. Music Freely Available on Websites

Digital music has expanded its space on the internet to not only include music stores, but also social networking and informational sites as well. These websites, although a great networking and informational tool, also act almost as a destructive device for the purchasing of music. With full songs freely available to the user at the simple click of the button, there is no longer a need to purchase the music. The websites do not charge a fee for services and instead offer an interactive way for the users to choose the music they want to listen to free of charge. Once this is done the user may listen to the song as much as he or she would like without incurring any fee. Although the nature of the website may differ, the fundamental interactivity level between user and website remains the same. The concern over these websites offering on demand copyrighted music is how they can prevent the user from taking advantage of website services and also how can the copyright holders, record labels, and publishing companies continue to receive revenue through this new technological and user based innovation.

1) MySpace.com

Created in 1999, MySpace started as a site that allowed users to maintain a “virtual” hard drive of pictures and music.⁷⁹ In response to the evolution of the needs of internet users as well as business restructuring by its creators, MySpace became the internet networking site it is known as today.⁸⁰ The single goal that has remained the same since the inception of MySpace is the goal of advertising. Although MySpace offers a great tool for social networking, the site’s strongest asset is its ability to advertise to millions of people. As early as 2005, MySpace reported 12 billion unique user pages.⁸¹ With the large user base and income generated by advertisements placed on the website, MySpace has been able to adapt to the changing online music trends and allow recording artists and users alike to post music and music videos to its user pages.

⁷⁴ *Id.*

⁷⁵ Apple Unveils Higher Quality DRM- free Music on the iTunes Store, <http://www.apple.com/pr/library/2007/04/02itunes.html> (last visited Apr. 10, 2009).

⁷⁶ *Id.*

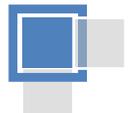
⁷⁷ *Id.*

⁷⁸ Apple- iTunes What’s New, <http://www.apple.com/itunes/whatsnew/> (last visited April 10, 2009).

⁷⁹ What’s Inside Myspace.com?, http://www.consumeraffairs.com/news04/2006/03/myspace_inside.html (last visited Mar. 29, 2009).

⁸⁰ *Id.*

⁸¹ *Id.*



MySpace created its MySpace Music division in 2008 as a collaborative work with the major record labels.⁸² At that time it was meant to be an online music store for MySpace users which would allow them to purchase music they heard on MySpace.⁸³ It was originally designed as a subscription service which would require users to pay a certain fee at the start of a designated period in order to download the music.⁸⁴ As of yet, there has not been an implementation of a subscription based music service, instead MySpace Music adopted a new approach.

MySpace Music has created an tool whereby major record labels as well as independent artist can place their music on the web for the billions of MySpace users to listen to and, if there is an agreement between MySpace and the artist, purchase the music. MySpace allows for users to interactively create their own playlist of music that visitors can listen to while visiting the site.⁸⁵ The user playlist can contain a maximum of ten songs of the users choosing and the audio player embedded in the user's page plays the song in its entirety.

When the artist uploads a song to MySpace they are giving the website a license to place the song on a users webpage should the user decide to add the song to their playlist.⁸⁶ The terms of services for MySpace explicitly states that by uploading the content onto MySpace the artist grants the website a license to publicly perform and display the artist's work while bypassing any requirement that MySpace pay royalties to the copyright holders.⁸⁷ Furthermore, the terms of agreement between MySpace and the users uploading the music states that the user agrees to pay any royalties to the proper party if the content is uploaded without the copyright holder's express permission.⁸⁸

In accordance with the DMCA, in order to utilize the safe harbor provision, MySpace includes in its terms of service a section devoted solely to the intellectual property rights of others.⁸⁹ MySpace also claims within a single sentence of its terms of use to use a technology that proactively prevents users infringing upon the intellectual property rights of others.⁹⁰ MySpace provides a takedown notice procedure as required by the DMCA.⁹¹ MySpace effectively meets the requirements under the DMCA safe harbor provisions, however it has yet to effectively prevent the infringement of copyrights within its website, thereby preventing the copyright holders from gaining revenue from the music posted on the website.

MySpace utilizes an interactive means of allowing artists to gain publicity for their music by allowing them to post music to the website and enter into agreements with MySpace to sell their songs in affiliation with Amazon.com. However, any MySpace user who wishes to create a playlist to put on their personal page may use the search feature and find a song by title. The results may include the actual artist's uploaded song or the same song uploaded by someone else and without the permission of the copyright holder.

The copyright infringement allowed by MySpace has not gone unnoticed. Universal Music Group and other major record labels filed a complaint in 2006 claiming that the website knowingly

⁸² MySpace, Major Labels Join Forces for Online Music Store, <http://blog.wired.com/music/2008/04/myspace-partner.html> (last visited Mar 20, 2009).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ MySpace.com- A Place for Music, <http://www.myspace.com/aplaceformusic> (last visited Apr. 11, 2009).

⁸⁶ MySpace, a Place for Friends, <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx> (last visited Apr. 11, 2009).

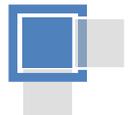
⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 17 U.S.C. § 512 (c) (B)- (c) (2).



allows users to post music which they do not have the copyright for.⁹² The complaint also alleged that the website profited directly from the posting of the pirated music because it was the cause of increased web traffic and increased advertising which the site was paid for.⁹³ The biggest problem for MySpace is the policing of fake profiles which users set up purporting to be the actual artist. The users may then upload the copyrighted music of that artist illegally.

2) Facebook.com

Facebook.com was founded February 4, 2004.⁹⁴ Since its inception, Facebook.com has been seen as a leading competitor to MySpace. Facebook.com allows for users to install “applications” on their own personal networking profile. One such third party application is titled iLike and allows users to upload music or choose music by an artist and post in on their profile much like MySpace does.⁹⁵ The iLike application for Facebook is not free from copyright infringement. As can be expected users are able to create fake artist profiles and upload copyrighted material without the consent of the copyright holder. In accordance with the DMCA Safe Harbor provision, iLike also has a copyright infringement notification and take down process.⁹⁶ Unlike MySpace, iLike allows the artists to control the nature of their songs’ usage on the site. When an artist uploads a song for use on profiles, the artist can choose whether or not the user’s profile will play the entire song, a thirty-second clip of the song, or allow the user to download the entire song directly to their computer.⁹⁷ Much like MySpace however, facebook.com allows for the unlimited streaming of these songs by the user, which in turn abolishes the need for the user to purchase the song legally and prevents the rightful copyright holder from gaining revenue from the song’s continuous usage.

3) YouTube

YouTube.com was founded February 5, 2005 and has since become a large community of users uploading videos so that all can see.⁹⁸ YouTube became so large within the first few months on the internet that Google, Inc. acquired the website and has expanded it since. Although a video website, YouTube has been under a lot of pressure regarding the user-generated content it allows to be posted online in regards to copyrighted music.

The mounting problem facing YouTube is the nature of the user generated content that is displayed on the site. At any moment a student at a high school can upload a video they made and include a hit song as background music thereby infringing upon a copyright. Furthermore, a website visitor may search for the title of a song or an artist and receive a long list of results including, but not limited to, a video clip of an entire song with a video of some sort playing in the background. Many times an entire album will be posted on the website where millions of people can listen to the song as many times as they would like.⁹⁹

YouTube has grown accustomed the copyright infringement lawsuits. The entertainment industry as a whole has recognized the challenge YouTube presents to artist copyright. Most recently, Viacom as

⁹² *UMG Recordings, Inc. v. MySpace, Inc.*, No. 2:06-07361 (C.D.Cal. filed Nov. 17, 2006).

⁹³ *Id.* at 17.

⁹⁴ Facebook.com, <http://www.facebook.com/home.php?ref=logo#/facebook?ref=pf> (last visited Apr. 11, 2009).

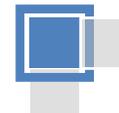
⁹⁵ iLike- Company Info, <http://www.ilike.com/about> (last visited Apr. 11, 2009).

⁹⁶ iLike Artist Service Help Center, <http://www.ilike.com/faq/artistservices/answers/39> (last visited Apr. 11, 2009).

⁹⁷ iLike Artist Service Help Center, <http://www.ilike.com/faq/artistservices/answers/24> (last visited Apr. 11, 2009).

⁹⁸ YouTube- Broadcast Yourself, <http://www.youtube.com/t/about> (last visited Apr. 11, 2009).

⁹⁹ One such example of this is by typing in the search field “Hinder live”. This will pull up bootlegged videos of the band playing live.



well as its subsidiary entertainment companies have filed lawsuits against YouTube for allowing the site's users to upload clips of the plaintiff's movies and television shows.¹⁰⁰ These user-generated clips include portions of the Comedy Central television show South Park, as well as clips from the MTV and BET television networks.¹⁰¹

In defense, YouTube has attempted to use the DMCA safe-harbor provision to shield itself from the plaintiff's claim of damages exceeding one-billion dollars.¹⁰²

YouTube has claimed that it has taken extreme and revolutionary measures far above the rest of the internet community to ensure that copyright owners are able to take down unauthorized content in a timely manner.¹⁰³ The plaintiffs utilized a software program that searched every page and video on YouTube for copyrighted content.¹⁰⁴ This program, created by software designers BayTSP was successful in identifying over 150,000 unauthorized video clips owned by the plaintiff Viacom.¹⁰⁵ This proactive measure taken by Viacom was not inexpensive by any means. It cost Viacom "tens of thousands of dollars a month to use the program."¹⁰⁶ Although still an ongoing issue, this court case will determine exactly how proactive a website is required to be in order to be protected by the DMCA.

4) PROJECT PLAYLIST.COM

Projectplaylist.com was created to allow website visitors to listen to music posted to the internet for promotional purposes. The user simply types in the title of a song or the name of an artist and the website searches for it and finds music streams.¹⁰⁷ The search engine used by the website searches trusted websites where it has been determined that the music there has been posted legally.¹⁰⁸ The website maintains the proper licenses from the major performance organizations as required by copyright law.¹⁰⁹ Furthermore, the more a song is included in a users designated site playlist the more royalties are paid to the artists.¹¹⁰

The interactive streaming between the website and its users has not only prompted the website owners to maintain the proper licenses, but also to follow the guidelines of the DMCA safe harbor provision in order to protect itself from liability should a song be streamed through the site and not fall under the license acquired. The site maintains the required copyright notice and takedown procedure as well as using a search engine that does not circumvent any DRM encryption that the copyright holder has embedded in the song file.¹¹¹ Project Playlist is not only a legal means of listening to music, but it also allows the copyright holders to control how long their music can be listened to. With that power in the hands of the copyright holder the likelihood that the user will be limited in access to the song and will need to purchase it is much greater than if the song was online for an unlimited amount of time.

User Generated Music Notation Websites

¹⁰⁰ Viacom Int'l, Inc. v. YouTube, Inc., 2009 U.S. Dist. LEXIS 4220 at 4 (North Dist. Cal, filed Jan. 14, 2009).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id. at 6.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id. at 7.*

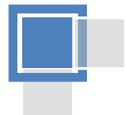
¹⁰⁷ Licenses and Legal Issues, <http://www.playlist.com/about/license> (last visited Apr. 11, 2009).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*



Copyright infringement on websites is not limited to social networking and video sites. The internet has many musical notation websites that allow users to generate their own musical notation for songs and post them to the site. The copyright infringement begins when users listen to copyrighted music and transcribe that music into notation and post it to the web.

1) OLGA.NET

The Online Guitar Archive (OLGA) began in 1992 and has collected homemade guitar tablature from users ever since.¹¹² Listeners would listen to music and transcribe what they believed the correct musical notation of the piece was and upload the tablature to the website for others to view and use so that they too can play the music. Although the work uploaded by users to the web may not be the exact transcription of the copyrighted music, the music publishers are concerned that having the music notation available for free would decrease the need for the sale of the actual musical score as published in sheet music books and on sheet music websites.¹¹³

OLGA has been threatened with take-down notices on numerous occasions and since has shut down.¹¹⁴ Although many other musical notation websites exist patterned after OLGA, none have shut down due to threats of copyright infringement claims.¹¹⁵ The copyright infringement claims of music publishers have been discussed on NPR as well.¹¹⁶ One such person interviewed was an individual operator of a guitar tablature website similar to OLGA who contacted an entertainment industry attorney who sent him an infringement claim letter.¹¹⁷ In response to the inquiry by the site operator about how to license to the sheet music the attorney declined to make any negotiations or discussions involving licensing.¹¹⁸

2) MXTABS.NET

In response to the copyright infringement claims of music publishers one such website has worked alongside the music publishers and now offers a legal guitar tablature website. MXTABS.NET prides itself as being the first legal guitar tablature website on the internet.¹¹⁹ It was first in 2006 that the website closed down due to similar copyright notices.¹²⁰ Upon reopening, the website allowed users to only post guitar tablature that the site obtained the proper licenses for.¹²¹ The parent company of MXTABS.NET is Musicnotes, Inc whom in 2008 entered into licensing agreements with many of the major music publishing companies to allow the music tablatures of such popular artists as Reo Speedwagon and The Eagles.¹²²

¹¹² Redhat.com, <http://www.redhat.com/magazine/023sep06/features/olga/> (last visited Apr. 11, 2009).

¹¹³ *Id.*

¹¹⁴ For copies of these notices visit <http://www.olga.net>.

¹¹⁵ A list of such sites can be found at <http://www.guitartabs.net>.

¹¹⁶ Chris Arnold, Music Industry Goes After Guitar Tablature Sites, available at <http://www.npr.org/templates/story/story.php?storyId=5622879> (last visited Apr. 9, 2009).

¹¹⁷ *Id.*

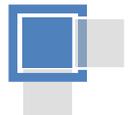
¹¹⁸ *Id.*

¹¹⁹ About Us, <http://www.mxtabs.net/about/> (last visited Apr. 11, 2009).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*



D. Proactive Measures for Continued Revenue and Infringement Control

The greatest challenge facing the music and movie industry in this digital age is how it can protect the intellectual property rights of its artists and continue to receive revenue from the work that has been pirated. Although the Digital Millennium Copyright Act has created a set of tools to allow websites and copyright holders to collaborate, the act does not create a specific solution to ensure to the best of its ability that the content that is on the internet will continue to be a source of revenue. For this reason copyright holders must adopt proactive approach to protecting their rights by various means. Although there is not at this time a definitive solution to the protection of the copyright holder's source of revenue, there have been many ideas an innovative programs that can act as another barrier to user generated free copyrighted content.

1) Collaboration between Artist and Service

The first step in protecting the copyright of artist and promoting revenue within the music and entertainment industry is to ensure that the internet services and websites that display copyrighted material collaborate to develop programs and services that allow for both parties to achieve the goals that they desire. The first collaboration of this kind has created guidelines and principles in order to create a means of achieving these goals have been formed. With the goals of fostering innovation, encouraging creativity, and thwarting infringement, companies such as CBS, Disney, MySpace, Microsoft, and the Fox Entertainment Group have created list of principles for sites posting user-generated content.¹²³ The principles include informing individuals of copyright law, the terms of use of the site, the development of identification technology that will identify the copyright infringing content and allow the copyright holder to control its use on the website, use human- review procedures to additional infringing content, and to create a repeat infringer termination policy.¹²⁴ Although the many principles will prove to be effective to some degree, the implementation of technological means of copyright infringement protection has the most promise.

2) Technological Means for Prevention and Revenue Generation

The use of technological means to prevent copyright infringement is not a new concept. Although made popular by Apple iTunes, digital right management has evolved into much more than just an encryption in the coding of a digital song. YouTube has created a new form of digital rights management and copyright infringement protection. This innovative format not only protects the copyright holder, but also makes the user generated content which originally was infringing material to act as an advertisement for that song or video.

YouTube's Content Management software allows for the identification of both audio and video files of copyright holders and notifies allows the copyright holder to control how their work product will be used and displayed on the website.¹²⁵ The copyright holder will give YouTube a copy of that work to use a reference for its software so that the work is automatically identified when uploaded.¹²⁶ The copyright holder has the option of how they will allow YouTube to display their work.¹²⁷ The copyright holder has the option of blocking the content from being posted to the website; simply allow the work to be posted, or to allow the content to be posted but turning the content into an advertisement.¹²⁸

¹²³ User Generated Content Principles, <http://www.ugcprinciples.com/> (last visited Apr. 11, 2009).

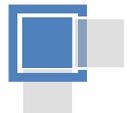
¹²⁴ *Id.*

¹²⁵ YouTube Content I.D. System, <http://www.youtube.com/t/contentid> (last visited Apr. 11, 2009).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*



The option of using the copyrighted material as an advertisement is entirely conducive to the goals of member of the music industry. Websites such as YouTube, Facebook, and MySpace have partnered with record labels and music publishers in order to promote the singer, or video. The ability for these artists to promote themselves and their work is unprecedented now that social networking websites have come into existence. Originally it was just the single artist, record label, or television station that would create user pages where they could post material to promote themselves. Now with millions of people uploading that copyrighted content every day, the artists can let their fan base do the work for them.

The advertising of the copyrighted content is simple yet effective for users of the internet. An individual uploads a music video to YouTube. The copyright holder previously submitted a reference copy of that video and song to the content management team at YouTube. The software automatically encodes the video with a code that displays a link on the video where the viewer will be able to purchase that song either through Amazon.com or iTunes if the viewer likes it.¹²⁹ This tool allows the fans of the artist to be a promotional tool without the artists direct input.

YouTube has also created a website tool for copyright holders to identify infringing user-generated content that has already been uploaded to t website.¹³⁰ The web tool searches YouTube for possible infringing content and allows the copyright holder to notify YouTube if they want the website to take down the content.¹³¹ The web tool was created to allow the copyright holder to quickly and efficiently search the site for infringing works and notify YouTube quickly if the copyright holder decides to take the video down.¹³²

Much like digital rights management, copyright holders will find it prosperous to limit the accessibility of their content. This may be done on such websites as MySpace and Facebook by requiring that those website visitors wishing to listen to the song be a member of the website. The website can then limit the streaming opportunities that the user has. By limiting the amount of time that listen may listen to the song, the copyright holder will no longer need to worry about the songs being available for an unlimited amount of streams which would increase the likelihood that the user will purchase the song.

Currently, Microsoft uses a digital rights management encryption in its Windows Media Player software.¹³³ The software works by requiring that the user have a license key generated for that specific computer that must be entered in order for the copyrighted material to play.¹³⁴ As an added safeguard against piracy, the DRM encryption is not placed within the song file but instead in the program, making it hard for even experienced internet pirates to strip the song of the DRM and distribute the song freely.¹³⁵ To further insure that the music and video files are secure, Microsoft has engineered a measurement for further protection by securing the sound that the user hears so that no other computer program recording the audio file will recognize it.¹³⁶

For portable audio and video devices such as iPods and other MP3 players, Microsoft has created a digital rights management tool that can limit the number of the times the content is played on the

¹²⁹ *Id.*

¹³⁰ YouTube- Content Verification Program, http://www.youtube.com/t/copyright_program (last visited Apr. 11, 2009).

¹³¹ *Id.*

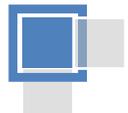
¹³² *Id.*

¹³³ Digital Rights Management (DRM), <http://www.microsoft.com/windows/windowsmedia/forpros/drm/default.aspx> (last visited Apr. 11, 2009).

¹³⁴ Features of Windows Media DRM, <http://www.microsoft.com/windows/windowsmedia/forpros/drm/features.aspx> (last visited Apr. 11, 2009).

¹³⁵ *Id.*

¹³⁶ *Id.*



device as well as how long the content will be stored on the portable device.¹³⁷ Similarly, Apple iTunes has created a similar DRM experience for video that can be rented through the iTunes web store.¹³⁸ With iTunes the user may rent a movie and watch it within thirty days of the rental.¹³⁹ Once the user pushes play, the DRM begins to limit the user's ability to watch the content after a twenty-four hour period.¹⁴⁰ After that time period has lapsed the song is automatically deleted.¹⁴¹

The scientists of the European Union have shifted the paradigm of digital rights management. Researchers and developers in the European Union have created a new fully automated system for digital rights management and content protection that not only protects the copyright holders' rights, but also allows users freedom in accessing the content anywhere and on any platform.¹⁴² The AXMEDIS framework as it is referred to will also allow users to protect their own content.¹⁴³

In a much more expansive means, copyright holders will find it beneficial to follow in YouTube's footsteps by acquiring a program that will actively search the internet and identify infringing content. Once the content is verified to be from a site that has not acquired the proper licenses the copyright holders should then utilize the website's copyright infringement notification procedures. As of this time, however, a program of such magnitude has not been developed that acts in this manner.

It must be understood that no matter what technology is developed and implemented in order to protect copyrighted content, there will always be people that will find a way of circumventing the program, the encryption, and the need to acquire the content legally. A solution to the challenge now facing the entertainment industry will likely come in the form of collaboration between the consumer, websites, and the copyright holder. Although there is yet to be a definitive solution to the current challenge facing the entertainment industry, there is at least some type of idea, as presented by YouTube, that the industry can use this technology to its benefit. The challenge rests in the balancing of the goals of the entertainment industry with the needs of the society in which it serves. Until the entertainment industry adequately adapts to the digital age and works with consumers there will be forms of digital pirating.

Conclusion

Although the law has attempted to maintain an updated approach to the protection of intellectual property rights, the last major change of law a decade again with the adoption of the digital millennium copyright act. Over the last decade alone websites have adopted new programs and technology that not only encourage creativity, but also aid in the piracy of music and entertainment. Instead of constantly amending the law to prohibit certain websites from operating, the government has maintained certain standards that must be maintained to allow the website to operate while remaining free from liability in regard to copyright infringement damages.

There is a balance that must be maintained between the demand of the general public and the goals and needs of the copyright holder and others in the entertainment industry. This balance was originally maintained through the legal requirement of licenses according to how the music was to be used. By simply paying a fee to the performance rights societies the entity was able to use the

¹³⁷ *Id.*

¹³⁸ View Every Feature of iTunes 8, <http://www.apple.com/itunes/features/#rentingmovies> (last visited Apr. 11, 2009).

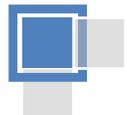
¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Removing Digital Constraints From Digital Rights Management, <http://www.sciencedaily.com/releases/2008/12/081212081720.htm> (last visited Apr. 11, 2009).

¹⁴³ *Id.*



copyrighted work without the fear of a lawsuit. Although still required by copyright law today, the internet has created a substantial challenge to website operators and copyright holders alike when the website relies upon user-generated content for operation.

For user-generated content websites such as MySpace, Facebook, and YouTube the risk to copyright holders is substantial. Not only is it difficult for the website operators to know which licenses it should acquire, but it is also extremely difficult to police the actions of the website users. Although there is not a definitive requirement that a website police the content uploaded to it, there is a requirement that a website make itself available for claims of copyright infringement.¹⁴⁴ Even though the take down procedure is a wonderful tool to allow the copyright holder to regain control of how his/her work is used, the form is just not enough to protect their rights. The copyright holder has the right to determine how the work is to be used and should use that control to his or her advantage.¹⁴⁵

User-generated content which infringes on the rights of copyright holders, although harmful at first glance, can be used by to the owner's benefit. The copyright holder can take control and prevent and further damage the infringing material might cause taking a proactive approach. By utilizing technology that limits the lime frame it is available, copyright holders can prevent the song's online presence from diminishing the need for the user to purchase it. Additionally, the copyright holder should also consider using the infringing content to his or her advantage by using it as an advertisement that directly links the listener to an online store for purchasing the song.

It is only through adaptation by the music industry that it will continue to prosper in a digitally based world where anybody with a computer can copy music and post it on the internet for all to hear. It will not be a quick transition, but by further utilizing technology and user-generated content websites, the music industry will be able to reach a diverse and much larger audience in the internet user. It is because of this adaptation that the music industry will allow the consumers to market the product to others- a relationship that will prove to be beneficial to all parties involved.

¹⁴⁴ 17 U.S.C. § 512 (c) (B)- (c) (2).

¹⁴⁵ 17 U.S.C. § 106 (2002).

