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MUSIC FOR NOTHING OR, I WANT MY MP3

The regulation and recirculation of affect

With the public discourse around filesharing veering towards punitive extremes, our aim in this essay is to reframe the issue in two ways. First, we argue that the filesharing debates are 'too economic', insofar as they reduce a multi-faceted phenomenon to a single issue: financial loss resulting from the theft of intellectual property. Lost in such arguments is the fact that music routinely circulates through the culture in myriad ways that have little (if anything) to do with commerce and capitalism, and everything to do with affect and affiliation. Second, the filesharing debates are simultaneously 'not economic enough', insofar as they evade the financial complexities of the music business in favor of an overly simplistic equation: 'downloaded music' leads directly to 'lost sales revenues'. A more robust analysis of the music industry's standard economic practices, however, undercuts both its economic claims about the negative effects of filesharing on sales and its moral claims to be defending helpless musicians from downloading 'thieves'.

Keywords affect; copyright; filesharing; intellectual property; mp3s; music

US Senator Orrin Hatch wants to destroy your computer.

During a Congressional hearing in June 2003, Hatch claimed that technological booby traps designed to damage computers used for filesharing¹ 'may be the only way you can teach somebody about copyrights' (Associated Press 2003). While Hatch's views on how to combat filesharing are not widely shared, the mere fact that he would make such a suggestion demonstrates how drastically the public discourse on filesharing has shifted. Mainstream media coverage of the issue once spanned a relatively broad range of positions. For every op-ed column that branded filesharing as a grave threat to the livelihood of struggling musicians, one could find (albeit not always in the same venue) an equally celebratory feature that taught filesharing novices how to negotiate the new technology successfully. It would be going too far to describe this as an idyllic moment of even-handed

journalism, but there was clearly a strong current of fan-friendly coverage in the discourse.

Today, however, any pretense of journalistic balance has been shattered: filesharers are routinely described as ‘pirates’ and ‘thieves’, and the ‘gee-whiz’ articles are largely about finding technical ‘solutions’ to the filesharing ‘problem’. The most visible victims of filesharing in the new discourse are no longer musicians – many of whom have embraced filesharing and/or condemned the industry for its systematic neglect of their art and livelihood (Love 2000, Wheaton *et al.* 2005) – they’re the multinational entertainment conglomerates, whose very future is allegedly imperiled unless they can figure out how to transform filesharing into a rigorously policed, corporately controlled, highly profitable enterprise.

In the new discourse, filesharing is unequivocally immoral and illegal – this is no longer a point for discussion – and filesharing ‘evildoers’ must be met with devastating force. David Israelite, chair of the US Justice Department’s Intellectual Property Task Force, explicitly compares the efforts to stop filesharing to ‘the drug war’, claiming that ‘you never really are going to eliminate the problem, but what you hope to do is stop its growth’ (‘Online Groups’ 2005). The gratuitous leap to equate filesharing with a high-stakes, body-count-generating, criminal activity such as drug trafficking is a textbook example of how ‘good’ moral panics operate: a large dose of ‘guilt by free association’ helps establish a climate in which the ‘problem’ behavior readily can be seen as a scourge so pernicious that almost any measure to eradicate it – no matter how excessive – can be justified. Hatch’s plan to destroy filesharers’ computers may be the most extreme example of this discourse, but it’s a telling one. If nothing else, its draconian nature serves to make lesser – yet still substantial – legal penalties (e.g. hefty fines and confiscation of pricy computer hardware) seem like reasonable compromises by comparison.

With the public discourse around filesharing veering towards punitive extremes, our aim in this essay is to reframe the issue in two ways. First, we argue that the filesharing debates are ‘too economic’, insofar as they reduce a multi-faceted phenomenon to a single issue: financial loss resulting from the theft of intellectual property. Lost in such arguments is the fact that music routinely circulates through the culture in myriad ways that have little (if anything) to do with commerce and capitalism, and everything to do with affect² and affiliation. Second, the filesharing debates are simultaneously ‘not economic enough’, insofar as they evade the financial complexities of the music business in favor of an overly simplistic equation: ‘downloaded music’ leads directly to ‘lost sales revenues’. A more robust analysis of the music industry’s standard economic practices, however, undercuts both its economic claims about the negative effects of filesharing on sales

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Too economic

There’s a place that we like to go. It’s like a giant warehouse containing millions of different examples of creative and artistic work. Best of all, it’s completely free. We can wander in, browse around at our leisure, borrow whatever we want to, and simply copy what we like for ourselves. The ‘warehouse’ doesn’t get a penny. Neither do any of the people who created all the stuff we’re duplicating. To be sure, there’s a nominal expense associated with the actual copying process, but most of that money winds up going to the people who make and provide the duplication technology. And, needless to say, it’s much cheaper for us to copy the warehouse’s holdings than it is to buy our own ‘official’, commercial versions. Some people argue that what we’re doing is wrong – that we’re depriving the original creators of the warehouse’s holdings of their ability to earn a living – but clearly not everyone feels this way. There are millions of other people who use warehouses like this one every day: far too many people to police effectively – especially since most of us conduct our business in relative anonymity.

You probably think that we’re describing filesharing networks like BearShare and KaZaa – but we’re not. The duplication technology we’re referring to isn’t a CD burner: it’s a photocopier. The texts we’re allegedly stealing aren’t songs: they’re books, magazines, and other printed material. As for the warehouse that all those teeming millions are using for alleged copyright infringement, we suspect that most of you use it, too: it’s called a library.

To be fair, the library analogy isn’t perfect. If nothing else, one can generally access library materials without duplicating them, while filesharing effectively obligates users to copy files to their computers before they can be used at all. Whatever gaps exist in the analogy, libraries still serve as an important reminder that sharing intellectual property – for free, no less – has a long history of being esteemed as a noble endeavor, and that the ethical and legal questions at hand are more complicated than simply deciding whether someone’s creative work is circulating without permission or (usually) compensation.³

Part of what makes intellectual property so complicated is its relatively high fluidity in comparison to physical property. The latter can be mass produced, but not actually duplicated: you can’t photocopy the toaster in your kitchen and create a second, fully functional appliance suitable for preparing bagels or giving to your cousin Dana as a wedding gift. Nor can physical property be shared without reducing its availability and value to its owner: if you let a friend borrow your car, you can’t both drive it at once, and it will

come back to you with more wear and tear on it than it had when you handed your friend the keys.

Intellectual property, on the other hand, can be copied, shared, and distributed without diminishing its value at all. In fact, the worth of intellectual property – measured economically, culturally, politically, and/or socially – is often dramatically enhanced by the extent to which it circulates. And though they often are loathe to admit it in public, the media monopoly (Bagdikian 2004) knows this. In fact, they bank on it. Literally. It's why they want 'their' songs played on the radio and in clubs and on video channels and at sporting events and in blockbuster movies and on prime-time TV series: they know that before people will buy new music, they typically want to hear it and decide they like it. Of necessity, then, the health of the industry's sales depends heavily on the free circulation of music through the culture.⁴

What circulates in such moments, however, is not just a commodity or a piece of intellectual property: it's a set of *affectively* charged social relationships. For fans, the impulse to buy and the impulse to share are often too tightly intertwined to be separated: the music that you purchase often becomes the music that you simply must tell others about, and the music that other people share with you can inspire you to make a few purchases – sometimes more than a few – of your own.

To this end, we want to share a few stories that underscore the affective aspects of musical fandom and filesharing: stories that disrupt the industry's facile equation of filesharing with theft, and that remind us that cultural ownership involves much more than just a legalistic relationship between people and texts. While these are personal anecdotes, they nonetheless describe forms of musical sharing that are far from unique. Perhaps more importantly, the passions and pleasures at the heart of these practices – and at the heart of our argument – come through far more clearly when presented as detailed narratives than they do as more abstract accounts of general types of behaviors.

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CV: A few years ago, my husband and I hosted a dinner party for a few friends: an evening of good food, good drink, good company, and good music that was much like any other casual social gathering on a Saturday night . . . well, almost. Once upon a time, the evening's musical accompaniment would have been provided by a CD player set on 'shuffle' play or a couple of party tapes compiled especially for the occasion. On this particular occasion, however, there was no stereo; instead, the evening's tunes came to us courtesy of a computer, a cable modem, and Napster.⁵

This might not seem like a significant shift, especially since the night began with a digital version of those shuffled CDs: a few hundred mp3s playing in random order. As the evening progressed, however, different people shuffled

in and out of the role of ‘Napster DJ’. While one song was playing, whoever happened to be sitting at the computer would use Napster to find fresh tunes to be added to the mix, with each of us implicitly trying to answer the question: ‘What is the soundtrack for this moment?’ All of this led to an eclectic and unpredictable playlist for the evening: Jacques Brel found himself alongside one-hit wonders from the early 80s, Flemish rap songs segued into bad Bob Dylan covers, Johnny Cash intermingled with contemporary dance hits, etc. Clearly, the evening had multiple and competing soundtracks – much as the practice of filesharing itself has multiple and competing stories.

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GR: In 2003, my girlfriend spent seven weeks in New Zealand doing research. Ours was already a long distance relationship, but this separation far exceeded any that we’d experienced before. One of the things that Margaret said helped to bridge that 13,000 mile gap was that, before she went to sleep each night, she would listen to the various mp3 ‘albums’ that I’d made for her over the course of our relationship.

This is a twenty-first century version of the old line, ‘they’re playing our song’, only there’s more than just one song that’s ‘ours’. Those anthologies were compiled from a variety of sources – CDs I owned, CDs I borrowed, mp3s I downloaded, mp3s other people had sent me – but the affective investment that we both have in ‘our’ songs has nothing to do with who paid for them . . . or even whether we’re listening to our own recordings of them. For instance, when ‘Absolutely Right’ by the Apollas turns up on the satellite radio feed at my local coffee shop, or ‘#1 Crush’ by Garbage drifts out of a passing car as Margaret sits on her front porch, we still feel the affective pull of that music – ‘our’ music – just as strongly as if we’d chosen to play it ourselves.

One of the reasons that people are willing to pay for music is so that they can (re)produce particular affective states whenever and wherever they want. Thus, affect can reasonably be said to be one of the things that creates a market for pre-recorded music possible in the first place. Despite the industry’s most fervent wishes, however, the reverse is rarely true: the mere act of paying for music doesn’t automatically lead to an affective investment in a particular song, album, or artist. Though the industry may claim not to care about forms of musical ownership other than those defined by copyright, they *should* realize that, without affective forms of ownership, people simply wouldn’t care enough about music to keep the industry afloat.

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CV: Tampa is a city with little musical diversity when it comes to radio. Our only college station is run by paid staff and plays classical music.

Two microradio broadcasters who specialized in freeform programming were shut down by the FCC a few years ago. And we have more Clear Channel-owned stations than we can count. The one exception to this relentlessly bland soundscape is WMNF: a non-profit, community-based station that offers an eclectic range of alternatives to the commercial pop that otherwise dominates the local radio spectrum.

One of the WMNF DJs (David) crafts entire shows out of musical obscurities that he's chased down online, and he invites his listeners to play the game with him. My husband August likes to burn mix CDs from his own music collection and then deliver them to the station. On weeks when he does this, August listens to the show with extra fervor, in the hopes that David will have liked his music enough to play it on his show. This is another form of sharing that defies market-centered explanations: the fan discovers something and then wants to share it with other people who, hopefully, certify whatever value he or she has found in that music. Obviously, August can listen to 'his' music whenever he wants to, but he takes extra pleasure in hearing it on the radio – especially if David gives August credit publicly for introducing it to him. Predictably, most of the music that David plays on his show never turns up on any other station in town. August's music clearly has fans – and devoted ones, at that – but if you actually want to find it yourself, your best bet is probably to go online.

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GR: Recently, I've become a big fan of a tiny label called Bloodshot Records, and chances are good (at least in the US) that you've never heard music by any Bloodshot artists on commercial radio. My first exposure to this music came from filesharing. I don't recall why I originally downloaded tunes by such musicians as Neko Case, the Asylum Street Spankers, and the Meat Purveyors. Maybe someone recommended them to me, or I may've stumbled across a track or two while searching for songs with similar titles. But once I heard them, I was hooked. I downloaded more and more . . . and eventually went out and bought every CD by these artists that I could find. I've become fanatical enough about both Neko and the Spankers to 'infect' a few dozen friends in the process, many of whom, in turn, have bought their own copies of various Bloodshot releases.

Bloodshot's website includes an extended rant against 'freeloaders' who 'swipe' music online – but it's a more nuanced take on filesharing than that typically put forth by the media monopoly:

We're not talking about Don Henley here. We're talking about struggling musicians who drive around in crappy vans, who keep crappy day jobs, and spend long periods of time away from their families and friends, all to

bring you interesting, fun, and un-crappy music. A couple of hundred lost sales to these bands represents a significant dent in their ability to tour. Recording studios aren't free, you know. Neither are vans, hotels, gear, pressing plants, etc.

(Bloodshot Records 2000)

Insofar as they're willing to distinguish between 'struggling musicians' and superstars, Bloodshot's philosophy parts company — sharply — with the mainstream industry's 'zero tolerance' approach to filesharing. Even more important, though, Bloodshot recognizes that the current state of mainstream radio, video, and retail outlets is such that they can't rely on 'free' airplay or the display racks at Walmart to help attract paying fans to their music. So they continue their rant against filesharing as follows:

Sure, if you're a moral person and do it to evangelize the cause and continue to buy their CDs, we have no problem with that. We even offer a few MP3s on this site, but only in the hope you'll download the song, enjoy it, tell your friends and come back to hear more.

(Bloodshot Records 2000)

Undoubtedly, most downloaders — myself included — don't purchase all (or even most) of the music that they find online. At the same time, however, labels like Bloodshot depend on people learning about their music — and coming to love it — through *popular* circuits of affective investments: circuits that the media monopoly largely doesn't try to serve, but that filesharing serves exceptionally well.

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CV: I remember my father coming home from a neighbor's house after being given a demonstration of what, at the time, was still a very new technology: the 'shuffle' function on a CD player. My father was absolutely awestruck: 'It's like having a DJ inside your stereo', he told me, excited by the potential to experience his own music collection anew.

More recent technological innovations have increased our ability to be surprised by the music in our possession. The ability to store thousands of songs on personal computers or portable mp3 players offers a refreshing sense of musical serendipity and randomness in a consumer environment that marketers tout as an 'on-demand world'.

In our household, untold numbers of 'mystery' downloads lurk on our hard drive to surprise us — pleasantly or not. The 'shuffle' DJ inside our computer will frequently serve up some loathsome stowaway song — something downloaded long ago by an unknown houseguest — that causes us to race for the 'delete' button in disgust. On the other hand, the mystery

guest who downloaded Wilco and Billy Bragg's 'California Stars' gave me a gift that continues to delight me at unexpected moments. Whenever *this* track (which I never would have known to look for on my own) serendipitously shows up in my home soundscape, whatever else I'm doing at the moment suddenly stops: I take a break, close my eyes, and happily lose myself for a brief moment in a soothing dream.

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The media monopoly would like to erase the affective economy that produces stories such as these from the public discourse on filesharing. Take, for example, the 'favorite song' series of TV commercials that Apple used to promote the opening of its iTunes online music store in 2003. One of these ads features a young woman named Nava. Standing alone against a pure white background, an iPod in her hand, tiny bud headphones in her ears, she sings along to what the ad tells us is her 'favorite song': the Jackson 5's 'I'll Be There'. In its minimalist fashion, the ad lets us *see* the music in the sway of Nava's body, the tilt of her head, the slow flutter of her eyelids. We *feel* it resonate through her emotionally compelling, yet still amateur, performance. We're presented with the vision of a body transformed by music – and we're offered the chance to transform our own bodies in similar ways. What we *don't* get is the actual sound of the original song that moves Nava so strongly. Nonetheless, we still know exactly what she's experiencing as she listens to her 'favorite song'. If the ad works, it's precisely because we know that feeling. We enjoy that feeling. We want that feeling.

This series of ads invites us to download our own favorite songs onto our own iPods so that we, too, can enjoy 'our' music in the highly portable, fully individualized, and unmistakably pleasurable ways that Nava and her fellow pitch-models do. Apple invokes the notion that fans 'own' their favorite music, but they reframe such ownership as something *only* achievable through a 'legitimate' market transaction. The personal experiences, social practices, and affective investments that typically lead people to feel that they possess specific bits of music (and, in turn, that they are possessed *by* that music) are nowhere to be seen.

In Nava's case, for instance, whatever personal history makes 'I'll Be There' into her 'favorite song' – a love affair, a high school dance, a childhood bedtime ritual – is never mentioned. The pleasure visible in Nava's face and body as she sings isn't presented as a public or social experience. She floats alone and unconnected in a vast ocean of pure whiteness. The sound of the young Michael Jackson's voice (the public form of the song that makes Nava's performance recognizable for the ad's viewers) is tightly contained inside Nava's headphones. This is her *private* experience, her *private* music. And, most importantly for Apple and their corporate partners in the online music

business, she's downloaded 'her' song, not from an illegal network of filesharing 'pirates', but from the fully licensed and corporatized virtual space of iTunes. In the spotless, antiseptic world of the ad, she 'owns' this music, *not* because of the powerful affective role it's played in her life story, but because she's paid Apple US\$0.99 for it.

This industry-sanctioned vision of digital music is *not* about friends or lovers or house parties or road trips or nightclubs or street festivals or any of the other public, social, and collective contexts where we typically stake our initial claims to 'our' music. Instead, it's about atomized individuals, each of whom buys his or her own copy of the new U2, the new D12, the new Dixie Chicks – if not at US\$19 per album, then at US\$0.99 per song. And, of course, once that purchase has been made, the industry's ideal atomized consumer conveniently forgets everything that his or her parents and kindergarten teachers taught about how to get along with other people: they *don't* share with their friends.

Not economic enough

For the sake of argument, though, let's pretend that the economic angle on filesharing simply must be given priority. 'Affect be damned', the industry tells us, 'sharing is theft, and musicians are being robbed blind by all those downloading, so-called 'fans'.' There *is* an important kernel of truth here, since musicians *are* being robbed . . . but the principal thieves are all those industry suits, rather than filesharers, and an honest economic analysis of the music business undermines the claim that downloading fans are taking bread out of the mouths of struggling artists.

For starters, two of the four major recording labels are part of multinational conglomerates that manufacture digital recording hardware for the home consumer market – hardware that's a central component of the filesharing phenomenon – which makes the industry's opposition to filesharing something less than a principled objection to an allegedly unethical practice. As long as Philips makes and sells CD burners, and as long as Sony makes and sells MiniDisc players/recorders, they're directly profiting from the very technology that they claim is hurting them, and neither company can claim the moral high ground in opposition to all those filesharing 'thieves'.

Equally disingenuous is the industry's moralizing on behalf of artists whose livelihood is allegedly imperiled by filesharing. According to the Pew Internet and American Life Project, professional musicians are evenly divided when it comes to the ethics of filesharing, but two-thirds of those surveyed *aren't* significantly worried about its effect on their income – and 72 percent of them claim that the Internet has helped them to make more money from their music (Pew Internet and American Life Project 2004). Moreover, a diverse range of

professional musicians (from Brian Eno to Heart, Chuck D to Janis Ian) have explicitly endorsed filesharing networks as a much-needed alternative to the existing recording industry when it comes to the distribution and promotion of music (Wheaton *et al.* 2005).

Meanwhile, the music industry continues to shortchange artists through a combination of shady accounting practices, usurious recording contracts, widespread failures to pay back royalties, and dramatically overpriced retail product. For instance, consumers can currently buy blank CDs in major retail outlets for about US\$0.25 each – a price point that’s presumably still profitable for both the original manufacturer *and* the retailer – while the standard list price on a single pre-recorded CD is currently about US\$19. The massive gap between those two figures ostensibly tells us something about the economic value of the intellectual property inscribed upon pre-recorded CDs, but since mere pennies of that US\$18.75 winds up in the hands of the artists, what that gap *really* represents is the dramatic growth in the industry’s per-unit profit margin since the inception of the CD format in 1982. Most of what’s fueled that growth is the fact that the basic per-unit rate structure for royalties hasn’t changed in decades, even though actual per-unit manufacturing costs are now far less than they were in the heyday of vinyl records (Negativland 1996).

Even musicians who record million-selling albums are by no means guaranteed anything more than a modest payday for their efforts, because the typical major label recording contract is structured so as to minimize whatever royalties an artist might eventually receive. For instance:

- Standard royalty rates are set at about 12 percent of an album’s wholesale price, so nearly 90 percent of the revenues for an album go directly to the label.
- Labels recoup the costs of ‘promotional’ copies (sent free to reviewers, radio stations, and the like) by only paying royalties on roughly 85 percent of actual sales.
- Labels impose exorbitant deductions – up to 25 percent of sales receipts – in order to cover ‘packaging costs’ (i.e. jewel boxes and artwork) that are rarely (if ever) close to that expensive.
- Costs of tours, videos, and recording sessions are also typically deducted from royalties (i.e. money that labels seem to be using to promote artists’ music actually comes out of the artists’ paychecks).

Add up all these deductions (and others like them) and an artist can quite easily see a net profit of less than US\$40,000 from an album that sells a million copies, while their label will clear somewhere around US\$8 million (Goodman 1992a, 1992b, Love 2000 and Resnicoff 1992). From a financial perspective, then, the biggest threat to artists’ well-being is not downloaders: it’s the music industry’s unchecked greed.

Even with these exploitative practices firmly in place, for at least the past two decades, the bulk of the industry's profits from musical forms of intellectual property has come, *not* from the direct sales of pre-recorded music to consumers, but from the traffic in *secondary* rights: i.e. the fees associated with selling the rights to use particular songs in commercials, movies, TV shows, video games, and so on (Frith 1988). While it's possible that the bottom line may be sagging for the music divisions of major media conglomerates, given the primary sources of industry profits, it's not clear that any such decline could reasonably be attributed to retail sales (much less to the negative effects that downloaded music allegedly has on such sales).

More than that, it's not entirely clear that the music industry's bottom line is really sagging. The industry is pleading financial ruin and declining sales, but the figures used to support such claims only tell part of the story. While the early years of filesharing saw noticeable drop-offs in both 'units shipped' and 'gross receipts' for the industry as a whole, during that same period, the major labels also sharply cut back their rosters of active artists, released fewer new albums, and raised the standard list price of new CDs. So while the industry's aggregate sales declined, their per-album profit margin appears to have *risen*, and all those self-imposed shifts in industry practices arguably affected the overall profitability of pre-recorded music as much as (if not more than) filesharing did.

When it hasn't been bemoaning its alleged financial 'woes', the industry has leaned heavily on the rhetorical trope of 'piracy' to make its case against filesharing: paint a portrait of filesharers as amoral bandits powerful enough to disrupt global markets, and it becomes much easier to mobilize support, among both legislators and the general public, for the industry's efforts to eliminate filesharing completely. The increasingly common equation of 'filesharing' and 'piracy', however, erases significant distinctions between two very different practices: both may be illegal, but they're about as comparable as 'improper lane change' and 'vehicular manslaughter'. Prior to filesharing, 'musical piracy' was a phrase used to describe the public sale of bootlegged versions of best-selling albums: a practice primarily found in countries where 'official' major label releases are hard-to-find and/or exorbitantly expensive by the standards of the local economy. *These* pirates aren't simply snagging free copies of music for their personal use: they're mass producing full-length cassettes and CDs of existing commercial product, passing them off as if they were genuine releases from the major labels, and profiting heavily from the resulting sales. Curiously, in the filesharing era, we hear very little from the industry about *this* sort of piracy, even though it threatens the industry's profits in much more direct and obvious ways than does filesharing.

One explanation for this gap in the industry's rhetoric is that a public conversation about musical piracy of this kind would make filesharing look like

an insignificant nuisance by comparison. Even more than that, though, it might bring more scrutiny to the vision of filesharing commonly advanced by the industry. Recording Industry Association of America press releases and court briefs, for instance, tend to make filesharing sound devastatingly efficient in its ability to separate the industry from its rightful profits: as if filesharing were a highly coordinated global shoplifting spree where millions of people continuously walk into retail outlets around the world, scoop vast armfuls of CDs into over-sized shopping carts, and then stroll back out the door again without paying a penny for any of their ill-gotten goods. Such a scenario, however, isn't close to the filesharing experience that most people actually have – or *ever* had, even in the wildly unfettered days of the original Napster. Given a high-speed Internet connection and the right software, you can potentially download a perfect copy of an entire CD in about 15 minutes. But that theoretical example is more the exception than the rule. Even for fans with fast computers and lots of bandwidth, filesharing networks routinely suffer from truncated files, flawed 'rips', mislabeled songs, slower-than-molasses transfer rates, impossibly long download queues, mid-transfer system crashes, and other technical difficulties that make filesharing into a decidedly hit-or-miss experience.

Most importantly for our purposes here, all those technical difficulties demonstrate the many ways in which filesharing is similar to much older (and now generally accepted) ways that music circulates outside of the commercial market for new product. For instance, the unpredictable sound quality of music found online often produces a listening experience that's much closer to the hisses and pops and variable sound levels of homemade mix tapes than it is to the pristine purity of professional digital recordings. And if we absolutely must use a market-centered metaphor for filesharing, the best one is not the unimpeded grand larceny of factory-sealed product: it's the practices associated with *scrounging* for records, tapes, and CDs at garage sales, thrift shops, flea markets, and *used* music stores. For many fans, hunting for their music is only marginally easier online than it is offline. If your musical tastes run to, say, 1980s Belgian dance-pop or raunchy 1930s blues tunes, you're likely to experience more or less the same sort of frustrations and disappointments (interspersed with rare moments of surprising discoveries and blissful successes) if you're using Morpheus or LimeWire as you are if you're browsing through the bins at Tower or Virgin or Sam Goody. Viewed in this light, the industry's notion that filesharing is an unprecedented and novel form of high-tech theft simply doesn't ring true.

Of course, one of the reasons why the industry doesn't like such comparisons is that they're telling reminders of past moments when the industry tried – largely in vain – to blame slumping sales on ways that fans recirculated music through home taping and used CD stores. The music industry, however, managed to survive both those 'threats' perfectly well

without having to criminalize either practice. A comparable lesson can also be found in the historical precedent of the VCR, which the film industry tried to outlaw on the grounds that it enabled copyright infringement on a scale that would ultimately bankrupt the major movie studios (*Sony v. Universal* 1984). Tellingly, the film industry thrives today largely *because* of the technology that they swore would wipe them out, as video rentals have been a far more profitable revenue source than box office sales since the 1980s (Acland 2003, 23–25ff).

Conclusion

While our primary focus in this essay has been music, the fundamental issues involved have far-reaching implications for a broad range of cultural practices. What's at stake in the filesharing debates is not simply whether you can download the latest hit single for free or load your iPod with mood music. This is ultimately a struggle over the very ownership of culture, where the media monopoly is working to transform intellectual property into something that more closely resembles physical property: i.e. a phenomenon where 'ownership' entails absolute control over how (or if) one's property circulates through the world. Viewed in this light, the industry's decision to attack filesharing more vigorously than piracy suddenly makes sense. Piracy is primarily a defensive issue for the industry, necessitating a rearguard action that protects the industry's existing right to sell recordings of its intellectual property. Filesharing, on the other hand, is a wedge issue that potentially opens up an expanded sphere of intellectual property rights for the industry: one that would grant copyright owners the right to control a broad range of cultural activities that have historically operated beyond the reach of legal sanctions.

In a media-saturated society, the ability to speak about cultural texts and the ability to share those texts (in whole or in part) are tightly intertwined with one another, and one of the primary effects of the ongoing efforts to expand intellectual property rights is an increasingly strict limit on who can speak about culture and what those speakers are allowed to say. Put simply, the media monopoly is using intellectual property law in ways that undermine people's freedom to document, criticize, and transform their own culture. For example, *Eyes on the Prize*, the award-winning documentary on the US civil rights movement, has been in a state of legal limbo since 1995, because the filmmakers can't afford to renew the licenses for intellectual properties (including music, photographs, and archival news footage) contained in the film. Existing video copies (which date back as far as the film's initial public release in 1987) are starting to deteriorate from time and use, and those expired licenses prevent the film from being re-exhibited or re-released.

One scene from the film features a rendition of ‘Happy Birthday to You’ being sung to Martin Luther King Jr. Since the song is the copyrighted property of Time-Warner, *Eyes* can’t re-enter public circulation without the formal consent of the media conglomerate, which aggressively enforces its copyright, charging as much as US\$20,000 for the use of a single verse of this song. ‘Happy Birthday to You’ is just one of the many pieces of intellectual property included in *Eyes* that are standing in the way of its re-release. The film contains numerous examples of the music that played a powerful role in the civil rights movement and that helped to define that moment in history. This isn’t merely background music that the filmmakers chose to use in order to give their story a particular feeling: it’s music that was an integral part of the history that the film attempts to capture. Put simply, the story at the heart of the film cannot be told – or at least not told well – without that music. And now, because of the industry-promoted expansion of intellectual property rights, that story apparently can’t be told at all.

The example of *Eyes* serves to underscore the ways in which the media monopoly’s stance on intellectual property works against the interests of creativity and public dialogue that copyright laws are ostensibly intended to promote. The people on the losing side of this particular battle, after all, aren’t fans trying to scam music for free: they’re creative artists, cultural critics, journalists, and social historians who are trying to chronicle a major moment in US history. Even the creators of the intellectual property found within *Eyes* aren’t necessarily being protected here. The vigorous defense of the ‘Happy Birthday to You’ copyright, for example, no longer generates revenue for the song’s original composers (or even their heirs): it’s simply an efficient way for Time-Warner to profit handsomely from the creative labors of others.

In both the filesharing debates and the *Eyes* controversy, the media monopoly is essentially staking a claim to large (and ever-expanding) swaths of culture – in both the textual and social senses of the term – even though it’s not entirely clear whether existing bodies of intellectual property law are entirely supportive of such claims. Arguably, under the Fair Use provision of US copyright law, at least some of the intellectual property found in *Eyes* could be freely usable, but the legal doctrine here is deliberately vague, and the burden of proof in any such case would fall on the filmmakers.

Similarly, the entertainment industry’s recent victory in *MGM v. Grokster* (2005)⁶ was *not* a blanket repudiation of filesharing, either as a technology or a social practice. Significantly, the Court’s published opinion hinges on the fact that Grokster had explicitly conceived of its software as a vehicle for copyright infringement – and the Court’s logic suggests that software with other, ‘non-infringing’ uses more clearly at its core (e.g. a filesharing program designed and promoted with the express intent of allowing collaborative teams to share documents) would have met the legal standard for acceptable ‘contributory’ infringement set forth in *Sony v. Universal*.

Perhaps more crucially, the potential ambiguities in intellectual property law are such that the media monopoly would presumably be just as happy if *no* legal precedent were ever firmly established with respect to filesharing. To date, the industry's aggressive legal pursuit of filesharing 'pirates' has largely consisted of 'cease and desist' letters and lawsuits aimed at intimidating filesharers, Internet service providers (including colleges and universities), and the authors/distributors of filesharing software . . . but, so far, all the major cases in this regard have been settled out of court. Significantly, the industry's legal strategy seems to involve targeting people who can't afford the time, energy, or money to mount a legal defense – even if they actually might be able to do so successfully. In such a scenario, the media monopoly doesn't need to *win* a court case to win the larger battle: in fact, they might prefer not to have to worry about the uncertainty of an actual court decision, as long as they can shape the terrain of intellectual property use with the threat of lawsuits.

Most of those industry-initiated lawsuits amount to an attempt to solve the filesharing 'problem' by changing the attitudes and behaviors of fans. What the music industry has largely failed to recognize, however, is that what matters most to fans is the *music* rather than the industry – and that it's stupid (and reckless) to antagonize one of your principal sources of long-term income by publicly attacking them as criminals. Fans don't care about 12" slabs of vinyl or 5" wafers of laser-friendly polycarbonate: they care about Eminem or the Dixie Chicks or Prince (etc). And so fans generally won't care much if they can acquire and listen to 'their' music in ways that don't involve shrink-wrapped consumer product. Part of the industry's problem in responding to filesharing has been to fetishize those bits of shrink-wrapped product, largely because they've been unable to envision any other way to sell music profitably. More disturbingly, they can't recognize the fact that music might circulate freely – outside of any immediate and direct profit-generating machinery – and that all that 'free' music will most likely boost their profits in the long run. Those enhanced profits would derive from the fact that filesharing exposes people to new music that they won't hear anywhere else, and from the ways that an active 'popular economy' of music increases people's affective *and* economic investments in musical entertainment. The industry, however, seems unable to recognize that their current Orwellian philosophy – 'sharing is theft' – is ultimately bad for business.

More significantly, such a philosophy is based on the flawed assumption that culture is a privately owned, commerce-driven phenomenon, rather than something ordinary, ubiquitous, and shared in common (Williams 1958). It's a philosophy that denies us the right to make use of the most prevalent aspects of our surrounding environment in anything but the most narrowly circumscribed ways. It's a philosophy that infringes on the most basic practices of creativity and criticism by prohibiting us from using (or even referring to) cultural texts without first securing formal permission from (and often paying hefty fees to)

the corporate ‘owners’ of those texts. It’s a philosophy that stifles our emotional and personal lives by inhibiting our ability to share affectively charged texts – musical and otherwise – with friends, lovers, and families. And so, in the end, it’s a philosophy that does extraordinary damage to the fabric of contemporary culture.

Notes

- 1 For our purposes here, ‘filesharing’ is a shorthand term for a variety of Internet-based practices in which people upload, download, trade, and otherwise share digital versions of various cultural texts outside of the traditional circuits of commercial exchange. Probably the best-known (and the most common) form of filesharing involves the exchange of music via various ‘peer-to-peer’ (P2P) networks, beginning with the original Napster in 1999, but filesharing can (and does) involve *any* sort of digitized file (including videos, movies, photographs, software, ebooks, ‘ordinary’ text, spreadsheets, etc) and it takes place across a range of different network protocols (including BitTorrent, IM, and Usenet).
- 2 We use ‘affect’ here to refer to the varied range of emotional, psychological, and bodily ways in which people relate to cultural phenomena. In particular, we’re interested in the facets of people’s cultural lives that cannot readily be reduced to (much less explained by) matters of semantics, semiotics, or ideology: where the central question is ‘how does it *feel*?’ instead of ‘what does it *mean*?’ See Grossberg (1992, pp. 69–87) and Seigworth (1999).
- 3 The qualifier here is due to the phenomenon of ‘public lending rights’: a practice that exists in some countries that results in small remunerations being paid to authors and publishers whenever library books are borrowed. Thanks to Ted Striphas for alerting us to this phenomenon.
- 4 To borrow a now famous distinction first made by Richard Stallman, we mean ‘free’ as in ‘free speech’, not as in ‘free beer’, as there are often business-to-business fees associated with the placement of music in other entertainment venues.
- 5 This was the original, ‘free’ Napster, rather than the revived, pay-per-download Napster.
- 6 This case revolved around claims made by the entertainment industry (MGM) that particular software companies (Grokster) were guilty of ‘contributory infringement’ of copyright, insofar as they made and distributed software used for filesharing.

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