

# Current Issues

SUPPLEMENT



Face the Music



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By Marcia A. Thompson

### Close Up Press

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Close Up Foundation  
44 Canal Center Plaza  
Alexandria, VA 22314-1592  
closeup.org

The intersection of music and technology has created an explosion of activity and controversy regarding the way people acquire and enjoy music. For this reason, we are pleased to provide you with this supplement to *Current Issues*. It is in keeping with our 4-decade tradition of providing readers with insight on critical issues facing the nation.

Timothy S. Davis  
*President and CEO*  
Close Up Foundation



# MUSIC DOWNLOADING

People the world over love music. So perhaps it should be no wonder that when Internet innovations made music seem “free,” millions of people jumped at the chance to copy song files to their personal computers. The instant popularity of this activity caught many by surprise. Obtaining and distributing copyrighted music without permission violates United States federal copyright laws, which are designed to give creators rights over the use of their creative work to encourage and protect continued innovation. And besides being a crime, illegal downloading has the potential to profoundly affect—and damage—music and other copyright industries.

So, just how big an issue is illegal music downloading, or “songlifting”? More than 3 billion unauthorized song downloads took place in 2005, reports the NPD Group, a market research company. Although people of all ages partake in illegal downloading, teenagers and young adults collect songs most aggressively; more than two-thirds of the music they acquired in 2005 was obtained illegally, according to the NPD Group. Illegal downloading, illegal CD burning, and other forms of piracy have taken a toll, according to some industry executives who note that retail CD sales fell 25 percent from 1999 to 2005. And unfortunately, what hurts the music industry can hurt the U.S. economy. Music, along with movies and software, has been one of the fastest-growing sectors in the U.S. economy, accounting for 6 percent of the nation’s gross domestic product (GDP) and helping to drive overall growth and to offset the U.S. trade deficit.

Despite the fact that most people agree that stealing is wrong, music piracy has proved to be a difficult and controversial problem to fight. Many Americans appear confused about the legal issues. And even after they recognize unauthorized downloading as stealing,

many continue to download illegally. After several years of trying to raise awareness of the issue through information campaigns, in 2003, the recording industry began suing individual violators by tracking illegal activity online. This strategy raised privacy concerns and angered many music fans but also spread the word that unauthorized downloading was a crime.

Cases of illegal downloading also went to the courts, highlighting numerous conflicts among the many stakeholders, including artists, consumers, and the recording and technology industries. Recent court rulings on the liability of online music site operators have prompted a number of illegal file-sharing services to become legal and licensed providers of music. As awareness and legal options increase, more and more people are downloading digital tracks and albums legally. However, illegal downloading persists as a serious problem.

How can protecting the rights of authors and owners of creative works be balanced with the desires of consumers to benefit from and use those creations? People disagree. Some consumers, especially young people, believe that more needs to be done to foster easy exchanges of music files. Others, particularly those in the music business, want stronger protections for intellectual property like music, and they worry that without such protections, their livelihoods—and indeed the future of the music industry—are at risk. Some technology advocates see another problem—stronger copyright protections could discourage people from creating new technologies for fear that they will be held liable for users' copyright infringement. Still other people argue for a middle ground that protects copyright and rewards creativity but also serves consumers well and promotes future technological innovations.

## I Want My mp3

In the early 1990s, the Internet was a new frontier in American life. Businesses rushed to set up Web sites and services, offering free content in the hope of making money on advertising. Many people mistakenly came to believe that if something appeared on the Internet, it was theirs to use as they liked. Over the next decade, millions gained access to the Internet. By 2006, more than 73 percent of Americans were “online” at home. The number of Internet users with high-speed “broadband” connections also grew rapidly in the twenty-first century.

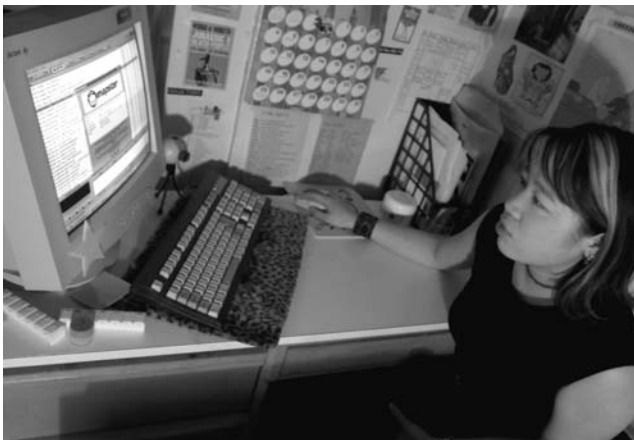
**The “Perfect” Storm.** While Internet content and user access skyrocketed, music was also evolving. The release of the CD format in 1983 allowed for songs—previously etched into vinyl or recorded on tape—to be turned into digital audio files. Later, new software created a way to compress these files into much smaller versions, called mp3 files, which could be easily played, transferred, and collected on the Internet. Perhaps most critically, mp3 files could be quickly and nearly perfectly copied. The first mp3 players debuted in 1998, making these digital files portable. For consumers and the music industry, mp3s marked the beginning of a revolution.

**Napster.** In 1999, a college student named Shawn Fanning wrote a software program so that he could easily share music with other students in his dorm. The program, Napster, created a centralized index of all its users’ music files so that users could track down and access songs on one another’s hard drives. Napster soon became a worldwide phenomenon—millions of computer users discovered that they could have what seemed like unlimited access to music. They “ripped” or uploaded their own CD music collections as well as downloaded songs from other users. There was only one problem—all this peer-to-peer (P2P) file “sharing” was illegal. The recording industry sued

Napster for copyright infringement, and in early 2001, a federal judge ordered Napster to shut down.

**Peer-to-Peer.** Even as Napster's legal troubles mounted, software writers developed a new form of peer-to-peer—a decentralized approach to copying files, which is now the most common method of illegal downloading. Everyone who uses P2P network software can search all users' share folders and freely download files from them. And according to the NPD Group, approximately 10 percent of U.S. households with Internet access use a P2P network each month.

**A View from the Pirate's Seat.** Why do people illegally download? In surveys, downloaders often cite the ease, cost (free), and speed of collecting songs that way. Some believe that copying electronic song files does not hurt anyone. Some illegal downloaders, especially young adults, contend that record labels overcharge for CDs and make too much money; they see illegal downloading as a means of rebellion. Other people who use P2P networks point out that they often cannot find the individual songs they want on legal services, and so turn to illegal file sharing. And young teens in particular report that they download illegally because they either cannot afford to buy music or do not have credit cards to make online purchases.

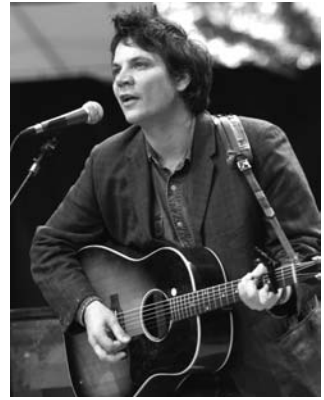


*The creation of Napster in 1999 led to widespread illegal file sharing of music over the Internet. File sharing immediately became popular on college campuses. Here, a college student downloads music in 2001.*

*Many artists, like producer/singer Missy Elliott (left), believe illegal downloading harms the music industry; some have spoken out against it. But others, like Jeff Tweedy (right) of Wilco, take a different view, suggesting that people have a right to share “culture”—and music files.*



Jason Szentesi/Keap/Corbis



Tim Mosenfelder/Corbis

**The Music Industry Responds.** As music technology and consumers’ desires changed, the music industry responded. It made single song downloads available for purchase through legal music sites. Music industry executives also searched for ways to ease licensing challenges so that more songs could be made available for legal download. Meanwhile, record companies kept the price of physical CDs lower than CD prices from twenty years ago.

## **Intellectual Property and Copyright**

Why is exchanging song files illegal? It comes down to U.S. copyright law, which gives anyone who creates something certain rights over its uses. In America, the notion of protecting intellectual property such as ideas, written work, and inventions goes back to the drafting of the Constitution. The framers considered intellectual property important to the nation’s society and economy. They reasoned that for citizens to have incentives to create, they had to have the right to benefit from (by making money) and control (by preventing misuse of) their ideas. So, in the Constitution, the framers charged Congress with protecting intellectual property by making laws that “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

**Copyright of Music.** As defined by Congress, intellectual property law covers three main categories: (1) copyrights, which protect written or artistic expressions, (2) patents, which protect inventions, and (3) trademarks, which protect names and brands. Every person who creates a written work automatically owns the copyright. Even an essay written for school, once completed, is automatically copyrighted. No one else can claim it or copy it without permission from the copyright owner. Many authors and other creators apply for an official copyright registration from the U.S. government, a step that is not required but that affords additional legal protections in case of a dispute. Musical compositions and recordings—along with books, motion pictures, and computer software—fall under copyright. Collectively, these industries are often referred to as copyright industries.

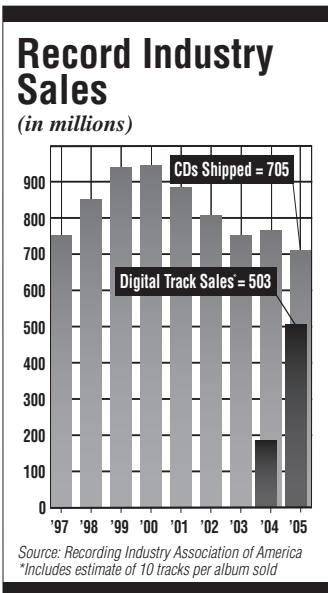
Over the years, Congress has passed laws to refine the scope of copyright. Most notably, in 1972 Congress extended copyright to include not just written songs but also the sound recordings of songs. Congress also sets the terms for copyright. Once a copyright's term expires, the work becomes part of the public domain and can be used freely without permission. Today, a copyright lasts for the life of the author plus 70 years.

*The Fair Use Doctrine.* U.S. courts have always recognized that copyrights should have some limits. In 1976, Congress codified aspects of this judicial doctrine of “fair use” of copyrighted works into law. In general, fair use allows the public to use a work under certain circumstances without permission of the copyright owner. Although there are no specific rules, four main criteria apply in determining whether a use is fair: (1) the purpose of the use, (2) how distinctive the copyrighted work is, (3) the amount “used” relative to the size of the copyrighted work, and (4) how much the use will affect the potential market for or value of the copyrighted work.

What does “fair use” mean for people and their music collections? This is a difficult question to answer because fair use is based on the context and

intent of the use. Currently, fair use is generally understood as allowing individuals to make a copy of copyrighted music that they already own, as long as the copy is for their personal use. The fair use doctrine also allows “format shifting” (such as making a mix CD from a personal collection for personal use) and “time shifting” (recording a copyrighted television program to watch later).

*The Digital Millennium Copyright Act (DMCA).* The increase in digital content and the ease by which copyrighted works can now be duplicated and distributed provoked Congress to pass the DMCA in 1998. This legislation makes it illegal to circumvent anti-piracy measures or to create software that allows users to circumvent copyright protections, but allows a few exceptions for research and testing as well as for libraries.



*The debut of Napster in 1999—and soon after, the spread of P2P file-sharing networks—coincided with a drop in CD shipments. Legal sales of digital tracks began in mid-2003 and grew by more than 150 percent between 2004 and 2005.*

## Piracy and the Music Industry

**How the Music Industry Works.** Artists sign contracts with record labels to create albums. Under these contracts, the record company pays the costs of recording the music (which includes studio time and equipment, along with the salaries of studio engineers and others), designs and prints the liner notes for the CDs, presses the CDs, ships the CDs to radio stations and retailers, and markets and promotes the albums. In return, the record company gets to sell the recordings, and it pays royalties to the artists, songwriters, producers, musicians, and vocalists from each sale. Generally, the record company keeps the copyright to each work. Record labels take great financial risks and lose money on most of their artists—approximately one in ten albums turns a profit. And many musicians and songwriters struggle to make a living on their creative works.

## BEHIND THE MUSIC

Some people who illegally download music believe that in copying music files, they are not hurting anyone. But creating music is a complex endeavor that involves many more people than the performer—all of whom make their livings from the sales of CDs and digital music. The production of most records involves, among others, (1) a songwriter who writes the lyrics and music, although in some cases, the songwriter is also the performer; (2) the recording artist(s) who perform the song; (3) a record producer who helps the artists refine their performances; (4) a sound engineer who records and remixes the music to achieve the best sound; (5) a record company or label that pays for the artists' expenses, recording sessions, the printing and pressing of the CDs, and the marketing of the recording; (6) distributors who buy the CDs and sell them to retail outlets; (7) a general or business manager who helps the artists make business and creative decisions and oversees lawyers, agents, and others who support the artists; (8) a tour manager who books and arranges tours; and (9) retailers, either online or brick-and-mortar, who sell the music. In 2004, nearly 1.9 million people (about 1.4 percent of the labor force) worked in the arts, entertainment, and recreation industries, according to the U.S. Bureau of Labor Statistics.

**Piracy's Impact.** Illegal downloading directly affects all of the people involved in creating music. Lost revenues mean record labels have less money to invest in developing new artists or marketing the work of lesser-known musicians. Most record labels have laid off workers. Such actions affect individuals as well as the local economies of areas like Nashville, Tennessee, that have a high concentration of music industry-related businesses. Songwriters and performers earn lower royalties as a result of piracy, and performers may lose income if they receive fewer opportunities to tour.

**Artists Weigh In.** Most artists consider illegal downloading a harmful practice, and some have participated in public service campaigns urging fans to buy music legally. But other performers disagree or have mixed feelings about the effects of piracy. Some believe that illegal downloading prior to an album's release creates "buzz" that boosts sales.



what should be done about music piracy. Some approaches to fighting piracy have been generally welcomed, such as the creation of legal alternatives, but others have prompted debate.

*Education Efforts.* When music piracy first became a problem, some people thought that the public was simply misinformed about copyrighted material and the law. Several groups launched educational Web sites and sponsored public service announcement campaigns. Despite these efforts, illegal downloading continued to spread.

### FAIR PLAY

Downloading music is not necessarily illegal. If the song is in the public domain, it can be freely downloaded from any source. If the song is copyrighted (and most songs are), legality depends on where the song comes from and what the user does with it. Under the current guidelines of copyright law and fair use, here is what is considered legal and what is not:

#### Illegal

- Burning a CD copy of purchased music and giving the copy to someone else.
- Downloading a song from a nonlicensed P2P file-sharing network (unless the song is in the public domain or the copyright owner has authorized the download).
- Downloading a song illegally but deleting it after listening to it once.
- Downloading a song illegally but then buying the CD.
- Uploading songs from a purchased CD to a share folder available to other users on a nonlicensed P2P or other network (unless the song is in the public domain).

#### Legal

- Giving away a purchased CD—and deleting the files from your computer—that you no longer want to keep.
- Creating a mix CD for personal use from your personal collection of purchased CDs or mp3s.
- Uploading songs from a purchased CD to your personal computer.
- Copying purchased songs from a computer to an mp3 player.
- Downloading a song from a legal service like iTunes.

*Recording Industry Lawsuits.* Beginning in 2003, after educational campaigns had failed to reduce music piracy, the Recording Industry Association of America (RIAA) resorted to suing individuals who illegally distribute music. To find violators, the RIAA monitors file-sharing services to identify users who post copyrighted files in their share folders. Then, by tracking the users' identities through their Internet Protocol (IP) addresses, the RIAA can serve lawsuits. Fines can be as high as \$150,000 per illegally shared track, although the average settlement is reportedly between \$4,000 and \$5,000. Tens of thousands of lawsuits have been served and the number is constantly growing.

Although these lawsuits seem to have factored into a number of users' decisions to stop illegally downloading music, they have also generated controversy. Civil rights advocates and others decry the recording industry's practice of monitoring Internet users' activities and tracking down users' identities as an invasion of privacy. Industry supporters counter that P2P users voluntarily post their illegal files for the world to see and are committing a crime. The lawsuits have also alienated some music fans, some of whom believe that by illegally downloading, they are actually supporting the music industry.

*Protesters make their point outside the 2005 MGM Studios v. Grokster Supreme Court hearings.*

*While record industry groups contended that the makers of P2P software should be held liable for copyright infringement, technology- and electronic-rights advocates countered that such a decision would dampen future innovations.*

*The Court ruled for the entertainment industry.*



Yuri Gripsas/Reuters/Corbis

Finally, some industry analysts believe that lawsuits are a hopeless business strategy, given the fact that file sharing has become a worldwide phenomenon with millions of participants.

*Increased Federal Enforcement.* Increased music piracy—a federal crime—led the Federal Bureau of Investigation to accelerate and expand its efforts to find and prosecute offenders. Enforcement actions resulted in the shutdown of computer servers, and charges filed against individuals involved in large-scale piracy efforts as well as people instigating P2P networks that promote piracy.

*Stepping Up the Global Piracy Fight.* The U.S. government has also taken its anti-piracy efforts abroad. For years, U.S. officials have pressured nations with lax intellectual property enforcement, like China and Russia, to curb widespread illegal copying and reselling of U.S.-produced CDs and DVDs. As high-speed Internet access expands across the globe—and with it, illegal downloading of music and movies—U.S. trade officials have been negotiating with other countries to shut down unauthorized file-sharing sites housed within their borders and to toughen their laws and enforcement regarding illegal downloading and other forms of intellectual property piracy.

*The Grokster Decision.* Music downloading reached the Supreme Court in 2005 after the recording and motion picture industries sued several businesses whose Web sites used unauthorized P2P file-sharing software. In the case, *MGM Studios v. Grokster*, the Court ruled, “one who distributes a device with the object of promoting its use to infringe copyright ... is liable for the resulting acts of infringement by third parties using the device.” To the relief of technology advocates, the Court did not overturn its 1984 decision in *Sony Corporation of America v. Universal City Studios* (the “Betamax” case) that held that companies could not be held liable for simply making a copying technology available.

The *Grokster* decision had a huge impact on the file-sharing world. After the ruling, Grokster settled

the case and shut down, and the future of other unauthorized P2P services remains in question. P2P networks still exist and may prove difficult for authorities to track and close down.

*The Wild, Wild Web.* The increasingly insecure nature of the Internet has unintentionally served to fight piracy. Because users of P2P networks essentially give access to their computers to thousands—sometimes millions—of other people, many are finding that their privacy has been compromised and their computers have been hacked and infected with damaging viruses, spyware, and other software. More people say they are now using paid legal services out of fear of such attacks.

*Legal Alternatives.* Legal services may pose the most successful remedy to piracy over the long run, say some analysts. The first service, Apple's iTunes, debuted in 2003; by early 2006, customers had legally downloaded more than 1 billion songs. iTunes' early success stemmed from a large song catalog at a cheap price, integration with Apple's popular portable music player, and ease of use. Since then, consumers' options have expanded. Legal downloading services now include Wal-Mart, Urge, eMusic, AOL Music, and others. Other alternatives include online subscription services like Rhapsody, Sony Connect, Yahoo Music, and the new Napster, which give consumers unlimited access to millions of songs for a monthly fee. And recent years saw the debut of legal, licensed P2P services—like iMesh—that collect payments from file-swappers for downloads of copyrighted songs and then pay the copyright owners.

There are several significant challenges facing legal music downloading services. First, it is difficult for them to compete with illegal services offering the same product for free. And second, though it grows daily, song selection through legal sources is more limited than through illegal sites. There are several reasons for this. Some artists, including some with very large and valuable collections, have chosen not

to release their material for online sales. In addition, legal services have faced challenges in negotiating licensing agreements with music publishing companies; as a result, there are still some songs that are not legally available for download anywhere.

## OUTLOOK

Despite efforts on many fronts, piracy of intellectual property like music will never completely go away. But all stakeholders will have decisions to make to ensure that music remains a creative, viable, and economically productive industry. Music fans will have to decide whether they want to risk the consequences of illegal downloading. Congress will face new challenges in setting clear and reasonable parameters for copyright and fair use of music. The music industry will have to work to adapt to both the perils and possibilities of online music while meeting the demands of technology-savvy and music-hungry consumers. Ultimately, most people hope that the music business will adapt to the digital world with new business models and that music consumers will respect the law when it comes to obtaining their music. All hope that music will continue to be something that benefits both creators and fans.

## GET INVOLVED

### Think about...

- Is illegal downloading an ethical issue?
- Are current copyright laws fair to creators? How about to society at large?
- Is taking a digital song file without paying for it different from stealing a physical CD from a store? Why or why not?
- Should record companies sue people who illegally download music? Why or why not?
- Will the *Grokster* decision encourage more people to pay for online music? Within the music industry, will the *Grokster* decision stifle innovation or advance it?
- What might encourage more people to download music legally?
- Should the U.S. government do more to curb piracy of intellectual property?

### Learn more...

- **Creative Commons**, [www.creativecommons.org](http://www.creativecommons.org), proposes alternative ways of licensing artistic work in an effort to benefit artists and creators as well as consumers.
- **“Day of Decisions”** offers a discussion of the ramifications of the *MGM Studios v. Grokster* Supreme Court decision. [www.pbs.org/newshour/bb/law/jan-june05/decisions\\_6-27.html](http://www.pbs.org/newshour/bb/law/jan-june05/decisions_6-27.html).
- The **Electronic Frontier Foundation**, [www.eff.org](http://www.eff.org), advocates for consumers’ digital rights and presents its perspective on intellectual property issues such as the *Grokster* case.
- **“Internet Piracy,”** on PBS Frontline, features perspectives of different people in the music business on the scope and impact of illegal music downloading. [www.pbs.org/wgbh/pages/frontline/shows/music/perfect/internet.html](http://www.pbs.org/wgbh/pages/frontline/shows/music/perfect/internet.html).
- **MusicUnited.org**, [www.musicunited.org](http://www.musicunited.org), presents information about the impact of illegal downloading, a list of legal downloading sites, and more.
- **The United States Copyright Office**, [www.copyright.gov](http://www.copyright.gov), is the official resource on questions of copyright law.
- **What Do You Think?**, a documentary from the National CyberEducation Project, offers a quick overview of intellectual property with students’ and lawyers’ perspectives on key questions related to downloading music. [law.richmond.edu/ipi/whatdoyouthink.htm](http://law.richmond.edu/ipi/whatdoyouthink.htm).
- **What’s the Download?**, [www.whatsthe-download.com](http://www.whatsthe-download.com), describes legal and illegal downloading of music, and provides information on copyright, fair use, and artists’ views.

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