

A COMPLETELY REVISED AND UPDATED EDITION  
OF THE DEFINITIVE GUIDE TO 'MUSIC BUSINESS'

3RD  
EDITION

# MUSIC BUSINESS

A MUSICIAN'S GUIDE TO THE AUSTRALIAN MUSIC INDUSTRY  
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## **DOWNLOAD DELIVERY: EVOLUTION IN BUSINESS – REVOLUTION IN THINKING**

**THE BIRTH OF DIGITAL DOWNLOADS DEMANDED THAT THE RECORD COMPANIES TAKE NOTICE. ONE OF THE MOST IMPORTANT ISSUES IS HOW BEST TO MANAGE COPYRIGHT MATERIAL IN THE DIGITAL ENVIRONMENT. THIS CHAPTER LOOKS AT SOME OF THE DEVELOPING MECHANISMS OF DISTRIBUTION AND COLLECTION IN THIS CONTEXT.**

To become dominant, a new technology must provide consumers with a clear advantage over existing technologies. This will provide the motivation for consumers to invest, financially and culturally, in the new product. Manufacturers will compete heavily to enter the market early to establish their brand names. They will do all they can do to win, including using lawsuits to drive their competitors out of the market and to drive the demand. Most of the old players will survive and prosper but new businesses and alliances will emerge.

History has shown that both the law and the business of music have adapted to and grown because of these new technologies. On-line music delivery is the latest of these technological challenges and the music industry is still feeling its way.

Let's face it, the pioneers of on-line music distribution were not the record companies – they were the fans. Lovers of music have always distributed their recommendations to friends whether as sheet music, vinyl, cassette or CD. With powerful computers easily able to copy the digital music files from CDs and the Internet, it was no great conceptual leap to foresee that popular on-line music distribution was waiting to happen.

The adoring public created a new market based on a new delivery mechanism that demanded that the record companies take notice. But how did it all come about?

## THE BIRTH OF DOWNLOAD DELIVERY

Compact discs, increasingly capable domestic computers and the Internet gave the music-loving public the tools they needed to start the revolution. CDs provided the music in unencrypted digital form. The personal computer had become sufficiently powerful to read, translate, copy and manipulate the digital files. Audio formats such as MP3 enabled such files to be compressed so that they were more easily stored and transferred. The Internet linked all those people together and enabled them to swap music files. People now had the power to copy, store, play, manipulate and transfer music.

The Internet was seen by many as the saviour of the indignant artist and consumer who had suffered too long under the tyranny of the record companies, inequitable contracts and overpriced CDs. For nascent rock stars and indeed all creators of music, it provided an independent means to contact and deliver news, music and video to their fans. Thousands of official and unofficial fan sites sprouted like spring flowers across the Internet.

Through the 1990s, when it was already evident that the Internet would become an important medium for music delivery, the record companies and the music publishers gave it insufficient attention. The Majors in the Australian industry were predictably reliant on their head office in the United States or England for their direction and answers, and head office just didn't focus early enough. As a result, the music industry has had to play catch-up. It is now in the position of being reactive to a reality, the shaping of which it played no part. The download war that they are now fighting as a rear-guard action is one that the industry lost, through inaction and a failure of strategic planning by those in control of the Majors in the mid-1990s. Quite simply, at that early stage in the campaign, when it mattered, they failed to allocate financial and intellectual resources to deep study of the changing role of copyright; the effect of the new technologies on the economy of music; how the new technologies would change the way we perform, conserve, distribute, market, promote, sell, study or enjoy, music.

When the Major record companies, who control the distribution of about 83% of sound recordings, initially refused to license emerging on-line music sites to distribute their catalogues, a market vacuum emerged. Internet start-up companies like Emusic.com, Napster, MP3.com and Scour, emerged everywhere, determined to take power away from the multinationals and deliver it into the hands of the individuals (whilst trying to make a small fortune in the process). The culture of the Internet, coupled with uncertainty over the particular application of law to these transactions and the complete absence of legitimate alternatives, motivated the users to disregard intellectual property laws and copy and distribute music all over the world.

In 2000 and the following years, the record companies took legal action to stop the on-line music pirates. The most infamous case was the one against Napster, the on-line distributor of music whose members peaked at sixty-two million people across the world. While Napster's infamy is eroding as other pirate systems jostle for supremacy and legitimate systems emerge, the Napster story is an important part of on-line music history.

## **NAPSTER**

Napster was an ingenious system. By accessing the Napster website, users could download a software package that would enable them to search for and download music files. At its peak, it was actually a challenge trying to find songs that weren't available through Napster. But rather than go to the expense of copying and storing music files on to its own computer servers, Napster relied on a database of songs that were stored on their members' personal computers. When a user found a title, the Napster software enabled the user to directly access the other user's computer and retrieve a copy of the music file. It was the users who paid for the storage and connection costs. It was the users who made and downloaded copies of the sound recordings. Napster simply facilitated the transaction. It provided free music.

Napster became a household name and challenged the record companies' control of the distribution of their music repertoire. While there is some debate as to what extent, if any, illegal downloads compete with traditional music sales, the record companies decided that Napster must be closed down.

In December 1999, the record labels began legal proceedings against Napster (*A&M Records, Inc v. Napster, Inc.* 114 F. Supp 2d 896 (N.D. Cal. 2000)). It alleged, among other things, that Napster was infringing copyright by permitting the duplication and distribution of copyright works on the Internet.

The District Court of Northern California granted the record labels an injunction stopping Napster from engaging in (or helping others engage in) copying, downloading, uploading or distributing the record labels' copyright works. The decision was appealed.

On appeal, one of Napster's defences was that what it was doing constituted 'fair use' under U.S. copyright law. Lawyers argued that people used Napster to sample tracks before they bought them and transfer music they already owned (on say CD) onto their computers (so called 'space-shifting'). It was also argued that Napster had a role as a distributor of legitimate music as users also used it to distribute sound recordings of artists who had permitted such distribution.

The court on appeal, dismissed Napster's arguments and its other more technical defences, concluding that sampling and space-shifting in these

circumstances were a commercial rather than fair use and competed with the record companies' legitimate commercial interests.

The court then went on to find that although Napster itself was not infringing copyright by copying and distributing protected music (its users were), Napster was likely to have had knowledge of such infringing conduct. The court said that Napster 'induces, causes or materially contributes' to that infringement and fails to take any action to prevent it. Napster was found to have turned a 'blind eye' to the illegal actions of its users whilst profiting from those actions and was found to be vicariously liable.

In March 2001, following the delivery of these findings by the appeal court, Judge Patel of the Federal District Court of Northern California issued a preliminary injunction against Napster. The record labels were required to identify their copyright music and Napster was required to block access to it through their system within three days. As the vast majority of music available through Napster was copyright controlled by the record labels, Napster was effectively sunk.

## **POST NAPSTER**

Even before the final judgments had been handed down in the Napster case, BMG moved in and bought what was left of the company. It was a clever move because they acquired the rights to the Napster name and brand without having to invest huge amounts into promoting a completely new on-line identity. Of course the new manifestation of Napster no longer promotes illegal downloads. It has been completely redesigned as an on-line source of legal downloads.

However, even though the old Napster had been brought down by the court decision, many other companies filled the void. One of the larger distributors was Grokster. It, too, was sued and the court asked to decide the tricky question: "When should the distributor of a multi-purpose tool be held liable for the infringements that may be committed by end-users of the tool?" (see [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/](http://www.eff.org/IP/P2P/MGM_v_Grokster/)). It was particularly significant because it revisited the 1984 decision in *Sony Corporation of America v. Universal City Studios Inc* (known as the Sony Betamax case. This earlier case had held that if you supplied a machine that could be used for legal purposes as well as illegal purposes (in that case a dual recording tape machine) you were not liable for the illegal uses to which it was put. Perhaps it wasn't a great surprise given that the same approach that has been taken for many years with regard to guns.)

In 2005, the courts finally handed down their judgement in favour of the record companies and against Grokster.

In the same year, the Australian Federal court was given the opportunity to consider the legitimacy of the Kazaa website in the case of *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242. At the beginning of 2004, Kazaa was the most used website for peer-to-peer file sharing activities and over 317 million people had downloaded Kazaa onto their computers.

Kazaa enabled users to share sound recordings by placing the material in a file called 'My Shared Folder'. Other users could then search and download for free any material from another user's 'My Shared Folder'. These files were referred to as 'blue files'. Kazaa also enabled users to access licensed works (works made available to users pursuant to arrangements made with the owners of copyright in those works). These files were referred to as 'gold files'.

The 30 applicants in the case, including the major record companies, claimed that the sharing of blue files constituted an infringement of their copyright in certain sound recordings.

While the court was not prepared to find Sharman Networks guilty of direct copyright infringement, the court had no difficulty in finding Sharman Networks guilty of authorising copyright infringement. It was held that once Sharman Networks knew Kazaa was being used to infringe copyright in various sound recordings, they should have taken preventative measures. Displaying warnings on the website and making users agree not to infringe copyright under an end user licence agreement, was not enough to excuse Sharman Networks from liability for authorising copyright infringement because it was obvious to Sharman Networks that these measures were ineffective. The court expected Sharman Networks to take further measures to curtail infringement by implementing technical measures involving keyword filtering and gold file flood filtering. These measures would have prevented copyright protected files being searched and limited search results to licensed files. It was clear to the court that because Sharman Networks made its revenue mostly from advertising, it was in Sharman Network's financial interests to maximise music file sharing. Sharman Networks' desire to maximise file sharing was also apparent through the website encouraging users to 'Join the Revolution' and expressly criticising record companies for opposing peer-to-peer file sharing.

With these factors in mind, the court ordered that the Kazaa system be modified through a system of keyword and gold file filtering so as to protect copyright interests whilst allowing sharing of permitted files. Sharman Networks appealed the court's decision and the appeal is expected to be handed down soon.

## **THE BATTLE WON, THE WAR RAGES ON**

That is not to say we have seen the death of on-line music piracy. Far from it; it has just been marginalised. In the wake of Napster and Kazaa, and while similar systems operate, personal computers have been and are still being stocked with an enormous catalogue of unencrypted music. Each of these computers is connected by the Internet: All that remains is for file sharing software to act as an intermediary. Inevitably, when one dies another grows.

One such peer-to-peer file sharing software that has grown in popularity recently is BitTorrent. Much like Napster in its infant days, BitTorrent has provided users of the Internet a more efficient way of file transfer. However, unlike Napster, BitTorrent does not store files on a central server. Instead, files are stored locally on the user's computer and distributed from one computer to the next. This makes it difficult for record companies to fight: Because the files are not stored on a central server, it is harder to shut down all the users of BitTorrent (who number in the millions), than one central server (like Napster or Kazaa).

Of course, the practicalities of commencing complex and expensive litigation against every new Napster, Grokster, BitTorrent or Kazaa (or their users) is an entirely different issue altogether.

## **THE WAY FORWARD**

The real alternative for the record companies is to go with the flow and provide a viable alternative for consumers: one that is cheap, easy and legal and of course, one that maintains their control over their copyright works.

The model for the way forward has been illustrated by iTunes. In February 2006, iTunes announced that it has sold one billion legitimate downloads. That same month EMI, which has been perhaps the most innovative of the Majors in its approach to marketing and commercialising music downloads, announced that almost 6% of its gross income worldwide, came from digital downloads. The International Federation of the Phonographic Industry (IFPI) says that global sales of digital music zoomed to \$1.1 billion in 2005, up from \$380 million in 2004.

It is perhaps not surprising that the light was provided not by record companies that had been moulded on an old paradigm but by a computer manufacturer that prided itself on providing new and elegant solutions to old market problems. Apple didn't have to worry about protecting its (non-existent) investment in music copyrights. It figured that if music consumers were given an opportunity to buy legitimate product for a reasonable price and deliver it through well designed, simple to use hardware, a lot of them would. And they did.

The report from Entertainment Media Research shows around 35% of online music buyers are paying for legal downloads versus the 40% who have pirated music. (The online research company used data collected from 4,000 music consumers to compile the *2006 Digital Music Survey* in association with UK media law firm Olswang.) This is a turn-around in consumer attitudes that would have been inconceivable just four years earlier.

### **CHANGE IN THE WAY COMPANIES DO BUSINESS**

Irrespective of technological or legal developments, the ways in which we do business will change.

The early efforts of the Majors seemed almost ludicrous. First, they ignored the public-lead download revolution. Then they acknowledged it but forbade their repertoire to be downloaded. Then they allowed certain material to be downloaded but only for the payment of a fee that no net-customer would possibly be interested in paying. Why would they do such an apparently self-defeating thing, as to charge for a download, a price that is similar to that paid by its customers for a compact disc? Could it really have been as stupid as it seemed? Obviously, the young people that make up the potential cyber customers were not going to pay that much. We have to assume that the companies knew this.

Continuing this benign analysis, we must assume that this was a deliberate attempt to limit the usage of their systems so that they could trial them and perfect them before they were tested by large volume usage. If on the other hand, the companies were simply trying to maintain their old profit structures, by such a seemingly primitive price maintenance scheme, they were clearly going to fail; customers ignored them and, it became very apparent that - like all businesses that abuse their customers - if they continued, they would wither and die.

Until record companies have chief executives who were born too late to own vinyl records and never did play pinball, we are unlikely to see management that is completely comfortable with the Internet and plan the corporate future accordingly. At the moment, there is a generation gap in record company and music publishing management. Did any of the horse breeders of the late 18th century contribute to the development of the motorcar? Both were means of transport but they required very different skills, experience and comfort zones. When it comes to executives in the rapidly evolving music business, like soldiers, 'age does not weary them'. It kills them.

Of course that is exaggeration. Alain Levy, the former head of PolyGram and the current CEO of EMI, is an obvious example of a successful record

man who realised that the industry had to find a way of making money out of music downloads. Record companies need to hire flexible and creative minds because they have to completely rethink and redefine the way that they do business.

Does anyone want to run a book?

- They will become principally production and promotion houses. For many companies, pressing and distribution functions will virtually disappear. These will be outsourced in the same way as most music publishers outsource their print music publishing.
- Their promotion staff are going to be focusing, not on how to sell records, but on how to persuade the public to select their artists' product from the extensive menu of choice and to visit their own cyber-download shops.
- One of the major determinants of a record company's commercial success will be its ability to attract Net surfers to pay-for-play services. These services will have to be a mix of company, cross-company and company-independent. It is the artist's brand, not the company's, which sells the download.

Present trends already indicate that we will see a number of strategic alliances formed (both formal and informal). We are seeing that through conventional advertising, on-line service providers are using existing broadcasters and print media as tools for attracting the public to their on-line services and products. But this is just the start: record companies or on-line service providers will enter joint-ventures with existing radio networks so that each cross-promotes the delivery of services of the other; record companies will form alliances with telcos for the delivery of their content; large record retailers will establish alliances with those with dominant web presences to distribute and promote product. One thing that we have learned from the two massive crashes of the dot com share market is that e-commerce requires alliances. No matter how big the cash box, the financial demands of establishment, promotion, financial administration and product fulfilment in e-commerce, are punishing if you try to do it alone.

Mainstream publishers, record companies, record retailers, newspapers, film studios etc are only now, committed to the Internet. They know that it is not going away and that unless they embrace it, get comfortable with it, learn how to make it work for them, learn how to dominate it, they will lose market share.

This creates an internal conflict for the companies: they know that if they continue to delay their involvement, they endanger their potential for market predominance and indeed give even more encouragement to free file swapping; if they do embrace the Internet, they know that they are ordaining

the death of the market-place that is their own present comfort zone and the foundation of their current prosperity. It is a hard choice.

That said, after their early bumbling efforts, the record companies have clawed back considerable control of on-line music distribution. By combining business acumen, lawsuits and market power, they have bankrupted, acquired or effectively marginalised many of their pirate competitors. At the same time, by licensing product either directly or to legitimate on-line distributors, they are creating a legal alternative for consumers.

There have been many casualties. Of the victims of the two dot com crashes of 1998 and 2000, many were music-based companies. Virgin Megastores ceased on-line distribution and went back to its bricks and mortar business. Momentarily high-profile Atomic Pop.com, died in 2000. Early 2001 saw the collapse of Musicmaker.com which was a well funded public company backed by AOL and BMG. Discjockey.com couldn't make a business of it. Napster never did have a business model and eventually sold out to Bertelsmann under the weight of lawsuits. CDNow, which in the late 1990s seemed to be a coming heavyweight, nearly went broke and had to negotiate acquisition by Bertelsmann. (The German company was early to recognise the significance of on-line delivery and while every one was busy suing Napster, it realised the value of the brand and acquired the name very cheaply - so that it could later resurrect it.)

All of this was perhaps predictable when the share price in all the dot coms listed on the NASDAQ, fell by no less than 92% during the 1999-2000 period. This was an astonishing fall out. Very few businesses can survive this kind of haemorrhage. Even those that survived, shed both staff and rhetoric.

Part of the problem was that, for a long time, the record companies were not prepared to accept that consumers were not prepared to pay high prices for on-line music. It was not until iTunes became successful as a retailer that the message was made clear: The old pricing structures based on hard-fought-for record prices (despite the pressure from the record retailers) could not be maintained. iTunes demonstrated that the subscription service was not the only financial model; if the price was right, customers would buy individual tracks. Indeed, that was what they wanted!

Just as it was a computer company that cracked the legal download market, it seems to be the on-line companies and the telcos that are beginning to dominate the nascent business of on-line music stores: iTunes, BigPond Music, Yahoo Music, eMusic are dominant although there are many smaller players, including labels and, of course, artists. In the on-line world it would appear that the Majors might be losing their dominance as distributors of music. The present trend indicates that record companies will be predominately makers and marketers of music product. The old industries

of manufacture and distribution will be relegated to minor parts of their business.

And what about the record store? It is impossible to discuss the impact of the download without thinking of the effect that the download has already had on this traditional form of retailing. In February 2006, the director of Brazin (the company that runs HMV, Sanity and Virgin record stores in Australia) announced the introduction of Fast Tracks Kiosks to allow customers to buy single tracks for download on either CDs or MP3 players. Record stores are not taking the download lightly. They realise that they have to learn ways of retaining relevance in a different distribution environment.

### **THE SLOGANS THAT COME AND GO**

In the mid-1990s, every article about success on the Net seemed to stress brand recognition. Certainly, one of the ways that the public can gain reassurance and comfort in a new environment, is through brand recognition. Quite simply, people will be more likely to use an unfamiliar medium for commerce if they are dealing with people or things that they trust. That is what brand recognition is all about. Nowadays, so few years later, we realise that brand recognition is valuable but not determinative. No one buys a record because Sony is distributing it. They buy it for the content. (Perhaps the exception to this is the product of smaller, quality labels such as ECM were someone might buy on the basis that they don't release anything that is not, at least, interesting.)

These days, we don't hear so much about the role of brand recognition. Experience is proving that content and price is more determinative on the Internet.

Similarly, at the end of the 1990s, the catch-cry became 'on-line communities': the presence of like-minded fellow travellers provided the comfort zone necessary for on-line business to flourish. The NASDAQ crash of 2000 killed off many of those warm and fuzzy thinkers.

In the on-line music world there are only three words that should be accorded icon status: 'content', 'access' and 'price'.

### **NEW TECHNOLOGY AND ARTISTS' ROYALTIES**

Fortunately, instead of being the beginning of the end for musicians, each advance in recording technology seems to have increased demand for music and for musicians. Each new technology always has a definite impact on recording contracts. Unfortunately, unless recording contracts have provision for the new media, the artists risk not being remunerated properly for their efforts and the artistic integrity of their recordings may be at risk.

When the compact disc was being introduced, the record companies immediately made sure the artists contributed to offsetting the enormous re-tooling costs by taking a royalty cut on records sold in the new medium. First the ‘black-disc equivalent’ clause was used. This capped compact disc royalties at the same dollar values as was paid for the equivalent vinyl records. When that fiction became too embarrassing to defend any longer, it was superseded by a royalty reduction for new technology and/or with so-called packaging deductions.

They were (and largely remain) ‘non-negotiable’. There is an argument that the new medium boosted sales and that it was ‘only fair that the artist share in the establishment costs’. On the other hand, if this is so, it is one of the few examples in the history of commerce where the cost of product development was recouped from a part of the creative team rather than from the consumer of the end product!

The same thing happened with the introduction of DCC and the MiniDisc format. Now the audiovisual and digital download technologies are the focus of the debate. There is always a new technology.

It is unclear at this time, how much users will be expected (or are prepared) to pay for legitimate music from on-line retailers. That said, it would seem that the success of iTunes has set the first reasonable price indicator. Nevertheless, until the content owners experiment with different pricing regimes there is much uncertainty. It remains very difficult for record companies and artists to evaluate the commercial worth of their copyright in the on-line environment. Certainly, most record companies are being cautious in dividing on-line revenue with their artists. From their perspective, considerable sums are invested in developing new technologies and they argue that in order to recoup this research and development cost, the artists should be paid less (up to 35% less) for sales in such developing markets. Let’s face it, CDs had become the dominant sound carrier for years before record companies ceased treating CDs as a new technology and subject to such royalty reductions.

That said, on-line delivery is a very different system to traditional physical delivery and bears potentially enormous cost savings for record companies in the manufacture, packaging, storage and distribution processes. There are, of course, costs involved in on-line delivery. There are the costs involved in encoding and watermarking music files including the licence costs for using such proprietary software, web development costs and there are the digital storage costs in running large computer servers. But this is nothing compared to the costs of making, pressing, packaging, warehousing and physically distributing CDs. Once an encrypted, watermarked music file is created and is sitting happily on a hard drive, all that is left is to procure a

licence for the track, send the sound file to an on-line distributor, retailer, or customer and then collect and distribute the sales income. This is largely an IT function. No warehouses to buy, secure, insure, maintain and staff; no delivery trucks and drivers; no defective returns to administer. The list goes on.

Now, in a perfect market, if the record companies are making more money per unit through on-line delivery then, competition principles suggest that they should pass these savings on to consumers and impart higher royalty rates to artists. In most cases this has not yet happened.

Many record companies are still treating on-line sales as though they were physical sales. In other words, artists receive a percentage of the sale price using the same royalty formulation that it applies to the sale of CDs. If, based on wholesale price, the royalty for a single might be 17% less of course 'new format' deductions (say 25%) and 'packaging deductions' (say 25%). The deductions erode the end royalty to about 9.5% of the wholesale price. So if a track is sold on-line for \$1.00 (excluding GST) the artist gets 8 cents. The record company pockets 92 cents. There is something wrong in that model!

Other companies, more appropriately, treat the download not as a sale but as a licence – which strictly speaking it is. (Either the company is licensing the customer to reproduce the recording by means of download or it is licensing an on-line retailer to grant sub-licences to its customers.) When analysed this way it is apparent that the artist should receive a much higher royalty. After all, record agreements provide generally that where the record company licenses a third party to use a recording (such as in a film) the artist receives 50%-75% of the net amounts received by the record company.

The record companies' concern is that, if on-line music becomes the predominant form of music sales and if the record companies are locked into a high artist royalty rate, they may be unable to recoup their large financial investment in the recording and promotion of the artist. Almost any analysis of this argument shows that it is flawed. What it fails to recognise is that the economics of the record business are not going to remain as they are. On-line distribution changes the economic model. Nothing remains constant - not even the traditional paradigm for calculating record company overheads or artist royalties.

For the moment, however, the record companies are being cautious. Until the commercial profit models are abundantly clear, the record companies are hesitant to commit to higher artist royalties or to lower consumer pricing. The cynical would say that the companies have no incentive to allow such benefits to flow through to either the artist or the consumer when the savings produced by on-line distribution can be better applied to company profits and executive bonuses. Damn the cynics!

If companies continue to adopt this passive-resistant approach, we must take comfort in the application of competition principles: A company that

wishes to attract top artists will have to offer a competitive royalty calculation model; if it wishes to sell large volumes of product on-line, its pricing is going to have to reflect the consumers' price sensitivities.

In any event, the move from free to fee will not be an easy one for the record companies. Firstly, as we have seen above, those people who are familiar with and see value in downloading music onto their computers have become accustomed to getting what they want for free. Secondly, there are many people who do not see (or do not understand) the additional value of downloaded or streaming music. Thirdly, particularly in Australia and despite encryption technologies, there is still a reluctance to divulge credit card details on-line.

What is certain, however, is that the music available through legitimate systems must be in a relatively secure format that allows record companies to maintain control of their music. Software developers are creating complex rights management systems that enable copyright owners to control how digital works are used. By embedding information into a music file, instructions can be given to the file player, such as a computer or MP3 player, to limit the way in which the music is used. (For example, instructions can be given such that the file can be downloaded for free but only be played for 30 seconds after which the user is obliged to purchase the song.) Hackers will always enjoy the sport of cracking such systems. That said, so long as there is a hurdle to deter the amateurs and a clear benefit to consumers, the legitimate market will continue to emerge. Indeed it is likely that technological methods controlling the use of intellectual property will deter pirate use much more effectively than threats of lawsuits.

## **ARTISTIC CONTROL IN THE DIGITAL AGE**

Digital manipulation already enables artists' voices to be added or erased, instrumentation changed, stereo synthesised and so on. The technical ability to alter recordings, even without access to the original multi-track tapes, means that recordings are vulnerable to radical alteration by third parties. Artists are likely to hear very different versions of their recordings, as others manipulate the originals.

Apart from the obvious problems this creates for copyright owners, it means artists, who often pay thousands of dollars to producers to get the sound 'just so', risk having their recordings changed - not always for the better. Copyright and moral rights go some way to preventing travesties from being produced but these only protect the composers and lyricists. In contract, artists who want to control manipulation of their recordings have to rely on contractual provisions that are inherently inadequate for the purpose.

## **COPYRIGHT ISSUES ARISING FROM RECENT AND FUTURE TECHNOLOGICAL DEVELOPMENTS**

### **DOES COPYRIGHT HAVE A FUTURE?**

There is a modern myth that the Internet is some sort of law-free zone. In spite of the popular writings of commentators such as John Perry Barlow, this is not so. The laws of the country apply to Internet just as any other form of communication such as mail or radio.

It is argued that because the Internet is based on a digital system, it is impossible to regulate bits in any meaningful way using the existing legal framework. It is certainly difficult at the moment (for the law always reacts to technological development and is therefore always a little behind), but many of the copyright problems thrown up by the Internet are not so very different from those posed in relation to other areas of social regulation: Defamation and obscenity are obvious examples.

It is also argued that the Internet is unique in that it is a medium that ignores national boundaries and thus national government control. Not so. Radio and TV broadcasts are everyday examples of media that have footprints that extend far beyond national boundaries and far beyond the possibility of local regulation.

Whenever a new reproduction or transmission technology comes along, one has to ask, 'Can the existing formulations of the law cope with the effects of the new technology?' The Internet is no greater challenge to the copyright system than the photocopier, which when it was introduced was supposed to presage the end of the text publishing industry. The Internet is just the latest in a long line of challenges to copyright provided by technology.

The continued existence of copyright is hardly worth arguing. It is an economic and cultural given. There are at least three indicators that this is so:

- First, copyright has long been entrenched in Western Europe and the United States and in countries such as ours which have been legally, socially and economically sculpted by those influences. This predominantly Western intellectual construct has developed into a powerful international network of treaties and organisations and through the internationalisation of communications and commerce, it has influenced the world.
- Secondly, the copyright-based industries are among the largest in our society. Intellectual property contributes billions of dollars to our corporate balance sheets every year and it is improbable that these corporations are going to simply allow these billions to be wiped off their asset registers on the strength of a few articles in Wired

Magazine or the IT pages of the local newspaper. In other words, commerce will demand an evolution, not a revolution.

What developed as a mode of cultural remuneration for individual creators is now established as integral to the balance sheets of many of the most powerful companies on earth and, as such, has become a fundamental part of the world economy.

- Thirdly, is history: The phonograph didn't kill the live performance industry as it was prophesied (although thankfully it probably did kill off the music box)! The tape recorder didn't kill the record business! Television didn't kill the cinema! The photocopier didn't kill text publishing! All developments in the law of copyright are technology-driven and all significant changes in the copyright industries are similarly technology-driven.

It is not the future existence of copyright but rather the future design of copyright that should be the concern of the industry. Given that:

- copyright is now inextricably a part of the cultural expression in which it is embodied; and
- copyright has now become an important factor in the national and world economy.

Simultaneous with the revolutionary effects of the Internet, or perhaps it is merely a part of it, we also have the impact of fibre optics, broadband, convergence and interactivity. Each of these technologies is influencing and enabling the others. Together, they have created a turmoil that is going to influence, if not completely change, the way we study, perform, record, market, distribute and enjoy music.

It is always useful to remember that most of these technologies were not invented as part of some considered social or cultural strategy. They are largely an accidental by-product of the scientific method that demands that the researcher reject all questions of cultural value and influence. The companies develop and market the technologies. We adopt and we adapt. The impact of these technologies on copyright is but one example of the way that we are forced to adapt.

Technology and culture are not enemies, they are inextricable; but we have a duty to consider the impact of technological developments on culture in general and, in particular, its effect on the rights owners who are, and will always be, vital to the provision of content and thus vital to the cultural richness of our community.

The challenge, just one of many, is to ensure that the laws of copyright adapt to the new technological environment in a way that feeds and encourages creative activity rather than in a way that inhibits or overwhelms it.

As we have seen in previous chapters, Australia has implemented a range of legislative amendments such as the Copyright (Digital Agenda) Amendment Act and the Broadcast Services Act to clarify parliament's intention that, in essence, what is protected in the off-line world is protected in the on-line world.

Given that technological advances continue to modify the way in which intellectual property is created and used, the laws will need to be continuously revised by parliament and interpreted by the courts to cover the ongoing process of technological change. What is clear beyond doubt, however, is that the Internet is no longer a lawless wonderland or an anarchic state. It is governed by the rule of law.

With a clearer legal framework, the commercial risks associated with investment in the Internet have been reduced. This has soothed the investors who have begun to pour millions into the development of legitimate on-line music ventures.

There are many matters that will influence what music copyright will look like and how it is exploited in the music industry.

### **COPYRIGHT MANAGEMENT**

One of the most important issues is how best to manage copyright material in the digital environment. It is now extraordinarily cheap and easy to store, re-purpose, manipulate and distort, and distribute.

These are characteristics that can greatly enhance the commercial value of the copyrights and this is reflected in the macroscopic view of corporations which are acquiring content through takeovers or strategic alliances and in the microscopic view which sees the release of a record and video featuring a long-dead Nat King Cole singing with his very much alive daughter thanks to the miracles of digital technology (and our ability to suspend belief). It sees Forrest Gump talking with President Kennedy.

On the other side of the coin, distortion and manipulation is an important moral rights issue for the authors of content. It is also important for every company whose business is the administration, exploitation and control of that content. The use of copyright without remuneration obviously affects the rights owner's ability to make income from their work, but the distortion and manipulation of one's work can not only deprive the rights owner of income in respect of that reuse, but also derogate the value of the original. Copyright control and supervision is not just an issue for the creators, it is an issue for the boardrooms.

### **PROMOTING CONTROLLED COPYRIGHT ACCESS**

The cost of getting lawful access to copyright material is considerable. The traditional forms of licensing take time, skill and money. Interactive technologies require us to look for new ways of granting access.

The granting of statutory compulsory licences (such as the mechanical licence administered by AMCOS) is one way that the community ensures access but generally, compulsory licences are an unwarranted interference with the right to control one's own valuable property. There are other approaches that should be investigated and encouraged. They are all based on a balancing of competing interests. On the one hand, easy access by the user and on the other, protection of the commercial and cultural interests of the owner.

The development of an international, reliable mechanism for the authoritative identification of works, uses, permissions, income collection and distribution, is essential. There are two ways that this might go.

**(I) ROLE OF COLLECTING SOCIETIES**

The role of the copyright collecting societies will become even more important than they are today. To achieve this, these societies themselves are going to have to be at the forefront of IT research, development and implementation. They are going to be responsible for the design, administration and supervision of the process by which uses are identified, royalties are collected and by which rights owners are identified and remunerated. Few individual rights owners will have the resources effectively to administer their own rights.

The proof of this has been the facilitative approach of APRA, AMCOS and the PPCA in negotiating a regime for downloads and web-casting.

**(II) DIGITAL OBJECT IDENTIFIERS**

As part of this strategy, many of the major international societies together with a number of the major content owners combined in a major research initiative called the INDECS project. This was based on the need to develop digital object identifiers (DOIs) by which users and uses could be identified and administered. It was an ambitious project and resulted in a cataloguing system that may yet provide the basis for a reliable international DOI structure and standard. Quite simply, until there is such a standard in place, the effective and reliable administration of copyright on the Internet is going to be cumbersome and expensive and the prophecies above, concerning the online access to the world repertoire of legitimate content, will be impossible.

The digital age may be one in which everyone has the ability to be a content provider but only those who administer their rights collectively will be able to maximise their commercial benefit. This is one of the great ironies of the digital revolution: The mechanisms of freedom of expression will be anarchic, but the income mechanisms will be largely collectivised. Or is this so?

The emergence of a DOI standard, while essential for collecting societies to administer web-based transactions, is also the seed that may grow to make the role of societies virtually redundant.

There are now several companies investing very large amounts of money in developing software that will permit the trading of intellectual property material online. There are various models, each too complicated for this discussion but each seeks to provide a simple way of distributing digital content for a fee that is determined by the content, the user and the use. The largest and best funded of these initiatives, Intertrust, is a United States-based strategic alliance of massive companies rich in copyright and content. It was due to launch in mid-2001 but it got enmeshed in a legal battle with Microsoft - a fight that was only settled in mid-2005. There is nothing like the payment of a \$440 million settlement and the inking of a nice long-term licence agreement for Intertrust's digital rights management tools, to bring joy to a boardroom. (See [www.intertrust.com](http://www.intertrust.com)).

These systems could largely do away with the need for collective administration and thus the role of collecting societies. Each content owner will theoretically be able to mark, distribute, trace, set terms, trade and collect payment for, his or her own material. That said, this is likely to assist only large-scale owners, as the small distributors such as individual artists are unlikely to have the resources to administer the various component functions. There will still need to be a degree of collective administration to support such owners. (This is a bit like the current functioning of AMCOS; large record companies don't need to use AMCOS to license the mechanical rights from publishers - they can do this themselves, direct with the relevant publishers. AMCOS is essential for the smaller operators that do not have the administrative resources to do it themselves.)

## **POLICING COPYRIGHT**

Copyright tagging, watermarking and unique identifiers permit the owners of digital material to be able to identify their property wherever it is and however it has been modified or distorted. This technology already exists and, as it develops, will overcome many of the present problems of identification.

Of course it is only useful in respect of material that has been tagged or watermarked. This takes resources. Then it takes even more resources effectively to use, supervise the tagged or marked material, administer the granting of access to it and operate some system of stopping non-authorized use.

This is going to give rise to the 'killer app'. It doesn't exist at the moment but every copyright owner looking to trade content on the Internet wants it and needs it. Bad.

Let's call it the 'Exocet bot': a very directional and efficient destructor. We already have 'intelligent agents' or 'bots' that are capable of trolling cyberspace identifying these tags and tracking the copyright material across the Internet wherever they may be. What does not exist is a bot that can identify an unauthorised use of a digital object and simply disable that object while it is sitting in the user's hard disk. In a sense it would be a 'white virus' - affecting only material that was illegitimate. Of course, the legal issues arising out of such technology are considerable (but that's not all bad!).

### **COLLECTION OF COPYRIGHT INCOME FOR INTERNET USE**

None of the payment collection mechanisms currently used on the Internet is ideal. Each has its disadvantages. Most of the problems are related to security issues and the cost of financial administration. This is where the telcos have the great advantage over most other service providers: they have highly automated and reasonably reliable billing systems already in place. What is more, they are internationally available and already familiar to millions of phone users. As such they are readily accessible and have a major comfort and confidence factor. The provision of billing services for intellectual property trades is potentially a very large business for the telcos. Accordingly, it is predictable that most content providers will seek to form strategic alliances with Telstra or its competitors, to provide the billing backbone of their business.

The other likely enabling technology will be the new generation of smart cards. Although this technology was probably over-hyped in its early days, it is now coming of age. For example, imagine a card, loaded with the necessary financial information which, when inserted in your computer or mobile phone, simply conducts the payment part of the transaction automatically. This technology presently exists. It allows the payment and collection of revenue with minimal administration and expense.

With intellectual property transactions on the Internet, the multi-layered nature of the licensing means that the transaction is much more complex than most e-commerce. One digital object (or song) may embody rights owned or controlled by several entities. Each requires a small piece of the payment for use. This can certainly be done most cost-effectively in a computerised transaction but it is still to be seen whether that is most effectively achieved by distributing the necessary software to each user's computer (say bundled with the operating system) or through the operation of ASPs that would permit greater security and would make software upgrades comparatively simple to implement.

## **THE FUTURE OF ON-LINE MUSIC – 'THE TIMES THEY ARE A CHANGIN'**

When Bob Dylan sang of the radical social changes of the 1960s, his song was a plaintive cry to the conservatives of the day to accept that the world will never be the same. While forty years old, the song is still used as a revolutionary anthem. The message is one that needs to be heard by the record industry today: 'you better start swimmin', or you'll sink like a stone'.

At the time this chapter was written, the music industry was in the early stages of its latest metamorphosis, the online delivery revolution. As this and the previous chapter have tried to show, the music industry has been continuously subjected to technological developments and with each such development, the industry has embraced the change and turned it to a profit.

With the development of digital technology and ever cheaper and more powerful computers, technology has changed the way music is created, used, copied and enjoyed. The Internet has provided new ways for it to be delivered. Where consumers have been faster than the big record companies to adapt to these changes, opportunities have appeared for new players. These more agile new businesses have challenged the record companies' traditional business models and income streams, leaving them with Dylan's ultimatum - learn to swim, or sink.

Although they have been slow off the mark, the major record companies have finally made clear their intention to lead the industry through its next big change - on-line music delivery. With their financial and market muscle, not to mention their enormous catalogues, the Majors have the power to transform access to music - and thus the business of music.

This will be no easy task. The music industry is heavily entrenched, physically and conceptually, in a business model that has been fine-tuned over the last 100 years. No wonder the record companies have been such reluctant supporters of the revolution.

The key to overcoming consumer resistance is 'access'. On-line music's real drawcard is that it potentially offers access to the world's entire record repertoire, past and present, directly from the record company. That access should be cheaper and easier than going down to the local record store.

On-line music is a great idea. There is no shortage of prophets foretelling the time when every mobile phone can access any song ever recorded and stream it to your stereo or headphones, you'll pay 5c per song to go on your phone bill to be split between the various rights owners and the telco. Sounds great. We're waiting.

## A POSSIBLE FUTURE

Having covered so much ground focused on the past and the present, we should have a think about what the future might look like. This is true risk taking!

### A STORY

The following scenario is based on current and emerging technologies: It assumes the ongoing development of interactive media, of community access to broadband and ever-increasing computing speed. (This piece of future -gazing was written in 1994 and still remains relevant!)

Let's imagine a person wants to see an opera at the Sydney Opera House. She is in her lounge room in Singapore. She turns on the media centre. The media centre delivers the household's complete entertainment and telephony requirements. Through it, on a pay-for-play basis, she can access the world's music repertoire, an enormous library of films and other audiovisual programming and she has the option of both aural and audiovisual telephony. It is, of course, also a computer and has the usual email and fax facilities. What is not self-adjusting is voice activated and voice controlled. By voice instruction given to the remote control, she requests access to the Music Channel; Opera; Sydney Opera House.... (and so on).

The media centre immediately accesses the desired channel and program. She is able to watch live or recorded events. If she wants to see a performance or an incident from a different camera angle, she has only to ask. If she wants to know the performance history of a particular singer, she has only to ask. The data is immediately thrown up on the screen in the right-hand corner so that she doesn't miss the live action. If she wonders how the singer trained to achieve such a level of performance or what the singer's home town looks like, she has only to ask. She can buy some genuine Opera Australia merchandising by requesting to see the range, making her selection and paying without leaving her chair. If she wants to listen to a recording before purchase, she can do so. The whole transaction is voice controlled. The media centre automatically does the form filling on the basis of her pre-programmed personal details. She approves the transactions before they are completed. Then she leaves a message on the viewer response line. Seeing the world's best has excited her and she immediately calls up the on-line music reservation service and books her seats for the Singapore Opera next January.

At the end of the month she will get a statement of account that will include all her purchases, her bookings and her on-line access fees.

She may never have been to an auditorium. Yet she is an active participant in music. She doesn't know it, but she is a very valuable asset to all participants in the music business.

## FEATURES OF THE POSSIBLE FUTURE

This is a possible future. Most of it is already technologically possible. It is neither science fiction nor mere speculation. In an age when media rights are negotiated for several years at a time, it is important to spend expert time trying to work out what the most likely future will be. If you don't, the future becomes the present and you are unprepared for the change.

In the world of music media, if you miss the technological change, you can miss the opportunity. This can cost you dearly. Rather, you must develop and implement strategies to maximise the opportunities that this inevitable future presents. It is a future with many unknowns but some things are certain: multi-format media and interactivity will be basic elements in the way that you communicate and present your music and music services to the world.

What are some of the features of the futuristic tale?

- The technology was a basic home facility.
- The technology was simple to use. It didn't require knowledge of systems or software. The cleverness of the technology was invisible.
- The response time of the technology was almost immediate.
- The viewer had no resistance to using the service for shopping.
- The machine could respond to various programmed languages.
- The machine had a fuzzy logic capacity; it could make inferences as to what the viewer wanted or meant.
- The machine was truly multimedia.
- The available programming was diverse in interest although thematically consistent. Everything related to the music but it had action, lifestyle programming, travel, etc.
- The viewer was more actively participating than a television viewer, radio listener, newspaper reader or record listener.
- Although the activity was in another country it could be used to stimulate audience attendance and other benefits in the viewer's local country (International presentation; local stimulation).
- The activity represents an integration of music, commerce, domestic life and technology in a seamless and effortless continuum.

## TIMING

When will it happen? The arrival date of a technology is determined by what might be called confluence. Basically, the future tale cannot be realised until there are a number of ducks in a row. Let's just take 12 of them:

- Watermarking and tagging of copyright material to allow effective tracing and identification of rights usage;
- Development and invisible availability of effective encryption technology to protect financial transactions and reduce user resistance;
- Increased speed of information transfer: not just top-end but rather, the public average;
- Increased storage capacity: hard discs and other technologies that permit enormous quantities of data to be stored and accessed by vast numbers of users simultaneously;
- Domestic media hardware that has the technical capacity to be truly multi-format and truly interactive - at a price that allows it to be pervasive and with an ease of function that disarms the average person's resistance to complicated technology;
- Reliable and trusted information technology solutions to the charging, collection and distribution of micro-payments;
- Easy-to-use online copyright licensing software that permits flexible, 'granular' licensing;
- Multi-industry acceptance and implementation of a universal system of identifying digital objects;
- Content that makes the public want to adopt and pay for the new technology;
- Content makers (including musicians and record companies) who are prepared to make material that is suitable for the new delivery formats and who are prepared to rethink their traditional business models;
- New marketing paradigms that are based on the digital, online environment rather than the old, atom-based world;
- Confluence: these developments have to come together before we can have a real, online, interactive, entertainment economy;
- And when will we have confluence? The most unreliable thing about trying to guess the future is to judge the timing. Still, by the time you see the next edition of this book, this chapter will look quaint and old fashioned. Confluence will have occurred and today's future will have arrived.

## CONCLUSION

Technology and culture are not enemies, they are agents of mutual influence and change. All participants in this process have a duty to consider the impact of technological developments on culture in general and, in particular, its effect on the rights owners who are and will always be, vital to the provision of content and thus vital to the cultural richness of our community.

New technologies can kill older technologies. Their introduction is rarely fatal to any art form. The invention of the camera did not mean the death of painting; film did not kill the theatre; the photocopier did not ruin the book, and so on. Rather, technological innovations act as catalysts and modifiers of the arts. Each changes the way we practice, conserve, distribute, market, promote, sell, study, criticise and enjoy, the arts.

The power of technology undoubtedly influences the music industry but in doing so it creates new forms and new opportunities for enhancing its aesthetic, social and economic impact.

Technological invention is rarely part of some considered social or cultural strategy. It is largely a by-product of the scientific method that demands that the researcher reject all questions of cultural value and influence. Corporations develop and market the technologies. We adopt and we adapt. The impact of these technologies on copyright is but one example of the way that we are forced to adapt. In spite of the ‘copyright is dead’ cant that it has been generating, the Internet poses no greater challenge to the copyright system than the photocopier. It is just the latest in a long line of challenges provided by technology.

Given that copyright is now inextricably a part of the cultural expression in which it is embodied and has now become an important factor in the national and world economy, it is not the future existence of copyright but rather the future design of copyright that should be the concern of the music community: how we manage copyright material in the digital environment; how we protect it from theft, manipulation and distortion; how we do that while still promoting access to it?

Copyright must continue to play an essential role in any modern, developed, sophisticated society. At the end of the day, the rights of copyright are an award for innovation, creativity and risk taking. This recognises that both the culture and the economy of our community is dependant on encouraging and fostering these characteristics.

Whatever happens, there is no reason to think that the demand for music will decrease in any way. If anything, it is likely to increase. It will certainly become even easier to access. Online delivery of music is going to mean great changes in the way that publishers and record companies operate; it will change the way that performers and composers work and the sort of material they produce; it will change the legal relationships between the talent and the companies; it will change the exploitation media available to the companies; it will change the way you use music to communicate with your market.

As you can see from the brief history provided by this chapter, we can look back and see how fast the future arrives, is overtaken and dismissed. For record and publishing companies to survive and flourish in the digital age, they will have to overcome the disadvantage of being creatures of an earlier age. The old media tools and existing marketing recipes will no longer necessarily be relevant. That is why it's a revolution. All of the old paradigms must be challenged. We cannot know what the future will be, but we must acknowledge that if we are to be part of the new commercial, social and cultural order, we must be part of the revolutionary force, not its subject.