

Tools of Infringement

Evolving file-sharing technology raises hell with copyrights.

BY DANIEL EPPS

Walk around the UO campus and the iPod users are easy to spot. Look for white headphones and colorful carrying cases. But it's harder to tell how those students have stocked their portable Apple music players with songs. Have they paid for their music, or have they downloaded it off the Internet for free? That question is at the center of a nationwide controversy, which includes heated policy debates on university campuses.

Some schools, like Penn State, make all students pay for unlimited legal downloading licenses as part of their basic fees. Others are fairly hands-off when it comes to students' downloading activities. The UO is among the schools that have taken a more punitive approach. Students who use the UO network to download or share copyrighted files are subject to warnings, restrictions of their Internet access, and even prosecution.

In 1999, the UO alerted federal authorities to a student named Jeffrey Levy. He became the first person convicted under the "No Electronic Theft Act," a 1999 law written to crack down on the unauthorized online distribution of copyrighted material. Levy had run a website providing free access to music, software programs, and movie clips. He received only probation and restrictions on his computer use, but could have gotten three years in jail and a \$250,000 fine.

A more typical case is that of Alex Frix, currently a second-year law student. His first term at the UO, he was using a version of the file sharing service Gnutella, and inadvertently downloaded commercial video editing software. He received a threatening letter from the Business Software Alliance, a software industry group, and had to meet with university officials. In the end, all the university did was send a four-page letter detailing UO sexual harassment and abuse policy to his parent's house. While comical, Frix's case shows how closely students' Internet activities are watched.

These students' stories are episodes in a much bigger dispute over copyright, freedom of information, and the ultimate ownership of culture. Last October, the Supreme Court heard arguments in *MGM v. Grokster*, a case that may be a bellwether for how the government will answer these questions in the next few decades. An issue that many think is only about teenagers and college kids "pirating" Metallica albums actually touches on much more fundamental issues of social values.

A short and eventful history

File-sharing is older than Napster, but most accounts start there, and it's as good a beginning as any. The brainchild of a 19-year-old college dropout, Napster was a service that let computer users easily download and share music files in MP3 format, a form of encoding that shrinks large CD audio files to manageable sizes. Napster grew immensely popular, but also drew the ire of record companies. Fearful that CD sales would plummet with freely available music, the Recording Industry Association of America (RIAA) filed a lawsuit claiming that that Napster was responsible for any copyright infringement by its users. The San Francisco-based U.S. Court of Appeals for the Ninth Circuit agreed and shut down Napster in July 2001.

Since the end of Napster, several potential successors have emerged. Some, like Apple's iTunes Music Store, are RIAA approved and sell songs and albums for a little bit less than their CD equivalents. But a second-generation of peer-to-peer file-sharing programs is now available, such as KaZaA, Limewire, and Grokster. Unlike Napster, they are much more difficult to stop. Napster worked like a telephone operator — a central server compiled a searchable list of the users connected and what files they were sharing. If one user wanted to download a song from another, Napster simply connected them. All the file transfers went directly between users — that's what's meant by "peer-to-peer." Nonetheless, once the Napster server was shut down, the whole network collapsed. With no server, users had no way to connect to each other.

With Napster's downfall in mind, designers of second-generation file-sharing networks built them to require no central servers. When a program like Limewire opens, it starts looking for other users, and as soon as it finds one the first computer is then connected to all of the other users to which the second is connected. Searches are routed through "supernodes" — home users with fast connections whose computers take on the role formerly played by a central server. All of this fancy networking is done in the background, so the user experience is not that different from using Napster. And while Napster was limited to music, the new peer-to-peer programs can be used to download all sorts of files, including movies.

A war fought in the courts

The RIAA and, more recently, the movie industry, have taken a two-pronged legal approach to stopping users of these new programs from downloading copyrighted music and movies. They've brought suits against individual file-sharers, who have had to agree to expensive settlements or face even more expensive trials. Almost all choose to settle. At the same time, entertainment companies have sued the makers of peer-to-peer software. The lawsuits against individuals seem to have at least partially achieved the desired result: They've stopped some computer users from downloading files for fear of legal reprisal, although millions still use the programs —

including plenty of UO students, although few are inclined to go on the record admitting to downloading.

The legal effort to stop peer-to-peer software designers has not fared as well thus far. The Ninth Circuit ruled in favor of Grokster last year. But the Supreme Court will get the last word.



Keith Aoki

The central question in *Grokster* is subtly different from the one in the Napster case. Napster was a service that actively helped users commit copyright infringement. Grokster is just a tool, with copyright infringement one possible use among many. The case turns on whether such programs should be legal, and whether those who make them can be allowed to profit.

Remember the Betamax

The Grokster case is strikingly similar to one of the most important intellectual property Supreme Court decisions in recent years, *Sony v. Universal City Studios*. Movie studios wanted to stop Sony from selling their Betamax tape recorders, because they feared that viewers would use the devices to make their own copies of movies broadcast on television, and thus be less likely to go to the cinema or rent tapes. The Ninth Circuit had found for the movie companies, citing the potential for abuse inherent to the device. In a surprising move, the Supreme Court reversed the decision, ruling that a device needs to be merely "capable of substantial noninfringing uses" in order for the inventors not to be subject to liability. The justices rightly observed that while some Betamax owners were using the recorders to build large collections of movies, most were simply using them to "time-shift" shows — that is, to record programs they wanted to watch later — a practice the Court said was not an infringement of copyright law.

Twenty-one years later, few think that *Sony* was decided incorrectly. The "time-shifting" abilities of VCRs made them incredibly popular; instead of hurting the movie studios' bottom line, this phenomenon just gave them a bigger market. With so many homes equipped with VCRs, video rental and sales become hugely lucrative. Now, videotapes and DVDs account for more of Hollywood's profits than big screen releases.

The lesson many draw from *Sony* is that entertainment companies don't always know what new technologies will do to their profits — to what extent file-sharing has actually hurt record sales is hotly disputed. In addition, giving copyright holders whatever they want might not be in the best interests of society in the long run. Some downloading activity that entertainment companies are trying to stop may be making them money. One UO student said that she started watching the new UPN drama *Veronica Mars* midway through the season after downloading the episodes that aired before she discovered the show. "Without downloading, I would never have been able to get caught up until the DVDs came out, so I probably just would never have