



**FREEDOM OF  
EXPRESSION®**

Overzealous Copyright Bozos  
and Other Enemies of Creativity

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**FOURLEADAY**

NEW YORK LONDON TORONTO SYDNEY AUCKLAND

**PRINT** No printing is permitted of this book.  
**LEND** This book cannot be lent or given to someone else.  
**GIVE** This book cannot be given to someone else.  
**READ ALOUD** This book cannot be read aloud.

Only after intense lobbying from the American Foundation for the Blind did the Librarian of Congress grant a DMCA exemption that legalized the unsavory crime of reading e-books aloud. Copyright was originally conceived as a way of dispersing knowledge and culture. But for nearly five years the DMCA was pretty much responsible for keeping blind people from accessing e-books such as *Alice in Wonderland*. Even though *Alice* and many other e-books are in the public domain, by converting them into digital form, companies can recapture works whose copyrights have lapsed. In doing so, they create newer, more innovative ways of eroding our cultural commons that go beyond the mere extension of copyright-protection terms. Also, they can create protections that are virtually infinite, rather than respecting the balanced bargain that has been at the core of copyright for over two centuries. It's a sign of the times when overzealous copyright bozos move to make *everything* a billable event, tightly controlling all access to their property.

In the old days, for instance, we could purchase a book and take it home, read it, mark it up, store it for years on our bookshelves, photocopy a chapter, loan it to a friend, or whatever. Such uses are protected by what lawyers call the "first sale doctrine," which essentially states that when you purchase a copyrighted good, you can resell it, give it to a friend, or make personal copies, among other things. Unfortunately, this doctrine is quickly evaporating in the digital world. Under the DMCA, content providers can now regulate who can see its product, how long it can be viewed, whether or not it can be copied, and what can be done with it. This signifi-

## CHAPTER SIX

### THE DIGITAL FUTURE

and the analog past

**T**alk about the law being blind and dumb. Not until late 2003 did it become legal for blind people to listen to certain e-books without a copyright owner's permission. For whatever overprotective reasons, it wasn't unusual for publishers to disable the "read aloud" voice synthesis function on the computers that stored e-books. Software companies were too scared to pick this digital lock—no matter how easy it was, or how much common sense it made—because it was a violation of the Digital Millennium Copyright Act. Among other things, they were chilled by the 2001 arrest of Dmitry Sklyarov, the Russian computer programmer mentioned in the last chapter who was jailed on DMCA charges. His employer developed software that broke a publisher's restrictive rules, such as the following ones that appeared on the copyright page of Adobe's e-book edition of *Alice in Wonderland*:

**COPY** No text selections can be copied from the book to the clipboard.

cantly rewrites rules that had been in place for years and struck a balance between copyright holders and the public.

#### EMBRACING A REMOTED FUTURE (WHILE FORGETTING THE PAST)

Soon after Apple introduced its iTunes store—which legally sells digital music files with “locks” that prevent free copying—a Web developer stirred up a digital hornet’s nest with his online performance-art piece. George Hotelling placed a song he purchased from the iTunes store on the Web auction site eBay, promising to donate any surplus proceeds to the Electronic Frontier Foundation. “I’d just like to know that if I buy something, whether it’s physical or intellectual property, that I’ll have my right of ‘First Sale,’” stated Hotelling. “It underscores the fact,” added Fred von Lohmann, a senior staff attorney at the EFF, “that when you purchase digital music online today, you may be getting quite a bit less for your money than when you purchase a CD in a store.”<sup>1</sup> Eventually eBay yanked Hotelling’s song for violating a ban on goods purchased and distributed electronically. Because Apple never had a chance to weigh in on the debate, the status of the first-sale doctrine for legally downloaded music remained murky.

Justifying their actions, copyright owners argue that without strong protections against digital leaks, they’ll no longer be able to make money. They constantly remind us that the Internet and digital distribution are different from that which came before. Although this is partially true, they are still dehistoricizing the current situation. Virtually every time a new technology has been introduced, copyright industries have hysterically and hyperbolically responded the same way. After all, even the *phonograph* was supposed to destroy the music industry at the beginning of the twentieth century. Of course, there was a reorganization of the music industry,

but music itself didn’t suffer—instead, the industry got much, much bigger.

“What we find, historically, is that the folks who do best are those who embrace the new technologies,” says Brian Zisk, co-founder of the Future of Music Coalition. “The King Olivers and those folks who are early and got their stuff on records built this following.” But the early twentieth-century musicians who wouldn’t let their music be recorded have been forgotten. “They may have thought they had a legitimate reason to say, ‘We don’t want people to copy our licks,’” Zisk continues, “but it’s really about how to get as many people to hear your music as possible.” Then radio was supposed to ruin the newly emerging recording industry because, well, if people don’t have to pay for the music they hear, why would they go out and purchase records? The answer soon became obvious: The more people heard certain songs for free, the more likely they would buy a familiar record. Radio turned out to be a fantastic promotional tool.

“Radio was also supposed to end live music because people were going to stay home,” says Steve Albini, someone who knows more than a thing or two about the music industry. Over the past quarter century, Albini has produced or engineered over one thousand albums for more than one thousand artists—ranging from relatively obscure critical darlings (Nina Nastasia, Man or Astro-man?, Low), midlevel acts (the Pixies, P. J. Harvey, Weezer), and multiplatinum stars (Nirvana, Bush, Cheap Trick). “What actually happens is that every single one of these [innovations] increased the general public’s participation in music,” the recording engineer tells me. Albini said this before literally suiting up—in a specially designed jumpsuit all his engineers wear—and getting to work in his Electrical Audio studios in Chicago. They look like a team of über-cool crime fighters.

“This stuff came about *because* of these technological advances,”

he says, "not in spite of them. The radio made people excited about hearing live bands because they'd hear live bands in a ballroom with this excitement going on, and the ballrooms exploded in popularity after radio." With hindsight, it's perhaps too easy to sit back and make fun of the shortsightedness of those who believed that radio would spell the end of the music business. But one can imagine why people thought that; this was a new technology, after all, a wireless medium of communication that would supposedly reorganize society—sort of like what we've heard about the Internet.

Stanford law professor Lawrence Lessig argues that controversies over cable television foreshadowed the first Napster controversy. As a newly adopted commercial technology, cable television raised the hackles of the three television networks because cable companies were "stealing" their content. (Cable companies were pulling broadcasts from the airwaves and copying it onto their wires.) Under pressure, the Federal Communications Commission (FCC) halted cable's expansion in the 1960s, yet another example of how copyright conflicts can slow the development of significant new media technologies. When the FCC began reversing itself in the early 1970s, television program—copyright owners took the cable companies to court twice.

Judges sided with cable and left it up to Congress to strike a compromise, which legislated a compulsory "blanket license," similar to what radio and live-music venues purchase from royalty-collection agencies such as ASCAP. This license allows radio and television to broadcast copyrighted materials by paying a statutory fee set by Congress, not by copyright owners. It limits the monopoly rights of copyright owners by ensuring that they can't stifle competition by setting artificially high prices. Under the compulsory blanket-licensing system, copyright owners don't have the right to arbitrarily refuse permission to rebroadcast their programs

or to favor one company in its pricing schemes. This way, the cable industry was allowed to thrive, consumers had new entertainment options, and copyright owners were fairly compensated.

These blanket licenses are curious constructs. In chapter four I wrote about the legal fiction of the "corporate individual," and the way this plays out in broadcast and cable television raises important questions. First of all, who is the "author" of a television show or a movie? The multiple writers, the director, the actors, the producers who put up the money, the editors, other technicians necessary in such a production, or the channel that broadcasts it? Practically speaking, it's a puzzling problem, one that displays the cracks in the smooth veneer of the culture industry's conception of "the author." In his essay, "What Is an Author?," Michel Foucault argued that "we should reexamine the empty space left by the author's disappearance; we should attentively observe, along its gaps and fault lines, its new demarcations."<sup>2</sup>

In Hollywood, the death of the author leaves behind a chalky police outline of a homicide victim, a merely cartoonlike representation of a person. It's an imitation author, a corporate individual. The television or movie studio that funds and produces entertainment becomes a virtual author, which takes ownership of property created by a multitude of people. When a show is broadcast on cable television, cable companies pay statutory fees to an independent collection agency that then redistributes payments to individual copyright owners. Under the compulsory blanket-licensing system, the product has been turned into a *simulation* of property; a statistical formula based in part on Nielsen ratings is used to dole out slices of the royalty pie. As media scholar Thomas Streeter points out, with the blanket licenses there is no actual exchange of copyrighted products for money—it's more like paying and collecting taxes.

Although cable television was similar to Napster in important ways, some say that the decentralized nature of the Internet could make it harder for a similar licensing system to work. Comparatively, there are a much smaller number of cable companies than individual peer-to-peer network users, which makes it easier to regulate the cable broadcasters. In dealing with a rogue company, copyright owners can literally follow the hardwired cables back to the source and demand payment. The same isn't true of the Internet, where physical addresses are harder to track down—but it's not impossible, for there are technologies that can monitor file-sharing activities. After the dust settles on all the RIAA lawsuits, and after much legislative wrangling, the most likely and reasonable compromise on the file-sharing issue will be a relatively small fee tacked on to the Internet-service bills of individual consumers. The money could then be redistributed in a manner similar to what has worked for decades with broadcasters, something I'll return to later.

Also predictive of the Napster controversy was the introduction of the VCR. Hollywood viewed the VCR as nothing less than a mass murderer that would pick off movie studios like frightened teens in a slasher film such as *Halloween*. I'm not exaggerating in the least. Jack Valenti, CEO of the Motion Picture Association of America for years, tactfully told Congress the following in 1982: "I say to you that the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone." In the introduction, I quoted Valenti arguing that the VCR would lead to a "lessened supply of high quality, expensive high budget material where its investment recoupment is now in serious doubt."

Earlier, in the 1970s, RCA was developing a version of the VCR, but when they approached Hollywood studios, they were rebuked. Companies such as Disney balked at the idea of losing control of their copyrighted works, even when RCA suggested a mechanical

version of today's digital rights management technologies. The scheme: When a videotape played all the way through, it would lock up and could only be unlocked when the consumer returned it to the video store and paid a fee. But this was still troubling. "How could they know," asked a disturbed Disney executive, "how many people are going to be sitting there watching? . . . What's to stop someone else coming in and watching for free?"<sup>23</sup>

The idea that audiences could freely record and watch entertainment was a novel one, just as the Internet just recently felt wholly new, and it's understandable why executives felt threatened. But Hollywood was nevertheless very shortsighted and completely off base. The movie studios were forced to relent after they lost the Betamax Supreme Court case in 1984. The high court thankfully decided that the public had a right to record and watch movies as many times as they want—with as many people in the living room as they'd like—to the chagrin of Disney execs. Little did Disney know that letting millions of kids watch its movies over and over and over would boost the sales of its T-shirts, toys, and other related products.

As the market penetration of VCRs exploded, box-office receipts steadily increased, and VHS and DVD revenue became a major moneymaker for previously unnerved entertainment companies. Box-office numbers have continued to rise since the 1980s, and, in 2002, home-video revenue totaled \$11.9 billion, surpassing the \$4.2 billion in theater ticket sales. Also in 2002, Jack Valenti said about movie downloads, "It's getting clear—alarming clear, I might add—that we are in the midst of the possibility of Armageddon."<sup>24</sup> He wasn't talking about the Ben Affleck film, but he was beginning to sound more and more like Chicken Little freaking out about the sky falling.

At the beginning of the 1990s the RIAA lined up digital audio-

tape (DAT) recorders in front of the firing squad. Using lawsuits, legislation and, regulatory tactics, the RIAA severely stalled the introduction of DATs into the U.S. market and eventually killed potential mass market demand for this new technology. At the end of the decade, it sued to keep portable MP3 players from being sold in the United States (the RIAA lost this time). After that, Hollywood attacked personal video recorders (PVRs). PVRs such as Tivo allow people to digitally record television programming by using keywords and menus, something TV networks and studios have tried to ban. Although MGM's 2002 lawsuit targeted SonicBlue, which produces the most sophisticated batch of PVRs, it was also aimed at all PVR companies. MGM lawyers argued that their searchable keyword functions would "cause substantial harm to the market for prerecorded DVD, videocassette, and other copies of those episodes and films."<sup>5</sup>

I don't doubt that many entertainment executives are genuinely scared. Artists have worried no less than corporations that the new recording, reproduction, and distribution technologies would strip them of their livelihoods as their work becomes infinitely reproducible for free. This fear has proven to be unfounded so far—and is likely to be so in the future. In fact, these recent changes have the potential to disseminate a more diverse and democratic array of art than what was allowed to bubble up through the culture industries of old. It's for this reason that we shouldn't kill the creative potential of these new technologies before they have a chance to positively enhance the ways we produce, distribute, and consume culture.

#### FILE-SHARING AND CD BURNING ARE KILLING HOME TAPING

In the early 1980s, when the music industry slumped after its disco and-cocaine-fueled high—during a recession, by the way—record

companies blamed tape recorders, and the people who used them, for lackluster sales. They even came up with a bumper sticker—ready slogan, "Home Taping Is Killing Music." Record-company executives feared that the convenience of cassette tapes would raise an entire generation of people who believed they didn't have to pay for music. "Never before"—a phrase that pops up frequently in these debates—did so many music fans have the ability to copy music themselves. So, at the urging of the RIAA, Congress initiated a study of home taping, but the Office of Technology Assessment (OTA) issued a report that contradicted many of the industry's claims. The OTA report stated that, among other things, home tapers bought more records than nontapers and, conversely, the majority of nontapers didn't listen to or purchase prerecorded music.<sup>6</sup> The only study of home taping initiated by a record company, Warner Brothers Records, also concluded that there is a direct correlation between how much you tape and how much you buy. "These findings imply that, although related, taping may best be seen as independent ways of expressing a more general, underlying commitment to music," the Warner report stated. "In fact, the data clearly indicate that the stronger this commitment, the more likely one is to both tape and buy prerecorded music and engage in a variety of behaviors that also express this commitment to and interest in music."<sup>7</sup> Congress's report also found that home taping has a "stimulative" effect that fuels record sales, though it claimed that record companies need to find ways to get consumers to spend *all* their money on records, and *none* on blank cassettes.

Trading music is very much a social act. The sharing of songs with like-minded people exposes them to new music, increasing the chances of someone buying a new record. This is corroborated by my own experiences, the experiences of others, and the reports issued by Congress and Warner. I've been notorious for making lots of music compilations for friends, which I know has generated al-

bum sales. For instance, I gave my friend Megan Levad a mix-CD that included a song, "Iowa City," about our little college town. Eleni Mandell sings this pretty ditty as a country waltz with a chorus that goes, "Iowa, Iowa, skies are blue / Not so Chicago, Never New York..." Upon hearing it, Megan bought Mandell's CD for someone who had recently moved away from our beloved Midwestern town as a kind of musical postcard. When Mandell stopped in "the I.C." during a 2004 tour, I nervously told her this story, not knowing if she'd be offended by my piracy. The Los Angeles-based musician responded simply: "Cool."

Iowa City's best-known musical export is folkster Greg Brown, who is one of the crusty crown jewels of the town's roots rock scene. Another in the upper echelon of the local music hierarchy is David Zollo, a thirty-five-year-old piano player, singer, bandleader, record-label owner and, more recently, father of baby boy, Rocco (yes, his name is Rocco Zollo). A few weeks after the birth of his son, I dropped by Dave's house to talk about life, kids, music, and, as the conversation wore on, copyright law. I admitted to him that I obviously have no problem making mix-CDs of other people's music, but when it came to Dave's records, I've felt uncomfortable doing so. He laughed, and said he appreciated my sensitivity. But, Dave said, "I've *always* made mix-tapes. It's the idea that you actually become involved with the art and become an artist, in a way. And any time someone is actually involved, it makes them a part of the experience." One of the ways he courted his wife, Beth, was to make her tapes. Putting together music mixes has been a key part of mating rituals since music-possessed geeks learned how to press the record button on the cassette recorder.

"The act of making a mix-tape is an act of creative engagement," Dave Zollo insists. "I might listen to a Chuck Berry record and then write a song, so I am engaged in this music that has influenced me.

I've reinterpreted the music, released a record, and someone takes that song that I made and puts it on a mix-tape. And someone will tell me about it." Dave doesn't really make a hard distinction between the creative acts that music fans engage in and the music-making that he does—in part, because he's doing both. "Once my music has been put on someone's mix-tape, the work lives. It's been placed in another context, and been given importance because of what it's alongside. Like, first Tom Waits, then David Zollo. Holy shit, how did I get there? Then all of a sudden, that validates the work."

Sonic Youth guitarist Lee Ranaldo told me about how he and his wife, Leah, started a tradition of making mix-CDs of "classic oldies" for their kids' summer birthdays. "All the kids who come to the parties get one, and (hopefully) get turned on to all this music that is outside the realm of 'kids' music,'" he said in an e-mail. "Last year it was themed about colors, so yellow submarine, white wedding, 99 red balloons, good-bye yellow brick road, Michael Jackson's black or white, purple rain, green river, etc." These musical juxtapositions, however, will be harder to create if the recording industry fully embraces protected, proprietary digital files, either online or on CDs. If they get their way, we'll no longer own the music in the same way people did when they bought records and tapes—when they stored them in their homes and built libraries of music.

The introduction into the marketplace of CDs that can't be copied is one example of how intellectual-property owners are willing to protect their products at all costs, even if it means alienating consumers. One of those companies is EMI, part of the major label system that controls the distribution of 80 percent of the music sold in the world (it's down to only four companies now). EMI's response to Holger Turck—a consumer who in 2002 wrote a letter of complaint after he bought a CD with copy protection that was not

clearly labeled as such—demonstrates the arrogance (mixed with fear) of a corporation that feels threatened.

Even without formal study in economics, it should be clear to anyone reading this that the music industry cannot continue to exist if the trend holds. The widespread copying of prerecorded audio material via the burning of CD-Rs can only be countered one way: namely, copy protection. We fear, however, that all these facts will not interest you in the slightest, as these measures will herald the end of free music, which surely won't please you at all. . . . In the event that you plan to protest future releases of copy-protected CDs, we can assure you that it is only a matter of months until more or less every CD released worldwide will include copy protection. To that end, we will do everything in our power, whether you like it or not.

Sincerely,

Your EMI Team

True to EMI's condescending threat, which ignored the fact that this customer *bought* the album, in 2003 major labels began releasing copy-protected CDs into the marketplace. Although a few hundred million of these CDs had already been released in Europe, it was the first time the technology was deployed in the United States, though on a limited scale. By 2004, the number of CDs embedded with copy protections (the industry term is "digital rights management") had significantly increased in America—making it difficult or impossible to, for instance, place certain CDs on our iPods.

Companies such as EMI are increasingly treating their own customers like criminals. In 2003 the RIAA hired the former director of the Bureau of Alcohol, Tobacco and Firearms to head up its anti-piracy efforts. The next year, the RIAA won the FBI's approval to

begin using the law-enforcement agency's logo in its packaging. This has ruffled the feathers of quite a few artists on major labels, who have no choice but to deal with the fact that an "FBI Anti-Piracy Warning" dominates the lower fifth of their CD art. "Yeah, the FBI thing totally creeps me out," Lee Ranaldo says. "It's stupid in the extreme." Sonic Youth's 2004 record *Sonic Nurse* sported the mandatory layout the first week it was rolled out. "We happened to have our release right on the schedule for this new design invasion," Thurston Moore tells me. "Everyone was PISSED—I can see why—but, in a way, it was so absurd I kinda liked it."

As I've argued throughout this book, copyright was conceived of as a bargain, one that is supposed to balance the interests of both the creator and the public. Copy-protection technologies, however, only respect one side of this balance. "Hollywood and the recording industry," writes Robin Gross, an intellectual-property lawyer at the Electronic Frontier Foundation, "take all the privileges from the government-created monopoly but none of the responsibilities like ensuring fair use and contributing to the public domain."<sup>28</sup> When the RIAA and MPAA argue that theft is on the rise, and that it has steadily increased since the introduction of copying technologies, they are conceiving of copyright in relatively new terms.

Up until the 1970s, most legal briefs, judicial decisions, law articles, and books understood copyright as something that strikes a balance between the public and the creator. It didn't hand over *complete* control to the author; for the law was designed to provide a more porous kind of protection—not an airtight barrier.<sup>29</sup> Today, however, any activity that goes beyond adhering to the rules set by a copyright owner is considered theft, a quite significant change in the way we understand the role of intellectual property.



Krukowski tells me, "the only thing we had heard about it was from people who hadn't heard of us before, but were coming to our shows and saying, 'I heard about your band through Napster.' That was no different to us than hearing, 'I heard about you on college radio or a friend gave me a tape of your record.'"

Even the Dave Matthews Band developed its initial fan base by encouraging people to record their shows and give them to friends. This built a word-of-mouth following in the early 1990s that expanded the group's reach from Charlottesville, Virginia, to the southeastern tour circuit and beyond. They followed a road-paved by the Grateful Dead, which was one of the first to encourage tape trading. "The Grateful Dead sort of got it together," film archivist Rick Prelinger tells me. "They got the whole intellectual-property thing together while a million lawyers and activists were still spitting in their soup [like babies]. They figured out that there are going to be some things that are sold and some things that are traded. And the cohesiveness of that fan base kept it free. There's a real strong ethic that we can learn from; they had a trading policy that really worked. It meant that the fans get all their music, and they'd still buy."

The Dave Matthews Band have been hailed as the multimillion-selling successors to the Grateful Dead. In the beginning, though, Matthews was just another local musician when I worked at Plan 9 Records during the first half of the 1990s. We sold Matthews's independently released debut, *Remember Two Things*, as well as concert tickets, posters, and other merchandise. My record-store job gave me a vacation from my academic life because, at the time, I was an unhappy grad student in sociology at the University of Virginia with an interest in copyright law. Despite my best intentions, my music and scholarly lives intertwined. One day, Dave Matthews came into Plan 9, and from behind the raised checkout counter I

questioned him about why he allowed his music to be copied and traded. "You work at a record store," he said in his easygoing tone, "and I'm sure you make mix-tapes for friends."

"You're probably choosing songs that you think are good, or songs you think a friend would like. I mean, how else are they going to hear about a band and possibly buy the whole record unless they're exposed to the music?" He had a point. I hadn't quite thought of it in that way, I'm embarrassed to admit, until Dave Matthews said this to me. "So, no," Matthews said, "I don't think it's the same thing as stealing. The whole tape scene has served us well. We can't get on mainstream radio, and who knows if we ever will"—little did he know!—"so, it's a way of getting word out about the band, and with each year there are more tapes and bigger audiences." The popularity of the Dave Matthews Band rose through the late 1990s, and so did the Internet, which made this kind of music swapping easier and more efficient. In many ways, the band still benefits from the culture of trading—online and off—because it's part of what maintains connections among fans.

The spread of cassette-tape technology also created new outlets for disseminating music and ideas that had been silenced by governments and corporations around the world. For example, it created a seismic shift in India's musical landscape, which had previously been dominated by one record company until the 1980s. This monopoly created an extremely narrow selection of music that didn't reflect the diversity of tastes of the country's population. Before the spread of cassette technology, only large companies could afford to manufacture and distribute LPs; then, suddenly, a plethora of choices emerged from the ground up. Egypt, Thailand, Indonesia, and Sri Lanka also experienced similar transformations, some of which carried over into politics.<sup>10</sup>

Hip-hop thrived in the 1970s long before the record industry

paid attention; this also had a lot to do with the recent affordability of cassette recorders. During this time, the only way to hear hip-hop music was at live performances in South Bronx parks, public-school gyms, small nightclubs, or on boom boxes. DJs and crews sold dubbed copies of their live performances, and their fans copied these cassettes—passing them on from friend to friend, acquaintance to acquaintance. “Around 1977,” said DJ Disco Wiz, “we used to record all our battles. Every party we had we always had a boom box on the side, and we used to record what we did and who we did it to. And those things used to sell—we used to sell them in high school.” Jazzy Jay, an MC in Afrika Bambaataa’s Soulsonic Force, boasted, “I mean, we had tapes that went platinum before we was even involved with the music industry.” An exaggerating Grandmaster Flash said that tapes of his performances sold at “a buck a minute.”<sup>11</sup>

Hip-hop prospered because of the wide diffusion of bootlegged tapes. This is true for hip-hop even today, because record companies frequently leak exclusive tracks to popular DJs who make and sell illegal mix-tapes. Giving away tracks that float around the underground mix-tape circuit is a way of promoting up-and-coming artists and building buzz for an established act’s new record. “At first,” said Rob Love, an executive at the seminal hip-hop label Def Jam, “I was anti-mix-tape, because I thought it was stealing and I thought that the resale of [the recordings] did not benefit the artist.” But Love changed his mind when he realized mix-tapes were extremely effective promotional tools; the success of mix-tape favorite 50 Cent (and others) demonstrates this.<sup>12</sup> Even Metallica, in the early 1980s, directly benefited from the unauthorized trading of their tapes, an irony that would rear its ugly head years later.

## WORLD WAR MP3

In the spring of 2000, Metallica’s Lars Ulrich carted into the Napster offices boxes of printouts naming the downloaders who violated his group’s copyrights. It’s the kind of grunt work typically done by an intern, but the heavy-metal drummer’s sacrifice was for a higher purpose: a stage-managed media event, complete with press conference. An outraged Lars Ulrich had earlier explained that his band goes through a “grueling creative process” when writing and recording each of their songs. “It is therefore sickening to know that our art is being treated like a commodity,” the multi-platinum rocker said. “From a business standpoint, this is about piracy—aka taking something that doesn’t belong to you, and that is morally and legally wrong.”

“Fuck you, Lars,” screamed a member of the teenage peanut gallery that spontaneously formed at the scene. “It’s our music, too!”<sup>13</sup> Indeed, in recent concerts the group had changed the lyrics of “Whiplash” from “We’re Metallica” to “We’ll never stop, we’ll never quit, ‘cause *you’re* Metallica.” In doing so, they emphasized a supposed communal connection between the band and its fans. As recently as 1996, Metallica allowed fans to tape shows and trade their music for free, setting up special recording sections in arenas. It was a nod to their early fan base, because in the early 1980s Metallica was just one of many unknown hard-core metal groups slogging it out. They got their first big break from the world of bootleg-tape trading, and the group has gratefully acknowledged this debt on a number of occasions.

“The brutal irony of the Metallica beef,” Steve Albini tells me, shaking his head, “is that Metallica’s early fan base was all kids that traded cassette copies of the Metallica demo. That’s how I first

heard Metallica—on a fucking cassette dub of a demo. They owe their career to the exact same practice, in a different form, and for them to get bent out of shape about it now is fucking retarded.” Along with long-forgotten groups (Jaguar, Blitzkrieg, and Anvil Chorus), Metallica’s demo *No Life ’Til Leather* tape was a favorite among fans who scoured the pages of British metal magazines such as *Kerrang!* and *Sounds*. “Back in the Stone Age,” remembers early Metallica fan Brian Lew, “tape trades took weeks to complete as letters and packages were sent and received.”<sup>14</sup> His description highlights an important difference between tape trading and file sharing—a difference in volume, scale, and speed of delivery. But to say tape trading is *nothing* like file-sharing is just as disingenuous as saying the opposite, for there are significant similarities.

“The difference between tape trading and file trading that the major labels hype up is the idea that people can go and get whole records, so they never bother to buy the music,” says Thom Monahan. “I actually don’t buy into that at all.” For Thom and others like him, both file-sharing and tape trading are a kind of underground radio, spreading the word about bands that aren’t pumped out through more mainstream outlets. “I see the file-trading thing as a different kind of listening booth, that’s all it is,” says Albini. “It’s like a special radio that you can program yourself, but it’s not the real thing. Nobody listening to a downloaded file is actually getting the record, they’re not actually getting the same sound quality. . . . You’re getting a cheapened simulacrum, which might excite you about the real thing.”

For a rock star whose band made rebellion their stock-in-trade, Lars Ulrich showing up at the Napster offices with a lawyer wasn’t exactly the best image enhancer. In doing so, Ulrich volunteered to be the File-Sharing Nation’s first whipping boy—even though Dr. Dre and other non-Lars superstars also sued Napster. He was evi-

cerated on many Web sites and booed by the kids in the balcony when presenting an MTV Video Award later in 2000. It’s quite possible that on the day he entered the Napster offices, Ulrich may very well have realized just what he got himself into. Joseph Menn reported that the drummer grew increasingly uneasy when he realized that Napster was housed in a decrepit building over a bank, and he looked miserable on the elevator ride up. Upon entering the Napster offices, Lars was swamped by employees who told him they were fans, some of whom had gone to Metallica concerts since junior high. Upon hearing this, “Ulrich seemed to slump,” wrote Menn.

In 2003, three years after Lars Ulrich entered the Napster offices, the RIAA began its lawsuit campaign against hundreds of file-trading consumers, which sought \$150,000 in damages per song. Among the evildoers were a working mom, a seventy-one-year-old grandfather, and a twelve-year-old honors student named Briana Lahara, who lived in New York City public housing. “I am very sorry for what I have done,” said the little girl in an RIAA press release, after her mom shelled out a two-thousand-dollar settlement. The girl continued, under duress from the RIAA, “I love music and I don’t want to hurt the artists I love.”<sup>15</sup> By 2004, the RIAA had racked up over three thousand lawsuits against downloaders in the United States, and the international music industry began suing individuals in Italy, Germany, Denmark, and Canada. Perhaps realizing it’s a bad idea to sue military personnel during the wartime occupation of another country, the music industry chose not to go after troops who shared music in Iraq (suing twelve-year-olds in public housing, I guess, isn’t crossing the line).

During and after the second Gulf War, troops would upload songs on a central server for others to download. “Anytime anybody on the team gets a new CD,” said Sgt. Thomas R. Mena, “they load it

in, so we stay pretty current." Sgt. Daniel Kartchien added, "Everybody has their own MP3 player to pass the time."<sup>16</sup> Back in the homeland, a retired Massachusetts schoolteacher was served with papers—for downloading tracks such as Trick Daddy's "I'm a Thug" from KaZaA, even though this file-sharing software doesn't work on her Mac computer. While it's unlikely that a retiree was downloading hard-core rap, she still had to hire a lawyer to clear her name, and the RIAA only let her off with a warning, generously stating, "We decided to give her the benefit of the doubt."

A Colorado dad received a reprimand from his ISP when he downloaded "Happy Birthday to You" for his child, not knowing it was a copyrighted song. The list went on. It was a sign of desperation from an industry that had been for years hopelessly unwilling to adapt to changing times and shifting technologies. The recording industry spent the first couple of years before and after Napster's debut holding its breath, closing its eyes, and wishing file-sharing would go away—instead of developing a coherent, standardized business model for digital distribution. The major labels could have done just that when they launched the Secure Digital Music Initiative, but they dropped the ball, coming up with next to nothing.

Exactly one hundred years before the music industry began suing consumers, believe it or not, the same thing happened in the auto industry. In 1903 Henry Ford launched the Ford Motor Company and locked horns with the Association of Licensed Automobile Manufacturers. ALAM, much like the RIAA, represented the major auto companies of the time, and it guaranteed its market dominance through the Selden Patent. Through this patent, ALAM could collect royalties on "self-propelled vehicles powered by internal combustion engines." You know, cars. At the time, automobiles were expensive and out of the reach for most consumers, and ALAM wanted to keep it that way, so they refused to grant a patent license to Ford.

He made his cars anyway, and ALAM sued hundreds of Ford customers for purchasing these intellectual property—violating "unlicensed vehicles," quickly turning public sentiment against it. Reminiscent of RIAA's lawsuits and ads about downloading, ALAM placed the following notice in newspapers, stating that "any person making, selling, or using such machines made or sold by any unlicensed manufacturer or importers will be liable to prosecution for infringement."<sup>17</sup> Litigation lasted from 1903 to 1911, until an appeals court ruled in Ford's favor, and most of the ALAM-licensed companies failed after being left in the dust by technological advances. Moral of this hundred-year-old story: Don't sue your customers, or they'll move on. Also, embrace change.

In its relentless drive to stamp out any and all music trading on the Internet, the RIAA sent Penn State's Department of Astronomy and Astrophysics a threatening cease-and-desist letter. Apparently, the department was unlawfully distributing MP3s of R&B artist Usher. Just why was a department of astronomy illegally giving away Usher songs? Well, it wasn't, it's just that the RIAA's automated Web-crawling copyright bots found that the department's Web page contained a mention of emeritus professor Peter Usher and an MP3 file that contained an a capella song about the Swift gamma ray satellite. Sample lyric: "With a superbright explosion, never to repeat again, how are we supposed to know? / How 'bout a telescope rotation swiftly on to the location of its panchromatic afterglow . . ." That would be one weird slow jam. It's like a scene from Terry Gilliam's *Brazil*, the black comedy about authoritarian bureaucracy gone painfully awry. The RIAA later apologized after a slew of bad publicity.

Even more troubling was the RIAA's plan to plant "bombs" in the computers of those who download MP3s by posting fake viruslike files on peer-to-peer networks. The *New York Times* reported that record companies were preparing a program called Freeze, which

“locks up a computer system for a certain duration—minutes or possibly even hours—risking the loss of data that was unsaved if the computer is restarted.” To make things worse, the RIAA has many allies in Congress, from the barely contained lunacy of Republican senator Orrin Hatch to the relative moderation of Howard Berman, a California Democrat. “I’m all for destroying their machines,” said Hatch in 2003 during a Congressional Committee hearing, referring to those who trade music files. “If you have a few hundred thousand of those [bombs], I think people would realize the seriousness of their actions.”<sup>18</sup>

Interestingly, Hatch—a musician who distributes his gospel records independently—had previously been somewhat sympathetic toward file-sharing, and an outspoken critic of the RIAA. Now the Utah senator wanted new legislation that exempts copyright owners from being prosecuted for the crimes of property destruction and invasion of privacy. Although Hatch apparently believes there’s an excuse for willful destruction of property, he says, “There’s no excuse for anyone violating copyright laws.” The next day, he cryptically clarified himself: “I do not favor extreme remedies—unless no moderate remedies can be found.”<sup>19</sup> (He almost sounds like a by-any-means-necessary-espousing Black Panther.) Similarly, Representative Berman has advocated for the legal right of intellectual-property owners and their agents to hack computer systems that may be facilitating copyright infringement. In 2004 a couple of key bills were introduced in Congress that would significantly criminalize individual file-sharing activities, and similar laws began popping up around the world.

There was a far more troubling irony that emerged during the file-trading wars. It turned out major labels were using the same method of identifying and suing potential copyright infringers—tracking down one’s IP address, kind of an online street address—

as a way of gathering marketing data. The firm BigChampagne monitors downloads on file-trading networks and collects the data, creating a sort of alternative *Billboard* charts for the digital era. BigChampagne has worked with most major labels, selling subscriptions to its database, though these record companies are loath to admit it. (By doing so, the companies would undermine the RIAA’s position that file-sharing has no promotional value.) Jeremy Welt, head of new media at Maverick Records, Madonna’s label, is more forthcoming. He calls it “fantastic,” adding, “It actually shows us what people are doing of their own accord,” because it allows labels to peer into the private preferences of downloading listeners.

IP addresses contain information akin to a zip code, allowing downloads to be sorted and ranked according to geographical location. (For instance, one month in 2003 38.35 percent of file-sharers in Omaha, Nebraska, had a song from 50 Cent’s debut album.) Joe Fleischer, VP of Sales at BigChampagne, explained how a label executive uses their data. “He’ll give this to promotions,” he said. “They call these stations and say, ‘You need to bang this shit. You’re barely playing it, and it’s already in the top fifteen among alt-rock downloaders in your market. You need to step on this at least twenty more times a week, and not while people are sleeping.’”

To use a concrete example, the Maverick Records–signed band Story of the Year’s music was being downloaded as much as other popular artists, but the group wasn’t getting much radio play. Armed with this data, their record company successfully lobbied radio to spin their music more, and soon after, Story of the Year’s *Page Avenue* went gold. “In the world of what we do,” says Gary Oseary, Madonna’s business partner, “it’s always good to have real information from real fans.” BigChampagne chief executive Eric Garland marveled, “It’s the most vast and scaleable sample audience that the world has ever seen.”<sup>20</sup> File traders unknowingly are working—for

free, and at risk of being sued—in an ongoing focus group. Some thing about this seems horribly wrong.

#### IS FILE-SHARING REALLY THAT BAD FOR BUSINESS?

Critics argued that file-sharing was directly responsible for the widely reported CD-sales slump from 2000 to 2003. The worst year was 2002, which saw total album sales drop 10.7 percent compared to 2001. However, blaming file-sharing for the decline ignores the fact that the economy was in a recession after 9/11 and many other industries suffered greater declines at that time. More important, the two primary markets that directly compete for young music buyers' dollars—video games and DVDs, media that are also heavily traded on the Internet—did quite well during the recession period. In 2003 DVD sales enjoyed a staggering growth rate of 46 percent, and video-game sales also rose over the previous year. If we accept the industry's rhetoric that each download equals a lost sale—an estimated 2.6 billion music files are downloaded a month—we would have seen sales decline to zero, something that obviously never happened.

Still, it's perfectly reasonable to assume that downloading, rather than the economy, was the cause of the post-2000 drop in CD sales—a certain number of those downloads surely accounted for lost sales, after all. However, some strange things began happening that complicated this simple narrative. The United Kingdom saw a 7.6 percent increase in CD sales in 2003, and that year turned out to be the Australian music industry's best year ever. In the first quarter of 2004, U.S. CD sales rose 10.6 percent over the previous year—and sales continued to rise in the following months—an upturn that the RIAA confidently attributed to the more than three thousand lawsuits it filed against downloaders. However, the Pew Inter-

net & American Life Project released an April 2004 report that stated that the number of people who say they download music files "increased from an estimated 18 million to 23 million since the Project's November–December 2003 survey." Other nonsurvey-based estimates put that number at 60 million—more people than who voted for Bush in 2000—and the technology firm CacheLogic reported that file-sharing activity had doubled between mid-2003 and mid-2004.<sup>21</sup>

At the exact moment file-sharing activity rose, so did CD sales, numbers that confirmed the findings of an important two-year economic study on file-sharing. The paper Felix Oberholzer-Gee and Koleman S. Strumpf published contradicted the RIAA's position. Their findings indicated that file-sharing had no measurable effect on music sales and couldn't be attributed to their overall decline. "At most, file sharing can explain a tiny fraction of this decline," concluded the report. "This result is plausible given that movies, software, and video games are actively downloaded, and yet these industries have continued to grow since the advent of file sharing."

These men are not anti-copyright activists by any measure—Oberholzer-Gee is a professor at the prestigious Harvard Business School, and Strumpf is a Visiting Fellow at the conservative-leaning Gato Institute. In fact, they began the study with the assumption that file-sharing had a negative impact, but their analysis demonstrated otherwise. "No matter how we use our statistical models, we cannot find a connection between decreased sales and downloads," says Oberholzer-Gee. "The Internet is more like radio than we thought. People listen to two or three songs, and if they like it, they go out and buy the CD."<sup>22</sup> Sonic Youth's Lee Ranaldo agrees: "I view file-sharing in a manner similar to the way AM radio worked when I was young—it was a source of information about a lot of new

music, a place where you could hear new sounds. If you liked it, you went out and bought it."

For instance, Norah Jones's second album, released in 2004, had one of the biggest selling first weeks in history, selling over one million copies. "She is one of the most downloaded artists of all time," says BigChampagne's CEO, Eric Garland, "which disproves this idea that illegal downloads cannibalize CD sales." The director of marketing at Jones's label, Blue Note, cautiously agrees. "People who download [Jones] truly might be previewing it," he says. "If they like what they hear, they'll probably go out and buy the record, too."<sup>23</sup> This behavior doesn't just extend to acts that appeal to older consumers who are less likely to use file-sharing networks. *The Eminem Show*, Mather's third album, was the biggest selling CD of 2002 despite heavy downloading. And Oberholzer-Gee and Strumpf's report notes that CD sales for Eminem's *8 Mile* soundtrack didn't decrease during or after several downloading spikes.

Too Much Joy's Tim Quirk explains this apparent contradiction by drawing from personal experience. Although Quirk isn't an old man, he's been in the music business long enough to watch LPs give birth to CDs, which then begat MP3s. Real Networks, his current employer, was one of the first music services to get in on the legal downloading game, so Tim can speak firsthand about the subject from the perspective of a businessman, musician, and fan. "I can listen to things for free all the time at my job," Tim tells me. "But I buy even more records than I did five years ago due to my access to more." He adds, "My personal take on file trading is the practical musician's take. To me, it's really not that much different from when I used to walk into a used-record store, and if I saw a used Too Much Joy CD in the used bin, I was happy," Tim explains. Someone would be more likely to buy his CD at a reduced price than for eighteen dollars, and it didn't matter to him either way be-

cause he never saw a penny of royalties from Warner Records. "As a musician, you want your music out there; you want it out in as many places as it can possibly be."

This increases the chances more people will pay to see your band when it comes through town (and perhaps buy merchandise), or that a newfound fan will purchase one of your other albums. While there are always going to be freeloaders who will never pay for music, that doesn't characterize the majority of fans who share music. A study of file-sharers conducted in 2000 by the Norman Lear Center at the University of Southern California backs up these anecdotes with numbers. It stated, "MP3 usage does not reduce students' CD consumption patterns. Fully 73 percent of students who download MP3s reported that they still bought either the same number of CDs or more." Those who are most likely to trade with friends are the very people who buy the most CDs, echoing the earlier Warner report, which noted that home taping demonstrates a commitment to music. Additionally, the Pew Internet & American Life Project conducted random digit-dial phone surveys during Napster's 2000 to mid-2001 heyday, and it concluded:

It is clear from the passion the Napster controversy has generated among music fans and musicians that a "commitment to music" is very much in play throughout the debate, as it was during the home taping controversy. That so many music downloaders in the surveys are not concerned with matters of copyright does not mean that they are criminals, or even scofflaws, or that they do not understand copyright law. Instead, as seems to have been the case with home taping, music downloaders believe music occupies a special place in their lives and in the world, a place that they believe is not subject to the same rules and regulations found in the world of commerce. In general, the Internet appears

to have given them an opportunity to experience music in ways not as connected to income and commerce as music buying.<sup>24</sup>

A 2003 study by Jupiter Research found something similar among European downloaders. "There are strong music fans within the file-sharing community," Mark Mulligan, an analyst at Jupiter Research, told Reuters. "They are more likely to listen to digital radio and visit artists' Web sites. There is compelling evidence that this group is the bedrock community for those willing to pay for legitimate (online) music services in the future." All this isn't to say that consumers aren't disgruntled with the recording industry.

When consumers figured out that CDs cost as little as one dollar to manufacture but retail for upward of \$19.99—while artists receive about one dollar in royalties per CD, or nothing—it's no wonder many have moved on to other more value-packed forms of entertainment such as DVDs. For instance, the list price of the DVD *High Fidelity* is \$9.99, but the soundtrack CD is \$18.99. It also didn't help that, during the 1990s, the major labels defrauded consumers out of millions upon millions of dollars by fixing CD prices. The week before I finished this book, I received a \$13.86 settlement check—split many ways with other CD buyers—after participating in a class-action suit brought against the majors.

Even many in the porn industry have embraced the free trading of its pictures online. "It's direct marketing at its finest," says Randy Nicolau, president of playboy.com. The porn industry has always been among the first to exploit new technologies—the VCR, the Internet, and online payment systems, for instance—and it has grown savvy during the copyright wars. Nicolau doesn't worry about steering a different course than the RIAA, telling the *New York Times*, "I haven't spent much time thinking about it. It's like asking Henry Ford, 'What were the buggy-whip guys doing wrong?'" Al-

though some porn companies are concerned about the issue, most don't go after their customers, opting to sue for-profit Web sites that reprint their photos. "We haven't gone after Joe Citizen who's sharing something he printed off something from the *Hustler* Web site with another guy," says Paul Cambria, a lawyer who represents *Hustler* and others.

Different musicians—from rock stars to obscure indie artists—have varying opinions about downloading. For instance, Missy Elliott hates it when people download her songs: "Copy-written, so don't copy me," she rapped in "Get UR Freak On." During the 2004 Consumer Electronics Show, actor Ben Affleck, singer Sheryl Crow, and U2 guitarist the Edge—remember him from the *Negativland* controversy—took the stage to make a pitch against unauthorized digital downloading. "All the downloading of music, and all the sharing of music, I can't stand it," says indie hip-hop maestro Prefuse 73. "That person gets paid, they make a living, rather than just these kids downloading music." On the other hand, at the height of the RIAA lawsuits, Neil Young told *Rolling Stone*, "I'm not greedy to the point that I need to get paid for every little thing I do. I'm an artist. I should be fucking doing art, not standing up for artists' rights." He adds sarcastically, "We got Sheryl Crow and Don Henley—it's covered. I don't have to do it. When the copyright law is all over and I'm dead and gone, I'll have more songs."

"I personally don't know a single artist that takes any offense at file-sharing," says Steve Albini. "I think that it's a genuine expression of an appreciation of music, and most bands don't feel threatened by it all. They don't think that someone is downloading a song in order to *not* give them money. The big record labels look at downloading as a means for someone to not pay, and these bands look at it as yet another means for somebody to hear their music." Claudia Gonson—manager of the Magnetic Fields, and also a mu-



sician in the band—primarily makes her living administering the band's finances. As someone who isn't very tech-savvy, she admits that the spread of file-sharing makes her nervous. "The learning curve is so steep, it's hard to acclimate to the changes the Internet has brought," she tells me. "So this makes it scary to a lot of people—it's a fear of the unknown." However, Gonson says she's reluctant to see downloading as a bad thing because of the many positive accounts she has heard from her musician peers.

When entering these debates, especially if you aren't a musician yourself, it might seem unethical to ignore the wishes of artists. A standard line I've heard, which sounds rather convincing, is that it should be up to the artists to decide whether or not their music can be freely distributed. Some artists such as the Beatles have even resisted allowing their music to be legitimately sold in downloadable form. Reasons for this are manifold, including the fact that artists spend a considerable amount of energy sequencing the tracks and designing album packaging. With iTunes, they say, anyone can ignore these intentions and simply pick, choose, and rearrange. However, the desire these artists have for full control ignores multiple historical precedents.

As I discussed earlier, radio doesn't give musicians the right to choose how their music will be presented. Radio stations purchase annual blanket compulsory licenses from organizations that collect songwriting royalties—ASCAP, BMI, and SESAC—something that gives these broadcast outlets the freedom to order songs in whatever ways they see fit. Once the song has been publicly released, copyright holders are given only *limited* control over their creative goods. The difference between current file-sharing and radio, at the moment, is that radio pays for what it plays. *Sort of*. The fee for these blanket licenses compensates the songwriter, not the performing artist. In other words, every time a commercial radio sta-

tion played Frank Sinatra's signature song, "My Way," the crooner didn't see a dime, because late-1950s teen idol Paul Anka wrote it. Radio stations are essentially getting a free ride on the value Sinatra added to Anka's song.<sup>25</sup>

At first glance this payment practice seems unfair, but it really points to how the enforcement of copyright law has always involved compromise. The example of radio also shows how "free" can translate into cash. Radio broadcasts act as commercials that advertise the existence of a record, and it is in this indirect way that performing artists are remunerated for their efforts. If all copyright owners had their way—if they could manifest their own vision of a "perfect" world—our media culture would be quite different, and much more constrained. For instance, if early-twentieth-century song publishers had their way, we'd still be diligently buying their sheet music, just as if modern record companies had prevailed in court in 1999, there would be no MP3 players.

#### THE GIFT ECONOMY IN ACTION

When the Dave Matthews Band shelved an entire album recorded with longtime producer Steve Lillywhite, the songs leaked onto the Internet and fans devoured them. The band initially believed the album wasn't worth putting out, but the extensive downloads demonstrated otherwise. And when they released an official version of the album, *Busted Stuff*, it debuted at number one. Even though the audience for the CD overlapped with those who had already downloaded versions of those tracks, it sold about two million copies, according to Nielsen/Soundscan. The same scenario played out with the Chicago-based rock band Wilco, which was dropped by Warner after the major label deemed their album "uncommercial." As the group searched for a new label, the tracks leaked onto

file-sharing networks—so they put the album on their Web site so that fans could listen to it for free.

By applying the major labels' logic, the band's gift should have cut into sales, but the exact opposite happened. Wilco's *Yankee Hotel Foxtrot* ended up debuting in the *Billboard* top twenty and went on to be the band's biggest album, selling a half million copies, double that of its last album. The publicity surrounding the plight of the record combined with the free distribution of their music on the Internet undoubtedly generated more sales for the little band that could. Wilco's next album, *A Ghost Is Born*, also spread on file-sharing networks long before its official release. "How do I feel about the record leaking on the Internet?" says Wilco business manager Tony Margherita. "Well, that's a little bit like asking me how I felt about the sun coming up today. It's an inevitable thing and not something we ever perceive as a problem."<sup>26</sup> The Magnetic Fields are signed to Nonesuch, Wilco's label. "When we went to Nonesuch," says Claudia Gonson, "they told us not to worry about downloading—because look at what happened with Wilco, and how their sales increased."

Responding to concerns about downloading, film archivist Rick Prelinger argues that the answer isn't the nearly impossible task of preventing unauthorized duplication. The solution is to sell more copies by creating incentives and positive reinforcements to pursue. Many people still collect CDs and DVDs because of the value that the packaging and supplementary materials add—and they download. "The biggest reason to make material available for free is that it feeds demand," Prelinger tells filmmakers and other creative types. "Think of a free download as a trailer, a preview, an ad, as a way of stimulating DVD sales."

In 1982 he founded the Prelinger Archives as a storehouse for ephemeral films about American history and culture that nobody

else was collecting at that time: educational filmstrips, industrial films, and the like. It became a rather large collection that went to the Library of Congress, and since 2000 he's been working in a partnership with Brewster Kahle's Internet Archive to digitally distribute these materials. What's fascinating about the Prelinger Archives is that they've taken all the key films from the collection and put them online, for free. People who download the material can then reuse the footage in their own work without restriction; all that is asked for is a simple credit. "So if somebody wants to make a movie and they don't have money to get footage," Prelinger tells me, "they can access really a kind of wonderful library of historical footage for free."

"Why not free?" Prelinger says, turning my inevitable question around. "As long as it's possible for me to make a living out of that collection—it turns out that we actually make more money because we give things away." He put his money where his mouth is, demonstrating in practice the fact that the gift economy isn't just a nifty theoretical idea, that you can give things away and still have a viable product. "We have a two-tier model. If you want a very, very high-quality copy—a physical copy on tape—you can pay to license it from us," he says. "But if you want something for free, you go online and you download it. It's been exciting. I think archives are validated by what kind of use is made of them. There's been this profusion of work that wouldn't have happened if people hadn't had access to that material. So it's kind of an exercise in democracy."

Prelinger points out that in 2003 his company's sales were up roughly 20 percent from the previous year—this during a recession, something that wasn't true of his competitors. He attributes the increased profits to the easy availability of the archive's films online and the publicity that has generated, allowing Prelinger's outfit to compete with other archive companies with bigger marketing

budgets. He says there are a lot of people out there whose jobs require them to find interesting imagery and recycle it into the culture—trend spotters, fashion people, MTV producers, ad people, and others. “It’s kind of like the rising tide. I make more money,” Prelinger says, “and all the other people that are involved with selling stock footage do better. I think it’s kind of an amazing example.”

At the exact moment when Hollywood successfully lobbied the FCC to mandate that television signals carry a “broadcast flag” which prevents programs from being downloaded—the British Broadcasting Corporation took another course. After visits from Lawrence Lessig and Brewster Kahle, in 2003 the BBC announced it would make much of its archive available for download. BBC director-general Greg Dyke will make available free, digitized versions of the network’s productions from the earliest radio broadcasts to its most current documentaries. It also allowed media-makers to reuse the BBC’s material in their own work. Contemplating a question about whether or not file-sharing harms the BBC, Dyke pauses, then asks, “Wait a minute. Why do we care about them sharing our programs?” It’s part of the BBC’s charter: to make its material available to as wide an audience as possible. File-sharing only helps this cause.

The project is called the BBC Creative Archive and is inspired in part by the U.S.-based Creative Commons project, which Lessig helped found with involvement from Kahle, Prelinger, and others. The Creative Commons Web site offers simple boilerplate contracts that allow artists’ works to be easily shared, and Brewster Kahle’s Internet Archive offers free hosting of digitized works that carry a Creative Commons license. Sound-collage artists such as Negativland and Vicki Bennett have applied Creative Commons sampling licenses to their work, which encourages others to sample and

transform it. The famous Brazilian artist Gilberto Gil, today Brazil’s minister of culture, released his 2003 album with a Creative Commons license.

“You are free,” the license stated, in part, “to make derivative works.” Rather than all rights reserved, *some* rights are reserved. Gil retained his copyright on the album, but the license gives others more freedom to do something new and unexpected with fragments of his music, without dealing with lawyers. “I’m doing it as an artist,” says Gil, though he acknowledges his leading role as a Brazilian government official. He says his ministry has been “getting interested in supporting projects concerning free use,” not only for music but creative content in general.<sup>27</sup>

The gift economy also works in its own curious way for artists whose songs have been sampled, something that has frequently rekindled the commercial life of the original artist or song. Liquid Liquid was dealt a major legal headache when Grandmaster Flash appropriated their song “Cavern” for Flash’s “White Lines,” but it turned out to be a good thing over the years. “I don’t have any bad feelings about the ‘Cavern’ thing,” bassist Richard McGuire tells me, sitting in his immaculate Manhattan studio. “I think it helped keep our band alive. The band still has this following because of that, and it’s given us so much more attention. The song will live on because of it.”

#### OPEN-SOURCE AND FREE CULTURE

The same technological advances that made digital sampling possible also helped dramatically lower the price of home recording equipment. Garage bands and platinum-selling artists alike now use computer-based software and hardware systems that cost a fraction of a traditional professional studio. At a hugely reduced

price, musicians can make a high-quality recording and put it directly onto the hard drive of a computer (though it still can't recreate the sonic richness and nuance of many traditional studios). With these programs, rather than patching your guitar through a physical reverb or distortion pedal, you can download "plug-ins" that generate those effects. Since the late 1990s, there's been an explosion in the number of free, freaky effects available for musicians and producers to download and do with what they want.

"There's all sorts of synthesis techniques that can be applied," says über-gearhead Thom Monahan. "Stuff that emulates analog circuitry, like stuff you might find in an old studio. You can do lots of things with plug-ins." Reason is a popular audio-production program, one that is designed to emulate a rackful of audio gear—drum machines, samplers, synthesizers, pianos, etc. The program allows you to use "sound sets" called Refills, which might contain, for instance, the full range of notes made by an organ. Propellerhead, the software company that makes Reason, opened the architecture of the software so that people could create their own Refills. For instance, the 808 drum machine, whose booming bass sound was the foundation of a lot of 1980s hip-hop and House records, has been fetishized by collectors to the point that it now sells for thousands.

"There's a guy in Italy who thought it was ridiculous," Monahan says, "so he took his 808 and he sampled the hell out of it, and put together this amazing Refill of his 808 drum machine and put it online so that people could do stuff with it." Similarly, Thomas O'Neill loved an eight-foot Baldwin grand piano that his parents had to get rid of, so he spent hours recording it. He then turned the digitally preserved piano into a Refill packet and posted it on the Web for anyone to download. "I hope you like this little gift to the Reason user community," O'Neill wrote on his Web site, "and that it finds its way into your music making." This is yet another example of the

gift economy, which goes to the very communal heart of the open-source and free-software movements.

The "openness" of open source and the "freedom" of free software allows many people to collaborate and build upon each other's ideas, which are then transformed into something new and unexpected. This kind of creativity is possible because open-source code can be copied and freely built upon by an army of volunteers, then given back to the community, often in improved or expanded form. The surprising thing about the open-source and free-software movement is that its products often outcompete the products of their closed, proprietary competitors. For instance, the open-source Sendmail routes over 80 percent of all e-mail on the Internet, and Linux commands 27 percent of the server market, much to Microsoft's chagrin. Bill Gates has a right to be concerned. In 2002 Britain, Russia, China, South Korea, and other countries began to seriously consider replacing their Microsoft servers with Linux-based PCs.

Other governments worldwide are expected to require state agencies to use free, open-source software, and Brazil, Thailand, India, and Germany have already begun to use open-source software on public computers. During these times of education budget cuts, many information technology (IT) workers in the United States are turning to open-source software. For instance, a University of Missouri IT employee told me that his department uses open source whenever possible, something that is increasingly common for his colleagues at other institutions. In 2003 Massachusetts adopted a broad-based strategy for the state government to use open-source software. State Administration and Finance Secretary Eric Kriss said that the state was motivated by reducing licensing fees, but also "by a philosophy that what the state has is a public good and should be open to all."<sup>28</sup>

It's not just governments shifting to open source; Amazon, eBay,

Google, and many others run on Linux. Even Motorola released a cell phone that runs on the open-source Linux and Java in order to speed the development of innovative features and applications, something that other companies followed. "We've been open, using Java, which is the key to applications," says Motorola senior VP Scott Durchslag. "But putting Linux under Java as our operating system is openness cubed."<sup>29</sup> By 2003 IBM was running television ads worldwide, proclaiming, "The Future Is Open."

Richard Stallman, the founder of the Free Software Foundation, explains that his use of the word "free" isn't economic. It's "free," as in "free speech," Stallman says, not "free," as in "free beer." Lawrence Lessig explains, "A resource is 'free' when (1) one can use it without the permission of anyone else or (2) the permission one needs is granted neutrally." Still, you might be wondering, *why* does the gift economy work? Is it some sort of magic increase machine? Intellectual-property scholar James Boyle says that it's fun to debate and imagine all the different explanations, but they're ultimately irrelevant. With open-source software, he writes, you have a global network of people, and it costs almost nothing to transmit, copy, and share digital materials.

With these assumptions, it just does not matter why they do it. In lots of cases, they *will* do it. One person works for love of the species, another in the hope of a better job, a third for the joy of solving puzzles, and so on. Each person has his own reserve price, the point at which he says, "Now I will turn off *Survivor* and go and create something." But on a global network, there are a lot of people, and with numbers that big and information overhead that small, even relatively hard projects will attract motivated and skilled people whose particular reserve price has been

<sup>29</sup>crossed.

Robert Greenwald's *Outfoxed*, discussed in chapter four, used a kind of open-source methodology to produce this documentary. Although the medium was film, rather than computer software, it was similar to the way individual open-source programmers write certain sections of code, which are then compiled to create something larger than the sum of its parts, like Linux. In the case of *Outfoxed*, the *New York Times* reported that a group of volunteers was recruited to watch Fox News's broadcasts twenty-four hours a day, with each volunteer assigned to monitor a particular time slot. Greenwald created a list of categories—the sort of techniques used by Fox News to slant its coverage—and when a volunteer noticed an example on the producer's list they e-mailed the producer the exact date and time it aired.

This information was entered into a spreadsheet, and before long Greenwald's assistants had logged enough examples to begin constructing a general outline of the film. Soon after, a small army of highly skilled film editors (who worked for next to nothing because they sympathized with the film's politics) organized the clips into subsections that eventually created coherent narrative. Each worked as a separate node, often in different cities, and at the end of each day they posted their work on a secure Web site for Greenwald to review. *Outfoxed* was conceived and completed in just four and a half months, an astoundingly short amount of time to create a professional-looking documentary.

Interestingly, the ability of free or open-source software to remain unrestricted relies on the existence of copyright; it's another reason why copyright itself isn't inherently flawed. "Copyleft" is the term Richard Stallman uses to describe the method he and others apply to prevent their free-software code from being turned into proprietary software, that is, full of restrictions. "Copyleft uses copyright law," Stallman says, "but flips it over to serve the opposite

of its usual purpose: Instead of a means of privatizing software, it becomes a means of keeping software free." The basic premise of copyleft is that it uses the legal-contractual force of copyright law to permit anyone to do anything with the code. You just can't add your own restrictions to it (all modifications must be free—again, as in freedom).

There are many companies that profit from open-source software, such as Red Hat, a company that packages and bundles Linux software and sells it for a price. But Red Hat also supports the development of new code and returns it to the open-source community, setting the information free. It's by honoring the very basic social contract that we learned when we were kids—to share, and share alike—that companies such as Red Hat can contribute to openness *and* make money. (Red Hat is profitable, has \$328 million in the bank, and provides support for Amazon, DreamWorks, Reuters, British Petroleum, and others.) Red Hat claims that the open-source model "often builds better, more secure, more easily integrated software. And it does it at a vastly accelerated pace compared to proprietary models." Also, it's cheaper for consumers.

The fact that much of the (sometimes giddily over-the-top) discussion of cyberspace's "innovation commons" originates in the United States comes as no surprise to Eva Hemmungs Wirtén, a Swedish scholar. The way America's Wild West has been romanticized—freedom from constraints, rugged individualism, and ingenuity—overlaps closely with the tech talk of certain open-source and free software advocates. Those who lament the expansion of intellectual property and the enclosure of the Internet's public domain can occasionally sound like Libertarian cowboys who are repulsed by how the beautiful wide-open spaces have been fenced in by government (or corporate) regulation. At their worst, they come off like free-market yahoos whose primary mission is to protect the personal liberties of the programmer.

"Innovation is a poor excuse for democracy," Wirtén points out, "and the ultimate test of whether or not the Internet truly offers the possibility of a global public domain lies perhaps not in its capacity to stimulate further technological breakthroughs on the part of a privileged elite but in its capacity to ensure increased public and hence democratic participation."<sup>31</sup> I believe that for a "free culture" movement to grow into a broad-based coalition—rather than remain in an affluent technological ghetto—its *raison d'être*, its obsession should center around fostering genuinely democratic freedom of expression® and social justice, rather than merely developing cool gadgets and nifty software tools.

Given that, I'm encouraged by some in the next generation of open- and free-software converts. For instance, Nelson Pavlosky, the nineteen-year-old Swarthmore College student who sued Diebold over its copyright censorship, sees open and free software as something more than just an engine of innovation and individualistic creativity. "My friend installed Linux on my computer the summer before my freshman year," he tells me, "and I was instantly hooked. It was just so cool; it embodied everything I believe in." At the heart of the free-software ethos, Pavlosky sees an ideal of participatory democracy, one that comes from the bottom up—rather than a top-down privatized model. "This is at the core of my philosophy: that people should be active, not passive," the undergrad says, avoiding the cold, geeky technobanter some programmers can lapse into—instead, exuding a kind of earnest, humanistic warmth.

"The greatest barrier to positive change on our planet is apathy, and what better way to promote apathy than to prevent people from participating? What better way is there to prevent people from caring than to remove all sense of community, of involvement in the world around them, to make action and activity the domain of other people far away?" Reminding me of his religious background, he explains, "There is actually a lot of overlap with my Quakerism.

A Quaker meeting is very democratic. Anyone can speak in a meeting—that right is not reserved for a priest or preacher—and Quakers have a long tradition of direct action that opposes injustice.”

“The importance of open-source software is not that it introduces us to a wholly new idea,” writes Professor Boyle. “It makes us see clearly a very old idea.”<sup>32</sup> He’s talking about the long-standing ethic of resource sharing, and the Internet has opened up new opportunities for the gift economies to flourish. For instance, the prestigious Berklee College of Music has put a large amount of content online. With a Creative Commons license, Berklee encourages people to freely download more than one hundred music lessons that come with video, audio, and text files. These range from tips on Afro-Cuban conga rhythms to turntable tricks for DJs. There are a number of reasons why Berklee is wading knee-deep into the gift economy. “(One) it’s free and easy—the best proven way to get your stuff widely disseminated right now,” says Glenn Otis Brown, executive director of Creative Commons. “(Two) it’s their audience. A lot of people using these networks are music lovers, so they know they’re getting the attention of groups inclined to listen. This project really demonstrates that file-sharing is basically just a great communication tool, and there are very legitimate uses of this kind of technology.”

The college is doing this to cheaply spread the Berklee name around the world, to educate students about careers in the music industry, and to cultivate a multilateral conversation about file sharing. After quietly introducing these lessons in late 2003, within a month the files spread to more than ten thousand Web sites, generating over one hundred thousand downloads during that brief period. While Dave Kusek, associate vice president of the school, and other faculty members were surprised at this overwhelming positive response, they were even more amazed to discover that

these users were also uploading their music to file-sharing networks. “When you look at the big picture, most musicians, if they’re not songwriters, make most of their money performing,” says Kusek. “It’s a great way for new artists to get exposure for nothing. This is an example of when you want to use the network to distribute, when you want access to your material to be free. That’s a choice you can make that has a lot of power.”<sup>33</sup> Creativity wants to be paid, true, but it also wants to spread freely, to be known.

#### FROM THE MUSIC BUSINESS TO THE MUSEUM'S BUSINESS

A funny thing (humorous, at least, to someone who isn’t a major-label exec) is that the music industry itself is responsible for ushering in what it sees as the dark days of downloading. In the 1980s record companies were pushing the digital compact-disc format on the public, but cassette and LP buyers remained unconvinced. CD sales weren’t as brisk as they had hoped. Then, in the late 1980s, the major labels instituted an industry-wide no-return policy on vinyl that forced retailers to stop carrying LPs. Because the vast majority of records released fail commercially, a liberal return policy had been an industry norm. Stores could no longer sell LPs without serious financial risk, because they couldn’t return them for credit. I was working at a record store during the late ’80s, and I remember watching the geographic shift as CDs colonized the majority of the racks over a brief period of time.

Although CDs are in many ways better than cassettes and LPs—in terms of sound quality and portability, respectively—this change was not purely the result of “free market” supply and demand. It was a conscious policy instituted by record companies who wanted to make sure this format took off. The policy generated higher profits and new sales as fans began replacing their vinyl collections with

CDs at inflated prices. And it didn't engender sympathy among consumers when a U.S. court found the nation's largest labels guilty of a conspiracy to drive up CD prices. These companies were ordered to pay back consumers \$143 million for a practice called "minimum wage pricing" (which contributed to the steady-increasing retail cost of CDs throughout the 1990s). Also in 2004, New York state attorney general, Eliot Spitzer, revealed that the majors agreed to shell out upward of \$50 million in royalties to artists they had neglected to pay.<sup>34</sup> Production expenses fell, consumer prices rose, and artist's royalty rates stayed the same—when artists were paid at all.

Selling CDs meant higher profits, but it eventually allowed fans to easily "rip" songs onto their computers and upload music files to the Internet. Jim Guerinot, manager of the Offspring, a favorite among Napster users in 2000, believes that the industry brought the downloading debacle on itself. He said that when record companies complain about downloading, "I say to them, 'Hey, I'm not the one who went out and had sex without a rubber. This is your problem, not mine.'"<sup>35</sup> The industry opened the door to the digital world, but it was dragged the rest of the way by the consumer-fed file-sharing movement. The rise of digital distribution doesn't mean everyone will suddenly stop purchasing music. It became clear that many consumers were willing to pay for downloads after the debut of Apple's iTunes in 2003 (along with Rhapsody and the too-legal-to-quit Napster 2.0).

Most songs were available for ninety-nine cents a pop, which was considered by most a good bargain, but the low price is deceptive. In the world of digital distribution, there are no costs associated with manufacturing and distributing a physical object, which is built into the retail price of CDs. For a similar price-per-track, record companies can sell their goods with a higher profit margin, but still pay an artist the same per-unit royalty, about ten cents a

song. The label takes 65 of the 99 cents, so that Apple—after it pays for advertising, hosting the files, and a workforce that runs the service—makes nothing. But the company can sell iPods, and it has been tremendously successful at doing that, earning millions. Napster 2.0, with no iPods to sell and the same unfavorable business model, immediately began losing millions after its debut.

With the iTunes model, record companies pass along the non-existent manufacturing and distribution costs to the consumer (who now has less freedom to copy the song because of iTunes' copy-protection technology). However, by finally embracing this new digital-distribution model, major labels are buying into something that may end their market dominance. For a century, the major labels' system dominated the music industry because they owned the means of production *and* distribution. Also by raising overhead costs (publicity, cross-promotion, etc.), the music industry makes it more difficult for indies to enter the market. It just costs too much to get on radio and into stores unless you have big pockets.

Today, the means of producing and distributing music has shifted to individual artists, which means one doesn't need a major-label contract to reach thousands of people. Indie stalwart and Fugazi member Ian MacKaye states, "If there is anything good about the Internet—and there are some things good about it—it kind of cuts out the middleman. It's just a matter of being found."<sup>36</sup> One of the positive things about the iTunes store and similar distribution networks is the fact that they encourage the participation of independent labels, which can more fairly split the revenues with artists. In other words, independent labels can make their music available at little cost, *and* pay artists fairly. Which brings us back to the question: Why do we need the music industry, or at least major labels?

The RIAA is fighting to save a system that rarely treated artists fairly. Following the lead of Ani DiFranco, who began her own in-



dependent label in the early 1990s, Michelle Shocked, Aimee Mann, and other artists burned by the major-label system did the same. Similarly, Iowa City's Dave Zollo founded Trailer Records in the 1990s to self-release his solo debut, but it soon turned into something else. It's run much like a collective, with a roster that includes Iowa artists Greg Brown, Bo Ramsey, Brother Trucker, and others. Zollo explains, "It's an organic thing that operates under the philosophy that a family, a community, can go out into the world and support each other, and when something good happens to one member of the family, then everyone benefits."<sup>37</sup>

By sharing knowledge and resources, the Trailer family is able to turn into an advantage what used to be a liability: lack of major-label connections and relative geographic isolation. Trailer obviously isn't the first label of its kind. Other independents such as Touch & Go—home to many classic post-punk records, including dozens that Steve Albini has recorded—operate in much the same way. "Independent labels, generally speaking, operate on a profit-sharing model," says Albini. "That is, as money comes in for a title, a certain amount of the money is used to pay off the expenses associated with that title and then the profits are split halves, generally, with the band."

The Def Jux label, home to one of the most talented rosters of today's hip-hop artists, operates under the same principle. "We're a label," says Mr. Lif, "where all the artists are friends and any configuration of us can go out and have a successful tour because we love performing." The recent changes in the industry make it more possible for this model to be one of music's healthy futures. By healthy, I don't just mean economically, but also creatively and culturally. We can hear a greater diversity of expression than what is allowed through the gates of big record companies—with their narrow ideas about what kind of music is profitable.

I don't mean to romanticize indie labels or claim that they always behave more ethically than majors, but they do tend to be more closely involved with artists, and are oftentimes run by them. As Berklee College's director of career development Peter Spellman characterizes it, we're seeing a shift from the "music business" to the "musician business." In the early 2000s, major labels had to lay off large chunks of its workforce while—at the same time—many independent labels have seen profits rise (in some cases 50 to 100 percent). This phenomenon materialized because there are huge overhead costs that go into running companies such as Sony Music, with its massive physical infrastructure that employs hundreds of people. At the same time that the major labels' share of the market shrank, the independent sector enlarged in the United States, the United Kingdom, and elsewhere.

In this shift from the music business to the musician's business, the money generated by music-related sales can be more fairly distributed among those who actually work to make art. There will be less need to deal with and pay for the layers of accountants, lawyers, executives, and others who have populated the music industry for years. Previously, musicians' labor subsidized the salaries of those who made far more annually than the vast majority of the musicians employed by their label. This doesn't mean there will be no need for these people, because as long as the products produced by Big Entertainment remain popular for mainstream consumers, they'll have jobs. Britney Spears and other performers like her—those who not only sing, but can appear in films, commercials, televised concerts, *US* magazine, on soda cans, etc.—are the new model for major labels. Only through cross-marketing opportunities, where they can license their properties (both the star and the music), do big record companies believe they can survive.

Today, there is the very real possibility that most musicians can

make a living from a small but loyal fan base, and completely bypass the bloated entertainment industry. "I just think there's sort of a middle ground to it all," says Thom Monahan. "I mean, the Pernice Brothers make all our records in-house and all the money comes directly back to the band, so, you know, we don't really need to sell tons of records in order for it to work." The Pernice Brothers own their own record label, Ashmont, which means they have full control over creative and economic decisions. "If radio wants to play it, good," Thom says. "They can come to us because it's just too much money to mount a radio campaign. It would be pointless. It'd be throwing money out the window to pay people—for what? I mean, where does that money go? It goes into a system that's feeding the rich."

For the first time, new recording and distribution possibilities make it possible for more artist-entrepreneurs to thrive without relying on a self-interested corporation. Also for the first time, the independent sector has a fighting chance to be heard alongside the (admittedly pleasurable, at times) products pumped out by the culture industry. "File-sharing has broadened the audience for all these independent bands," Steve Albini tells me. "All these subcultures and niche types of music—music that's difficult to come by in the conventional record-store environment—it's dead easy to find on the Internet. So, it's exciting people in exactly the same way that the phonograph excited people in the Plains about opera. . . . It's exactly the same way that radio made people sitting at home want to go to the dance hall. The Internet is making people who would never otherwise come across it find music that they like and then buy it."

The music and movie industries were able to survive the homotaping scares of the 1980s and 1990s because a very basic social contract remained intact. You share some things, but you also sup-

port others by purchasing their creative work. People will stop supporting musicians and other artists only when the concept of community breaks down, not because of the introduction of a new technology (such as radio one century ago or the Internet). When the owners of VCRs and audiocassette recorders realized they *could* make copies, and never have to pay for content again, it didn't mean the vast majority of people actually did. The same is true of file-sharing networks.

Also, these networks provide an inexpensive way for independent musicians shut out of commercial radio to get their music heard nationally and globally. For instance, Clear Channel Communications owns over thirteen hundred radio stations throughout the United States, which homogenizes music playlists. Clear Channel also excludes musicians who choose not to fully immerse themselves in the corporate music world, which requires them to spend a *lot* of money to ever have a shot at getting airplay. If file-sharing networks were to be shut down, it would have a serious and demonstrably negative impact on many musicians who are increasingly relying on peer-to-peer technologies to get their music heard.

Interestingly, around the same time radio playlists narrowed, there was an increase in the eclectic range of music many young listeners were exploring. Evidence of this can be seen in the wild success of music festivals such as Bonnaroo, which is annually held in Tennessee. The 2004 event drew 100,000 fans and included a dizzyingly diverse array of performers, from jam bands such as Dave Matthews, Gov't Mule, and moe to rock iconoclasts Yo La Tengo, Wilco, and Los Lobos to legends Bob Dylan, Patti Smith, and the Dead. Additionally, there were bluegrass, jazz, blues, African pop, hip-hop, and funk artists—many of whom sell less than one hundred thousand CDs. This, of course, raises the question, how is it

that the kids of Clear Channel America can connect these musical dots? The answer I found, after talking to a great number of young music fans, is file-sharing (and other methods of trading music). For instance, most file-sharing programs allow you to look into a peer's music library and download selections. This is a common way fans are exposed to new artists today, and it mimics the informal musical networks of the pre-Internet days—you know, checking out a record collection at a friend's house.

Music is only part of what's distributed on file-sharing networks, which makes possible the spread of information that governments and corporations might wish to suppress. It would have been much more difficult to disseminate the controversial Diebold memos mentioned in the last chapter without the existence of file-sharing. The decentralized nature of these networks made it impossible for the e-voting company to successfully suppress these damning documents, no matter how hard they tried. It's a simple technological and social fact that file-sharing isn't going away; when Napster's head was cut off it sprouted dozens more. Therefore, it's important for us to deal with this reality and to maximize file-sharing's potential to spread creativity while still protecting creators.

First, we need to put the economic impact of file-sharing into perspective. The 2.6 billion downloads per month the RIAA estimates doesn't mean we should adopt an iTunes model that requires consumers to pay out \$2.6 billion a month for each download. This far exceeds the music industry's actual revenues, and it would be unworkable. However, just because the recent economic effects of file-sharing seem to be minimal doesn't mean that *no* fees should be paid to copyright owners. On the other hand, these owners shouldn't be allowed to set the terms in an unregulated manner. As we've seen with the history of radio and cable television, there needs to be some third party—governmental or otherwise—that

can temper the outrageous prices that businesses inevitably demand when they have the opportunity.

Unchecked monopolies fly in the face of how copyright has been applied by Congress and courts for two centuries. The blanket compulsory-licensing model successfully used to legalize radio and cable television can point us to a future system that would work for file-sharing. This does not mean the new system would be *exactly* the same—for there are qualitative and quantitative differences—but there's also no need to totally reinvent the wheel. In his book *Promises to Keep*, Harvard University professor William W. Fisher has arrived at a workable proposal, similar to a model put forward by the Electronic Frontier Foundation and others. Fisher sees his plan as something that will replace the current intellectual-property system, though I agree with Lawrence Lessig that it would instead complement it.

Boiled down, this proposal goes like this: Given that the movie, gaming, and software industries have grown during a time when their products are freely downloadable—and file-sharing's negative impact on the music industry is highly debatable—additional fees needn't be exorbitant. To generate a dividable annual pot of money in the range of \$2 billion, Fisher's plan would require an additional six dollars tacked onto the monthly bill paid by broadband Internet users. The intellectual-property lawyers at the EFF estimate five dollars per month for a file-sharing license. Although the cost of high-speed Internet use would slightly increase, the overall returns would be great. Consumers would have more entertainment options, and artists would be fairly compensated.

"The set of artists who made their creations available to the world at large—and consequently the range of entertainment products available to consumers—would increase," writes Professor Fisher. "Musicians would be less dependent on record companies,

and filmmakers would be less dependent on studios, for the distribution of their creations. Both consumers and artists would enjoy greater freedom to modify and redistribute audio and video recordings." He adds, "Finally, society at large would benefit from a sharp reduction in litigation and other transaction costs."<sup>38</sup>

As I said earlier, radio stations don't pay the record companies that own musical recordings, they compensate the publishing companies that own the musical compositions. They pay songwriters, not recording artists. No system is going to be deemed fair by all parties involved; no doubt record companies would love to be paid for the *millions* of individual plays their songs annually receive on radio broadcasts. To do so, however, would put an undue burden on station owners and would stifle the dissemination of culture. When Electronic Frontier Foundation attorney Fred von Lohmann introduced the file-sharing license proposal at a music-law conference in 2004, the RIAA's vice president of government relations David Sutphen condemned the idea. He said the licensing system made no sense because, in part, all music would have the same value; an obscure artist's song would equal "Yesterday," by the Beatles.

Of course, Sutphen's assessment ignores the fact that price controls have been around since the Copyright Act of 1909, but the RIAA has consistently ignored history when it's convenient. What I'm outlining here is just a start; it's by no means perfect, and I'd be lying if I said that hammering out a workable proposal will be easy. It won't. But the alternative option—to do nothing—will continue to criminalize the everyday behavior of millions of Americans and also inhibit the spread of artistic works. Also, if downloading does in fact cause the sales of DVDs, video games, software, and CDs to go into a free fall, which hasn't been the case thus far, there would at least be an adjustable safety net in place to fairly compensate cre-

ators. As of now, the extra money will just be icing on the cake for copyright owners.

### THE FUTURE WILL BE A LOT LIKE THE PAST

Rick Prelinger believes that the future will be a lot like the past. "You sell some things, but you also give some things away," he says. On the Internet, for instance, you often can download software, then decide whether or not you want to buy it. Software is frequently built on a two-tier system, where the free version allows you to do a limited number of things, but its capabilities expand if you purchase a license. "I think that model is a very old model," Prelinger tells me. "You can read a book in a bookstore, now they've got sofas for you to do it and a café. However, if you want to keep that book, you pay for it, and it works. We still have a book business."

The Internet makes it possible for music, art, video, and other forms of culture to circulate in new ways, but it won't replace the music-industry truism: Start small, and build your fan base. Yes, these changes may be troubling for some artists who crave less ambiguity, but the life of an artist has never been filled with certainty and stability. It goes with the territory. Anyway, the music industry of old didn't exactly provide the most predictable of career paths either, or the most fair and honest ways of being paid. What is clear, though, is that a greater diversity of music is already available today, much more than what previously squeaked through the major-label and broadcasting systems.

Less important than the new medium itself is what is *done* with it, both through public-policy decisions and the moves made by private industry. Communication historians have rightly argued that there is nothing inherent in the way many familiar technolo-

gies have wound up being used; in the formative stages of a new medium, much is up for grabs. My esteemed departmental colleague John Peters points out that radio was originally designed to receive *and* send messages, and the phonograph was envisioned as a recording device, not just a machine that could replay sound.<sup>39</sup> The CD, as opposed to the digital audiotape, was enthusiastically embraced by the music industry because it could be used only as a playback format. But to the horror of record companies, it soon turned into a recording medium.

Technologies are designed to encourage certain habits and discourage other activities, argues Jonathan Sterne, another media historian. The habits imprinted onto technologies have much to do with how they are designed and manufactured as consumer hardware. The radio of today can only receive signals because of the way it is put together, but by adding a microphone and rewiring it a little, it's ready to broadcast. But most people don't do that, or don't know how.<sup>40</sup> In the case of radio, only a company's top management and engineers can decide how the hardware will be designed, manufactured, and, therefore, used by consumers. But it's different with the Internet. Yes, you need a piece of hardware, the computer, to process and receive information from the online world, but the Internet's networks of communication are much more malleable. They're soft, as in *software*.

Anyone with basic computer-programming skills and an imagination can potentially alter the habits of millions of Internet users. When the teenage Shawn Fanning patched together his simple Napster program, he pointed to a new way of searching for and retrieving information online. This redesign didn't require an expensive hardware overhaul for every user, only software modifications, which were free. Also, the investment needed to distribute music has gone from *a lot*—which was why a small number of large com-

panies dominated the music industry for a century—to next to nothing. Although there are many elements of the Internet that are quite old, the two things I just mentioned are genuinely new, and much more democratic. Their egalitarian promise is one reason why I can remain relatively upbeat near the end of this book about the dark side of intellectual-property law.