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Digital Rights and Wrongs: Intellectual Property in the Information Age

Norman E. Bowie

Elmer L. Andersen Chair in Corporate Responsibility
Carlson School of Management, University of Minnesota

CENTER FOR
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The Center for Business Ethics at Bentley College is a non-profit educational and consulting organization whose vision is a world in which all businesses contribute positively to society through their ethically sound and responsible operations. The center's mission is to give leadership in the creation of organizational cultures that align effective business performance with ethical business conduct. It endeavors to do so by the application of expertise, research, education and a collaborative approach to disseminating best practices. With a vast network of practitioners and scholars and an extensive multimedia library, the center provides an international forum for benchmarking and research in business ethics.

The center helps corporations and other organizations strengthen their ethical culture through educational programming such as the Verizon Visiting Professorship.



The Visiting Professorship in business ethics and information technology at Bentley College is made possible through the generous support of Verizon. The work of the Center for Business Ethics is furthered by this educational initiative, which engages students, faculty and corporate partners in an important dialogue.

The Verizon visiting professorship enhances the college's mission of creating an environment that blends business studies and information technology. In addition, it gives prominence to the ethical dimension of business, such that students learn to recognize and understand its fundamental importance.

We were honored to have Dr. Norman Bowie as our sixth visiting professor in the Verizon series. Dr. Bowie is the Elmer L. Andersen Chair in Corporate Responsibility at the University of Minnesota where he holds a joint appointment in the departments of Philosophy and Strategic Management and Organization. Dr. Bowie is known throughout the world as a leading authority on business ethics and has written and edited numerous books, including *Ethical Theory and Business*, which is now in its seventh edition.

The Center for Business Ethics will continue to strengthen the business ethics movement through programming such as the Verizon Visiting Professorship in Business Ethics and Information Technology. We are grateful to the Bentley community, to Verizon, to Norman Bowie and to everyone connected with the center, whose support makes these initiatives a success.

W. Michael Hoffman
Executive Director
Center for Business Ethics
Bentley College



(Left to right) **David Raney**: Ethics Officer, Verizon; **Norman Bowie**: Elmer L. Andersen Chair in Corporate Responsibility, Carlson School of Management, University of Minnesota; **Anne Carroll**: Director of Ethics and Business Conduct, Verizon; and **W. Michael Hoffman**: Executive Director, Center for Business Ethics.

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DR. NORMAN E. BOWIE

Norman Bowie is the Elmer L. Andersen Chair in Corporate Responsibility at the University of Minnesota where he is also a professor in the department of Strategic Management and Organization. He obtained his AB degree in philosophy from Bates College in 1964 and his PhD in philosophy from the University of Rochester in 1968. Dr. Bowie is recognized throughout the world as a leading authority in the areas of business ethics and corporate social responsibility.

A frequent contributor to scholarly journals in business ethics, Dr. Bowie has also written and edited numerous books. These include: *Management Ethics*, with Patricia Werhane (to be published in fall 2004); *Ethical Theory and Business*, with T. Beauchamp (eds.), 7th edition (2003); *Blackwell Guide to Business Ethics* (2002); *Business Ethics: A Kantian Perspective* (1999); *The Individual and the Political Order*, with R. Simon (1998); and *Ethics and Agency Theory*, with E. Freeman (1992).

Dr. Bowie's research specialties include leadership, corporate responsibility, international business ethics, and the morality of the market. Currently, he is engaged in projects relating to Kant's ethics, the moral obligations of multinational corporations and the moral foundations of business. He has been the Dixons Professor of Business Ethics and Social Responsibility at the London Business School and a fellow at Harvard's Program in Ethics and the Professions. Dr. Bowie teaches business ethics in the Executive MBA program at the University of Minnesota and at that university's partner Executive MBA program at the Warsaw School of Economics. He also provides customized ethics modules for the non-degree programs at the University of Minnesota's Executive Development Center. He holds a number of editorial appointments for publications that include *Business Ethics Quarterly*, *Business and Professional Ethics Journal*, the *Journal of Business Ethics Education* and the *International Journal of Applied Philosophy*.

Digital Rights and Wrongs: Intellectual Property in the Information Age*

Norman E. Bowie

Elmer L. Andersen Chair in Corporate Responsibility
Carlson School of Management, University of Minnesota

1. Introduction

I am honored to be here as the Verizon Visiting Professor. Modern business ethics began here and all of us in this field are indebted to the Center for Business Ethics, and to Michael Hoffman and his colleagues.

In 1999, Richard T. De George presented the first in this series of Lectures in Business Ethics and Information Technology. De George built on his lecture to write a book on the topic. His chapter on Intellectual Property makes use of some important examples that are even more relevant today, now that corporations have taken to suing individuals — including individuals at this institution — for sharing music over the Internet. It is worth quoting De George at length:

Last evening, Joe taped the popular movie “Sound of Music” which was playing on one of the TV channels. He was away for the evening and intended to look at the movie when it better fit his schedule. This is both common and legal. He may tape as many programs and movies as he wishes for later viewing. His taped version is his to use, even though the same movie is also available for rent or sale at the local video rental store. His friend, Richard, intended to tape the movie but by mistake set his VCR to the wrong channel, and hence taped some other program instead. When he learned this, he asked Joe if he could copy Joe’s tape. He reasoned that since it was legal for him to copy the movie directly from the TV, and he would have had he not made a mistake, there seems to be no difference in principle for him to copy Joe’s tape. Another friend, Tom, also meant to tape the movie, but forgot to set his machine. Rather than phone friends to see if any of them had taped it, he simply went to the Internet and asked if anyone had made a copy from the TV broadcast that they would let him copy. His reasoning was similar to Richard’s: It was legal for him to make a copy from the TV — there is no difference in principle between his recording it directly or his getting it from someone else who recorded it directly and it does not make any difference whether or not the person he copies it from is a friend, as long as he or she copied it legally.

De George's examples allow us to distinguish between what is legal and what is moral. Joe's taping of the movie is legal. Tom's copying it from someone who supplies it on the Internet is illegal. Richard's getting a copy from a friend is, I believe, of questionable legality. But no one in this scenario thinks they have done anything wrong. Are they right or wrong on this matter?

De George goes on:

In addition to taping the "Sound of Music," Joe also taped some songs that were being played on MTV.... Since he makes copies for his personal use, Joe reasons that he may also make copies of music played by DJs on the radio or that he gets via the Internet. The principle of fair use seems to be the same, whether one uses a VCR or a CD writer on one's computer.

However, one is legal and the other is technically illegal. But Joe thinks both actions are morally right. Is he correct on this matter?

Today I argue that Tom's actions are wrong and that Joe is wrong when he thinks it is morally irrelevant whether he copies music on his VCR from MTV, or whether he gets his music from persons or organizations that provide it for free over the Internet.

I realize this is an unpopular stance. A *New York Times* article provides some quotations and statistics that are relevant here. ¹ The Pew Internet and American Life Project made a study that showed that 56 percent of college students download music, compared with about 25 percent of non-students, and those students are more likely than downloaders in general — 80 percent as against 67 percent — to say they do not care if the music is copyrighted when they download it. *The New York Times* article goes on to point out that students treat downloading copyrighted material like underage drinking — illegal but not immoral. Here are a few representative quotations:

"It's not something you feel guilty about doing.... You don't get the feeling it is illegal because it's so easy." He held a MP3 player in his hand: "They sell these things; the sites are there. Why is it illegal?"

"I have 400 songs. I listen to 20...I don't know why...You can and it's cool to have them."

Moreover, this attitude is not limited to the United States. Young people in Europe have the same views. ² Obviously, I have a hard sell ahead. But I think it is important to make the argument since I find the cavalier attitude expressed by students on this topic to be a matter of great concern.

2. Traditional Arguments for Copyright

I begin with the assumption that the notion of copyright is morally defensible. It is worth pointing out that copyright protection is one of the few specific property rights protected in the Constitution. Here is what Article 1, section 8, clause 8 of the Constitution says: “[Congress shall have the power] to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the Exclusive Right to their respective Writings and Discoveries.” The two primary justifications for copyright rely on very different traditions. De George³ provided a standard account of each justification. The fact that both the utilitarian tradition and the deontological tradition support copyright only strengthens the justificatory case. I agree with most who argue that the chief justification for copyright is utilitarian. If society wants to induce creativity and entrepreneurship, it must provide financial protection for intellectual property so that inventions and the fruits of artistic creativity are forthcoming. Some have pointed out that people have other motives for invention and creation than financial gain. True enough, but few deny the importance of the financial motive in our culture and even the most altruistic of artists and inventors need to eat and have a roof over their heads.

Although utilitarian considerations are the main justification for copyright protection, there are deontological justifications as well. Fairness arguments point out that those who invest the time, energy, and money to create deserve the financial rewards when creative activity bears fruit. This is especially true when one takes account of the fact that many creative ideas are not successful in the market place. So an additional consideration on behalf of the fairness argument is that those whose creativity has been successful in the marketplace are those who have borne the risk. In the absence of protection for intellectual property, it is easy for those who have not borne the risk nor expended large amounts of time, energy and money to reap rewards from copying. That is unfair and unjust.

In *A & M Records v. Napster*, the U.S. District Court for Northern California made use of such a fairness argument in its decision. The Court pointed out that the music publisher and the artists rely on royalties from sales for their income. The Court also pointed out that the publishers, artists and recording companies provide a substantial amount of “money, time, manpower, and creativity.” Finally the Court pointed out that no royalties are paid when Napster uses uploaded or downloaded MP3 files and that Napster, compared to the plaintiffs, has made no comparable investment in money, time, manpower and creativity.

These two justifications for copyright protection are widely accepted — not just as a matter of law, but also as a matter of ethics. I assume that that these justifications are essentially correct. Thus those who disagree with the position I am advocating will either have to challenge the two standard justifications for copyright, or show that somehow these two justifications do not apply to cases where people download music or movies from the Internet. The latter move is the one that two distinguished writers on this topic, Richard De George and Lawrence Lessig make. They argue that the traditional justifications are not sufficient when people download music or movies from the Internet.

3. The De George Thesis

De George's main point is that copyright law cannot be enforced in cases involving downloading and sharing songs. When he wrote his book, the target was Napster. His conclusion at that point seemed to be that:

Moral suasion and possible legal action have not stopped the downloading by millions of copyrighted music. ... The problem facing the music industry and legislators in the face of the rising peer-to-peer technology that is replacing Napster is that the law is all but unenforceable. Prosecuting even a small fraction of those who download copyrighted music using the new technology from the Internet is unfeasible. Even if the worst perpetrators were caught and fined, the chance of any individual being caught would be slight, unless more resources were put into policing and prosecuting such action than it seems socially responsible to do. ⁴

Notice what De George is not saying here. He is not saying that downloading and sharing the songs is right. He is saying that a law that tries to enforce copyright in this case is not enforceable. That is very different from saying that such a law is morally incorrect. Besides, is De George correct? Is such a law unenforceable?

The music industry suits certainly have thrown a scare into many, who have decided as a result to cease and desist from downloading and sharing songs. Although it seemed in bad form to sue your customers, the recording industry perceived the threat to be sufficiently great that on September 8, 2003, it did indeed begin suing individuals who shared music over the Internet. (No one who simply downloaded was sued.) Since the possible penalties for this kind of copyright infringement are quite high, the crackdown on just a few violators had a major deterrent impact. The amount of illegal swapping and downloading decreased dramatically.

The illegal downloading of music also received attention at the Super Bowl. Pepsi-Cola ran an ad promoting a giveaway offer it cosponsored with Apple's iTunes. 100 million Pepsi bottle caps contained the code for a free song download on iTunes. The

ad featured 14 teenagers who had been caught illegally downloading music. In the background the song “I fought the law and the law won” played conspicuously. A 14-year-old, Annie Leith, had downloaded 960 songs from Kazaa and then had to settle a lawsuit for \$3,000.⁵ Nielsen NetRatings estimates that U.S. visits to the Kazaa web site are down 50 percent from the peak.⁶

In February 2004 the Recording Industry Association of America (RIAA) sued an additional 531 John Does (unnamed individuals). The third wave of suits was announced on March 23, 2004 when the RIAA specifically went after college students who had used university networks to share files. Students at New York University, George Washington University, Marquette University, University of California Berkeley, Indiana University, and Stanford University were among those targeted. With these additional suits, the RIAA has filed nearly 2,000 suits. About 400 have been settled for sums ranging from \$2,000 to \$10,000.⁷

It remains to be seen how successful this campaign will be. Some believe that the pirates will always win. Blubster, which has an estimated quarter of a million users, has a technology that makes monitoring much more difficult and the next version of Blubster is supposed to be totally encrypted so that only the intended user can access it.⁸ Another technology is Freenet, introduced in 1999 by Ian Clarke. Users make part of their hard drives available to an encrypted system. No one can know what files are on that part of the hard drive and requests to download a file to that part of the hard drive are also encrypted.⁹ As of this writing, Freenet is still difficult to use and is not a viable alternative to file-sharing companies like Kazaa. However, it is just a matter of time before some of the technological obstacles are overcome; developers in Germany are developing Frost — a more user-friendly version of Freenet. Software companies can also create private file networks for specified uses — darknets as they are called. There is also a way to use proxy servers: users download through intermediary computers and thus make it more difficult to trace the path between the source file and the person who downloads it.¹¹

Of course, the danger for the user of any of these services is the extraordinary penalties he or she could face if discovered by the recording industry. Using such services to download music is tantamount to a statement of guilt. For example, the recording industry may create their own proxy services that serve as decoys and thus ensnare the violator. It seems to me that this kind of cat-and-mouse game between the pirates and the recording industry is more like a game or ideological combat than simply wanting to download some music for free. From my perspective, this looks more like malicious hacking, or even initiating a virus, than a simple act of stealing. Acts of downloading songs are ill thought out, too easily rationalized, and are wrong on grounds of harm and unfairness. But they are not designed to bring down an industry. Premeditated

widespread file-sharing of copyrighted material “protected” through the use of encryption seems to be on a different scale. If so, that raises the moral stakes considerably.

Universities have their own moral difficulties since they allow students to access the Internet through university mainframes. Realizing that many students are using this privilege (and it is a privilege) to conduct illegal and immoral activities, universities are now responding. They are denying Internet access to students who illegally download songs or engage in other illegal acts. The reasoning behind these decisions is as much moral as it is legal since at least one U.S. District Court has protected universities from subpoenas demanding information on students who may be downloading illegally. For example, Boston College voluntarily surrendered the names of the suspected students even though they were not legally required to.¹² However, officials at BC thought it was the right thing to do. And it is. The highest value in a college or university is intellectual integrity. Your work must be your own or you must provide proper quotation or citation when using the work of others. Thus it should come as no surprise that, in one way or another, universities and colleges will crack down on students who misuse university Internet connections. Some, like the University of Rochester, will use the carrot. They provide every student with an account with the new Napster. Some, like Carnegie Mellon, will use the stick and deny you Internet access if you illegally download.

I do admit that recent court cases have given De George’s argument about lack of enforceability renewed credence. These cases, both in the U.S. and abroad, have made the job of the record industry more difficult. A federal court ruled, in April 2003, that Kazaa and other file sharing organizations are not responsible for the actions of their users.¹³ In December 2003, another federal appeals court (District of Columbia) ruled that “Internet service providers cannot be forced to turn over the names of subscribers who are suspected of illegally sharing music online.”¹⁴ This court decision is often referred to as the Verizon case. By the way, Verizon’s argument in this case was that to turn over the names of subscribers would violate the subscribers’ right to privacy. Verizon countered a moral argument with a competing moral argument. The courts have also ruled that they will not shut down Grokster and Morpheus, two file-sharing networks.¹⁵

Legal decisions in Europe seem to be going in the same direction. The Dutch Supreme Court has ruled that Kazaa cannot be held liable for piracy by those using its services. And a Norwegian court cleared “DVD Jon,” who distributed software that made possible DVD movie copying. DVD Jon’s defense lawyer hailed the decision “as a boon for CD and DVD copying across Europe.”¹⁶ U.S. courts have barred the soft-

ware. I would be interested in the lawyer's moral argument in defense of a decision that undermines copyright protection in Europe. What greater overriding moral principle is he defending?

Frankly, I do not know whether copyright laws forbidding the downloading and sharing of songs and movies from the Internet can be enforced. But even if the laws cannot be enforced, that does not make such activities morally right. Laws against adultery cannot be enforced but that does not make adultery right.

4. Lawrence Lessig Thesis

The key to Lessig's thesis is that regulation on the Internet can occur through law but more importantly through code. Code is a form of regulation. With that insight, Lessig goes on to argue that regulation comes through law and through code and, as a result, the combination of law and code goes too far in protecting copyright.

Lessig makes this point by contrasting a student's dorm room with a student's computer. In dorm rooms around the country, there are taped copies of old LPs. Taped to the windows, there are posters of rock stars. Books borrowed from friends are on the shelves in some of these rooms. Photocopies of class material, or chapters from assigned texts are strewn across the floor. In some of these rooms, *fans* live; they have lyrics to favorite songs scribbled on notepads; they have pictures of favorite cartoon characters pinned to the wall. Their computer may have icons based on characters from the *Simpsons* ...

Now imagine all this activity moved to cyberspace. Rather than a dorm room, imagine that a student builds a home page. Rather than taped LPs, imagine he produces MP3 translations of the original records. The *Simpsons* cartoon is no longer just on his desktop, it is also on his Web server. And likewise with the poster: the rock star, we can imagine, is now scanned into an image file and introduces this student's Web page.¹⁷

Some of the actions in the dorm room may be violations of copyright but several are not. Even with those that might be illegal, for all practical purposes there is not much that can be done about the copyright violations in the dorm room. In cyberspace, all those actions are in violation of the law; there is plenty that can be done about the violations of copyright on the computer. Companies like Fox, which "owns" the *Simpsons* characters, can use special devices called bots to search websites for images of Simpson characters. Recently, the company Audible Magic announced that it has the technology "to spot copyrighted materials while they are being passed from computer to computer and block the transfer."¹⁸ Executives from the company pointed out that their software could be written into the software of such companies as Kazaa

and Grokster. The significance of this technology is that it provides a way to test the intentions of the peer-to-peer (P2P) facilitating companies. Are they running a legitimate business that can be abused or are they in the business of aiding and abetting illegal and unethical activity? All we know so far is that the file-sharing community has not greeted Audible Magic's announcement with enthusiasm. Universities may be more supportive. The provost at the University of Rochester has been described as impressed with the new technology.¹⁹

Lessig provides numerous historical instances where businesses have used the fear of legal liability to have content removed from websites, or even have a website shut down. One example features the online guitar archive (OLGA). OLGA is a library of files that shows you how to play songs on the guitar. The files come from guitar enthusiasts, mostly amateurs, and the quality of their contributions varies greatly. The original host was the University of Nevada, Las Vegas, which shut down the site when EMI Publishing alleged copyright infringement. OLGA moved to another host but when it was contacted by the Harry Fox Agency, complaining of copyright violations, OLGA closed down. Lessig then says:

The pattern here is extremely common. Copyright holders vaguely allege copyright violations; a hosting site, fearing liability and seeking safe harbor, immediately shuts down the site. The examples could be multiplied thousands of times over, and only then would you begin to have a sense of the regime of control that is slowly emerging over content posted by ordinary individuals in cyberspace. Yahoo!, MSN, and AOL have whole departments devoted to the task of taking down "copyrighted" content from any Web site, however popular, simply because the copyright holder demands it. Machines find this content; ISPs are ordered to remove it; fearing liability, and encouraged by a federal law that gives them immunity if they remove the content quickly, they move quickly to take down the content.²⁰

What can be said about this argument? First, let us assume for sake of argument that Lessig is correct here. It does not follow from this that the downloading and sharing of songs and movies becomes morally justified. The fact that companies are overzealous in their defense of copyright does not mean, as Lessig himself would admit, that protecting copyrighted material on the Internet should be abandoned. OLGA should probably not have been threatened. However, the vast majority of downloading and sharing involves burning CDs rather than buying them and in those cases the utilitarian arguments and fairness arguments still hold.

Lessig points out correctly that copyright protection has repeatedly been extended, contrary to the assumptions of the founding fathers. In 1998, Congress extended the term for an additional 20 years, the 11th time in 40 years that copyright has been extended. This extension can suppress artistic creativity. *Gone with the Wind* was published in 1936. Alice Randall was denied the right to publish a parody, *The Wind Done Gone*, in 2001 on grounds of copyright protection. That case is still working its way through the courts, but copyright on *Gone with the Wind* extends until 2031 — nearly 100 years. I agree with Lessig that copyright protection has been extended for too long a period but that is not the point at issue here. The failures of Congress do not justify the downloading and sharing of songs, especially since most of the downloading is for newly released songs. In the world of popular music, few songs have staying power beyond a few years. Students who download songs from an album to see if they like it are not protesting the length of copyright protection.

Lessig also criticizes the anticircumvention provision of the 1998 Digital Millennium Copyright Act. That provision prohibits the creation of code that cracks code designed to protect copyrighted material. It is like a law that prohibits disabling burglar alarms.²¹ So what is wrong with that? In the vast majority of cases, such a law would be ethically appropriate. If doing X is wrong, then breaking the defenses that protect X is wrong. In situations where material no longer has copyright protection, breaking the defense would not be wrong. The morally ambiguous cases are those like OLGA where it may be wrong to shut down the operation. Those cases do raise complicated ethical issues but, again, those kinds of complicated cases are not under consideration here.

Lessig also points out how the American courts, in protecting copyright law, have infringed on the national sovereignty of other countries. He cites iCraveTV, which streamed television content over the Internet. The site was in Canada and the streaming was legal under Canadian law. Even though iCraveTV tried to block non-Canadians to the site, they were not terribly successful. This fact was the basis of the suit. Lessig then asks pointedly:

Imagine the Chinese government telling the American site China Online that it must shut down until it is able to block out all Chinese citizens, since the content on China Online is illegal in China. Or imagine a German court telling Amazon.com that it must stop its selling of *Mein Kampf* until it can guarantee that no German citizen will be able to get access to the book — since that book is illegal in Germany. Or imagine a French court telling Yahoo that it has to block French citizens from purchasing Nazi paraphernalia, since it is illegal in France. (Oh, no need to imagine. A French court just did this.)²²

Lessig raises an important issue here. The U.S. has been criticized for its tendency to impose its views on Internet regulation on the world, just as it has been criticized for imposing its views on other matters. However, what Lessig has shown is that there needs to be international agreement on matters like this, and that the U.S. should not insist that everything be done its way. I agree, but intellectual property protection is a part of all international trade agreements. To be a member of the World Trade Organization (“WTO”), a country must endorse the WTO’s Agreements. Now, the what and how of international intellectual property protection is often contentious but I do not see how all this speaks for downloading and sharing copyrighted music without paying for it. Indeed the European Union is now considering copyright protection that is even more extensive than that in the United States.

5. The Current State of the Argument

My own conclusion is that copyright protection is warranted when, in fact, what is protected is artistic creativity. And I argue that with respect to the downloading and sharing of songs and movies, what is being protected is artistic creativity. Thus copyright protection is normally morally right in such cases and the downloading of songs or movies without paying for them is morally wrong. Whether morality should be legally enforced in these circumstances is, of course, another issue; although I see no overriding reason why morality should not be enforced in these cases. I have considered arguments by De George and Lessig that might override the traditional arguments in the cases at hand and have found them unconvincing. What else needs to be done to make my case?

I first need to show harm. U.S. revenue from CD sales has fallen by a third since 1999. Forrester Research said that “downloaders had reduced industry revenues by at least \$700 million.”²³ Even though movies still take a long time to download, the quality is not as good, and the industry has done a better job with code that prevents copying, “as many as 600,000 movie files are shared each day on peer-to-peer file-sharing networks such as Morpheus and Grokster, according to the Motion Picture Association of America.”²⁴

It might be tempting here to say that we are not protecting artists but rather the big recording companies. Most recording artists never see what are called back-end royalties since their record sales never make back their front-end advances and other expenses. There are lots of things wrong with this argument and we will revisit it several times. But in terms of harm the argument overlooks the fact that it is the songwriters who are hurt far more than the artists. Barbara Dozier who keeps the books for her husband, Motown songwriter Lamont Dozier, noticed the following:

A few years ago she began to notice that while Dozier's radio royalties were holding up, his royalties from CD sales were plummeting. "Finally I realized it was file sharing," she says. An income stream that Dozier had counted on to serve as an annuity had been cut in half she says.²⁵

It takes only a moment to apply the two justifications for copyright protection to the case of Dozier, a man who has written more than 600 songs including 76 top ten hits.²⁶ What the copyright law protects in this case is artistic creativity and, in the absence of such law, there would be far fewer songs written. Moreover, it is unfair that those who have contributed nothing to the creative process should deprive Dozier of income while gaining advertising revenue at his expense and at the expense of all other songwriters.

Secondly, I need to examine the moral logic behind two major intellectual property cases. In declaring the VCR (technically the Betamax MTR) not to be in violation of the copyright laws, the U.S. Supreme Court in *Sony Corporation vs. Universal City Studios, Inc.* was impressed by many factors. The primary purpose for recording a television program is what the Court called "time-shifting." The Betamax allowed a TV viewer to record a television show at a time when he would not be present and then watch it later when he would be present. He was merely watching later something he could watch for free. Furthermore, there were relatively few objections from the copyright owners to having their shows recorded. Finally, even those like the plaintiffs who did object could not show significant harm. Thus the use of a Betamax machine to record a television program does not infringe on the copyrighted programs.

It seems to me that the Napster case presented morally relevant facts that led the Court to a different conclusion from than in the Sony case. The Court explicitly stated that the primary use of Napster was to enable users to download songs rather than purchase CD's. Furthermore, the Court cited Napster documents that showed that Napster knew it was encouraging the exchange of "pirated" music. Indeed Napster aided and abetted this activity by intentionally being ignorant of the names of Napster users. Many artists objected to this practice. It was the band Metallica that pressed for the lawsuit. And the plaintiffs did show substantial harm. Thus Napster involved more than time-shifting, there was far more objection from copyright owners, and significant harm was established to the court's satisfaction. Accordingly, Napster, the Court decided, should not be exempt from the copyright laws.

It seems to me that the same reasoning applies when applied to Kazaa, Morpheus, and other companies that permit the downloading of songs without operating as a central server. These companies enable thousands of people to download millions of songs in violation of copyright, harming the copyright holders and other companies which

operate in accord with the copyright law — Sam Goody and Tower, for example. Companies such as Kazaa facilitate individuals in doing something that is unethical. Why would the absence of a central server make any moral difference?

Lessig makes much of that fact that *Sony vs. Universal Studios* demonstrated that Betamax was capable of significant noninfringing uses; since Napster was also capable of noninfringing uses, he argues, Napster should not have been found in violation either. I respectfully disagree. The main use of Betamax was noninfringing. That is not the case with Napster. As it was held in *A&M Records vs. Napster*, “The court finds that Napster use is likely to reduce CD purchases by college students, whom defendant admits constitute a key demographic.”)

By the way, another incentive for people to steal music is the normally excellent quality of digital music files. Before digital technology, copying always involved corruption in the item copied. That was certainly true with copying VCR tapes, which may be why the industry did not protest the Sony decision very much. There was a built in deterrent to stealing. That is not the case with downloading and sharing songs in digital format. Now the downloaded version is close to being a perfect copy of the original. There is now no longer a physical deterrent to theft.

Thus the reasoning in these two court cases is consistent with the moral arguments that support copyright protection. In Sony there was not, in the Court’s judgment, a significant threat to artistic creativity nor were there major fairness issues. In Napster, there were.

6. Objections and Replies

A. The “one good song, many lousy songs” argument: One of the most common objections students have is that CDs must be purchased as a whole where what is really desired is just one or two songs on the CD. These students say something like this. “The record companies are just ripping us off because they force us to buy all the lousy songs. They force us to pay for material we do not want. So it’s only fair that we download from the Internet.” Even I find such an argument to be somewhat persuasive. Back in the dark ages of vinyl records, record stores would sell both long playing albums and individual records. With the advent of CDs, fewer singles were sold. For example, I really enjoy the ballads of Bonnie Raitt but I am less enamored with her rock songs. Every Bonnie Raitt CD I own has more rock songs than ballads. Why can’t I have a CD with just the ballads?

Technology has made that argument obsolete. Apple has developed iTunes and brokered an agreement with the recording industry to allow individuals to download songs for 99 cents each. Despite predictions that people would never pay 99 cents to

download a single song, Apple's strategy has been a great success. Indeed Steve Jobs, Apple's CEO, appeared on the cover of *BusinessWeek* on February 2, 2004. Jobs had estimated that as many as 80 percent of consumers would pay for downloads, so long as it was simple and relatively cheap. Since April 2003, 30 million songs have been downloaded from Apple's store.²⁷ Moreover, Apple is not the only game in town. Microsoft, RealNetworks, and Sony all have products that do or could compete with Apple's iTunes. Even websites using the P2P technology are rethinking their stands. Altnet and Kazaa have had some conversations with the RIAA.²⁸

Thus the advent of iTunes has eliminated one of the arguments that people have used to defend the practice of downloading and swapping music over the Internet.

B. "You can't get some songs except through the Internet" argument: Lessig made use of a version of this argument when he pointed out that there are songs from the 1930s or 1940s that are still under copyright but are not commercially available. Certainly there are songs that are difficult, and perhaps impossible, to get through normal commercial channels. I suspect, however, that as iTunes grows, availability will increase exponentially. After all, that is the point regarding information in cyberspace. And besides, downloading esoteric material is miniscule. The vast majority of illegal and immoral downloading and sharing involves songs that are readily available commercially. Although legal sales of downloads topped two million the first week in February 2004, Big Champagne (which tracks file swapping), "estimates that about 250 million songs in MP3 format are being traded each week through the most popular services for sharing downloads illegally."²⁹ And the problem is not limited to the United States. In Germany, during the first half of 2003, the number of pirated songs downloaded as well as compact discs copied equaled or exceeded the number of those purchased. German music sales declined 18.1 percent during that same time period. In October 2003, more Europeans used Kazaa than Americans.³⁰ Of course, the large number of illegal downloads does not fully address the issue of music that is unavailable. In those cases I agree with Lessig and would endorse either a revision in the copyright law that decreases the time of copyright protection or adopt a "use it or lose it" provision. Such a provision would allow others to exploit a copyrighted work if the copyright holder does not make the work available commercially.³¹

C. "There is literally nothing to steal" argument:ⁱ Some might argue that downloading the songs is not stealing because there is literally nothing to steal. Stealing usually involves stealing something physical like a car, a stereo or even cash. But nothing physical is stolen when the music is downloaded. All that is downloaded is a bunch of electrical impulses coded as 1s or 0s. How can that be stealing?

ⁱ I am indebted to my colleague Philip Bromiley for this argument.

That is an interesting argument but I think it misses the point. First, the argument ignores the fact that copyright law is intended to protect the expression of ideas, which are not physical assets in the usual sense. When you copy an entire book, you do not steal the physical paper. You steal the ideas that were on paper and put them on your paper.

Second, the argument misunderstands what is really stolen. What is stolen is the royalties that would have gone to the record companies and the artists. They have less money than they should have had under the law. When some mutual funds were accused of various practices that kept money from going to those who had bought the fund, nothing physical was literally taken away from those in the fund. Rather they never received something that they were entitled to. Nonetheless such activities were wrong and were a kind of theft.

I do admit that psychologically it is easier to steal off the Internet than it is to steal a car or pickpocket a wallet. It is also psychologically easier to steal from an institution like the government than it is to steal from a known person. However, the psychological fact that it is easier to steal from an institution does not make it morally right. The same is true of stealing from the Internet.

D. “The artists aren’t hurt — it’s only the big business record companies:” We were introduced to this argument earlier. Actually major artists are hurt — although one might try to apply the “it’s only big business” argument to them as well. But, more importantly, as we have seen the songwriters are hurt. However, there is more involved here than harm to songwriters. One has every right to be disgusted with the behavior of American business and American business leaders. Executive compensation is out of control and several egregious cases have occurred in the entertainment industry. Even those facts do not give one the moral right to steal from big companies. One can justifiably seek greater regulation or boycott their products, but one does not have a right to steal from them.

E. The Business School Argument: “This is about competitive advantage — not creativity:” This is not about protecting artists and supporting artistic creativity. An examination of the real world shows that corporations use copyright law and other forms of protection for intellectual property as a competitive strategy to gain strategic advantage for the company. Despite the rhetoric, the aim of much copyright protection in the real world is to gain or maintain market share. To the extent that copyright policy is a strategy for gaining market share, it has nothing to do with stimulating creativity or providing a just reward for the time, effort, and risk taking that goes with innovative activity.

What is true in real space may be true of cyberspace as well. Lessig quotes Michael Robertson of MP3.com as saying, “This litigation is as much about strangling the competition as anything else.” In summary, it is argued that most of the appeals about copyright protection are a smokescreen. Copyright is used as a strategy in competitive warfare. It has nothing to do with protecting artist creativity. This strategic use of copyright is not justified by the Constitution or by the traditional utilitarian and fairness arguments that I have relied on.

Obviously there is some truth in this argument. In fact, I think Lessig is on very solid ground here. However, the argument does not easily apply in the cases at hand. Downloading and sharing songs without paying for them, in violation of copyright, threatens an entire industry. It does not simply threaten some in the industry while enhancing the position of others. In principle, if the amount of free downloading were big enough, the entertainment industry would be limited to those who wanted, for whatever reason, to have their material available for free. That would be an injustice to those who did not want, or could not have, it available for free.

Determining the real motives for action can be really difficult. However, one way of getting at all this is to look at what the artists say rather than what entertainment executives say. And the truth is that the artists do not speak with one voice about this. A lot depends on how artists make their money. New artists, initially, are more interested in being known. Thus they may be perfectly happy to have their music downloaded and shared. So long as they hold copyright to the music, there is nothing to stop them from putting it on the Internet and sharing it for free. Other artists earn far more from concert appearances than they do from the royalties from recordings. I have in mind artists like the Dave Matthews Band. These artists would benefit from the increased sharing of their recordings on the Internet, especially if the Internet activity would increase the buzz around them and thus increase concert attendance.

On the other hand, some artists — due to age, illness or just a decline in popularity — might not be able to make concert appearances any more. James Brown comes to mind. For them royalty income is important and thus it is critical for them that copyright be protected. From a utilitarian perspective, some artists gain from the strict protection of copyright and others do not.

The solution, it seems to me, is fairly simple and is in line with many of the suggestions that Lessig has made. There is nothing in current copyright law to prevent artists from making their material available for free. If they believe it is in their interest to do so, they have every legal and moral right to do it. Certainly, file sharing facilitators can provide the means for file sharing and downloading songs for which these artists desire no compensation. (Note: the artists will still want to copyright their songs so

that they own them, but they can nevertheless allow their copyrighted songs to be downloaded for free.) In fact, some of this is already happening. Apple is meeting with independent labels and some, like CD Baby, are reported to be negotiating on behalf of several groups of independent artists.³²

Conclusion: Suppose that De George and others turn out to be correct. It remains relatively easy to download from the Internet and not get caught. Be that as it may, the moral point remains the same. It is immoral to violate copyright by downloading and sharing music or movies. I can think of no good argument that allows people to violate copyright law with respect to movies and music. I admit that I am demanding a lot. For the sake of argument let us agree that technology has made stealing easier. Thus a morality that forbids stealing becomes more demanding—and this at a time when some say that ethical conduct is declining generally. Most studies show a huge increase in student cheating over the past 20 years. Universities are waging a battle not dissimilar from the record companies regarding the taking of term papers off the Internet; and the universities are using the services of technology to try to discover when students have done so.

Furthermore, as morality becomes more demanding, students seem to be less sensitive to it. The rise in cheating and plagiarism is one example. The cavalier attitude toward respect for intellectual property is another. Technology produces easier opportunities for immoral behavior so it is more difficult to behave morally. Worse yet, people are becoming more cynical about morality. Morality is for chumps. But when carried to its extreme that attitude is extremely dangerous.

Think of terrorism at the extreme end. Since unethical behavior is easier, morality becomes more demanding. And what happens if we do not meet those demands? The world looks more and more like the Hobbesian world of the war of all against all where life is nasty, brutish and short. And in that world the illegal downloading and sharing of songs will be the least of our problems.

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* I am greatly indebted to Jared Harris who provided a critical review of two earlier drafts of this address. The address has benefited enormously from his reviews.

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Below are the highlights of Norman Bowie's Question and Answer session.

Question:

CD's are really cheap to make, yet most people believe they are overpriced. Don't you think the music industry is ripping off its customers, and aren't we just getting even by downloading music?

Norman Bowie:

Perhaps your argument was stronger two years ago than it is now. The advent of Apple's iTunes has been a significant development. Its success shows that people don't mind paying 99 cents to download CD-quality music. In preparing for this lecture, I went to the house of a colleague of mine whose daughter studies at Carnegie Mellon. She has iTunes and I discovered they even have songs that I'd listen to, like the Beatles! So developments like this have taken some force away from your argument.

Question:

What came to mind during your remarks was the expression "opportunity makes the thief." In my misspent youth I was a lawyer and occasionally would use that expression. It seems the music industry is up in its tree and those who download music are up in theirs. I'm wondering if there's a middle ground here and if there might be a way to bring them closer together. What do you think?

Norman Bowie:

The honest answer is that I don't know, and when I don't know I tell a story. I shared these remarks with a graduate student in Strategy and Ethics at the University of Minnesota and he said, "Norman, the trouble is that the industry has a very bad business plan." The question is, what is the industry response going to be? The industry response so far has been to sue everybody that they can get their hands on. Irrespective of the legal rights and wrongs, that is not the normal way to deal with customers. One of the things on which the student wants to work with me is figuring out what the industry's alternative business plan should be. What it can't be, it seems to me, is what happened when some of the music retailers dropped the price of CDs by about 25 to 30 percent. All that has done is put Tower Records into bankruptcy because stores selling pretty much just CDs couldn't take that kind of a loss. Some of my friends in the Strategy Department in the Business School say that it is like the airline industry. If you simply keep lowering the price, then a lot of people who sell things will see it's not going to be profitable to do business. I know that's inconsistent with the previous question on overcharging but I agree with you that the music industry needs to respond in a different way.

Question:

Do you see a positive side to downloading? You examined the “one good song per album” argument. Do you see artists improving their art so they can sell more because of downloading?

Norman Bowie:

Yes, I can see that an artist might want to make his or her music available for free over the Internet, to become better known and perhaps secure a big record deal. That’s okay, as long as it is their music. You’re not obliged to exercise your copyright protection. If I had the copyright in this lecture—which I don’t—I would allow you all to download it for free; that would be fine with me. I’m not against downloading, when the artists want you to download it for free. Its artists like James Brown that I am worried about. iTunes, and services like it, could potentially make the prerecorded CD a nonviable product and I don’t have any problem with that. That gets us back to the other question: what is the viable business model? I believe in competition—I’m a capitalist.

Question:

What if I were to buy several CDs legitimately and then use the technology we now have to ‘burn’ perfect copies of a couple of them for my girlfriend?

Norman Bowie:

Now that is a good question. One of the things that I left out in the beginning of my talk to save time was that De George actually goes through several scenarios like that. Technically, it is illegal, but I don’t worry about that too much. The Kantian purist side of me says its wrong and you shouldn’t do it. But as old as I am, and realizing that I’ve lived an imperfect life, I am reluctant to be an extremist about these things. However, there are cases like the one that I quoted, where someone downloaded 960 songs; and I know another student, a personal friend of mine, who has downloaded 800 songs. It’s the big stuff that I really worry about.

Question:

It is interesting to hear the discussion from a moral standpoint. It is hard to formulate an argument for saying that it is morally okay to steal copyrighted material. But it seems you are asking a lot of consumers to act ethically when labels are able to cut the price of a CD from \$20 to \$10, or \$16 to \$12 overnight. Obviously they must have been gouging pretty hard in that circumstance. You also read of many artists who are making no money off of their sales, or of platinum level artists who are only making \$30,000 a year from their company. When you look at all these things and then ask the consumer to behave ethically, it seems like all the responsibility is on the consumer’s side, and there is no reciprocation from the record companies.

Norman Bowie:

If you are lucky, as an artist, you are paid what in the publishing business is called an advance; you get some royalty money upfront. Then you have to sell a certain number of records before you've paid that off. Many artists never raise enough money to pay that off, so basically they get their advance and that's all. So a lot of artists don't make a lot of money. I once got an advance of \$500 for a book that I wrote and they probably didn't sell more than 25 copies! I didn't make any more money. I got my \$500 up front and the publishing company actually lost money on me because I could not even make the advance back. That's why in many cases artists don't get the money because they don't recoup their advance. And sometimes artists just make very bad contracts (like guys in the sports industry sometimes do) and just end up with no money. Your other point about dropping the price is interesting, because it raises the question, what is the fair price? It is true that those companies could drop the price once they are no longer on a legitimate competitive field. This question arises in the case of the pharmaceutical industry. The debate about what counts as a just price is interesting. However, even if you are right that the companies are ripping you off, what is the proper response on the part of the consumer? I think that consumers should not respond by stealing music. They could boycott or get involved politically to change the laws. I don't think copyright violation is the way to go.

Question:

What differences do you see between the copyright laws and patent protection? Both are isolated mechanisms and I know that both are recognizing the fact that knowledge is a public good and once it is out there, it essentially becomes free. Patents have an expiration date, and then the subject of the patent becomes generic. Is it possible that the copyright law could have certain modifications as an element to resolve this reciprocity dilemma between the customers and the companies?

Norman Bowie:

As I understand it, trade secrets, copyright, and patents, are three different ways to protect intellectual property. The choice that is made by the person who owns the intellectual property depends on utilitarian kinds of business decisions. In the case that I was talking about, the way that the industry has gone has been to use copyright because they don't think patents are a very good way to do it.

Question:

Looking at morality on a broader scale, with downloading music I think it is funny how morality has come up where money is involved. No one seems to be paying attention to what the artists are singing about: violence, sex and drugs. No one is saying anything about the artists who are singing to our youth that it is okay to steal, kill,

and sell drugs. No one is saying anything about those moral issues. I think that it is funny how moral issues are being raised about money, whereas no one cares about the sanity of our children.

Norman Bowie:

I totally agree with you. If you think back to the very end of my talk, I said that technology is making it easier to be immoral and the impact of that is huge. I said that if we can't rise up to the challenge of a more demanding morality in a technological world that makes immorality easy, then we will be in a Hobbesian state of nature in which the downloading and sharing of music will be the least of our worries. My point is that morality is a slippery slope. What troubles me is how easily we resort to trying to rationalize all kinds of immoral behavior. This is just a symptom of a much more serious issue, and all the issues that you raised are much more serious than the downloading issue.

Question:

We are talking about money that is due to these different individuals. But don't you think the words of some of these artists raise issues that are on a much bigger scale than money that is owed to them?

Norman Bowie:

I'm discouraged by the fact that when you look at that early quotation from *The New York Times*, you see that people who don't have the privilege of going to college are taking more of a moral stand than the college students. That is very troublesome to me. I think it is a symptom of something much deeper because we in the university, whether it is faculty or students, ought to be aspiring to a higher morality. We ought to be asking the questions about social justice that you are asking.



CENTER FOR
BUSINESS ETHICS
175 Forest Street, Waltham
Massachusetts 02452-4705

Center for Business Ethics

Tel: 781.891.2981
Fax: 781.891.2988
E-mail: cbeinfo@bentley.edu
On the Web:
www.bentley.edu/cbe