

Is iTunes Good Enough?

Civil liberties, privacy and the internet are victims of the peer-to-peer wars.
Apple's iTunes Music Store doesn't help matters when it plays by music industry rules.

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Since late April 2003, Apple customers have been enjoying an unaccustomed pleasure: readily available, high-quality digital music at the click of a mouse. The Apple iTunes Music store has made over 200,000 such files available for \$0.99 each (discounts are offered for whole albums), and the success of the service (over 2,000,000 sales in the first 16 days) has even led people to suggest that the iTunes Store is the long-sought answer to the “problem” of peer-to-peer (P2P) file-sharing. While the iTunes store has a lot to recommend it, if you think it's the “answer” to P2P, then you're not asking the right questions. iTunes store or no iTunes store, P2P file sharing is here to stay. So we've got two questions to answer. First, how do we get artists paid for the unauthorised file-sharing. Second, how do we halt the collateral damage on civil liberties, privacy and innovation that is piling up as a result of the legal assaults on file-sharing. The Apple iTunes Store, whatever its other features, fails to address either question.

COLLATERAL DAMAGE

P2P has problems, that much is clear. The biggest problem with P2P is that it has attracted the wrath of the entertainment companies that make the majority of American music and films. These companies have fixated on crushing infringement over P2P networks at any cost. The war on P2P has done untold damage to the Internet and to the freedom of those who use it. The attacks on P2P are an assault on privacy, innovation and civil liberties. Verizon is being compelled to compromise its subscribers' identities on the basis of a suspicion that they were sharing infringing files. Purveyors of general-purpose P2P software spend more time defending their software in court than improving its usability, and their investors face litigation for the “crime” of investing in a software company. College students' life savings are being transferred to billion-dollar media companies and university administra-

tors are putting their entire campuses under surveillance to catch infringers. New laws are working their way through Congress, laws that will subject network users and technology companies to unprecedented risk and attack from the entertainment industry.

Your privacy is a victim of the P2P wars: as a sop to Hollywood, the University of Wyoming is copying and examining every packet routed on its campus network. No university would have appeased Joe McCarthy by opening and examining all student and professorial mail to root out secret communists, but more and more universities, companies and organisations are lining up to help the studios run infringers to ground.

Recent proposals and actions from the studios reach even farther. First came the legislation known as the Hollings Bill, which would have required technology innovators to beg permission from federal regulators before they were allowed to build any new digital products. Next came the Berman Bill, which would have given copyright owners vigilante rights to attack the computers of anyone suspected of infringing copyrights, absolving them of responsibility for any collateral damage done to innocent bystanders. Both of these bills could be reintroduced at any time. What's more, the studios are working to sneak in similar regulations through efforts like the *Broadcast Flag* proposal, which is working its way through the FCC right now.

All of this represents an old tactic for eroding civil liberties – by turning us all into criminals, it becomes easier to violate our rights. Today, more Americans have engaged in file-sharing than voted for President Bush. In fact, in May 2003 alone, fully half of all internet users in this country used file sharing software. Do we really want to live in a country where the copyright law turns a majority of internet users into unindicted criminals? Do we have any illusion that we can somehow convince all of them to comply with a copyright law that

is so clearly out of step with the technology and the times? The iTunes Store doesn't do anything to solve this most dire problem of P2P.

In fact, in order to protect services like the Music Store from competition, copyright holders will redouble their efforts to stamp out the P2P networks. Of course, the file sharing genie won't go back in the bottle. But the collateral damage to our civil liberties, privacy and innovation – that will keep piling up.

LISTENING TO LABELS, NOT CUSTOMERS

Recent developments with the Music Store illustrate the ways in which copyright owners are reaching out to control technology, trying to take away your rights and sell them back to you broken.

In 1984, the Supreme Court ruled that it's legal to sell any tool capable of a "substantial non-infringing use" – that is, any tool that can be used for good is legal in the market, and can be offered up even if some bad actors use it to infringe on copyrights. This is called the *Betamax doctrine*, and it's good news for the public. We get the benefit of flexible, general purpose tools (imagine how crappy cars would be if Ford had to limit their features to those that wouldn't be useful to the getaway driver in a bank-robbery!). Companies get the benefit of our business. Even the entertainment industry benefits, though it often has to be dragged kicking and screaming to the money-tree: Hollywood has been the biggest beneficiary of the VCR.

Indeed, companies ignore their customers' demands at their peril. Sony, inventor of the revolutionary Walkman, was once synonymous with personal stereos. But today, the digital Walkman market is dominated by companies like Creative Labs and Apple, who have thoroughly eaten Sony's lunch. Sony opted not to develop digital MP3

players at a time when the market was crying out for such a thing. They allowed themselves to be ruled by their recording arm, which saw MP3s as a “pirate” format. Instead, Sony built crippled “rights-managed” players that supported formats like Real and OpenAG, formats that restricted the legal rights and legitimate expectations of their customers, who stayed away from these ridiculous devices in droves. Apple is following Sony’s footsteps right up to the cliff-edge. The iTunes store imposes nonsensical limits on private uses, like capping the number of “authorised” machines that can play your bought-and-paid-for music to three. Nowhere in the Copyright Act does it state that playing your music on three stereos is fair use, but adding a fourth is piracy. More ominous is Apple’s recent “enhancement” to iTunes, which removed the ability to listen to your iTunes collection over the internet (for example, you could leave your music library on your home computer and listen to all the tracks at work). This feature is perfectly legal, and what’s more, there’s been a strong market-demand for features like this. But Apple removed the feature, apparently to assuage the fears of the music companies whence it licensed the music in the iTunes store. Apologists for Apple argue that because this feature was used by some people to infringe on copyright, Apple had a duty to remove it. This is, of course, nonsense. The Betamax Doctrine has been the law of the land for nearly 20 years, and for all that time, technology companies have been free to ship any technology that could be used legally – even if someone can think of an infringing way of using it, too.

Another argument holds that Apple had a financial responsibility to remove this feature – that a failure to appease the music companies would result in a loss of revenue to Apple. This is looking-glass logic: how can serving a legal market demand be bad for business? Of

course, the recording studios might hold back on releasing more music to Apple if it doesn’t roll over (for all we know, the deal may even allow them to pull back all the music they currently offer if Apple won’t comply). Certainly, it would be a terrible black eye for Apple to have its music service killed by the recording industry. But this simply highlights another way in which the iTunes store can’t solve the problem of P2P. Apple’s customers have rights under copyright: the right to fair uses like time-shifting, the right to first sale, the right to space-shift music from one player to another. These are rights, not privileges, but our ability to exercise them are hostage to Apple’s need to maintain good relations with the control-mad labels.

If Apple’s continued ability to create and deliver software, hardware and services is to be subject to the emotional equilibrium of recording executives, then Apple’s customers should be very alarmed indeed. It’s possible – easy, even – to take the music off an iPod and move it to another computer. If this catches the attention of the recording studios, can we expect Apple to stand up to them, or will they “enhance” the iPod by removing the ability to mount it on your desktop like a hard-drive and use it for backup and other non-music-related tasks? Indeed, the more Apple’s products and services depend on the studios’ continued support, the more of its customers’ legitimate interests it will have to trample.

The recording industry is dictating how Apple’s customers may use their *own* media, as well as those licensed from its artists. Where will it end?

THROW AWAY 90% OF THE LIBRARY

Another “problem” of the P2P nets is that they’ve created an unprecedented library of human creativity. At a time when 80 per cent of the music ever recorded isn’t available for sale at any price, P2P networks teem with live,

bootleg, and out-of-print music digitised from media as diverse as 78s, reel-to-reel tapes and LPs. This library can *never* be matched by the iTunes store. Most of the music on the P2P networks is simply not controlled by the recording studios. The bootlegs and DJ mixes inhabit a netherworld of conflicting copyright law principles and thus can't be licensed.

The independent tracks are owned by thousands of labels, individuals and groups. The copyrights on the deleted tracks have often changed hands too many times to be tracked, or have reverted to creators who have long since died. The purpose of copyright, as set out in the Constitution, is to build just this kind of library. Copyright gives authors a limited set of rights in their works to encourage them to create, so that the largest quantity of work will be made available to the public. The iTunes store can never grow to more than a fraction of the size of the P2P library, no matter how many deals Apple cuts with the studios and even the independents.

Copyright law exists to build this kind of library, but it has lagged behind the technology so badly that copyright law is precisely the reason that Apple can't make a legal version of it.

START PAYING THE ARTIST

Of all the problems with file-sharing, the one that gives average users the most trouble is the idea that they're stealing from the artists they love: that file-sharing is depriving musicians of their rightful living. It's true. If you download a song from a P2P network, the artist doesn't earn a penny. Surely, here, the Apple iTunes store offers some improvement over the P2P networks.

Sort of. Apple's deal is with the labels, not the artists whose music is offered for sale in the iTunes store.

The labels have their own deals with the artists, deals that are notoriously one-sided and subject to crooked account-

ing practices that leave most artists without any substantial royalties for the sale of their work.

This, too, is a failing of copyright law. If we fix copyright, we can use both P2P-nets and the iTunes store to compensate artists.

THE SOLUTION

Any solution to the P2P problem has to do four things:

1. Stop the assault on the Internet and its users.
2. Leave the public's rights intact.
3. Support the ongoing existence and improvement of the library.
4. Directly compensate artists for the use of their work

The iTunes store is interesting and useful, but it doesn't solve any of the problems of P2P.

What *will* solve the problem of P2P is a reform to copyright law. In fact, changing copyright law is the traditional way to reconcile the need to treat artists fairly with the need to allow new technology to flower.

The solution is something called a *compulsory license*, and it's the tool we've always used when copyright has gotten in the way of freedom and new technology.

It's pretty straightforward. Under a compulsory license, it's legal to share any music you can find. A pool of money is collected from users of the system (this could happen at the level of the P2P service, or the OS vendor, or hardware vendors, or network providers). A "rights-society" uses statistical sampling to determine whose music is being shared how often, and splits the money up, with a portion going to the labels and another portion going directly to artists. In the past, compulsory licenses have been enacted in response to the player piano, the jukebox, cable and satellite television. In fact, there's *already* a compulsory license for music on the internet: internet radio stations have a

deal via the Copyright Office that lets them pay a fee and stream any song. Part of the fee they pay goes straight to the artist.

A compulsory license for music on the internet won't be simple. We'll need to work out how much money gets collected, from whom, and who it gets paid to. These are hard problems, but they're a *lot* easier to solve than eliminating P2P is. The compulsory license may need some tweaking to get it exactly right, but a mistake won't send

students to jail, it won't break the end-to-end nature of the internet, it won't stifle criticism or bankrupt companies.

The iTunes store still has a place in a compulsory license world: a bigger and better place. Apple has always been about ease-of-use, clean interfaces and great organisation. Those can be the selling points of tomorrow's iTunes store, too: except that tomorrow, Apple could offer a library that was 1,000 percent larger, and give its customers the features they demand.