

CHAPTER 1 MUSIC TECHNOLOGIES AND INTELLECTUAL PROPERTY

Introduction

Since the first mechanical recordings of sound for future ‘playback’ in 1796, there have been incredible advances in music distribution technology.¹ The year 1877 saw Edison’s invention of the phonograph cylinder on which music was recorded and ‘played back’ (or *read*, in the terminology used in much of the current literature concerning music and intellectual property). Berliner patented the ‘gramophone record’ which was a ‘flat disc’ form of Edison’s cylinder and became the precursor to the Long Play disc (LP). There are many interesting steps that have led to current sound recording, distribution and playback technology but here I will discuss only the relevant technological changes as they pertain to current debates in intellectual property policy, technology and ‘piracy’. These will include popular contemporary vehicles for music distribution e.g. LPs, cassettes, Compact Discs (CDs), etc. I will also discuss how technology and policy frame the ethical issues that will be dealt with in chapter three.

Before I discuss changes in technology, it is important briefly to outline two groups of people who are differently affected by the technological changes that I will describe: Ordinary Users (OUs) and Recording Industry Supporters (RISs). An Ordinary User is anyone who possesses the means to file share (computer, high-speed Internet, large hard drive, etc.) and is motivated to file share due to a desire to consume music (i.e., those who embrace these

¹ For a detailed explanation of the science behind sound recording technology, see *Handbook for Sound Engineers* (Ballou 2000). And, for a history of recorded music see (Music CD Industry 2000—online).

technological changes in the interest of access to music). An RIS is anyone who is acting in such a way as to protect herself from possible harms due to these technological changes. RISs will include entertainment industry groups, record labels, (some) recording artists, producers, copyright holders, etc. (those who would like to control these technological changes as a matter of maintaining their copyrights, and so too, their livelihoods). I will use the terminology of OUs and RISs throughout, so I introduce it here.

History

LPs were introduced commercially as a vehicle for the distribution of recorded music in 1948. Musicians were recorded in recording studios and their music was transformed from sound waves to vinyl discs. These discs were then sold to consumers and played in their homes on record players (or turntables). This technology was the main method of distributing music for nearly forty years. Though it is true that many people have maintained a love of this format, it was eventually replaced by new, more versatile, technology.

Though the 8-track tape did not displace the LP by any means, it was developed and popularized because it gave consumers of music an option that LPs could not – portability. The 8-track tape was first introduced as a car audio accessory in 1965 and home 8-track players were introduced in 1968-1969. The 8-track tape was a small (relative to the twelve inch size of a standard LP) product on which music could be recorded. The portability of the 8-track satisfied a desire among music consumers to bring the music they liked the along with them as they travelled instead of having to listen to whichever songs the radio disc jockey decided to play.

Technology in this area was moving along quickly now, for in the early 1970s (just a few years after the 8-track tape had become popular) cassette tape technology was becoming popular.² The cassette (French for “little box”) took a few years to become popular after its development, but it soon became another popular consumer option when it came to the distribution of recorded music. The cassette had the features consumers wanted from previous technology; namely, a means by which they could purchase recorded music (distribution) and the option of taking the music that they had purchased with them instead of being forced to listen at home (portability). But, cassette tapes had one more important characteristic that the previous technology lacked—the capability of being recorded upon but the consumer.³ Now, ordinary people (Ordinary Users – OUs) could record sound onto a cassette by using the same device they used to play music from the cassette. The cassette player (or cassette recorder) came with a ‘record’ button which gave the ordinary person a new power over the format. This technology now gave average consumers of music the power to both *read* (consume what the medium supplied) and *write* (supply content to the medium itself).

The cassette was a distribution vehicle, it was portable (and compact), and (with the introduction of *blank* tapes) it was now a way for consumers to copy and ‘share’ the music that they had purchased or heard on the radio. With a cassette recorder and a blank cassette, one could rearrange their own collections and record them in the order they liked best. This activity

² Though the Compact Audio Cassette was first developed in 1963 it took some time for it to become a popular consumer product. It was not until 1977 that the cassette “had begun to challenge the disc as the most popular format and the number of LPs sold gradually declined while sales of cassettes increased rapidly. Record companies were releasing their product in both formats.” (Music CD Industry 2000—online)

³ It is not that previous formats for sound recording distribution were not recordable – the sound was written to each type of format, after all – it was just that, until the cassette, the option to record was not open to all people who used the technology of LPs, 8-tracks, etc. These other formats were not popular as recordable technology, but the cassette was; and this is due to the ease of recording and the low cost of the technology available for recording. Cassettes provided the first music distribution medium that consumers could both *read* from (listen to) and *write* to (record upon). This type of format is called *read-write*. The low cost of the cassette and the ease with which consumers could copy also made the cassette an excellent choice for ‘piracy’.

was known as ‘mixed taping’. Producing a mixed tape for friends or family was a great way to ‘share’ the music that you enjoyed and to gain knowledge of (and to sample) music given to you by friends that you may never have heard otherwise. Unfortunately, the quality of re-recorded music on cassette tapes was low, eventually making it not worthwhile to copy music from a copy, and so on. But, by the early 1980s (though not popularized until the late 1980s/early 1990s) a technology called the Compact Disc (CD) was introduced that produced much higher quality sound recording than any of its predecessors.⁴

By the mid-1990s the CD had become the dominant format for commercial music distribution. A CD is a disc that contains digital information that is read by the laser of a CD player. CDs, for most of the 1990s, were a ‘*read-only*’ technology as far as consumers were concerned. In this way they were more like the LP or 8-track tape. But people had become accustomed to ‘mixed taping’ from the days of the cassette, and soon blank CDs were developed which allowed consumers to engage in the mixing that they had once enjoyed. Unlike the cassette recorder, CD players did not have a ‘record’ button, so another device (the personal computer) had to be used in order for people to ‘mix’ songs in CD form. The personal computer was becoming an affordable device and had become popular and used in many homes (in developed countries). A CD of recorded music could be read by a personal computer and then copied as digital files and stored on the computer’s hard-drive. Once on the hard-drive, these files could be arranged and copied onto a blank CD. Unlike the cassette, a copy of a digital file did not lose its sound quality when ‘burnt’ onto a CD. This allowed OUs to reproduce their music collections with (near) exact quality.⁵

⁴ The CD was introduced in 1982 and was quite expensive. It was not until the end of the decade that the CD was a popular choice for the average music consumer.

⁵ The move to digital recording from analogue recording was an important one. The older forms of sound recording media were recorded upon via analogue methods (a continuous wave of audio signals transformed onto some

One thing that CD technology did not allow for (that cassettes did allow for) was the copying of music from the radio for one's own personal use. It is not necessarily the case that what CD users wanted was 'radio' per se, but the ability afforded *by* radio, which was the ability to copy any of a large selection of songs from one central source. At the time, people could only copy their own CDs or the CDs of other's onto their computers. In the late 1990s computer software was available to play digital music files on one's own computer, meaning that one no longer needed two devices to perform the same task as a cassette recorder could, namely, both play and copy music. The personal computer could perform the *read-write* tasks of the cassette but did not provide the ease of recording files from *another* source (like radio, for example) as the cassette recorder had.⁶

And so it was, until two major innovations in digital information and computer technology were developed – digital file *compression* and *decompression* (or *codec*) technology and high speed Internet capability. The digital files that could be copied from a purchased CD were large and took up a lot of space on a hard-drive (relative to a compressed version of the same file). In 1987, a German Research team (part of The Fraunhofer Society) found a way to better move digital audio files via the Internet. They developed an encoder that allowed for larger music files to be compressed (using the already developed codec technology) and as a

physical device). In the case of LPs, for example, sound waves were cut into a 'master copy' disc with a needle that created textured grooves – which another needle could play back from a vinyl disc pressed from the master. In the case of cassettes, sound waves would cause electrical impulse fluctuations in a magnetic field that would 'record' onto magnetic tape. Digital recording, on the other hand, converted audio signals into a pattern of 1s and 0s and so create a flawless (abstract, as opposed to physical) copy of the sound recorded. Any further digital copy would retain this abstract perfection, whereas the physical 'master copy' of an LP could wear over time – decreasing sound quality in future copies, and the limits of magnetic tape created a high degree of 'hiss' when copies were made of copies.

⁶ Though any analogue signal can be transformed into a digital signal, ordinary people did not (at least in the late 1990s and early 2000s) have as easy a time recording broadcast material through the use of a computer; though this was simple with a cassette recorder – especially if it had a built in radio.

result the MP3 format of digital audio files was born.⁷ This technology allowed for the compression of ‘regular’ digital files (like those copied from a CD) into smaller files with comparable sound quality. This technology was needed so that the large size of the digital files did not hinder the movement of the files through cyberspace. Alongside this innovation came the ‘speeding-up’ of the Internet. Formerly, connections between distant computers over the Internet were slow. The development of High-speed Internet allowed for much faster movement of digital information from one personal computer to the next.⁸ High-speed Internet became (nearly) the standard for North American and European Internet users between 2000 and 2003.⁹

Today MP3 is just one among many types of compressed file formats. For the purposes of my discussion here, ‘MP3’ will be used as the example of the technology but it should be understood that there are others, with more or less compression and sound quality loss, that perform similar functions (WMA, APE, OGG, FLAC, etc). These files gave the music consumer the ability to mix CDs, play their favourite music from a personal computer and store those files for later use. The year 1999 saw the introduction of portable MP3 players which could be ‘hooked-up’ to a computer. The MP3 files could then be transferred from the computer’s hard-drive to the MP3 player. The MP3 player could hold the equivalent of several CDs worth of music and a set of headphones would allow these audio files to be enjoyed anywhere. One of the most popular portable music players, the Apple iPod, was released in 2001. With the speed of the Internet and small, easily moveable files, the ability to copy a large number of songs (with a wide range of choice) was now possible.

⁷ About.com—online

⁸ Here, in the interest of brevity, I will not explain in detail the establishment and development of Internet technology; though this is an interesting topic in its own right.

⁹ Ezine Articles—online

The satisfaction of the need to access a large amount of music from a central source (a need that remained from the cassette/radio recording days) came by way of the development of Peer to Peer (P2P) file sharing networks. I do not mean to imply that a P2P network is similar to a radio broadcast in any way except that both allow the consumer to access and copy music for free from a source other than a physical copy (e.g., a friend's copy of a CD or cassette). P2P networks allowed (and still allow) anyone with a personal computer, an Internet connection (high speed preferred), and the P2P software program installed, to search for music files that other P2P users made available and to then 'download' digital copies of other people's music files to his or her own hard-drive.¹⁰

Notice here the difference in capabilities between the technologies I have discussed. LPs were a distribution (*read-only*) technology meaning that you could buy the LP from a record company and play it at home but could not make an LP of your own. 8-track tapes were distribution vehicles as well as portable. Cassettes were all the 8-track tape was, *plus*, it allowed for the copying of (and so, the sharing of) music. CDs (with the help of the personal computer) were a high quality vehicle for distributing, copying and sharing portable music. MP3 technology was primarily used in the movement of *redistributed* music. It was not a popular distribution vehicle for recorded music.¹¹ People were (in a sense) piling up all of the songs that they had individually purchased into a huge digital mound and then taking from the pile songs that others had contributed. There was no room in this (specific) story for the distributor. People

¹⁰ The details of different ways in which P2P networks were organized will come up later in this chapter, as it is important for the legal issues that followed such technology, but for now this explanation should suffice.

¹¹ Though SubPop records did start distributing music in MP3 format in February 1999, it was not a popular method for distributing recorded music, which I will explain in more detail later. Chapter three will have examples of online stores that now provide the recording industry with over 15% of their music revenue. So though it *was* not popular for the record companies to distribute music over the Internet in the late 1990s/early 2000s, it is becoming increasingly popular for labels to do so.

had access to music without having to go through the channels of the recording industry or the businesses that sell CDs, cassettes, etc. MP3 files along with high-speed Internet and portable devices like the MP3 player and iPod afforded music consumers a portable way to copy, share and store their high quality sound recordings. The OUs were happy - music sharing and radio-*esque* copying (that is, free copying from a large, centralized pool of music) were back in place and the music they enjoy was more portable and of higher quality than ever before. Though the consumers (OUs) were happy, the people involved in recording and distributing the music (RISs) were not. This tension between the happiness of the OU—in having access to music through P2P networks—and the ‘misery’ claimed by those in the business of making and distributing music (RISs) will be a central part of the remainder of this essay.

Intellectual Property

As we will see in the latter part of this chapter, the tension between RISs and OUs has a great deal to do with considerations of *music as property*. It will be useful here to explain (at least in part) the nature of property and property rights.

John Locke, in his 1690 work *Second Essay Concerning Civil Government*, provided an influential theory of property. Locke’s account focused on the rights owners of property hold. Locke famously explained that from a stock of un-owned resources (it may be helpful to imagine a new, virgin land to which you and others have arrived to settle) one person can obtain rights to those resources by “mixing her labour” with them. By mixing labour with resources in the commons, one is making that resource useful, whereas, were it left alone, the resource may be of no (or little) use. For example, upon arriving in a new land if you were to till a section of that land and plant a crop there, your labour mixed with the resource (the land in question) would

give you property rights over that section of land. Labour could be mixed with any resource from the stock available provided that ‘as much and as good’ was left for others to appropriate *and* what was taken was not allowed to spoil. These are the Lockean Provisos (there are actually *two* provisos in the Second Treatise).

Locke’s discussion is of physical property, in that the resources with which one could mix her labour are themselves physical. The stock of un-owned resources (“The Commons”) is physical and finite. This means that with a limited stock of resources, the appropriation of all of the water, for example (as one of the resources), would provide, for the person who toiled in procuring all of the water, a monopoly over that resource and so violate the first of Locke’s provisos. This is exactly what Locke wanted to avoid by setting such a guideline. Each person would have a right of access to the commons that another person cannot take away by violating the first Proviso. So, the finitude of the resources within the commons means that, for every ‘piece’ of resource appropriated, this leads to a slightly scarcer amount of that resource. This creates a value for the piece appropriated and as such can serve as a product from which the owner can profit (perhaps through the sale of the property or through trade of other property of value). J.W. Harris explains that, “[p]roperty is a legal and social institution governing the use of most things and the allocation of some items of social wealth. ‘Social wealth’ comprises all those things and services for which there is a greater potential total demand than there is a supply” (Harris 1996, 3).

In order for the property owner to find value in the appropriation of property (beyond the value gained through personal, private use – i.e., the value that comes from the property to the property owner herself), others must be excluded from its use. This is one of the ‘rights’ that one

has to her own property. By owning the property she has rights to it that others do not. She can do with the property what she wishes (destroy it, transfer it, etc.) and she can keep others from using it. These are important aspects of one's right to property - as Munzer points out, "power to exclude and the power to transfer are often the weightiest components of property rights" (Munzer 1990, 25). Through sale or trade of the property, however, ownership trades hands, and so the original owner would be excluded by the rights of the new owner. The excludability depends on the fact that physical property is "naturally rivalrous."¹² Physical property is considered rivalrous in that it can be depleted and so be unavailable for use by another person. For example, if you own a bottle of beer and I drink it, you cannot drink it. It is depleted as soon as I consume it and so you get no personal value from it, though you are the owner of it. Because the beer is rivalrous, physical property, the owner of the beer has a right to exclude me from its use.

Intellectual property is quite different from physical property in a number of important respects. Intellectual property can be understood as units of 'intellectual objects' - to use Tavani's phrase (Tavani 2005). Intellectual objects refer to expressed ideas.¹³ Ideas, unlike physical objects, are non-rivalrous in that the expression of one idea does not take the idea away from the person expressing it when consumed (i.e., heard and understood) by someone else.

Ideas are like a bottomless bottle of beer. To quote Thomas Jefferson:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar

¹² Physical resources are "naturally rivalrous" in that there is a finite amount of them. So, in this case, beer is something that is rivalrous by virtue of being physical. As we will see, intellectual property is non-physical yet can still be made legally (though *not* "naturally") excludable and so, legally rivalrous.

¹³ Intellectual objects can be understood as ideas that have been made public. Ideas that are subject to the creator's secrecy (i.e., unexpressed ideas) will not count as 'intellectual objects'.

character, too, is that no one possess the less, because every other possess the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me (Bergh 1903, 333-334).

Once an idea is communicated, it becomes practically non-excludable. It cannot be kept from anyone else who wants to use it or express it themselves. Again, as Harris writes,

Once an idea is fully in the public domain, it ceases to be scarce and in that sense an item of social wealth which must be allocated between competing claimants. An ideational entity differs from a tangible object in that mere uses of it are not naturally competitive...we may all, simultaneously, make any use we please of the abstract proposition that the angles of a triangle add up to 180 degrees (Harris 1996, 43).

Examples of the kinds of protections—Intellectual Property Rights (IPRs) that surround certain ideas include copyrights and patents. These protections are like ‘non-physical’ fences that protect intellectual objects from being used freely by others. Law creates an artificial scarcity by,

build[ing] around [intellectual objects] a property structure modelled on the structure which social and legal systems have always applied to some tangible things. By instituting trespassory rules whose content restricts uses of the ideational entity, intellectual property law preserves to an individual or group of individuals an open-ended set of use-privileges and powers of control and transmission characteristic of ownership interests over tangible items (Harris 1996, 44).

In the case of intellectual property, it seems that a right given to an owner of an intellectual object is not based on “claim[s] of natural right based on expended labor...[but] [i]nstead it is a temporary state-created monopoly given to encourage further innovation” (Boyle 2008, 21) and further to encourage innovation as a way to “[encourage] men to pursue ideas which may produce utility” (Bergh 1903, 333-334). If anyone can use an idea and no one can

exclude another from using an idea once it is known to others, why protect intellectual objects in similar ways to the ways in which we protect physical objects?

Policy and the Current State of Affairs

There are two main justifications for (IPRs): the incentive argument (utilitarian) and the desert argument (deontological). The incentive argument has been (in part) explained (above) with the words of Jefferson. It is that the expression of certain ideas is beneficial to everyone and so should be available for anyone to use. At the same time these ideas must be protected to provide a motive for people to create and express ideas.¹⁴ Seeing as people can protect their ideas through secrecy or by never expressing those ideas at all, there need to be protections like patents and copyrights in place to provide people with an incentive to divulge their ideas yet still allow the idea to bring profit to the author of the idea. So, for example, a person has an idea for a new cancer drug. In order for this drug to reach the public, a great deal of money will have to go into the research and development (R&D). The amount of money it will take to do the R&D may be so high that it is not worth it for the inventor of the drug to invest *unless* the sale of the drug will at least recoup the cost that went into developing it, upon its successful introduction to the market. In order for any profit to come to the inventor of the drug, it cannot be the case that the expression of the idea of the drug's formula (for example) be used freely by anyone, because if it were produced by many people, the price will be low (if not a zero cost). Also, those that produced the drug, via the formula of the original inventor, would be able to profit without the burden of the R&D and so can charge a lower price for it. The original inventor would then be subsidizing her competition. So, a temporary monopoly (in this case, a patent) must be granted

¹⁴ In the case of useful inventions and advances in science, patents would be issued. And, in the case of culture i.e., music, literature, etc., copyrights would be issued.

to the inventor, because if not, the inventor will have no incentive to put the effort into inventing the useful drug without a prospect of being able to recoup costs of invention. In such a case, where the inventor does not make the drug available—that is, protects her invention through secrecy—many people will not be able to gain the benefits that the drug (if available) could potentially provide. So, the utilitarian justification for intellectual property rights (copyrights, patents, etc.) is that we need to protect intellectual property to encourage inventors (through promise of possible financial gain) to make their beneficial ideas available to all. The expectation is that doing so will produce more utility than if we did not provide such an incentive.

The desert argument focuses not on the benefits to people as a whole, but instead is focused on respect for the author of the idea. Claims of desert are (in many cases) deontological. As George Sher states, “many desert claims are grounded in action. Persons are said to deserve things as a result of their transgressions, superior performances, sustained efforts, and displays of moral excellence” (Sher 1987, 5). In this sense, the action of an author in creating is enough to warrant the deserving of reward (of some kind) as a matter of natural right. James Boyle, in his recent book *The Public Domain*, explains the idea that authors have a natural right to their work:

My book is mine because I wrote it, not because society or the law gives me some period of exclusivity over allowing the copying of its contents. My invention is mine because it came from my brain, not because the law declares a twenty-year monopoly over its production or distribution. My logo is mine because I worked hard on it, not because the state grants me a trademark in order to lower search costs and prevent consumer confusion (Boyle 2008, 27).

Though Boyle points out that this is not the reason adopted by the framers of the U.S. constitution for copyright and patent protection, he mentions later that it is loosely the

justification for certain aspects of the French copyright policy (or *droits d'auteur*). There is an important distinction concerning the word 'mine' when it comes to ownership of ideational content. One is the traditional understanding where 'mine' entitles an author to the entire bundle of rights that copyright affords (excludability, transferability, etc.). The other is that 'mine' refers to authorship attribution. That is, that the author has the right to have his or her own name attached to the work and so even if the work is to exist in the public domain, that author is known to be the creator of the work. The former understanding is one of a "legal right" were the latter is of a "moral right."

The central idea behind the desert argument is that if I invent or create something (valuable or not), it is mine and, further, I deserve *all* goods (or harms) that come from it (if goods/harms come from it) because I produced it. It is not clear, however, whether the desert argument entitles one to 'legal' or 'moral' rights in ideational property. In order to deserve something one must have performed some act to warrant some reward. Serena Olsaretti gives an example of a student who deserves to do well on her exam because she worked hard.¹⁵ It is also the case that deservingness needs to be judged by another,¹⁶ as Olsaretti puts it,

desert is a sort of "fittingness" between certain features and actions of one person on the one hand, and another's responsive or evaluative attitudes on the other. Claims of desert have an appraising character. It is because we take up evaluative attitudes towards other

¹⁵ The issue of how hard one works very much complicates this issue. Concerns of easy work or hard work, forced work or voluntary work are brought forward with such a discussion. This is a discussion that I wish to avoid for it does not seem to be relevant to my treatment of the issue. So, for my purposes, I will focus instead on the idea that work itself is enough to bring about claims of desert and not worry about the degree of difficulty that comes from work or the conditions under which work is performed. Further it may be interesting here to note Nozick's discussion of work from *Anarchy, State and Utopia* in which he claims that "[p]erhaps the idea...is that laboring on something improves it and makes it valuable; and anyone is entitled to own a thing whose value he has created" (Nozick 1974, 175). Here it is the work itself that brings about ownership and not the degree to which one toiled or the work conditions.

¹⁶ If, for example, I act in some way and only I am the one that judges my action as one deserving of some reward or punishment, my judgement may be biased in my favour or (if I am hypercritical of myself) too strong a punishment. Seeing as reward and punishment are often given out by others, so too is the judgement of deservingness of such rewards or punishments.

people's features and actions that they deserve some response, good, or treatment (Olsaretti 2004, 13).

The claim then is that one ought to receive something (good or bad for that person) based on a feature of that person or based on the action he or she performs. The fittingness must be evaluated based on strictly deontological criteria, for instance: i) the character of the deserving person, or ii) some characteristic of the method by which an action was produced, or iii) the motive behind the action produced.¹⁷ All of these criteria are deontological in that they are focused on past or present character, action or motive. The character of a person could be viewed through a story of past actions that person has performed (and hence the character that person has developed) and so, seen as a way to judge present actions. If someone had developed the habits (character) of a person worthy of reward in the past, that person could be judged as one that deserves reward by virtue of that character at present.

The desert argument seems subject to a strong objection. Though intuitively the desert argument is appealing in that strict control over one's own creation seems to be deserved, it seems difficult in practice to implement policy (of various kinds) based on concerns of desert. The example above (supplied by Olsaretti) of the student that deserves to do well on her exam does not speak to the ways in which we *actually* evaluate exams. If it were the case that the policy for exam taking was based on a deontological evaluative process, we would not only consider correct answers as our evaluation but in addition consider whether or not the student had studied for the exam, the reason that the student took the exam, or the character of the student in general. Though it may be the case that there is no principled reason that

¹⁷ Perhaps it is the case that once a policy (like copyright) has been put in place (via utilitarian motivation), thereafter, the reason for following *that policy* may be justified through considerations of desert. As I am primarily concerned here with the reason for adopting copyright policy in the first place, I will not linger on such issues.

considerations of desert could not be used to evaluate exams, this is not (in fact) how exams are evaluated.¹⁸

This is also clear in the case of copyright policy as explained above. In practice, the legal justification for intellectual property rights typically is based in utilitarian considerations (save for France, and some other jurisdictions that recognize *droits d'auteur*). If it were the case that the desert argument grounded copyright justification then it would be possible for the author of a song, book, or poem to exclude people entirely from his or her work.¹⁹ 'Fair dealing' (or 'fair use' in the U.S.) is an indication that policy has been designed to disallow perfect control of a work because of the benefits that come along with people's ability to take 'small pieces' of a copyrighted work and reproduce it for the purpose of criticism, parody or review.²⁰ 'Fair dealing' is an important limitation on an authorial right to one's work and this is a limitation that is not guaranteed if the desert argument justifies intellectual property rights.²¹

Also, if the desert argument grounded intellectual property rights there is a potential that an author with strict control could pass that control on after her death to her heirs and potentially lock away the work for all time. That is to say that 'deservingness' does not have any principled

¹⁸ When discussing music, we see similar considerations. The work that went into an album or the character of the band members do not guarantee financial gain. The financial gain that comes to authors of music comes if, and only if, the music that they produce finds favour by the purchasing public. This is true if IPRs were justified by desert or utilitarian arguments. But, were it the case that people ought to be rewarded by the action of creating, it should be the case that artists are paid whether or not the music they produce finds favour. It may be important to note that even in the open frontier of Internet music distribution, there is only the potential for financial gain for those that produce music that is (at least to some degree) popular. Boyle notes that, "Copyright law is supposed to give us a self-regulating cultural policy in which the right to exclude others from one's original expression fuels a vibrant public sphere indirectly driven by popular demand. At its best, it is supposed to allow a decentralized and iconoclastic cultural ferment in which independent artists, musicians, and writers can take their unique visions, histories, poems, or songs to the world—and make a living doing so if their work finds [favour]" (Boyle 2008, 7).

¹⁹ It may be the case that the author may in fact allow his or her creation to be openly used but this is not guaranteed by policy built on justifications of desert.

²⁰ For a comparison between Fair Dealing and Fair Use see, Creative Commons Canada 2004—online.

²¹ It is true, however, that, though desert does not guarantee fair dealing, it does not necessarily rule it out either.

reason to end and so the work of an author could never enter the public domain. Boyle notes that,

there are time limits on the length of the rights (and frequently different ones for different creators—authors, inventors, performers, and so on). Once one has accepted that point, the question of how long they should be is, surely, a matter for empirical and utilitarian analysis. One cannot credibly say that natural rights or the deep deontological structure of the universe gives me a right to twenty-eight or fifty-six or seventy years of exclusivity. The argument must turn instead to a question of consequences (Boyle 2008, 229).

The desert argument as a justification for intellectual property rights allows an author perfect control over his or her work for an unlimited time and this is a situation that Jefferson wanted to avoid. Historically, IPRs were set up through a utilitarian justification to ensure that works would eventually enter the public domain.²² Article 1 Section 8 Clause 8 of the U.S. Constitution states that intellectual property will be protected “to promote the progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (Lessig 2006, 183) and the Canadian copyright policy mirrors this sentiment.²³ Boyle explains that,

Jefferson, like most of his successors in the United States, does not see intellectual property as a claim of natural right based on expended labor. Instead it is a temporary state-created monopoly given to encourage further innovation...intellectual property rights are not and should not be permanent; in fact they should be tightly limited in time and should not last a day longer than necessary to encourage the innovation in the first place (Boyle 2008, 21).

²² The amount of utility that is supposed to come from an idea eventually being free from exclusive ownership rights (and so in the public domain), is high enough (it is claimed) that ideas—and not physical property (like that which is transferred in inheritances)—need to be freely available after a limited time. For this reason, ideas are things that require this important limitation on transferability, where physical property (e.g., inheritances), are not. This limitation on the transferability of ideas is justified more easily through utilitarian considerations than through considerations of desert. This is highlighted in Boyle’s quote above.

²³ Similar policies hold internationally to accord and mesh with North American policy.

Seeing as the current state of intellectual property law seems to follow a broadly utilitarian justification, I will not linger on considerations of desert here, though there is much interesting discussion concerning such matters. It does seem, however, that the ‘legal’ rights that Jefferson speaks of are created for utilitarian reasons. These legal rights depend on attaching the authors name to the ideational object to ensure that the rights of excludability and transferability apply to the proper person. The desert argument may justify moral rights in authorship (name attribution) but not the rest of the ‘bundle’ of rights that existing copyright policy affords. I point here to the distinction between legal and moral rights as it plays a role in a later discussion of copyleft.

Copyright policy has changed a great deal over the past one hundred years and, some claim, most drastically in recent years. Since much of the controversial policy changes in copyright have happened in the U.S., much of my discussion here will concern American copyright policy. International policy tends to follow U.S. copyright policy in as much as the U.S. is a major exporter of ideational content (music, movies, books, etc). Because they have this major influence, the countries to which they export their culture must closely mirror the changes to their policy so that these import countries do not violate the policy of the exporter and so effectively block their own access to American cultural exports.²⁴ So, it will be the case that the policy of many other countries mirror American policy; I will point out some differences specifically to Canadian copyright policy, but it will generally be the case that U.S. policy will be the focus here.

Copyright law protects the ‘idea’ of a creative work. If you have written a poem, the poem itself is protected, not the physical instantiation of it, say, the paper it is written on. This

²⁴ For evidence supporting this claim see, Krasilovsky et al. (2007: 78, 82, 211), ‘The Canadian DMCA: A Betrayal.’ (*MichaelGeist.ca*—online), and (*CRIA.ca* 2006 –online). Also, see: ‘How the U.S. got its Canadian Copyright Bill.’ (*MichaelGeist.ca*—online).

protection gives the idea itself value in that no one but you can then take the poem that you have created and profit from it in a specific number of ways. Harris explains (though specifically talking of British copyright policy) just what copyright protection affords the owner of that copyright.²⁵ He writes explaining Sec. 16 of the British *Copyright, Design, and Patents Act* of 1988 that,

general classes of acts in relation to a work which the owner of the copyright has the exclusive right to do, and the doing of which by anyone else without the owner's licence constitutes an infringement: 1) copying the work – 2) issuing copies of it to the public – 3) performing, showing or playing the work in public – 4) broadcasting the work or including it in a cable programme service – 5) making an adaption of the work (Harris 1996, 45).

With these rights afforded to the owner of the copyright, a 'state of scarcity' concerning this 'idea' is created and (as long as the law is upheld) maintained. This protection provides value in the 'idea' just as Locke's appropriator of commons property could sell (or trade) that property with others. And this provides the incentive for the poet to create the 'idea' in the hopes that she (the poet) can profit from the 'idea'. To grant a copyright is to exclude temporarily all but the owner from the rights to the 'idea'. Information that is not protected makes up the public domain. The public domain is analogous to the commons of physical property explained by Locke. It is any and all information (or ideas) that are available for anyone to use as they will.

This ideational protection is to last for a limited time (as we saw above). In the case of other types of intellectual property rights protection, like patents, there is a 'state of scarcity' or

²⁵ This 1988 British copyright policy is a great example of the similarity of copyright policy in different countries as this English policy is perfectly in line with U.S. and Canadian copyright law. For the "Extent of Term of Copyright Section 6- 6.2 of the Canadian Copyright Act (Section 80)—copying for private use", see: (Copyright Board of Canada—online).

temporary monopoly created for a twenty year period.²⁶ In the case of copyrights policy things are different.

The term of a copyright protecting music (around the turn of the 20th century) was similar to the length of a patent term. “Copyright had only been extended to musical compositions in 1881. Like all copyrights back then, copyright over music lasted for only twenty-eight years, with a possible extension for another fourteen” (Boyle 2008, 128). Someone looking to protect his or her idea had to actively register copyright until the U.S. Copyright Act of 1976. Since 1976, however, the policy changed so that any work created by any person was copyrighted automatically and this policy remains today. The moment someone creates a physical instantiation of an idea, that person’s idea is protected through copyright. The 1976 law also states that copyrighted works that originally granted a term of protection of twenty-eight years could renew for sixty-seven years instead of the previous extension term of fourteen (in 1909 the extension changed to twenty-eight) years. (Yerrick 2000—online)

What had been policy that allowed copyright to someone who actively registered for such protection was now automatically granted. Further, copyright protection that was once a twenty-eight year term (with possible extension for another twenty-eight years) was now a ‘twenty-eight years plus sixty-seven years’ policy for works created prior to 1978. Works created after 1978 were granted a term of life of the author plus fifty years (and in some cases life plus seventy-five years for ‘works for hire’).

The length of term (length of time) of a copyright was extended drastically in the U.S. with the Sonny Bono Copyright Term Extension Act (CTEA) of 1998. “Everyone gets the term

²⁶ There is a great deal of interesting issues surrounding patents and the production of medicines of life saving treatments that I will not discuss in great detail here. See (Resnik 1997).

of life plus seventy years, or ninety-five years for corporate ‘works for hire.’” (Boyle 2008, 15)

The CTEA extended copyright from life plus fifty years to life plus seventy years and for ‘works for hire’, extended the term from seventy-five years to ninety-five (in some cases, one hundred and twenty) years.²⁷ This means that a work (doodle on a pad of paper, note to your partner, grocery list, musical work, etc.) that you or I may produce is granted copyright by virtue of one of us creating it, for as many years as we (respectively) live plus seventy years.²⁸ Because of the retrospective reach of the CTEA, only works created prior to 1923 are in the public domain, all others are copyright protected.

Another important policy concerning intellectual property rights protection came with the introduction of the Digital Millennium Copyright Act (DMCA) of 1998. I mentioned above how the sophistication of computer and Internet technology led to the ability of Ordinary Users (OUs) to share perfect copies of digital files with countless others. This new ability led to problems for those who hold copyright (i.e., RISs) over the content of those same (now widely shared) digital files. The ability to profit from the ‘idea’ due to the artificially created excludability provided by copyright protection, was being undermined by the fact that this new combination of technology made excluding others from an ‘idea’ very difficult, both due to the technology itself and difficulty in enforcing the law. It is difficult to stop the movement of copyrighted files through P2P networks and some even claim it is impossible. This is largely due to the fact that the numbers of files being shared is so high and the number of those sharing files is so high that

²⁷ For the 1978 changes to U.S. copyright law see: (*StopFakes.gov*—online)

²⁸ This is not the case in Canada. “In Canada, copyright lasts for the life of the author plus fifty years (s.6 of the Copyright Act) For example, if a poet penned a poem in 1925 and lived another eighty years, her poem would not enter the public domain until December 31, 2055, for a total of [one hundred and thirty] years. However, if the same poet died in 1936, her poem would have already entered the public domain in 1986.” (Creative Commons Canada 2004—online)

enforcing copyright law is a difficult task to undertake. But, actions have been taken in order to stop file sharing and those actions took the form of legal actions through the courts.

Another solution was the use of *code* to gain back the excludability and therefore the profits copyright law allowed. Code protection is the use of computer programming to help protect digital files. Though there are very technical explanations for code and what digital information it protects and how, I will only focus here on the aspects relevant to my discussion. An example of the use of code to protect digital information is Digital Rights Management (DRM).²⁹ DRM protected CDs, DVDs, digital media files, etc. are produced in order to curtail the behaviours of OUs that are seen as copyright violations. The DMCA is policy that makes any act that attempts to circumvent DRM illegal. Hackers (those people who are skilled enough to be able to manipulate computer code) are able to ‘get around’ the protection put in place by those attempting to protect their copyrights online.

In chapter five of his book *The Public Domain*, James Boyle tells a story of farmers in a new land as a way to explain the DMCA. Imagine a new land, similar to the one discussed above (during the explanation of Locke and the commons), that is newly inhabited by a group of farmers. This group has differing opinions about how to divvy up the land. A government is created as are holdings of land (property) by individual farmers. For ease of access, and as a shared benefit to all, roads are built that sometimes crossed the property of many farmers. It turns out that this beneficial ‘ease of access’ also meant that people on the roads could easily stop and take some of another farmer’s crop with little chance of detection or repercussion. The law (it so happens) is less than perfect in protecting the property of the farmers. The farmers then take it upon themselves to protect their property. The farmers eventually erect barbwire

²⁹ In Canada this is referred to as TPM or Technical Protection Measures.

fences to protect their own property. The government allows the farmers to protect their property in this way and also make it illegal to cut the barbwire fences. (Boyle 2008, 83-85) Those taking crop from the road are analogous to OUs and the farmers are analogous to RISs, in my discussion.

This story shows the difficulty that was produced by the computer and Internet technology that made it difficult for the law to uphold the protection of copyright just as the farmer was not easily protected from crop pillaging. The barbed wire in the story represents the code that surrounds and protects digital information online. The DMCA is a government-supported policy that makes it against the law to ‘cut the barbed wire’- or for that matter ‘produce wire cutters’. The DMCA makes it illegal to circumvent the protective measures that are set up by product developers and manufacturers. There will be further discussion the DMCA and what it and the CTEA mean for OUs in chapter three, but for now, I hope, this explanation will suffice.

Case Law

There have been a number of legal battles that have focused on both the actions of OUs (seen as theft/pillaging of crops) and the development of certain products (seen to enable the circumvention of code/cutters of barbed wire). I will briefly summarize the findings of five important cases here. These cases will be referred to in chapter three when discussing the actions of the RISs in bringing about such law suits.

In 1984, Sony had developed the Betamax (an early form of Video Cassette Recorder—VCR) and this technology was seen as posing a threat to movie producers Universal Studios (RISs). In subsequent litigation, known as the ‘Betamax case’,³⁰ Universal Studios claimed that

³⁰ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). (Referenced in: Boyle 2008, 272)

this technology would produce harm to the movie industry in that people could use the Betamax or VCR to record (or ‘tape’) movies from the TV and others could watch these films without having to pay for them. Boyle explains the case and the outcome:

[The movie industry’s] business plans relied upon showing movies in theaters and then licensing them to television stations. VCRs and Betamaxes fit nowhere in this plan; they were seen merely as copyright violation devices. Hollywood tried to have them taxed to pay for the losses that would be caused. Their assumption? Cheaper copying demands stronger rights. Having lost that battle, the movie studios tried to have the manufacturers of the recording devices found liable for contributory copyright infringement; liable, in other words, for assisting the copyright violations that *could* be carried out by the owners of Sony Betamaxes. In the *Sony* case...the movie companies lost. The Supreme Court said that recording of TV programs to “time-shift” them to a more convenient hour was a fair use. The movie studios’ claims were rejected (Boyle 2008, 63-64).

The act of “time-shifting” is to record a program to watch it at a later time than it is aired on TV. As Boyle points out the time-shifting as an instance of fair use (fair dealing) is not the most important finding of the court in this case, but rather that Sony, the manufacturer of the Betamax, could not be considered guilty of infringement simply because they are contributing to (possible) infringement by users of the technology because there are a number of noninfringing uses for the Betamax or VCR. Here, it is important to note two things: 1) according to this ruling, as long as a technology allows for a number of noninfringing uses, the manufacturers could not be held responsible for the acts of the users of that technology. And, 2) the rental market that grew up out of the technology of the VCR, brought (and still brings) a great deal of revenue to the film industry.

In 2000, owners of the website MP3.com were taken to court by UMG Recordings (RISs). MP3.com provided a service which allowed OUs to upload their own CDs onto MP3.com’s server and then log into the site and listen to their music from any computer to which they were connected. So, had I uploaded my collection of music onto the MP3.com site, I could

have listened to any of the music I had purchased from anywhere that I could connect to the Internet, be that school, work, home, etc. In this way my music is with me wherever I go. In this case the court found that this server actually made copies of music that were not authorized by the copyright holder and so MP3.com eventually had to change its format. The court decision pointed to the fact that full CDs (and lots of them) were placed online and (though there was no fee charged to the subscriber) ad-revenue made it a profitable venture; ‘fair use’ could not be claimed by MP3.com. The court decision read,

Although defendant [MP3.com] seeks to portray its service as the ‘functional equivalent’ of storing its subscribers’ CDs, in actuality the defendant is re-playing for the subscribers converted versions of the recording it copied, without authorization, from plaintiffs’ copyrighted CDs. On its face, this makes out a presumptive case of infringement under the Copyright Act . . . ³¹

It is important to underline that this decision removed a service that gave OUs access to their own (purchased) music collection and so did not displace sales of CDs offered for sale by the RISs that initiated this suit.

In 2001, owners of Napster were taken to court by A&M Records (RISs) in the, now famous, Napster case.³² Napster was a P2P file sharing website with a central directory (instead of a central server that contained copies like in the case of MP3.com). This central directory was updated constantly and included both the addresses of the computers of other participating users and a list of the files on their respective hard-drives. Anyone who was participating could search for files through Napster’s directory and connect directly to the computer of other participants in order to share files. This court decision read,

Napster users infringe at least two of the copyright holders’ exclusive rights...Napster users who upload file names to the search index for others to copy violate plaintiffs’

³¹ *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000). (Music United—online)

³² *A & M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). (Music United—online)

distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights....[V]irtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music . . .³³

Boyle claims that this case should have fallen under the precedent set in the *Sony* case because of the number of non-infringing uses there were for Napster. But the court found that, because Napster knew of the infringement that was going on and did not stop it or remove the infringing content, Napster was guilty of contributory infringement.

In 2003, the Recording Industry Association of America (RIAA) took the Internet Service Provider (ISP) Verizon to court. The RIAA (RISs) wanted to be able to request the names of subscribers to Verizon who were (allegedly) making "more than 600 copyrighted music files" available over the Internet and specifically through the use of KaZaA P2P software (Grodzinsky and Tavani 2005, 243). Verizon claimed that because they are an ISP they do not have any copyright infringing files on their servers and so they are not subject to the claims of the RIAA. They need not, therefore, supply customer names. The RIAA argued that, by ignoring the subpoena and refusing to hand over the names of 'suspicious clients', Verizon was in violation of the DMCA. The court agreed and stated "that the subpoena power ... applies to all Internet service providers within the scope of the DMCA, not just to those service providers storing information on a system or network at the direction of a user" (Mark 2003).³⁴

In December of the same year, however, this case was overturned and so Verizon did not have to divulge the names of their clients. The outcome was that,

[c]opyright holders cannot use pre-litigation DMCA subpoenas to get identifying information for peer-to-peer filesharers and must instead file John Doe lawsuits and seek the information using ordinary discovery processes (EFF 2004—online).

³³ A&M v. Napster, Inc...(2001). (Music United—online)

³⁴ Originally found in Grodzinsky and Tavani (2005).

The RIAA had attempted to gain personal access to OUs' personal information via subpoenas based on the DMCA policy but U.S. courts rejected this.³⁵ Many see this attempt to access information (even though it failed) as a potential threat to privacy.

In 2005, Grokster was brought to court by MGM studios with the support of 28 of the major entertainment companies (RISs).³⁶ Grokster—a P2P site—did not have a central directory (like Napster did) and so the P2P network was run entirely by OUs and connected between individual computers. The lack of a central directory made it impossible for the makers of Grokster to know about specific infringing files being moved via their software, nor could they control the behaviour of those using the system. Grokster (like Napster) gained income from streaming advertisements to those using their software.

The court decided in this case that Grokster could be held liable for illicit copyright infringement and as a result discontinued their P2P service. The grounds on which the decision was based were tripartite:

In the case of *MGM v. Grokster*, the Supreme Court followed the line of the *Napster* court, but went even further. The Court created a new type of contributory copyright infringement—while apparently denying it was doing so. Grokster and its fellow services were liable because of three different kinds of evidence that they had “intended” to induce copyright violation. First, they were trying “to satisfy a known demand for copyright infringement.” This could be shown by the way that they advertised themselves as alternatives to the “notorious filesharing service, Napster.” Second, the file sharing services did not try to develop filtering software to identify and eliminate copyrighted content—though this alone would not have been enough to make them liable. Finally, their advertising-supported system clearly profited by high-intensity use, which they knew was driven in the most part by illicit copying. This too would not have been enough by itself, the Court added, but had to be seen in the context of the whole record of the case (Boyle 2008, 77).

³⁵ In March 2004, a similar Canadian decision was handed down. “The recent [Federal Court of Appeal music file sharing case](#), in which the court rejected the Canadian Recording Industry Association’s attempt to uncover the identities of 29 alleged file sharers” (The State of File Sharing and Canadian Copyright Law. *MichaelGeist.ca*—online).

³⁶ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). (Referenced in: Boyle 2008, 274)

The creation of new types of infringement by the courts broadens the scope of what is illegal when it comes to computer and Internet use. As we will see in chapter three, the creation of new types of infringement by courts that are very much steered by the interests of RISs, is especially problematic.

The Sony, MP3.com, Napster, Verizon and Grokster cases demonstrate the lengths to which RISs will go to protect their intellectual property and the scope of current policy concerning intellectual property. In the face of the new technological developments of the late 1990s and early 2000s, there was a great threat put on intellectual property that was created in (or converted to) digital formats. This brought the cost of copying and transferring copyrighted files close to zero and, as Boyle mentions, “[a]s copying costs approach zero, intellectual property rights must approach perfect control” (Boyle 2008, 61). At least, this is the claim of the RISs; the truth of this claim will be examined in chapter 3.

In 1909, you had to personally secure your creation by registering a copyright. This copyright protection had a span of twenty-eight years and a possible twenty-eight year extension. This meant you had a fifty-six year window within which to profit from your idea and then your idea entered into the public domain. Fair dealing was a matter that was as highly protected as the copyright itself. Now, in 2009, you passively gain a copyright by creating and you (and your heirs) will (possibly) profit from your creation for the span of your life plus seventy years. Fair dealing is having a tough time surviving in the atmosphere of strict policy that surrounds ideational creations (more on this in chapter three).

In the next chapter, I will give an explanation for the ethical theory that I think will best adjudicate the issues of tension seen in this chapter. An explanation of the harms and benefits of

certain policies, put in place to right the wrongs that result from the actions of people stealing music, seems necessary. In what follows, I set up a scalar utilitarian theory and a preference satisfaction model to explain which 'utils' will be calculated in the final chapter.

CHAPTER 2 ETHICAL THEORY

Introduction

In this chapter I will lay out a version of utilitarianism that seems to suit adequately the issue of file sharing. I want to avoid the issues that come along with traditional utilitarianism, namely the demands of maximizing utilitarianism and the measurement problem. The reason I want to avoid these issues is that given the sheer magnitude of possible considerations for a utilitarian calculus concerning file sharing, it would be nearly impossible to calculate properly which action to perform in order to bring about the best possible outcome. For this reason, I will instead put forward a ‘satisficing’ utilitarian theory—first introduced by Michael Slote and later developed by Alistair Norcross.

I also want to avoid focusing on specific instances of file sharing. For my purposes it will be safe to assume that any one instance of file sharing (by one agent, of one file, to one other agent) will not bring about significant harm or benefit so as to warrant ethical consideration. For this reason I will instead focus on the aggregate cases of an agent’s file sharing behaviour and the aggregate of many agents with similar behaviour (utilitarian generalization).

I will also explain the ‘good’ in terms of preference (desire) satisfaction. It seems that a ‘desire-satisfaction’ account of utility is a fitting one for the present discussion. What is driving file sharing behaviour on the one hand, and insistence on stringent copyright policy on the other, are two different ‘interests’; respectively, a preference for cheap/free music (on the part of the

OUs) and for compensation for music produced (on the part of the RISs). The aggregate measurement of ‘pleasure’ or ‘happiness’ brought about by file-sharing issues is far too hard to calculate and as such will not be the focus of my work here.

A normative ethical theory guides us in action.³⁷ We can then look to it when faced with situations that call for a difficult decision. Normative ethical theories are said to be prescriptive in this sense. It is also the case that the actions prescribed by an ethical theory should meet closely with our moral intuitions in certain difficult cases. If a theory can be prescriptive in this way while leaving the agent (relatively) comfortable in the action she is to perform, the theory will be an adequate one. One such theory is the theory that I will describe below.

Traditional Utilitarianism

Utilitarianism is a teleological (goal driven) consequentialist ethical theory. That is to say that a utilitarian focuses on the consequences of an action and, more precisely, on the value of those consequences. So, utilitarianism is centered on actions that bring about good rather than bad consequences. This theory is initially empty of normative language altogether. It is normatively empty in that simply knowing what is ‘good’ or ‘bad’ does not necessarily help tell us how we ought to act. An ethical theory is one that is to guide us in action and so to tell us which actions are ‘right’ and which are ‘wrong’. An application of normative language³⁸ in the form of utilitarianism was one that was developed by Bentham and further developed by Mill.

Traditionally, a relation commonly proposed by utilitarian theorists from the value of the consequence of an action to the rightness of an action has been to maximize. As utilitarianism is

³⁷ It is true, however, that there are descriptive theories of ethics.

³⁸ Or, the move from speaking about the value of a consequence (good/bad) to speaking imperatively about how one ought to act (right/wrong).

a theory that focuses on the value of consequences, a move needs to be made that inputs normative terms into the discussion of actions that are derived from value terms such as ‘good’ or ‘bad’. So, an action is judged to be ‘right’ if it is (among all of the alternative acts that can be taken) the one with, not only ‘good’, but ‘the best’ value. So, if five alternatives (#s 1-5) are available to an agent just prior to the agent acting, and (#1) would produce the *least* amount of ‘good’ and (#5) would produce the *highest* amount of ‘good’, then, (#5) is the right action to perform and (#s 1-4) are wrong actions.³⁹

This ethical theory (or guide to action) is in principle very precise and straightforward. As long as you know which action will produce the ‘best’ consequences, it is easy to know the right action to perform. And further, you are then obligated to maximize by performing the act that will produce the best consequence. But this account has been criticised as being too demanding. It is not easy to *know* what actions to take. American political scientist, Herbert Simon has pointed out that people (being imperfect in their knowledge of *all of the facts*) are not normally very skilled (at all) at being able to properly predict what type of consequences will come from an action. Our lack of cognitive power to calculate probabilities, collect all relevant data, etc., makes it (in most, if not all cases) impossible to maximize. For this reason, Simon explains, the most that can be reasonably expected from any agent⁴⁰ is to ‘satisfice’ rather than to maximize. The best thing (given our imperfections) that people could do is *aim* for (what we could reasonably imagine to be) maximization.

If the best we could do when deciding how to act is to *aim* to maximize, it seems too demanding to expect us to always perform the ‘right’ (or best) action. That means that we can,

³⁹ I use the (#) symbol here to point out rankings within a preference list. I do so to avoid confusing a preference list with any other list that I happen to provide in this (or the next) chapter.

⁴⁰ Simon calls this imperfection in people, ‘bounded rationality’. See: (Simon 1984)

instead ‘satisfy’ our obligations by acting ‘sufficiently’ with regard to bringing about good consequences.⁴¹ Aiming to maximize will get us as close as possible to what is objectively right.⁴² Later, I will say more about satisficing, but for now I wish to look at two other problematic issues that come along with the traditional utilitarian view: the problem of measurement and the discomfort that comes with the clash between utilitarianism and common-sense morality.

The measurement problem in utilitarianism has been (in part) dealt with above. The problem of measurement is one of the concerns that limit us cognitively⁴³ and, as such, prevent us from properly determining the best action (of a group of alternative actions) to perform. Here I will briefly sketch some related concerns. Many factors can be considered when attempting to assess the value of the consequences of an action. These complicate a utilitarian calculus and, as such, add to the cognitive stress that thwarts the agent’s ability to achieve the goal of maximization. This complication becomes more pronounced as we add up the number of ways in which an act can affect people, the number of people affected, the amount of time that the consequence will have an effect, etc. I will look further into this issue below.

The third problematic issue with traditional utilitarianism is that some of its requirements seem off-putting and opposed to our common-sense moral intuitions. For example, one day you walk downtown in a large city. As you turn the corner you are accosted by a man, smoking a cigar, holding a small metal box with a red button in the centre and a new born baby. He says, “The tall building in the distance is full of people and thanks to me, also full of explosives, all of

⁴¹ Simon coined the term ‘satisfice’ by amalgamating the words ‘satisfy’ and ‘suffice’.

⁴² I will discuss objective and subjective rightness and wrongness later in my discussion of Derek Parfit.

⁴³ Later, I discuss Tännsjö’s list of factors that hinder our decisions concerning maximization. Included in the list are measurement issues as well as epistemological issues. I will discuss the epistemological concerns more in the section to come which deals with the desire (preference) satisfaction account of the good. The measurement problem will be dealt with in the discussion of scalar utilitarianism, below.

which are wired to this button. I will push this button, detonating the explosives and killing all of those people unless you take this cigar and burn the bottoms of this baby's feet."

The utilitarian would (given only the information provided and assuming it is reliable) burn the baby's feet. But this is one major reason that people contend that utilitarianism is a poor ethical theory. It does not mesh up with our common-sense moral intuitions. There is no question that good consequences would far outweigh bad consequences if you were to burn the baby's feet, but doing such a thing seems to stand in opposition to the common sense of nearly everyone (even those with utilitarian leanings). The virtue of scalar utilitarianism, by contrast, is that it is not subject to some of the problematic issues to which traditional (maximizing) utilitarianism is subject.

Scalar Utilitarianism

Two problems that scalar utilitarianism avoids are: 1) the demand of acting so as to maximize utility and 2) the discomfort that comes along with theories that deviate away from common-sense morality (or the morality that we intuitively imagine given certain difficult choices).

A *scalar* phenomenon is one that is measured as a magnitude that maintains an ordered interval; a quantity that has only its magnitude as its measurement (as opposed to *vector*, which has both magnitude and direction as its measurement). Temperature, speed, time, mass, energy, etc., are all scalar phenomena. The claim of the scalar utilitarian is that the value of a consequence is a scalar phenomenon as well. That is to say that a *scale* of 'good' and 'bad' is what we imagine when we make judgements of value. So, saving a kitten from a tree is *better* than throwing stones at it. We can (and do) say that to save a kitten is good (or falls further to

the ‘good’ end of the scale) whereas hitting it with stones is bad (or falls further to the ‘bad’ end of the scale), given the alternative actions that we could perform. The scalar utilitarian says that

[i]f a utilitarian has an account of goodness and badness, according to which they are scalar phenomena, why not say something similar about right and wrong: that they are scalar phenomena but that there is a point (perhaps a fuzzy point) at which wrong shades into right? (Norcross 2006, 223)

It is clear that *this* move from ‘good’ to ‘right’ is a non-maximizing one.

Scalar utilitarianism is a satisficing form of utilitarianism. This means that it (like all forms of utilitarianism) is concerned with the consequences of actions. The consequences of actions are then judged as ‘good’ or ‘bad’. This judgement serves as the criterion by which we judge the action itself as ‘right’ or ‘wrong’. Satisficing here means that (unlike traditional utilitarianism) the judgement of a ‘right’ or ‘wrong’ act is not based on a very specific criterion of one and only one ‘best’ outcome but instead a ‘right’ act may result from any sufficiently ‘good’ outcome. Traditional utilitarianism claims that the move from ‘good’/‘bad’ to ‘right’/‘wrong’ is through maximizing utility with each act. This means that “an act is right if and only if it produces at least as much good as any other alternative available to the agent, otherwise it is wrong” (Norcross 2006, 217).⁴⁴ So, it is maximizing in that, only the ‘best’ of possible acts can be taken in order to perform a ‘right’ action.

Scalar utilitarianism is satisficing as opposed to maximizing in that “the boundary between right and wrong can in some cases be located on the scale at some point short of the best” (Norcross 2006, 219). For example, imagine that giving 10 percent of your income to

⁴⁴ Definitions with near identical wording are given by other philosophers writing on the topic of (in this case, act) utilitarianism. Some of these philosophers include: (Hodgson 1967, 1), (Shaw 1999, 71), (Lyons 1965, 9) and (Tännsjö 1998, 31);

I want, here, to avoid discussions of dispositions to act in a certain way and focus entirely on acts themselves. Though it may also be the case that rule utilitarianism could be discussed using this/these definition(s), I will not discuss that here.

charity was optimal.⁴⁵ Maximizing utilitarianism says that to give any less than 10 percent is wrong. But the value (10%) seems arbitrary. It does not seem that there is a real moral difference between giving 8 percent or 9 percent, nor is there a real moral difference between giving 4 percent or 5 percent. Giving either of the latter values is ‘wrong’ and giving 10 percent is ‘right’. Alistair Norcross claims that “[a] moral theory which says that there is a *really significant* moral difference between giving 9 percent and 10 percent, but not between giving 11 percent and 12 percent, looks misguided” (Norcross 2006, 220). In this example, giving 9 percent is (presumably) a right act just as giving 10 percent is, although giving 10 percent is clearly ‘better’.

So, maximizing utilitarianism seems to disagree with our common-sense intuition on this score. If it is the case that there are five (5) possible acts that could be performed by any given agent (#5 being the best and #1 being the worst) the only ‘right’ action is (#5) and (#s 1-4) are wrong. Satisficing utilitarianism does not require that only number (#5) be the necessary action taken. We could imagine that (#4) or (#5) (or maybe even #3) would be considered to bring about a sufficiently good consequence to consider the action ‘right’. Consider an example from Michael Slote. A doctor wants to relieve suffering in India. It just so happens that there is another country (Cameroon, for example) in which more suffering occurs and if the doctor went there to help, the best outcome would be achieved. Maximizing utilitarianism would demand that the doctor avoid India and instead move to Cameroon to help. Scalar utilitarianism does not make such a demand and finds that the doctor’s move to India is perfectly permissible—and, in fact, good (Slote 1985). If we assign numbers to this example case, we could say that going to

⁴⁵ This is a similar example to the one Norcross gives on page 220.

Cameroon to help would be the best choice (#5); India (#4), and perhaps Italy (#3), and France (#2). Not helping at all would be the worst (#1).⁴⁶

Scalar utilitarianism, then, judges an action not as ‘right’ or ‘wrong’ but as ‘better’ or ‘worse’ than other possible acts. Ethical theories provide a guide to action in particular cases. A criticism of scalar utilitarianism is that it provides no such guide, for there is no definite ‘moral goal’ to be reached. But common-sense morality (which is the guide to action that we use in the absence of any formal ethical theory) often allows agents to perform acts that are less than maximizing and still be considered ‘right’ which means that—even without a definitive threshold of ‘rightness’ (in this case provided by ethical theories)—people can (and do) chose to act, and further, act rightly. As Slote puts it (drawing a comparison between goodness and *baldness*, which are both scalar phenomena), “drawing a dividing line between baldness and non-baldness may not *add* anything to one’s knowledge about baldness, if one has sufficient understanding of comparative baldness, of baldness as a scalar phenomena” (Slote 1985, 78). Similarly, there is no good reason to insist that we ‘draw a line’ on the ‘goodness’ scale either, in order to know what ‘right’ action would be.

Scalar utilitarianism offers a different (but purely utilitarian) ‘guidance’ of action. Minus the demands of maximization, we can see that scalar utilitarianism guides us in the way that your darts instructor teaches us to throw a dart at a dart board. Maximization demands a ‘bull’s-eye’, whereas, scalar utilitarianism guides you to the board, though strives for an ever increasing accuracy for ‘better’ and ‘better’ shots. We aim to maximize but do not perform a *wrong act* by (slightly) missing the mark.

⁴⁶ According to the WTO list of Nations with the strongest health care systems, France is number 1 and Italy number 2. For this reason, I include them as places where the doctor need not spend time helping when compared to the other places on the list.

There are a number of variables that are considered when aiming to maximize. Some of these are listed by Torbjörn Tännsjö in *Hedonistic Utilitarianism*.⁴⁷ The list includes both measurement issues and epistemic issues; they include an agent: a) falsely believing in their ability to perform a particular act, b) making simplistic, biased, or foolish representations of alternatives, c) leaving out important possible outcomes, d) ignoring relevant information, e) making unwarranted probability assessments, f) miscalculating interpersonal comparisons of well-being, and g) and failing to perform the action (Tännsjö 1998, 36). In any case of action that provides (even two) alternatives, all of these problematic variables can apply, making a decision on which action will be ‘best’ practically impossible. This problem gets even more difficult when there are more than two alternatives available and gets still more difficult as that number increases. In addition to this difficulty, considerations of future generations and the scope of an act/consequence (that is, the time in which an act can be said to be bringing about a certain consequence), will further complicate the issue. I will avoid a long discussion of these problems here, but it seems important to mention this issue and, so far as possible, to avoid this measurement problem in an attempt to find an adequate ethical theory that provides a guide to action.

It seems that we often make a mistake when thinking about the power of an ethical theory. There is a clear intuition that if given two choices of action, say between *helping an old lady across the street* or *killing and eating her*, that one is right and one is wrong. In cases like this, a threshold of rightness seems clear; there is no room (at least in this example) for other

⁴⁷ This list includes both epistemic issues (a, and g,) and measurement issues (b, c, d, e, and f). Some of the issues listed may very well be considered a combination of measurement and epistemic problems; it is my hope that the issues listed here help to indicate how difficult it is to act to maximize and lead our thought to issues that are in some cases arithmetical and on the other expose the limits of human knowledge capacity. Which of the specified list falls into which category will not affect the main concern at hand and as such the taxonomy of the list can be done without strict precision.

alternatives that exist between these extreme choices. But in normal situations, where a choice is to be made, there are a number of possible actions from which to choose. And these actions can bring about outcomes that can be spoken of in terms of ‘degrees of goodness’. Scalar utilitarianism allows us to act in moderation while judging these acts as ‘better’ than other alternatives. As long as an act brings about a sufficiently ‘good’ outcome, it is ‘right’.

So, the claim that the notions of ‘right’ and ‘wrong’ are actually embedded into utilitarian ethical theories seems to speak to notions of ‘right’ and ‘wrong’ that are absolute and, as such, have no place in a consequentialist theory. The work, then, of the utilitarian ethical theory is to make the best general set of guides for performing ‘right’ actions while avoiding ‘wrong’ actions. But this seems to be a mistaken impression of what ethical theories do. Just because “[p]eople look to morality to tell them what to do in various circumstances [does not mean they should] see it as issuing commands” (Norcross 2006, 228-229). The claim here is that utilitarianism has been plagued with vestigial deontological concerns and as such has tacked on concerns about ‘obligation’ (in the form of maximization) which, in a pure utilitarian theory, would not have been there. Were it the case that utilitarianism had a list of absolute moral and immoral acts, it would no longer be utilitarian.

This means that using the terms ‘right’ and ‘wrong’ as they concern actions (in a scalar utilitarian outlook), would more accurately be discussed as ‘better’ or ‘worse’ actions given a set of outcomes. Norcross’ suggestion is “that utilitarianism should be treated simply as a theory of the goodness of states of affairs and of the comparative value of actions which rates alternative possible actions in comparison with each other” (Norcross 2006, 223).

If our guide to action can be prescribed by scalar utilitarianism (and I think that it can), we have a theory that looks as if it will guide our action *toward the bull's-eye* without demanding that we always hit it. So, in the case of miscalculation (through poor measurement or epistemic limits) expressed above (by Tännsjö), we can see that a benevolent agent will indeed aim to bring about the *objectively* best consequence while only ever being able to reach the *subjectively* best consequence.

In *Reasons and Persons*, Derek Parfit gives an example of objective and subjective rightness. A doctor is in a situation in which she must act in such a way as to heal a patient. There is an objectively right solution to this patient's medical problem, it is clear, however, that the patient is not in possession of the knowledge that will help the doctor to reach such an objectively right solution (because the patient has come to the doctor for help). The doctor has trained to be better at possessing the relevant knowledge in such medical cases and so, there is a higher probability that a doctor will find the solution to the patient's medical problem. It is true, however, that though the probability of the doctor's action producing an outcome that is closer to what is *objectively right* for the patient is high, the doctor's probability of matching her action to whatever is *objectively right*, is not 100 percent. The doctor can only ever *aim* for what she guesses to be objectively the right treatment (solution to the patient's problem). As Parfit explains:

The medical treatment that is objectively right is the one that would in fact be best for the patient. The treatment that is subjectively right is the one that, given the medical evidence, it would be most rational for the doctor to prescribe...what it would be best to know is what is objectively right. The central part of a moral theory answers this question. We need an account of subjective rightness for two reasons. We often do not know what the effects of our acts would be. And we ought to be blamed for doing what is subjectively wrong (Parfit 1984, 25).

So, to apply this language to the current discussion, we can say that maximizing utilitarianism is one that is focused on objective rightness and not subjective rightness. It seems that all we can reasonably expect of the doctor is to *aim* for objective rightness (or the best consequence) and given all of the ways in which mistakes can be made (following Tännsjö's list), that *only* her subjective rightness can be judged as right or wrong. The likelihood of the doctor performing an action that brings about a consequence that lands short of the 'best' is quite high, but that does not mean that *her moral dart* falls far away from the bull's-eye (nor does it often, if ever, miss the dart board entirely) and, as such, it remains (according to scalar utilitarianism) on the *dart board* and in the 'good' range.

So, scalar utilitarianism is a theory that avoids the demands of traditional utilitarianism by allowing 'right' actions to be performed that fall short of the best possible outcome. Obligation to produce outcomes that are at least 'good enough', will likely provide a greater number of 'right' actions performed, and as such, conforms more to our common-sense moral intuitions.

Utilitarian Generalization

I have explained the virtues of scalar utilitarianism in order to set it up as a usable theory for the purposes of adjudicating the practice of file sharing. I think that such a satisficing theory will allow for a rich discussion of the issues involved in the distribution of digital audio files. But it is in the nature of such a discussion to consider the scope of our ethical concerns. The number of people who participate in file sharing behaviour, and the number of single acts of file sharing, generalize this discussion. It is likely that any one case of file sharing (i.e., one person sharing

one file with one other person) will not bring about enough of a ‘poor’ outcome to raise any interesting ethical consideration. For this reason, my focus will be on utilitarian generalization.

Utilitarian generalization is the theory of judging how good a state of affairs would be if all people performed acts of a certain type. So, for example, imagine a world where everyone aimed to maximize their own intake of apples. David Lyons, in *Forms and Limits of Utilitarianism*, provides just such an example. Discussing the act of an agent who picked from an orchard on the side of the road, Lyons says,

...if everyone did the same, if every passer-by picked as he chose, this grower (or perhaps all growers) would suffer irretrievable losses. Moreover, he might ask himself: ‘Does it pay to take such care of my orchards if others are to pick them bare?’ Thus, his *incentive*⁴⁸ could be undermined and future production could thereby be damaged (Lyons 1965, 2).

Lyons continues:

Notice how our moralizer did not argue. He did not claim that the grower would suffer hardship or loss as a result of the small expropriation proposed by his companion. Nor did he say that such hardship or loss would indirectly flow from the act, as a result of their example inciting others to do likewise, sparking a chain reaction leading to a devastation of the orchard. Nor did he maintain that in doing such a thing he and his companion were disposing themselves to act in future in ways which ultimately would have bad consequences. Finally, our moralizer did not mention the contingency, the outside chance that others would in fact do the same and that, under the circumstances, this act might contribute to a bad state of affairs (Lyons 1965, 2).

The ways in which the *moralizer* did not argue will be discussed at greater length later, but for now we can note that, though any one act of apple picking or file sharing will not likely be significant enough to cause any real ethical issue, it is important [for consistency] to take into consideration (as I am considering the general behaviour of file sharing) the consequences of all people seeking to satisfy potentially unlimited demand for audio files.⁴⁹ Some claims of harm as

⁴⁸ I placed the emphasis on this word because the issue of ‘incentive’ will come up again in chapter three.

⁴⁹ Again, I want to avoid a discussion of the virtues of act or rule utilitarianism. As I have claimed, any single act of file sharing is not of ethical concern, and I will also show that an aggregate of file sharing instances will be morally permissible. So, I need not spend time here going through these different types of utilitarianism in detail;

a result of file sharing behaviour will be shown to be both unwarranted and outweighed by the benefits that come from such behaviour in chapter three. For now it is important to mention what type of scope the scalar utilitarian theory will cover in the discussion to come.

One thing that seems important to mention here is that the discussion of utilitarian generalization is one that will map onto my discussion of scalar utilitarianism nicely. Scalar utilitarianism, as a non-maximizing theory, will allow actions (and aggregates of actions) to be considered ‘right’ even if they bring about less than the best consequences. As such, we can aggregate actions and if this aggregate number turns out to be less than 100 percent (short of a maximized state of affairs), we can still rank the state of affairs as better (or worse) than other aggregate numbers that are less than 100 percent. That is to say, if all people on the planet performed act ‘ φ ’, the objectively best consequences would come about and so each act (of each person) would be considered the objectively right action by utilitarian lights. But, as discussed above, calculating which act is ‘ φ ’ is difficult for any one person to do—let alone calculating the aggregate of ‘ φ ’ when the whole population is considered. So, as we generalize to larger and larger numbers of acts, the ability of the collective population to objectively maximize becomes increasingly difficult. Scalar utilitarianism can (and does) accommodate less than perfect (100%) aggregate calculations and as such is the preferred model for adjudicating issues of aggregation of utility.

It is important to note here, as well, that this discussion could easily include movies, video games, etc., but here, my discussion will focus on sound recordings.

The Good

In further avoiding measurement issues, I defend the thesis that what should be taken into consideration on the utilitarian account is ‘the satisfaction of desire’.⁵⁰ It will turn out that with such an account there will be two main considerations of ‘what people really want’ and those are: I) access to inexpensive (or, ideally, zero cost) music and II) compensation for the work put into producing music.⁵¹ The calculus will be, in part, focused on what these two desires amount to and how much force each has in considerations of ‘good’ states of affairs concerning file sharing.

Desire or preference-satisfaction accounts of utilitarianism have become a central focus among contemporary utilitarians. This type of account is concerned with an ordinal (or rank-ordered) rather than a cardinal measure for a utilitarian calculus. An issue that comes along with traditional utilitarianism (mentioned above) is the issue of measurement. Getting to a common measure unit, like ‘hedons’ (when looking at pleasure) or at units of happiness, has proven problematic. These would be cardinal measures as they would involve the calculations of units on a ratio scale. A difficulty with traditional utilitarianism is in how to assign cardinal measures to an agent’s amount of pleasure or happiness.

⁵⁰ There is no doubt a perfectly reasonable way to apply other variables of value to my account (pleasure, happiness, etc.), but, in the interest of getting the argument off of the ground, I chose ‘desire-satisfaction’ or ‘preference-satisfaction’. I will give an outline for why this variable of value suits my needs but I do not wish to imply that it is the best account of a ‘utile’ nor do I wish to imply that it is the only way to reach similar conclusions to the one that I reach, here.

⁵¹ These two considerations may overlap in some members of the population concerned with file sharing and so some individuals may have (to varying degrees) a tendency to desire I *and* II. Here let us imagine that this tendency leans more toward I and less toward II for ordinary users (OUs) and vice versa for those in the recording industry (RISs). This would include RISs that none-the-less want free/cheap music or OUs that file share but still want compensation for the music that they themselves produce. Here, I will explain the interest of the OU and the interest of the RIS in terms of there being two separate groups of people that hold only one of these interests. I will do so in the interest of generalizing for the sake of ease of explanation, all the while understanding that the issue may not be so cut and dried.

If we consider instead, the rank-ordered preferences of an agent we avoid attempts at quantifying happiness or pleasure. So, if an agent prefers milk to water, water to juice, and juice to bleach –we can rank this agent’s preferences like this: (#1)—milk, (#2)—water, (#3)—juice, and (#4)—bleach. Milk (through the satisfaction of preference #1) then yields higher total utility compared to the available alternatives. This allows us to act in ways to bring about the best consequences for this agent. Knowing this rank-ordered list of the agent allows us to choose what beverage to have available when the agent comes to visit. It is no doubt difficult to *know* (on all occasions)⁵² what the order of any agent’s list states. As A.J. Ayer notes, “Our estimates of what it is that people ‘really’ want and how far they are satisfied are bound to be somewhat rough and ready” (Ayer 1959, 269). But, Ayer goes on to say that we can be reasonably sure of what a person’s wants are by examining that person’s behaviour.⁵³

The rank-ordered preferences fit very well into a scalar account of utilitarianism. Consider two examples. 1) You have the agent (discussed above) over for a game of cards. In this example, you know the agent well; that is to say that you know the ordering of that agent’s specific list concerning which beverages she prefers. You have milk, water, juice and bleach in the kitchen. You bring a glass of juice (#3) for the agent. In this case you have *missed the mark* (as far as the objectively best drink to bring the agent is concerned) *but*, given your personal knowledge of the agent’s preferences (and the fact that all four drink options cost the same, are as easy to access from the kitchen, etc.) you have *not even aimed for the mark* of maximizing the agent’s utility. In this case you have performed a worse action toward the agent than you could have—especially with your privileged information about the agent’s preferences. Had you

⁵² Of course, sometimes people tell you what they prefer, but even this can be problematic in some cases.

⁵³ See: (Shaw 1999) – (footnote 57, below)

brought a glass of water (#2), (the agent's second choice) you would have performed a better action.

Now, 2) let us consider the card game where the agent is a stranger to you. You have no knowledge of the agent's beverage preferences (you can assume that the agent ranks bleach (#4) very low on that list, as do the rest of your guests). You also have the same four drinks in your kitchen as in the first example. When you bring the drinks to the table, putting a glass of bleach (#4) in front of the agent would clearly be the worst action to perform (as far as any agent's beverage preferences are concerned). But, acting with the knowledge you have and subjectively aiming for the maximization of the agent's preferences, means that any of the other three beverages will likely land you within the 'good' range of actions. You have *aimed to maximize* the total utility and brought juice for the agent (#3). It is not the objectively 'best' action, but it is a 'good' action, nonetheless. And as it has come as close to the objective best that you could reasonably be assumed to have reached, given your knowledge, you have performed a right act and not a wrong one.

It seems clear that an ordinal (rank-ordered) preference list is one that maps nicely on to our imagined *scale* of value—and rightness. That is to say that our common-sense intuitions seem to tell us that being in the agent's shoes (as a guest at a stranger's home), we would never hold our host to objective maximization of our (hidden) preferences and as such, never consider the host's action morally wrong unless the beverage served is one that is clearly the worst choice (bleach).

There are some objections to the preference satisfaction view (as there are with any ethical view). One objection, put forth by R.B. Brandt, is that it is hard to tell how to act when

considering how an agent's preference list can change over time. In these cases we change our terminology from preferences to desires.⁵⁴ Brandt states,

[S]uppose my six-year-old son decided that he would like to celebrate his fiftieth birthday by taking a roller-coaster ride. This desire now is hardly one we think we need attend to in planning to maximize his lifetime well-being. Notice that we pay no attention to our own past desires (Brandt 1979, 249).

Brandt's claim is that it is not really *desires* that we are talking about but instead some type of mental-state preference that can be satisfied in the present based on *present* wants. However, this objection does not seem to really affect the scalar utilitarian/desire-satisfaction account. For if we aim to maximize the desires of an agent by acting in the present, we can aim and (likely, by doing so) hit a point on the scale that renders a right action. So, in the example above, on the fiftieth birthday of the (former) six-year-old we could (if we had knowledge of that agent's former desire, which is *not* now a *high-ranked preference*) provide the opportunity for the agent to take the once-dreamt-of roller-coaster ride. This act would likely be looked at as an act that is a very nice gesture (as we have kept this person's former desires in our thoughts for forty-four years) but *not* an act which we were required to attempt due to the (current) low rank of a roller-coaster ride on the agent's (current) ordinal preference list. To act in this way then would not move the consequences down the value scale into the 'fuzzy boundary' toward (subjectively)⁵⁵ bad consequences anymore than *not* acting in this way would move the consequences down the

⁵⁴ The reason for the terminology changes is that it seems more natural to talk about desires when discussing what people want at one time to happen later in the future. If today I want to retire at 50 years of age, it seems clumsy to say that I 'prefer' to retire at 50. Instead we normally talk about 'desiring' to have some state of affair come about in the future. Here, talk of 'preference satisfaction' will mean 'current preference' as opposed to long-term desire.

⁵⁵ I say 'subjectively bad consequences' here, because we could imagine bad consequences coming from a roller-coaster ride and so I cannot claim that an objective bad consequence can *necessarily* be avoided in this case, any more than I can make that claim of any other consequence that could come from any other action.

scale (due to the low-rank of the act on the agent's preference list). This seems to mesh with our common-sense intuitions.⁵⁶

There is still more to this objection, however. Imagine a case (likely familiar to many people) from *Seinfeld*. Jerry met a woman in an elevator to whom he was physically attracted. She gave to him her phone number and they started seeing each other. He soon found that they were very much dissimilar to each other intellectually which made Jerry think that they should not see each other anymore. So, Jerry gave the piece of paper with her phone number on it to his friend Kramer with strict instructions not to return it to him under any circumstances. Jerry's physical attraction to this woman took over and he started to demand that Kramer give the piece of paper back to him. The typical fight ensued and eventually Kramer gave the number back to Jerry.

This example makes clear a problem of the desire satisfaction account. The question is, which of Jerry's desires should Kramer have satisfied? The answer is a difficult one that seems to put the desire-satisfaction account in jeopardy. If Kramer aims to maximize Jerry's well-being, he either considers the long-range of Jerry's general desires or the short-range. Kramer decided to aim to maximize Jerry's short-term desires (or in our alternative terminology, his current preferences).

James Griffin, in his article called "A Sophisticated Version of the Desire Account," talks about the problem with acting in such a way as to accurately maximize long-term desires. As

⁵⁶ Just imagine the types of acts performed toward a grown child of your own. We would not satisfy an adult daughter's childhood desire to have a pony farm in her basement because (as an adult) this act would rank (presumably) very low on her (current) preference list now that she is an adult. But her childhood desire to see a Celine Dion concert may (currently) rank further down her preference list than it once did but still rank not far enough down (her current list) to make the act of giving her Celine Dion tickets for her birthday a morally objectionable act.

mentioned above, desires seem often to change and this makes it difficult to gauge just how strong a former desire currently is. Griffin says,

[t]he trouble is that one's desires spread themselves so widely over the world that their objects extend far outside the bound of what, with any plausibility, one could take as touching one's own well-being (Griffin 1986, 17).

It seems that it is more reasonable to expect people to act in such a way as to *strongly* aim to maximize current preferences of an agent and only *weakly* aim to maximize former desires of that same agent.

So, in the case of Jerry and Kramer's fight over the woman's phone number, Kramer's calculation concerning which of his acts toward Jerry should have been taken warranted the action that would *more probably* result in a higher yield of Jerry's total well-being. And the act that would most likely result in higher well-being (in this case) was to aim to maximize Jerry's *current preference*. That is, by looking at Jerry's behaviour, Kramer inferred that Jerry's current preference is more probably achieved than his long-term desire (to avoid interaction with the woman) would be. This is because Jerry (during their fight) produced no behaviour in favour of his long-term desires and only behaviour in opposition to that long-term desire. Given how difficult it was (in this case) for Kramer to know that Jerry's desire to avoid the woman was *still* a desire of Jerry's (due to a lack of outward behaviour that would indicate that desire), Kramer could only use the information given to him by Jerry to help in his (Kramer's) decision on how to act. Since past desires are hidden and assumed to be current until shown otherwise, once some behaviour *indicates* otherwise, that behaviour (of the wanting of a current preference) is, of the two (past desire or current preference), the relevant factor in the moral decision.

Watching people's behaviour can be an indicator of the intensity of their respective desires. And there is (at least in principle) a way to roughly calculate a person's desire based on their choices and the trade-offs that the person is willing to make in exchange for one thing or another.⁵⁷ As Ayer states:

[w]hatever ends a person may in fact pursue, it is surely the case that he would not pursue them unless he liked doing so. And to say that he does what he likes is to say that he acts with the view to his own happiness, whether he is conscious of doing so or not (Ayer 1959, 265).

Given how Jerry's preferences change and how widely spread Jerry's long-term desire could be, it is more probable that Kramer will get closer to objective rightness by aiming to maximize Jerry's current preference than if Kramer had to consider the breadth of Jerry's desire without any salient 'behavioural' indicators from Jerry. Jerry was not acting in a way that would help guide Kramer's action toward Jerry's former desire and as such this complicates the calculation of Jerry's well-being and lowers the probability that Kramer's action will yield results that come close to the 'best' possible results for Jerry. What any agent needs in order to aim for the best outcome is information. Kramer's knowledge of Jerry's 'desire' to avoid the woman in question is unreliable in that it can change without any behavioural indicator. In this way, Jerry's 'desire' is hidden. Jerry's current preference on the other hand, provides Kramer with knowledge (through Jerry's behaviour) to use in his calculation. The best way for Kramer to act is to use the information provided to him in order to satisfy Jerry's preference. Jerry "acts with a view to his own happiness" (to use Ayer's phrase), and Jerry's behaviour indicates just what that happiness is.

⁵⁷ On page 54 of W. Shaw's *Contemporary Ethics: Taking Account of Utilitarianism*, Shaw gives a possible calculation. His example involves a person acting to choose having one orange over taking a 50/50 risk of having one apple. This could (in principle) give us a rough and ready way to access an agent's preference list and so a rough and ready guide to how to act toward that agent. Statistics from chapter three concerning the acts of OUs and of RISs will (later) help demonstrate this point.

The issue of *changing* and *conflicting* desires, that puts the desire/preference account in jeopardy, seems resolved. It is resolved with a seemingly huge sacrifice via the necessity of ignoring the long-term interests of an agent. In certain cases where current preferences are irrational or self-damaging (compared to the long term desire), the current preference is still to be acted upon by any actor (if behaviour of the agent provides information to this end). So, if the behaviour of (agent) A indicates to (actor) B, A's current preference, B should act to satisfy A's preference. This will be true even in cases where A has indicated a 'desire' to never have another alcoholic drink, but on New Year's Eve asks B to get her a beer. B, knowing the long term desire of A, has a difficult choice to make. B has a strong feeling that he should *not* satisfy A's current preference because it is a *slip* in A's judgement or a *mistake* in A's belief that she can have a drink in this case and still reach the goal of her long-term desire *not* to drink.

So, in more dire cases than those of Jerry and Kramer, what should the 'actor' (Kramer or B) do concerning the 'agent' (Jerry or A)? The knowledge held by the actor is still central in the discussion of the subjective rightness of the actor's action. The knowledge held by B is of A's *conflicting* desires (or in the terminology I have been using—a conflict between long-term desire and current preference). It is a limit of B's knowledge that makes it so that B cannot really tell if the current preference of A is a *change* in desire or a *slip/mistake*. B (as a benevolent actor) wants to help prevent A from making mistakes but does not want to act paternalistically toward A by forcing A to 'stay the course' of a desire that has changed in an opposite direction. Doubtless, specific instances and the factors that apply to them will (and do) play a role in deciding between satisfying A's current preference and A's long-term desire, but it is only the present behaviour that is most probable at bringing about the most current utility for A. If B

satisfies A's current preference and A later regrets that she made such a request of B (because A realizes that her preference for a drink was a mistake), B is hardly to blame. B was looking to non-paternalistically satisfy the preference of A. The subjective rightness of B's act is maintained if *given the information available, B acted rationally to bring about the most utility for A.*⁵⁸

The difficulty involved in an actor knowing the mind of the agent both limits and focuses the expectations that can be placed on B. This difficulty is a variety of the epistemological problem that cognitively limits our ability to maximize. But, there is the possibility that, had B encouraged A to ignore the advice of her Alcoholics Anonymous (AA) sponsor and by doing so pressured her into having a beer at the party, B would be acting in a subjectively wrong way and (as Parfit says) ought to be blamed. But in B acting to satisfy A's current preference, B is using the information given, which is all that B is able to use to calculate a toss of B's moral dart. This may end up bringing about consequences that are *objectively* bad, just as the medical advice of the doctor may kill a patient. But given the information available it is the only choice for the actor to make.

It seems that some objections to the desire-satisfaction account can be overcome if we look at desire (preference) satisfaction through a scalar utilitarian framework. For this reason, I will use desire satisfaction as the measure of 'good' in the pages to come. In the pages above I have discussed what my account of utilitarianism will consist in and how it best accommodates the specific concerns centred on the issues that come along with concerns of file sharing. The issues with traditional utilitarianism (the demand of maximization, the

⁵⁸ I italicize this section as this wording is (purposefully) similar to the words of Derek Parfit, quoted above. If the italics did not remind the reader of this, hopefully this footnote will draw her or his attention to it.

measurement problem, epistemological problem, and the issue of common-sense moral intuition) can be best ameliorated through the use of scalar utilitarianism and a preference/desire satisfaction account.

I will summarize chapter two—in light of chapter one—with an example. Imagine an island city twenty years ago. At this time the city was just starting to develop. People lived comfortably together in this city as they were free to build their homes to accommodate their growing families *and* they could enjoy the beautiful coastal scenery. If people wanted to build an extension onto their homes they could ‘build out’. This ‘building out’ still allowed their neighbours to enjoy the view.

Now, imagine that same city today. The population is high enough now that the city has been developed to the extent that it reaches to the coastline on all sides. But the population is still on the rise. In order to accommodate this increase in population, people expand their homes by building ‘up’ instead of ‘out’. Those who prefer to have more room add storeys to their homes. But, by doing so, they undermine their neighbours ability to enjoy their view.

Those who prefer the ‘view’ lobby the government for strengthened policy against ‘building up’ so to ensure access to the ‘view’. This policy made sense twenty years ago when people could ‘build out’. The “view lovers” explain that those who want to expand (the “upward expanders”) could stop having children or make do with the space they have.

If either group acts to maximize their own preference they necessarily undermine the other group’s ability to maximize its preference. This type of situation I will call a “good for me, bad for you” situation. A traditional utilitarian account would attempt (as difficult or impossible as this may be) to calculate how much preference satisfaction can come from one side or the

other and decide in favour of one side's interests while sacrificing the interests of the other. A scalar account does not demand maximization from any member of either side. So a person looking to add two storeys (maximizing her expansion preference) to her home, can instead satisfy by building just one storey. And the person looking to maintain her view can sacrifice part of her view instead of lobbying for policy that stops upward expansion all together. The "view lovers" do not have the strength of claim that they had twenty years ago in that they are acting in ways that limit or punish people for a situation that came about due to the limitation in the size of the island and not for acts committed by the "upward expanders" of the population. Given the limits of the city's natural boundary, such policy would bring about a great deal of harm generally and so lower aggregate utility.

If an "upward expander" maximized she would gain a high degree of preference satisfaction. But this would leave the "view lover" with a low degree of preference satisfaction. If the interest of the "view lover" is maximized the results are vice versa. Either way, by adding together the resultant satisfied preferences of the "upward expander" and the "view lover", we are only ever left with a degree of preference satisfaction (roughly) similar to the degree of preference satisfaction achieved by whichever group's interests are acted toward. This is true, of course, if and only if the preference satisfaction value of the 'view' is as high as the value of a higher population *and* the value of free upward expansion in a city limited by natural boundary, combined.

Notice the advantage of the non-maximizing scalar account. In the maximizing utilitarian account both the "upward expander" and the "view lover" can make separate and different claims about how acting in his or her own specific interest will bring about the most

aggregate utility. But scalar utilitarianism allows “view lovers” to act so to satisfy their interests by allowing “upward expanders” some (but not necessarily maximal) expansion. Preference satisfaction on either side need not reach a zero level due to the acts of the other. So we can imagine that satisfying less than maximal preference on either side will allow for a high (but not highest) degree of individual satisfaction. “Upward expanders” can expand (to a degree) and so gain a degree of preference satisfaction that result in a slightly lower level of preference satisfaction than if they acted like traditional utilitarians. “View lovers” can enjoy a certain degree of preference satisfaction (as they can enjoy *some* of the view instead of the whole view of twenty years ago). So, by adding together the resultant satisfied preferences (slightly reduced from maximal on both sides) the total aggregate utility is higher under the scalar account than is achieved under traditional utilitarianism. Acting as a scalar utilitarian allows all people to be better off than if we acted as traditional utilitarians. Scalar utilitarianism allows us to find a middle ground compromise in which each side chooses their own (#2) preference and so achieves higher aggregate utility. In the case of the island city, a “good for me, bad for you” situation can be converted into a “better for all” situation. These island inhabitants (as they are good utilitarians) will act in ways that bring the highest amount of aggregate utility even if it means satisfying lower degrees of their individual preferences. In the next chapter, I will show how this “better for all” situation can be come from the clash between OUs and RISs.

The case of file sharing will provide an example for how scalar utilitarianism along with a preference satisfaction account can bring about high amounts of utility in satisfying current preferences (those of gaining access to more and more free/cheap music) *and* long term desire satisfaction (that of having continued access to more and more musical choices in the future). It

could be said that by the OU satisfying her current preference, she is undermining any ability to satisfy her long term desire, in this case. I will later show that these two desires are not incommensurable. It will turn out that it is not the case that the copying and sharing of sound recordings online cause less sound recordings in the future. In the pages to come, I put this theory to work by plugging into the calculus many variables from the current discussions of digital technologies.

CHAPTER 3 IS IT WRONG TO FILE SHARE MUSIC?

Introduction

In the previous chapters, I have explained the growth of Internet and digital technology and the effects that this growth is having on the music recording industry. There are conflicting concerns about how music should be distributed given this technology. For the purposes of adjudicating this conflict, I purposed a scalar utilitarian calculus which is based on preference satisfaction.

Two different, but overlapping, sets of interests are motivating the discussion of file sharing, intellectual property and copyright law. On one side there is an increasing interest in inexpensive/free music and on the other there is an interest in having producers of music compensated for their work. P2P file sharing is said to be undermining artist (not to mention record executive) compensation. The claim is that the open availability of music that is easily accessed at nearly zero cost is taking away the financial compensation that copyright law is supposed to provide for music producers.⁵⁹ So, copyright needs to be strengthened in order to right this wrong. Strong copyright protection for music (some claim) will lead to compensation. It seems, however, that strong copyright protection is not the only way in which music producers can be compensated. It is *not* the case that the *concept* of ‘copyright’ in music is in desperate need of protecting, but instead, that financial compensation needs to be divvied out properly. But, *anything* that leads to compensation for artists’ work will do the job that the artificial state

⁵⁹ I am using this term here to talk about all of the people that have a stake in making music. I am not describing what is commonly understood by the term ‘music producer’—the person that works with the artist in the studio.

of scarcity (copyright) was originally meant to do (that is, to provide incentive to people so they will continue to create music).

The push for stronger copyright protection in music is bringing with it a great deal of disutility. Strengthened copyright in music is shrinking the ‘information commons’ (a term I define later), it is turning a great number of computer users into criminals and punishing those criminals with substantial fines and jail time—all in the interest of saving an industry that is providing little benefit itself through its production of ‘hit’ music. Technology has allowed nearly anyone to produce quality sound recordings at home and distribute them across the world.

Notice the number of factors and issues to be dealt with in deciding if it is right or wrong to steal music through P2P networks. As discussed in chapter two, a maximizing/traditional form of utilitarianism will not help a great deal here. The degrees of preference for free music and for artist compensation make maximizing nearly impossible. Scalar utilitarianism will help in showing how when Jane throws her ‘moral dart’ by downloading songs for which she did not pay, she need not hit the ‘bull’s-eye’. She need not avoid the behaviour of downloading through P2P networks because the act of doing so (even in the aggregate) is not bringing with it enough harm to mean that the value of the consequence has moved into the area where ‘right’ shades into ‘wrong’. Notice, I said ‘enough’ harm. We can imagine specific cases where certain acts would bring enough harm to artists in general, so to make those acts ‘wrong’. But, I will show in the following pages that, in general, file sharing through P2P networks is not an instance of this type.

In this chapter, I will make three arguments. The first will be that, in aggregate, acts of file sharing do not produce harm sufficient to outweigh the benefits it produces, and so, are

morally permissible. Second, I will argue that the attempts to protect copyright in sound recordings are harming more people than can be justified, and so, these acts are morally impermissible. Finally it will be shown that the removal of copyright, as it is currently understood, from sound recordings would bring the highest amount of aggregate utility.

Who Counts?

The entire population of the planet need not be considered in this calculus as not everyone (globally) is concerned with the consumption of music or with file sharing, though it seems that it may not be long before this is true. Instead, I will focus on only those people concerned with the consumption of music and who have the technological tools that allow for file sharing (namely, computer and Internet access). This will include consumers of music of any kind, people who produce music, and people who gain financially from the production of music. In some cases, an individual may fall under more than one of these three headings. For the ease of calculation (as mentioned previously), I will break the group of those concerned with the consumption of music (who are technologically savvy in the appropriate way) into two groups: Ordinary Users (OUs) and Recording Industry Supporters (RISs).

I will make two assumptions concerning what two different groups of people really want: I) access to music at the lowest cost possible (ideally, no cost) and II) compensation for the work put into producing music. For the purposes of this calculation, an Ordinary User is anyone who possesses the means to file share (computer, high-speed Internet, large hard drive, etc.) and is motivated to file share due to a desire to consume music.

Subscribing to broadband Internet access indicates computer use, and the use of computers with high speed Internet access leads users toward free music through file sharing networks.⁶⁰ But the above definition of an Ordinary User does little work here. Surely some of the advocates for stronger copyright protection due to Internet and computer technology also fall under this description. In chapter one I discussed two opposing camps, each with at least one important difference in preferences (or common preferences with importantly different rankings). So what could provide a distinction that separates one camp from the other? Presumably, anyone with an interest in music consumption is also one who would prefer access to music at the lowest price possible. The important distinction to be made here seems to be along the lines of where these two preferences rank in different people. Those who rank cheap (free) music over artist compensation; I will call Ordinary Users (OU)—consumers. Those who rank copyright protection policy (i.e., artist compensation) over the access to cheap (or free) music; I will call Recording Industry Supporters (RIS). It is important to note here that these two groups should not be understood as clearly distinct groups of a certain countable population. It seems to me easier to discuss these opposing interests in terms of opposing groups, though this may cloud the moral issue somewhat. Hopefully, knowing my intention for framing the discussion in this way will help to clarify what follows. Individual interests can change depending on context. For example, an OU could become an RIS and vice versa. But this would come about just if (in some context) one's preference ranking shifted one way or the other. Also, I do not mean to imply that an OU has no interest in artist compensation nor necessarily that an

⁶⁰ To see how this trend is showing itself in Canada, see: the Canadian Music Industry: 2006 Economic Profile—online, 7.

RIS has no desire for cheap/free music. With that in mind, I will continue with these idealised types.

The RISs, then, will include those in the Canadian Recording Industry Association (CRIA), the Recording Industry Association of America (RIAA), recording industry executives, producers, distributors, composers and (some) recording artists.⁶¹ As discussed in chapter one, current digital and Internet technologies affect these two groups in different ways. OUs get free/cheap access to the music that they want and so have this preference satisfied. RISs would prefer to have a system similar to that of the booming 1990s and the money that came along with the success of the introduction of the CD. Recall from chapter two, the discussion of which drink to serve your guest. If we assume, for the sake of an example, that OUs rank cheap/free music high on their preference list (#1, say) and artist compensation lower (#3) while RISs rank artist compensation at (#1) compared to cheap/free music at (#3),⁶² then, open access to free music satisfies OUs to a high degree but satisfies RISs to a lower (even zero) degree. RISs (as they would prefer to have their higher ordered preference satisfied) act in order to strengthen copyright and so, diminish general open access to free music. In order for RISs to maintain historically high profitability, they think that there needs to be strengthened (or, at least, actively enforced) copyright policy.

An explanation of the harms and benefits brought under two different situations is warranted. One situation is generally supported by OUs and the other is generally supported by

⁶¹ There are a number of examples of artist that are not in full support of the current state the music business is in. Examples of these artists and their views will be seen in detail later.

⁶² I continue, here, using the symbol (#) to indicate an ordered preference ranking and do so as a way of clarifying preferences from other numbered lists in the text. Preference (#2) will be discussed later. It will be the satisficing alternative that is a middle ground between (#1) and (#3). Copyleft will allow (#2) as an option that guides the moral darts of both OUs and RISs away from the maximization of their respective preferences toward the satisficing (close to bull's-eye hitting) alternative that brings the highest aggregate utility.

RISs; these are: low (to zero) copyright protection and strict copyright protection, respectively. So, I will start with a discussion of the harms and benefits brought about by low (to zero) copyright protection.⁶³

What Do Those Concerned Really Want?

I made two assumptions about what each of the two conflicting groups prefer: for OUs it is music at a low (or zero) cost and for RISs it is compensation of the work put into music production. I will try to provide strong reasons to believe that these assumptions are true by describing the ‘acts’ performed by each group (which will serve to indicate their respective preferences). Later, I will normatively assess these same ‘acts’ together (and so, which set of acts together bring about more aggregate utility), but for now a description will suffice.

As mentioned above, RISs are represented in the U.S. by the RIAA and in Canada by CRIA. These organizations have been especially interested in saving the recording industries in their respective nations since file sharing started to make the movement of music easy (though still ostensibly illegal) over the Internet through P2P networks. The RIAA’s website claims that an Institute of Policy Innovation study found that incredible losses have come from the music ‘piracy’.⁶⁴ Canadian losses mirror those of the United States: “As in the United States, in Canada the sales of records have fallen substantially from 1999 to the present, reflecting downloading and piracy issues” (Bernstein et al. 2007, 71).

The fact that music files are being shared illegally over the Internet is (according to the RIAA and CRIA) a major threat to ‘legitimate’ music industries. The sharing of these music

⁶³ File sharing is a violation of copyright and so (unless stopped) rampant, unchecked file sharing amounts of a low (or zero) level of copyright protection.

⁶⁴ See the answers to the Frequently Asked Questions section of the RIAA website at www.riaa.com/faq.php.

files is (in cases where the file is not in the public domain or not explicitly made freely available) a violation of the rights of the copyright holder (or holders) of these sound recordings. So, as outlined in chapter one, measures have been taken to stop the illegal sharing of music files online, including DRM protections and legal actions taken against those who illegally share files. Until as recently as December 2008, people were being sued in the U.S. (by the RIAA) for illegally downloading songs from P2P networks. Between 2003 and 2008, approximately 35,000 people were sued, with most of these suits settled out of court for an average of US\$3,500.⁶⁵ Other actions undertaken by the RISs were described in chapter one in the section involving the court cases brought to Internet Service Providers (ISPs) and P2P network operators in attempts to stop illegal file sharing, some of these more successfully than others.

Concerning Internet ‘piracy’, the RIAA states that, “[i]t’s not realistic to wipe [piracy] out entirely but instead to bring it to a level of manageable control so a legitimate marketplace can really flourish” (RIAA.com—online). The CRIA states,

[we are] participating in a global response to internet piracy that is orchestrated by the International Federation of the Phonographic Industry (IFPI) along with the Recording Industry Association of America (RIAA), to identify and bring down websites hosting illegal copies of sound recordings in Canada and its international affiliates around the world (CRIA.ca 2006—online).

The actions of the RISs suggest that the RISs’ preference ranking between access to inexpensive (free) music (I, above) is lower on their ordinal list than is (II) compensation for the work put into producing music. The measures taken by the RISs to strengthen copyright policy are (they assume) the only way to ensure compensation for this work.⁶⁶ As Jason Berman of the RIAA

⁶⁵ See: (Nakashima 2008—online) OR (McBride and Smith 2008—online)

⁶⁶ Whether or not they are right to ‘assume’ this will be discussed more later.

puts it, “American music is something the rest of the world wants to listen to. Our job is to make sure they pay for it” (Heatley 2008, 33).

If RISs prefer compensation for sound recordings upheld through strengthened copyright policy, what do the OUs prefer? People in general appear to have an increasing desire for music. According to the IFPI Digital Music Report 2008, a public opinion survey shows that 51% of Americans say that listening to music is extremely important to them (while 27% said that watching TV was extremely important and 10% said this of going to the cinema). The article continues, “A few years into the digital revolution, it is clear that, for all the challenges of rewarding creators and producers, the overall volume of music consumed is greater than ever before” (IFPI Digital Music Report 2008, 12).

People in general consume more music than ever before. The popularity of iTunes and subscription services like Napster and Rhapsody are indicators of this tendency. But the number of P2P users is staggering. The sales of digital songs increased by 169% between 2004 and 2005 to a total of 419 million units worldwide, while “[t]ens of billions of illegal music files are traded annually worldwide at an estimated ratio of 20 illegal downloads for every track sold” (IFPI Digital Music Report 2008, 18). These numbers indicate that people are willing to file share sound recordings even if that means violating copyright protections and risking the threat of legal action. It seems that for these people (the OUs), access to inexpensive (free) music ranks higher on their list of preferences than compensating artists for the work involved in producing music.

The ‘Acts’ of the File Sharer

Now that we see the different preferences of each group we can also see why these two camps are at odds over the practice of file sharing. How do the respective actions of the OUs and the

RISs affect the other and do these acts (together) bring utility or disutility? If an OU were to act in order to maximize the satisfaction of her own preferences, she would be necessarily bringing a certain degree of disutility in aggregate due to the harmful effect that act would have on RISs, and were the RISs to act to maximize *their* own preferences, they would bring a certain degree of disutility in aggregate due to the harmful effect *that* act would have on OUs. Scalar utilitarianism may aid us here in helping us avoid the problem of maximizing and at the same time allowing for each camp to act in a way that brings a high amount of utility generally.

As mentioned in chapter two, any one act of file sharing (presumably) will not bring about sufficient harm for each act (independently) to count in the calculus and so single acts of file sharing will not be considered. Instead, I will concentrate on file sharing in the aggregate.

The RISs claim that the violation of copyright by illegally sharing music tracks through the Internet is undermining (essentially removing) the artificial state of scarcity that copyright law provides. This removal of the state of scarcity “depriv[es] the recording artists, composers, authors and recording companies of the right to choose the value of their creative property in a free and open market” (CRIA.com—online). This deprivation leads to a loss (total or partial) in financial compensation which harms RISs directly.⁶⁷ This loss in financial compensation leads to the further harm of a loss of the incentive to create. Artists and composers of music will not put in the effort required to create the music that so many people enjoy if they cannot, at least, make back the cost of producing, marketing and distributing that music. The harm then extends past the RISs to all people, including OUs (who benefit from the production of music). If these claims are true, the RISs have a strong argument for enforcing or even strengthening copyright law as it will lead to a high level of aggregate utility.

⁶⁷ ...and possibly the general population. More on this later.

What is wrong with the claims of the RISs? Is the harm to the RIS a real harm? Some claim that the industry's worries are somewhat exaggerated. According to Krasilovsky, the recent change in technology "has...unleashed revolutionary rhetoric loudly proclaiming the industry's demise" (Krasilovsky et al. 2007, 414). Yet, a 2007 economic study by Oberholzer-Gee and Strumpf suggests that,

[t]he entertainment industry's opposition to file sharing is not a priori evidence that file sharing imposes economic damages. The industry has often blocked new technologies that later become sources of profit. (Oberholzer-Gee and Strumpf 2007, 3—n. 1).

Examples of these new technologies once opposed by the entertainment industry include the recording industry's opposition to the radio in the 1920s and 1930s and the film industry's opposition to the VCR. The study concludes that, although there has been a decline in record sales from 2000 to 2005, "file sharing has had only a limited effect on record sales" (Oberholzer-Gee and Strumpf 2007, 3). Oberholzer-Gee and Strumpf instead that sales slumps in the music business are common and have happened before file sharing became a popular activity (or an activity at all).

A number of different factors are pointed to in the Oberholzer-Gee and Strumpf study that explain why less money was being spent on CDs between 1999 and 2003 (a time that shows a definite decline in CD sales). Some of these factors include: 1) the end of the consumer trend of replacing old formats (LPs/cassettes/8-tracks) with CDs, 2) more money being spent on DVDs (between 1999 and 2003 DVD sales rose \$5 million), 3) more money being spent on video games (between 1999 and 2003, sales rose 40%) and 4) more money being spent on cell phones (between 1999 and 2003, there was a rise of \$3 million in cell phone sales) (Oberholzer-Gee and Strumpf 2007, 39). Since 2003 there has been an increase in popularity of non-CD media. The

sale of digital downloads, in Canada alone, increased in 2005 to 6.7 million units, while digital albums sold in Canada reached 462,000 units (Canadian Music Industry 2006 Economic Profile). Digital music revenues now comprise 15% of the U.S. recording industry revenue. In fact, the total revenue from digital music sales in 2004 was \$400 million, while as of 2007 that figure rose to 2.9 billion dollars (IFPI Digital Music Report 2008, 6).

Prior to 1999, consumers had far fewer options when it came to the money that they allotted to entertainment. The drop in CD sales does not seem to indicate that file sharing is the reason for the recording industry's loss in revenue. The recording industry's business model proved very lucrative in the 1990s with the popularity of the CD as a new, exciting, and (then, nearly) unrivalled music distribution vehicle. The CD has brought a great deal of financial success to the music industry until recently but, just because the time of a sales decline for CDs coincides with the rise of file sharing over P2P networks, does not necessarily indicate that file sharing is reason for this decline. The other factors that are coinciding with the drop in CD sales may play a partial (or even decisive) role in accounting for the harm claimed by the RISs.⁶⁸ Some claim that the recording industry is making a desperate attempt to hold on to the good old days of the CD (the 1990s). "[W]e are looking at an industry that is currently not in a golden period but rather has assumed a defensive position in its eagerness to maintain the status quo" (Berstein et al. 2007, 17-18).

It does not seem that there is a direct link between file sharing and economic loss to the recording industry. Let us assume for the moment, however, that there *is* a loss of financial

⁶⁸ It may be important to keep in mind exactly what harm is actually being produced as a result of file sharing. 'Sampling' music may actually increase music sales in some cases, as James Boyle points out, "[t]he record companies would have to show harm to the market—the people downloading who do not purchase music because it is available for free. Those who download, but would not have purchased, do not count. And we have to balance those who are deterred from purchasing against those who purchase a whole CD because they are exposed to new music through Napster" (Boyle 2008, 73-74).

compensation to copyright holders in the music industry. Is there any evidence for the RISs claim that without financial incentives musicians will not be motivated to produce music for all to enjoy? It turns out that there is *not* much evidence for this claim. In 2003, a Gallup Poll “found that 54% of American households included one or more members who played a musical instrument, up from 38% in 1997” (Krailovsky et al. 2007, 4). So, there exists a large stock of musicians. This pool of amateur musicians is not, however, necessarily an indication that more music will be produced. But, as of 2008, “[t]here are more than 1.2 million rock acts and 1.7 million R & B acts alone clamouring for attention on MySpace” (IFPI Digital Music Report 2008, 13). The fact that so many new bands have formed and are looking to become popular on the internet suggests two things: 1) the threat of not being guaranteed financial compensation (through royalties on CD sales) is not (itself) a decisive deterring factor for most people interested in making music, and 2) that going first to the internet to gain notoriety, instead of going directly to the record companies, may provide a better way to satisfy the reason for wanting to produce music in the first place (be that for financial gain, fame, or open access and the sharing of culture). I will expand on the second indicator later on, but for now, the first shows us that the incentive argument is a weak one for the RISs. The amateur bands looking for attention on MySpace provide a great example of a group of people who are (largely) aware that a career as a popular musician is a risky one due to the undermining of copyright law in sound recordings (if the RISs claims are true), yet they still produce music and make it available to be heard.⁶⁹

⁶⁹ Perhaps there is another (or one other of many) reasons to produce music besides money, as Anderson explains, “...there is a coin of the realm that can be every bit as motivating as money: *reputation*. Measured by the amount of attention a product attracts, reputation can be converted into other things of value: jobs, tenure, audiences, and lucrative offers of all sorts” (Anderson 2008, 74).

Perhaps there are stats that show a decrease in new (professional) bands signed to major record labels? Perhaps it is the case that *talented* musicians are not motivated to make records and so are not signing deals and producing music through the recording industry? According to *The Encyclopaedia of Popular Music* (in conjunction with MUZE.com), popular album sales showed a significant drop only as late as 2005. Otherwise album releases were generally steady from the years 1988 through to 2005.⁷⁰ This indicates that the record labels and bands were releasing albums at a similar rate up until 2005. In fact, Anderson points to an *increase* in released albums for this period: “In music...the number of new albums released grew a phenomenal 36 percent in 2005, to 60,000 titles (up from 44,000 in 2004), largely due to the ease with which artists can now record and release their own music” (Anderson 2008, 54). File sharing first became popular around 1998, yet there was little significant drop in releases for seven years. It is true, however, that file sharing became increasingly popular over this seven year period. The number of file sharers rose gradually during this time but the release of new albums drops off sharply instead of gradually. A gradual increase in file sharing might reasonably be expected to produce a gradual decline in albums released, if the RISs’ claims are true.

RIAA stats show a dramatic drop in revenue for 2005 (compared to prior years) which may indicate that there was less money to invest in the production of new albums in that year (and in subsequent years). Loss in revenue due to the popularity of other media besides CDs may have led to this dramatic drop in released albums. This seems to be reflected in statistics concerning the rise in revenue for other forms of popular media to which I have pointed. So,

⁷⁰ There was a higher plateau of CD releases from 1995 until 2001 which corresponds to the high point in CD revenue for the recording industry (according to the RIAA 2007 Year-End Shipment Statistics, www.riaa.com/keystatistics.php).

though there has been economic harm to the recording industry, it may not be the case that a drop in signed artists' releases indicates a loss of incentive to produce music.

So, it seems that file sharing (by itself) brings little (to zero) harm to RISs.⁷¹ The recording industry has lost revenues due to a drop in CD sales, but they are making back revenues through digital downloads which have risen increasingly over the past few years.⁷² This means that the disutility of *the aggregate acts of file sharing* is low (if not approaching zero). The act of file sharing via the Internet then is an act which, while satisfying the highly ranked preference of OUs (access to inexpensive (free) music), does not at the same time prevent the RISs from satisfying their highly ranked preference (compensation for the work involved in the production of music). Compensation for this work is being lost due to factors besides file sharing.

The claim of the RISs is that the sharing of music files displaces the purchases of CDs. “In Australia, research has been undertaken...that shows that 57 per cent of P2P downloaders rarely or never purchase the music they download—pointing to straight substitution of legitimate sales” (IFPI Digital Music Report 2008, 18). This claim is based on the assumption that, if any individual were given an unlimited amount of expendable income, they would purchase each album that they downloaded through a P2P network. This is a poor assumption: as Oberholzer-Gee and Strumpf note, “[f]ile sharing is attractive to those who are time-rich and cash-poor, and

⁷¹ If you recall the discussion of the “view lovers” and the “upward expanders” from chapter 2, you will notice that the acts of the “upward expanders” actually did bring harm to the “view lovers” and in this respect the analogy falls apart. But notice also how this strengthens the claim that the RISs have little gripe against the OUs and this then shows how the actions that the RISs perform in punishing OUs for file sharing are all the more deplorable.

⁷² Artists that are part of the Canadian Recording Industry have a further revenue stream to offset losses in CD sales. The Canadian Private Copying Collective (CPCC) collects and distributes a blank media levy that is currently charged to the consumer of Blank cassettes, CD-R, CD-RW and other blank media. “\$92 million of the \$145 million collected between 2000 and 2005 [has been distributed to Canadian artists]” (Canadian Music Industry-2006 Economic Profile, 20). The U.S. has a similar blank media levy under the 1992 Audio Home Recording Act (AHRA).

these individuals would purchase fewer CDs even in the absence of P2P networks” (Oberholzer-Gee and Strumpf 2007, 5). It does not seem likely that the fifteen year old who downloads a Clash song from a P2P network would have purchased that CD were it not the case that the file was available for free online. It is more likely that the breadth of musical experience provided by the fact that many songs are available free through online sharing (albeit, illegally) provides a chance that this fifteen year old may never have had without the technology. Lessig notes how the sharing of files online may not necessarily displace the sale of a CD. He says, “[t]he Chinese who bought [counterfeit] American CDs for \$0.50 are *not* likely a demographic that would pay \$15 for that CD. So, the industry is no worse off yet a large number of people are better off” (Lessig 2004, 64). Motivation to purchase an album (especially if the album is highly priced) is low and people may avoid such purchases, except in special instances in which they save up for a special album. In fact it is possible that the downloading of an album rarely displaces a sale. In the absence of a P2P site from which to download the album, the CD would have never been purchased (but more importantly, never heard). Access to this cheap/free music brings higher aggregate utility because it satisfies a highly ranked preference in a large portion of the population (and a lower ranked preference in a smaller portion) while, at the same time, not (itself) producing disutility in the aggregate.

The ‘Acts’ of the Recording Industry Supporter

Benefits?

The recording industry has several functions. Members of the recording industry serve to find talent, produce music, market artists to the public and distribute recordings. A record label will pay an artist a certain amount of money upfront to help support the artist during the creation of

his or her music. Also, the record label typically will pay all of the production, advertising and marketing costs during the production of an album.⁷³ Money paid upfront and as recording costs is an investment in the artist which normally is expected to be recouped to the record label through royalties. Such royalties for new artists, as Krasilovsky remarks, amount to “9% to 12% of the suggested retail price for domestic sales” (Krasilovsky et al. 2007, 19). A typical CD goes for a retail price of \$14.98, so at 12 percent, this comes out to a royalty of \$1.79 per CD. Of this 12 percent, however, deductions are taken for things like producer royalties, promotional goods (CDs, etc. given to radio stations), cost of packaging and for any CDs that are sent back from retailers due to low sales. After all of these things are calculated away from the 12%, the royalty for the artist amount to \$0.56 per CD sale (or 3.74%) (Krasilovsky et al. 2007, 21).

Typically the artist does not see any of this royalty until enough CDs have been sold (at 56 cents per unit) to repay to the amount of the upfront money and the recording costs to the record label. Sometimes this amount is in the millions of dollars which means a lot of albums need to be sold in order for the artist to be both repay the investment costs and then see any profit from CD sales. Often times as part of a standard agreement, sound recordings created in a recording contract are considered ‘works for hire’ which (as noted in chapter one) are protected for a longer term under the U.S. CTEA. This also means that the recording company has the copyright to each sound recording produced. Mick Hucknall of the band Simply Red puts it this way: “Like many artists, my deal meant I paid for the cost of recording the music. I paid for the marketing. I don’t know any other business where you pay for something and then someone else owns it” (Heatley 2008, 39).

⁷³ For information about a standard agreement see, Krasilovsky et al. (2007, 15).

For these reasons many artists are sidestepping the record labels all together. Established artists can afford studio time and they can assume other marketing costs. Many artists have developed their own record labels in an attempt to have control over their own creations (copyrights to their own sound recordings) and to make more on their own CD sales. A band with their own record label gets 100% of CD royalties (after costs).⁷⁴ So, if the cost of a CD is \$14.98 and it costs \$2 per CD in recording costs to make each CD; that is a return of \$12.98 instead of \$0.56. If you have the working capital to do it this way, working outside of major record labels seems to bring high profit (utility) to artists.⁷⁵

Radiohead, Nine Inch Nails, and Ani DeFranco all have their own record labels and the ability to control their own sound recordings. The Radiohead Experiment, conducted by the band on January 1, 2008, was the release of the band's album *In Rainbows* which was offered on a 'pay-what-you-want' basis. The band made the album available on its website (which it could do since it owned the rights to its own sound recordings) and people could pay \$0 or more for the downloading of the album. Maki at DoshDosh.com states that,

The band is able to offer their songs in a DRM-free mp3 format because they don't have a record label and hence own complete distribution rights over the music. This essentially bucks the industry trend of reliance on record companies and marketing teams to produce, commercialize and promote music records (DoshDosh.com—online).

According to a *Rolling Stone* online magazine article, Radiohead's action allowed the band to make "more money before *In Rainbows* was physically released than they made in total on the previous album *Hail to the Thief*" (Kreps 2008—online). Thom Yorke of the band says,

⁷⁴ It is not even necessary to have a record label at all, be it a large or self-owned label: "The ability to produce and deliver digital products on demand has a significant impact on the economic value of the products it affects. Now almost everyone can afford to make and keep available all of the music that they have created. The expense of making a work available is now low enough that just a handful of sales are needed to cover the basic costs" (Krasilovsky et al. 2007, 417-418).

⁷⁵ Later, we will see that it no longer takes much working capital for someone to produce a quality recording independently of a record label.

“I like the people at our record company, but the time is at hand when you have to ask why anyone needs one. And, yes, it probably would give us some perverse pleasure to say ‘Fuck you’ to this decaying business model” (DoshDosh.com—online).

Nine Inch Nails (NIN) is another band that has benefitted greatly by sidestepping record labels. In 2008, NIN released their album *Ghosts I-IV* under a Creative Commons licence which meant that fans could go to any file sharing network and download the entire album legally—for free.⁷⁶ In spite of the fact that it was legal to freely download, *Ghosts I-IV* was the best selling MP3 album of 2008 on Amazon’s MP3 store—making \$1.6 million in revenue for the band in the first week of its release (Benenson 2009—online). Lead singer of the band, Trent Reznor, has also encouraged people to edit and redistribute film footage of NIN concerts online. This allows fans to produce creative, derivative works based on sound recordings of the band, and since Reznor chooses not to hunt down and hold people to the performance rights he is entitled to in his sound recordings, people are free and encouraged to create. Reznor says, after giving advice to those who wish to create derivative works from his concert footage, “It could be really interesting to see what creative users can put together using this and other fan-recorded footage” (Reznor 2009—online).

Ani DiFranco owns her own label, Righteous Babe Records. She has been called a “poster child” for the “economic advantages of owning your own product.” She is able to profit much more in revenue on her own, by selling her CDs at concerts and by being able sometimes to release two or three albums per year (an activity frowned upon by major record labels “because they want a bit more distance between albums”) (Bernstein et al. 2007, 24). Having

⁷⁶ A Creative Commons licence is an alternative way of protecting ideational content that guarantees only some of the bundle of rights guaranteed by a copyright. To license something under a Creative Commons licence is to allow for some uses of a ‘work’ while not allowing others. This idea will be explained in more detail in the last section of this chapter.

her own record label allows her to produce as much music as she wants, set prices lower than those set by the record labels, and gain more in royalties for each CD sale. It seems that, in cases like DiFranco's, Radiohead's and Nine Inch Nails', avoiding the recording industry brings far more utility to the artists themselves and (through the ability to produce more albums, make those albums available for little cost, and through encouraging fans to share and edit their music) to the OUs than the status quo.

It does not seem that the recording industry is necessary for, nor always beneficial to, the production and distribution of music. Amy Winehouse says,

I've given [the record label] a lot of control—I made the music because I know how to do that, but then for the promotional side I stepped back and thought, 'I've got to trust this lot, because I've never done this before'. That was the wrongest thing I could have done (Heatley 2008, 31).

It is claimed, however, that the recording industry is necessary to bring *quality* music to people who, without the recording industry, would never gain access to musical works. The recording industry allows for the production of quality music and further allows for that music to be brought to the public through radio play and music television. But it seems that recent technological developments have taken these roles of the recording industry and put them in the hands of OUs. On this issue, Krasilovsky comments,

Technology has radically decreased the costs for all participants in the music business. The cost of capable computer-based recording equipment is now much less than \$2,000 and can generate professional results. Cheap digital storage combined with the Internet's fast, cheap distribution capabilities, have also expanded the realm of the practical (Krasilovsky et al. 2007, 417).

It is the case now for both professional artists and amateur artist that production, distribution and marketing can all be done for a much lower cost than paying a record label to do these things for you.

In Chris Anderson's book, *The Long Tail*, he explains how a growing amount of interest (in a growing number of people) for 'niche' music rather than 'hit' music has come about through technological changes. He says that 'niche' music makes up the 'tail' while 'hit' music makes up the 'head' where the head and tail refer to music 'sales graphs' that show the highest sales at the left of the graph and a long 'tail' of sales that continue from the head and constitute 'lower' sales numbers down the rest of the graph. The 'tail' has become an ever growing section of this graph as the popularity of independent (amateur) artist rises.

Anderson explains three forces that bring about the 'tail': 1) the democratization of the tools of production, 2) cutting the costs of consumption by democratizing distribution and 3) connecting supply and demand. The *democratizing of the tools of production* of music comes from the availability of computers and software that allow people to "do what years ago only professionals could do" (Anderson 2008, 54). Many people do choose to use these tools to produce music and though "[t]alent is not universal...it's widely spread: Give enough people the capacity to create, and inevitably gems will emerge" (Anderson 2008, 54).⁷⁷ *Cutting the costs of consumption by democratizing distribution* comes about through Internet technology and how the Internet makes it much cheaper to reach more and more people who use the Internet. Anyone who produces music can make it available online on sites like MySpace for the cost of uploading the files and millions of potential listeners can hear it for free. *Connecting supply and demand* comes simply through the technology of web search engines like Google, iTunes, Rhapsody and Pandora. These sites make 'search costs' low by providing easy access to available content online and, in the cases of iTunes, Pandora and Rhapsody, through recommending certain artists to consumers based on the customer's own taste in music. In this way, the 'gems' that emerge

⁷⁷ For a more detailed discussion of types of software and cost, see Krasilovsky et al. (2007, 376).

through the uploading of music by amateur artists can be easily found and enjoyed, while the ‘non-gems’ are still accessible for consumer’s with a taste for them.

These technological advances undermine the claims of the RISs that the recording industry is necessary to both create music and deliver that music to consumers. People can access a larger pool of music online than is provided to them by the recording industry and search engines and recommendation websites allow for easy access to any type, (almost) any quantity and any quality of music desired. The recording industry seems to be displaced by this new technology but this technology allows for a large group of artists to provide its music online for the enjoyment of all. The amount of aggregate utility that *this* system provides (even though it makes the recording industry obsolete) is very high.

Harms?

The recording industry is not a source of benefit to consumers of music nor is it a source of benefit to producers of music. But, are they causing harm? The answer is yes. Chapter 1 included details of what legal actions have been brought about by RISs in recent years. In spite of the benefits that come from *avoiding* the recording industry—and, thus, being able to both control the rights of your work and make that work available either for profit or for free—the recording industry has taken certain actions to ensure that their business model retains its strangle hold on music profits. The fact that until recently (Dec. 19th, 2008) the recording industry was suing its own customers for copyright infringement is an indicator of harm to a large portion of people who file share. There are a number of ways that OUs can violate copyright law. Some of them include: emailing a copy of a music file, putting an MP3 copy of a song on the Internet and connecting to a file sharing network, downloading from a P2P network,

burning CDs from your computer and giving them to friends, etc. All of these are violations of copyright law. In many (most) cases the penalties that come from these violations are quite high in relation to the (supposed) lost revenue to the copyright holder. According to the MusicUnited.org website,

Criminal penalties for first-time offenders can be as high as five years in prison and \$250,000 in fines [even if you didn't do it for monetary or financial or commercial gain]. Civil penalties can run into many thousands of dollars in damages and legal fees. The minimum penalty is \$750 per song (Music United—online).

Often the recording industry does not bother to sue in this way, but instead, sues for statutory damages of up to \$150,000 for each copyrighted song downloaded or uploaded. This system “imposes damages...far in excess of the actual damages caused.” (Nakashima 2008—online) In most cases, even innocent people charged tend to settle these statutory suits out of court for fear of having to pay (in some cases millions in) damages. As mentioned above, the average case brought the RIAA \$3,500 in out-of-court settlements for each of the 35,000 people sued for copyright infringement.

Breaking the DRM locks imposed by the (recording industry driven) DMCA (in the U.S.) or Bill C-61 (in Canada) “could result in lawsuits seeking up to \$20,000 in damages” (Nowak 2008—online). The threat of damages for circumventing code (even if doing so for the purpose of accessing files for perfectly legal reasons) or huge statutory damages for file sharing, bring about onerous punishment for actions that (though technically illegal) tend to bring about more aggregate utility to more people.⁷⁸ The actions of the RISs seem to bring a great deal of disutility

⁷⁸ Lessig, commenting on the difference between stealing physical property and intellectual property, says, “...when I take a CD from Tower Records, the maximum fine that might be imposed on me, under California law, at least, is \$1,000. According to the RIAA, by contrast, if I download a ten-song CD, I'm liable for \$1,500,000 in damages” (Lessig 2004, 180).

to a great number of people in the interest of financial gain for a dying industry that (itself) brings little utility (given new technologies).⁷⁹

One thing that the DMCA (or its Canadian equivalent, Bill C-61) and the CTEA have done is limit the access of individuals to information via the Internet. The Internet provides people the capability to access a great wealth of information. Vaden states that “[b]ecause digital information can be reliably and cheaply copied, it has great potential for democratisation and equality of information distribution” (Vadén 2004, 223). From this wealth of information, people can access files that: help them research, help them gain access to any number of cultural works and grant them countless opportunities to communicate ideas. Strong copyright policies like the DMCA and CTEA threaten to limit this incredible social utility.⁸⁰ This wealth of information is sometimes referred to as the ‘information commons’. Herman Tavani describes the information commons as,

[a] body of knowledge and information that is available to anyone to use without need to ask for or receive permission from another, providing any conditions placed on its use are respected (Tavani 2005, 92).

In cases of strong copyright policy,

we are worse off when as a result of overly-strong copyright laws, the information commons is diminished to the point that ordinary individuals are denied access to information that had once been in the public domain [CTEA]; and (ii) copyright laws such as the CTEA and DMCA are unjust to the extent that they make ordinary individuals worse off by unfairly diminishing the information commons (Tavani 2005, 96).

These issues of limiting access to the information commons point to a significantly high amount of disutility brought about by RISs’ insistence on strong copyright policy. The fact that RISs are

⁷⁹ For other examples of harm brought about by the RISs insistence on strong copyright policy, see: Lessig (2004, 47, 95-115, 191), Anderson (2008, 33-34, 180, 196), and Moon (2008, 205).

⁸⁰ Concerning the threat brought about by strict copyright law, Tavani claims that, “[d]espite the fact that digital technology has made information exchange easy and inexpensive, the DMCA has made it more difficult to access information that either resides in or is converted to digitized form” (Tavani 2005, 94).

acting so to maximize their own preference satisfaction means they are necessarily undermining the OUs' ability to act in their own interest. As we have seen, the aggregate acts of file sharing are morally permissible (as they do not result in harm to RISs and so do not lower aggregate utility) and so file sharing itself should be avoided.

So, the amount of utility that the recording industry used to bring to the general population by serving as the necessary purveyor of music is no longer being brought *by* the recording industry but instead by OUs who have access to the tools of production and distribution of music. This means that the recording industry is not providing much utility (if any at all) to a large number of people. As we have seen in chapter one, RISs have taken a number of steps in order to secure the business model that thrived prior to the onset of digital and Internet technologies. These include suing their customers for incredibly high damages and thereby striking fear in consumers, covering digital files with protective code that only allows it to be used in certain ways, and pushing through legislation that broadens the definition of illegal activity through outlawing circumvention of code protections and strengthening/lengthening copyright (further enclosing the information commons).⁸¹ These acts bring very high disutility to a large number of people. Further, the harm inflicted on artists by the recording industry is high, in that they remove the artist's ability to control his or her own work and also take a great deal higher amount of costs compared to a standard amount of revenue. It seems that the RISs are acting in ways to maximize their own preferences at the cost of creating a great deal of disutility in aggregate. Weighing the costs of the RISs actions and the benefits of the OUs actions seems

⁸¹ James Boyle says, “[o]ne could imagine entire fields—of open educational content or of open music—in which creators could work without keeping one eye nervously on legal threats and permissions” (Boyle 2008, 183).

to produce a much higher amount of utility if the strong protection of copyright is abandoned and if people are free to access music online without dire repercussions.

Strengthening copyright law makes it more difficult for OUs to satisfy their (#1) preference—accessing cheap/free music. So, the amount of utility ‘blocked’ by the RISs’ actions is lowering aggregate utility. OUs, however, by acting to satisfy their (#1) preference (as we have seen) are not ‘blocking’ (through this act itself) RISs from satisfying *their* (#1) preference—compensating artists. The amount of harm brought to OUs naturally leads to a large amount of aggregate disutility due to RISs’ actions. The acts of the RISs in strengthening policy affect more than just OUs but all of the growing number of Internet users. Boyle asks us to,

[T]hink of the costs of the copyright extensions that lock up most of twentieth-century culture in order to protect the tiny fraction of it that is still commercially available—[the costs] are spread out over the entire population, while the benefits accrue to a small group of commercial entities (Boyle 2008, 236).

The cost of this ‘closing of the information commons’ to the entire population far exceeds the value of benefits gained by RISs that claim, albeit wrongly, to gain financially from strong copyright protection.

In aggregate, acts of file sharing bring benefit to OUs while bringing close to zero harm to the recording industry both financially and in terms of artist incentive. The acts of strengthening copyright policy and all the acts that this strengthening seems to entail bring a significant amount of harm to the entire population while bringing only a small amount of benefit to RISs.⁸² Since the recording industry has been displaced by technological advances in music production, distribution and marketing, the recording industry is no longer the significant

⁸² Another example of RISs’ actions that harm music consumers is Digital Terrestrial Radio (DTR) and satellite radio—XM radio and Sirius radio. Each have a large number of subscribers and are perfect examples of a small group of people acting in their own interest and so undermining the interest of a large number of people. For more information see: Krasilovsky et al. (2007, 5).

source of utility to the general population that it used to be and, as such, need not be protected in hopes of future utility to come. This is another reason (beyond the harm that it brings) that strong copyright protection, and the acts that come along with it, are not justified and so morally impermissible. If copyright protection actually brought general utility (as it did before the cultural change that new technology has brought) then it would be something that should be maintained. But seeing as the things that produce utility in a huge (and growing) number of people are not the things that copyright protects (illegally shared (free) music), there seems little need to hold on to strict copyright protection just in the interest of those dependent upon a quickly failing market. The interests of this increasingly insignificant market are not enough to 1) deny ordinary users of the music that they really want to consume, 2) threaten general personal autonomy by policing internet use in the interest of revenues and 3) denying access to the social utility of the most impressive social networking and information providing technology that the world has ever known. The recording industry mistakenly believes that the decline in CD sales (compared to an unprecedented high point in the 1990s) is the result of file sharing. Because they *mistakenly* believe this, they have unjustly taken action against file sharing.

Recall the traditional (maximizing) utilitarian calculation of aggregate utility in the example of the island city inhabitants in chapter 2. The calculation of ‘preferences satisfied’ was tallied and one side’s interests proved to bring about more utility than the satisfaction of the interests (preferences) of the other. The side with the highest amount of resultant utility had their interests acted upon while the other side sacrificed their interests entirely. At this point in the discussion, this is precisely where we are situated. The RISs brings little benefit and substantial harm to the entire population (low aggregate utility) and the OUs (through having their

preference for free/cheap music satisfied maximally) bring a great deal of aggregate utility.⁸³

Stopping the acts of the RISs and allowing the acts of the OUs will bring a high amount of aggregate utility. In order to stop the acts of the RISs I purpose removing copyrights in sound recordings (as they are currently understood). But this means sacrificing the interests of the RISs. This is a clear example of a “good for me, bad for you” situation. The claim of the RISs was that, what is ‘good for the OU was bad for the RIS’. And the claim of the OUs was that, what is ‘good for the RIS was bad for the OU’. It turns out that the RISs were wrong in their claim and the OUs were right (and not only was it bad for the OU but bad for the entire population).

In the next section, I explain the virtue of using scalar utilitarianism as it creates a “better for all” situation that brings about higher aggregate utility than the situation explained above. I also provide a middle ground compromise that satifies preference satisfaction from both sides.

What of Copyright Protection?

Anything that is in the world when you're born is normal and ordinary and is just a natural part of the way the world works. Anything that's invented between when you're 15 and 35 is new and exciting and revolutionary and you can probably get a career in it. Anything invented after you're 35 is against the natural order of things.—Douglas Adams The Salmon of Doubt⁸⁴

The old are scared of us. They don't want the change. It makes them irrelevant to what's going on now and they know it.—Johnny Rotten, Sex Pistols (Heatley 2008, 59)

If it is morally impermissible to act in the ways that the RISs have in attempting to protect their copyrights, what sense does it make to apply copyright to sound recordings at all? Surely,

⁸³ In the island city example from chapter 2 we assumed that the ‘view’ held equal value to that of ‘upward expansion’. This is not the case with OUs and RISs interests in that when calculated together, the aggregate utility of either side’s maximizing action do not end up equal (i.e., maximizing OU interest results in higher aggregate utility than maximizing RIS interest).

⁸⁴ Adams 2003, 95

removing copyright in sound recordings altogether is far too strong a claim to make. Removing copyrights means removing a bundle of rights that owners hold over the ideational content they create. These rights, it is claimed, are important for the future creation of ideational works. My argument seems to imply, however, that the highest amount of overall or aggregate utility would come from a change in copyright policy concerning sound recordings. It would remove the possibility of harm toward a large percentage of the population (the threat of punishment, diminishing of the information commons, etc.) while allowing for the possibility to benefit from open information access. This change seems like it would have to take the form of completely removing copyrights from existing sound recordings and not granting copyrights to future sound recordings. This *is* a pretty strong claim.

A possible reason that the claim that copyrights should be removed from sound recordings seems like such a strong one comes (in part) from the fact that the idea of copyright protection has become incredibly engrained in our collective consciousness. Copyright protection is so common, now, that (as Anderson puts it):

There are some...mental traps we fall into because of scarcity thinking: [i] Everyone wants to be a star, [ii] Everyone's in it for the money, [iii] If it isn't a hit, it's a miss, [iv] The only success is mass success, [v] "Direct to video"= bad, [vi] "Self-published"= bad, [vii] "Independent"= "they couldn't get a deal", [viii] Amateur= amateurish, [ix] Low-selling= low quality, [x] If it were good, it would be popular (Anderson 2008, 187).

But the artificial state of scarcity that copyright is supposed to provide, and the benefits that are supposed to come from this state, is a relatively recent institution itself. It was put in place for a reason and that reason was to provide an incentive for people to make their ideas public for the general good of society. As we have seen, and as it concerns sound recordings, people make public their ideas without this protection (or, without the *guarantee* of this protection—because

the protection is currently meant to exist, yet is undermined by file sharing) and so, there is no real reason for copyrights, as they are currently understood, when it comes to sound recordings. Drastic change in technology has led to drastic change in the collective consciousness⁸⁵ as it concerns copyright in sound recordings and so perhaps it is not so drastic to adapt our copyright law to reflect this drastic change.

The technological advances that have brought computers, compressed music files, music production software and the incredible social utility that is the Internet, has also brought about a huge change in the collective consciousness. This shift is explained in part through the Douglas Adams quotation above. A generation of people has had the opportunity to take advantage of all of these tools and, moreover, these tools will be considered commonplace (and nearly mundane) to the next generation. This collective consciousness is the belief that any ideational content can be accessed at any time, from anywhere, by anybody for low (zero) cost. This is a possibility; a possibility if and only if the information commons is full and open for use without threats of lawsuits and without digital or legal fences blocking access. The amount of utility to all people (that would come from this type of utopia) would be extremely high.

‘Open source’ is a way of designing and distributing products through peer input. The term ‘open source’ is primarily used, today, when talking about software development but the notion can be applied to the production of most intangible goods or knowledge. For open source to work, what is required is ‘free’ use of existing information.⁸⁶ A popular example of open source software is the Linux operating system for personal computers. Whereas Microsoft and Apple have centralized design teams that work to produce their software, Linux is an operating

⁸⁵ Maki speaks of this shift in people’s thinking and states that “[t]he strong file sharing community is itself an indication of the demand for free or donation-funded creativity” (DoshDosh.com—online).

⁸⁶ ‘Free’, here, refers to liberty, not price. This is ‘free’ as in *free speech*, not ‘free’ as in *free beer*. (GNU Free Software definition - <http://www.gnu.org/philosophy/free-sw.html>)

system that runs on any platform and is ‘built upon’ by a community of software developers and can be manipulated by anyone with the ability to manipulate source code. Linux software is freely available to use and ‘free’ to change to serve the needs of each user.

Traditionally, music ‘production’ was done the same way. For example, “soul” music (as a genre) was developed out of a mix of gospel and R&B.⁸⁷ A popular song was often directly used as a basis for a derivative version. This system of building on older works in order to create new works was dependent upon the ability to access and freely use the older works. Today, as mentioned above, most of twentieth century cultural works (including music) are inaccessible for this type of use. But this does not need to be the case. The RISs are acting to ensure that OUs are excluded from copyrighted sound recordings so they can gain financially from the state of scarcity that copyright provides. This protection results in a depleted information commons from which people can access works on which they can build. Copyright is not the only option when it comes to ‘protecting’ new ideational content in the form of sound recordings, however.

It might be objected that copyright ensures other important rights besides excludability and transferability (rights that are supposed to ensure the possibility of profiting from your ideational property). Even if it is the case that I cannot exclude others from transferring my songs (ideational content) over the internet (by virtue of the nature of the technology and the disutility that policing and punishing OUs brings), surely I should still have the right to claim the idea as my own by having my name attached to it?⁸⁸ How can I prove a song is mine without the

⁸⁷ Siva Vaidhyanathan has explained a number of different examples of how many influential artists of today and yesterday have used older musical styles in creating new ones. (See *Copyrights and Copywrongs* for Vaidhyanathan’s discussions).

James Boyle says, “...styles are often built around ‘standards’ –classic songs of the genre to which an almost obligatory reference is made.” (Boyle 2008, 129) Also, See Boyle’s book, chapter six, for an interesting account of Ray Charles and the creation of *soul*.

⁸⁸ Tim Wu, a law professor at Columbia University explains ‘exposure culture’. He says, “[t]he exposure culture reflects the philosophy of the Web, in which getting noticed is everything...The big sin in exposure culture is not

formal institution of copyright? Can I not at least protect myself from someone using my song for sinister purposes like playing my song in an advertisement for a product or company (or political party) that I do not wish to endorse or support?

Canadian copyright law makes a distinction between two concepts of copyright, the legal (including all of the rights discussed in chapter one—exclusion, transferability, etc.) and moral (including the attachment of the author’s name to his or her creation). A number of examples of ideational objects protected under copyleft prove that moral rights can be maintained even in the absence of copyright protection (see the example of Boyle’s book, below).⁸⁹

“Copyleft” is the term that refers to a system of protection that could keep the moral rights of copyright while jettisoning the rights of excludability and transferability.⁹⁰ A copyleft protected song is one could be available for others to use and build upon. An author that does not want his or her creation appropriated by others all together is an author that does not want to license under copyleft protection. Under a copyleft licence, you can decide to let others modify your work (or not), decide to let others profit from the use of your work (or not) and decide whether you want people to attribute your name to the work you have created (or not). But a copyleft licence allows people to copy your work without you being able to restrict such copying. So, in cases where people create some ideational content that they do not want copied, they can either gain a copyright to that work or keep the work a secret from others. I propose that the option of a copyright be taken away leaving the options of secrecy or copyleft to take its

copying, but instead, failure to properly attribute authorship” (Quoted from: Anderson 2008, 74).

⁸⁹ As stated “[u]nder s.14.1(1) of the [Canadian] Copyright Act, an author of a work has a right to the integrity of their work and to be associated with their work by name, unless they choose otherwise. Unlike exclusive or monopoly rights, moral rights cannot be assigned to another person, but they can be waived in whole or in part.” (Creative Commons Canada 2000—online)

⁹⁰ I will refer to all licensing options that are similar to the General Public Licence (GPL)—Creative Commons licences, etc.—as copyleft licences for simplicity sake.

place. This, by no means, makes the song itself valueless as a commercial product. James Boyle's book *The Public Domain* (from which some of the information for this essay was found), was released under a *Creative Commons Attribution-Noncommercial-Share Alike* licence.⁹¹ Boyle's book is free to download (copy) and free to distribute. Physical copies of the book are also for sale.

The copyleft licence could maintain the moral rights of the artist (as long as the person enjoying/building upon the music has access to authorial information) while still providing a possible source of revenue. The 'copyleft' movement is a way of allowing artists to make their work accessible and keeping them that way. A copyleft licence can provide the freedom to use a song in the creation of a derivative work as long as the derivative work is also protected by a copyleft licence. This provision ensures that the person who makes a derivative work cannot protect that 'new' work under copyright and as such lock it away from the use of others. Though there is the possibility of financial gain in music protected under copyleft, financial reward may not come primarily from CD royalties (though this may bring in some money). Instead, it could come from live performances, digital download sales (see the NIN example), merchandise or some other type of sellable (physical) good or service for which there is a non-artificial scarcity (a good not affected by the existence of today's technology—rivalrous goods). It is important to note here that I am not trying to find balance (like other writers on the issue) nor am I trying to provide a new business model. By expressing the possibilities of new ways in

⁹¹ This licence states that, you are free: 1) to Share — to copy, distribute and transmit the work; 2) to Remix — to adapt the work—Under the following conditions: *Attribution*. You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work); *Noncommercial*. You may not use this work for commercial purposes; *Share Alike*. If you alter, transform, or build upon this work, you may distribute the resulting work only under the same or similar licence to this one. (<http://creativecommons.org/licenses/by-nc-sa/3.0/>) This type of licence is similar to GPLs (like 'copyleft' licences).

which artists can receive financial gain, even in the absence of copyright, I am (at least) attempting to show that my argument does not imply disastrous results.

Perhaps I have not given the RISs numbers a fair play and so perhaps underestimated the amount of harm brought to them. This consideration may indeed still lead to disastrous results.

The RIAA claims that,

global music piracy causes \$12.5 billion of economic losses every year, 71,060 U.S. jobs lost, a loss of \$2.7 billion in workers' earnings, and a loss of \$422 million in tax revenues, \$291 million in personal income tax and \$131 million in lost corporate income and production taxes (RIAA.com—online).

Also, “since late 2003 approximately nine hundred independent record stores have closed” (Bernstein 2007, 15-16). However, if the economic studies I have pointed to are right, and the economic losses are not due to file sharing, my argument should still hold.

The harm (if there is any) to the recording industry is a harm that has met a number of industries that have become obsolete over the years and in these cases, we do not blame the consumers behaviour for such a change. The change from coal burning engines to gas powered engines must have been a quite damaging change to those in the coal production industry but had they the clout (in that industry) that the recording industry has today in restricting the change in a budding internet music distribution market, the world would be a very different place indeed. Throughout the history of marketable technology, changes in the sophistication of technology have produced winners and losers and to protect the losers here is to provide a security for an industry that is saving themselves at the expense of all others.

Many authors that write on issues of intellectual property rights as they concern the recording industry speak of ‘balance’ (Boyle, Eric Garland of *Big Champagne*, Easley, to name a few). They have spent much time attempting to find a way in which the OUs and RISs can both

coexist with minimum harm to either camp. This ‘balance’ is based on the assumption that the recording industry is a much needed one and therefore one for which we should find a place within a new age of technological advancement and shift in collective consciousness. Why concern ourselves with their interests at all if they provide us with little output that we cannot get ourselves both less expensively and more perfectly? Lessig says, “our greatest fear should be dinosaurs stopping evolution...we should be most concerned when existing interests use legal systems to protect themselves against innovation that might threaten them” (Lessig 2001, 217). Though it is increasingly becoming true that the recording industry is being displaced by ordinary people producing, marketing and distributing music, they may still provide some utility. The industry has become very good and ensuring that the new music that they produce is known to the public and this may be of some value still. So, though we need not concern ourselves with the interests of the recording industry, there is no reason to act in ways to block them from bringing any aggregate utility they can. If their business model shifts in such a way so they provide something that only they can provide, then they should be afforded that opportunity. I say *should* here with the condition that they are not providing harm and providing at least some benefit.

The development of new technology is difficult to stop or slow and, as such, it seems unlikely that the recording industry will ever be what it was prior to Internet and Digital technologies. In fact,

[i]t is true that it is literally impossible to totally stop illegal Internet activity; however, to say that is focusing on the wrong issue. The real question is whether enough illegal activity can be stopped to make the risks of transacting business using the Internet low enough to ensure business success (Krasilovsky et al. 2007, 448).

What is stressed in much of this literature is that we must somehow ‘ensure business success’ for the recording industry. But as I have pointed out, file sharers bring little (to zero) disutility to the recording industry and the recording industry is no longer needed for the production and distribution of music (so it brings little but harm—in the form of copyright policy—and so lowers aggregate utility). The assumption of the recording industry must be considered a faulty one.

If all music moved via Internet networks were free, there is an argument that claims that this would provide a huge marketing tool the sale of concert tickets, t-shirts, etc. This tool is both free and open to anyone who wants to market their music (professional and amateur, alike), as well, it is ‘blanket marketing’ to the consumer. As some of the economic studies have shown, there is either zero effect on record sales due to digital file sharing or a slight positive effect. This indicates that the movement of music files through P2P is increasing sales of both CD and higher quality files through pay sites. But, even if this were not the case (and the recording industry was subject to losses due to P2P), the marketing capabilities that the Internet provides seems to nearly make up these (imagined) losses. For example, though the ‘sound recording’ would be given away for free, there is still the possibility to charge for CDs (for those who want to buy them), concerts, merchandise, live footage DVDs, and digital downloads. In fact, digital downloads in Japan have nearly made up for any losses from ‘piracy’. (IFPI Digital Music Report 2008, 9) Also, models that give away music for free as a means of promotion have worked in the past. MTV was provided with music videos from the recording industry for free as a promotional tool for the industry. MTV made money through the sale of its programming to

cable operators. A similar model could be developed where MP3 files are given away for free just as the videos were.⁹² Krasilovsky states that,

'Free promotion' is the rallying cry of many marketing schemes. Yet fame alone is not a business model. Being famous may well get you the girl (or boy), but it will not feed you...Nevertheless, if you have something to sell and/or can get a share of the revenue, it is possible to take advantage of the media's need for sensation, and the public's taste de jour, for your own promotional purposes (Krasilovsky et al. 2007, 445).

The acts of the RISs to strengthen copyright protection have not curbed the actions of OUs when it comes to file sharing. In fact, consumers of music have not been spending money on music that has been protected through DRM and, as such, the recording industry is moving away from this type of protection in digital music files. Also, the cost to the recording industry in legal fees while suing its customers for copyright infringement have proven to be higher than the money received in damages from file sharers. As a result, the RIAA has stopped suing individual file sharers. It is claimed that it is nearly impossible to stop illegal file sharing and this has been shown through the rise in popularity of P2P sites even under the threat of legal suits. What would happen if it were the case that all copyrights in sound recordings were replaced with copyleft licences?

The recording industry would be in a similar situation to the one in which they are now (i.e., one in which copyright protection of the ideational property of sound recordings is largely ineffectual) *except that*, the consumer would not have to worry about being sued, nor about paying high prices for sampling or producing derivative works from copyrighted sound recordings (and, as result, people would be filling the information commons with new cultural works which would in turn be available for further production of creative/derivative content).

⁹² For an interesting discussion of the marketability of 'non-hits' or niche/tail consumer goods, see Anderson (2008); particularly, chapters fourteen, fifteen and the epilogue.

Were copyright for sound recordings replaced by copyleft licences, all people would have access to all sound recordings. Not only could people enjoy all of the music that they would like for free, but they could take and use that music in any way they like in creating derivative works. They could sample as a way of paying homage to artists that they respect, open up new and exciting genres based on melding of older genres, and criticise or parody existing or forgotten bands. In the absence of copyright, the RISs can still find financial gain (though through means not dependant on CD sales, necessarily). This ability leads the RISs away from aiming to satisfy their (#1) preference (artist compensation) to (#2) (artist compensation plus access to cheap/free music). Acting toward (#2) instead of (#3) guides the RISs 'moral dart' toward the 'bull's-eye' and so leads to higher aggregate utility. The RISs must come to realize that it is impossible for them to maximize their own (#1) preference (without lowering aggregate utility as a result) given the change that new technology has brought with it. If the marketing aspect of freely available music works toward the general population in the ways I have mentioned, then the acts of the OUs (by making purchases based on tangible goods promoted by free music marketing) will naturally (if not unintentionally) guide the OUs 'moral dart' toward (#2) and away from aiming directly at their (#1) preference (cheap/free music). In fact, some OUs actively aim toward (#2) by sending money directly to the artist from which they have downloaded albums/songs through P2P.⁹³

The shift of sound recordings being protected by copyleft instead of copyright seems to help in guiding the RIS's moral dart closer to the centre of the OUs dart board. At the same time, it seems that there may be several opportunities for both artists and the record labels (albeit, more independently of each other as compared to the pre-Internet boom) to find compensation

⁹³ See examples of Smashing Pumpkins, Nine Inch Nails, Radiohead, and Wilco (above).

for the work that they have put in to the creation of music. Though a maximization of utility is difficult to reach concerning matters of intellectual property rights and music, it seems that the scalar utilitarian model provides a “better for all” solution to the “good for me, bad for you” situation in which we currently reside. Notice here that though we have no obligation to find a balance that ensures the success of the recording industry, we can still allow for it. It is unlucky for the recording industry that technology forces a situation on them that demands a shift in their business model in the same way that the “view lovers” (from chapter two) were unlucky that their island did not expand further into the sea. But they are lucky that a scalar utilitarian model saves them from having their interests (compensation and coastal scenery, respectively) from being totally ignored.

CONCLUSION

In the past, music distribution technology depended on physical media (LPs, CDs, etc.). This allowed for an industry (with the help of copyright protection) to gain financially through the sale of these physical goods. Copyright law was built to create an artificial state of scarcity in the intellectual property contained in these physical goods. This scarcity allowed for the sale of music through physical media which provided incentive for the future production of music.

Today, music distribution no longer depends on physical media. Computer and Internet technology make it difficult for the music industry to profit from the sales of physical media.⁹⁴ This is due to the fact that the intellectual property which was formerly distributed through physical media can be distributed online either for sale or, worse of the industry, for free. The collective consciousness has shifted toward a desire for cheaper and cheaper music. This lowers (or drops to zero) the price consumers are willing to pay for music in physical form.

Given this new situation, the acts of the recording industry, in attempting to maintain the financial security of the past through the strengthening copyright law, are morally impermissible. DMCA, DRM protections on CDs, DVDs, filing law suits and suing for heavy damages; all of these acts I have examined through utilitarian analysis. The recording industry could be said to be acting morally if all people would be happiest through so acting. If it were the case that only through maintaining strict copyright law would new music be produced, there may be some support for so acting. I have shown that it certainly is not the case that copyright protection is the only way that new music from new bands is produced. The incentive argument fails, here, and so weakens the recording industry's ability to justify such acts.

⁹⁴ As I have pointed out before, the recording industry is now making money through the sales of 'non-physical' music and may provide services in the future based on this new technology.

The consumer of music is much worse off because of the actions of the recording industry in strengthening copyright protections in sound recordings. They are threatened with huge statutory damages for file sharing. The media that they purchase is locked up in ways that limit the consumer's use of those products. Policy makes it very difficult for people to create derivative works through the use of heavily protected sound recordings—and culture is built on works of the past. Policy also limits the use of digital information and given the possibility for the exchange of digital information between people all over the world, this creates an especially devastating harm.

Acts of file sharing allow people to satisfy their preference for free/cheap music. These acts themselves do not undermine the sales of physical music media. The shift in collective conscience has made people's preferences change toward a want of free music, but the availability of music for free online is a product of a technological shift that if regulated and controlled by industry, slows cultural and technological innovation and blocks much potential benefit.

So, aggregate utility is higher if we allow for the open sharing of digital music online and ensure that the recording industry cannot act in ways that bring general harm through strengthening and enforcing copyright law. This amounts to the ignoring of the interests of the recording industry in favour of the interest of the music consumer. This need not be the only treatment of the issue that can be offered. Again, notice that this is a traditional utilitarian treatment of the issue and brings about a certain amount of utility in aggregate. I have suggested that by using scalar utilitarianism, we can ensure even higher aggregate utility through satisfying less than maximal preferences for consumers and the recording industry. The new situation

brought about by recent technological innovation has necessitated that (in order to bring about the highest utility generally) the recording industry must stop aiming to maximize their own financial success (that is, financial success that made sense in the past) and instead adopt a new business model that does not depend on strict copyright protection. Their profits may never reach the level that it did in the past but they should not bring general harm by punishing the consumer or blocking cultural and technological growth. I suggest copyleft instead of copyright as a way of (though in a more limited way) protecting sound recordings. This allows the possibility of a new recording industry business model to develop while allowing the satisfaction of people's preference for free/cheap music.

Though the profits of the past may not be guaranteed to the recording industry, profits can be made. And though this is not maximizing behaviour on their part, it is the behaviour that allows for the highest amount of aggregate utility.

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