

"The technology is neither good nor bad. It is illegal use - and encouraging illegal use of our copyrights - that we have a problem with."

Jordan Rost, Senior Vice President of Marketing
for the Warner Music Group on the proliferation
of MP3 files on the Internet (Bowermaster)

The entry of MP3 technology in the mid-1990s meant a revolutionary method of compressing and distributing music over the Internet. Capable of compressing a 60 megabyte file to under 5 megabytes while retaining high quality sound fidelity, the technology has become among the hottest on the Internet within only a few years (Krochmal). Although initially popular with just college students who traded music with others for free, the technology has spread to society at large (Jones). No one knows exactly how many people are using this technology currently but Nullsoft, Inc., the maker of one of the most popular MP3 players on the Web today, the Winamp player, claims to get 100,000 requests to download its Winamp everyday (Jones).

Since its introduction, however, this technology has been synonymous with piracy. The simple reason being that MP3 technology allows anyone to copy and distribute music anywhere. It is in response to this development that Mr. Rost said that it is not the technology, but the illegal uses of it that the recording industry finds objectionable.

Considering the actions of the recording industry regarding this issue, however, the forthrightness of Mr. Rost's - and by extension the recording industry's - statement is suspect. Following such activities as (1) attempting to ban Diamond Multimedia's portable Rio MP3 player, (2) starting the

Secure Digital Music Initiative, and (3) restricting the development of music content on the Internet, the recording industry has gone beyond preventing piracy to attempting to control the distribution of music on the Internet.

Through its trade organization, the Recording Industry Association of America (RIAA), the recording industry has attempted to thwart digital music distribution by taking legal actions to ban Diamond Multimedia from selling its Rio PMP 300 in the marketplace (Rawsthorn).

The Rio is a portable MP3 player the size of a typical walkman. It works by transferring MP3 files saved on a computer's hard drive onto its own storage space and then playing the files through headphones.

Seeing that this portable player could allow MP3 files to be spread more quickly, the RIAA issued a legal complaint to stop its entry into the market. The RIAA's central argument in support of its position was that the Rio would lead to widespread music piracy (Rigney).

Unfortunately for the RIAA, however, Diamond won this case because the judge found that the device was not capable of 'downstream copying' (ie. permitting further copies of the MP3 files to be made from the Rio player itself) and so would not allow further piracy. Carrying through with this logic a little further, the court decided that requiring the Rio to have 'anti-copying measures' (as requested by the RIAA) would be futile because such an act would not curb the "explosion of illegal files on the Internet," which will continue to proliferate with or without the Rio (Ricker).

The interesting element in this situation, however, is that rather than trying to prevent piracy by making the Rio conform to the stipulations of the Audio Home Recording Act (AHRA), the RIAA initially wanted to ban the device from entering the market altogether, thus curbing the distribution of illegal *and* legal MP3s alike.

In essence, the AHRA requires all manufacturers, importers and distributors of digital audio recording devices to pay royalties to the recording industry anytime they make a sale (Rigney). The rationale for this is that since these recording devices permit consumers to make copies of protected material without legal permission (and as a result, record companies lose out), the manufacturers of the devices should compensate the recording industry on behalf of the consumers.

Following through with this logic, all the RIAA need have done to address the piracy issue initially is to have required Diamond Multimedia to pay similar royalties to record companies. Rather than following that path, however, the RIAA tried to stop the device from entering the market at all. (Note: As was mentioned earlier, preventing portable recording devices from entering the marketplace restricts both illegal *and* legal MP3 files from being distributed more easily.)

Knowing this to be the case, the recording industry still attempted to ban the Rio. The reason is that the recording industry did not -- and still does not -- know which way the distribution of music on the Internet will go. So, it wanted to maintain the status quo by preventing this new method of distributing music from becoming popular. An effective way to do this was to claim that the Rio violated copyright law when all it did really was present the marketplace with a new method of music distribution.

In addition to directly attempting to stop the Rio from entering the marketplace, the RIAA also timed its lawsuit and related activities so that the delay of the product's release was inevitable. For example, the RIAA sent a letter to Diamond Multimedia asking it to delay the shipment of the Rio until "meaningful copyright solutions" could be developed (Ricker). Two days after Diamond Multimedia refused to comply, the RIAA filed a legal complaint. As a result of this complaint, the RIAA was able to get a temporary restraining order on October 16, 1998 against the Rio. Having delayed the release by a little over a week, the RIAA then motioned for a preliminary injunction, after which followed the above mentioned lawsuit.

Why did the RIAA try so hard to delay the entry of the Rio into the marketplace? For the same reasons that it wanted to stop the device from entering the market in the first place. The Rio represented an entirely new method of music distribution that the recording industry was unprepared to deal with. In such a situation, the recording industry's only recourse was to stop the technology from proliferating until it could come up with a way to respond. As Andrew Bridges, counsel for Diamond Multimedia said in Entertainment & Law magazine, "[the RIAA] stated publicly [that] Diamond jumped the gun." (Ricker) In light of a statement like that, it is clear that the RIAA was interested not just in protecting copyright but in ensuring that Diamond Multimedia (and perhaps other companies like it) did not make a success of the Rio before the RIAA could respond.

After losing in court to Diamond, the recording industry realized that the MP3 issue was a serious one and could not be controlled simply by trying to prevent it from proliferating. So, in response

the RIAA started the Secure Digital Music Initiative (SDMI), an attempt to develop a security standard that would prevent music piracy on the Internet altogether. Although this was and is the functional goal of the initiative, the membership of the group indicates that this is another way to maintain control over digital music distribution.

SDMI is an attempt by several well established record and technology companies under the auspices of the RIAA to develop a standardized method by which to protect copyrighted music over the Internet. Consisting of the big five record companies (EMI, BMG, Universal, Warner and Sony) and several technology companies such as America Online, AT&T, IBM and Microsoft, the target of the SDMI is to come up with a security standard by Christmas 1999. (Quan)

That this initiative is led by the RIAA and supported by equally big technology companies raises a key concern: smaller independent producers and distributors -- who according to Forrester Research will lead the switch to the distribution of music over the Internet -- will be subject to the outcome of this initiative. (Haring)

Sony, for example, has developed two copyright management technologies which it will submit to the SDMI for consideration. The first is 'MagicGate,' which "employs a microchip embedded in both the player/recorders and media to ensure that protected content is transmitted only between *compliant* (emphasis added) devices and media." (Sony) The second is 'OpenMG,' a technology that will ensure that "protected content is transmitted only to *compliant* (emphasis added again) devices and media." (Sony)

Although Sony's technologies are no more than just proposals, whichever technology the SDMI chooses as a standard will most likely be the technology that the remainder of the digital music industry will have to comply with.

Ironically, most of the smaller digital distribution companies, although subject to the SDMI standard, will have little say over which technology is chosen for standardization. This is because the criteria for joining the SDMI are stringent. First and foremost, companies aspiring to membership in the SDMI must be "amenable to industry cooperation." Of course, several of the smaller companies want to maintain an identity outside of the established music industry, so they will be barred from working with the SDMI. Second, they must have "strategic financial relationships or investments that affect the music industry, or the potential for such activities, investments or relationships in the near future." (Secure) Most importantly, the membership fee at minimum is \$10,000 and can go up to \$50,000 if a company wants to get a place on the steering committee of technology companies. (Secure) Clearly, many of the smaller companies cannot afford to pay such fees.

By making it difficult for smaller companies to participate in the SDMI, the RIAA essentially prevents the entertainment of ideas that are contrary to its own. In essence, therefore, excluding smaller companies from joining the SDMI means that the RIAA can have greater control over the standard that could at one time affect the entire Internet community.

As in the case of its legal actions, the RIAA is using this standardization process to delay the entry of device manufacturing companies into the marketplace. Rather than attempting to stop

manufacturers from entering the market, however, this time the RIAA is using the SDMI to have device manufacturers release their products later.

For example, Creative Technology is developing a group of portable MP3 devices under the name Project NOMAD (Atwood). The first generation of its NOMAD players, however, will not be SDMI compliant because they are due to be released before the RIAA comes up with a standard.

Needless to say, the RIAA has expressed concern about this development by issuing a statement intended to dissuade Creative Technology from releasing its device prior to the fruition of SDMI's efforts. It has argued that if Creative does not comply with the SDMI standard, consumers will feel "unsatisfied, confused, and frustrated." (Atwood) Unfazed by such a threat, however, Creative has decided to release its device as originally planned, stating that it will adopt the SDMI standard when it is in place. (Atwood)

Although the RIAA stated this time that it wants to ensure that consumers are 'satisfied' (rather than protecting against piracy as in the Diamond case), the real reason that the RIAA attempted to delay Creative Technology's portable device is the same as it has been in the previous cases: to stall the growth of music distribution on the Internet until the recording industry can come up with an adequate response. The RIAA is hoping, with fingers crossed, that the SDMI will lead to this much needed 'adequate response.'

Above and beyond using legal tactics and security standards, however, the RIAA has used its strongest asset, music content, to control the distribution of music over the Internet. This it has

done by preventing artists that it represents from posting their work on the Web. For example, the Beastie Boys, Public Enemy and Less Than Jake were forced to take down their MP3 songs from the Web by their record companies (Reece). Similarly, Tom Petty, whose MP3 release got 150,000 downloads within only a few days, was forced to remove it from the Web by his record label, Warner Bros. (Tom) In an unprecedented move, Hollywood Records also put up an MP3 single from one of its bands, Alien Fashion Show, but almost immediately received flack from other record companies who said it was not an appropriate thing to do. (Reece)

Although the RIAA claims that preventing its artists from putting their MP3 files on the Internet will protect their works from piracy (Reece), the truth of the matter is that this only helps the record companies in maintaining their control over artists.

As a report from Forrester Research suggests, the music industry of the future could be extremely different from the one today. According to Forrester, in the future albums will give way to singles, compilations and small collections dubbed 'mini-titles.' (Haring) In addition, within two to three years "top artists will be paid as actors and athletes are, commensurate with what consumers are willing to spend. A top act might command \$40 on the release date for a title, while little-known acts, available at any music portal, would get only \$11." (Reece)

If a forecast such as this turns out to be true, then the very existence of recording companies as they are now could be in jeopardy. In such a situation, it is also very likely that artists would not need to be with an established record label any longer.

Without even looking that far into the future, it is easy to see that the Internet poses a serious threat to record companies. As Chuck D, leader of Public Enemy and a supporter of MP3 technology says, the recording companies are afraid of the implications of an open digital-distribution system, and this is why they hesitate to let their artists release music on the Web. (Reece)

Viewed from this perspective it is easy to see why the recording industry will do anything possible to maintain its control over its artists, even if it means stopping them from distributing music on the Internet. As Steve Rimland, Head of New Media at Interscope says, "we don't want our bands posting stuff up because we want to sell records and albums, not stuff that's floating around on the Internet." (Reece)

Until this point, however, what the recording industry is doing is not all that surprising. After all, if it wants to survive by stopping its musicians from entering cyberspace, it has every right to do so.

Where it gets interesting, however, is when this stand of the recording industry is coupled with its attempts to develop a secure method of digital music distribution through its Secure Digital Music Initiative (mentioned earlier). Placing the two factors together, it immediately becomes clear that the recording industry will permit its artists to post their music on the Web once it has come up with a secure method of music distribution over the Internet.

This is an issue of concern because it means that the recording industry will then be able to transfer its current control over music distribution into cyberspace.

A good example that illustrates this situation is an issue the recording industry is having with Microsoft. Microsoft currently wants to launch its new compression software called MS-Audio, but in order to do it, Microsoft needs big-name musicians to perform at the software's release (Shapiro). Despite the technology having embedded anti-piracy protection, however, the recording industry has not cooperated, and so far Microsoft has not been able to get any national level musicians to agree to perform. The reason for this is that record companies do not want to give up control to Microsoft (Shapiro). As Dave Goldberg, Chief Executive of launch.com, a company supporting the MS-Audio format explains, "the [record executives are] frightened by the strategic implications." (Strauss)

From this example, it is clear that the recording industry will not cooperate with other entities that promote technologies, even if they are secure, unless it feels that it has control over the artist and the distribution technology.

In addition to preventing its own musicians from distributing their work on the Web and ensuring that no other technologies but the one it supports becomes successful, the RIAA has also taken a few steps to control the activities of independent musicians on the Internet. "[Big recording] companies have made it extremely difficult for new and emerging companies to secure visibility and sales of [their musicians' work]," says Michael Robertson of mp3.com (Sandler). Similarly, returning to the portable MP3 player issue, Diamond Multimedia said the real motivation for the RIAA to file the lawsuit was "to prevent competition from unsigned recording artists who can use the Internet to distribute their music directly to a broad audience." (Judge)

So all in all, the recording industry has prevented musicians from putting their work on the Web. The reason for this, as highlighted in the Microsoft case, is not to prevent piracy. If that were the case, MS-Audio, which is a secure distribution mechanism, should have been adequate. Instead, the real reason is that the RIAA does not want to let other entities gain a foothold in digital music distribution.

Having seen the three areas in which the recording industry has addressed the MP3 issue, the central question to ask is whether it has attempted to curb piracy or to gain control over the distribution of music on the Internet. When attempting to ban Diamond Multimedia from introducing the Rio to the marketplace, was the RIAA preventing piracy or was it trying to ensure its control over the digital music distribution business? When attempting to arrive at a security standard through the SDMI, is the recording industry preventing piracy or maintaining its control over digital music distribution? And when preventing artists from distributing their music over the Internet has the RIAA been trying to prevent piracy or to maintain control over digital distribution?

In all cases, the answer is the same: the recording industry has repeatedly pursued actions that facilitate its control over the digital distribution of music rather than prevent piracy.

Observing the RIAA's legal actions regarding Diamond Multimedia, it is clear that the RIAA was initially interested in ensuring that Diamond and other device manufacturers not produce their portable MP3 devices, period. The reason for this is that the RIAA wanted to maintain its control over the existing music industry by preventing the entry of a new technology that could undermine its importance. Similarly, when the RIAA delayed Diamond's release of the Rio, its intentions were

to stall the technology's popularity until it could develop an appropriate response. In both cases, the intention was not to prevent piracy but to maintain control.

Considering the RIAA's attempts at a security standard for the distribution of music through the SDMI, it is important to recognize that although it claims to be working towards the development of a security standard, its membership is such that it only works toward strengthening its control over digital music distribution. Similarly, the criteria for joining the SDMI are so high that they exclude smaller independent companies from getting involved in the process. Lastly, Sony's attempts at popularizing its copyright management technologies mean that smaller, legitimate record companies and distributors will most likely have to comply with the standards set by record companies in order to be successful.

Most importantly, however, the RIAA's attempts to control digital music distribution by restricting the development of music on the Internet has the gravest of implications. Considering the Microsoft example, it is clear that by using their artists in conjunction with the Secure Digital Music Initiative as leverage points, record companies will continue to dominate the music business.

The longer term issue at hand is indeed less about piracy and more about the record companies attempting to maintain their distribution channels.