THE MUSIC INDUSTRY: A MODERN-DAY GREEK TRAGEDY

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The music industry is in a mess. Some would say this is a problem of its own making and that it continues to make things worse—what with its lawsuits against college kids (Since 2003, the Recording Industry Association of America (RIAA) has reported on its website that it has instituted more than 16,000 such lawsuits) its bludgeoning (their word not mine) of companies, girl scout camps, and performing venues for performance fees, and generally with all of the negative press it has received. I don't think it would be inaccurate to say that the music industry (and by implication, intellectual property generally) faces the most intensive attacks from anti-copyright interests our society has ever known —attacks that find themselves on the front pages of our newspapers and among the lead stories on our electronic media. Whether as intellectual property lawyers or entrepreneurs, we can either continue to move blindly forward justly enforcing our rights or stop, and reflect on what we are trying to accomplish, the reasons we are not succeeding, and the ways in which we can fix the problem.

There are actually a *multitude* of problems facing the music industry today. I will address two of these: first, illegal downloading by consumers; and second, the self-destructive behavior by copyright owners themselves arising out of the way they have chosen to exercise their monopoly. Even

though I am a practicing attorney in the IP field, it is my belief that we are going nowhere by following the advice of contemporary legal sages. So I thought a better solution to this problem might be achieved with a little help from the ancient Greeks.

But first, let me explain the peculiar view that we in the copyright bar have of that otherwise dry concept called "copyright." One of the legendary music lawyers in our field, and my mentor, Harold Orenstein, would regularly compare copyrights to *children*. "Nurture them," he would say. "Feed them. Protect them." I had no clue as to what he was talking about.

Over the years, I learned. A copyright that lies fallow is like a child starved. Paul Simon once offered millions of dollars to purchase an entire publishing company where he once worked as a low-level employee before his success with Art Garfunkel. During his brief employment, the company had acquired six of his copyrights (the only significant ones being *The Fifty Ninth Street Bridge Song - - Feeling Groovy* and *Red Rubber Ball*, a hit with the 1960's group The Cirque.).

After Simon's success, he tried to buy the music publishing company for the sole reason of getting back his six songs at any cost. He was distressed that his six copyrights were not being exploited, nurtured. I began to understand what Orenstein meant.

Yet, while likening copyrights to children is a fine sentiment, warranting such noble efforts as that of Mr. Simon in the early 1970's, it appears that songwriters and their "children" today are in jeopardy much

more than were they merely experiencing a lack of attention. Indeed, they are watching helplessly as their “children” are being killed off first by peer to peer “sharing” and second, most surprisingly, and disappointingly, by the copyright proprietors themselves, most often music publishing companies in whom the songwriters entrusted their copyrights. But more about that later.

What does this have to do with Greek tragedy? A lot I think.

Remember Medea? She was the sorceress who was betrayed by Jason (of Argonaut fame) and who decided to pay him back by killing their children. Medea decided to “wring their father’s heart” just as he had wrung hers.

I couldn’t help but consider Medea as a perfect metaphor for the music industry.

“*Go home*,” Medea says to her boys, “*I cannot bear to see you any more. I don’t want to hand you over to someone else to be slaughtered by a less loving hand. I who gave you life will kill you.”*

And then, “*For this short day, I will forget they are my children— And will mourn them later. The evil done to me has won the day. I understand too well the dreadful act I’m going to commit, but my judgment cannot check my anger, and that incites the greatest evils human beings do.”*

I know this is not the usual reference material of entertainment

lawyers, but just as James Joyce, in *Ulysses*, saw a continuous parallel between ancient myth and modern life, I believe a similar parallel can be drawn between ancient Greek mythology and modern music copyright law.

Illegal Downloading

As I describe in my book *What They'll Never Tell You About the Music Business: the Myths, the Secrets, the Lies (and a Few Truths)* [Billboard Books: 2002], Napster was the well-publicized software created by a then 19-year-old, which permits multiple Internet users to access each others' collections of MP3 files for free. MP3, of course, is the free technology protocol that enables a user to convert a large file contained on ordinary music CDs into files that are compressed to 10 to 12 times smaller than the originals. Since they consume considerably less computer storage space than the form in which they were originally configured, they can be transferred faster and have become the preferred modality for moving audio files through the Internet and among computers and digital download players. Napster was the mechanism for the deluge of illegal downloads that we have all read about and which has been nothing short of catastrophic for the music industry.

I think we all will agree that for years, the music industry allowed illegal downloading to become totally out of control. We gave birth to mass infringements by neglect, by standing on the sidelines while technology advanced well beyond its ability to keep up with legal protections, and by seeking to remedy the situation by a bumbling array of solutions that really are mind boggling, given the perceived sophistication of the industry. The industry did not understand then, and still does not understand, that much

of the record buying public today has been brought up using music, but not owning it, and that that's ok with the youth of the world today. The industry has not yet grasped this reality.

The examples of how the industry tried to remedy this situation are too numerous to mention, and I did not intend this lecture to be a tear-jerker, so I will limit myself to only a few:

First the music industry tried to keep prices high even though it was becoming more and more obvious that consumers did not want to pay for the entire album when they were captured by the emotional pull of one particular song. Then it blocked, and later encouraged, the creation of compilation albums in order to increase sales volume. But all this did was remove even more album-buyers from the food chain. Harold Vogel, the renowned economic analyst who is quite familiar with the music industry reminds us that population shift made a difference in demand. Baby Boomers who were the primary buyers in the '60's and '70's were no longer enthusiastic about standing in the rain and snow to be the first to buy an album and to push it into the top 10 overnight. Technologically, the industry fought invention and did everything they could to block it from the marketplace. More time and money was spent on encryption techniques than on education and adapting to the new paradigms. And then these lawsuits!

As I just noted, much of the record buying public today has been brought up *using* music, but not *owning* it. My generation bragged about our record collections; we displayed them openly in our homes and in our entertainment centers. But today's consumer keeps his and her 10,000

songs on a little box and is quite content with that. Needless to say, the industry has not yet grasped this new reality. They see it as a stopgap. I see it as a replacement for the music business as we know it.

In all of its inadequate responses, the one consistent characteristic is that the entertainment industry has not, until now, acknowledged that the fault may lie within as well as without. It took an outsider, Steve Jobs, to figure that out.

Just as Medea was driven by the passion of a betrayed suitor, so the music industry seems to be driven more by passion than by reason. And in so doing, it has become the victim. The spurned woman.

So it just rolls right along, suing college kids, teenagers and unsuspecting grandmothers? 16,000 lawsuits so far - - 7,000 in 2005 alone. How many more must it initiate before it realizes that this remedy is not achieving what it is seeking? CD sales in the US fell 3.5 per cent in 2005 after a slight increase in sales in 2004. It turns out that there are not many sites left to shut down. The emphasis on suing pirates has been reduced to feeble attempts to penalize lyric and guitar tab sites and their unsuspecting visitors - - mostly young musicians. It is projected that consumers are going to face as many as 10,000 more lawsuits in 2006. And it is not working. While downloads doubled in 2005, and we are approaching 1 billion downloads from the Apple iTunes Store, the company that has most benefited from this boom in activity is Apple, the same company that urged consumers to “Rip and Burn” music using their computers. And good news for Sony Corporation: its Connect internet site has had phenomenal growth in the last twelve months. Talk about putting

the fox into the hen house! The argument that the fight against piracy is intended to allow record companies to invest in new bands and develop more flexible legal Internet sites seems very weak when one considers that Apple has made billions from its pre-eminent position in the download business, but that artists and music publishers down the food chain have years to go before they will see any meaningful recovery from the reduction in CD sales.

None of us will personally recall that when the phonograph record was first produced, music publishers insisted on a head start of several weeks before the release of their songs on records so that they could sell sheet music - - the predominant income-earner in the early part of the 20th Century. The new century's version of this is the DRM-marked CDs which at their best require careful and sophisticated readings of the DRM warnings and at their worst result in the debacle resulting from SonyBMG's use of rootkit cloaking technology. Even when the software was not secretly introduced into consumers' computers, the notice of the software's inclusion on the CDs resulted in the bizarre situation in which SonyBMG sold product which had so many disclaimers that even though the product did not work, SonyBMG took no responsibility. In other words, they sold a product that they knew did not work in a large percentage of cases and yet they refused to take the product back. What were they thinking? This copy protection intrusion into consumers' personal computers not only did not serve its security function - - to impede piracy, but it actually threatened the integrity of hundreds of thousands if not millions of computers world-wide. At the close of 2005, SonyBMG settled many lawsuits brought against it for compromising the digital security and privacy of consumers who played the XCP-laced CDs on their home computers. The company

also had to recall all of their copy-protected titles and make available uninstall software and security patches for infected computers. Just consider how SonyBMG's legal fund for fighting the multitude of lawsuits resulting from its invasive XCP software could have been spent more efficiently toward that too often forgotten goal - - to increase sales, not just to reduce piracy.

We know that there is considerable tension between the life of a file-sharer on the one hand and the music industry on the other. This is true whether the file-sharer is a teenager or a college student or simply a music lover who is tired of being taken advantage of by the creative and commercial paradigms that have defined the music industry for the past fifty or so years - - since the advent of the long-playing record.

Music is like air. It is going to be with us however, and to whatever extent, the music industry seeks to put it in a protective box. It is a fundamental essence of humanity; only the expression is different. And of course, it is the expression that the copyright laws seek to protect.

Professor David Lange of Duke Law School , in a talk given to the Copyright Society of the USA at its Annual Meeting a couple of years ago, asserted that "these kids" are not pirates; they just love their music; they're just being kids." (Tell that to the copyright owners of the works that "these kids" are passing along to the million other kids comprising their "friends and family." By virtue of the technology offered by Kazaa *via* Grokster and other peer to peer software methodologies, one song on one unsuspecting person's computer can find its way in seconds across the globe and into unlimited numbers of computers of what we naively refer to as file

sharers.) Given the awed reaction of the professionals who attended the meeting, whose very beings scream EXCLUSIVE RIGHTS, it is a wonder Professor Lange was permitted to leave the conference in one piece.

But we can learn something from what Professor Lange suggested. Kids perceive that morality is on their side. Why? Partly out of youthful naiveté, partly out of ignorance, and partly because of the well-documented perception that songwriters and artists have never been paid a fair share of the money they generate. They perceive the music industry as more likely to be avaricious, manipulative and oppressive, than fair and sympathetic.

This perception by a large segment of its customer base has resulted in a feeling that, like Jason, it is the music industry which has betrayed *them*. Yet the music industry feels betrayed as well. After all, did not the music industry invest heart, soul, artistic talent, and oodles of money to produce and distribute the very art that the consumers now feel entitled to take for free?

Ironically, it is the recording artists themselves who have recurrently publicized the fact that they are not getting what they consider to be a fair share of the income generated by their music. So why should the file-sharers deny themselves the opportunity to “take from the rich?” [Regrettably, and very un-Robin Hood-like, these file-sharers have forgotten the part about giving to the poor who are often the very songwriters and recording artists whose music they pilfer.]

As was inevitable in international commerce, copyright owners and

those who depend on copyright sanctity, looked to the courts to enforce what they considered to be their divinely-given rights. In America, a long line of lawsuits, culminated in the Federal Appeals Court decision in the defining case A & M Records et al. vs. Napster, Inc. [114 F. Supp 2nd 896 (ND Cal 2000), aff'd in part, rev'd in part 239 F3rd 1004 (CA 9 2001) Decided February 2001] in which the Court held that the Napster model which I referred to earlier necessarily harms the copyright holders. These file-sharers were dealt an even harder blow in the recently decided Grokster case (Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd: Case #04-480 Decided June 27, 2005) At issue was whether peer-to-peer file-sharing services could escape liability if their networks were used for illegal purposes, even though they did not *control* their networks, as did the Napster model, but merely *facilitated* their creation. The U. S. Supreme Court had struck another victory for copyright interests. In a unanimous decision, Justice Souter wrote: "We hold that one who distributes a device with the object of promoting its use to infringe copyright is liable for the resulting acts of infringement by third parties." Once again, the legal system enforced its view that what some call borrowing was really no different than stealing,

So finally we saw that reason, according at least to those who value the Federal Courts' decisions, thwarted the passion of the file sharers. Maybe we have learned something since Medea rode off on her winged chariot at the end of *her* story. But has reason trumped passion? Is *our* story ended as well? I don't think so. Unlike a Beethoven symphony, the last movement is not the resolution the copyright industry sought. Indeed, the last movement has yet to be written.

What, then, have we achieved?

Right or wrong, moral or immoral, supported by the court system or not, there is still something wrong about putting your most passionate, avid customers in the dock. I have always felt that suing college students is a losing proposition—not because it is the wrong thing to do, but because it is self-defeating.

Suing four college students who are transferring a million files each is not effective if they are replaced by four million college students transferring one file apiece. And believe me, none of "these kids" are transferring only one file apiece. In my opinion, these lawsuits are like parents saying no to their teenage children. We all know what the response is likely to be. Add a layer of moral justification because their heroes are also getting taken advantage of and you have an almost insurmountable scenario.

Now, of course, there is a certain logic to what the copyright interests are trying to do just as there is a certain logic to what Medea did.

According to the RIAA, the lawsuits themselves constitute a form of education of the public and the RIAA is actually quite encouraged by the willingness of their numerous defendants' acknowledgements of *mea culpa*. Unfortunately, as I noted earlier, the numbers of the converted are miniscule when compared to the actual damage being done on a worldwide basis. Furthermore, there is some considerable question as to whether the suits have any enduring value. There are also significant variations in analysis of the impact of illegal downloading on the one hand,

and the effects of legal downloading options. For example, according to The Harry Fox Agency, Inc., analysts significantly underestimated the appeal of subscription alternatives. They found that even legal downloading decreases the sale of physical CDs, while not particularly affecting piracy. The lawsuits by the RIAA have similarly had an impact far less than that which they had hoped for. The Fox Agency found that only 15% of illegal downloaders would have paid $.99 anyway, so neutralizing and converting the illegal downloaders will not necessarily have the impact of creating legal customers.

Indeed, when every time a well-founded action is commenced, the public is reminded of some of those lawsuits whose rationale and result were, in a word, absurd.

Take, for example the 41 year old disabled single mother living in Oregon counter-sued the RIAA for fraud, invasion of privacy, abuse of process, electronic trespass, violation of the Computer Fraud and Abuse Act, negligent misrepresentation, and the Oregon RICO Act alleging racketeering by the music industry. Her personal home computer had been secretly entered by the record companies' agents, MediaSentry. The fact that she had been up at 4:24 AM downloading "gangster rap" music failed to make the newspaper release.

In another case, the RIAA sued the mother of a 13-year-old when her daughter shared music over a file-sharing network. The suit was dismissed on a technicality. In order for the RIAA to sue the child, the court had to appoint a guardian to represent her. The mother was able to step out of the case, but not before having incurred substantial legal fees. The

RIAA's position was that the mother was indirectly liable because she had purchased the computer, even though she had no clue as to how to use it. They failed - - this time.

Many feel that the majority of those sued are innocent of copyright infringement; but the threats of legal costs, criminal prosecution, ruination of their credit, publication of their names, and eventually losing the case has resulted in thousands of settlements.

And so, we must ask again: "Is the desire for free music dictated by passion or by reason?" I would suggest that the weight of the evidence would appear to run toward the former and not the latter. But appearances are deceiving. For, cannot passionate action actually be reasonable action?

What Medea has done *is* intelligible in the sense that what she did is what you do when you are ruled by passion. No, she is not behaving wisely, because she is driven by passion and anger. Just as the illegal downloaders are driven by passion and anger. Interestingly, greed, something the music industry often points to as the underlying motivation for illegal downloads, is not really a factor at all.

So, you see, Medea is beginning to seem a lot more sane.

So, what happens when reason is trumped by passion? Most philosophers - - students of human conduct after all - - believe that in such event, the most horrible consequences ensue. If to be driven by passion is to have passion rule reason, then is what the music industry has been

doing to enforce its rights--*ir*rational? Is this kind of behavior actually *beyond* reason, and not merely the manifestation of it? Is the end worth the means? Does the mission dictate the process?

Here is where a *particularly* strained use of reason intervenes to counter the passion argument. The freeloader (to coin a word) feels that he has not been given what he wants, when he wants it, by the powers that be. If he is *not* offered what he wants, when he wants it, at a fair price, is he operating outside of the natural order by downloading music by unauthorized means? Is he a thief? Is his behavior the same as if he were to steal a CD from a record store (which of course, he *never* would think of doing)? Herein lies the dilemma.

But, what if the freeloader was offered the chance to buy the music at a fair price? In my book, I predicted that he would.

And, given a chance, he has.

Apple's iPod has fundamentally changed the way people listen to music. Who are these people? They are young; they are entering the commercial marketplace and, unlike us grownups, they are not used to owning music and they are not used to paying $18.00 or 25 Euros for an album when they only wish to possess (I didn't say own) the right to listen to their favorite song. Yes, I know. The Nano is not what it was supposed to be and the new video iPod is receiving questionable reviews insofar as pricing and other factors are concerned. And other products such as Echo Dish are providing better video and whatever. But we cannot deny that hundreds of millions of legitimate downloads have indeed happened.

While this may be a drop in the bucket of what sales used to be during the music industry's heyday in the 60's through the 80's, it is a significant turnaround from what were universally depressing statistics about record sales over the past five years. To show you just how successful the iPod has been for Apple, it now represents one-third of Apple's total revenue and seventy-five percent of the market for digital download players. Apple offers more than 300 accessories. It is an industry unto itself and this upstart company, known for its design marvels and rabid fans, while breaching a mere 5% of the computer market, has done it again.

When An Apple Boomerangs

But all is not quite as it appears. Consider 100 million downloads of singles; divide by 10 and you have the equivalent of 10 million albums—something Whitney Houston, or Michael Jackson could have sold in a nano-second during the now departed "golden age" just a decade or so ago. And now Japan has threatened to *tax* downloads. Just what the industry needed! And this, after 1 million songs were sold in just four days in Japan after the launch in August, 2005, of the iPod in that major music business market.

Observe what we have seen.

We have seen that college kids and millions of others prefer to act according to their own whims and will pay attention to the laws of copyright only when sued. After all of the bad press the music industry has been receiving, there is a widely held perception that, given a chance, many in power in legislatures throughout the world will turn against the music

industry. Indeed, observe the near disaster caused by the French legislature recently. In the US, the copyright interests are extremely worried that if they cannot negotiate a mechanical and performing "uni-license" with Internet subscription companies, the US Congress will do it for them - - at considerably lower rates than they feel entitled to. Those negotiating against them, represented largely by the audio and video rights trade association DiMA (The Digital Media Association: HYPERLINK "http://www.Digmedia.com" www.Digmedia.org) seem confident that if they do not get what they want via negotiation, they will by Congressional mandate. This sense of entitlement by those who depend on their survival by the use of the content of others is new. Contrary to copyright interests' reluctance to look to Congress during this period of an anti-copyright mood among citizens, DiMA is quite comfortable urging Congress to amend the Copyright Act. Similar sentiments will inevitably be pursued around the world. These interests' goals are not just to help facilitate technological development, but to make things easier for users of the Internet as well. Indeed, many of the changes they seek have the ring of reason behind them. For example, in the US, tech companies are seeking to amend the Copyright Act by, among other things, replacing what they refer to as the "dysfunctional" Section 115 compulsory mechanical license with a comprehensive statutory blanket license.

Furthermore, there are not a few pundits who believe that the record and music publishing segments of the music industry will be taken over by the computer giants whose hunger for "cleared content" is insatiable. Elements of the music industry have even turned against each other. You may recall in the US, the Work for Hire controversy (during which the RIAA sneaked an amendment into the Copyright Act in the dead of night to

defeat the interests of “their” recording artists) wasn’t exactly pretty. And the recording industry is relentlessly chipping away at music publishers’ rights and control in all fields, not just the digital world. And why not? The major music publishers are all owned by the major record companies. We have seen newspaper headlines and talk shows that have eviscerated the music industry. We have seen avarice and ignorance succeed over wisdom and reason.

Yet I cannot help but believe - - notwithstanding the instructive re-read of the Medea myth - - that the natural human state is one of reason, virtue, fairness and justice. The music industry, and its counsel, have an opportunity to oppose the rule of passion and to apply reason to find ways to satisfy both their own vested interests in protecting the copyright structure on which our entire intellectual property industry is based, as well as the expressed needs of those who consider the music industry’s creations as their own property. Some of this will be achieved through education; some through example; some, inevitably, through lawsuits.

So, is the music industry living a Greek tragedy? Sounds like one to me.

When Culture Trumps Commerce

Let us now consider the social, legal, and economic consequences of having multi-nationals own what citizens of the world perceive to be *their*s.

Vogel calls music the most fundamental and widespread basic

human need and emotion-inducing type of product in the world. As I noted earlier, only the expression differs from population segment to population segment, from country to country, from continent to continent. Naturally, people want to have what they believe is theirs. In a word, their own culture.

The **World Social Forum** (WSF) is an annual meeting held by left wing (some would call progressive) members of the alternative globalization movement to counter its capitalist rival, the World Economic Forum which meets - - usually in Davos, Switzerland - - at exactly the same time. Talk about a counter-culture! In 2005, at the Fifth World Social Forum Porto Alegre, Brazil, Free Culture advocates encouraged the idea that the establishment and maintenance of property rights in music, films, and computer software are just one more (and overwhelming) example of the rich countries' dominance over the poor countries. Limiting access to these materials - - which to a large extent form the underbelly of these countries' *own* culture - - by copyright laws and conventions is deemed to be tantamount to occupation by a foreign power.

It is no wonder that many refer to the Free Culture movement as CopyLeft!

WSF is more of a meeting place, than an organization, or even a movement - - yet. But it reflects many of the tenets underlying Communism, Socialism, and even Anarchy. No, Karl Marx is not forgotten. Many feel that WSF is a threat to property-loving people everywhere. Surely capitalism *per se* is not going to defeated; on the contrary, it has survived the cold war and is thriving in former Communist

countries. But there is nothing to stop *aspects* of capitalism from being undermined in large chunks of the civilized world. The attendance in Porto Alegre of more than 100,000 participants suggests that we have not heard the last of this particularly venal form of anti-copyright enthusiasm.

Using phrases like “proprietary culture” in an address to the WSF, Lawrence Lessig , Professor of Copyright at Stanford University, and a bit of a gadfly who has authored some pretty compelling books questioning the very underpinning of copyright, demonizes copyright by distinguishing “culture” from the control that copyright places over creations which, of course, are the elements of our culture. He points to what he calls an “error” in the 1909 United States Copyright Act which used the word “copy” rather than “publish” as the right mostly to be protected by the new law. For “copying” was at the time nothing but re-printing something. It required an intentionality and a culpability that was easily punished and just as easily avoided. But with the development of digital transmissions via the Internet, copying has become not just routine, but ubiquitous. There is no way that a document can be “called up” onto a computer screen without it being a “copy.” In addition, the copyright system had been reshaped from an “opt-in” system where registration was required to claim copyright ownership to an “opt out” system where copyright is automatic unless waived. Therefore, it became likely that simple, innocent, activities such as visiting a website implicated copyright infringement. In the US, replicating what had existed for years in Europe, everything created after the new law’s effective date,1978, was automatically “copyrighted” and every click on the mouse resulted in a “copy.” Things that used to be “free” - - like playing a song on the piano via sheet music became infringements if the music were reproduced on the Internet. Reading a book became an

infringement if the book happened to be an e-book. Giving your sheet music or a Cold Play recording to a friend is fine; forwarding it to a friend via the Internet is not. Selling used music at a flea market was always a convenient way to disseminate music to lovers of certain genres; selling it on the Internet is an invitation to a lawsuit. Why then should we be surprised that the eruption of so-called copyright violations (beginning of course with peer-to-peer sharing) has provoked everything from discord to near riot (at the 2005 World Social Forum) by those who claim that "their" culture has been stolen and, as Lessig refers to it, become a "by-permission culture."

How Copyright Owners have sacrificed reason for passion and co-opted the (il)logic of the illegal downloaders

I am not certain that a balance between copyright interests and consumers can be achieved without a better understanding by copyright owners of their customers - - the consumers (yes, the very ones the RIAA is suing). As long as they do not understand them, the copyright community is vulnerable not only to the wholesale theft of its assets, but to the rejection by the public as well.

In the famous allegory of the cave, Plato showed us that darkness is tantamount to ignorance. In order to survive - - or at least to survive with a semblance of the model in which we currently live and work - - we have to teach "those kids" to penetrate the darkness. And we have to teach ourselves that unless we understand human nature, we will not have a clue as to how to fix this mess we're in.

Some of you will say that good conscience cannot be taught. In the Myth of Gyges, the protagonist finds a ring that allows him to make himself invisible. What did he do when he could get away with murder and not be caught? He killed the king, raped the Queen, and took over the kingdom. No punishment? No problem. Some will say that this is what we are seeing among the peer-to-peer sharers. But there's a reason they are called peers. They are of a similar mind that has neither been taught correctly or effectively; and they act as if they can do whatever they want because they won't be caught. Like Gyges, they only think of what they CAN do—not what they SHOULD be doing or not doing. Yet, as we have observed in the record piracy area overseas, making available what people want, when they want it, at a reasonable price, is the best policing we can achieve in the marketplace. Wise business decisions will neutralize those who would take advantage of the vacuum and provide alternatives to hungry consumers. Apple's iPod has proven this point quite well indeed.

What Goes Around Comes Around: Are they getting what they deserve?

Which brings us to the second part of this article: the self-destructive behavior of copyright owners themselves

In addition to the digital revolution, something else tipped the balance between copyright owners and consumers which had stabilized the relationships among copyright owners and users for many, many decades.

It may have been copyright clearance that did it.

Those who hold firm to the outdated concepts of contemporary copyright law see abuse wherever they look and they see the benefits of technology being twisted into support for protections that are no longer valid. The last thing they want to face is one more technological breakthrough that threatens the status quo of their traditional licensing models. For example, no one, you would think, would support a law that would require three, four or more, different licenses to be secured merely for one use. But that is exactly what has happened. An interactive Internet file will implicate the mechanical, synchronization and performance rights; a karaoke producer will do the same - - but add print rights to the other three). [Some entertainment lawyers recommend that a composite license be composed - - a so-called uni-license. But to date, there really is no such thing available.] An EMI Music Publishing spokesman points out that this is simply the way it is - - that the "law couldn't be clearer." That is the problem. And that is the solution as well. Once the Congress hears the cries of the bedeviled users of music, they will see that the law indeed could not be clearer. And they will change it. The fear among the copyright community is that they will change it in ways that will satisfy no one.

I will not delve into the evolving area of intellectual property law dealing with "misuse of copyright." But the wholly legitimate, and legally sanctioned, actions of copyright owners are enough to make one wonder if reason has totally taken a vacation. The stories are legion:

Recently, a public company, was planning a promotion with DJs around several hundred of their stores. It was reminded that they would require

performance licenses from the three American performing rights societies: ASCAP, BMI, and SESAC. Their new VP in charge of promotion complained that at other companies he had never cleared performance rights. "It's just music," he sputtered. "We want to do the right thing, but we now learn that in addition to your legal fees, we have to pay SESAC, the smallest performing rights society, three to four times what ASCAP, the largest, is charging."

When I was asked to clear five songs and five masters for use in a television show that initially appeared on PBS (and were covered by a special provision in the Copyright Law for those specific broadcasts), negotiations for non-public television rights, a DVD, foreign broadcast rights, etc. were required among more than thirty different companies and departments and the paperwork took six months to complete.

Use a photograph or likeness of Elvis Presley or Marilyn Monroe in a book? Forget about it. Whereas the right of publicity was always assumed to have died with the subject, many states are now passing laws to keep their citizens alive. I call the Tennessee law reviving Mr. Presley's publicity rights from the afterlife the "Help the Balance of Payments of Tennessee - - Keep Elvis Alive" law.

A prestigious art-book company wishes to digitize an Andy Warhol photograph of Marilyn Monroe on the cover of its book: "The Culture of the 20th Century." The Warhol estate doesn't care; but the Monroe estate does.

Documentary film-making is a particularly rich source of complaints about

claimed excesses of copyright owners. By definition, documentary film makers *have* to quote existing transcriptions (whether print, video or audio) in order to tell their story. Documentary films' budgets are notoriously small, and the films are usually completed before the directors know what they are going to use to tell their story. They fear the costs when they can find the owners; the risks when they cannot; the eagle-eye of their insurers who demand proof of 100% clearance; the need to self-censor rather than take their art where their muse carries them; the imprecision of the Fair Use doctrine (which no attorney can assure a client he actually comprehends). When they shoot their factual moment in the frame of their documentary camera, they must be conscious (and cautious) enough to turn off the television or radio while filming lest they end up having to negotiate with Disney, or Fox, for a few immaterial, non-integral, background seconds of the Simpsons; or they have to pay attention to the possibility of innocently reproducing the background sound of a cell phone ringing out the *Theme from Rocky* (Try it! It is not cheap.) Documentary filmmakers refer to this recurrent nightmare as "the clearance culture trap." It is no wonder.

What happens when a company desires to use a copyrighted work, is willing to pay any price for a license, and cannot locate the copyright owner? An honest company will be discouraged from using it and presumably the consumer is worse off as a result. Works whose progeny or current ownership is unknown or uncertain are often referred to as "Orphan Works." While the owners or administrators of music and film works are fairly well documented and public, the same is not true of works of art, illustrations, cartoons, etc. This issue has drawn the attention of the Copyright Office and the Congress; but their proposed solutions are

suspect. One resolution of the problem has the potential user posting an "intent to use" on a public registry. The failure of the copyright owner to identify himself or itself will free the user from any liability unless and until the copyright owner shows up - - at which point, his claim will be limited to a fixed fee for uses prospective from the date he appears. This amounts to the opposite of the exercise of the copyright owners' vaunted exclusive rights.

Sampling. The practice of capturing sounds from a previously recorded and released recording and incorporating them into a new recording. Contrary to the belief of some, most sampling is not simply an easy way out for producers and other authors who are too lazy or untalented to create the sounds themselves. Their real intent is to capture a mood, a memory, a feeling of a specific time or experience, and to blend that into their own creation. DJ's have "sampled" for years. But what they have been able to do in a club live is prohibited when duplicating their feat on a permanent recording - - even if the recording is available only via the Internet through a download or streaming facility. Most composers, and the courts, find sampling anathema to the concept of private property; others find the process similar to making a salad - - the ingredients that make up a contemporary recording naturally include elements that went before. What else is culture than the accumulation of a civilization's art over time? Sampling is now part of most every genre of music - - from hip hop to rock to pop. Even electronic classical works are utilizing samples from our everyday culture just as a hip hop composition might.

While another source of business for us entertainment lawyers, the laws written during the pre-digital/internet age (or their application) often

invite frustration and anger - - not to forget the expense - - of legitimate, creative users of music who want to reach citizens around the world and convey to them the fruits of *their* creations. No wonder some companies would rather hide than call us. Or simply give up their creative urges and become engineers.

Among the most important functions of entertainment attorneys is to provide their clients with a "rights roadmap" to navigate: show them how to comply with copyright laws, identify the risks they must avoid or manage, and somehow find them a way within the law to publish their book, write their musical, or record their song.

Too often, we are unable to achieve these goals for our clients. Our frustration is mirrored in the frustration and anger of those who wish to use copyrights in a responsible manner. The possibilities offered by the Internet have merely added exponentially to the mood among copyright users when they keep running into stone walls in an effort to seek permission, and - - yes - - pay a reasonable fee for the rights they seek. Their frustration is finding support among academics and, more importantly, powerful lobbies that single-handedly are reversing the thinking of the author-friendly legislatures of the past 230 years. Are they justified?

It used to be that building on the art of others was the hallmark of genius. Now it is an invitation to a lawsuit. Sampling on contemporary sound recordings is illegal without the permission of the owner of the music sampled. Fine. But the cost and liability of clearing rights which ranges from impossibly difficult to nearly impossible is encouraging both a lack of

creative use of our culture's output and a widespread violation of copyright owners' rights. Neither result is welcome; either result is unproductive and destructive.

Certainly intellectual property is a property right. The RIAA and the NMPA (the National Music Publishers Association) say it is a property right PERIOD! What I create is mine. PERIOD! This view permeates the copyright owners' world. What then, is our culture? An accumulation of other peoples' property? Whose culture is it, then? Certainly not "ours." How can it be "ours" when we have to ask permission to use it? And how can a culture survive and expand when innovation is stifled by the threat of lawsuits?

The licensing archetype needs to be reformed. Everyone acknowledges this. In the US, if the industry does not do it, the Congress will do it for them. And no one is ever happy when legislatures interject themselves into their world - - especially when their world is so complex, so filled with custom and tradition, and so beholden to the industry's own peculiar sense of balance among authors, publishers, and recording companies.

No, copyright is not mere property. It if were, it would follow the rules of property and government regulation that enforces property rights. A primary difference between copyright as property, and ordinary property in the form of goods and services, is that the cost of producing a copyright does not reflect either the cost of its reproduction or its distribution. Another one is that intellectual property is more vulnerable to theft (which we call piracy) than ordinary run of the mill goods. For a user of

intellectual property to pay less than the value of providing the property via distribution means such as radio, television, motion picture theatre presentations, even the Internet, is anathema to creative people and their supporters, the publishers, record companies, film companies, etc. And why not? People are willing to pay for water that they can get for free? Why not copyrighted works?

Back to the Greeks.

You may remember, in Sophocles' drama, *Antigone*, Polynices, Antigone's brother, has been killed; King Creon has ordered no one shall touch or bury him. Antigone is very upset by this command. "Don't touch the send button! say the modern day Creons. Infringement suits await you!"

Anyway, Antigone disobeys the command and goes ahead and buries Polynices, and Creon comes out of the wings and says "What—are you nuts? Why did you do this? Don't you know I'm the king and didn't you hear my order?" The point he wants to make is that his law is supreme. He is the King and his rule trumps everything. Or does it? Antigone's response: "Yes, that's true, she says. But your law doesn't trump human nature. There is something bigger and older than your law. After all, it was always the right thing to do for a sister to bury her dead brother. There is something in all of us that tells us the course of action that is right for us.

Antigone is no dummy; she doesn't want to be jailed or killed by this bozo king. But she responds to her nature. Just as Medea laments the fact that passion has taken over reason, Antigone has answered the

command to do what is instinctual in us. The laws of nature will force us to do right.

But what then is right.

Do you believe greed, and stealing, are less right than respect and discipline--- following the rules?

Germany itself has a fair share of philosophers who have dealt with this question - - from Immanuel Kant to Arthur Schopenhauer. As you may recall, what is moral to Kant requires actions whose imperative is "categorical." He dealt with *universal* truths and maxims. His sense of morality affects all the people, all the time, at all places. The moral worth of participating in what we call illegal downloading is something he would enjoy discoursing on. Schopenhauer of course differed in that he felt it was futile to attempt to base morality on reason. Kant postulated that freedom of action is an absolute prerequisite of morality. But what he meant by free required that people act on the basis of reason alone, independent of sensuous impulses. Schopenhauer, for his part, felt that the will obeys no law of reason and no law whatsoever. His reality is entirely irrational. This is not to say there is no morality in Schopenhauer's world. On the contrary, moral behavior is ok as long as we agree that it is derived only from the knowledge of what he calls "unity." In non moral action, the intellect merely facilitates the impulses of the will. Ironically, moral behavior turns us against these impulses. I wonder what he would have said about the dilemma facing the music industry today.

There is one memorable statement of Schopenhauer that indicates

that he might be not so far from understanding at least the musical impulses of our 21st century culture. Perhaps anticipating the ever-changing musical landscape that we have been experiencing since Elvis Presley replaced Mitch Miller, he said: *I have long held the opinion that the amount of noise that anyone can bear undisturbed stands in inverse proportion to his mental capacity and therefore be regarded as pretty fair measure of it.*

There is a battle going on now among the copyright and anti-copyright interests. Some compare it to the book and film "*The Perfect Storm*." Except we don't have the confluence of *three* events creating the problem; we have dozens! In the US, whether it is the effort to repeal the Fairness in Music Licensing Act; re-establishing in California the seven year rule for recording contracts; establishing one in New York State; judicial modification of the line of decisions affirming State Sovereignty Immunity where public universities can use music and other copyrights without care because of the immunity they have been granted by the 11th Amendment; or now the French consumer body UFC-*Que Choisir* which is suing record companies and retailers over the production of copy-protected CDs because in their mind, encryption *penalize*s customers by not permitting them to copy master recordings freely! I am certain you have your own menu of wishes in Germany - - which naturally is further complicated by the EU hegemony and yet another layer of bureaucracy. And last, but not least, the clearance nightmare, about which more later.

Whatever it is, wherever you find it, there is a war going on –and it is becoming stronger as I write.

In the digital rights area, as well as in the music clearance area, the battle is between those who use passion to define their strategies (while hiding behind the cover of reason) - - the copyright owners - - and those who use reason to justify their behavior (while hiding behind the cover of passion) - - the consumers. Those who wish an easier and more economical access to the music of their cultures are battling with those who want to deny them such access except on their terms, their parameters, their paradigms, their conditions, their specifications, their financial demands. I am a lawyer. How does that qualify me to preach about the right and the wrong of music piracy? The Greeks help us out here as well if I may extend the parallel between ancient myth and modern life.

In *The Republic*, Plato defined law as reason unaffected by desire. Not long afterwards, Aristotle defined law as reason without passion, and wrote that reason applied to the law must benefit all, not just the few. Has the music industry got it backwards?

Conclusion

When all is said and done, and the extremes on both sides are neutralized by the judicial process, legislative intervention, wiser choices by the copyright community, and the passage of time, the survival of copyright, as we know it, and as we believe it should exist, will depend on two things. First, does the citizenry understand the purpose of copyright? And second, if they do, are those who enjoy the benefits of copyright willing to recognize a balance between their interests and those of the rest of the population?

Whether or not this balance is achieved depends in part on education; and in part on the behavior of copyright owners. Once the public processes the information that they have been presented with for the first time - - i.e. once the public deals with the fact that copyright is no longer invisible to them - - hopefully, they will recognize that copyright is as much, if not more, in their interest, than in the interest of the copyright proprietors.

The recent Grokster decision will most certainly reduce the need for copyright interests, at least in the United States, to sue the individual users in the peer to peer environment. [The new standard for secondary copyright liability, the Grokster standard, is whether the manufacturers created their software with the "intent" of inducing consumers to infringe copyrights, rather than whether the software itself was capable of non-infringing uses - - the test in the Sony Betamax case of 1984.]

Taken together with the preliminary success of legal download options and the fact that the music industry is slowly awakening to the needs - - and societal rights - - of consumers, and not just of themselves, I am cautiously optimistic that this is not a time when we can bemoan the end of copyright, resulting from the pernicious exercise of remedies afforded by the world's diverse assortment of copyright laws, but rather a time to seek theirs transformation into the beneficial mechanism that it needs to be to serve the interests of all peoples and all industries.

Hopefully, the public will recognize that copyright is as much, if not more, in their interest, than if there were no copyright at all - - a proposition

that is not as unlikely as it sounds.

Back to Medea - - and I quote:

Things have worked out badly in every way, sings the chorus..
Who can deny the fact? Nonetheless,
You should not assume that's how things will stay.

I just hope that the chorus is singing in tune and getting it right..