

Riding p2p

John T. Mitchell, August 19, 2004

“The p2p horse is out of the barn,” to paraphrase the ruling of the U.S. Court of Appeals for the Ninth Circuit. It's no use trying to close the barn door now, much less burn down the barn. It's time to let everybody ride!

I'm not one of those “everything ought to be free” types. Copyright owners *should* be allowed to stop others from infringing. But the real story behind p2p (peer-to-peer file-sharing) and the Ninth Circuit's ruling in [*MGM v. Grokster*](#) is that it may force a minority of copyright owners who are absolute control freaks to quit raining on everyone else's party.

Back in the old days, copyright owners had to make all of their copies at central locations and ship them to various distribution, sub-distribution and retail facilities until a consumer went to one of those locations, purchased a copy, and took it home. That took a lot of work.

Along came video rental, and people wanting to watch a home video no longer had to wait for the long journey from manufacturing plant to retail store to home. They could just go to the video store to pick up a copy that a neighbor had returned moments before. We got a lot more use out of a single factory-to-store delivery, and consumers were able to capitalize on the efficiencies of that system in the form of super-cheap rentals. Tapes that cost \$75 wholesale could be rented for \$2 to \$3 because it was unbridled retail competition, not copyright owners, that made it so.

Then came digital media. It first followed the old traditional lines: (1) copyright owner makes a master, and physically takes it to a manufacturing facility, (2) copyright owner licenses manufacturer to make 1,000,000 copies, (3) manufacturer makes 1,000,000 copies and, with permission from the copyright owner, (4) ships them to distributors, (5) sub-distributors and (6) retailers who eventually make them available for (7) consumers to pick up at the store and (8) take home. The more efficient rental model was not allowed for music out of fear that renters might make copies.

But then came “bandwidth,” and the ability to transmit digital bits from one location to another. Instead of having one plant manufacture a million copies and then figure out how to deliver them to a million people, the copyright owner could license a million people to each manufacture one copy. An eight-step process could be boiled down to three: (1) copyright makes places master copy on server, (2) copyright owner licenses individuals to make copies, and (3) individuals make copies.

Although the process was much simpler, it was complicated by the fact that copyright owners hadn't a clue how to license a million consumers. Plus, they wanted everyone to come to their site but not any other copyright owner's site. The system cried out for retailers to do their thing – to aggregate works from many different copyright owners and present the licenses for consumers to manufacture them, competing with each other on price, selection, features, ease of use, customer service, and everything else that keeps retail margins razor thin and fuels innovative business models and efficient support services.

But a few of the copyright owners, who happened to have large quantities of copyrights, saw opportunities they never had before. Knowing that it would be hugely inefficient for consumers to have to go to each copyright owner for the license, they sought to drown out

copyright owners with fewer works. First, they tried to bundle their own copyrights into mega-sites, until they learned that consumers don't shop by record label. Then they tried to bundle their own mega-offerings together and offer 85% of the available works through one or two Internet sites, shutting out garage bands, unsigned artists and small independent record labels. That didn't work too well either, mostly because their sites were inefficient, non-competitive, and simply nauseous to consumers. Traditional retailers that consumers might be expected to flock to for their downloads could not get the time of day. Copyright owners perceived them as their greatest threat to ownership of the Internet.

That control-freak system failed miserably to meet demand for individual reproductions. By the millions, consumers turned to p2p networks to get for free what legitimate retailers were prohibited from offering for a fee. That's when the barn door started opening, and the Napsterization of the music industry began. The p2p networks were proving to be a hugely efficient method for transmitting digital bits for reproduction, but the major copyright holding companies refused to let anyone ride it. They wanted it all, and were prepared to get nothing and starve their own artists in hopes of some day getting it all.

Copyright owners eventually began licensing retailers outside traditional retail channels the rights to offer downloads. They figured that outside players, like Apple, would not pose the same threat that music-related brand names like Tower Records or Musicland might pose. And they claimed victory of sorts, but the strings remained firmly attached: "The horse is getting out of the barn, so while we struggle to close the barn door, we will let only a few select companies ride it, but only side-saddle and for no more than one mile at a time." The famous iTunes rode nonetheless, and demonstrated demand even for a relatively high priced download service replete with restrictions from which the p2p networks remained free. All the while, they thought that if they could just close that barn door, they could control every horse and rider.

For a while, they seemed to be making progress. The lawsuit against Napster appeared to be working. The Ninth Circuit ruled that Napster's control over its p2p network was sufficient to make it liable for the copyright infringement of Napster users. But that proved to be the wrong barn door. Other p2p networks soon developed that would allow individuals to manufacture copies from other individuals, but no one controlled the network. When Grokster and other decentralized p2p networks were sued, the Ninth Circuit concluded that the horse was long out of the barn and miles down the road, and closing the barn door would do nothing to change that.

The Ninth Circuit was right. Almost forgotten in the debate is that it's not just a few major copyright owners who wanted to control horse-riding. It was undisputed that thousands of smaller copyright owners with perhaps only a handful of works wanted people to be able to ride the p2p horse. The Senate is even considering legislation to try to shoot the horses so that nobody can ride them, but it is these thousands (and more likely millions) of copyright owners who want to allow their works to be accessed over p2p networks that would be hurt. They would be denied wild ponies to ride, while licensed horses would go back into the barn to get fat and slow.

What is a control-freak copyright owner to do? Make sure that as many people as possible get to ride the p2p horse in a manner worth paying for. Don't rail against a daunting wasteland of copyrighted works where no one gets paid, and where consumers may not know what they are looking for, or if they do, whether what they find is the genuine article.

Instead, allow retailers – the experienced horse handlers – to work with consumers to give them a safe and enjoyable ride.

It's time to let everyone ride the p2p horse. Legitimate retailers should be given an equal opportunity to enjoy the efficiencies of p2p systems. Quit trying to limit which retailers can participate. Let Apple face some *real* competition, not just Real Networks' competition. Quit trying to make everyone ride side-saddle, and instead let retailers compete to offer support for the most competitive array of codecs, media players, privacy protection, and quality enhancements they can find.

Back in the old days, I could buy a vinyl record album and play it on the phonograph of my choice. The copyright owner could have cared less what media player I used, what price I paid for it, or what retailer I bought it from, so long as my passion created a market for the reproduction at its wholesale price. It is time for copyright owners to care less what media player I use, what retailer I download it from, what codec is used or what retail price I pay for the download, so long as my passion creates a market demand for the download at wholesale.

Give us good music, give us a reason to want to download it, and let the experts, in free and open competition, beat a path to the consumer's door. Name your wholesale price per download, and let the experts decide whether they can offer it at a mark-up price or below cost. Demand an accounting, but don't shackle retailers with ridiculous restrictions that drive customers to trade with each other instead.

Back in Napster's heyday the head of digital commerce for one prominent music retailer insisted he could compete with Napster if only given half a chance. He knew Napster's weaknesses, and knew his company's strengths. He knew that, just as some companies make millions of dollars competing with “free” water by placing it in attractive and convenient bottles with high standards of quality control, he could compete with free p2p services by offering a better quality, cleaner selection, and more attractive presentation and convenience. “Just name your wholesale price” was all he asked of the majors. “Let me figure out how to resell it.” All he got in response was “we're not sure you will succeed if it's not side saddle. Just help us close the barn door.”

Today, the Ninth Circuit's message to the majors is that if you insist on “all or nothing,” your wish will come true. You will get nothing. You might as well let retailers pay you good money for the right to let people ride p2p side saddle, English, western or just bareback. You might as well start making more money by letting retailers drive the consumer price down. Copyright owners were denied all of the home video market, and yet profited beyond their wildest dreams from an uncontrolled delivery method. It's time to let all copyright owners, artists and authors, retailers, engineers and consumers start reaping the benefits of modern delivery systems. It's simple, really: If you can't stop Harry copying from Sally, you should let retailers pay you for the right to let Harry and Sally make copies from each other. If the pirates get to use p2p to efficiently deliver reproductions, the neighborhood record store should get to use it too.

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