

The New Vigilantism: Combating the Piracy of Copyrighted Materials on Peer-to-Peer Networks

Alvin Stauber

College of Business, Florida State University, Tallahassee, Florida 32306-1110, U.S.A.
astaube@cob.fsu.edu

ABSTRACT

Non-existent just a few years ago, peer-to-peer networks have experienced phenomenal growth. One consequence of the expansion of these networks has been extensive unauthorized downloads of copyrighted materials. Losses attributable to music piracy alone are estimated to exceed \$4 billion. In response to this problem and to combat the misappropriation of copyrighted materials, the Peer-To-Peer Piracy Prevention Act ("Act") was introduced in the United States Congress in 2002. The aim of the law is to enable copyright holders to utilize technological self-help measures to stop copyright infringement on peer-to-peer networks. This paper describes the developments leading to the introduction of the Act and briefly analyzes the provisions of the Act. In addition, the paper discusses the legal issues raised by the self-help remedies contained in the Act and concludes that there is ample precedent to support the legal propriety of these measures.

Keywords: vigilantism, copyright, peer-to-peer network, self-help remedies, citizen's arrest, safe harbor

1. INTRODUCTION

"Hollywood Vigilantes v. Copyright Pirates"
(Humphrey, 2003)

"Streamcast Opposes . . . Posse of Copyright
Vigilantes" (Streamcast, 2002)

"Vigilantes v. Pirates: The Rumble Over Peer To Peer
Technology" (Fazekas, 2003)

The foregoing headlines provide a glimpse into the battle that is being waged over the misappropriation of copyrighted materials on peer-to-peer networks. Words such as "vigilantism" and "piracy"—ordinarily reserved for portraying mischief in the Wild West or on the wild seas—are now part of the lexicon used to describe this cyber warfare. One of the principal contributors to this adversarial atmosphere was the proposed enactment in the United States of legislation known as the Peer-To-Peer Piracy Prevention Act (H.R. 5211, 2002). As one observer stated, it was "greeted by a swirl of controversy in the Internet community" (Humphrey, 2002). The purpose of this paper is: (1) to describe the developments that led to the introduction in the United States Congress of the Peer To Peer Piracy Prevention Act ("Act"); (2) to briefly analyze the provisions of the Act; and (3) to discuss the legal issues raised by the self-help remedies contained in the Act.

2. DEVELOPMENTS

Non-existent just a few years ago, peer-to-peer networks have experienced phenomenal growth. The leading peer-to-peer file sharing software has been downloaded over 200 million times, and its developer claims over 60 million users (Davidson, 2003). Peer-to-peer file sharing networks are different from other Internet applications in the following respects: they

tend to share data from a large number of end user computers rather than from the more central computers generally thought of as Web servers. A key innovation of peer-to-peer file sharing networks is their sophisticated mechanisms for searching millions of "shared" files to find data among many connected systems. Information on peer-to-peer networks tends to be less centrally controlled and more reflective of what end user participants believe is valuable or worth sharing (Davidson, 2003).

Napster first brought peer-to-peer networks into the limelight, but it was shut down by the courts because it facilitated—using a central directory and centralized servers—massive copyright infringement. Current peer-to-peer networks avoid the "Napster problem" by incorporating varying levels of decentralization. While unauthorized downloads of copyrighted software, games, photographs, tapes, and movies have occurred, the most rampant piracy of copyrighted work involves music. Losses attributable to music piracy are estimated to amount to \$4.3 billion annually (Sorkin, 2003).

Most of the efforts to thwart music piracy have focused on litigation instituted against companies and individuals that are involved in the distribution of pirated music. Last year, four college students settled a lawsuit initiated by the music industry by agreeing to halt their music swapping network and agreeing to pay penalties of \$12,000 or more. And recently a federal judge ruled that Verizon Communications must disclose to the Recording Industry Association of America the identities of customers suspected of distributing pirated music (Sorkin, 2003). But copyrighted works are spread over peer-to-peer networks so quickly that they wind up almost instantly on millions of computers, rendering litigation against

individual peer-to-peer users essentially ineffective. It is in response to these developments that the Peer To Peer Piracy Prevention Act was introduced by California Congressman Howard Berman in the United States Congress on July 25, 2002.

3. PEER TO PEER PIRACY PREVENTION ACT

In introducing the proposed legislation, Representative Berman explained the thrust of the Act as follows:

[E]nactment of the legislation I introduce today is necessary to enable responsible usage of technological self-help measures to stop copyright infringements on peer-to-peer networks . . . There is nothing revolutionary about property owners using self-help—technological or otherwise—to secure or repossess their property. Satellite companies periodically use electronic countermeasures to stop the theft of their signals and programming. Car dealers repossess cars when the payments go unpaid. Software companies employ a variety of technologies to make software non-functional if license terms are violated (Berman, H.L., 2002).

Lamenting the fact that “the primary current application of peer-to-peer networks is unbridled copyright piracy,” Representative Berman sought in the Act to permit copyright owners to employ a variety of technological tools—e.g., interdiction, decoys, redirection, file-blocking, and spoofs—to prevent the illegal distribution of copyrighted works over a peer-to-peer network (Berman, H.L., 2002). The protection afforded by the Act is to provide a “safe harbor” from liability when copyright owners employ self-help measures to prevent piracy of their works. But these self-help measures are narrowly tailored to ensure “acceptable behavior” by the copyright owner. Self-help measures that would involve planting a virus on a peer-to-peer user’s computer or otherwise removing, corrupting, or altering files or data on the user’s computer are prohibited and are subject to civil and administrative remedies (H.R. 5211, 2002).

In addition, the copyright owner is denied the safe harbor from liability if:

- (1) The copyright owner impairs the trading of files that do not contain any portion of the copyrighted work, unless such impairment is “reasonably necessary” to impair the trading of the copyrighted work;
- (2) The actions of the copyright owner cause economic loss to anyone other than the file trader;
- (3) The actions undertaken by the copyright owner cause more than fifty dollars of economic loss to the file trader, other than loss involving the copyrighted works; or
- (4) The copyright owner does not provide the required 7-day notice to the Department of Justice disclosing the

proposed method to be used to stop the copyright infringement (H.R. 5211, 2002; Humphrey, 2003).

4. LEGAL ISSUES

Immediately after its introduction, the Act was attacked by critics who claimed that the self-help remedies contained in the proposed legislation might result in a type of vigilantism in which copyright owners—taking the law into their own hands—might “hack” into computers, damaging the hardware, compromising legitimately downloaded files, and altering data. In addition, critics raised constitutional concerns, claiming that the self-help measures would violate the privacy of individual users (Streamcast, 2002).

4.1 Vigilantism

To characterize the self-help measures proposed by Congressman Berman as “vigilantism” is hyperbole of the first order. Society undoubtedly welcomes the prospect of a “community of ‘vigilant’ citizens who watchfully and lawfully seek to detect and prevent crime” (Brandon, et al., 1984). Vigilantism, on the other hand, is defined as an “organized, extra-legal movement, the members of which take the law into their own hands” (Sklansky, 1999). Vigilantes typically engage in the violent exercise of police power authority in an unlawful manner; they “violate the law, often heinously, in the name of law and order” (Brandon, et al., 1984). Being vigilant, however, does not make one a vigilante. The Peer-To-Peer Piracy Prevention Act emphatically rejects any measures that are violent or heinous or unlawful. Indeed, odious behavior such as planting a virus, altering or corrupting files, or “freezing” a computer system is proscribed under the proposed law and would result in civil and administrative remedies (H.R. 5211, 2002). What the Act advocates are self-help measures that do not disrupt the technical operation of a person’s computer or networks. The Act encourages vigilance and self-help, not vigilantism.

If anything, the self-help remedies envisioned by the Act are the antithesis of the vigilantism of bygone years. The vigilante activity that first appeared in the United States in the late 1700s involved “the frontier justice afforded cattle rustlers, horse thieves, murderers, thugs, and desperados” (Brandon, et al., 1984). Students of vigilantism, while acknowledging that our legal system condemns the practice, nevertheless warn that:

society should heed the message that outbreaks of this behavior sometimes suggest. Although many instances of vigilantism probably reflect extremist behavior, some vigilante activity also may suggest a latent societal feeling of dissatisfaction with the operation of criminal laws and the justice system (Brandon, et al., 1984).

It is, indeed, the dissatisfaction with the operation of our legal system that motivated Congressman Berman and others to try to improve that system by seeking legal approbation of self-help measures employed by copyright owners for their own protection. If this is vigilantism, it is a 21st century version and ought to be re-named the “new vigilantism”, in recognition that it is a practice that advocates self-help through legal, as opposed to illegal, means, and is, therefore, significantly different from the “old vigilantism”.

4.2 Self-help Remedies

Traditionally, self-help remedies have been sanctioned by the law. As indicated earlier, satellite companies use electronic countermeasures to stop theft of their signals and programming; retailers repossess goods when loans go into default; and software companies employ a variety of technologies to make software non-functional if license terms are violated. In the case of repossession of goods, the retrieval of merchandise does not have to be carried out by judicial order or by law enforcement officers' action. Rather, upon default, the creditor or his agent is authorized to enter private or public property so long as the taking of the item to be retrieved is effected without a “breach of the peace”. Entering the debtor's private property is not usually considered a trespass (thereby eliminating the possibility of a breach of the peace), because although a lack of consent to the entry might be claimed, there is nevertheless a privilege to enter—rendering consent unnecessary—created by the repossession right (*Brandt v. Dugent*, 2000). In fact, in the case of automobile repossession, the retrieving person is authorized to “break into” the vehicle in order to effect the repossession, although liability for damage to the car might be incurred (Clarke, 2001; Foster, 1982). This lawful procedure involving self-help by entering the real and personal property of another provides a precedent for the self-help measures in the Act.

Another precedent that provides support for the Act's remedies is that found in the law of citizen's arrest. The self-help power of citizen's arrest is available in most states to those private persons and businesses that observe a theft or other crime being committed. In fact, the laws of at least six states in the United States permit an individual to use force or to break a door or window to effect a citizen's arrest and thereby possibly effect recovery of stolen property (Code of Ala., 2004; A.R.S., 2004; HRS, 2003; Miss. Code Ann., 2004; N.D. Cent. Code, 2003; Tenn. Code Ann., 2004). The concept of “breaking into” another's property has relevance to the self-help measures advocated by the Act. Indeed, one commentator described the Act as “a bill that would have given the film and music industries immunity from prosecution if they found ways to **break into the swappers' computers** (emphasis supplied) and block their swapping” (Farrar, 2003). Admittedly, breaking into an automobile to

recover tangible property differs from breaking into a computer to recover intangible (intellectual) property, but the underlying concept remains the same. Critics of the Act's self-help measures argue that the differences are significant, stating as follows:

There are important differences between the two given the more utilitarian construction of intellectual property rights in the Constitution. IP rights are more limited in scope and duration, and the “fair use” rights of users is part of today's copyright bargain. Then again, fair use doesn't necessarily mean free use. Artists deserve compensation (Farrar, 2003).

Predictably, Representative Berman rejects the notion that “breaking and entering” into a person's computer is sanctioned by the Act. He explains his position as follows:

Despite wildly inaccurate press reports, H.R. 5211 in no way allows a copyright owner to “hack” into anyone's computer. Copyright owners are only allowed to enter or look into a P2P user's computer to the same extent that any other P2P user is able to do so. In other words, if a KaZaA user has advertised to all 100 million other KaZaA users that he wants to download or distribute a copyrighted song, the songwriter is not “hacking” if she reads the advertisement like everyone else. H.R. 5211 then allows the songwriter to take certain, limited actions to stop the distribution of her copyrighted song between KaZaA users, but in no way allows her to enter or look into a private area of those KaZaA users' computers (Berman, H., 2002).

Another complaint leveled by critics is that self-help copyright holders can make mistakes when they take action against alleged infringers (Davidson, 2003). Interestingly enough, the analogy to the self-help remedy of citizen's arrest again provides useful insight into how this problem is dealt with. According to most state statutes, a retail merchant has the right to detain a suspect (i.e., effect a citizen's arrest) whom the merchant reasonably believes has engaged in shoplifting as long as that detention is done in a reasonable manner (Ohlin & Stauber, 2003). Illustrative is the Florida law, which provides as follows:

a merchant . . . who has probable cause to believe that a retail theft . . . has been committed by a person and . . . that the property can be recovered by taking the offender into custody may, for the purpose of attempting to effect such recovery or for prosecution, take the offender into custody and detain the offender in a reasonable manner for a reasonable length of time.

The taking into custody and detention by a . . . merchant, merchant's employee, or . . . agent, if done in compliance with all the requirements of this

subsection, shall not render such [person] criminally or civilly liable for false arrest, false imprisonment, or unlawful detention (Fla. Stat. Sec. 812.015(3), 2004).

In other words, the Florida statute provides a “safe harbor” for merchants who comply with the requirements of the law. That is, criminal and civil immunity is granted to merchants so long as they act **reasonably**, even if they mistakenly accuse someone of shoplifting. While erroneously accusing a person of retail theft can understandably result in a terribly unfortunate experience for the innocent suspect, the law providing merchants with immunity balances the right of merchants who undertake reasonable measures to apprehend suspected thieves with the rights of an innocent person who is mistakenly accused of theft. Because shoplifting has become a problem of epidemic proportions, the law tips the scales in favor of the merchant (Sparrow, 2003).

A similar argument can be made in the situation involving on-line theft of copyrighted materials. So long as the copyright owner’s impairment of the unauthorized distribution or reproduction of the copyrighted work does not “alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader”, the copyright owner incurs no liability (H.R. 5211, 2002). Similar to the reasonableness criterion of the merchant shoplifter apprehension statutes, the Act in Section 514(b) creates a safe harbor exception. According to the Act, impairing the trading of files that do not contain any portion of the copyright owner’s copyrighted work would result in liability unless such impairment is “reasonably necessary” (H.R. 5211, 2002). Critics of the proposed law contend that such language creates serious problems. As one critic observed: the ambiguity of the words “reasonably necessary” paves the road to future litigation over the issue. . . . Although [Representative Berman] has referred to the “reasonably necessary” exception as “certain necessary circumstances,” [he] has yet to reveal what those circumstances are. Considering that H.R. 5211 explicitly allows copyright owners to navigate around existing state and federal law, Representative Berman’s desire to create legislation that is “narrowly crafted, with strict bounds on acceptable behavior by the copyright owner” will not be achieved until this provision is made more clear and the ability of file traders to trade legally is adequately preserved (Humphrey, 2003).

It should be recognized, however, that many statutes—including the merchant shoplifter apprehension statutes earlier described—utilize a “reasonableness” standard to guide individuals in their conduct. Indeed, there are entire bodies of law—most notably the law of negligence in its utilization of the reasonable person standard—that are principally based on the concept of reasonableness. The term “reasonable” is used in

thousands of contexts in the law; its use simply acknowledges that all fact situations are different and must be viewed in their own particular contexts. The definition of what is reasonable in any given set of circumstances is, therefore, situation-specific. Incorporating a reasonableness standard into a law is not fatal to the law. It simply means that the finder of fact—a judge or jury—will have to make the determination as to whether a particular course of conduct is reasonable under the circumstances (Clarkson, et al., 2004).

With regard to constitutional concerns relating to the Act’s self-help measures and their potential for invasion of privacy, the focus appears to be on the Fourth Amendment’s prohibition of illegal searches and seizures. The problem with attacking the Act’s self-help measures on this basis is that, as many courts have stated, “The Fourth Amendment’s proscription against warrantless searches and seizures does not apply to searches by private individuals not acting as agents of the state” (State v. Cooney, 1995). The copyright owners seeking to protect themselves against the piracy of their copyrighted work through self-help measures thus appear to have some latitude that law enforcement officers and/or government officials would not necessarily enjoy.

5. CONCLUSION

The self-help measures embodied in the Act are innovative and potentially effective weapons in the battle to combat the piracy of copyrighted work. While certainly subject to abuse, these measures are restricted in the Act so as not to result in harm to the hardware or software of peer-to-peer users. Although these self-help remedies are subject to constitutional and other legal concerns, there is ample precedent to support the legal propriety of these measures.

REFERENCES

- [1] A.R.S., Sec. 13-3892, 2004.
- [2] Berman, H., “Frequently asked questions about P2P Piracy Prevention Act,” at http://www.house.gov.berman.p2p_faq.html, July 25, 2002.
- [3] Berman, H.L., “Introduction of the Peer to Peer Piracy Prevention Act,” 107th Congress, at http://www.house.gov/berman/newsroom/piracy_prevention_act.html, July 25, 2002.
- [4] Brandon, D.I., et al., “Self-help: extrajudicial rights, privileges and remedies in contemporary american society,” *Vanderbilt Law Review*, Vol. 37, pp. 845-937, May 1984.
- [5] Brandt v. Dugent Liquidating Trust, 749 So.2d 1276, 2000 Fla. App. LEXIS 1675, 2000.
- [6] Clarke, S.S., “Repossession soars as economy plunges,” *Tallahassee Democrat*, p. 4B, December 31, 2001.
- [7] Clarkson, K.W., et al., *West’s Business Law*, 9th ed., Mason, Ohio: Thomson, 2004.
- [8] Code of Ala., Sec. 15-10-7, 2004.
- [9] Davidson, A., “Peer-to-peer file sharing privacy and security,” Testimony before U.S. House Committee on

Government Reform, at <http://www.cdt.org/testimony/030515davidson.shtml>, May 15, 2003.

[10] Farrar, C., "Hatch backs off P2P hack approval . . . somewhat," at http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Co, June 18, 2003.

[11] Fazekas, C., "Vigilantes v. pirates: the rumble over peer-to-peer technology hits the house floor," *Duke Law and Technology Review*, Vol. 2002, p. 20.

[12] Fla. Stat., Sec. 812.015(3), 2004.

[13] Foster, J.E., "Parties' remedies on default," *Secured Transactions in Florida*, 1982.

[14] H.R. 5211, 107th Congress, 2002.

[15] HRS, Sec. 803-11, 2003.

[16] Humphrey, J.S., "Debating the proposed Peer-to-Peer Piracy Prevention Act: should copyright owners be permitted to disrupt illegal file trading over peer-to-peer networks?" *North Carolina Journal of Law and Technology*, Vol. 4, pp. 375-417, 2003.

[17] Miss. Code Ann., Sec. 99-3-11, 2004.

[18] N.D. Cent. Code, Sec. 29-06-22, 2003.

[19] Ohlin, J.B., Stauber, A., "The applicability of citizen's arrest powers to the hospitality industry," *Journal of Hospitality & Tourism Research*, Vol. 27, No. 3, pp. 342-357, 2003.

[20] Robinson, T., "Bill would let copyright owners infiltrate file-swapping services," *E-Commerce Times*, July 26, 2002, at <http://www.ecommercetimes.com/story/18766.html>.

[21] Sklansky, D.A., "The private police," *UCLA Law Review*, Vol. 46, pp. 1165-1286, April 1999.

[22] Sorkin, A., "Software bullet is sought to kill music piracy," *N.Y. Times*, p. 1, May 4, 2003.

[23] Sparrow, A., "Shoplifting has become epidemic," *The Daily Telegraph*, July 31, 2003.

[24] State v. Cooney, 320 S.C. 107, 463 S.E. 2d 597, 1995.

[25] "Streamcast networks opposes Congressman Howard Berman's proposal calling for posse of copyright vigilantes," at http://www.streamcastnetworks.com/6_25_02.html, June 25, 2002.

[26] Tenn. Code Ann., Sec. 40-7-112, 2004.