

Is the Sky Falling? Should the Government Prop It Up?

Fred von Lohmann
Senior Intellectual Property Attorney
Electronic Frontier Foundation
fred@eff.org

Is the Sky Falling?

- History Lessons

- “I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.”

- Jack Valenti, MPAA, 1982

Is the Sky Falling?

- History Lessons
 - Player piano.
 - Broadcast radio.
 - Color television.
 - Cable television.
 - VCR.
 - Audio cassette.
 - DAT.

Is the Sky Falling?

- History Lessons
 - Same reaction to digital technologies:
 - MP3 player (Diamond Rio)
 - P2P (Napster, Grokster, etc.)
 - PVR (ReplayTV)
 - DVD Jukebox (Kaleidescape)

Is the Sky Falling?

- The Music Industry Today
 - mainstream P2P is now 5 years old.
 - at least 20 million U.S. P2P users today.
 - more than 2 billion downloads every month.

Is the Sky Falling?

- The Music Industry Today
 - CD sales in Q1-Q3 2004 are up 6%.
 - Sony Music profitable Q1 2004; BMG has its most successful quarters ever.
 - investment analysts welcome downsizing of major labels.

Is the Sky Falling?

- The Music Industry Today
 - “According to an internal study done by one of the majors, between 2/3rds and 3/4ths of the drop in sales in America had nothing to do with internet piracy.”
 - The Economist, 28 Oct. 2004

Is the Sky Falling?

- The Music Industry Today
 - recession + tired format
 - Internet, DVDs and video games
 - Walmart-ification of music retailing
 - radio consolidation
 - reduced number of releases (-20%)
 - higher CD prices (+10% 1999-2003)

Is the Sky Falling?

- The Music Industry Today
 - Canadian experience
 - in six months after Canadian court declares P2P file-sharing legal, CD sales up 12.4%.
 - prior losses more than offset by increase in personal copying levies.

Is the Sky Falling?

- The Music Industry Today
 - Australian experience
 - 1998 CD sales = 39m.
 - 2003 CD sales = 50m.

Is the Sky Falling?

- The Music Industry Today
 - Music publishers.
 - “For example, for the past five years, EMI Music Publishing has maintained revenues and operating profits at about £400m and £100m respectively.”
 - Financial Times, 17 Nov. 2004

Is the Sky Falling?

- The artists?
 - “Among the musicians in our online survey, two-thirds say file-sharing poses a minor threat or no threat at all.”
 - Pew Internet & American Life Project, 5 Dec. 2004.

Is the Sky Falling?

- The Movie Industry Today
 - Record box office.
 - Record home video sales.
 - Record revenues.
 - Record profits.

Is the Sky Falling?

- Goal of copyright: to create an adequate (not maximum) incentive for the creation and distribution of creative works.
 - are incentives adequate?
 - if not...

What Can Government Do?

- Goal: increase incentives for creators.
- Alternative approaches:
 - More laws, lawyers, and lawsuits.
 - Market solutions.

More Laws, Lawyers, Lawsuits

- Suits against technology vendors.
 - targets: software, VCs, law firms.
- Suits against individuals.
 - 7000+ lawsuits.
- Draconian anti-innovation legislation.
 - 2002 Hollings Bill.
 - 2004 INDUCE Act.

More Laws, Lawyers, Lawsuits

- Results after 5 years?
 - victories against Napster, Aimster, Scour, Audiogalaxy, iMesh fail to stop P2P.
 - suggests that additional legislation will be ineffective.
 - suits against individuals fails to stop P2P.
 - no compensation secured for creators.

More Laws, Lawyers, Lawsuits

- Perhaps it is not a “more laws” problem?

Alternative Approaches

- Market responses.
 - Compete with free.
 - iTunes.
 - DVDs.

Alternative Approaches

- Market responses.
 - Collective licensing.
 - create collecting society(ies) to issue blanket licenses to P2P users.
 - EFF White Paper, “A Better Way Forward: Voluntary Collective Licensing of Music File Sharing” (google: EFF better way forward)