

## PIRATES OF THE DIGITAL MILLENNIUM

By John Gantz and Jack B. Rochester

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The evolution of the Internet into a mainstream resource has provided its users with access to whatever their hearts desire, often at no cost. Such free access has instilled in the minds of users that they are entitled to possess all that they may obtain, without regard to those from whom they are taking. In *Pirates of the Digital Millennium*, Gantz and Rochester survey the damages to our economy and society on a global scale, and challenges to the current state of copyright law, resulting from the growth and advancement of digital technology, which has created a pandemic of apathy among an entire population of users toward the interests of copyright owners.

Twenty years after their best-selling collaboration, *The Naked Computer*, Gantz and Rochester reunite to take the reader through a journey toward a greater understanding of digital piracy, and its impact. In light of the downfall of an early file-sharing service,<sup>1</sup> the subsequent evolution of services which are both easier to use and more discrete,<sup>2</sup> and

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<sup>1</sup> A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9<sup>th</sup> Cir. 2002) (affirming injunction imposed upon peer-to-peer file-sharing network to comply with notice and take down requirements of Digital Millennium Copyright Act by searching its database for copyrighted works which were the subject of notice by plaintiff copyright owners and removing those files).

<sup>2</sup> Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (9<sup>th</sup> Cir. 2004), *cert granted* 125 S.Ct. 686 (2004) (the design of defendants' software prevents them from gaining knowledge or controlling infringing activities of users, thus barring imposition of secondary liability for copyright infringement).

the copyright industries' attempt to retaliate against pirates,<sup>3</sup> the authors seek to set forth the history and evolution of copyright law and copyright piracy in a manner which will allow the reader to choose a side in what has become a global debate in economic, legal, cultural, and technological forums.

Gantz and Rochester divide their analysis into ten easy-to-read chapters, each with its own whimsical title, and many with charts outlining the information they cover. Each chapter opens with several quotations related to the issues addressed in that portion of the book, followed by a brief anecdote or commentary leading into the discussion. In their preface, the authors set forth the foundation of the digital piracy conflict: artists' interest in obtaining a "fair return" for their creative efforts, versus the public's desire to use new technology in whichever manner they choose.<sup>4</sup>

The authors begin by allowing the reader to question whether she is, in fact, a "pirate of the digital millennium," and then go through an extensive review of the history of piracy, and a guide to the evolution of copyright law, which is well within the lay reader's grasp. They then identify the many "camps" involved in the debate, summarize their arguments, and explain which camps they are in conflict with.

This thoughtful analysis is interrupted when the reader reaches Chapter 4, *Inside the Corporate Intellect: A Day at Microsoft*. While it is clear that the authors are attempting to highlight the amount of work that often goes into the production of a

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<sup>3</sup> Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc., (subpoena served upon internet service provider, pursuant to the Digital Millennium Copyright Act, to obtain the identity of subscriber engaged in unauthorized file sharing on a large scale, may not properly be served upon an internet service provider acting as a mere conduit for file sharing), *cert denied* 125 S.Ct. 309 (2004).

<sup>4</sup> Pirates of the Digital Millennium, at xxii.

copyrighted work (software in this instance), the content of this chapter is not central to the analysis conducted in the balance of the text. Moreover, it is merely ancillary to the authors' discussion of the frequency with which software is pirated.

Nevertheless, in the chapters that follow, the authors more effectively address the conflict which inspired their writing of this book. They express that the reason why downloading is so rampant among college students is because the cost of various media is far more than the average student is capable of spending.<sup>5</sup> In the course of their research for the book, the authors conducted a number of focus groups which revealed downloaders' attitudes toward digital piracy. The results of these studies led to the accurate conclusion that educating the general public about the illegality of unauthorized downloading is a difficult task to undertake.<sup>6</sup> One of the focus groups asked students to analyze an instance of online infringement according to various ethical models, revealing that under each model, arguments could be made for both the artist and the consumer.<sup>7</sup>

In the closing chapter, aptly titled, *Through the Fog: The Future of Intellectual Property*, the authors elucidate the lessons they have learned in the course of their research, and enumerate their suggestions for the copyright industries to effectively combat piracy. They suggest that the "appeal of piracy" must be minimized<sup>8</sup> in order for sellers of intellectual property to maintain relationships with their buyers. Consumers should be more willing to pay for media, and sellers should offer media at more

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<sup>5</sup> Id. at 190.

<sup>6</sup> Id. at 234-35.

<sup>7</sup> Pirates of the Digital Millennium, at 245-47.

<sup>8</sup> Id. at 259, 278.

accessible prices, such that each side will benefit.<sup>9</sup> They assert that Internet piracy is a global issue, and throughout the text highlight that Internet piracy is not the only form of piracy which is global.<sup>10</sup> Additionally, they recommend that younger downloaders should not be criminalized for their acts, but rather, that they should be properly educated so as to move from “self-gratification [...] into a social conscience stance.”<sup>11</sup> This debate has called “our own value system”<sup>12</sup> into question.

Nevertheless, the authors’ analysis does contain several shortcomings. For instance, they downplay the impact of digital piracy to the film industry.<sup>13</sup> They also raise the question of whether it is “the file sharer’s first and true *intention* to distribute a file to millions,”<sup>14</sup> but do not include a consideration of the various drafts of the Induce Act<sup>15</sup> recently presented to Congress on the issue of the owners of a peer-to-peer network intending to create a network of such mass infringement.

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<sup>9</sup> Id. at 261, 266.

<sup>10</sup> See Eg. Pirates of the Digital Millennium, at 24 (image of street vendors selling pirated software in Taiwan).

<sup>11</sup> Id. at 264.

<sup>12</sup> Id. at 267.

<sup>13</sup> Id. at 20, but see Edwin Meese III, When Sharing is Stealing, The Star Ledger, January 2, 2005. “Smith Barney estimates that if something is not done, movie industry losses will exceed a whopping \$5.4 billion by 2005.” Id.

<sup>14</sup> Pirates of the Digital Millennium, at 75.

<sup>15</sup> Introduced by Senator Orrin G. Hatch (R-Utah) on June 22, 2004 as the “Inducing Infringement of Copyrights Act of 2004,” S.2560 would amend 17 U.S.C. § 501, making a party who “intentionally induces” the infringement of copyrights liable as an infringer. See <http://thomas.loc.gov/cgi-bin/query/z?c108:S.2560>: (last visited March 28, 2005). The bill came to a halt at the end of the 108<sup>th</sup>

In spite of their shortcomings, Gantz and Rochester raise several interesting points. They explain that in lawsuits brought against individuals for infringement, the Recording Industry Association of America (hereinafter “RIAA”) is hypocritical. The RIAA argues that unlawful downloading results in financial harm to artists, but rather than distributing some portion of their recoveries to the artists, they use the settlement money to fund subsequent suits.<sup>16</sup>

Moreover, Gantz and Rochester do address the issue of the evolution of copyright law. They correctly explain that historically, copyright law has failed to stay apace with evolving technology, and that such failure is often what results in a “permanently gray area around intellectual property protection.”<sup>17</sup> They conclude that the digital piracy debate will surely continue.<sup>18</sup>

Gantz and Rochester’s attempt to cover the entire spectrum of issues raised by digital piracy—when a law reviewer can expound for fifty pages on only one aspect of the analysis—results in a mere survey of the competing politics raised by such activities. Yet, they do produce a very readable guide to the digital piracy debate. Their commentary is both timely and relevant. For anyone who wishes to gain an introductory understanding of digital piracy, *Pirates of the Digital Millennium* proves to be an excellent resource.

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Congress, as interested parties could not reach a consensus on its formulation. See Jesse Hiestand, Studios, Labels Take File-Sharing Fight to Supreme Court, Hollywood Reporter, October 9, 2004, available at [www.hollywoodreporter.com/thr/article\\_display.jsp?vnu\\_content\\_id=1000663290](http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000663290) (last visited: March 4, 2005).

<sup>16</sup> Pirates of the Digital Millennium, at 127.

<sup>17</sup> Id. at 262.

<sup>18</sup> Id. at 268.