

Promises to Keep: Technology, Law, and the Future of Entertainment

by William W. Fisher III

Stanford, California, Stanford University Press, 2004, Cloth: ISBN 0-8047-5013-0 (Price \$29.95) pp. 340.

Reviewed by Steven Sharobem
Journal of High Technology Law
Suffolk University Law School

In January of 1999, a freshman undergraduate student from Northeastern University in Boston, MA created a peer file-sharing program in an effort to give his friends better access to digital music.¹ Little did the student, Sean Fanning, realize then what would be the worldwide popularity of this program he and his friends called Napster. Little did he and his friends realize the legal, social and political firestorm they unleashed.

Napster's success initiated a number of conflicts throughout the music and video industry and even amongst the consumer base. The popularity of Napster enlightened the world as to the future of technology and digital music and video availability. The ease with which consumers could obtain copyrighted works for free instigated the ire of the Recording Industry Association of American (RIAA) who feared massive profit loss from the free exchange of music files.² The increase in music and video availability pitted artists and performers against one another in debates over copyright, monetary losses, and disrupting fan loyalty.³ Finally, Napster afforded many consumers throughout the world access to a library of music that normally stood outside of their economic reach at the risk

¹ H. Michael Drumm, *Life After Napster: Will Its Successors Share Its Fate?*, 5 TEX. REV. ENT. & SPORTS L. 157, 163 (2003) (discussing the origins of Napster).

² *Id.* at 164.

³ David Nelson, *Free the Music: Rethinking the Role of Copyright in an Age of Digital Distribution*, 78 S. CAL. L. REV. 559, 567-568 (2005).

of being subject to private litigation.⁴ Five years later, new programs including Napster have come and gone (or in some cases modified their services into pay-to-download programs), and the legal, social and political battles continue to rage on with few acceptable compromises on the horizon.

William Fisher's *Promises to Keep* is a remarkably comprehensive book that details the contours of digital media technology, the music and video industry, consumer interests and the legal wrangling that converged to create this battle. The book also goes one major step further: offering a possible solution in line with the legal landscape and private economic interests to create an efficient, profitable and open system of music and video download. William Fisher is in a unique opportunity to provide this perspective, currently serving as the Hale and Dorr Professor of Intellectual Property Law at Harvard Law School and serving as Director of the Berkman Center for Internet and Society. Particularly significant is that Mr. Fisher spent the last four years debating many of the principle arguments he raises in the book with intellectual property and copyright scholars, and executives and attorneys in the entertainment industry in an effort to frame and shape a cohesive and dynamic proposal for an alternative compensation system for digital media.⁵

The problem raised in the book is one that many readers will appreciate from personal experience. Consumer availability of free music and video downloads comes in a variety of sources and the popularity of these programs have been alleged to reduce the sale of CD's and to a lesser extent DVD's annually. Yet the legality of these efforts

⁴ Drumm, *supra* note 1, at 164.

⁵ WILLIAM FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT* ix (Stanford University Press 2004) (2004).

remain far from clear and some consumers have been subject to or threatened with litigation for their downloading efforts.⁶

Consumers are far from the only groups affected. Manufacturers face pressure to provide systems that will preserve the copyright of works. However, the costs and risks associated with heightened encryption and security services have reduced many new technologies' utility. Artists, particularly new artists seeking to establish a name for themselves both in music and video are divided between diminished profit as a result of free download and streaming and their search for an open market to develop a listening audience—one they might not have had if the consumer were required to purchase the music or video first.⁷

Free availability of music and video also has the added benefit to society of advanced creations, modifications of the originals that may be far more preferable to the consumer than the original. Otherwise costs would diminish these opportunities and thus hinder society's growth artistically. However, this is of little solace to the original copyright holder whose efforts would not be compensated under an unfettered downloading scheme. Despite the benefits, the diminishment of a copyright can only do more harm than good over time, discouraging artists from pursuing their talents should the profitability of such become moot.⁸

Compensations systems of the entertainment industry prior to the 1990's provided the breeding ground for the confusion and legal wrangling in the area of music and video

⁶ In re Charter Communications, Inc., Subpoena Enforcement Matter, 393 F.3d 771 (8th Cir. 2005) (denying the RIAA the subpoena requiring ISPs to provide the names of consumers using peer file sharing or P2Ps transmitting copyrighted songs).

⁷ N. Curien, et al., *Towards a New Business Model for the Music Industry: Accommodating Piracy Through Ancillary Products*, Laboratoire d'économetrie Conservatoire National de Arts et Metiers, 1, 4-5, Nov. 11, 2004 available at [http://www.cnam-econometrie.com/upload/curien-et-al\(1\).pdf](http://www.cnam-econometrie.com/upload/curien-et-al(1).pdf).

⁸ FISHER, *supra* note 5, at 35.

download over the last five years. Mr. Fisher details extensively the general breakdown regarding payouts from sales of music and videos at a granular level, focusing specifically on the contractual inequities facing performers and artists (particularly less established artists) versus the recording and movie production industry juggernaut. The focus on the compensation structure is intended to illustrate the parties most injured by current free downloading programs and to illustrate concerns associated with developing an alternative compensation structure with the advances of the Internet medium for music distribution.

Many artists, performers and composers saw little to any profit from their labor in the musical industry due to contracts that support the recording industry's overhead and administrative costs associated with production, distribution and marketing of an album.⁹ Movie and video artists and creators also allege to suffer from the "free download experience." The economic impacts have to date been minimal, but trends suggest increased concerns for movie production companies. The greatest impact to video and movie creators is coming in two forms. The first is alteration of videos by unsatisfied consumers, who then distribute the altered wares via the Internet (occasionally attempting to pass the work on for sale as the original).¹⁰ The second, and by far the largest, is mass recording via VCR and DVD recorders of movies and film by consumers for continuous personal use without paying for the rights.¹¹

⁹ See Curien, et al, *supra* note 2, at 7.

¹⁰ See e.g. *Mystery of Star Wars phantom edit*, BBC NEWS, Jun. 7, 2001 available at <http://news.bbc.co.uk/1/hi/entertainment/film/1375742.stm> (last visited Mar. 26, 2005) (discussing an anonymous Star Wars fan's edit of the *Phantom Menace* movie).

¹¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984) (discussing the alleged use of VCR's to tape programs and movies for future use).

Artists, performers and composers in the music industry today face the same financial inequities contractually that their predecessors have suffered for decades. This disparity in profitability from music sales exists despite the fact that the packaging and distribution of music through CD's has become far more efficient and cheaper for the recording studios. Fisher notes that these cost-savings are not passed on to the artists and performers, in fact the overhead costs have remained constant or increased over time thus furthering the evidence of the financial windfall experienced by the recording industry. Thus, the distribution of music via the Internet, whereby overhead expenses would be of little to no purpose raises the concerns of the RIAA in relation to reduced financial profits associated with these ancillary costs.¹²

Fisher discusses many of the advances in technology throughout the 1990's that threatened the RIAA's and, to a lesser extent, movie production studio's profit margin, leading to increased litigation, attempts to reduce the utility of the technology and legislative lobbying to preserve their position. As the quality of hardware technology has improved the mimicking of the original sound and video recording, the greater the efforts of the music and video industry to seek cessation of the development of the hardware absent security and encryption additions.

Beginning with Digital Audiotape Recorders (DAT)¹³, encryption circumvention devices¹⁴ (to prevent CD's from being copied), to Music Lockers¹⁵ (storage devices on-line to preserve music in MP3 form), Webcasting¹⁶ (streaming music over the Internet),

¹² See Stacey Lantagne, *The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack*, 18 HARV. J.L. & TECH. 269, 279-281 (2004)

¹³ FISHER, *supra* note 5, at 83.

¹⁴ *Id.* at 87.

¹⁵ *Id.* at 98.

¹⁶ *Id.* at 102.

CD Burning technology¹⁷, and finally to Centralized File Sharing (e.g. Napster)¹⁸ and Decentralized File Sharing (e.g. Gnutella)¹⁹ each method brought new challenges and new concerns not directly controlled by current legislation for the music entities. Digital recorders, DVD burners, FTP sites, and digital camcorders bring new challenges to the movie studios to control the artistic value of their films. Furthermore, manufacturers of hardware find themselves subject to litigation by the RIAA, movie studios and individual copyright holders in an effort to protect their interests. Struggles ensued regarding increased efficiency and cheaper technology opportunities to satisfy consumer demand and the need for music and video industry leaders, composers and artists to preserve their copyright, legal and financial status.

The sense that intellectual property rights should be afforded similar protections as property rights in light of these struggles has grown considerably over the last decade. The lobbying efforts of organizations like the RIAA that seek adoption of the principles of trespass, burglary and nuisance to copyright, would place the onus on the consumers not to invade the copyright, and manufacturers of technology to develop strong encryption methods to assist in making “trespassing” efforts more difficult. Correlating property law to the entertainment industry would create a benefit of enforcing bright lines of legality for all parties involved.

Fisher argues, however, the adaptation of property law in absolute creates more problems than resolutions. For example, current property law precedent fails to appreciate the inherent difficulty in enforcing the boundaries of abstract ideas. The precedent also threatens to reduce the growth of technology (since many manufacturers

¹⁷ *Id.* at 128.

¹⁸ *Id.* at 110.

¹⁹ *Id.* at 120.

and programmers may be unable to provide sufficient security to prevent users from trespassing). Finally, enforcement of property law principles and the diminished technology efficiencies may further anger a consumer market who will only seek entrepreneurial efforts to sidestep any legal edifice constructed in their abilities to access and enjoy music and video.

While Fisher seems prone to suggest that property rights application offers some utility to addressing concerns with video and music download, too many vices arise to advocate an absolute adoption. Rather, Fisher argues for a new adaptation that encourages government regulation in the music and video industry supplemented by an enforcement of property-like rights. Regulation derives from the principle that the government authorizes music and video creation and protections through copyright and patent law. This authorization then should not simply be protected through litigation in private channels, but through government resources where applicable.

In light of his belief in a system that incorporates property rights and government regulation, Fisher proposes a bifurcated program with a goal of utilitarianism. The program is designed to exploit the efficiencies of new technology thus maintaining and encouraging technological innovation. Simultaneously, Fisher seeks to acknowledge the growing popularity of the Internet, provide more direct financial incentive to all composers and artists while reducing the stronghold of the recording industry, and to assist consumers in obtaining music in a free and expansive way.

The heart of the proposal focuses on the concept of raising additional tax revenues, either through a modest increase in income tax or a newly formed tax on consumers for the entertainment industry. Instead of consumers paying individual

companies for each song or video downloaded, the tax revenue acts as a comprehensive payment source that will support a consumer's ability to download music and video at will. The tax collected would not only support the governmental administration of this program, but also directly compensate the artists for their creations.²⁰

Fisher offers an admittedly simplified and preliminary concept scheme of governmental control to administer the program. For example, each composer and artist would provide each song to a centralized regulatory office, the U.S. Copyright Office. The Copyright Office would supply each filer with a unique identifier for each song. Consumers could acquire the songs either through on-line companies maintaining streaming non-downloadable or downloadable Internet sites, whose gatekeepers would track how many times each song was either played or downloaded by tracking the unique identifier. On a monthly basis, these "tracked" statistics would be provided to the Copyright Office. The office, utilizing the data, would be charged with compensating each artist and composer directly from the tax revenues by offering a set monetary amount for each time the song was "hit". In addition, the Copyright office would compensate each on-line company for storage of the music materials based on the relative number of overall consumers accessing the song from their site.²¹

Because organizations like the RIAA and motion picture conglomerates would see decreased profits from CD sales and DVD sales through such a program, Fisher offers them a new monetary opportunity. These organizations can acquire and consolidate the download/streaming sites in an effort to acquire a share of the tax revenues for each song sold. However, these organizations would no longer be able to

²⁰ FISHER, *supra* note 5, at 216-223.

²¹ *Id.* at 224.

justify overhead cost expenses that reduce the composer's ability to benefit financially from their copyright, nor can they redistribute the music and video in other mediums and formats in a manner designed to circumvent the artists.²²

An assumption of the process requires that composers and artists, be it music or video, would file their works with the Copyright office by use of a form. The form would also request whether the composer "sampled" or utilized another copyright in the creation of the song much in the same way rap songs or "mashes", songs that combine two or more songs to create one melody, do today.²³ For purposes of video, the question would turn on whether the artist altered a previously copyrighted movie (perhaps changing an ending that they found unpalatable in the original work for example). The form would also ask at what percentage the originally copyrighted song or film made up the new work. The reasoning behind this request is so the Copyright office would not only compensate the creator of the newly created work, but also pay a percentage to the original copyright holder whose creation was utilized in accordance with the percentage referenced in the newly created work. Failure to credit the original copyright holder would not be enforced by the Copyright Office, but rather by the original copyright holder through private litigation utilizing forms of copyright law and property law standards.²⁴

Radio stations that currently obtain broad licenses to pay for the rights to play certain music would see little change in their procedures. The main difference turns on the requirement that the stations not only maintain play lists, but submit these play lists periodically to the Copyright Office in order for the copyright holder to receive

²² *Id.* at 242.

²³ *Id.* at 235-236.

²⁴ *Id.* at 241-242.

compensation. While Fisher does not discuss satellite radio stations that utilize private pay markets for consumers, the presumption is the compensation program would remain ultimately the same as it would for public radio. However, one must consider whether a consumer would be a victim of a “double tax” and whether this scheme might financially impact copyright holders’ compensation from satellite radio.

Ultimately, Fisher is quick to point out that this proposal is merely a first pass at the problem facing the entertainment industry and consumer today. The book does discuss, albeit not in great detail, consumer appetite to increase tax implications for the added benefit of receiving “full access” to music and video availability. The book also lightly grazes over the implication that some established artists may abhor this process since it removes their ability to contract for certain compensation that may today place them in a more favorable position than merely relying on their playability.²⁵

Overall, *Promises to Keep* is an exceptional effort to analyze the historical state of the entertainment industry in light of technological advances. Fisher’s proposal for an alternative compensation system is an excellent launching point for exploring alternative opportunities to refine the system overall. While some readers will find aspects of the proposal speculative and contrary to current bargaining positions, the efforts to seek a middle ground and assist those whose current bargaining position is weakest (the consumer and the composers, artists, and performers) should be lauded. Perhaps *Promises to Keep* is poised to change the lexicon of scholars in intellectual property and copyright law for years to come. It may very well be the beginning of a momentum to

²⁵ *Id.* at 241. Fisher also lightly discusses that many artists would find that their inability to control their works once distributed publicly to be a bad side-effect of this proposal. *Id.*

seek a common ground in the battle between consumer, technology, and the music and video industry.