The Breakdown of Copyright in the Information Age:
or, Why Johnny Can’t Use Fairly

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Abstract:
As copyright law struggles to adapt itself to the Information Age it has become more general, more cumbersome and more easily infringed upon. It is rapidly approaching a point where copyright law will be so general and far reaching, and fair use so significantly eroded and unclear, that the use or viewing of basically any useful electronic material or media without the express permission of its creator will be a crime on the part of the user.

Introduction:
Ever since the prosecution of Napster the recording industry has championed a battle of ever-heightening legal pitch against illegal uses of copyrighted electronic material. The panic of distribution companies over file sharing reached a fever pitch during which strong legislation was drafted to protect copyrighted material in an electronic environment. In sharpening their swords and widening their swath to strike deeper into the crowds of their enemies, distribution companies have begun striking their allies, law-abiding consumers, in their frenzy to destroy the evil infringers. Distribution companies and copyright holders have begun to even be wounded by their own weapons, by crafting laws so strong that they prevent research intended to make copyrighted information even more secure.

Extreme extensions of copyright law as well as the highly subjective and easily reinterpreted guidelines for fair use, which are the only legal tools to demonstrate that copyright has not been infringed upon, make for an environment where copyright becomes more and more easily infringed upon and fair use ever more difficult to prove. These laws may make sense when dealing with copyrighted physical items, however they quickly become cumbersome and partially (if not entirely) nonsensical at best when dealing with items in the electronic realm. Due to the consternation of multiple businesses and a switch in the perception of what copyright is, copyright laws have been pushed forward that threaten to give owners of copyrighted electronic information total and utter control of their product even after it has been sold to the consumer, even to the point of being able to control when and how the consumer can use their product to the exclusion of fair use if not personal privacy.

The paper is organized as follows; first an explanation of the major copyright laws and treaties in force in the United States today as well as fair use, second a discussion of the character of electronic media in relation to copyright, third why and how recent laws and treaties break fair use in two examples, fourth a summary of how fair use is almost impossible to exercise, fifth a discussion of the proponents and causes for this legislation, and finally an overall conclusion.
1. The Lay of the Land

Copyright began as a legal artifact carried over from England, as did much of U.S. law. England sought to legislate the creation of printed works with the rapid popularity and relative ease of use of the printing press. This materialized as the Licensing Act in 1662, and later the Statute of Anne in 1710. [1] U.S. copyright was established in 1787 with the drafting of the U.S. Constitution, which gave Congress a mandate to “‘...promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.’” [1] Copyright law stayed much the same until the latter half of the 19th century, at which point the nation’s nascent music industry required further legislation. [1] When Copyright law again saw a major amendment in 1909 to protect all works that could be said to have ‘authorship’, Congress was already finding it a “‘...serious and difficult task to combine the protection of the composer with the protection of the public...’”. [1] In other words, it was very difficult to make sure that authors and distributors could not create a most ‘oppressive of monopolies’ out of the rights Congress had granted them for their own protection almost 100 years ago, over time technology would make things even more difficult. [1]

Copyright stayed as it was for almost 70 years. To smooth entry into the Berne Convention, an international standard copyright treaty, the U.S. substantively changed copyright law in 1976, namely not requiring works to registered or even published in order to receive the full force of copyright protection. [2] This made any creative work, once put in some fixed medium, automatically inviolate under copyright law. This changed the character of copyright significantly, from a way to protect commercially-viable, published works, to any and all creative works from the moment of their inception.

In order to partially codify consumer’s rights in using copyrighted material a small section of copyright law exists to give courts a set of criteria by which they can determine whether a use is a violation or not. These criteria make up fair use and are listed in their entirely below:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

(US Code of Law, Title 17 – Section 107) [3]
The criteria are highly subjective. Depending on how much of a work is considered substantial, how much a particular action’s effect is purported to be, how the nature of the work seems to bear on its use are all terms that beg interpretation and personal judgment calls with little or no guidance. A sympathetic court could grant wide liberties, while an antagonistic one could pass sentence on the most apparently innocent of uses. Imperfect and subjective as it was, fair use strongly shaped the development of technology. For instance, in 1984 Sony Corp. was sued by Universal City Studios, Inc. (UCS) for marketing the VCR. [11] UCS saw its role as a content producer and distributor being threatened now that consumers could videotape a single presentation and play it back at their leisure. [11] The courts ruled in favor of Sony in this instance since there existed ‘substantial non-infringing uses’ of the technology. [11] Indeed, it was judged more important that video cassette technology had many non-infringing uses than the fact that it could be used in an infringing manner. It would not be long before this view would be reversed.

Thirteen years later, due to the meteoric rise in popularity of the Internet a flurry of bills were passed to protect content distributors and authors from file sharing. These include the No Electronic Theft Act (NETA) in 1997 and the Digital Millennium Copyright Act (DMCA) in 1998, which were meant to fulfill the U.S.’s obligation to the World Intellectual Property Organization treaty signed in 1996, plus some extra provisions. [14] The DCMA is a rather hefty piece of legislation, with its agreement to the terms of the WIPO treaty it strictly and unequivocally states that, “Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.” [31] The DMCA/WIPO legislation also allows motion picture media to be rented only at the authorization of its authors only if “…such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.” [33] Most troubling of all, the DMCA also forbids the breaking of any type of media encryption. [H.R.2281-S.402][32] Although it certainly sounds well and good, the DMCA’s provisions actually systematically prohibit rights available under fair use, which are in and of themselves, difficult to define.

2. Atoms or Bits?

To borrow a distinction made by Professor Lawrence Krauss in his book, The Physics of Star Trek when speaking of the transporter device, there is a large difference between atoms and bits. [35] Atoms are single, indivisible quanta of some object or phenomena. For instance, the book, The Physics of Star Trek as one entire book can be considered an atom. If any pages, words, or letters were in any way altered or removed, the book would instantly cease to be The Physics of Star Trek. It would be something else, although very much like The Physics of Star Trek, but not the same. The entire book is at once and entirely, an atom. The book is also entirely self-contained. It is a single physical object that can be bought, sold, reasoned about and owned. This is the realm copyright law and fair use had been written for and has been functioning in for hundreds of years.

In a market made up of atoms it is entirely reasonable to forbid any and all copying since it is entirely unnecessary but for a few exceptions. The copyright provision of ‘first sale’ gives the owner of a work’s copyright the exclusive monopoly on the first
sale of any copy of their work, after that the consumer may dispose of the work as they wish. [37] This assures that once the author/distributor has charged for the work they can no longer control that copy, although the consumer does not have any rights to the creative content, the consumer does have rights to use *that copy* as they see fit, specifically they can destroy it, resell it, lend it or anything in between. What they do not have the right to do is make more of their copy.

It is easy to reason about atoms this way. The author/distributor has the right to the ‘first sale’ of any copy of their product, so they should be paid for every instance of that product that exists. If a consumer makes a copy of that product, then more copies will exist, but no payment was received, so copyright law was quite obviously violated. Atoms lend themselves to such an intuitive interpretation. If you copy a book, then one more book exists, and its original creators in effect just lost the cost of the copy that was made without their permission.

2.1 Magnetic Tape vs Copyright

Technology began to alter this modular, atomic view of creative works, just as technology had done hundreds of years ago when actual molecular atoms were thought to be solid, unbreakable, the tiniest bits of matter that could exist. Magnetic tape made the ‘solid’ creative works a bit amorphous. Audio cassettes and later video cassettes could be used to record any media, could be rewritten, and the public had them. Unlike the set, unchanging atoms of records and TV programming schedules, an audio or video tape could preserve any work its owner cared to record. The tape’s owner could then replay the work at any time. The issue of the legality of VCRs was decided as mentioned above, but these media obviously pushed fair use to its limits. If you examine the four criteria that define fair use it is apparent that audio and video cassettes look pretty bad. They can be used to duplicate commercial works (rule 1), of limited, licensed, creative nature (rule 2) in their entirety (rule 3)! The majority of the fair use criteria actually paint a very dismal picture of magnetic tape, however the fourth guideline is what kept it alive, namely that the effect of copying the work on to magnetic tape can be minimal to the point of nonexistence. If a movie on TV is taped, and then played back later for someone who was not able to see it earlier, then there is little lost value. Since the television is basically a performance medium, the performance was indeed copied, but it was only viewed once. This argument of ‘timeshifting’ of television programs was the lynchpin of Sony’s defense against UCS. [11] Works could be transformed into a more ‘liquid’ state, namely they *could* be copied and used again later without cheating the author or distributor. Works were no longer entirely atomic, as work could be separated from its representation (TV signal to VCR tape and back again), although the information still needed to be held in atomic, physical objects (one actual cassette) that could be legislated.

2.2 Enter the Bit

Computers finished the transformation. One fact that is a mainstay of computability and complexity theory but may not be widely known is that absolutely anything can be represented as bits. The pixels on a television screen, the letters in a book, the normalized sine wave difference per unit time of sound with some margin of error, basically anything that can be perceived can be set, in some form, into bits. Bits are
the simplest form of information possible. There are only two states any one bit can hold, on or off, yes or no; by stringing together more and more bits, exponentially more complex things can be represented. For example anything you see or have seen on your or any computer was only a sequence of bits. The thing that makes bits so powerful is their simplicity, but how would you copyright this? A string of zeros and ones could be anything, a game, my tax return, this paper, or it could be background radiation, random numbers, or any type of gibberish imaginable, the separation between the two is interpretation. At some point something needs to interpret the bits and form something usable. The difficulty is in legislating a sequence of ones and zeros that could be gibberish. Any digitized media exists as bits, and it would be very difficult for anyone to copyright ‘on’ or ‘off’, the royalties to be paid by light switch manufacturers alone would be enormous.

Individual bits do not make up an entire work however, so entire bit sequences would need to be copyrighted. The difficulty is then interpretation. Any bit sequence can have all the bits flipped to the opposite state. At that point the sequence is entirely different. I could then instruct my bit-interpreting program to invert all the bits it receives, in effect recreating the copyrighted work without actually creating the forbidden bit sequence. This is only one scheme, but any sequence of bits can be made unrecognizable, and then reinterpreted correctly. Even worse, it is entirely possible that while playing a game over the Internet, the bit sequence that my machine creates, if read by a certain media player, would actually be the movie “The Sound of Music”. While the chance of that happening is remote in the extreme, it is possible. It is also possible that one single string of bits could be interpreted by five different programs, and be a different thing for each. This would be akin to giving someone the book War and Peace, but when they read it, the words have magically transformed into the text of Gone with the Wind. Bits and strings of bits have no intrinsic value, so sequences of bits can not be copyrighted any more than every work put on paper can be copyrighted by one person just because they are on paper. Bits are a way to represent data, it is the interpretation that is important. Now that we have computers to interpret bits for us, information and creative works are entirely fluid. Representation (bits) is completely and utterly separated from the creative content. The only way to get a hold on something to copyright is to go a step higher, to legislate interpretation of bits, of information, which is the goal of the WIPO and consequently the DMCA, although the manner in which it was done simultaneously destroys fair use.

3. Down the Rabbit Hole

Current legislation forms a curious patchwork of interweaving regulations relating to electronic media, often at cross purposes. Individuals who study these laws professionally have drawn entirely different conclusions about what these laws mean, what they allow and what they prohibit. Indeed, many U.S. courts have had the same difficulty. In order to demonstrate how maddeningly complex current legislation regarding fair use has become, I will consider two discrete examples. First, is making MP3s illegal?
3.1 Round and Round They Go

People have been duplicating music from records to magnetic tape and have been making ‘mix tapes’ ever since magnetic tape cassettes were marketed. This could be considered ‘fair use’ by the same token as time-shifting with a VCR, namely that the fourth factor of fair use has been repeatedly judged to outweigh the others. Many people also aver that making MP3s of music is entirely legal, to wit two of my classmates, one a Masters student and the other a Doctoral student in Computer Science both insist it is perfectly legal to do so. [39, 43] Robin D. Gross, a Staff Attorney with the EFF (Electronic Frontier Foundation) and an IP Justice Executive Director for the examination of the European Union’s White Paper on the IP Enforcement Directive also states that fair use allows “…people to make a copy of copyrighted music for their personal use…”, and that “[p]ersonal use also permits music fans to make "mix tapes" or compilations of their favorite songs from their own personal music collection or the radio for their own personal enjoyment…” [39]. Since it was apparently legal to make magnetic tape copies of records and magnetic tapes, and make ‘mix tapes’, it would be reasonable to assume that making MP3s of any of this media would be legal as well. The fact, however, is stranger than fiction.

Firstly, MP3s are not exact copies of the music, they are compressions. Large amounts of data, in many cases beyond the human frequency and resolution range, are eliminated in the creation of an MP3. This makes an MP3 not a copy, but a derivative work, since the MP3 was intentionally created in such a way (not by limitation of the recording device or medium) that it contains a substantial amount of the original but is not in fact a duplication of the original. This is bad news for MP3 makers, since the “…owner of copyright under this title has the exclusive rights … to reproduce the copyrighted work in copies or phonorecords; to prepare derivative works based upon the copyrighted work…”, and in a double entente, the DMCA plainly states that “Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.” [USC Title 17, CH1, S106][48][31]

3.2 Where They Stop

There is the smallest glimmer of hope yet for consumers to use MP3s just like they used to use audio tapes, namely factor four of fair use. As explained above, the fourth clause has in the past been weighed more heavily than the others combined. So, could the simple act of dubbing music into MP3s actually damage the commercial viability of a musical album? Actually, it could be reasoned so. If consumers can actually compress their own audio files, then there would be no, or lessened, demand for distributors to sell their music on CDs in MP3 format. Distributors could, for example, offer especially-compilated ‘box sets’ containing hours of music on a single CD, but if consumers could also acquire hours of music on a single disc, this would undermine distributors’ efforts to market the music on multiple discs. If consumers can already do this for themselves though, there is little added value to the approach for distributors, in effect destroying an entire market before it begins and significantly impairing the commercial viability of MP3-based marketing schemes. So, even without selling, sharing or in any way distributing MP3s, it could be viewed that the mere act of creating highly-compressed representation of commercial music could make its previous method of
encoding, whether CD or magnetic tape, less valuable and marketable. There hasn’t been a court decision on this yet though.

The one possible counterpoint to this is the Audio Home Recording Act, passed in 1992. This Act may be responsible for large amounts of further confusion about fair use. The Home Recording Rights Coalition partially sums up section 1008 of the Act as follows: “No copyright infringement lawsuit may be brought based on consumers' noncommercial use of digital or analog recording devices to copy prerecorded music. Amen” [45] This is a very optimistic reading of the law, which may in fact be incorrect. The text of the law reads:

“No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.”
[USC Title 17, Ch.10, Sch.B, S.1008][47]

This law is actually relatively vacuous; it depends solely on the reader’s interpretation of what a ‘digital music recording’ is. Reading this without any contextual framing would lead most people to believe that this is implicit permission by Congress for private citizens to copy their brains out. Congress has, however, provided that selfsame contextual framing:

(5) (A) A “digital musical recording” is a material object—
            (i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and

            (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.
[USC Title.17, Ch.10, Sch.A, S.1001][49]

From this it is apparent that a ‘digital music recording’ is most likely not an MP3, since it is referred to as a material object, but it also is not necessarily the prerecorded music of your favorite band. Read literally, this exemption only covers the act of recording to a physical object (CD, magnetic tape) some sound. Although the language and title of this Act are highly suggestive, it only exempts citizens from litigation based on the act of using a recording device to record sound, not the content that is being recorded. Although this may sound relatively ridiculous, this law is apparently meant to avoid another suit like Sony v. USC, in which the legality of a certain type recording mechanism is tried. The Audio Home Recording Act only protects a private citizen’s capability to use audio recording equipment, it makes no assertions whatsoever about computer-based digital audio formats, like MP3, or about rights to copy copyrighted music.

The DMCA and WIPO then both strongly rule against the fair use capabilities of consumers in favor of distributors while suggestively-worded legislation exists that does not in fact address fair use issues and is often read as allowing copying of copyrighted
music, while conventional wisdom is directly opposed to the letter of the law as far as
dubbing music to an MP3 format is concerned making it all but impossible for a user to
determine their actual rights in such a situation. The situation looks grim, yet no court has
yet tried the creation of MP3s and there are no clear boundaries on the all-important
fourth criteria of fair use. Users are then left in an intolerable grey zone “...because the
law on fair use is murky and no real definition has ever emerged.” [39] If the experts
don’t know if it legal, average users have little hope.

3.3 DVDs

Ever since Sony v USC and the emergence of DVDs consumers would certainly
be logical to presume that they could treat DVDs just as they treated VHS tapes,
specifically, they could copy them for home and personal use. The law is much clearer on
this point however than on the issue of MP3s, any exercise of a consumer’s fair use rights
on a DVD is strictly forbidden.

The DMCA actually does not forbid this practice directly, but it effectively
removes a consumer’s ability to exercise their fair usage rights to duplicate DVDs. In
order to protect DVDs from casual copying, DVDs can be encrypted with the Content
Scrambling System, or CSS. [19] CSS makes electronic copies of DVDs basically
unusable. [19] There is an easy solution though, DeCSS. DeCSS is a tool that inserts
itself into a useful driver, like video, and captures the stream of bits after the CD-Rom
does the actual decryption. [52] The stream can then be written out to a DVD, making a
copy. The current legislation doesn’t find fault with the idea of actually copying a DVD,
but outlaws the tools and the process of doing so. The DMCA specifically forbids this, as
is clearly stated in Section 1201, “[n]o person shall circumvent a technological measure
that effectively controls access to a work protected under this title.” [32, 36] This is in
direct opposition to the following statement made by the DMCA only a few lines further
down; “[n]othing in this section [1201] shall affect rights, remedies, limitations, or
defenses to copyright infringement, including fair use, under this title.” [32, 36] If it is
illegal to break copyright protection it should be legal to copy disks that are not protected,
since VHS tapes aren’t protected and those certainly can be copied, right?

This is also untrue, as it is also outlawed by the DMCA as well. February of this
year the MPAA’s lawsuit against 321 Studios was upheld. [19] 321 Studios sold a
product that would allow a user to copy a DVD to their computer’s hard drive or to a
blank DVD. [19] In many cases DVDs are protected by CSS and the copies made are
entirely unusable. [19] 321 Studios further modified their program for the MPAA so that
it would not make copies of DVDs protected by CSS and had focused on the clause in the
DMCA mentioned immediately above, supposedly protecting fair use. [19] The MPAA’s
suit was upheld though as Judge Susan Illson took the opposite view, writing in her
decision that, “‘It is the technology itself at issue, not the uses to which the copyrighted
material may be put.’” [19] Indeed, the perception of technology versus copyright has
come full circle from the Sony v USC suit which decided the fate of VCRs, since now the
mere presence of the technological capability was at fault, not the uses to which it can be put.
3.4 DVD Traffic?

In fact, current legal attitudes are such that it is considered illegal to even communicate the existence of programs that can circumvent DVD encryption, as was determined in Universal v Reimerdes. [53] The court interpreted the actions of the editors of “2600 magazine” as ‘trafficking’ in encryption breaking mechanisms since they offered hypertext links to DeCSS code, and then later only hypertext links to pages that contained links to DeCSS code. [53] The members of the court conceded that, “… [a]s computer code--whether source or object--is a means of expressing ideas, the First Amendment must be considered before its dissemination may be prohibited or regulated.” [53] They however held the DMCA as stronger in this regard than the First Amendment in that it, “…furthers an important governmental interest--the protection of copyrighted works stored on digital media from the vastly expanded risk of piracy in this electronic age.” [53]

The specific elements of significance quoted are the Congress’ Constitutional mandate to protect copyrighted information, and the ‘significance to our economy of trade in copyrighted materials’. [53] The decision goes on to state that the Supreme Court has upheld the opinion that, “…copyright protection itself is the ‘engine of free expression’” and that “the prohibition of trafficking in means that would circumvent controls limiting access to unprotected materials or to copyrighted materials for noninfringing purposes--broader than is necessary to accomplish Congress' goals of preventing infringement and promoting the availability of content in digital form.” [53] Not once however is it mentioned in the decision the effects that this has on the provision of the DMCA that allows for ‘noninfringing purposes’, namely fair use, which can not be exercised if DVDs can not be duplicated for personal use that does not harm the commercial viability of a work. [53, 36] In essence, much like the decision of Judge Susan Illson, the existence of the technology itself apparently undermines copyright and does not allow for any fair uses, and being so virulently illegal, it is not even allowed that anyone can even make reference to it. This is apparently the case, although if I choose to purchase my movie on a VHS tape instead of on a DVD, none of the above conditions apply. The law, while carefully made and legislated, is contradictory in the extreme since a change of format, not of content, is all that is required to make one use of copyrighted material perfectly legal under fair, while another is a heinous crime, with legislation to make it a felony being examined in Congress now. [53][H.R.4077.RDS]

4. Through the Looking Glass

Due to confused legislation and distributors’ panic we now have an environment where technology itself is being ruled illegal based on the possibility that it may be used for illicit purposes, a situation which violates the fair use provisions made in the very same legislation that outlaws it. According to current laws the media that information is on is more important than the actual content! As discussed above, it is entirely legal to make a copy of a store-bought movie on VHS videotape for personal use, however it is at least thrice illegal to make a copy of the same movie if it is on a DVD. This is so since it is illegal to; duplicate a DVD at all, decrypt a DVD or circumvent its copy protection, and to traffic in any program that would allow you to do so. Fair use is a vital part of U.S. law that balances the desires of media distributors with those of the populace they serve, so isn’t any legislation that breaks fair use fundamentally broken? “‘A copyright is
a right to own and exploit your work” said DMCA author Lehman, and “...the fundamental principle behind copyright law is the protection of the copyright holder, not the protection of the public.” [25] By the admission of its own author, the DMCA is written to allow authors to control their work even after they released it to a consumer, in direct contravention of the notion of fair use and first sale provisions in U.S. copyright law, and that the DMCA is structured to cater to content distributors at the expense of consumers’ rights.

5. The Mad Queen’s Court
This strange disjunction in legal behavior can be explained by the acute technophobia of media distribution companies due to file sharing. The Piracy Deterrence and Education Act of 2004 specifies that Congress found that, “[e]ach month, on average, over 2,300,000,000 digital-media files are transferred among users of peer-to-peer systems.” [28] This certainly sounds bad, but is the effect of all this file sharing really so bad as to warrant such extreme legislation? Felix Oberholzer of Harvard Business School, and Koleman Strumpf of UNC Chapel Hill recently did a study and released it in March of 2004 showing that this may not actually be the case. [55] They found that in general file sharing of music is restricted to only the most popular songs of that week, and by monitoring a large slice of the Internet, the Billboard statistics, and total revenues for the songs, they were able to conclude that the songs’ distributors lost approximately 3% of their revenues to file sharing during the period of their study. [55] The RIAA expressed supreme disbelief in the study, with RIAA Realignment Expert Amy Weiss ridiculing the study, stating it was “incomprehensible” and that the sample size was in fact too small to be indicative of all file sharing activity. [56] This is also the same person though that stated, when asked to explain conflicting reports about the number of CD burners put out of commission in a ‘raid’, “…we need to put these operations in perspective based on burning capacity and output, not the number of physical slots for the discs, since they burn 4x burners - it is roughly 4xs the numbers of burners.” [56]

So who is right… is the destruction of fair use really necessary? “The single-bullet theory employed by the R.I.A.A. has always been considered by anyone with even a modicum of economic knowledge to be pretty ambitious as spin,” said Joe Fleischer, head of sales and marketing for Big Champagne, “in reference to the RIAA’s claim that file sharing is responsible for all music distributors’ lost profits. Big Champagne is a “...technology-driven market research and marketing consulting firm, specializing in peer-to-peer (P2P) technology.” It isn’t just the distributors being hurt by file sharing, musicians loathe it too, right? December 6th of this year, the study “Artists, Musicians and the Internet”, “…found that only 28 percent of all artists surveyed consider file sharing to be a major threat to creative industries -- contradicting the official stance of the lobbying arm of the record companies. About 43 percent agree that ‘file-sharing services aren't really bad for artists, since they help to promote and distribute an artist's work to a broad audience.’” [24] Mary Madden, the primary author of the study and Research Specialist with the PEW Internet & American Life Project said that Washington’s opinions make it seem like the Internet is the most disastrous thing to ever happen to musicians, however she found that overwhelmingly musicians seemed to think that file sharing wasn’t all that bad, and that the creative use of the Internet in general helped them a great deal. [24]
6. Conclusion
Having come full circle from the Sony v USC decision that allowed VCRs to exist, current lawmakers are outlawing technology that might possibly have infringing uses, effectively destroying fair use and oftentimes ignoring provisions in the law that provide for fair use. Current laws only outlaw technology, not the actual process of copying all copyrighted works. Fair use still holds with audio and video cassettes, however is has been systematically outlawed when dealing with MP3s and DVDs, and ambiguous, oddly-worded documentation confuses multiple people into thinking the opposite, making fair use a legal minefield. The need to do this is apparently only recognized by content distributors and their regulatory agencies, since musicians, academics, and independent P2P and Internet Culture research foundations have found otherwise. It is very difficult to decide how to legislate digital content. As discussed above, copyrighted content can only even be identified at application levels, however muddying the waters by throwing stacks of legislation at a problem that mounting evidence continues to show does not exist and abrogating the vanishingly few rights that consumers have when dealing with copyrighted material, does not seem to be a wise course of action. Fair use wasn’t broken, but now we do have to fix it.
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