

LIGHTS, CAMERA, LAWSUIT

A.J. Bedel¹

Duke University School of Law

aj.bedel@law.duke.edu

As the speed of Internet access improves, the film industry will need to explore its options for eliminating the downloading of digital movie files. After examining the successes and failures of the music industry in its battle with peer-to-peer networks, the film industry has begun to follow its predecessor. However, the nature of film as an entertainment medium is quite different than that of music. As a result, the film industry could implement creative solutions to this problem that would not have been available to the music industry. A recent study shows that most films available on the Internet have been leaked by industry insiders. By implementing an increasingly publicized use of trade secret litigation, the film industry could take a tough and effective stance against the digital dragon.

INTRODUCTION

¶1 In the summer of 2003, the music industry sent a shockwave through the entertainment world with its unprecedented legal attack against the downloading of copyrighted material from the Internet.² After the destruction of Napster, the industry felt that it could replace the free program for downloading music with a pay-to-download model.³ This has proven unsuccessful because, like the mythical Greek hydra, the music industry's elimination of Napster has caused even more free file download options to develop.⁴ In a move that could be part legal strategy and part desperation, the music industry has recently resorted to filing lawsuits against individual users of networks for downloading music.⁵ Suddenly, lawsuits are being distributed "randomly" to those downloading copyrighted music; it seems that the music industry is making defendants out of all walks of American life, from college students⁶ to retired schoolteachers.⁷

¶2 While the music industry wages this battle, the film industry has watched and learned. On November 11, 2002, the film industry engaged in its first offensive action by providing consumers with a way to access

¹ A.J. Bedel is a second-year law student at Duke University School of Law and received his B.A. in Psychology from Boston College in 2002. Special thanks to Kathryn Gilmore, my family, Jessica Bohrer, and Prof. David Lange.

² Nick Wingfield & Ethan Smith, *Record Industry Files Suit Against 261 Music Uploaders; Move May Alienate Customers*, WALL ST. J., Sept. 9, 2003, at B1.

³ Johnnie L. Roberts, *Pay 2 Play; There's a Gold Rush in the Fledgling Market for Downloadable Music. Now Comes the Test: How Big Will the Fan Club Be?*, NEWSWEEK, Oct. 13, 2003, at 47.

⁴ Steve Lohr, *Is the Online Piracy Battle Doomed?*, INT'L HERALD TRIB., Sept. 16, 2003, at 1 (listing Kazaa, Morpheus, Grokster and other online services as taking Napster's place).

⁵ Wingfield, *supra* note 2, at B1.

⁶ Jefferson Graham et al., *Hammering Away at Privacy*, USA TODAY, Sept. 11, 2003, at D1.

⁷ Jefferson Graham, *Music Industry Weighs its Options: Lawmakers Want to Hear Proposals for Fighting Piracy Without Lawsuits*, USA TODAY, Sept. 29, 2003, at D6.

films quickly and allow them to be viewed on a computer.⁸ Five of the biggest film studios came together to create Movielink, a service which allows subscribers to rent films online.⁹ When a user chooses a film, he or she can begin viewing the film at any point in the next 30 days.¹⁰ Once the film is started, it can be played an unlimited number of times over the next 24 hours.¹¹ Although the Movielink experiment is less than a year old, one cannot help but compare this attempt by the film industry to capitalize from the offering of films online to that of the music industry's attempt to turn Napster into a profitable enterprise.¹² Based on the music industry's limited success with defeating the downloading of digital files, the last thing the movie studios would want to do is follow this example.

¶3 To this end, the film industry, led by the Motion Picture Association of America (MPAA), must stop following in the footsteps of the music industry and should instead forge its own path towards successfully defeating this increasing business threat. The movie industry must focus on how movies as an art form are inherently different from music and use those differences to develop creative solutions to the problem of digital piracy. One promising avenue of recourse for the film industry is the use of trade secret litigation to prosecute the source of pirated movies: industry insiders.

MOVIES VERSUS MUSIC

¶4 The film industry, as represented by the MPAA, currently claims to lose 3 billion dollars every year as a result of piracy.¹³ Film as a medium lends itself to more flexibility and therefore a better method with which to address the digital piracy problem than the music industry, which has lost 2.4 billion dollars this year.¹⁴ Although a few film production companies have participated as plaintiffs in some of the attacks against the music file sharing programs,¹⁵ the film industry as a whole has remained relatively inactive. The main reason for this is that the film latter has not felt as threatened as the music industry because of the current state of technology. A typical music file can be downloaded on a modem in approximately 20 minutes or 3 minutes through broadband cable.¹⁶ An entire film takes around 24 hours to download by modem or 3 to 4 hours on broadband cable.¹⁷ Because of this large discrepancy between the lengths of time required for download, the film industry has not felt the impact of a digital threat. However, that is changing.

⁸Anna Wilde Mathews, *Hollywood Studios Will Launch Paid Service for Online Movies*, WALL ST. J., Nov. 11, 2002, at B7.

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²See Roberts, *supra* note 3, at 47.

¹³Motion Picture Association of America's Statement on Anti-Piracy, at <http://www.mpaa.org/anti-piracy/index.htm>.

¹⁴*Study: Music Piracy Has 5 Years of Growth*, CHICAGO TRIB., Sept. 23, 2003.

¹⁵See *Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D.Cal. 2003); *but see* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

¹⁶Ted Greenwald, *Decoding the Codecs*, WIRED MAG., Aug. 1999.

As technology improves, the speed of home Internet access will be faster and the ability of the large movie files to be compressed into smaller files will increase as well. The digital threat is looming on the horizon and the film industry must take affirmative action to protect itself against piracy.

¶5 Additionally, the manner in which a typical consumer might experience the film affects the potential solutions to the piracy problem. Someone who possesses an MP3 might wish to listen to the song repeatedly or burn it onto a CD for even more play time in the car or on a personal walkman, etc. However, a film is different, as many argue that the experience of watching a movie in a theater is an attraction that no amount of digital pirating could ever replace.¹⁸ Also, the desire of repeat viewing of a movie does not compare with that of a song. In fact, very few patrons of movie theaters will view a movie an additional time.¹⁹ Finally, a key difference between film and music is the quality that digital pirating provides. Currently, an MP3 can have quality equal to that of a track found on the original CD;²⁰ however, a pirated film rarely has the same quality as a DVD.

¶6 Because of the differences inherent in the digital pirating of music and film, movie studios find themselves in a much more advantageous position from which to defend their products and profits from pirating attack. A solution such as Movielink would have been impossible for the music industry to implement, because the limitation of only listening to a song for 24 hours without copying it to a CD does not compare with a pirated copy that allows for unlimited uses. Although Movielink and other solutions of this type from the film industry would have certain inherent restrictions, these restrictions are more compatible with the practical desires of the consumer. However, this is a solution that is a long way off, because the movie studios must strike a balance between pleasing the customer at a price that falls within their profit margins. Until that balance is reached, the film industry can not afford a piracy price tag of three billion dollars a year; it must take immediate action.

“THE INSIDER”

¶7 In order to prevent piracy, the film industry could target the consumer of the pirated material, the source of the pirated material, or the middle-man. (For comparison purposes, when the music industry and, to a lesser extent, the film industry target services such as Napster,²¹ Kazaa,²² and Grokster,²³ they are attacking the middle-man of the pirating process.) Recent lawsuits have turned the attack against consumers as the

¹⁷ *Id.*

¹⁸ Jonathan Greenblatt, *How to curb digital piracy*, CNET NEWS.COM, July 3, 2002, at http://news.com.com/2010-1071_3-941412.html.

¹⁹ Robert Oberwetter, *Building Blockbuster Business*, OR/MS TODAY, June 2001, at <http://www.lionhrtpub.com/orms/orms-6-01/oberwetter.html>.

²⁰ Greenwald, *supra* note 16.

²¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

²² *Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003) (Kazaa was a co-defendant in this case).

music industry has chosen to pursue individuals engaging in music piracy.²⁴ However, a party which has remained relatively untouched by legal action is the source of the pirated material. For the music industry, this would have been a fruitless avenue to pursue because the sources of most MP3s were the consumers themselves, as they burned the songs off of legally-purchased CDs.²⁵ However, for the film industry, finding the sources of the material could prove to be the best way to combat piracy.

¶8 Although there are inherent disadvantages and risks to this course of action, the low cost on the part of the film industry in finding these sources should be enough of an incentive to take action. In addition, attacking the source of the material is a relatively risk-free venture in terms of to public relations, as compared to the abysmal reaction that the music industry has received from its pursuit of the consumers of the pirated product²⁶. The only real problem for music studios is the challenge of finding the source of this pirated material. To this end, AT&T Labs have published a report entitled “Analysis of Security Vulnerabilities in the Movie Production and Distribution Process.”²⁷

¶9 This report studied any film in the U.S. box office’s top fifty films that appeared online between the dates of January 1, 2002 and June 27, 2003.²⁸ In this time period, the study engaged a sample size of 285 films.²⁹ The study examined the online versions of the films and studied the picture and sound quality, along with any other telltale signs of illegal copying.³⁰ Additionally, the study focused on the dates on which the films first appeared online in comparison with their theater release date and home video release date.³¹ By inspecting the quality of the file, any other signs of the film’s source, and the online date, the report was able to hypothesize as to the origin of these illegal online copies.³²

¶10 The results of AT&T Labs’ report was eye-opening and provides a good first step for the film industry in solving the digital piracy problem. Of the movie samples examined, 77% appear to have been leaked by industry insiders.³³ Seven of the films appeared online prior to their theater release date and 163 were online prior to the film’s DVD release date,³⁴ but only 5% of the films that had been released on DVD at the conclusion of the study appeared online after their DVD release date.³⁵ The report also noted that there

²³ *Id.*

²⁴ Wingfield, *supra* note 2, at B1.

²⁵ Todd Pack, *Industry Tries to Kill Piracy at the Source*, ORLANDO SENTINEL, Aug. 6, 2001, at A1.

²⁶ See Lohr, *supra* note 4, at 1; see also Graham, *supra* note 7, at D6.

²⁷ Simon Byers et al., *Analysis of Security Vulnerabilities in the Movie Production and Distribution Process*, DRM 2003, Oct. 27, 2003, available at <http://lorrie.cranor.org/pubs/drm03-tr.pdf>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

were two time frames during which the majority of leaks occurred: the two weeks surrounding the film's theater release and the three weeks leading up to the DVD release date.³⁶

¶11 These results suggest that the biggest source of digital pirated films is in fact industry insiders. This trend is demonstrated not only by the quality of the digital copies but by the noting the time at which these copies appear online. If these results reflect the reality of the current situation, there are a few privileged members of the film community who are using their status and access to the films illegally to pirate movies on the Internet. These trends give the film industry a unique advantage over the music industry, and provide the former with the chance to dramatically slow the receipt of pirated movies on the Internet.

“T2: JUDGMENT DAY”

¶12 There are several reasons to explain why pursuing industry insiders in the fight against film piracy is easier than the struggle experienced by the music industry. First, the source of the pirated information – industry insiders – is a relatively small and contained group of people. An aggressive prosecution strategy against insiders in the film industry has great advantages over the music industry's prosecution of the large population of consumers of pirated material. There will be relatively no adverse public outcry as a result of prosecuting a few select people who are directly stealing information from the film industry as compared to the widespread and seemingly random prosecution of “everyday” people.³⁷ The limited number of targets for prosecution will also be advantageous for the film industry because it will dramatically reduce litigation costs.

¶13 The second advantage for the film industry's pursuit of the source of pirated material is that lawsuits will be relatively painless and without much controversy. Instead of the figurative briar patch that has accompanied the prosecution of distributors³⁸ and consumers of pirated material,³⁹ the film industry may be able to use trade secret law in order to obtain judgments in its favor. A simple formula has been established in previous trade secret litigation to efficiently determine trade secret infringers; the ease with which these insiders fit each requirement of this formula will further simplify the proceedings.

¶14 According to § 39 of the Restatement of Unfair Competition, a trade secret is defined as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”⁴⁰ An unreleased film (either in the theaters or onto a home video format) fits this definition. Films constitute one component of a very lucrative business; according to the MPAA, that business is losing a substantial amount or revenue due to the

³⁶ *Id.*

³⁷ See Graham, *supra* note 7, at D6.

³⁸ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); ; *Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003); see also Lohr, *supra* note 4, at 1.

³⁹ See Graham, *supra* note 7, at D6.

⁴⁰ Restatement (Third) of Unfair Competition § 39 (1995).

release of these products prematurely.⁴¹ Additionally, by taking active steps to keep the film a secret, the creators of the film possess a great financial advantage over any other distributors of the same product. Given these facts, there can be no doubt that a film must be considered a trade secret.

¶15 Because films may constitute trade secrets, anyone with access to that film before it is released to the public has a duty to keep that information confidential. This duty is established in § 41 of the Restatement and can be enforced by the employer if the employee has made an express promise of confidentiality or if the employee should have known that the trade secret was to be kept in confidence.⁴² Even if an insider in the film industry has not signed an express confidentiality agreement, he or she should know to keep this information in confidence given the lengths that each studio goes through to keep its films from the public until their release dates.

¶16 Finally, § 40 sets out the elements of a trade secret case. The actor must a) acquire the information improperly or b) disclose that information without the other's consent assuming that the actor knew or had reason to know that the information was a trade secret while breaking a § 41 duty of confidence.⁴³ By definition, a source of pirated material has improperly acquired the information in question; however this element may be difficult to prove when authorized industry insiders are in possession of films. Because employment may require them to possess these pre-release movies, the acquisition may be considered proper, in which case the first element of a trade secret case is not satisfied. However, despite this technicality, the insider likely knew that the information was a trade secret and therefore breached a duty of confidence.⁴⁴ Thus trade secret may be easily proven in the case of industry insiders using confidential materials to facilitate piracy on the Internet.

¶17 There is, however, one major flaw in this type of trade secret litigation. The most comprehensive award given as damages under state statutes has been injunctive relief and monetary damages.⁴⁵ This is too little, too late for most major studios who feel that billions are lost in profit due to pirating.⁴⁶ Also, the insider could be fired for his or her actions, but it is again doubtful whether this is sufficient compensation for the studio. Film studios may lobby for the ability to prosecute these offenders under the threat of criminal sanctions. Movie creators would like to see these trade secret violators serve significant incarceration sentences for their blatant disregard for the confidentiality of pre-release movies. Furthermore, for deterrent effect, the film industry would also like for the prosecution and incarceration of these sources to receive

⁴¹ See Motion Picture Association of America's Statement on Anti-Piracy, at <http://www.mpa.org/anti-piracy/index.htm>.

⁴² Restatement (Third) of Unfair Competition § 41 (1995).

⁴³ *Id.* § 40.

⁴⁴ See *id.* § 41.

⁴⁵ See Uniform Trade Secrets Act § 2-3; DAVID LANGE ET AL., INTELLECTUAL PROPERTY: CASES AND MATERIALS 300 (2d ed. 2003) (recognizing that the Uniform Trade Secrets Act has been adopted by more than forty states).

⁴⁶ See Motion Picture Association of America's Statement on Anti-Piracy, at <http://www.mpa.org/anti-piracy/index.htm>.

substantial publicity. However, these goals may prove difficult if not impossible to achieve. Most recently, Kerry Gonzalez pleaded guilty to a federal felony copyright infringement charge for taking part in releasing an unfinished version of “The Hulk”⁴⁷ two weeks before its theater release date.⁴⁸ The District Court for the Southern District of New York ordered Gonzalez to six months home confinement, three years of probation, a \$2,000 fine, and \$5,000 in restitution to Universal Pictures.⁴⁹ Despite the fact that the defendant pleaded guilty to a felony charge, the court refused to require that he serve time for his offense. The film industry would be able to prosecute more defendants with easier and more consistent results if it scaled back its litigation to trade secret infringement instead of other alternatives. Although jail time may prove unavailable for the pirates, large monetary judgments could give the film industry a strong stance with which to attack the illegal piracy of movies.

CONCLUSION

¶18 The problem of digital pirating is a difficult one with no easy solutions. However, one thing seems clear: The closer the film industry treads on the same path of the music industry, the more likely they will both experience limited success in the quest to end digital piracy. The use of trade secret litigation against insiders of the industry providing pirated material is by no means the perfect answer, but it is a powerful and relatively unused weapon with which the film industry could make some noticeable headway. Trade secret litigation could be effectively used to prosecute those involved in illegal pirating of movies, thereby allowing the industry to reap the benefits of its movie-making efforts.

⁴⁷ THE HULK (Universal Pictures 2003).

⁴⁸ Jon Healey, *Man is Sentenced for Posting ‘Hulk’ Film*, L.A. TIMES, Sept. 27, 2003, at C3.

⁴⁹ *Id.*