



**FEDERAL TRADE COMMISSION
FOR THE CONSUMER**



Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues

Panel 6: P2P File-Sharing and Its Impact on Copyright Holders

December 16, 2004

Framing the P2P/Copyright Policy Debate

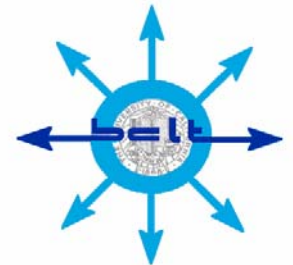
Professor Peter S. Menell

Executive Director


Berkeley Center for Law & Technology

University of California at Berkeley School of Law

**BOALT
HALL**



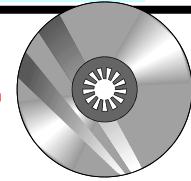
General Observations about the Relationship between Content and Technology Industries in the Analog Age (1440-1992)

- Technology Discouraged Unauthorized Distribution 
 - Media not amenable to low cost or high quality reproduction
 - Distribution regulated and could be monitored at reasonable cost
 - Broadcast spectrum; Cable
- Unauthorized Distribution Could Be Detected at Reasonable Cost

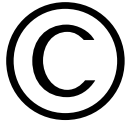
Generally Symbiotic

General Observations about the Relationship between Content and Technology Industries in the Digital/Internet Age (1992-present)

- ~~• Technology Discouraged Unauthorized Distribution~~
- ~~• Media not amenable to low cost or high quality reproduction~~
- ~~• Distribution regulated and could be monitored at reasonable cost~~
 - ~~• Broadcast spectrum, Cable ISPs, wireless~~
- ~~• Unauthorized Distribution Could Be Detected at Reasonable Cost~~



Increasingly Conflictual

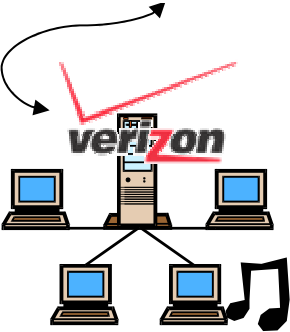
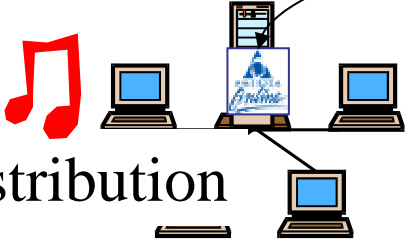


The Internet/© Enforcement Age



Internet v 1.0 (Client-Server)

- fear of rampant unauthorized distribution
- content owners ramp up Internet policing efforts
- DMCA take-down process/cease-and-desist letters



Internet v 2.0 (P2P I - Central Server Model)

- knowledge/ability to control \longrightarrow liability/shut-down



Internet v 3.0 (P2P II – Decentralized Model)

- knowledge/ability to control? *certiorari granted*
- thousands of lawsuits against uploaders





**Governance of Content
Distribution Platforms**

*Anarchy/
Private Enforcement*



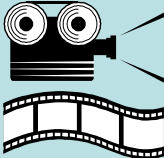

**Compulsory
License**

**Regulatory
Mixed
Public/Private**



P2P/Copyright Policy Matrix

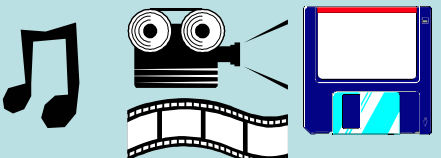


Criteria	Anarchy	Regulated Market 	Compulsory License
Creative Expression   			
Competition <ul style="list-style-type: none"> • Content Developers • Systems/Business Models 			
External Effects <ul style="list-style-type: none"> • Internet functionality • product innovation 			
Implementation <ul style="list-style-type: none"> • public – rent seeking • private – fencing (DRM), spoofing, enforcement • dynamic attributes 			



P2P/Copyright Policy Matrix



Criteria	Anarchy	Regulated Market	Compulsory License
Creative Expression 	--	++	++
Competition <ul style="list-style-type: none"> • Content Developers • Systems/Business Models 	-	++	++
	+	+++	--
External Effects <ul style="list-style-type: none"> • Internet functionality • product innovation 	+++	--	+
	+	+	-
Implementation <ul style="list-style-type: none"> • public – rent seeking • private – fencing (DRM), spoofing, enforcement • dynamic attributes 	+	-	--
	---	-	+++
	-	++	--



P2P/Copyright Policy Matrix



Criteria

Anarchy

Regulated Market

Compulsory License

Creati
Expres
Compe
• Co
• Sy
Extern
• Int
• pro
Implem
• pu
• pro
sp
• dy

General Observations

- Heterogeneity of tastes and technological possibilities → regulated market/decentralization
- Enforcement → compulsory licensing
 - but “one-size fits all” can impede innovation
- Internet functionality → anarchy
 - but anarchy → strong “DRM”
- Beware of dogs that don’t bark
 - roll-out of content hindered
- Beware industry “studies” – whether or not from industry
- Dynamic attributes/institutional competence are critical
 - social norm formation important
- First best unachievable; second best problem