

The Impact of Electronic Commerce on the Intellectual Property System
By Doris Estelle Long¹

3 John Marshall Center for Intellectual Property Law
News Source 8 (Spring 2001)

The Internet has revolutionized communication and information dissemination. In addition to finding the latest news and research about just any topic you can name, the Internet has literally changed the complexion of international commerce. Even the smallest company can advertise its products and services in the global marketplace by launching a webpage. And for those whose products can be delivered digitally, the Internet provides a distribution channel that is nearly instantaneous, and relatively inexpensive .

The pace of technological penetration represented by the Internet has been truly unique when compared to similar communications advances of the 20th Century. It took 25 years for radio to reach 1 million sets in the United States. It took ten years for Television to reach a one million set penetration level. Yet in only four years of commercial availability, Internet penetration reached 1 million users in the United States.

Since the early 90's, the rate of Internet penetration has grown exponentially. It is currently estimated that there are currently 335 million users globally. And the number is increasing daily. Such growth is not limited to scholars and researchers. To the contrary, according to Forester Research, European E-commerce is expected to increase to 174 billion Euros in 20005 from its current rate of 8.5 billion Euros.

The Internet has the potential to level the playing field in the global market. It has already lowered barriers to entry so that small and medium enterprises (SME's) can compete with the largest multinational. As demonstrated by such well-known sites as Napster, and such new software as DeCSS, which allows users to circumvent anti-copying code in DVD's, and Gnutella which allows peer to peer transfers of MP3 files, the Internet has also become a method of choice for pirate activities. Illegal copies of music can be distributed at the click of a button. Counterfeit product is auctioned by anonymous sellers to anonymous buyers on Internet auction sites; cybersquatters reserve domain names based on famous marks owned by other companies. In short, the Internet has become a bonanza for illegal activities. No one ever said pirates can't spot an

opportunity when it comes along. And the Internet is one of the best low cost business opportunities available.

The challenge of e-commerce has pushed intellectual property systems almost to the breaking point of protection. The global digital marketplace that e-commerce seeks to exploit runs on intellectual property. IP-protected software operates the system, and permits the uploading and downloading of files that is at the heart of IP piracy on the Internet. IP-protected content is a key trading item of e-commerce -- in the form of films, music and software, and the key text source for web-sites. IP-protected domain names serve as "addresses" for web pages and IP-protected databases fuel the search engines that make the Internet such a useful source for commerce and information.

Despite the fundamental contribution IP-based products make to the development and operation of e-commerce, unfortunately the Internet may be one of the most IP-hostile environments ever developed. Since the first declaration that "information [on the Net] wants to be free" IP-owners have faced users who mistakenly equate copyright-protected expression with "information," and "use" with unauthorized and uncontrollable reproduction. It is as if the *ability* to do something, such as reproduce a copyrighted song without permission and send it to your hundred closest friends, is the same as having the *legal* right to do it. And woe to anyone who disagrees.

The ongoing story of the Napster website seems a paradigm for the problems posed by e-commerce on IP systems. While the unauthorized reproduction of millions of sound recordings would seem an obvious copyright infringement, users claim that they are engaged in the fair activity of "personal use." Very briefly, the Napster website provides a free downloadable copy of software that permits users to exchange (otherwise known as "copy") MP3 files on line. Once you download the software, you can basically copy any MP3 song file contained on another Napster user's website. The only requirement is that both computers be turned on. The Napster site maintains an Index so that users can easily check to see if the song they want to copy is available on another user's machine. Some defenders of Napster claim that the site is useful in allowing new music groups to gain visibility. The reality, however, is that a lot more copies of Brittany Spears' new songs are downloaded than those of unknown new groups. Furthermore, while an unknown music group may *choose* to play its music on Napster for free distribution, Brittany Spears did not. This vital distinction between *choice* and being *forced* to distribute your copyright protected work for free is given short shrift by Napster users and supporters.

When the record companies challenged the illegal distribution of sound recordings via the Napster website, they found themselves on the receiving end of a particularly nasty public relations fight that remains on-going, despite the Ninth Circuit's decision upholding an injunction against the site. Since the copyright owners hadn't taken advantage of the benefits of e-commerce by establishing digital subscription download services, apparently users felt they were entitled to make their own *non*-paying services. Recently BMG signed a deal with Napster to turn the site into a paying site. But I have to wonder if the free-rider attitude that the Internet has encouraged won't come back to "bite" those who try to turn pirate sites into sources for legitimate product.²

Recent reports indicate that there are over 50 million Napster users. That is a lot of potential e-commerce customers. But, unfortunately, reports also indicate that most of those customers have indicated that they will not pay for what they now can get for free.³ And if the past is any window to the future unless enforcement increases, these pirate customers won't have much trouble finding alternate venues for their free-riding activity. In fact, with the recent shut down of Napster as the premiere source for illegal copies of MP3 files, other sources such as Aimster and Gnutella have grown in popularity.

Technology has always presented problems for IP enforcement. But it has never been quite so rapid in its development nor quite so global in its impact. If the potential benefits of the global digital marketplace are to be fully realized, then the market itself must become more than a pirate's bazaar. The Wild West, grab-all-the-free-stuff-you-can-get attitude must be replaced by rules and regulations that allow IP content owners a sense of security that their valuable intellectual creations and innovations will be protected against illegal uses. Putting something on the Internet should not be considered an automatic license to steal.

The problem has become so grave that some people are beginning to question whether we should even bother wasting our time trying to enforce IP rights on the Internet. They liken it to the US experience with prohibition, where an effort to prohibit the sale of alcohol ended up creating organized crime gangs, and ultimately had to be repealed. Others have suggested that what technology has given, it can take away. Technology has created the problem of Internet piracy, technology can solve it.

I think we all know how workable that solution has proven. Reports of hackers and DOS (denial of service) attacks aren't quite daily experiences, but sometimes they seem that way. I don't mean to suggest that technology doesn't

serve as an important component in the battle against Internet piracy. But it is only part of the answer. Technology cannot take the place of legal solutions, or strong enforcement efforts behind those solutions, to assure that the IP engine that drives e-commerce isn't stalled, or worse, shut down for lack of fuel.

The global nature of the Internet cries out for international solutions. Just as pirate publishing havens of the 60's and 70's created enforcement problems for the publishing industry so too countries that do not enforce rights in this digital medium, or deal with the issues of Internet Service Provider Liability, threaten to create Internet pirate havens. Fortunately, we have the benefit of some formidable enforcement tools that weren't available in those days.

Most significantly, we have TRIPS. Currently acceded to by over 137, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) provides a blueprint for an effective IP enforcement system on a domestic level. It requires that member countries provide provisional remedies for trademark, copyright, and patent infringement.⁴ Most important in this rapid-paced, digital-distribution era, TRIPS requires that seizure of infringing goods and those instrumentalities predominantly used in the manufacture of these goods be granted *without notice* to the infringer.⁵ It further requires that deterrent criminal penalties be imposed against copyright piracy and trademark counterfeiting.⁶ TRIPS is technology neutral. Its rules apply to all environments of IP use, including the Internet. Consequently, we already have in place a blue print for the types of enforcement we need to regulate this new digital marketplace.

We also have the WCT and the WPPT,⁷ two new treaties that specifically address the protection of copyright and neighboring rights in the digital environment. These two treaties give us new weapons in the fight against piracy, including prohibitions against the unauthorized circumvention of copy code protection⁸ and protection for the integrity of rights management information.⁹ In the trademark area we have a new Uniform Dispute Resolution Procedure under ICANN that has helped resolve some of the more troublesome cybersquatting cases.¹⁰

The real test of the IP system in the face of these new tools is whether we have the will power to use them effectively. Despite the ease of Internet piracy, the reality is that combating cyber piracy is not that different from combating "traditional" copyright violations. Evidence still has to be gathered, pirated goods have to be seized and the instrumentalities of the crime have to be forfeited. In the digital universe, the pirated goods may be computer files and the instrumentalities may be computers and Internet Service Providers, but technology hasn't altered

the fundamental fact that Internet piracy, like its hard goods equivalent, is nothing more than the unauthorized distribution of illegal copies of copyrighted works.

I think one of the reasons that Internet piracy has challenged the enforcement abilities of IP owners is because it is easy to be intimidated by technology. Internet piracy seems hard to deal with because it takes place in an unknown and untouchable universe called “cyberspace.” Instead of talking about illegal copying, we now discuss “unauthorized making available” or unauthorized “transfers” of computer files. Pirates are no longer engaged in pirate activities. They are “disseminating information.” The reality is theft is theft no matter how fancy the packaging. And many of the methods for combating Internet violations already lie in our hands.

While I believe that increased enforcement activities directed to those who benefit from pirate activities on the ‘Net is one solution to the overwhelming nature of current illegal activities on the Internet, there are other steps that we can and should take. Education is at the forefront of the problem. Conferences aimed at assisting in the training of enforcement officials in the tools for combating IP violations in the digital universe are a step in the right direction. But our educational efforts must reach deeper than to those who are already involved in the IP enforcement system. It should reach down to the perpetrators of many of these Internet violations – members of the general public.

Part of the reason that Internet violations are on the rise is because the public sees IP violations as basically victimless crimes. The only person who loses out is some wealthy record company or software company and they can certainly afford to take the loss. What’s the harm if somebody makes a copy without paying for it? Ignoring the illegality of the act, one unauthorized copy alone may not cause much harm, but millions of copies? And the reality is the Internet makes those millions of copies a reality, not some mere end-of-the-world fantasy on the part of intellectual property owners.

Perhaps most importantly, the harm caused by these pirate activities isn’t limited to a few lost pennies to a multinational corporation who can afford it. The people who suffer the most from Internet piracy are the customers for the illegal products. They suffer from the loss of tax revenue to the government caused by piracy. Think of the better schools, hospitals and roads that could be built from the billions of lost revenue globally caused by piracy. They suffer from the lost opportunity costs in jobs available to support legitimate e-commerce. They suffer from the societal harm caused by the traffic in narcotics and other contraband that piracy dollars help support. And on a more personal level, they suffer from the

paucity of investment dollars to support the next generation of creators. Brittany Spears probably doesn't lose much sleep over the money lost to Internet pirates. But the next Brittany Spears won't get a development deal because the company didn't make enough profits to develop as many new acts.

In addition to stronger education efforts, we could use a few additional international tools to help combat the special international nature of Internet piracy. Clearer rules on the basis for exercising jurisdiction over content providers would be helpful. If a web page comes into my jurisdiction with illegal content, I should be able to stop such content regardless of the place of origin of the website. In addition, given the special nature of Internet piracy, we need to eliminate the need internationally for proof of a commercial gain before illegal distribution of copyrighted content becomes actionable piracy. The Internet is filled with plenty of what has been referred to as "charitable pirates." These pirates love to give away others people work for free. Given the rapid dissemination of works over the Internet, however, you don't have to make money in order to destroy the exploitation value of a piece of intellectual property. In the United States, we enacted the No Electronic Theft (or "NET") Act which criminalized the unauthorized willful electronic reproduction and distribution of copyrighted works, including sound recordings.¹¹ Willful reproduction alone is sufficient. No intent to seek financial gain is required. The scope of pirate activities determines the penalties imposed. Similar laws should be enacted in other countries.

The real challenge posed to the IP system in the face of the rapid development of a global digital market is to establish an international legal regime that respects and protects intellectual property, that provides the necessary regulation to allow for the development of a viable global marketplace while keeping the barriers to entry low enough to permit the full benefits and opportunities presented by the growth of electronic commerce to be enjoyed by more than sophisticated multinational corporations. We must work together to assure that the level playing field which the Internet offers to small and medium businesses is not corrupted by those who would turn it the Net into a pirate's bazaar. Only with regulation and enforcement can the challenges of e-commerce be turned into future opportunities for us all.

¹ Doris Long is a Professor of the Law at the John Marshall Law School, where she teaches courses in copyright, trademarks, unfair competition, and international intellectual property law. This article is based on a luncheon speech given by Professor Long on March 2, 2001, at the Symposium on the Internet and Intellectual Property, co-sponsored by the US Patent and Trademark Office, the United Nations Economic Commission for Europe, and the UK Patent Office in London, England

² Recently, other efforts to develop downloadable subscription sites for music have been announced. It remains to be seen, however, how successful these sites will be despite non-binding avowals by Napster users that they would use a pay subscription service if one were available.

³ Other reports indicate that a majority of Napster users have indicated they would be willing to pay a “reasonable” fee for a downloadable subscription service. Whether such non-binding declarations reflect reality remains to be seen.

⁴ TRIPS at Article 50. In addition to requiring provisional measures for civil intellectual property infringement actions, TRIPS also sides forth a wide panoply of enforcement remedies and procedures that signatory countries must provide, including “effective enforcement,” “deterrent” penalties and “fair and equitable” procedures. TRIPS, Part III. The obligation to provide such relief is further supported by the Dispute Resolution Procedures of the WTO, which provide for trade sanctions for the failure to meet these treaty obligations.

⁵ TRIPS, Article 50.

⁶ TRIPS, Article 61.

⁷ The WIPO Copyright Treaty (WCT) deals largely with the protection of copyrighted works in a digital environment. The WIPO Performances and Phonograms Treaty (WPPT) deals primarily with the protection of sound recordings in a digital environment. Both treaties were established in 1996. Both treaties have roughly the same provisions and both require ratification by 30 countries. Neither has yet been ratified by a sufficient number of countries, however, given the pace of ratification, it is largely anticipated that both treaties will become effective by the end of this year.

⁸ See WCT, Article 11 and WPPT, Article 18. The United States has ratified the WCT and has enacted the necessary domestic laws as part of the Digital Millennium Copyright Act, codified at 17 U.S.C. §§1201, 1203 et al.

⁹ See WCT Article 12 and WPPT, Article 19. . The United States has also ratified the WPPT and has enacted the necessary domestic laws as part of the Digital Millennium Copyright Act, codified at 17 U.S.C. §§1202 et al.

¹⁰ For a copy of the URDP, see <http://www.icann.org>. One of the most active authorized organizations for deciding disputes under the URDP is the Arbitration Center of the World Intellectual Property Organization. For a copy of WIPO’s procedures and cybersquatting decisions under the URDP, see <http://www.arbiter.wipo.int>.

¹¹ 18 USC 2319.