

RIAA LEGAL DEFENSE GUIDE

Defending Yourself
Against the
Recording Industry Association
of America
(RIAA)

Legal Defenses for
Music File Sharing
in Cyberspace

Draughon®

Attorneys at Law

Ponte Vedra Beach, Florida
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If you are contacted by the Recording Industry Association of America for Music File Sharing you will need a competent lawyer to help you.

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We have copyright experience representing technology buyers and sellers during the last 15 years. Our experience in helping people protect their intellectual property assets can prove invaluable in asserting your defenses for music file sharing under the United States Copyright Act. We also have local lawyer affiliates located throughout the United States as listed in the MyTechnologyLawyer Lawyer Directory.

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Scott Draughon is a Technology Lawyer and passionate industry advocate for public policies favoring the Technology Industry. He has spent the last fifteen years representing technology buyers and sellers in contract negotiations, disputes and public policy forums. The names on Mr. Draughon's client list have included Barnett Banks, CSX Technology, Florida Tile Industries and Modis Professional Services, as well as a long roster of technology enterprises in finance, medicine, engineering and

manufacturing.

Scott is also a frequent keynoter on the New Economy and guest on radio and television news programs addressing such issues as Internet Taxation, Privacy, Broadband Deployment, Music/Movies On-Demand, Cyber-Terrorism, E-Government and cases in the news such as Microsoft and Napster. He frequently publishes articles on Technology Policy and Business Issues, with articles appearing in the Miami Herald, Xchange magazine, Baltimore Sun and others. He appeared on CNBC to offer his insights on the collapse of Worldcom and Fox News to discuss investigation of AOL/Time Warner by the Department of Justice. Scott is the Host of the daily MyTechnologyLawyer Radio Show, covering technology politics, business and cases in the news as well as legal issues.

Scott Draughon is the author and founder of MyTechnologyLawyer.com, an on-line legal services website providing complete contract drafts for more than 170 technology contracts, more than one-hundred free streaming video consultations and arbitration services.

MyTechnologyLawyer.com has more than 2,500 subscribers across the United States and in 10 foreign countries. You can learn more about Scott Draughon and related media appearances, as well as video excerpts and summaries of past Draughon speeches at www.MyTechnologyLawyer.com/Media.

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Foreward

Technology litigation and negotiation success depends upon realistic objectives and disciplined focus. Establishing realistic expectations requires a close working relationship between lawyer and client in assessing strengths and weaknesses of the case, and the resources required to achieve the desired goal.

Draughon Attorneys at Law works with clients to establish a litigation and negotiation plan tailored to client needs at the outset of the relationship. Our focus is on minimizing surprises and achieving client goals at minimum cost. We serve as zealous advocates for our clients while maintaining a practical, long-term view of the risks and potential of litigation in each case.

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Preface

If you are one of 57 million Americans sharing music files in cyberspace, the Recording Industry Association of America (RIAA) intends to file a lawsuit in Federal Court against you. Parents and Employers of persons sharing music files are also vulnerable.

Our representation of clients targeted by the RIAA asserts legitimate defenses under the Copyright Act. Defenses are available that can induce favorable settlement before the filing of any lawsuit. Understand your options and get your questions answered **before** you are contacted by the RIAA.

The materials in this Legal Guide will answer some of your questions. We are also addressing these issues live on a regular basis on the MyTechnologyLawyer Radio Show, a daily broadcast (Tuesday-Friday 11:00 AM EST).

You can learn more about your defenses against RIAA lawsuits by ordering our CD-ROM, "Your Legal Defenses Against the RIAA". The CD-ROM provides more than two hours of educational material outlining the law, your defenses, cases in the news and the business delima of the music industry. The material for the CD-ROM is taken from the MyTechnologyLawyer Radio Show and is delivered by lawyer Host Scott Draughon in an entertaining and easy listening format.

You can obtain answers to your specific questions for free using the Ask-A-Lawyer e-mail feature in the "Consultations" section of MyTechnologyLawyer.com. Listeners of the MyTechnologyLawyer Radio Show can call-in and talk with Scott Draughon live every Tuesday - Friday (11:00 AM EST) by dialing toll free 866-MTL-Show. You can listen to the MyTechnologyLawyer Radio Show anywhere in the world by going to www.MyTechnologyLawyer.com/radio.

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Introduction

The Recording Industry Association of America (RIAA) is targeting more than 57 million Americans for music piracy lawsuits. This action is based upon the assumption that sharing music files in cyberspace violates US Copyright Law and that the defenses available for music file sharing are limited. The stated goal of the RIAA proposal is to restore industry sales.

However, creative use of the Copyright Act by individual defendants and their lawyers may render the RIAA goal quite difficult. Two days after the RIAA announcement, music file sharing on KaZaA had resumed prior levels, suggesting that the immediate effect of the announcement was short term. If the RIAA begins to actually initiate suits, these same individuals are likely to seek and find legal defenses under the Copyright Act that will accelerate further file sharing.

Some of these defenses are well known and apply under only limited circumstances. Other legal scenarios require restructuring file-sharing arrangements. Still others involve political advocacy to seek consensus in changing technicalities under the law. Nevertheless, the US Copyright Law has sufficient loopholes that many users of file sharing services will be able to negotiate acceptable resolutions to RIAA claims.

Understand the Law

Under the US Copyright Act, Congress has granted a monopoly over works to authors for a limited time. Such works include musical works (i.e. compositions) and sound recordings (i.e. performances). The copyright grant conveys to the author the exclusive right to copy and distribute the work.

In bringing a claim under the Act for direct infringement, the plaintiff must have ownership of the copyright, and show unauthorized copying or distribution of the work. In bringing a claim for contributory infringement, the plaintiff must show that the defendant had knowledge (or reason to know) of infringing activity and had induced, caused or materially contributed to the infringing conduct. Employers and parents of parties guilty of Direct Infringement may be liable for Contributory Infringement.

The Plaintiff in a copyright cause of action may seek to prove actual damages or elect statutory damages. Statutory damages do not require any actual proof of damages. Statutory damages are those sanctioned by government in the statute and may have no relationship to actual damages. Depending upon the findings of the Court, damage awards in copyright piracy cases may range from \$200 to \$150,000 for each work infringed.

The Copyright Act also provides for criminal penalties. Copyright infringers may be sentenced to prison for one to ten years. Fines of up to \$2500 may also be assessed.

Consider the Cases

While the music industry has enjoyed a number of courtroom victories in the last several years, the most significant are Napster, Verizon and Grokster. These cases outline the initial application of US Copyright Law to file sharing services and provide a framework for suits against individuals engaged in music file sharing.

Napster was ultimately held guilty of Contributory Infringement. Since Napster benefited financially from the file sharing activities of its users, Napster was also held vicariously liable.

Napster users were guilty of Direct Infringement on two counts. First, the court held that a user who uploads a music file for others to copy distributes the work in violation of the exclusive grant of distribution to the author under the Copyright Act. Second, a user who downloads such files copies the work in violation of the exclusive right of copying granted to the author under the Copyright Act.

Under the Verizon case, the RIAA forced Verizon to release the names of suspected music file pirates. The result suggests that individuals engaged in music file sharing will not be able to rely upon anonymity to avoid litigation. The case is pending appeal.

In Grokster, the defendant distributed software allowing users to share files in a peer-to-peer environment. Because Grokster was not providing centralized services or promoting the sharing of music files, they were not held liable for Contributory Infringement. However, this ruling does not mean that Grokster users were not engaged in Direct Infringement.

The RIAA has also been aggressive in bringing action against select users responsible for massive song piracy. Most of the cases reported have been against college students who ran file-sharing services at universities. While damages in the millions of dollars were alleged against these defendants, the most common cases have settled in the range of \$15,000 before trial.

Understand Your Objective

Users faced with RIAA copyright claims should understand their objectives. You will not be able to negotiate or litigate a recovery. Your goal is to bring the dispute to acceptable resolution. While the range of acceptable resolutions depends upon the circumstances of your case, the universal goal is to minimize liability.

Each dispute likely starts with an accusation from the RIAA in the form of a letter. Some of the students sued by the RIAA learned by telephone call. There may be a demand for evidence or documentation.

Your goal is to resolve the dispute in negotiation without litigation. Get counsel to help you. Do not attempt to negotiate yourself or communicate directly with any RIAA representative. Do not admit or deny any allegations. Let your lawyer do the talking. The fact that you are even represented by counsel will benefit your position.

In selecting counsel, be sure to choose someone who understands the music and technology industries, as well as copyright law. There are many lawyers across the United States qualified to handle these cases listed in the MyTechnologyLawyer Lawyer Directory. There are also legal referral services who can help.

Leverage Your Defenses

The selective victories of the RIAA against a few centralized file sharing services located in the United States does not guarantee success against four million users sharing 900 million music files per day. Litigation intimidation tactics used against students who are not prepared to challenge the industry are unlikely to work against the masses. The US Copyright Act is simply not designed for bludgeoning millions of people into purchasing music.

As an initial observation, the RIAA cannot threaten individuals engaged in music file sharing with criminal prosecution. Although the Copyright Act provides for criminal sanctions, only the government can prosecute criminals. Since the government is not inclined to prosecute music pirates, no one is likely to go to jail in this dispute.

The RIAA also faces jurisdictional challenges. While popular press reports of the RIAA announcement have focused on the 57 million Americans engaged in music file sharing, the reality is that most music piracy occurs outside the United States. Since U.S. Copyright Law only applies in the United States, many KaZaA users will not be affected.

This problem also extends to offshore Internet Service Providers such as Blubster and Filetopia who are using decentralized technologies and offshore facilities to guarantee anonymity to their music file sharing users. Meeting these challenges through litigation in U.S. courts might result in a few victories, but is unlikely to reduce the level of music piracy sufficiently to restore sales to prior levels. Most of these users will simply be too difficult and expensive to pursue. Certainly, the music industry will not be able to pursue and prevail against all of them.

While these battles continue, users should also be mindful that copyright protection extends generally only for the life of the author plus seventy years. Furthermore, works may also have been conveyed to the public domain by the copyright owner. Public Domain status for popular works is likely to be more closely scrutinized by a population of customers threatened with litigation. Where this defense is applicable, it can be used to frustrate RIAA litigation initiatives.

Leverage Your Defenses (continued)

Defendants can also be expected to challenge RIAA standing in bringing copyright claims. In addition to showing the infringing activity, the prevailing party in a copyright claim must own the copyright for the work. Under the Copyright Act, the author or his assignee is the owner of the copyright. Most studios require the author to assign the work as a condition of production. However, sophisticated defendants will challenge the conveyance and many will find problems in the chain of title or the scope of assignment that precludes the RIAA from being able to bring the claim. A single victory by any defendant on this issue would result in a public relations debacle for the RIAA. A target defendant threatening this defense will be handled more gingerly than one who fails to recognize or assert the argument.

The RIAA is also likely to face imaginative fair use arguments under the Copyright Act. In determining fair use, Courts have traditionally focused on: (1) whether the purpose of the copying activity is commercial; (2) the nature of the work copied; (3) the amount of the work used; and (4) the effect of the infringement on the market for the work. To the extent a downloaded music file is not used for resale and does not result in a lost sale, two of these elements already favor fair use as a defense for the allegedly illegal download.

The Napster Court rejected the fair use arguments presented in that case as a defense for unauthorized music downloads. In Napster, the fair use argument focused on the idea that users were "sampling" music to determine whether to purchase.

The more creative defense structures the download as a presumptively fair use. Activities such as news reporting, teaching, scholarship, satires, parodies, and critiques are long established fair uses of otherwise illegally copied works. The defendant who is able to characterize their music file downloads as one of these activities stands a reasonable chance of establishing a fair use defense.

Leverage Your Defenses *(continued)*

Although the Napster Court rejected the "Time Shifting" argument as a fair use under the Copyright Act when applied to music downloading, this defense may still offer some promise. Napster argued that its users were simply recording music files for later listening, consistent with the ruling in *Sony v. Universal Studios* allowing homeowners to record broadcast television programs using their VCR for later viewing. Since the music files being downloaded in Napster were not being broadcasted, the copying of Napster music files was not analogous to copying television programming for later viewing. However, copying music files from radio or internet broadcasts is analogous, and may provide a planning opportunity and legal defense for music file copying in this context.

Music partnerships that structure the file sharing arrangement to avoid violating US Copyright Law are also likely. The First Sale Doctrine allows the owner of a copy to convey possession to another without permission of the copyright owner. Under the Audio Home Recording Act, an owner of a copy is allowed to make an additional copy (in any format) for personal use.

These features of the law allow partnerships as legal frameworks for music listening. Under the arrangement, a participant conveys his copy to the Partnership pursuant to the First Sale Doctrine in exchange for his partnership interest. The Partnership copies the song to a central file server in the appropriate format under the Audio Home Recording Act. As owners, all partners have listening access to music streamed from the central database.

The music partnership is just one potential example of the many creative file sharing arrangements and legal defenses the RIAA will face in attempting to litigate against everyone sharing music files in cyberspace. There are simply too many users and too many potential defenses under the Copyright Act for the RIAA approach to have any appreciable effect on the level of music piracy around the world.

Recognize Failed Defenses

Recognize that there are certain arguments that will not work as legal defenses for music file sharing, no matter how equitable they may seem or how commonly asserted. Many of these arguments are rooted in common rationalizations for music file sharing, but have no basis in law.

The argument that the defendant was unaware that music file sharing potentially constitutes copyright infringement will not serve as a legal defense. It may result in a reduced damage award if the Court can be convinced that the Defendant was truly ignorant, and his ignorance was justified under the circumstances.

The "sampling argument" was rejected in Napster. This argument suggests that the purpose of the download was to simply sample the target music in determining whether to purchase. This defense was proffered in the Napster Court in an attempt to argue that music file sharing is "fair use" under the copyright act. The court rejected the argument.

The Napster Court also rejected the "Time shifting" argument as a defense for music downloading. This argument suggests that the pirated music file is simply being recorded for later listening and parallels the arguments made by the defendants in *Sony v. Universal Studios*. The Court in *Sony* accepted the argument as a defense to copyright infringement for copying programs appearing on broadcast television for later viewing by home owners. However, since the downloaded music files in Napster were not being broadcasted, the music file downloading in Napster is not analogous to the copying of Television broadcasts for later viewing.

Recognize Failed Defenses (continued)

The argument that you already purchased a copy of the downloaded song and are just downloading a back up copy is not legally adequate either. Under the Audio Home Recording Act you are allowed to make a back-up copy only from the copy you purchased. This right does not authorize downloading a supplemental copy from another source, however identical such supplemental copy may be to the copy you purchased.

Destroying all your downloaded music files is not an adequate defense. These files have already been copied, and if a violation of the Copyright Act has occurred it cannot be "undone" by destroying the pirated files. However, as a matter of equity, asserting that you have no such files in your possession may motivate the RIAA to abandon any claim against you.

Distinguish File Sharing from Shoplifting

Contrary to comparisons in RIAA advertisements, music file sharing is not the same as shoplifting. The shoplifter enters the store owner's facility for an unauthorized purpose and deprives that owner of inventory and sales. The shop owner has finite space and inventory, as well as supplier relationships allowing return of unsold merchandise.

The sale that the shoplifter frustrates is the sale of the stolen inventory to a legitimate buyer. That legitimate buyer is most likely not the shoplifter himself. Retailers sue shoplifters because shoplifters take the inventory needed to satisfy legitimate buyers, not because the shoplifter is not a buyer.

Music file sharing does not exploit the facilities of the Copyright owner. The copyright holder is not constrained by space and inventory. Space and inventory on the web for music files are virtually unlimited. The needs of all legitimate buyers of music in cyberspace can be met regardless of the level of piracy.

The complaint of the music industry appears to be that the music pirate has stolen customers, or at least reduced the number of legitimate buyers. This argument is very different from the retailer whose constraint for meeting demand is not the number of legitimate buyers, but the amount of inventory available to satisfy those buyers. The focus of the retailer is the amount of product available to meet demand, while the focus of the music industry is on the level of demand.

This distinction is critical to the legal analysis supporting the two claims. The retailer is able to convincingly demonstrate actual damage in the form of a lost sale. The music industry is not, and must rely on Statutory Damages.

Distinguish File Sharing from Shoplifting (continued)

There is one analogy between music file pirating and shoplifting that is valid. Neither shoplifters nor music pirates are easily converted to legitimate buyers. Prosecuting shoplifters does not significantly increase sales by converting the shoplifter to a legitimate buyer. Copyright lawsuits will not convert music pirates into legitimate buyers either.

The fact that music piracy does not deprive the music industry of inventory or sales explains why legal victories against the likes of MP3.com, Napster, Aimster and Verizon have done little to improve the financial fortunes of the industry. These courtroom victories against file sharing services on the web have not improved business. Lawsuits against individuals who share music files in cyberspace are also unlikely to improve music sales.

Exploit Statutory Damages Arguments

The biggest weakness in the RIAA strategy is the inequity of the statutory damages provision under the U.S. Copyright Act when applied to music file sharing in cyberspace. This provision allows the RIAA to bring claims without proving actual damages in open court.

The problem is that statutory damages are artificial, bearing no relationship to actual damages. Statutory damages are damages conclusively assumed by government under the copyright statute without need of proof. The industry challenge will be justifying the statutory damages in the face of arguments that there are no actual damages related to music file sharing in cyberspace. This argument will be persuasive in the public forum as well as before jurors.

The RIAA argues that the music industry has incurred damages from music piracy in the form of declining sales. However, the notion that each illegally obtained music file is a lost sale for the industry is inconsistent with survey results on this question. USA Today recently reported that 35% of queried teens acknowledged they would download a song they liked, while only 10% would legally purchase the same song.

The thirty-five percent population in the USA Today survey that are pirating their music appear only interested in free downloads. Eliminating piracy would preclude them from using this technique to acquire music. However, it is not at all certain that this same population will elect to legally purchase their music in the alternative. They may go without, seek alternative legal means to acquire music they like, or resort to radio listening. In any case, it does not necessarily follow that music piracy in cyberspace is actually damaging the music industry by reducing sales.

Exploit Statutory Damages Arguments (continued)

These arguments question the fairness and legitimacy of allowing the RIAA to take advantage of statutory damages under the Copyright Act in bringing their claims against individual citizens for sharing music files in cyberspace. A political consensus may build among these citizens (and their representatives in Washington) to require the RIAA to prove actual damages in open court in music file sharing cases, thereby drastically reducing the chances for a RIAA recovery. This argument is also likely to be well received by jurors in a copyright infringement claim for music file sharing, resulting in minimal judgment for damages against the defendant.

Minimize Employer Liability

Employers can be held liable for Contributory Infringement for the music piracy acts of their employees under the Copyright Act. The two primary elements of proof are: (1) Employer knew (or had a reason to know) of music piracy by the employee; (2) Employer induced, caused or materially contributed the piracy. Under the standard, music file sharing by employers using the facilities and equipment of the employer imposes liability risk on the employer for copyright infringement. The same analysis holds for parents of children who share music files at home.

The best first step of employers towards minimizing these risks is to articulate a policy prohibiting music file sharing using employer equipment or facilities. The Policy Statement should prohibit the sharing of music files by defining the prohibited activity with particularity. The consequences of violating the policy, process for investigation and review, as well as employee reporting should also be addressed in the Policy Statement. A sample Policy Statement is provided in the Administrative Sublibrary of the Employment Library of MyTechnologyLawyer.com.

If an employer is contacted by the RIAA with a litigation threat because of alleged music piracy by an employee, the best course of action is an aggressive defense. Obtain counsel. Investigate the allegation. Negotiate for favorable settlement by raising the risk of litigation for RIAA representatives.

Join the Public Relations Battle

The prospect of prolonged hostile engagement on these issues promises a public relations battle with artists, technologists and consumers that the music industry cannot win. Users favoring music file sharing can join the battle by writing articles, circulating protests, activating local clubs and giving speeches and presentations.

Artists have long chafed under the yoke of a Music Industry that failed to share profits except with the biggest stars. The Artists now have the technology to produce, promote and distribute their own works and will be less inclined to convey their copyrights to the industry. The industry cannot leverage current copyright law without ownership of the copyright. Users can underwrite this trend by actively supporting and promoting the work of these artists.

Technologists are slowly antiquating the notion of copies altogether. Rather than tape or CD players, consumers are moving to a world of Internet access anytime, anywhere, anyplace. Ubiquitous Internet access means one copy centrally stored and accessible by millions through streaming media. Supportive users will readily adopt those new technologies, thereby eventually rendering a Copyright Act structured on the creation, reproduction and distribution of "copies" useless.

Consumers can prevail in the struggle. Decentralized file sharing services, ubiquitous technology, multiple jurisdictions, antiquated statutes, artificial damages, legal defenses and political activism raise very real challenges to an industry struggling with the realities of the New Economy. The music industry gained predominance in the 21st century because it controlled music distribution technologies. That control has been permanently lost. The music industry will never be the same again.

Appendix A



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The Draughon® Legal Plan (continued)

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(continued)*

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- Corporation Annual Reports
- Registered Agent Services
- Monitoring of filings and official records
- File Storage
- Miscellaneous photocopy & facsimile services

Appendix B

FORMS

Catalog



Table of Contents

Forms on MyTechnologyLawyer.com

The MyTechnologyLawyer.com forms have been derived from thousands of technology transactions executed for hundreds of technology firms by Draughon Attorneys at Law, a technology law practice. The 170+ forms are logically grouped into nine main libraries. Within the main libraries, forms are further grouped into sublibraries. Forms may be purchased individually. Complete libraries of forms may also be subscribed to, at considerable savings over individual forms purchase. An annual subscription to the entire library of forms is also available at further savings over individual library subscriptions.

<u>Library</u>	<u>Price</u>
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CORPORATION (MLB01)Pages- 5-6

Financing	.SLB01
Standard Promissory Note	.MTL101
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