

Music piracy - is the tide turning?

By [Stephen Hollis](#)

12 Oct 2011

The internet has created a platform which allows artists to reach worldwide audiences and gives these audiences the ability to access their music directly from their homes. It has also spawned a direct distribution system of content to consumers and created a competition monster for music retailers and distributors.

Since the late 90s global record sales have fallen dramatically while the entertainment industry has grown exponentially. One in 20 internet downloads are estimated to be legal.

Figures released by the British Phonographic Industry revealed that music piracy may be costing the recording industry and artists around £50 million a year.

Who is affected by music piracy?

In terms of South African copyright law, the copyright owner of a sound recording is the party who exercised control over the making of the sound recording. Usually this will be the recording studio or record label. The copyright owner of a sound recording has the exclusive rights to make reproductions and adaptations of the sound recording and consequently to benefit financially from such actions. It is this right that is being impinged upon by third parties who make unauthorised copies of sound recordings and by people who purchase such copies on our street corners or who download unauthorised copies from the internet.

Of course, artists are affected as well. In terms of a recording contract an artist may receive a royalty for every legal copy of a sound recording which is sold by the record label who owns the recording. It must be said though that artists' royalties from record sales will usually only become due to the artist after all of the recording costs have been recovered from the artist's royalty share and also after deductions such as taxes, packaging and distribution costs have been applied. It will therefore be some time before an artist can expect to receive money from the record label from record sales and, arguably, it is the record labels that are affected the most by music piracy.

Consumers may not be aware of this, but they are also affected by piracy. Since record companies and artists have to try to make up some lost ground insofar as dwindling record sales are concerned, consumers pay for this in the form of increased concert ticket prices.

Is there a solution?

An unfortunate reality is that music piracy and illegal downloading is here to stay. In the 1990s, artists such as Metallica

and Jay-Z confronted and sued the illegal filesharing website, Napster to effectively shut down the manner in which it operated. The victory was short lived as many other illegal file sharing websites adopted the same business model.

In the USA illegal file sharing is taken very seriously and, earlier this year, a US court found a student at Boston University guilty of copyright infringement for sharing music unlawfully and ordered him to pay US\$675 000 in damages to the record companies who own the music (Sony BMG Music Entertainment v Tenenbaum).

In the United Kingdom the High Court ordered British Telecoms (the largest internet service provider in the UK) to block user access to an illegal file sharing website, Newsbin. This is considered a landmark ruling in favour of the record companies, but whether this approach would be adopted by other countries is uncertain. Until a universal approach is adopted by governments in the developed world which clearly addresses the scourge of music piracy, coupled with the co-operation of industry bodies in those countries, it seems as if the pirates and infringers are managing to stay one step ahead of copyright owners.

What can be done in the interim?

If one good thing can be considered to have originated from music piracy, it may very well be that record companies and artists have become more resilient and are adapting their business models to deal with the scourge of the illegal copying and downloading of music from the internet.

In China, where illegal copying of music has become so rampant that almost no revenue is made from record sales, the recording industry has surrendered record sales as a revenue stream. Record labels have begun to negotiate so-called '360-deals' in terms of which they gain the right to share in every area where an artist may receive income, such as performance fees, touring and concert income, monies received from sponsorships, publishing deals and merchandising.

The West kept an eye on these developments and began adopting a similar approach. EMI's deal with Robbie Williams in 2007 is evidence of this. The label negotiated a groundbreaking deal in terms of which they will have a share in all monies received or generated from six of Robbie Williams's albums (including monies generated from touring, merchandising, etc.).

Artists have also been doing what they do best - being creative. The alternative rock band, Radiohead, initially released their album, In Rainbows, in 2007 for free download on the internet. The band made the entire album available for download by their fans and posted a message on their website that consumers can decide for themselves whether and how much they wish to pay for the album. In Rainbows became their best selling album and Radiohead benefited from an excellent public relations coup in the form of their daring and unprecedented 'pay as much as you want' model. While this model is perhaps more suited to groups with very large fan bases, it is an interesting look at how some artists are treating the internet. Instead of expending a lot of time and money to try to fight illegal downloading websites, they are 'going with the flow' and embracing the possibilities of excellent marketing campaigns to even enlarge their consumer base.

With the big money awards by US courts and the record labels' success in the abovementioned landmark ruling in the United Kingdom, there is hope for the copyright owners of recorded music that they may begin to turn the tide against rampant infringement of their rights. One cannot help but feel that courtroom victories may not be enough and that record labels and artists need to be innovative and creative in addressing the scourge of the illegal copying of music.

ABOUT THE AUTHOR

Stephen Hollis is an associate in the corporate legal firm Bowman Gilfillan