

Just as some thought that the invention of the record would signal the end of live performances, and later that the advent of the radio would lead to the extinction of the record, today the music industry fears society's latest technological achievement: the internet. Technology is almost always first viewed in a negative light by major corporations before it is examined as a tool to enhanced profits. While old business models are slowly being abandoned in favor of ones built around the internet, it is very dangerous for 3rd parties to try and build a new business in an clearly uncertain market. To meddle in the war between an established industry and technology is to potentially face a tremendous amount of legal action. Grooveshark is trying to defy the odds and build its company upon one of the most controversial aspects of the current illegal music scene: peer-to-peer file sharing. In doing so, it potentially faces quite a bit of serious litigation.

What Is Grooveshark & How Does It Work?

While companies facing legal concerns like Google and Yahoo! are well known to the public, Grooveshark is unknown to most people, even to those who would consider themselves tech-savvy, so a brief explanation of what the company is and what it does is necessary. Founded by a small group of University of Florida graduates, Grooveshark calls itself "a revolutionary music community that rewards users for sharing their music."¹ After signing up for the service and downloading the requisite SharkByte Client peer-to-peer application, users are asked identify the location of the music on their hard drive, whether the files be ripped from a CD, purchased online, or illegally downloaded. The user can point to as many directories on the computer as

¹ "About Us." Grooveshark. 5 Dec. 2007 <<http://www.grooveshark.com/about>>.

desired, at which time the application appears² to create a directory file of the songs, which is uploaded to Grooveshark and linked with the user's registered account. The actual audio files are not uploaded to or stored on any central Grooveshark servers at this time.

If another registered user searches for a term that appears in any of metadata associated with a song through the Grooveshark website (all searching and navigating is performed exclusively through the website), it will appear in a list of results, where it can be previewed, edited, or purchased. If preview is selected, and the uploader of the file is still running the SharkByte application, the file will stream directly from the host's computer. If the original uploader is not using the SharkByte application, the file will be marked as offline, and will not be able to be played. However, the next time the uploader launches SharkByte, the requested song will be sent to Grooveshark, so that in the future it is available regardless of his or her status. There are most likely a variety of factors that determine when songs are sent to the central servers, including if they have been requested while offline, if the file already exists due to another user previously uploading it, as well as a potential an error in the application software such that newly added content is only uploaded upon restarting. Regardless, music files are being directly copied to Grooveshark servers from a user's hard drive to facilitate the purchasing and downloading of songs.

When a song is purchased, the file is retrieved from Grooveshark's servers, and is downloaded to the buyer's computer. The user who uploaded the song does not need to be using the SharkByte application, be connected to the internet, or approve the transaction. Currently, all

² There is little information that Grooveshark has disclosed about the technical process through which it handles the activity of its peer-to-peer client. Therefore, inferences about what is happening behind the scenes will be made based on personal experimentation and network traffic analysis, with the knowledge that it may be partially inaccurate, despite being well intentioned.

songs are priced at 99¢, although the company expects to shift to a variable pricing structure once the service matures³. With the money that Grooveshark collects, most of it is given to the record label who holds the rights to the song, while the remaining money is split evenly between Grooveshark and the original uploader⁴. For popular songs that may be uploaded by hundreds of users, an algorithm which takes into account a variety of factors including positive community activity (such as fixing incorrect tags and adding album artwork) divides the revenue appropriately. The money returned to users is in the form of store credit, which is intended to encourage future use of the service. Grooveshark likes to describe this unique transaction as one where “everyone gets paid.”

The Elephant In The Room: Copyright Infringement

This unique model is an attempt to legalize what is currently illegal file sharing via peer-to-peer networks. Instead of creating an entirely new download service like iTunes or developing a subscription service like Rhapsody, Grooveshark takes a proven infrastructure that millions of people use every day and tries to make it financially viable and legal. However, in order to ensure that “everyone gets paid” Grooveshark must set up arrangements with both the labels and its users. Entering into a contract with its users is relatively simple, as all members are forced to agree to certain terms if they use the service, but having a relationship with the record labels is infinitely more complex. The company has over 80 labels committed to the service, which allows for music under their control to be uploaded in exchange for payment when a song is downloaded. Although Grooveshark maintains that negotiations are ongoing with

³ Tarantino, Sam. Interview with Tom Merritt & Molly Wood. *Buzz Out Loud*. 3 Oct. 2007. 5 Dec. 2007 <http://podcast-files.cnet.com/podcast/cnet_buzzoutloud_100307_i.mp3>.

⁴ Riley, Duncan. "P2P Music Sharing Service Grooveshark Ups Compensation." *TechBrunch*. 10 Oct. 2007. 5 Dec. 2007 <<http://www.techcrunch.com/2007/10/10/p2p-music-sharing-service-grooveshark-ups-compensation/>>.

all music providers, the group of 80 notably excludes the four major labels who control over 90% of music sales in the United States⁵. Agreements with the labels are what make it legal for a user to upload their music to Grooveshark, but without the consent of EMI, Universal, Sony BMG, and Warner, most additions to the catalogue will be a violation of copyright law.

If the user follows the request of the software to reveal their entire music library, the user is almost assuredly going to be uploading music that falls outside the current agreements Grooveshark has in place. The company tries to preempt issues concerning what will happen with uncovered copyright material in the end user license agreement that is presented while signing up, where it is stated that customers may not upload "any content which is copyrighted, and represented by a label on the list of labels that EMG [Grooveshark] currently has a licensing agreement with."⁶ However, aside from this clickwrap license agreement, nothing exists to prevent a user from uploading any song, regardless of its protection under intellectual property laws. Despite Grooveshark's desire to be seen as a completely legal alternative to illegal peer-to-peer file sharing, as evidenced by a statement on the company's FAQ page claiming "all downloads in Grooveshark are legal"⁷ a great deal of activity on the site is clearly violating copyright law.

The Natural Comparison To Grokster & Others

With these copyright troubles facing the company, the comparison to peer-to-peer software maker Grokster is inevitable. Unfortunately for Grooveshark, it does not hold up well against the standards set in the landmark Supreme Court decision of 2005. However, there are

⁵ "Who We Are." RIAA. 5 Dec. 2007 <<http://riaa.org/aboutus.php>>.

⁶ "End User License Agreement." Grooveshark. 5 Dec. 2007 <<http://beta.grooveshark.com/eula.php>>.

⁷ "Frequently Asked Questions." Grooveshark. 5 Dec. 2007 <<http://www.grooveshark.com/faq>>.

some respects in which it does fare better, such as the nature and use of the service. Unlike illegal peer-to-peer file sharing networks, Grooveshark does not actively promote the use of its software and network as a means to infringe upon copyright. While copyright violations are clearly possible using Grooveshark's system, the company itself does not outwardly encourage its use for nefarious means. This distinction is important considering that in the *Grokster* ruling, the Supreme Court held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." With its slogan of "everyone gets paid" and its on-going negotiations with the major record labels, it is apparent that Grooveshark's mission is not to continue the practice of illegal file sharing, and does not actively promote use of its service for illegal means, despite the possibility that such illegal activity may take place. The Supreme Court continued, "a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the Sony safe harbor." Under the *Grokster* ruling, even a lack of preventative measures is not enough to find Grooveshark liable, due to the sizable presence of a clear legitimate and legal use of the service.

While Grooveshark holds up comparatively well when the question concerns the nature and use of the service, there are also numerous metrics on which Grooveshark seems more vulnerable relative to the now defunct *Grokster*. *Grokster* was found to be liable without hosting any copyrighted files (not even an index of files), without specific knowledge of infringement, and without directly profiting from the transfer of illegal files (revenue was generated from

advertising)⁸. This is in sharp distinction to Grooveshark, as every file that is available for download through the service is stored on a Grooveshark server. Furthermore, in order to collect money from the users who download music and to credit the users who uploaded popular content, the company keeps track of what songs are being bought and sold by whom. Since Grooveshark knows if certain songs that are purchased fall outside the realm of their current record label agreements, the company can neither claim ignorance as to not knowing that illegal activity is occurring nor that it is uncertain who is engaging in it. Perhaps the most obvious difference between Grokster and Grooveshark is that Grooveshark collects money and directly profits from the illegal transfer of unsanctioned copyrighted material. For example, Grooveshark collects money for the purchase of songs from The Beatles catalogue, despite there being no legitimate online outlet for the sale of the band's music.

Worst Case Scenario: The RIAA Sues

Taking this into consideration, the greatest legal concern facing the company would most likely be a lawsuit filed by the Recording Industry Association of America. In the event that negotiations with the four major record labels fail, it could be expected that the the individual labels or the RIAA would sue Grooveshark, just as other file sharing networks have been pursued. However, despite the precedent set in the Grokster case, the outcome such a lawsuit is not certain. While it is true that when weighing the differences between Grooveshark and Grokster, Grooveshark appears to be in a worse position, this is not to say that a lawsuit claiming violations of the Digital Millennium Copyright Act and other copyright law against the company would result in the same judgement.

⁸ METRO-GOLDWYN-MAYER STUDIOS INC. ET AL. V. No. No. 04-480. Supreme Court of the United States. 27 June 2007. 5 Dec. 2007 <http://w2.eff.org/IP/P2P/MGM_v_Grokster/04-480.pdf>.

The more apt comparison to the legal predicament facing Grooveshark is not to Groster, but to Google and the situation it faces with YouTube. Google is being challenged by multimedia conglomerate Viacom that it does not do enough to prevent copyright infringing videos from being uploading to YouTube, despite following the notice and takedown guidelines set forth in the DMCA. Current policy is to be reactionary: when Viacom locates a video on YouTube that it has not authorized, it must formally notify Google, who then promptly removes the video. However, Viacom alleges that Google could be doing more to ensure that the videos are not even uploaded in the first place, since finding infringing videos is a costly endeavor for Viacom.

In following this procedure, both Google and Grooveshark are operating under Section 512 (c) (the safe harbor clause) of the DMCA⁹. Both companies are treating all of the media that is uploaded to their respective sites equally - they assume that it is legal and will treat it as such until they are notified differently. Grooveshark makes it very clear who to contact and what steps should be taken in the case that unauthorized material is discovered¹⁰. But due to the volume of infringing material on both sites, copyright holders do not seem to be satisfied with purely after-the-fact methods of resolution, especially when the sites are making a profit off the unauthorized use of copyrighted music and video. If Viacom wins its lawsuit against Google, the effects on Grooveshark would be chilling. Not only would it have to restructure the fundamental way its site functions going forward, but it could also be liable when unauthorized copyrighted material falls through the cracks and is uploaded onto the site regardless.

⁹ "THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998." U.S. Copyright Office. 1998. 5 Dec. 2007 <<http://www.copyright.gov/legislation/dmca.pdf>>.

¹⁰ "Terms of Service." Grooveshark. 5 Dec. 2007 <<http://beta.grooveshark.com/tos.php>>.

Revenge Of The Consumer

Another possible legal threat comes not from the copyright holders, but rather from the users of the site. In the promotion of the company's service, statements made by the CEO Sam Tarantino as well as others appearing on the company's website have been at best misleading and at worst outright lies. Naturally, the company has to deal with the persistent question of how the service can possibly be legal, especially as consumers consistently hear about the danger of uploading music files. In an effort to assure potential users, Grooveshark has stated that users are protected from legal action in the probable scenario where they upload copyrighted material not covered by an agreement between a record label and Grooveshark. In an interview, Tarantino claimed that "we've indemnified our users at some level," although it is unclear at what level he was referring to¹¹. In the company's FAQ section of its webpage, it is written that "Grooveshark allows you to download MP3s safely and legally." In response to a question about a customer potentially being sued for using the service, Grooveshark cleverly says that it "respects the rights of copyright holders", but does not explicitly state that it is legal to use the service itself¹². While failure to guarantee the legality of the site is not substantial enough for consumers to bring legal action against the company, assurance that users are indemnified when they are clearly not surely is. Article 9 section 2 of the terms of service states:

Indemnification. You agree to indemnify, defend, and hold harmless EMG, Affiliates and the EMG Staff from and against any and all liability and costs, including reasonable attorneys fees incurred by said parties, in connection with or arising out of your (a) violation or breach of any term of this Agreement or any applicable law or regulation, whether or not referenced herein, or (b) violation of any rights of any third party, or (c) use or misuse of the SharkByte Client, or (d) files transferred by means of the SharkByte Client.

¹¹ Tarantino, Sam. Interview with Tom Merritt & Molly Wood. *Buzz Out Loud*. 3 Oct. 2007. 5 Dec. 2007 <http://podcast-files.cnet.com/podcast/cnet_buzzoutloud_100307_i.mp3>.

¹² "Frequently Asked Questions." *Grooveshark*. 5 Dec. 2007 <<http://www.grooveshark.com/faq>>.

Furthermore, article 9 section 11 discusses the company's limitation of liability, stating that it is not responsible "for any misuse of the SharkByte Client to transfer copyrighted media not represented by a label on the list of labels that EMG currently has a licensing agreement with." Ironically, it is not the users who are indemnified from potential lawsuits, but rather the company who is protected from the possible infringing uses committed by its users. Such direct a contradiction between the word of the chief executive and the fine print is at least enough to bring a credible class action lawsuit, probably generating enough negative attention on the web to slow growth.

Congress To The Rescue?

In contrast to the legal problems the company may potentially face, in terms of legislation, Grooveshark may stand to benefit. Section 494 of the recently introduced College Opportunity and Affordability Act of 2007 would create a requirement for public universities to "develop a plan for offering alternatives to illegal downloading or peer-to-peer distribution of intellectual property" or risk losing financial aid for their students¹³. If the bill were to pass, and the company were to avoid other legal trouble in regards to copyright infringement, the benefit to Grooveshark would be clear: an tremendous number of new students being offered the service as a legal alternative to downloading. This also would immediately increase awareness of the Grooveshark brand and would likely bring more people into the community. Paradoxically, while Grooveshark fits the description of an "alternate to illegally downloading" it does so via "peer-to-peer distribution of intellectual property," meaning that if the language is strictly

¹³ Bangeman, Eric. "Bill Tying Financial Aid to Antipiracy Efforts Passes House Committee." *Ars Technica*. 15 Nov. 2007. 5 Dec. 2007 <<http://arstechnica.com/news.ars/post/20071115-bill-tying-financial-aid-to-antipiracy-efforts-passes-house-committee.html>>.

interpreted the company's service would not satisfy the requirement set forth by the law¹⁴.

However, it is possible that either the exact wording of the bill will be modified in a Congressional conference committee or that it will be acknowledged that Grooveshark's legal service satisfies the underlying intention of the law despite it doing it in an unconventional way.

Legal Strategy: Protection For The Company

With the main legal threats identified, there are certain strategies the company can employ to protect itself from probable litigation. The most effective yet drastic preventative measures would be direct changes to the way the service functions, including how songs are uploaded to the Grooveshark servers. Currently negotiations are ongoing with the four major record labels, and it has been said that as long as the talks are active, they will act on good faith and not imminently begin pursuing possible copyright infringement cases¹⁵. Regardless, it would still be a good idea for Grooveshark to try and prevent the uploading and downloading of unapproved music through its service. Since it would be unattractive to have an approval layer at the moment of sale such that a request to download a song would be put on hold for the transaction to be authorized, perhaps it is more ideal to inspect the files when they are being uploaded. Human approval is probably the most effective method, although it is very costly. At the least, a filtering technology (such as the type being developed by Google for YouTube¹⁶) could be developed to weed out songs known to be excluded by existing record label agreements. While the Grokster decision states that the failure to take affirmative steps is not enough to

¹⁴ United States. Cong. House. College Opportunity and Affordability Act of 2007. 110 Cong., 1st sess. HR 4137. 9 Nov. 2007. 5 Dec. 2007 <<http://thomas.loc.gov/cgi-bin/query/z?c110:HR.4137>>.

¹⁵ Tarantino, Sam. Interview with Tom Merritt & Molly Wood. Buzz Out Loud. 3 Oct. 2007. 5 Dec. 2007 <http://podcast-files.cnet.com/podcast/cnet_buzzoutloud_100307_i.mp3>.

¹⁶ Perez, Juan. "Google Testing YouTube Antipiracy System." InfoWorld. 16 Oct. 2007. IDG News Service. 5 Dec. 2007 <http://www.infoworld.com/article/07/10/16/Google-testing-YouTube-antipiracy-system_1.html>.

establish liability, it is still in the company's interest to create some type of program that polices their site.

In terms of potential consumer action as a result of misleading statements made on the company's website and by the CEO, further clarification and complete openness would be the best remedy. On the Grooveshark forums, administrators have explained that the indemnification clause that the CEO discussed is forthcoming and will only appear in a future end user license agreement¹⁷, despite it originally being implied that it was present in the current version. Removing misleading statements that contradict the terms of service from the company's website is an easy step to reduce Grooveshark's legal risk.

Conclusion

To date, the solutions that companies have introduced to combat the illegal peer-to-peer downloading market have been safe and completely industry supported. Apple came to the market with the iTunes Music Store in 2003 with the support of all the major record labels and Napster relaunched as a legal service with a subscription model built on a copy protection scheme to quell piracy concerns. But both of these services failed to do what it is simple although risky: take the existing illegal peer-to-peer market and try to legalize it. Consumers have demonstrated that they enjoy the wide selection and DRM free nature of the songs on peer-to-peer services, and Grooveshark is betting that they are also willing to pay for it to be legal. However, it is unclear whether Grooveshark's service itself is wholly legitimate, an issue which may soon be answered in court.

¹⁷ Davis, James. Response on CNET Forums. 8 Oct. 2007. 5 Dec. 2007 <http://forums.cnet.com/5208-6035_102-0.html?forumID=97&threadID=267041&messageID=2601606#2601606>.