ACCESS AND CONTROL IN MUSIC DISTRIBUTION: LOCKS, LOCKERS OR LOCKED OUT

ALAN HUI
PhD candidate,
ANU College of Law

In 2011, three digital media giants — Amazon, Google and Apple — launched music locker services. The timing of the launches was curious, given that the decision of a United States district court case on music locker service Mp3tunes.com was still pending and the same court had previously ruled that operation of an earlier music locker service Mp3.com constituted primary infringement copyright.

However, the opportunities posed by locker services were clear. As a centralised and managed music distribution system, lockers provided opportunities for new data, new services and new revenue.

First generation of music lockers

The music locker service on MP3.com, known as My.MP3.com, was the product of entrepreneurs Michael Robertson and Greg Flores as part of the Z Company. It was launched in 2000, a hostile time for developers and operators of new music distribution platforms, a time when the Big Four music labels were committed to protecting their revenue streams by taking action against intermediaries.

The My.Mp3.com music locker service operated simply. Users would get an account, prove to the locker service that they owned a CD by putting it in their CDROM drive for scanning, and then be able to stream MP3 versions of the tracks on those CDs through their browser. This provided an early iteration of the anytime, anywhere music service, albeit limited by the low availability of mobile and wireless internet and the lack of mobile devices for digital music playing.

In a case brought about by Universal Music Group, the United States District Court for the Southern District of New York ruled that operating this service, particularly the ripping of CDs to provide access to streaming of digital format equivalents, constituted primary infringement. In making this ruling, the court considered four factors set out under that were essential to MP3.com’s unsuccessful fair use defence:

1. The purpose and character of the use: To qualify for fair use, MP3.com wanted to transform the work and did not make money from its use of the work. Here the court ruled that its use was commercial, but not transformative.
2. The nature of the copyrighted work: Here, MP3.com wanted to show that the works were less worthy of copyright protection, that it had a low level of creativity. The Court ruled that the works were creative, not factual or descriptive.
3. The amount used in relation to the whole: Given that MP3.com ripped and streamed whole works, the court ruled that it could not satisfy this factor for fair use.
4. The effect of the use of the potential market or value of the work: The Court ruled that MP3.com invaded Universal’s right to licence the works.

The key message from this case for music lockers was that in the United States, spaceshifting without licence or other permission from the copyright owner infringes. As the Court’s judgement states, describing MP3.com’s operations as transformative spaceshifting ‘is simply another way of saying that the unauthorized copies are being retransmitted in another medium’. Without the ability to spaceshift legally, it would be a brave soul who would operate a music locker again.
Second generation of music lockers

As it turns out, Michael Robertson was such a brave soul, starting a new music locker service in 2005 known as MP3tunes.com. Robertson learnt from the earlier court case that he could not spaceshift to provide music, even after checking that that the user owned the relevant CDs. Robertson decided to not to check ownership or provide the tracks. MP3tunes would simply provide an online storage space and streaming service; in essence a very basic locker. Users would be largely responsible for loading their own content into the online storage space. Users could fill the locker in two ways. The first was uploading from their computer to the locker. The second was sideloading. Sideloaded allowed users to find song files on the Internet and, by providing a web address, load those songs directly to the locker, bypassing the need to download the songs to their own computer and then upload.6

Unsurprisingly, the music industry represented by fourteen EMI companies and publishers exercised its rights once more, taking the MP3tunes.com to the United States District Court for the Southern District of New York. This time MP3tunes mounted a defence under safe harbour. In summary, the Court’s 2011 findings in relation to primary infringement were as follows:7

1. Repeat infringer policy: The Court found that MP3tunes had an adequate policy, because it had tracked repeat infringement, had takedown procedure and terminated user accounts of repeat infringers.
2. Compliance with MP3 takedown notices: The Court found that MP3tunes took down many of the songs that EMI requested but had incorrectly chosen not to take down some of the songs that it claimed did not provide sufficient detail to identify specific songs.
3. Actual knowledge of infringement: The Court found that there was MP3tunes had no knowledge of red flag infringement.
4. Benefit and control of infringing activity: The Court found that users, not MP3tunes, uploaded or sideloaded all songs. In addition MP3tunes’ business model did not depend on infringement and would generate the same revenue regardless of whether users chose to store infringing or noninfringing material in their lockers.

In short, operating a music locker like MP3tunes.com would not constitute primary infringement as long as it fully complied with takedown notices. The Court also ruled that MP3tunes.com was responsible for limited secondary infringement, similar as a concept to authorisation under Australian copyright law, again to the extent that it failed to fully comply with takedown notices.

While the judgement is not final, as the case may be continued in the Court of Appeals and the Supreme Court, it provides a number of promising precedents for operators of music lockers.

Firstly, deduplication of files is permitted. This is a standard data storage practice that some new music locker operators, particularly Google with Music Beta, have been reticent to employ for locker services.

Secondly, while fair use failed to support the innovation of music lockers, safe harbours specifically supported music lockers. As the Court states in its ruling, ‘[i]f enabling a party to download infringing material was sufficient to create liability, then even search engines like Google or Yahoo! would be without DMCA protection’.8

Thirdly, it shows that streaming for music locker services can be permitted. This is a useful precedent for streaming services such as MP3tunes, but a less useful precedent for push services such as Google’s Music Beta and Apple iCloud.

**Locks and watermarks**

The music industry’s commitment to protecting their revenue streams at the intermediary level has historically also involved locks on access and copying.
In the music CD world, we saw discs that deviated from the Compact Disc standard to restrict playing to certain devices. We also saw discs that automatically loaded rootkit software onto user computers, which created security vulnerabilities on those computers. Having inconvenienced and angered users who had paid for music CDs, the industry faced class action litigation and the recall of millions of discs and ultimately removed locks from most discs.

In the compressed, digital music world, we saw the introduction of locks; many were in the form of proprietary formats that would only play on proprietary devices. This limited choice and inconvenienced customers. Many in the music industry, including Steve Jobs, called for the removal of locks on digital music sold through iTunes as they did not curtail infringement, which occurred on a much larger scale on peer-to-peer networks. Again, the music industry succumbed and locks on digital music sold through iTunes were removed.

The locks experience on CDs and compressed, digital music highlights the role of intermediaries in balancing access and control. Intermediaries can lock content, by locking the files themselves or by filtering search results. Intermediaries, most notably creators of peer-to-peer protocols, clients and trackers, can spread content beyond control. More recently, we have acknowledged the role of intermediaries is centralising and organising systems for access and control.

However, intermediaries have a role that goes beyond the black and white dichotomy of access and control. When viewed only as a bundle of exclusive rights, copyright can provide a focused lens, leading on to follow the content through the chain, find those who have access and identify infringement of exclusive rights. Ultimately, many decentralised actors are beyond the control of the copyright owner. Hence, the past decade witnessed a pattern of slow, ultimately successful cases against the most popular peer-to-peer networks that simply drove traffic to the next peer-to-peer protocol or client.

Moving beyond the extremities of access and control, some industry players, most notably Sony and Universal, have moved onto watermarking digital music files. Watermarking a file allows one to identify its origin — for example, the iTunes or Amazon music stores — without affecting its ability to be played on most devices. By providing intermediaries a means of identifying the origins of files, watermarks can help achieve several outcomes in the context of lockers:

1. The copyright owner can request that a locker operator lock non-watermarked content
2. The copyright owner can work with a locker operator to identify the extent of infringement on its service
3. It becomes easier to show that a locker operator had knowledge of watermarked and non-watermarked files in its lockers, bring it a step closer to actual knowledge of primary infringement. This can be used both in litigation and to negotiate better licensing outcomes

The key point here is that watermarks can be part of an automated system that identifies, but does not necessarily block or curtail, volume primary infringement. Not blocking or curtailing the behaviour leaves open opportunities for observing, licensing and other monetising this activity.

**Futures of lockers**

It is critical to remember at the outset that lockers provide digital access, not ownership of physical content. Apple iCloud, for example, scans and matches your tracks, and then provides perfect copies of files from its library. This is possible as it has negotiated deals with the Big Four music industry players. However, once a user stops paying for the service, or if one or more of the Big Four withdraws from the arrangement, access is taken away. We should also note the case of Amazon, which realised that it had accidentally sold copies of George Orwell’s Nineteen Eighty Four for the Kindle and pulled the copies out of devices as a consequence. For lockers, the overarching point is that content pushed can be pulled, and that content streamed can be cut off. The Amazon Kindle experience shows that even content sold can be unsold.
However, on the whole, lockers present significant opportunities as they develop and evolve as part of a music distribution system.

New, richer sources of data are one set of opportunities. For example, Apple iCloud scan and match service provides access to an unprecedented range of content and has turned what was infringement for MP3.com into a new revenue stream. In addition, the scan and match service provides usage data to complement existing purchasing data; given that most music is distributed through non monetised, decentralised and unauthorised channels, this data is particularly useful. Scan and match services make it possible to discover the extent of primary infringement of music users on their machines, providing a far superior source of industry data.

Lockers also present opportunities for new services. By combining the GPS in mobile devices with a Facebook-like check-in service, it will be possible to know when and how people are using their music. This adds value to initiatives like *45:33*, marketed as the perfect workout soundtrack by Nike and created by LCD Soundsystem on commission from Nike. With lockers, it will no longer necessary to guess what people listen to during workouts; this data can be used to inform new music releases. Once the work is created, some lockers will be able provide further benefits as they are able to push the soundtrack to the user.

Another potential service enabled by lockers would be personalised playlists pushed to the device. Google Music Beta is currently supplemented by the Magnifier service which allows users to generate content for other users to enjoy through Music Beta. This could be combined with a customise radio service like Pandora, which recommends news songs to users based on musical traits of previous selections, such as key and rhythm. If combined, this would provide a push platform that allows providers to recommend songs on a much more sophisticated level than playlists and shuffle. If combined with an online music store, this could also be a try-before-you-buy online shopping experience.

**In summary**

While a little over 300,000 people have joined MP3tunes, the new music locker services offered by Amazon, Google and Apple present an enormous potential market. These locker apps will work on the 300 million active Android and iOS devices, the 1 million new Android iOS devices that are added on an average day, and the millions of Windows devices that are expected from Nokia in the ensuing months.

Until MP3tunes litigation runs its course through the US Courts, music locker providers continue to remain cautious. Each provider has undertaken different strategies to mitigate identified risks. Apple has signed licensing deals with the major record labels to provide content on iCloud. Amazon and Google, like MP3tunes, provide only storage and no content on their locker services. Google goes an extra step by not deduplicating files on Music Beta, with its terms of use explicitly stating: ‘By uploading or submitting Your Music to or through the Service, you are directing Google to store a unique copy of Your Music on your behalf’.

Nonetheless, the manner in which lockers are leveraged has the potential to benefit content owners, users and creators of user generated content on a number of fronts.

Firstly, music lockers are a centralised and managed music distribution system, distinct from distributed peer-to-peer networks that have collectively eluded litigation and continue to operate in spite of industry efforts. Lockers not only provide control for content owners and access for users but also ensure that access is visible to the music industry through licensing and data sharing arrangements.

Secondly, they provide new data sources on usage on individual devices, complementing existing data on purchasing.
Thirdly, they provide opportunities for new services. Lockers are apps that provide either streaming of push capabilities for mobile devices; each can help deliver services that are better targeted to users. Lockers can also leverage other functionality on these devices, such as GPS, to deliver new mixes of services.

Fourthly and finally, lockers provide new sources of revenue. The new services may not only be supplemented by advertising, but also new online shopping experiences and new services that bring together existing services to deliver richer use experiences. New data sources provide a potentially supplementary line of revenue. For a music industry that is globally witnessing year-on-year falls in revenue and volume, the ability to generate new sources of revenue, in addition to music sale revenue, poses perhaps the most significant opportunity.

1 Capitol Records, Inc et al. v MP3tunes LLC et al. (S.D.N.Y. 2011).
3 A key difference that emerged quickly in this time was that decentralised services, particularly peer-to-peer networks such as Napster and Kazaa, were much more resilient that centralised, managed services such as the My.MP3.com music locker. Being decentralised helped peer-to-peer services resist litigation and, in the event of unsuccessful defence in courts, rely on abundant redundancy in their networks to rebuild.
4 For an account of the court’s reasoning, read the judgement for UMG v MP3.com. See supra note 2.
5 At 351, UMG v MP3.com. See supra note 2.
6 In addition, once a link was added to Sideload, other users could search this list of links to find songs.
7 For an account of the Court’s reasoning, read the judgement for Capitol v MP3tunes, supra note 1.
8 See Capitol v MP3tunes, supra note 1.