

Home Streaming is Killing Piracy

HOW STREAMING MUSIC AFFECTS THE NOTION OF MUSIC PIRACY



MA Thesis Robbert van Ooijen

University:	Universiteit Utrecht
Master:	New Media & Digital Culture
Student number:	0472972
Mentor:	Imar de Vries
Second Reader:	Erna Kotkamp
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**For Sarah, my inexhaustible source of inspiration
and for Imar, without whom I never could have finished this project**

The day the pirate retired



The day the pirate retired

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Track	Buy	Artist	Time	Album
☆ Can You Hear Me		Enrique Iglesias	3:42	Greatest Hits
☆ Somebody Told Me		The Killers	3:17	Hot Fuss
★ A Change Is Gonna Come		Wayne Brady	3:11	A Long Time Coming
☆ A Trip To The Unknown		Mark Isham	2:30	A River Runs Through It ...
☆ Pirate Moon		Mike Mennard	2:31	Pirates Do The Darnedes...
☆ Hush		Deep Purple	4:25	Shades Of Deep Purple
☆ Hush		Deep Purple	4:25	Shades Of Deep Purple
☆ I Want You To Know		Dinosaur Jr.	4:30	Farm
☆ It's Time To Move On		Dannii Minogue	4:49	Get Into You
☆ I See it in your Eyes		Andrew Foyston	3:35	STAY with Me
★ Go With The Flow		Queens Of The Stone Age	3:08	Go With The Flow
☆ Change Is Coming		Estelle	4:00	The 18th Day
☆ Hush Now		Maia Hirasawa	3:42	GBGVSSTHLM
☆ Hush Now		Maia Hirasawa	3:42	GBGVSSTHLM
☆ Can I Tell You		Kansas	3:33	Original Album Classics
★ New Days, New Ways		The Twins	3:54	Modern Lifestyle
★ Breathing In A New Mentality		Underoath	2:37	Lost In The Sound Of Se...
☆ We Renounce the Old World		Unspecified	2:23	History of the Soviet Uni...
☆ Change My Mind		Andres	2:46	II [Mahogany Music 24]
☆ Hush, Hush, Hush.		Paula Cole, Peter Gabriel	4:22	This Fire
☆ Hush, Hush, Hush.		Paula Cole, Peter Gabriel	4:22	This Fire
☆ For All We Know		Dave Brubeck Quartet ...	9:39	NYC Carnegie Hall feb 2...
☆ A		Kassem Mosse	11:13	Workshop 08
☆ Almost		FLORIS	22:56	FLORIS
☆ Potential New Sound		Vlor	4:15	A Fire Is Meant For Burning
★ The End Of My Pirate Days*		Mary Chapin Carpenter	5:02	Stones In The Road
☆ Hush Hush; Hush Hush		The Pussycat Dolls	4:14	Doll Domination - The ...
☆ Hush Now		Maia Hirasawa	3:42	GBGVSSTHLM
☆ Hush		Sad Day For Puppets	3:09	Just Like A Ghost EP
☆ Hush		Billie Joe Royal	2:22	Letter From Vietnam Vol. 1
☆ Hush		Miriam Makeba	2:41	South Africa's Skylark: C...

Table of contents

Introduction	5
1 The construction of piracy	8
1.1 Genealogy of a cultural phenomenon	9
1.2 The invention of piracy	12
1.2.1 The Company of Stationers and the English Revolution	13
1.2.2 Piracy after the English Revolution	16
2 Copyright and the music industry	18
2.1 The rhetoric surrounding copyright	19
2.2 The music Industry	22
2.2.1 The music industry: a copyright industry	23
3 Music piracy and its development	28
3.1 Industrial piracy	31
3.1.1 Sheet music	31
3.1.2 Recordings	33
3.1.3 Robin Hood of the waxworks	34
3.2 Domestic piracy	36
3.2.1 Tape	36
3.2.2 CD	38
3.3 Digital piracy	40
3.3.1 MP3	41
4 Streaming music	45
4.1 Music online - from distribution to consumption	46
4.2 Streaming music as a solution for music piracy?	48
4.2.1 The discourse on streaming music	49
Streaming music: the end of music piracy?	54
References	58

Introduction

In the Gallo report *On enforcement of intellectual property rights in the internal market*, that was adopted by the European Parliament in September 2010, the issue of piracy is addressed. The report is one of the latest in a series of controversial anti-piracy policy papers. Although the vote for this report did not get as much attention in the press as the proposed Anti-Counterfeiting Trade Agreement (ACTA), that was discussed in among others the New York Times (Baker, 2010; Pfanner: 2010) and The Guardian (Johnson, 2010), the contents and possible effects of the Gallo report certainly caused rupture on the Internet, most notably on the websites of digital rights organizations. *La Quadrature du Net*, a French group that promotes the digital rights and freedoms of citizens, for example expressed the fear that the report will “open the door for the European Commission to come up with new repressive legislation” (La Quadrature du Net, 2010). Although the adopted report is an initiative report, which means that it is non-legislative, the contents of this report can be used as an important guideline for future anti-piracy policy. Future policy that will be deployed as a possible solution not only for the counterfeiting of tangible products like fashion, but also to deal with the online sharing of intangible information, like digital music.

Next to advocating the enforcement of copyright law, the report surprisingly proposes to introduce an “European Day against Counterfeiting and Piracy” (Gallo Report, 2010: 19). The report proposes this in order to educate European costumers to recognize the value of intellectual property, and to raise awareness that “its misuse can cause a real value loss to the owners of intellectual property rights” (Gallo Report, 2010: 19). With the adoption of the content within this report and a proposal for an anti-piracy day, the European Parliament’s opinion on how to deal with counterfeiting and piracy seems to be largely in line with the statements from the music industry and its representatives. The music industry is notorious for lobbying for copyright law enforcement, expansion of copyright terms, and encourages trade agreements like the ACTA. The adoption of the Gallo report therefore, not entirely surprising, was well received by the music industry (IFPI, 2010).

While the enforcement of copyright law and the organization of European anti-piracy days is one (heavily contested) possibility to try to stop music piracy, it seems that another option to deal with music piracy is emerging. Judging from the popular discourse on music

piracy, it seems as if a solution for it is just around the corner: streaming music. This latest development in online music gives music consumers the opportunity to listen to “any track you like, any time you like” (Spotify, 2010) in streaming format, thus without having to download the music to a harddrive. These streaming music services offer their users vast music collections consisting of millions of songs that can unlimitedly be accessed for a monthly fee or for free with advertisements in between songs. Since 2009 a growing sentiment in the discourse on streaming music suggests that this new way of consuming, distributing, and organizing music can end the problems that the music industry has had with music piracy. Reasoning from this discourse, one could therefore argue that the resources of legislators and the music industry could better be used to educate music consumers about the value and opportunities of streaming music. Can streaming music trigger a change in the way we think about music piracy?

Regarding streaming music as a possible solution to music piracy, and as a different approach to cope with it, instead of stronger legislation, looks plausible at first sight. Why would anyone who has access to a streaming music library consisting of millions of songs (for free or for a monthly fee), still download music via file sharing networks? However, when exploring the history of the practices that are nowadays often *depicted as* music piracy, it appears that these practices have been existing for centuries. And although they have not always been called *piracy* practices, complaints about intellectual misappropriation go as far back as to the Roman Quintilian (Johns, 2009: 19). When viewed from this angle, reasoning that a new way to consume music can end the existence of these practices that are and have been depicted as piratical is very unlikely. Seeing streaming music as an alternative way to change the way music piracy is perceived is therefore a tempting, but also a contradictory idea.

To create more insight into this apparent contradiction and also to shed light on the way streaming music might indeed be regarded as an alternative way to affect the size of the music piracy problem, a historical analysis of the main involved concepts is needed. Indeed, one can only say something about a possible solution to music piracy when the way the concept of music piracy can be understood is clarified. Therefore, this thesis will analyze and discuss the historical formations, and contemporary interpretations of the main concepts that are involved in understanding music piracy.

The objective of this historical analysis is to create a better insight in the concepts that are involved in understanding music piracy and understanding the contemporary discussions concerning music piracy. As it appears, today's debates on music piracy are largely informed by popular belief, and the understanding of (music) piracy is often dominated by its negative character. This thesis will present a more nuanced vision on music piracy, and aims to give a substantive contribution to the contemporary debate on music piracy. It does so by tracing the context in which the formation of the main concepts of that are involved in understanding music piracy took place. These specific contexts that helped to form these main concepts, although sometimes centuries ago, are still influencing today's debates and the way music piracy is perceived. The insights that arise from the historical analysis of these concepts are subsequently used to give insight in how the latest developments in streaming music are influencing the notion of music piracy and are of help with forming an opinion on whether streaming music might be regarded as an alternative solution for the music industry and the European Parliament to deal with music piracy.

1 The construction of piracy

The contemporary debates concerning music piracy are incredibly interesting to follow, not in the least because all the parties involved in these debates are very dynamic. Legislation, technology, and piracy practices are changing at a rapid pace. But although it is important to stay updated on the latest developments of each involved concept, it is also important to acknowledge the history of each involved concept when analyzing these debates. The specific details of the discussions about music piracy may change every year, but always involve influential concepts like *authorship*, *intellectual property*, and *copyright* that came into existence and were shaped in the seventeenth century. The specific contexts in which these concepts were shaped still influence the way we think and talk about these concepts today and thus still influence today's debates. Because of this, the thesis will start with looking back at the epochs when the music industry was still nonexistent and the term piracy was used in conjunction with intellectual property for the first time. As will be shown in this chapter, going back to the late seventeenth century reveals that the term piracy is a legacy of this period and especially of the English book trade there and then. In order to illustrate how the specific context in which the term *piracy* was constructed, this chapter asks the following question: How did the concept of piracy come into existence and how did its specific history influence the connotations that are still attached to the term today?

In order to come to a full understanding of the history of the term piracy, this chapter introduces the concept of piracy and places it in its historical context. It does so on the basis of an archaeological research method that was proposed by the French poststructuralist Michel Foucault. As will be further explicated in the following pages, his approach of *epistèmes* is of help here with detaching several key concepts from their specific popular connotations. Then, after discussing the individual, but interrelated, histories of the involved concepts, the following chapters subsequently reason from these concepts, detached from their connotations, in order to eventually fully grasp the broad field that has been and still is described as music piracy.

1.1 Genealogy of a cultural phenomenon

When wanting to create more insight into music piracy and its history, this can be done in several ways. One can use different methods, and analysis can take place on several different levels. One way to trace the history of today's music piracy for example is to look at the different practices of music piracy through out history. What media were pirated, in which way, and by using what kind of technologies?

If this method would be used here, it could start with taking a close look at the late nineteenth century and its *piano mania*, that is described in Adrian Johns' influential work *Piracy* (2009) that will be introduced later in this chapter. At the turn of the century people had more money to spend and got more leisure time which resulted in an increase in the sales of pianos. Pianos became a popular way to spend leisure time and because the piano became popular among the masses, this resulted in an immense increase in the sales of sheet music. With this, a serious market for music arose. The increased availability of the photocopier in this period also brought along the first practices that were called music piracy, with dealers selling unregistered copies of popular sheet music. When tracing the history of music piracy by analyzing the practices of music piracy, subsequently, comparable case-studies could be analyzed surrounding vinyl in the 1950s, the cassette in 1980s and the CD in the 1990s.

By analyzing only the practices and their technical specifications, the motives behind music piracy and a close-up on the cultures surrounding it would be ignored. When analyzing music piracy at this level, a closer look at specific jazz piracy cultures in the 1930s, as described in Raymond R. Wile's article *Record Piracy* (1985), could generate more insight in the motives to pirate specific jazz standards and classics. When trying to understand today's music piracy by looking at the motives behind the illegal publishing and copying of music, focusing on radio-pirates in the English seas in the 1960s as is done in the article *Piracy as a business force* (Johns, 2009) and maybe even on the beliefs of the first software developers and their conceptions about free information, could also reveal a lot of interesting insights.

However, this approach would underexpose the definition of a pirate as it is and was defined in legislation. Maybe piracy can be explained by looking at possible gaps in copyright statues? By looking at the explicit articulation of copyright over the years?

Which level of analysis can explain best what music piracy was and is? It appears that when focusing on one level, several other levels stay underexposed. Levels that also influence the overall notion of music piracy and that have affected today's conceptions. Choosing to focus on one of these levels could entail in linking frameworks with each other with invisible causal relationships. The risk of this is assuming a rational progression of history, where facts are presented to fit in a teleological vision on history.

Traditional historiography has long worked in this way, explaining separate events in a teleological way. However, when using the method of traditional historiography, problems of assumed causality arise, inserting unwritten psychological reasonings and other forms of interpretation. Michel Foucault critiques these assumed forms of historical continuity and instead of focusing at interpretation, he proposes to look only at visible, positivistic statements. The approach that he proposes is of help throughout this thesis and, as will be made clear in the following pages, makes it possible to detach music piracy from its current popular connotations and popular understanding.

In *The Archaeology of Knowledge* (2002) Foucault sets aside psychological notions and any assumptions of the rational progression of history. About assuming causality in a teleological way Foucault states:

We must question those ready-made syntheses, those groupings that we normally accept before any examination, those links whose validity is recognized from the outset; we must oust those forms and obscure forces by which we usually link the discourse of one man with that of another; they must be driven out from the darkness in which they reign. And instead of according them unqualified, spontaneous value, we must accept, in the name of methodological rigor, that, in the first instance, they concern only a population of dispersed events.

(Foucault 2002: 24).

Foucault realizes that every concept is burdened with assumption and these assumptions influence the way we think about it. Instead of accepting this, he instead proposes an archaeological approach of history, which replaces the interpretation of history with a rigorous and detailed description of historical discourses. This approach to archaeology seeks to describe discourses in the conditions of their emergence and transformations rather than to search for a deeper, hidden meaning. In this approach the focus lies only at

the level of existence and never takes discourse to be a trace or record of something outside itself.

But what exactly does Foucault mean with this *discourse*? For Foucault discourse is extremely wide-ranging and variable, tending to cross over almost every traditional historical unity. It is defined in the same way as the *statement*; strictly at the level of *things said*, conditions of possibility, and relations to each other. In archaeology, discourse is only described at the level of its basic, operative existence, its existence as a set of emerging and transforming statements and the relation between statements. These statements though, have no stable unit and can vary depending on the scope that is used. Furthermore, these discourses emerge and transform not according to unarticulated world views, but through vast and complex sets of discursive and institutional relationships. Foucault shows that concepts that are usually presented by a given, rigid meaning, can only be understood when it is realized that it is the discourse that constructs this meaning: “We must recognize that they may not, in the last resort, be what they seem at first sight. In short, that they require a theory, and that this theory cannot be constructed unless the field of the facts of discourse on the basis of which those facts are built up appears in its non-synthetic purity” (Foucault 2002: 29). This purity is to be found in the discourse on concepts.

By adhering to this archaeological method in this thesis, it can be made clear that the meaning of piracy as a concept has not always been the same. Throughout history the word piracy has denoted different practices and cultures and has not always had the same meaning. Foucault shows that what we think we know is actually contingent on how we talk about it. Or, how piracy is understood is contingent on the statements that surround it. Therefore, when doing archaeological research, one must focus only on the positivistic statements that can be found in a certain period, rather than try to find a hidden, invisible historical truth. These positivistic statements and the relationships between them then are a depiction of what we know and how we understand a subject in itself.

As said, Foucault sets aside the psychological notion and assumptions of the rational progression of history. Instead, the history of ideas deals with series of *epistèmes*, through which a given subject has progressed. These epistèmes are a set of discursive relations without content and without a knowing subject. The epistème is that specific set of relationships that makes it possible for discourse to be taken as *knowledge*. Knowledge

becomes the unstable, complex set of discursive relations that makes it possible for a statement to qualify as something that is known. This approach of epistèmes is of help in this thesis with detaching music piracy from its current popular connotations and its popular understanding and gives the opportunity to fully grasp the transformations the notion of music piracy has undergone throughout history. This approach and this archaeological method is for example useful in the third chapter in which different phases in music piracy are being distinguished.

By following Foucault's archaeological research method, the shifting notion of music piracy can be understood in this thesis by tracing the discourses on it. Through tracing the genealogy of (music) piracy and analyzing the discourses surrounding it, this research will look for the different notions in which music piracy has been understood. After discussing these shifting notions, the latest development of streaming music and its characteristics will be introduced and analyzed in chapter four. This analysis makes it possible to present a view on how the development of streaming music is able to affect the contemporary and possible future notion of music piracy.

1.2 The invention of piracy

Instead of starting with a description of the advent of the music industry and the first practices that were characterized as music piracy, the following section starts about two and a half centuries earlier, in the mid seventeenth century. It starts at this specific point in history because it was in this period that the term *piracy* was first used to describe the theft of what became to be called *intellectual property*. As will be made clear in the following pages, the conceptions that were formed in this era, have heavily influenced the debates about copyright and intellectual property for centuries and still play an important role in the argumentations that are used in today's discussions about music piracy.

Complaints of intellectual misappropriation go as far back as to the ancient world when for example the Roman Quintilian bemoaned the unauthorized circulation of his rhetorical works. But, as Adrian Johns states in *Piracy* (2009): "these acts never seem to have been called piracies and [...] they were not legal offenses" (Johns, 2009: 19). A notion of copyright did not exist until the Romantic period. Although such practices have thus existed throughout history, the term *piracy*, that grouped many practices together as piratical, was an invention of the seventeenth century. Why there and then? And why refer to seagoing pirates?

The above cited book *Piracy* by Johns gives an extensive overview of piracy throughout history and throughout several parts of the (mostly European and American) society. The American historian bases his book on many primary sources and the work can maybe even be characterized as a genealogy of piracy. Johns' description of piracy practices and cultures in the seventeenth, eighteenth and nineteenth century form a rare and important source for academics studying piracy in this era. Although the following chapters of this thesis rely on several other sources and strike a very specific path of piracy (that of music piracy), the following section relies heavily on Johns' research, as it is a valuable resource when studying the history of piracy.

As Johns describes in his book, authorship had slowly become an important way to uphold authority, both for craftsmanship and academics, in the early modern period. The new craft of printing was giving rise to the first claims on behalf of a literate public to judge issues of common interest. Authorship was becoming a public authority and the violation of it came to be seen as an offense against the common good, akin even to the crime of the bandit.

Although it is hard to pin down the exact moment in time when the term piracy was first coined, it seems clear that it appeared in the mid-seventeenth century. While it was not mentioned anywhere in the beginning of that century, it suddenly appears everywhere at the end of this century and is starting to be defined in dictionaries as "One who unjustly prints another person's copy" (Johns, 2009: 23). The term piracy therefore is a legacy of the place and period of the English Revolution, and in particular of the book commerce there and then. So, what exactly happened in this century that connected the term piracy to authorship and intellectual property?

1.2.1 The Company of Stationers and the English Revolution

Before the English Revolution, the book trade in London had developed into an institution that oversaw printing and book selling, called the Company of Stationers. One of its goals was to oversee and prevent provocative printing and to achieve that it had developed its own conventions. One of them was a system of registration where members were expected to go to and enter the titles of the books they were publishing. This system worked well until the mid-seventeenth century, when the trade grew immensely.

Between 1642 and 1660 the kingdoms of England, Scotland, and Ireland descended into a series of wars and patents were no longer enforced. During this period, the book trade expanded enormously, feeding the political and religious controversies of the time. When the wars had come to an end, the Crown blamed pamphleteering and news selling for the great rebellion. The exchange of paper bullets had, according to them, led to the exchange of real ones. New volumes of law were therefore needed, to replace those that had been printed in the intervening eleven years, but more importantly to gain control over print.

The person that was appointed for this task was Richard Atkyns. As Johns describes Atkyns was convinced that the horrifying events of the previous generation had been encouraged by the book trade, like many at that time. The reasoning behind this was that the business interests led the printers to generating “as much public discord as possible, because discord sold books. So social and cultural collapse had been a consequence of the establishment of a property regime in print” (Johns, 2009: 32).

The solution to this, Atkyns thought, was to bring patents back. The culture of the book had to be restructured, which could be achieved only if the king would agree to cast the medium itself as property. Charles II, the monarch of England, Scotland and Ireland, had to declare that the art of printing originally belonged to the Crown, which would make booksellers and authors subordinate to the overarching property right that could subsequently be overseen by a new class of gentlemen (people from a good family). However, the problem with this claim was that it contradicted with historical knowledge. Printing had been pursued as an autonomous craft for generations, therefore Atkyns responded with offering to reshape history itself by writing that printing had originally been a part of the royal power: “As the numbers of printers had grown “the body forgot the head” and becoming “free” the trade had begun to print whatever generated a profit” (Johns, 2009: 33). A conflict of interest had risen and now the Stationers had become autonomous and incompatible with national monarchy.

The line that marked the peak of Atkyns’ argument, and that introduced the term piracy, was a comparison between the damage independent brewers could do to society in comparison to the damage that could be caused by independent printing: between a brewer and a Stationer “there is as much odds, as between a Pyrate that robs a ship or two, and Alexander that robs the whole world” (Johns, 2009: 35). Comparing the book

trade with Alexander suggested they were bandits of the grandest scale, intent to subjecting the whole world and thus culture in general to their own interests. The realm of print that the book trade had created was intrinsically piratical.

Referring to these practices with *pyrate* had a reason. The term *pyrate* had an ancient source. In ancient Greece, the term *peiratos* had been used to refer to seagoing warlords. Pirates were, just as we still know them today, seagoing thieves. But there was more to them than that according to Johns: “They were irritants to the civilized order itself” (Johns, 2009: 35). The Roman philosopher Cicero declared that pirates lay beyond all society. They had no set place, and owed nothing to legitimate their authority. He remarked: “a pirate is not counted as an enemy proper, but is the common foe of all” (Cicero in Johns, 2009: 36). For him, their unsociability was the defining characteristic of the pirate. The ships therefore were only incidental, as land-based criminals could also be identified as pirates.

It was this connotation, that was used in the 1650s by a political writer called John Streater, that later became an inspirational source for Atkyns. In his pamphlets Streater made a distinction between *Companies* and *Pyrates*, saying that companies contributed to the public good, while a *pyrate* did only worry about his private affairs. He added to this: “and indeed, when those that are in Government mind but their private good only, they are no better then Thieves” (Johns, 2009: 37). Therefore, before Atkyns’ argument against the booksellers, pirates were essentially members of any institution that was not integrated with society. Atkyns used this connotation to state that the leaders of the book trade were men whose ambitions had broken free of the boundaries of civility and had become a threat to culture in general.

In opposing Atkyns the Stationers had to develop a counterargument. They soon did so, and the results of this are still visible in today’s society. What they did is invent a central role for authorial property. They declared that they were essential intermediaries between civility and commerce. Gentlemen could achieve authorship with minimal compromise to their freedom only with a mediating figure to help. The lynchpin of this was the principle of property. The author of any manuscript or copy had “as good right thereunto, as any Man hath to the Estate wherein he has the most absolute property” (Johns, 2009: 38). This right was then sold to the bookseller, who registered it at the Stationer's Hall. There it would be preserved in perpetuity, thanks to the booksellers' protection.

This counterargument is regarded as one of the earliest explicit articulations of the idea of literary property of an absolute right generated by authorship, which would eventually serve as the cornerstone of an entire moral and economic system of print. “Authorial property and piracy were thus being forged in contest with each other. Each rested on highly contentious grounds, and neither was intrinsically credible. It was the concept of piracy that sparked the articulation of a principle of literary property, moreover, and not vice versa” (Johns, 2009: 39).

Recapitulating, it is interesting to see that the illegal printing of books and therefore the industry itself was initially depicted as piratical or even as an institutionalized group of bandits comparable to Alexander that robs the whole world. They were not characterized as a threat comparable with a small pirate, like a pirate brewer would be, but with Alexander and therefore as a threat to culture in general. The pirate (or superlative characterization *Alexander*) as a threat to culture in general was born. In a reaction to this birth of piracy, authorial property was also articulated for the first time. Comparing the ownership of authorship with that of estate was a new and inventive metaphor at that time. One that had lasting consequences, as it is still maintained as the metaphor for intellectual property today.

1.2.2 Piracy after the English Revolution

From the 1680s on, the idea that the medium itself was the property of the Crown came to seem outlandish, and the book trade’s autonomy was restored. However, the notion of piracy survived. The struggles of the book trade were never forgotten and scholars, the book trade itself, and others made the term their own and used it to point at dishonest practices. Therefore, from then on piracy was not used only to refer to illegal printing but also to a broad range of practices in medicine, engineering, and mechanics. As Johns states the generation after the revolution gave the term piracy “the kind of broad, popular currency that it has enjoyed ever since” (Johns, 2009: 42). It became an everyday concept that was being referred to in poetry, newspapers and essays throughout early eighteenth century London.

Instead of characterizing piracy in the book trade (the illegal printing of seditious content) as something that was solely a bad thing for society, it is important to acknowledge here

that this kind of piracy at that time also helped in shaping a public sphere and certain key concepts of the Enlightenment. Because of illegal reprinting, books were distributed beyond the common metropolises and were translated in all kind of languages. The illegal (re)printing also had an impact on the quality and price of books, because pirates reprinted the most profitable works in smaller formats and for far cheaper prices, which created a certain casualness of reading, making books portable and disposable (Johns, 2009: 48). Because pirates generally sought to reproduce works, instead of publishing new works, illegal reprinting, or piracy, also raised questions of accuracy and authenticity for the first time. Reprinters did not only copy works, but also improved them, by adding extra material or comments. Piracy therefore also boosted certain new cultures and habits, like for example completeness, authenticity and accurateness. The concept of piracy thus also helped in shaping certain key aspects of the Enlightenment. In *Piracy* (2009) Johns even goes as far as stating “No piracy [...] no Enlightenment” (Johns: 2009: 50).

As the importance of the book trade grew in the eighteenth and nineteenth century, the debates about authorship and piracy continued, establishing the terms, their self-evidence, and the involved assumptions more and more. Eventually these emerging concepts were an important influence in the formation of copyright, as will be shown in the next chapter.

2 Copyright and the music industry

In today's discourse on music piracy a notable sub debate and controversy exists over copyright. The main issue in this debate is the sustainability of copyright in its present form. Issues that are debated for example are: How useful is copyright in today's digital world; Should a new licensing structure like Creative Commons more widely be applied; and is a radical transition to a world without copyright possible? These discussions about the sustainability of copyright take place all over the world. Online on blogs and websites, in print in books, newspapers and magazines, and in public places. An example of such a public debate was the Dutch Downloaddebat (downloading debate), that took place in Amsterdam in May 2010. During this sold-out evening, lectures were being held by digital rights organizations, but also by anti-piracy programs, and it was concluded with a debate with representatives of all the major Dutch political parties.

These debates about the current state of copyright are important for the way music piracy is understood. As was already stated in the first chapter, the concepts piracy and copyright are closely related to each other. Not only did the notion of piracy spark the first explicit articulation of a sense of literary property, but the possibility to characterize piracy as a profound problem is largely made possible by the explicit articulation of the characteristics of intellectual property in copyright law. Next to being closely related to the concept of music piracy, copyright is also an important factor in understanding how the music industry functions. The preservation of copyright might even be considered one of the most important factors in maintaining a music *industry*. In this chapter copyright and its relationship with piracy and the music industry is being analyzed. As will be made clear by this analysis, the music industry is largely dependent on the properties of copyright. Not only for their daily activities (selling music as products) but also for their anti-piracy rhetoric which is clearly based on the assumptions on which copyright was established.

As will be shown in the following pages, the formation of copyright and the assumptions that provided the basis of copyright, heavily influence today's rhetoric about music piracy. Because of this importance, this section asks how copyright came into existence and how it developed since then. In answering these questions, this chapter does not intend to give a description of the complete history of copyright and all its global modifications over the years. Instead, in line with the previously discussed archaeological research method, a

special focus on the rhetoric that helped to establish copyright is presented and it is asked how this rhetoric has evolved since then.

Focusing solely at the rhetoric surrounding copyright has another reason, that is based on the insight provided by the American professor of law and co-director of the Institute for Intellectual Property & information Law Craig Joyce. In the encompassing work *Copyright Law* (2006), Joyce states that copyright evolves, not due to new technologies, but due to new conditions that are created by these technologies. In today's discussions about copyright it is often heard that a new technology *demand*s or *require*s a change in copyright, but as Joyce states, it is more accurate to say that "developments in new information technology alter economic, cultural, and social relationships to create conditions for change in copyright law. What form that change actually takes, in turn, is strongly influenced by both political and ideological considerations" (Joyce, 2006: 15). A focus on the rhetoric concerning these changing relationships therefore can give insight in how the discourse has influenced these political and ideological considerations in history.

An important element in copyright and in the discussions about music piracy is authorship. Before and in the early modern period the notion of the author as a creating genius was not common. It begins appearing only from the beginning of the eighteenth century. While the text, the product of an author, was seen as being in a dialogue with previous texts before the eighteenth century, the author nowadays is understood in the way Martha Woodmansee has famously defined him in *The Author, Art and the Market* (1994): "An individual who is solely responsible - and thus exclusively deserving of credit - for the production of a unique, original work" (Woodmansee, 1994: 34). What happened between the early modern period and today, that caused this transformation in the understanding of the author?

2.1 The rhetoric surrounding copyright

When analyzing the rhetoric of copyright it appears that copyright can be regarded as a solid foundation, just as it can be regarded as a political construction. In her doctoral dissertation, the American Debora J. Halbert (1997) even goes as far as stating that copyright is a carefully constructed myth: "Copyright is a socially constructed discourse that has become a powerful social myth. This myth, constructed over 200 years ago, has

taken on the power of truth, its assumptions and history ignored” (Halbert, 1997). What are these assumptions she refers to, and what history is ignored?

The most important assumption that Halbert discusses, is the metaphor that was and still is used when discussing copyright. Metaphors are used to make unfamiliar things familiar and create a conceptual framework to get a better understanding of abstract concepts. In the early discourse on copyright several metaphors were tested. Eventually, the metaphor that was used, made famous and that still is used today was based on a link between tangible and intangible property. Indeed, the English Revolution not only formed an inducement for discussions about the fate of the uncoordinated booksellers, but also provided an opening for the emergence of a debate on liberty and property. In this debate the work of the English philosopher and Enlightenment thinker John Locke was very influential. Eventually his ideas about tangible property proved to be a critical aspect in the emerging discourse on intangible, proprietary authorship. Halbert states: “The property metaphor was a powerful tool for understanding how one could own ideas, as well as land [and] by aligning the author in this emerging drama with landed estates, the people engaged in this discourse could easily draw images of theft and hardship because of loss of property” (Halbert, 1997).

By using this metaphor, the author as an *owner* of ideas could emerge. Just as one could own estate, one could also own ideas. Although it seems that this metaphor was especially beneficial to the author, it was especially beneficial for others besides him too. Those who were particularly beneficial with this metaphor were the earlier mentioned Stationers. To explain why, one has to go back to the circumstances after the English Revolution.

As was explicated in the first chapter, one of the primary goals of the new laws, that were designed after the English Revolution, was to regulate the book trade, and not to protect something that came to be defined as copyright. The Stationers had a monopoly on the book market. They largely determined what was being published and were partly held responsible for the outbreak of violence during the English Revolution. The reasoning for this was, that discord lead to increased sales and was beneficial for the book trade (Johns, 2009: 32). As was insinuated with this reasoning, the goal of the book trade was to create as much discord as possible, in order to maximize profits. A regulation of the book trade could reduce the power of the Stationers and by doing so could bring back order into society. To accomplish this, new laws were needed.

To establish this, the Statute of Anne (which was enacted in 1709) among others reduced the copyright term from being perpetual to 14 years. The copyright of already published materials was extended with 21 years, but with this proposal, booksellers had the prospect of their monopoly tumbling (Lessig, 2005: 86). In a reaction to this foresight, they therefore began developing arguments to justify their continued control. Eventually in 1774, when the Statute finally reached the House of Lords for a definitive construction, this led to fundamental differences between the enactment of the statute and its final construction by the courts.

The booksellers had the prospect of their monopoly tumbling and their income decreasing due to the limited time span of their ownership of the texts, therefore, in what has become known later as the *Battle of the Booksellers*, they began to campaign for perpetual copyright, which rhetorically led to a narrative that is still maintained by the music industry today: the author becoming the hero in need for protection from those who steal his work. However, before the Statute of Anne, the author had never held copyright, as authors sold their books to printers usually for a flat fee, thus giving up rights to publication and any other royalties, even if a book was popular (Halbert, 1997). The minimal rights the author had were limited to some basic rights in the text. The bookseller could for example not change the words in it, or add things to the text. Although the authors themselves had not held copyright before, their interest was being promoted by the Stationers. This rhetoric helped to pave the path of thinking about authorship as beneficial to those owning the copyright of the works. But in the end these owners were not the authors themselves but the booksellers. This rhetoric had a narrative with clear good and bad guys in it (the author vs. the pirate) and was beneficial for the booksellers. While copyright thus was rhetorically being transformed from a publisher's right to an author's right, the publisher in the end was still beneficial.

During the eighteenth century the copyright battle continued in England. The concept of the "modern proprietary author" (Halbert, 1997: 8) continued to be used by the London booksellers as a weapon to expand the rights within copyright law. The property metaphor and the rhetoric of the vulnerable author not only created clear victims and perpetrators, but also established a general understanding about the necessity to protect an author's rights. The result of this was, in the decades that followed, the text became defined more

and more as being independent from other texts. As opposed to being in a dialogue with previous texts, it became seen as an entity with clear boundaries.

This rhetoric had and still has a profound impact on how intellectual property is perceived and transformed the way how the ownership of knowledge is understood. Until today this is also still visible in the rhetoric of the music industry and its representatives. In the narrative that is used by them, copyright is often presented as a right that is beneficial for the artist, while in reality copyright is mainly beneficial for the record companies themselves, rather than for the artist as is shown for example in *MP3s Are Killing Home Taping* (McLeod, 2005: 528).

As will be shown, this way of thinking about intellectual property that had developed in the book trade was not only important for the book trade itself but became an important cornerstone for the music industry too. As this music became a commodity and as the industry began selling sheet music and recordings from the early twentieth century on, these too became seen as entities with clear boundaries, with the artists that created the music in need for protection against piracy.

2.2 The music Industry

After the foregoing parts introduced the individual but interrelated histories and accompanying rhetorics of the concepts piracy and copyright, the following section introduces the music industry. Firstly it will give a brief overview of the history and advent of the music industry, secondly it returns to the previously discussed concept of copyright and continues with discussing the importance of copyright for the music industry. Eventually it is described how the music industry can best be defined and how is it related to copyright.

In the book *The Music Industry* (2009) the Swedish scholar Patrik Wikström gives an overview of the music industry in the twenty-first century. Before diving into the contemporary challenges for this industry however, he gives an overview of the history of this music industry. As Wikström describes, through the ages the balance between three elements in music culture have been fluctuating: that of the live performance, publishing and recording. Before the advent of the print technology the music culture existed only of one of these three elements: the live performance. From the first mechanical method of

copying sheet music on in 1473 (Randel, 2003: 679), print technology evolved and publishing became a second element in music culture. Sheet music slowly became a product that could be sold, but it was not until the end of the nineteenth century that the trade of sheet music led to a real music *industry*.

Although popular opinion often points at the invention of the phonograph in the last quarter of the 19th century as the birth of the music industry, a real music industry already came into existence with the *piano mania* at the end of the nineteenth century (Johns, 2009: 330). As the sales of pianos increased, so did the sales of sheet music. This led to the birth of a real music *industry*.

As Wikström describes, the center of this upcoming industry was located in New York. In this area, often referred to as *Tin Pan Alley*, offices of music publishers were packed wall to wall. The publishers located on Tin Pan Alley began to produce and promote songs in order to sell them as commodities. Performers were being persuaded to play new songs from Tin Pan Alley, as the implementation of a song could result in a rise of sales throughout the United States. Music as a commercial enterprise rose to an unprecedented level which continued to grow in the decades after this piano mania.

Because this development of the music industry throughout the twentieth century will be discussed more thoroughly in chapter three, this section will suffice here with acknowledging that after the success of sheet music, recording techniques evolved quickly and in the decades following this eventually led to recording becoming the third, and from an economic point of view perhaps most important, element in music culture. To understand the dynamics within this industry, the following section defines the music industry. How can *the* music industry be understood?

2.2.1 The music industry: a copyright industry

There are several ways in which you can interpret, analyze, and characterize the music industry that came into existence in the late nineteenth century. In order to come to an understanding of this music industry, this paragraph suffices with exploring how this industry can best be characterized. It first takes a look at how the industry has been defined in history and eventually with the help of the earlier mentioned Wikström argues that the industry can best be defined as a *copyright industry*. This definition subsequently

is of help throughout this thesis, since it clearly explains the goals and dynamics of the music industry.

Since its advent the music industry has been classified and defined by several scholars and theorists. Each scholar has done this within its own specific context. The first famous classification of the music industry comes from the Frankfurter School of Critical Theory. In the 1930s and 1940s the recognized scholars Max Horkheimer and Theodor Adorno classified the music industry as being a part of the *culture industry*. Most notably in their book *Dialektik der Aufklärung* (1944) they argued that the culture industry was the result of a process, where an increase in media and communication technologies lead to the industrial production, circulation, and consumption of cultural commodities. Nowadays known and criticized for their pessimistic worldview, they worried that this way of *producing* culture would lead to formulaic and standardized products.

During the 1970s, French scholars (most notably Morin, 1962, Huet et al., 1978 and Miège, 1979) modified the term cultural industry, coined by Horkheimer and Adorno, and recognized the versatility and complexity of this industry by changing the term into the plural *cultural industries*. Next to this modification, they rejected the pessimistic approach and instead argued that the commodification of culture also had its positive sides. A pro of the commodification for example was the availability of culture. Due to the commodification, culture became accessible to a broader public than before.

More recently, the music industry has been classified as being a part of the *creative industries*. Although this term has been adopted widely in local cultural policy making (Hesmondhalgh, 2002: 144), the problem with this classification lies in defining what is part of the creative industries and what is not. Regions and countries differ in their definition of the creative industries. The term does not specify the goals of this industry and has been criticized as being too inclusive. Since the term focuses on the input, rather than on the output, inventions in medics could also be classified in this definition for example. Although the term has been used throughout the world, its shortcomings and ambiguities make it a term that is not so useful for further analysis of the music industry here.

Rather than using one of the above classifications, this thesis adheres to a definition of the music industry given by Wikström in *The Music Industry* (2009). Wikström argues that it is best to define the music industry as a *copyright industry*. Instead of focusing on the input

or on the production of the products within industries, this definition emphasizes the nature of the products that are created and traded within these industries. Next to this, the definition is less ambiguous than the aforementioned which makes it a useful definition for analysis in this thesis.

The Swedish author subsequently gives four characteristics of the copyright industry. In order to come to a broader understanding of the music industry, or the copyright industry, these four characteristics will be discussed here. In succession the following characteristics will be introduced: the nature of the copyright industry's products, the consumption of time by the copyright industry's products, the uncertainty in the market in which the copyright industry operates, and the characteristics of the costs that are involved in producing copyright products.

The first characteristic of the copyright industry is the nature of the products it produces. To describe the specific nature of these products, Wikström uses a definition by Paul Hirsch (2000) of cultural products as a starting point: "nonmaterial goods directed at a public of consumers, for whom they generally serve an aesthetic or expressive, rather than utilitarian function" (Hirsch in Wikström, 2009: 20). Although this definition comes close to the products of the copyright industry, there are more specific characteristics. An unique aspect for example is what the consumer actually buys, when it buys a CD or a MP3. He or she does not purchase the copyrights of a sound recording, but a right to listen to the sound recording within carefully defined restrictions. When buying a copyright product, the rights holder and the consumer close an agreement on how the consumer is allowed to use the recording.

The second characteristic of a copyright product is that it consumes time. A film, a book or a piece of music takes time to experience and people are only able to decide whether they like a copyright product if they have experienced it. This characteristic brings along a problem for the copyright industry. The products it produces consume the attention of the consumer and since the audience is only able to consume a limited amount of information, the audience can only experience a small fraction of the total number of new products released in the market. To cope with this, the industry over the years has come up with several systems of pre-selection to facilitate the audiences' decision making.

The third characteristic of the copyright industry is the level of uncertainty and change in the market in which it operates. Neither business executives, fans, musicians, or journalists can predict what is going to be commercially successful. This derives from a number of properties of the product. First, Wikström argues, new products involve a high level of risk, since a copyright product can only be evaluated when a first copy has been produced. After this first copy has been produced, the industry can test it on the public, but this does not guarantee anything. Second, the consumption of copyright products is unpredictable. Fashion and style can suddenly be outmoded, even when well promoted. Add up these two characteristics and it becomes clear that it is very difficult to predict the future of the market in which the copyright industry operates. Resulting from this the copyright industry copes with the level of uncertainty in its market by annually releasing a large amount of copyright products. Only a small percentage of these released products subsequently support all the titles that are unable to generate enough revenues to compensate for the costs.

Finally, the fourth characteristic of the copyright industry is the special allocation of costs and returns. The production of copyrighted materials is characterized by high production costs and low reproduction costs. The main part of the costs is attributable to creating the first copy and the marketing for this copy. These costs are often fixed, meaning that they are independent of the number of items sold. This has consequences for the behavior of this industry, for example in that it makes economic sense to sell a small amount of titles to a large audience.

When examining these characteristics and reviewing the definition of the music industry as a copyright industry, it becomes clear that this industry is largely dependent on the historical and current state of copyright. Its daily activities are based on the general understanding of ideas being entities with clear boundaries, and it uses the idea of the necessity to protect the author's rights that comes forth from copyright principles and rhetoric. Interestingly, in June 2010 after restructuring within EMI, one of the four largest record companies of the world, the company stated in a press release that it would rename the company a "comprehensive rights management company" (EMI, 2010). This reiterates the definition of the music industry as a copyright industry and gives credit to its dependence on copyright.

With this definition of the music industry in mind, and the exposed assumptions on which copyright is based, the next chapter will zoom in on music piracy and its development throughout the twentieth century. Needless to say, the previously discussed concepts of piracy, copyright, and the music industry deeply influence the discourse surrounding music piracy. Since the advent of a music industry, how did the notion of *music* piracy come into existence and how did music piracy evolve from then on?

3 Music piracy and its development

The music industry is facing a crisis. New technology, new media, and innovative business practices are challenging the copyright principles that have underpinned the industry for as long as anyone can remember. Taking advantage of a revolutionary process that allows for exact copying, “pirates” are replicating songs at a tremendous rate. The public sees nothing wrong in doing business with them. Their publicity, after all, speaks of a mainstream music industry that is monopolistic and exploitative of artist and public alike. The pirates, by contrast, are ostentatiously freedom loving. [...] They are, they claim, bringing music to a vast public otherwise entirely unserved. [...] The recently booming “dot” companies band together to lobby the government for a radical strengthening of copyright law. [...] the crisis of piracy calls the very existence of a music industry into question.

(Johns, 2009: 327)

In the above quote of the earlier mentioned Johns it seems as if the situation in which the music industry has found itself the last decade is depicted. Personal computers allow so-called pirates to easily copy songs and distribute them to others via file sharing networks, calling into question the very existence of a music industry. The public sees nothing wrong in dealing with these pirates and downloads music, as well as books and motion pictures, from websites such as The Pirate Bay. The industry is lobbying for an enforcement of copyright law. In a speech about intellectual property enforcement Gary Locke, a representative of the U.S. Obama administration, explicates the threat that the music industry faces: “copyright infringement is a growing threat, with cyberlockers as well as peer-to-peer, file sharing, streaming and user generated content sites providing a constant challenge to the music industry” (Commerce.gov, 2010).

Although the quote may look like a portrait of the twenty-first century, the quote is actually a portrait of the early twentieth century that gives insight in the discourse on the struggles that the music industry had with the pirating of sheet music. Did nothing change in the discourse on music piracy over more than a century? Is today’s sentiment the same as that in the late nineteenth century, or are there ruptures that can be found? In order to answer this question, this chapter discusses the emergence of *music* piracy and its development from the late nineteenth century until 2010. As will be made clear by this overview, the control of the music industry over their copyrighted music has been

fluctuating since the advent of a music industry. Furthermore, insight is provided in how the character of music piracy has been shifting during this period.

In the first chapter it was made clear that the term piracy was connected to the illegal reprinting of books and to the notion of intellectual property at the end of the seventeenth century. From then on print piracy became more and more regarded as a problem. However, despite that the illicit reproduction of musical scores also existed throughout the seventeenth, eighteenth and nineteenth century, music piracy was *not* regarded as a structural problem during this period. In contrast with books, reprints of musical scores were even reissued unauthorized and were often altered for paying clients. In *Piracy and Panacea in the Dissemination of Music in the Late Eighteenth Century* (1975) Barry S. Brook elaborates on the dissemination of music in the eighteenth century and for example notes: “Indeed, in many places, republication without remuneration of works originally printed in another country was not considered illegal nor even immoral” (Brook, 1975: 21). The practices that are depicted as piracy today, were the norm before the advent of a music *industry*.

Next to piracy not being regarded as a structural problem in this period, composers were unable to turn to copyright law as we know it today. In the following quote from the British political magazine the *New Statesman* Tim Blanning, an English professor of history at the University of Cambridge, places today’s situation in the music industry in its historical context:

Although sympathy for veterans about to be deprived of their royalties is entirely proper, it is just as well to see the crisis of the modern music industry [...] in its historical context. Modern musicians’ lot compares very well to that of their predecessors. By definition, it was only when commercial recording began in the early 20th century that a musician could expect any additional payment for a performance. Not even as great a virtuoso as Paganini or Liszt had a back catalogue.

(Blanning, 2008)

As stated above, musicians in the nineteenth century and the centuries before could not claim royalties over their compositions, since they were not able to resort to the copyright law as we know it today. The live character of music, the inability to turn to copyright for sheet music and the tradition to alter musical scores without having to ask permission ensured that until deep in the 19th century, piracy was not regarded as a problem and

piracy was the norm. This shows an important characteristic of the concept of piracy: it only exists when its practice is regarded as a problem.

It was at the end of the nineteenth century however that music piracy did become regarded as a structural problem. In line with the previous archaeological subquestions, the following section asks why music piracy became seen as a structural problem at that time. From there on it traces its various transformations through the twentieth and early twenty-first century. It does so by carefully examining different pivotal events, trends and developments.

It is not in the scope of this thesis to provide an exhaustive historical overview of all the important events that took place in music during the twentieth century. In order to map the important transitions within music piracy during the last century, the following section classifies the important events, practices and cultures of music piracy into three different phases. The three phases in music piracy during the twentieth century that are distinguished are: the industrial music piracy phase, the domestic music piracy phase and the digital music piracy phase. The use of the term phase is intentional here. The classification is heavily inspired by the earlier discussed Foucauldian term *epistèmes* and describes different periods that each have their own characteristics and corresponding discourse about music piracy. Using the term *epistème* for these periods is carefully avoided here, since an analysis of *epistèmes* in the Foucauldian sense would include longer timeframes and probably have the size of a book. Due to the limited space, the following section will talk about three different *phases* in music piracy, inspired though by Foucault's understanding of *epistèmes*.

This classification applies an important distinction to the changing character of music piracy. Although a large number of elements within music piracy might not have changed, the practices, ease, speed, and places where music piracy took place have been changing and have marked important transitions in the way music piracy was conceived. Of course, this classification can be criticized for containing overlaps. Examples of industrial piracy practices can be found in the twenty-first century with "small industrial pirate laboratories" copying CDs in mass quantities (Music Piracy Report, 2002). Examples of domestic music piracy can also be found in the early twentieth century. When focusing on the piracy practices, cultures, and anti-piracy campaigns in this century however, and how these influenced the discourse shaping our understanding of music piracy, this classification

proves to be a useful tool in understanding the transformations that the concept of music piracy has gone through during the twentieth century.

Next to getting insight in these transformations, the following pages furthermore illustrate how the control of the music industry over the dissemination and over exploiting the copyright in their music has been fluctuating. New technologies, demand for music, and fan cultures have challenged the position of the music industry, to which it responded with narratives and rhetoric, based on the previously discussed assumptions.

3.1 Industrial piracy

From the reproduction of sheet music and the first recordings on cylinders in the 1870s until the microgroove long playing record (LP) that was popular until the 1980s, duplicating music was mainly an industrial enterprise. For the reproduction of sheet music a printer had to be rented or owned and a warehouse was needed to store all the made copies. Pressing plants for recordings were autonomous firms or semi-autonomous firms that often were a part of the music companies themselves. In the 1930s domestic cutting machines for records were sold for a while, but were no success. There seemed to be no desire for home (re)recording, therefore the practice of music piracy from the advent of a music industry in the late nineteenth century until the 1980s can mainly be regarded as an industrial matter. Of course this had consequences for the way music piracy was perceived. The first phase of music piracy here is classified as the industrial piracy phase. During this phase, as will be shown, so called *pirate kings* emerged. These heads of pirate networks were often regarded as Robin Hoods, *stealing* from the rich and giving access to culture to the poor. In succession, this section discusses examples and characteristics of industrial piracy practices in the sheet music and recordings trade.

3.1.1 Sheet music

The growing popularity and affordability of sheet music during the seventeenth, eighteenth, and nineteenth century meant an important shift for music on several levels. Not only did it lead to “an increasing emphasis on reproduction” (Durant, 1984: 101), but it also encouraged the rise of the amateur musician and the development of standardized musical notation. Furthermore, as was shown in chapter two, the piano mania and the increased sales of sheet music lead to the advent of a music industry. Music had become

a commodity and the production and sales of sheet music was a lucrative business. By 1898 the English sheet music trade for example was averaging sales of 20 million sheets per year (as cited in Coover, 1985: 68).

As James Vale mentions in the paper *Piracy, pianolas and the internet* (2009): “the same factors that made mass printing of sheet music commercially viable also did the same for the widespread illegal copying and sale of music” (Vale, 2009: 1228). The copyright laws at that time offered the publishers little protection and the apparent public demand for more music at a cheaper price made it possible for sheet music pirates to increase their output and illegal reprints quickly began to sell in the tens of thousands (Vale, 2009: 1228).

Music publishers saw this as unfair competition and as they could not turn to copyright law, they began to trace the sheet music pirates themselves. This hunting for music pirates, the mass availability of pirated sheet music, and the public opinion that showed no compassion for the “monopolistic and exploitative” (Johns, 2009: 327) music industry led to the first crisis in the young music industry.

The sheet music piracies at that time consisted of networks of people, led by influential individuals, that distributed the sheets to different locations where the music was sold. One of those influential individuals for example was James Frederick Willets, alias “the London Pirate King” (Mann, 2000), who coordinated several printers and had a distribution network that extended across England. When he appeared in court, after being caught, he held a monologue in which he declared that after the piano came in reach for the average Englishman, he wanted music to be within reach for everyone too. In his opinion the prices of sheet music were too high and therefore he sold copies of the music for a lower price, serving the general population (Johns, 2009: 345). As will be shown in the following paragraphs, this is a sentiment that appears frequently in the history of music piracy.

At the end of the nineteenth century a new range of music carriers was being developed, next to sheet music. One them for example was the pianola (or player piano), that was very popular during a short period in the early twentieth century (see Vale, 2009). Another one of course was that of the recording. At first recordings could only be made with the innovative cylinder (or talking machine) that could preserve sounds. As making duplicate copies of these recordings at the end of the 19th century was even hard for companies that had a patent application for it, it was certainly not commercially viable to copy these recordings illegally. However, when duplicating methods evolved, music piracy appeared in the trade of recordings too.

3.1.2 Recordings

Since there was no satisfying method for preparing copies in the late nineteenth century, each recording was a unique document, and meeting the demand for recordings meant that recording artists were faced with an array of recording machines, ranging from a few to ten or more, depending on the sound that the performers could produce (Wile, 1985: 21). Before every recording an announcer would say the name of the performers and the performance. First this was used as an advertisement for the source of the recording, but as duplicating techniques evolved, soon this began to be used as evidence of origin to prevent copying by other companies. Later, these announcements would sometimes also continue into the music itself to prevent the possibility to block out the spoken announcement. Since it would take a lot of time to obtain additional copies and as methods for copying slowly evolved in the early twentieth century, recording companies had begun copying one another's product to meet the demand of popular titles. Resulting from these practices, the first litigations involving recording rights began to occur.

When, after the turn of the century, the disc became a strong competitor for the cylinder, the popularity of the cylinder began to decline. Columbia Records and Edison's National Phonograph Company were able to improve the method to cut duplicate records, allowing for greater volume and better reproduction of records. Subsequently problems with record piracy (or reprinting) seem to have disappeared "not of litigation, but because the newer technology made the piracies impractical" (Wile, 1985: 26). Nevertheless, because registering records at the Copyright Office was not possible yet, manufacturers began to supply their records with notices, stating that attempts at copying or counterfeiting would provide the basis for legal proceedings. A remarkable approach to prevent counterfeiting was the patenting of red paper wafers by Victor Records (Wile, 1985: 29).

Just as recording techniques posed a threat to the entertainment business of the nineteenth century, the young music industry itself was challenged in the 1920s. Although this was not by piracy practices, but by the development of radio. Despite the new advanced electrical recording process, that was controlled by only a few licensing firms at that time and that made it relatively easy to prevent illicit copying, the disruptions caused by the impact of radio and the onset of the Great Depression made the sales of records drop and almost sounded like the end of the recording industry.

As radio mainly played music by white artists, the demand for black jazz records increased (Frith, 1988: 17) and it was also in this musical genre that the first small-scale piracy incidents began to occur in the late 1930s. The unavailability of many classic jazz-performances lead to some notorious reissue labels such as the Biltmore label that duplicated these legally unavailable records for collectors in the 1930s and 1940s. Eventually these labels got caught by the big record companies that eventually began to reissue these records themselves.

In the late 1940s new technologies and materials had a significant impact on the music industry's growth. Arising from the oil industry in the late 1940s was the multi purpose thermo plastic polyvinyl chloride, that was suitable for making recording tape and gramophone records with very low surface noise. The microgroove LP, that was made from this material, became the new standard for records. Also, in 1949 the first demonstration of the transistor took place. The transistor would cause profound improvements in recording and playback techniques, and eventually the strong combination of the transistor and the microgroove LP record resulted in an unprecedented growth of the music industry. Music could now easily enter anyone's home. Because of this new recording standard, a new wave of piracies emerged.

3.1.3 Robin Hood of the waxworks

After the introduction of the microgroove LP in the 1950s, the production of 78rpm shellac discs was discontinued. Because not all classic recordings were being transferred from 78rpm discs onto microgroove LPs, communities of music devotees began to press them themselves without official permission. Unofficial labels, like for example the Jolly Roger label, reprinted classic jazz performances, deriving from among others the Columbia Phonograph Company and the Victor Talking Machine Company, on new 10" LP records (Wile, 1985: 29).

Although the record piracy that came forth from these communities was a commercial enterprise, the incentives by which these communities functioned can also be understood as *moral piracy*. It arose from communities consisting of groups of music enthusiasts that shared a devotion for music and that wanted to create canons to judge quality by. The sentiment among these record collectors was that these pirates were providing a public service, much like that of the sheet music pirates that were described earlier. As long as

the record companies were letting their old recordings gather dust they were betraying the public and culture in general.

While in the jazz community piracy was about restoring access to recordings of live performances that were out of print, in the opera community pirates provided access to recordings that were new or rare. Many performances appeared with disguised artist credits and recordings that had their origins in Eastern Europe were often simply appropriated. The American Colosseum label for example republished dozens of Russian, Czech and Polish recordings and even boasted on its record jackets that no royalties were being paid (Wile, 1985: 32).

When the recording companies subsequently increased their efforts to get hold of the bootleggers, one of them, RCA Victor, took the lead. They stated that they would not only target the labels but also the pressing plants that were pressing the discs for them. Eventually, it came out that these reissues were printed by their own Custom Pressing Division and eventually it was discontinued “at the expense of several red faces at Victor Custom” (Wile, 1985: 33).

Due to the abundance of these piracy practices, the record industry in the 1950s changed their approach on piracy and gathered together to form the Recording Industry Association of America (RIAA) that adopted a clear anti-piracy mission. The RIAA would both be lobbying for copyright and would pursue to deter, prevent and detect piracy.

When summarizing the events that took place in this industrial piracy phase, the main characteristic that can be seen is the centralized character of music piracy. Music piracy is carried out by networks of people that are centrally coordinated, be it from warehouses full of sheet music or from pressing plants. Furthermore, next to being a profitable business, the practices are often connected to ideologies. The main ideology connected to sheet music piracy in this phase has to do with accessibility. This accessibility for example was being promoted by the lower prices the sheet music piracy cultures pursued. Later, in the first decade of the twentieth century, the argument of accessibility manifests itself in the form of reprinting recordings by pressing plants because of a demand that is greater than the supply. The transition from shellac discs to vinyl marks another wave of piracies connected to accessibility. Only a selection of older recordings were reprinted on vinyl by the big music companies and again the lack of access to recordings seems to result in piracy practices. In all discussed situations, providing access to music or to recordings is a main argument that is used in favor of music piracy.

Another striking thing is the flexibility of the term pirate. While at first the term pirate is being used to denote the individual leaders of illegal reprint networks, several years later the term is used for companies that run pressing plants. Finally, it is apparent that at times when piracy is low, the demand for music seems to be met or the reprinting process is too sophisticated and expensive. The size of music piracy as a structural problem fluctuates and controlling it is mainly a matter that is dealt with by tracing the origins of counterfeited products and accusing the people or companies that lead the pirate networks.

As will be shown in the next section, this centralized character of piracy largely disappears in the domestic piracy phase, making room for a decentralized character of piracy. Piracy is democratized.

3.2 Domestic piracy

In contrast with the industrial piracy phase, music piracy becomes a decentralized problem in the domestic piracy phase. This can largely be attributed to the properties of a popular medium that is applied in a wide variety of formats and recorders during this period, most notably in the form of the Compact Cassette: tape. This section will dive into the second phase of music piracy, describe its most notable technologies and analyze how in this period the notion of music piracy is shifting.

3.2.1 Tape

The roots of the second phase of music piracy can be traced back to the late 1940s. Although tape had been developed earlier, the domestic application of tape in the form of reel-to-reel tape systems became a presence in several U.S. households in the late 1940s (Johns, 2009: 432). These reel-to-reel tape systems, although still being bulky in their nature due to the large size of the actual tape, made recording and copying easier than before. Looking back the systems may seem complicated. The machines were heavy, the tapes were large and the tapes do not seem to have had an ideal format for mass copying, however, as domestic habits of use developed, these systems initiated a revolutionary shift in the place where creation and reproduction took place. A shift from the factory to the home. And with this, a shift of music piracy from the industrial to the domestic sphere, decentralizing and democratizing it.

After the discussed piracies in pressing plants in the 1950s, the music industry refined and modernized its practices in the 1960s. While the vinyl disc remained the most popular music carrier during this period, a new tape format was introduced in 1963. At the Berlin Funkausstellung in 1963, Philips introduced the *Musicassette* that eventually will become popular as the *Compact Cassette* (Rapport Gerkens, 2009: 20). The cassette was smaller, less expensive and easier to use than reel-to-reel tape, and because Philips did not protect its cassette as a proprietary technology, other companies were encouraged to license it, increasing the speed of the spread of this technology. From 1965 on pre recorded cassettes were being released and by the end of the 1960s, around 85 different manufacturers had sold over 2.4 million cassette players worldwide. The music cassette became the standard format for tape recording and the standard for domestic music piracy in the 1970s and 1980s.

In the 1970s, music piracy seemed to be on the decline, but actually it was slowly being replaced by home copying, made possible by the cassette tape that proved to be convenient, portable, and durable. Home recording already existed, made possible by reel-to-reel systems, but with the success of the cassette a real mass market emerged. One could record LPs onto cassettes and swap these cassettes with friends. The cassettes could also be rerecorded and by making mix tapes, individuals could feel a sense of authorship. What contrasts the piracy practices connected to the cassette with those in the industrial piracy phase is the noncommercial nature of it. Although some piracy practices in the previously discussed industrial phase were also noncommercial to some extent and came forth from ideals, piracy at that time was largely a commercial enterprise. With the cassette however, piracy became a noncommercial decentralized practice.

The success of cassettes did not go unnoticed for the recording industry and next to releasing prerecorded tapes it began to warn people that home taping was a treat to music itself. At the end of the 1970s, the music industry described cassette piracy as the greatest threat it had ever faced. In a reaction to this threat, a concerted effort by the RIAA to end the practices through legislative recovering lead to the Copyright Act of 1978, that brought audio recordings under the wing of copyright for the first time. In this law a distinction was made between piracy (commercial) and home copying (noncommercial). Resulting from this it became widely believed that there was an exemption in the law for home taping, and because judges adhered to this exemption it became even harder to deter people from home copying (Johns, 2009: 448).

Despite being invented in the 1960s and made popular in the 1970s, the cassette tape sales reached its heyday in the 1980s, partly due to the introduction of the Walkman. According to the RIAA, in 1983 cassette tape sales surpassed the sales of LPs and EPs (Christman, 2007). With the (blank) cassette being very popular, the British Phonographic Industry therefore launched the *Home Taping Is Killing Music* copyright infringement campaign. In this campaign it stated that music piracy led to the *death* of music. The organization reasoned that a decline in album sales due to home copying would result in less revenue for the music industry, negatively influencing the investments in new music and therefore contributing to the *death* of music. Already in the 1980s, these kind of campaigns encouraged discussions around music piracy, copyright and the music industry and these discussions only grew in the 1990s and 2000s.

3.2.2 CD

In 1982 Philips Phonogram introduced the compact disc (CD). The disc could store digital data and was therefore capable of delivering clear sounds that could be preserved without any loss of sound quality, unlike the LP. The CD was hailed as one of the most important developments in the recorded music industry since the LP. After slow initial sales, 50 million CD units were sold in 1986. Two years later, in 1988, CD sales for the first time were higher than vinyl sales. By 1989 the CD accounted for over 200 million units and the LP was slowly beginning to disappear from record stores. Consumers were replacing their vinyl collections with CDs and partly due to this, the music industry entered its golden age: the 1990s (Rapport Gerkens, 2009).

During the heyday of CD sales a number of new carriers were introduced that competed with the CD. Sony for example introduced the digital audio tape (DAT) and the MiniDisc, and Philips introduced the CD-I and Digital Compact Cassette (DCC). Although these formats allowed consumers to record and playback music in a way comparable with the cassette, but digital so with a greater sound quality, the CD remained the most popular music carrier.

While the music industry was experiencing its golden age, it began to deal with piracies in the late 1990s. This time, it was not the cassette that troubled the industry but the CD-R that allowed people to copy and *burn* music to blank CDs. The prices for recording systems for CD-Rs fell from \$35,000 in the early 1990s to less than \$1,000 in 1995 and thereby the recording systems became obtainable for a large number of people (Starret,

1998). The affordability of the recording systems, combined with the convenience of the CD resulted in a new wave of home piracy.

While CD sales only began declining from 1999 onwards, the RIAA expressed its view on home copying in 1998 in a statement by Steve Fabrizio on behalf of the RIAA:

It's important to understand that record companies make their money virtually exclusively from the sale of records. If records aren't sold, but are copied instead, the business of making music suffers. Artists and songwriters don't collect royalties, and at some point, can no longer make a living in the music business; record companies don't recoup their investment, and at some point, are no longer able to invest in new artists and new music. In the end, the losers will be those who love music because the breadth and depth of the musical talent supported by the U.S. music industry cannot exist without financial support. The winners are the companies that make copying machines and blank media; they profit from selling their devices to consumers who want music without having to pay for it.

(Fabrizio as cited in Starrett, 2000)

Judging from this statement it is interesting to see that the RIAA on behalf of record companies again created a narrative with clear good and bad guys. In the previous chapters such clear good guy, bad guy narratives in history were already discussed. Although the depicted good guy here again was the artist, the bad guys changed to the companies that made copying machines and blank media. Although not being as explicit as in the *Home Taping is Killing Music* campaign, a doom scenario was pictured of what would happen when the consumer would copy music instead of buying it.

As is shown, music piracy is democratized in the domestic phase. Instead of being a concept tied to organizations and pirate kings, the meaning of piracy shifted to the practice of it. A practice that was not solely commercial anymore and that could now be exerted by virtually everyone. Not only the practitioners of piracy changed but the place where piracy took place changed too, and because of that, piracy became something that was hard to control because it exceeded the border between public and private. A result of this was that the way to defend against piracy shifted from large-scale raids to marketing campaigns that tried to impose certain ideologies on the music consumer.

The practice of piracy also changed in this domestic phase, since pirating music now did not mean to copy a work of art in large quantities and make it available to others without having an agreement with the owner of the copyright. Accessibility was a main argument

for piracy in the industrial phase, and this argument still remained, but the aim of it narrowed down to accessibility for the individual. Access for example to the personal music collection in the car or access to a selection of songs coming from different albums. Finally, piracy got connected to authorship and the social element in it got amplified through mix tapes and compilation CDs that were swapped among friends.

3.3 Digital piracy

Judging from the extensive amount of (popular) articles on music piracy from the late 1990s until today, one might possibly expect that the history of the music industry and of music piracy can be divided in a period *before* Napster and a period *after* Napster. Since the popularity of this file sharing network, music piracy has become an even more discussed subject, and the amount of claims made about the causes, motivations and effects of piracy have been abundant, expressed by music industry representatives, artists, politicians, scholars, journalists, and digital rights organizations. Simply relying on the amount of discussion alone separates the digital phase in music piracy already from the previously discussed domestic phase. The following pages will discuss more characteristics of this phase in music piracy and show among others how it broke the music industry's control over exploiting access to their products. Next to this, this section will map the popular discourse in this phase and discuss some often cited controversies. By doing this, this section functions as a way to complete the discussed history of music piracy and also functions as a precursor to the next chapter that explains how the digital music piracy phase helped to shape today's streaming music services.

As was mentioned in the previous section, the global music industry was quite successful in the 1990s. According to the International Federation of the Phonographic Industry (IFPI) the worldwide album sales increased from \$24.1 billion to \$38.6 billion in this decade. From the turn of the century on, the sales of music began to decrease. As is often expressed by the music industry and its representatives, this decrease seemed to coincide with the proliferation of online file sharing and especially with the success of the P2P file sharing network Napster. How this proposed correlation has been heavily contested will be shown in the following sections. First, what happened in the late 1990s?

Today's concerns of the music industry are based on the unauthorized distribution of music through the Internet. Generally this is described as file sharing which is a "catch-all term for uploading and downloading, and encompasses a range of technologies" (Van Eijk et

al., 2010: 36). The online sharing of music started with the Internet becoming accessible for everyone in the mid 1990s. With a common culture of sharing information, music was also among the information being shared online during the first years of the Internet, but downloading music in the 1990s was a difficult process, involving searching several websites, running into broken links and often requiring registration on these websites (Boorstin, 2004: 4). The emergence of Napster brought a radical change in online music sharing by bringing a community of music collectors to one place, making uploading and downloading very easy and eventually attracting 70 million users (Menn, 2003: 1). Anyone with the software installed on their PC could download songs from other connected hard drives. Because the service was free “the only cost faced by new users was the time invested in downloading the software and learning the well-designed interface” (Boorstin, 2004: 7). Every user brought his own library of shared files and because of this, the value of the service increased with each new user.

3.3.1 MP3

The sharing of music online was made possible through the Motion Pictures Expert Group-1 Audio Layer 3 (MP3) audio format, developed in the 1980s by the German Fraunhofer Institute (Hill, 2003: 4). MP3 compresses audio data, without having to compromise in sound quality. Because MP3 was and still is an open standard, it means that anyone can write a codec that can operate with such files and that no one can gain control over the standard. This also meant that anyone with a computer could rip CDs to their PC hard drives, compress the files to a MP3 format to reduce the storage memory requirement and share the files over the Internet. This process could also easily be reverted by *burning* the downloaded files to CDs that could be played in a regular CD player.

In the year 2000 the RIAA filed a motion against Napster for “engaging in or enabling facilitating or assisting others in the copying, downloading, uploading, transmission, or distribution of copyrighted musical work or sound recordings protected by copyright or state law without the express permission of the rights owners” (US District Court, 2000). Although Napster had to shut down its service in 2001 because of this lawsuit, file sharing via the Internet proliferated and where Napster closed, other networks and file sharing technologies took over and became popular. This lost battle is quite illustrative for the situation in which the music industry has found itself during the last decade. The

proliferation of digital distribution networks, combined with the wide availability of digital technology among consumers, has actually broken the music industries control over the access to their products (Van Eijk et al., 2010). This is one of the most significant trends in the digital music piracy phase that is discussed here.

Much has already been written about the specific platforms on which file sharing took and takes place. Maybe even more has been written about the consequences of file sharing, especially by the music industry itself and by its representatives that spread messages saying that file sharing hurts the sales of music, which negatively influences the music culture itself, a narrative that as was shown in the previous chapters is a well known narrative. But although the music industry seems convinced of the existence of a causal relationship between file sharing and the decrease of sales, reliable numbers on the characteristics and economics of file sharing are rare and academic research does not always support this claim made by the industry.

The research *Building a Digital Economy* is an example of an industry funded research on the consequences of piracy. It was commissioned by the International Chamber of Commerce's (ICC) Business Action to Stop Counterfeiting and Piracy (BASCAP), a unit dedicated to fight counterfeiting and piracy. Although its research method is highly contested (see for example Karaganis, 2010 for comments on this research) it concluded that 1.2 million jobs could be lost due to piracy in the E.U. in 2015 if no effective action would be taken to tackle piracy. In line with this research Alejandro Zentner of the Department of Economics of the University of Chicago in 2003 concludes his research *Measuring the Effect of Online Music Piracy on Music Sales* with the finding that file sharing may reduce the probability to purchase music and may explain an important reduction in music sales (Zentner, 2009: 21).

In contrast with the above mentioned researches the thesis *Music Sales in the Age of File Sharing* of Eric S. Boorstin in 2004 examines the effect of Internet access on CD sales and suggests that file sharing is not the cause of the decline in record sales. Furthermore it concludes that, while file sharing decreases the record purchases of younger people it increases the purchases of older people. A credible research focusing on the broader implications of file sharing for society is the Dutch research *Ups and Downs. Economic and cultural effects of file sharing on music, films and games* (Huygen et al., 2009). This research which was commissioned by the Dutch ministries of Education, Culture and

Science, Economic Affairs and the Ministry of Justice concluded among others that the overall welfare effects of file sharing are robustly positive. Finally the paper *Legal, Economic and Cultural Aspects of File Sharing* by Van Eijk et al (2010) based on the previously mentioned study by Huygen et al. concludes that “in terms of actual cultural diversity and accessibility [two pillars of the copyright law] no signs of impoverishment or the rise of significant barriers” are discovered in their research (Van Eijk et al., 2010: 53).

As can be deduced from the above examples, music piracy and its effect on music sales, national and international economies, and culture itself is a highly debated subject with clear pro and counter bodies. This debate takes place in articles, statements, and researches and has effects in courtrooms and on law makers too. In Europe and especially in the U.S., content industries have taken action in cases where they assumed that citizens violated the rights of authors, artists, and producers. They have organized extensive lobbies and have been mobilizing politicians to make file sharing a violation of the law (Van Eijk et al, 2010). As can be deduced from recent statements by the U.S. Vice President Joe Biden this lobby so far has been successful. In a press conference in June 2010 about the U.S. government’s plan on intellectual property enforcement, Biden said: “Piracy is theft. Clean and simple. It’s smash and grab. It ain’t no different than smashing a window at Tiffany’s and grabbing [merchandise]” (Sandoval, 2010).

The narrative that is used by the music industry, as well as by the U.S. government, again contains the claim that due to piracy cultural diversity will suffer and opportunities will dry up together with the industry’s revenues. These claims however are highly contested. In *The rhetorics and myths of anti-piracy campaigns* (2008) Majid Yar for example falsifies several myths that are used in anti-piracy campaigns. One of the statements that he contests comes down to the statement of Biden. Biden establishes an equivalence between the piracy of intangible property with that of tangible property. About this equation Yar states:

A tangible object ‘can only be in one place at a time’ (Kasten, 2004: 21) and only utilized by one party at a time. This limit to use justifies the prohibition on unauthorized use – if you take my shoes and wear them, I am denied their use. However, intangibles are fundamentally different. The particular expression of an idea can be taken and used by someone else, but this in no way deprives the possessor of the original expression – they still have the original and can make full

use of it. Thus, in the case of digital content (music, movies, software), it can be endlessly reproduced, but this does not entail dispossessing anyone.

(Yar, 2008: 613)

Next to falsify this popular assumption, Yar also contests other *myths* of anti-piracy rhetorics such as seeing property as a natural right, the threat of piracy to individual creativity and the harm done to artists due to piracy. He points out, just as the previous chapters of this thesis did, that many of today's assumptions used in the rhetoric on music piracy can be seen as solid foundations, but also as constructed social myths.

As this section showed, in the digital music piracy phase, the domestic and democratic character that emerged in the domestic music piracy phase is being expanded. Individuals are now able to swap music, not only with their friends, but also with strangers from all over the world that they connect to via file sharing networks. The character of this file sharing is mainly noncommercial and radically decentralized. The proliferation of these file sharing networks, combined with the wide availability of digital technology, results in the fact that the music industry cannot control the access to their products anymore. Since this control over their products is one of the core elements of their business, as was shown in chapter two, the music industry tries to regain control by suing companies and individuals and is actively campaigning against music piracy. In these campaigns it uses a narrative of good and bad guys and argues that music piracy leads to the death of music. This narrative, and the assumptions that are used in this rhetoric, have their history in the era that was discussed in the first two chapters of this thesis.

Despite all the controversies over music piracy and the strong lobby by music industry representatives, the revenue from recorded music sales is still decreasing at the time of writing. Whether or not music piracy is causing this trend, the music industry as well as politicians, artists, and technology companies are searching for new business models that serve the consumer as well as the artist and industry. As will be discussed in further detail in the next chapter, all participants involved in the (digital) music piracy debate seem to claim that the *solution* for all involved parties is to tap into new value creating opportunities: "Reinvention of the business model looks like the only way out for the traditional players in the music industry" (Van Eijk et al., 2010: 52).

4 Streaming music

In the article *Top 7 Disruptions of the Year*, the leading American technology magazine Wired in December 2009 included streaming music in a list of disrupting technologies and characterized the year 2009 as the year in which streaming music really took off. A sign that “the big players recognize that the future belongs not to iTunes and iPods, but to web-based services and connected devices” (Wired, 2010). As is shown in *The art of collecting in the age of streaming music* (Van Ooijen, 2010) this optimistic view on the future of streaming music is not only propagated by Wired magazine, but by many other (popular) sources as well. The research sets forth how in the popular discourse on this new way of consuming music the conviction is often expressed, that streaming music is determined to become *the way* in which we all will consume music in the near future.

As will be shown in this chapter, analyzing the discourse surrounding streaming music does not only reveal this optimistic view on the apparent bright future but reveals another often expressed sentiment: that streaming music might be the *solution* to music piracy. An example of this discourse can for example be found in an online article of the American newsmagazine TIME, that in the article *10 Tech Trends for 2010* stated: “Get ready for your files to start living online, rather than on your computer. [...] Who needs to rip CDs or buy songs when nearly any song imaginable is available, providing you have an active Internet connection?” (Fletcher, 2010: 5). The latest range of online music services provide their users access to databases of millions of tracks that can be streamed for free with advertisements between the songs or without the advertisements for prices ranging from \$5 - \$10 a month. When users start to adopt these legal *alternatives* to file sharing, will this mark an end to the vibrant history of music piracy?

While the streaming music services do look like a good alternative to file sharing, thinking that this new way of consuming music might get rid of music piracy seems to contradict with historical knowledge. As said in the first chapter, practices that nowadays are depicted as piracy go as far back as to ancient Greece and the structural problem of music piracy, although it has been fluctuating as shown in chapter three, has been existent since the birth of the music industry. It is clear that these two visions contradict. As will be shown in this chapter streaming music is already radically changing the way the music industry

works. Also, in line with the described discourse in the digital music piracy era, this chapter will show how the current discourse reveals how several important players in today's discussions point at innovation and a radical change of the music industry in order for it to become profitable again. Is streaming music this radical change and how is this development already changing the notion of music piracy?

In order to find out, this chapter will first set forth the relatively short history of streaming music and give a description of the contemporary business model. Subsequently, the chapter will show how the discourse on streaming music sees this new consumption model as a possible answer to music piracy. It does so by taking several important players in the music and music piracy debate (e.g. music industry representatives, music services, press) and presenting an overview of their views on the relationship between streaming music and music piracy. Arising from this overview is a look at how the music industry and streaming music services look at the latest developments.

4.1 Music online - from distribution to consumption

The terms *streaming music* and *streaming media* are already slowly becoming common concepts for a large group of tech savvy Internet users. Speaking in Internet terms it is already a common term that is getting mentioned more and more every month with *cloud* services successfully emerging in the fields of documents (e.g. Google Docs), online harddrives (e.g. Dropbox) and of course in online music (e.g. Spotify, MOG All Access). Still, streaming music as a new way to discover, organize, and consume music is very young and far from ubiquitous when compared to for example the CD. In fact, iMeem, the service that is being recognized as the service that was first in closing a streaming music deal with all the big labels (Warner Music Group, Sony Music Entertainment, EMI, Universal Music Group) only closed its deal with the fourth and last label Universal Music Group (UMG) in late 2007. Yet, the future seems promising.

Trying to understand how streaming music got established does not involve simply recounting a story of a design office that came up with the idea and produced a streaming music platform. Several trends and technologies have formed today's streaming music culture. In the previously mentioned research *The art of collecting in the age of streaming music* (Van Ooijen, 2010) an extensive overview of the history of streaming music is given, tracing its roots among others to the rise of the file sharing network Napster, that was

discussed in chapter 3. Starting in 1999, the research traces three important vectors in time that helped to shape the technology, the discourse and thus the concept of streaming music as we know it today: the music consumer who is getting used to the ubiquitous and often free access to music, the development of technology that affects the way music can be distributed and consumed, and the music industry that is trying to find new ways for exploiting its music. Instead of recounting the history of streaming music as discussed in Van Ooijen (2010), this section will adhere to a short description of these three distinguished actors. By doing this, this section will show how “the Internet is first used as a new way for distributing music and slowly evolves into a place where music is consumed” (Van Ooijen, 2010: 17).

The first actor that is distinguished in Van Ooijen (2010) is the music consumer who is getting used to the ubiquitous and free access to music, often driven by illegal initiatives. After Napster had to close its service and tried several times to go legitimate, other P2P services successfully continued to facilitate individuals to trade music files with each other. What is important to note is that these illegal file sharing systems were not only popular because they were free to use. As David Y. Choi mentions in *Online piracy and the emergence of new business models* (2007), these services offered important features like a broad selection of music, high quality recordings and were convenient to use. When in 2005 the BitTorrent technology comes along, it allows users to even share entire albums, box sets, and complete discographies. From the second half of the decade on, streaming (music) services start to appear, and with platforms like the video sharing service YouTube individuals are able to listen to online music for free, without even having to download the music to their hard drives. Music online becomes more and more ubiquitous and can often be accessed for free by any individual.

The second actor that helped to shape today’s streaming music services is the development of technology that affects the way music can be distributed and consumed. Apart from the affordability of PCs and a required Internet connection, online services, and technologies like P2P file sharing services, the BitTorrent technology, and streaming video and streaming music platforms like YouTube and Spotify facilitated the ubiquity of music online. Next to this, hardware devices like Apple’s iPod and the iPhone increased the hunger for digital music and mobile access to music. Especially the introduction of the iPod in 2001 introduced a new era in portable music and marked a significant end to the music

carrier. Music from then on could be stored in a machine itself, rather than in a separate carrier that was played by a machine.

Finally, the third actor that is distinguished in Van Ooijen is the music industry, that is on the one hand trying to control illegal ways of distributing music and on the other hand is trying to find new ways to exploit its music. After the dot com crash the music industry is tentative to get involved in online music and all over the world U.S.-style lawsuits begin to appear, aimed at file sharing individuals. Although the music industry during the decade is slowly moving towards digital revenue models, they also try to prevent illegal copying by keeping the Digital Rights Management System (DRM) active on CDs and MP3s. For TIME magazine, Lev Grossman depicts the general opinion about DRM and writes: “Nobody will admit to actually liking DRM. Customers feel retailers are treating them like potential copyright criminals, retailers say they use DRM only because the labels make them. The labels blame us, the customers, for being such filthy music pirates. And around we go” (Grossman, 2007). As Grossman states, the music industry criminalizes all its customers, a move that has negatively influenced their image. When from 2003 on the iTunes Store proves that consumers are willing to pay for digital music when it is done well, the big labels begin to invest and close deals with online music services. As will be shown later in this chapter, the music industry is eagerly looking for new ways to exploit the copyright of their music online and until today, all of the *big four* are also involved as investors in new online music services, such as in the latest generation of streaming music services (e.g. Deezer and Spotify).

These three distinguished actors together helped to shape today’s emerging streaming music culture and when discussed in succession it becomes clear that the Internet during the first decade of the twenty-first century has slowly been shifting from a medium that is used to *distribute* music to a medium that facilitates the *consumption* of music. But will this shift also mark the end of the digital music piracy phase?

4.2 Streaming music as a solution for music piracy?

When iMeem closed its deals with the big four in 2007, its users got access to a streaming music library consisting of five million songs. In comparison, iTunes at that time had six million tracks available (Schonfeld, 2007). Since then, the average size of streaming music catalogues has been increasing and at the time of writing the latest press releases from

streaming music services state that they are offering their users access to catalogues consisting of 7-10 million tracks, while iTunes has about 11 million tracks available worldwide. With this amount of songs available for \$5-\$10 a month or sometimes even for free (with advertisements interrupting the music though), who needs to illegally download music? Why would anyone want to search for music via file sharing networks and take the time to download the tracks in MP3 format to their hard drives when he or she can also enter the name of the artist and the title, click on “search” and stream the full discography of an artist without having to store the music and with the possibility to organize their music collection online?

The above reasoning on itself sounds logical, especially when considering that most of the services next to these large catalogues offer their users also easy ways to share music with friends by connecting the services to social networks such as Facebook, offer ways to organize music into playlists, have mobile applications with offline syncing options, similar artist recommendation systems, and have many many more features. Again, when taking into account the previous chapters in which it was made clear that (music) piracy has been existing throughout history, thinking that music piracy will simply come to an end due to a new method for consumption sounds at least very unlikely.

When analyzing the discourse on streaming music, even the main players in the music piracy debates (the music industry and its representatives, politicians, researches, press) seem to agree that the new streaming services provide a reasonable *alternative* to music piracy. How do the main players in the music piracy debates see streaming music and connect it to music piracy?

4.2.1 The discourse on streaming music

In *The art of collecting in the age of streaming music* (2010) it is shown that the discourse surrounding streaming music focuses on a problem and a solution:

The ‘problem’ is the limited amount of storage space on several devices such as the PC, the portable music player and the mobile phone. Another problem is not having access to all music possible, something that is perceived to be possible when having access to streaming music. The solution of these problems lies in [the idea] of always being connected and by being connected having access to everything. When this idea is applied to music, the discourse that results from this is a future in which every individual always has access to all the music, and if possible for free.

The desire, and maybe even expectation, of having access to information, or more specific to music that is visible in this analysis of the discourse is also echoed in other reports, books, and statements. One of them for example is Lawrence Lessig's influential book *Free Culture* (2005). Another one is Matt Mason's *The Pirate's Dilemma* from 2008 that states that pirates force big business and government to deliver what we want, when we want it (Mason, 2008: 38). But also Jon Webster, chief executive of the Music Managers' Forum, which represents artist managers in 14 countries all over the world, in February 2010 acknowledges this sentiment and stated that: "New media has to give the consumer what they want and the consumer is in a world where they want things right here, right now - and if you don't give it to them, they'll steal it" (Youngs, 2010). Also in the report that the Workgroup Copyright in June 2009 submitted to the standing Dutch committees of Justice and Economic Affairs this sentiment is echoed. In this report about the (future) bottlenecks of copyright they report on the behavior of consumers and state that the music consumer assumes that everything on the Internet is free (Rapport Gerkens, 2010: 37).

As was explicated in chapter two, the music industry is best defined as a copyright industry. With the Internet facilitating the free flow of information via all sorts of networks, the main question for the music industry these days therefore is how to regain control or how to find new methods to exploit the copyright in their music. The music industry is not alone in devising new online business models and many reports and researches on music piracy conclude with a recommendation for the music industry to innovate and look out for new online business models (e.g. Gerkens, 2009: 39, Van Eijk et al., 2010: 52, Gallo Report, 2010: 12). One of those new online music business models seems to be online streaming music.

When scrutinizing the statements, decisions and actions of this music industry and its representatives, it appears that the industry itself is fairly positive about this business model as being a solution to regaining control and stop the decline in music revenues. During a press conference of the IFPI's digital music report in January 2010 Rob Wells, the Senior Vice President Digital of Universal Music Group (which has a stake in Spotify) stated: "Spotify is a very sustainable financial model - full stop" (Cellan-Jones, 2010) and explained that the streaming music service could pay the label a share of the proceeds from subscriptions and advertising, rather than on a per-track basis. The largest record

company of the world seems to have confidence in streaming music. Another representative of the label's digital division, Francis Keeling, in May at the Great Escape Conference in Brighton stated: "Spotify has been a big success [...] it works off [Spotify's] freemium model, which was always a big jump for us – to let consumers access music for free, and get them off pirate services, with the aim of getting them up the ladder" (Music Ally, May 2010). Interestingly, this quote reveals that the company sees streaming music services as a method to lure away consumers from file sharing networks.

In reports by the music industry's representatives such as the IFPI, the sentiment about streaming music services also sounds positive. In the *IFPI Digital Music Report 2010: Music how, when, where you want it* John Kennedy, Chairman and Chief Executive of the IFPI, states: "In 2009 globally, for the first time, more than one quarter of record companies' revenues came from digital channels. Fans can acquire tracks and albums in ways inconceivable a few years ago – from download stores, streaming sites, subscription services, free-to-user sites, bundled with their broadband or a mobile phone handset". After this optimistic start however, the report immediately connects these new online revenues with digital piracy and continues with: 'It would be great to report these innovations have been rewarded by market growth, more investment in artists, more jobs. Sadly that is not the case. Digital piracy remains a huge barrier to market growth' (IFPI Rapport 2010, 3). The IFPI is positive about streaming services but sees piracy as a barrier for the success of these new business models (which is measured in market growth). But could the streaming music business model in itself be regarded as the antidote to music piracy?

In the IFPI Report 2010 the Spotify founder Daniël Ek is also interviewed. In this interview Ek explicates the goal of Spotify:

When I launched Spotify, I felt there was an inconsistency between how people consumed music and the way the business model worked. We are now using technology to bridge a business problem and make it more accessible for consumers to get music. At the same time, the protection of the content is important so that the revenues derived flow back to the artists. Spotify's primary objective is to migrate illegal file-sharers to its service, shifting 15-25 year old music fans to a legal model that puts money back into the creation of new music.

(IFPI Rapport 2010, 14)

As this quote shows, the founder of one of the most successful streaming music services also connects file-sharing to streaming music, similar to the opinion of UMG. Streaming music could be an alternative to file sharing. Interestingly, Ek uses the music industry's rhetoric here, by relating revenues from streaming music services directly to the creation of music.

While the sales of music have been declining for all the big labels, especially EMI is having a hard time to sustain its business. In *The Sunday Times* in March 2010, Alexi Mostrous writes about the financial problems that the comprehensive rights management company has and writes down the often used (but heavily contested) arguments to explain this crisis in the music industry: "the Internet is the big battleground. Piracy remains rampant, with more than seven million illegal file-sharers in Britain alone. [...] Albums, which bring in the most amount of revenue to record labels, have been hit by digital websites such as Apple's iTunes that allow users to "cherry-pick" their favorite singles. Falling revenue has had an inevitable effect on talent." (Mostrous, 2010). What is especially interesting is that the *Sunday Times* subsequently describes two approaches for the contemporary crisis in the music industry: "The desperate situation has pre-empted two radical approaches: labels have invested in new subscription services such as Spotify, and artists have increasingly moved towards corporate sponsorship" (Mostrous, 2010). After describing the recurring narrative of decreasing music sales and music piracy the article names subscription services such as Spotify as a radical approach to counter the decline, next to letting your band be sponsored by a brand.

In this article Ek is also interviewed. He, as can be expected, expects his business to see an impressive growth the coming years and states: "By 2012 half of all telephones will be smart phones and we'll see impressive growth in 'access' music services such as Spotify" (Mostrous, 2010). Although the founder and main stakeholder in a streaming music service is not the most objective source for predictions about the future of streaming music, the argument about mobile streaming applications that he gives notably is also addressed in the previously discussed IFPI report that states: "this convergence of services and devices, opening up new revenue channels is expected to accelerate" (IFPI Report 2010: 5). Smartphone adoption is increasing rapidly and this development is also used as an argument for the bright future of streaming music. Can mobile streaming fulfill the previously mentioned desire to always have access to all music?

Next to the music industry and the heads of streaming music services, popular (technology) press also seems to agree with streaming music being a reasonable alternative to file sharing. By all means it reports quickly and optimistic about facts that are provided by developments, researches and surveys. In July 2009 The Guardian for example eagerly stated “teenagers switching to streaming sites” and “Spotify and YouTube lead the way as habits change” in an article that followed from the results of a survey among 1,000 “fans” that revealed that 65% of the respondents streamed music regularly (Topping, 2010). Another survey of which the results spread fast on the Internet, was a survey commissioned in 2010 by Aspiro, a company that owns a subscription service in Norway and Denmark. This survey revealed that 54% of the respondents said that since using streaming music services, they no longer download illegally. Although the validity of the results of a research commissioned by an owner of a streaming music service itself can be challenged, these results were eagerly published on well read technology and music websites such as MusicAlly, Billboard, and Hypebot, starting discussions about the relationship between streaming music and music piracy.

When analyzing the discourse on streaming music, this reveals that streaming music is already influencing the discourse on music piracy. Heads of the big labels present streaming music as a possible new direction for the music industry and introduce streaming music business models as an *alternative* to music piracy. This view of seeing streaming music as an alternative to file sharing is also supported by the streaming music services themselves, that even claim that the goal of their service is to lure people away from file sharing services. Finally, the (technology) press is also introducing streaming music as a possible alternative to music piracy, and even uses the predominantly positive results of somewhat biased researches, that are funded by streaming services themselves. Reasoning from this discourse, one could therefore say, that the popular opinion sees streaming music as a reasonable alternative to music piracy.

Streaming music: the end of music piracy?

In this thesis an archaeological analysis is given of the main concepts that together form music piracy. This archaeological analysis was used both to get a better understanding of what music piracy actually is, and as a method to shed light on the way streaming music might be used as an alternative way to trigger a change in the way music piracy is perceived. The concepts that were analyzed were piracy itself, the notion of copyright, the music industry, and streaming music.

What has become clear from this is that the structural problem of music piracy is mainly a *rhetorical* problem. Indeed, piracy can only be regarded as a problem, with the presence of an influential player in the discourse that condemns and designates the illicit copying of intellectual property, in this case the illicit copying of musical ideas. If such a player is not present in the discourse, then the structural problem of piracy does not exist, even when the practices that *can* be designated as piracy are present. This has been further explicated in the third chapter, in which it was made clear that piracy, or rather the practices that are *designated as piracy* today, were not seen as piracy and were even regarded as the standard before the advent of a music industry. These practices were not identified as piracy, therefore music piracy did not exist.

As a result, when looking for a solution to music piracy, new technologies are not the primary actors to look at. When wondering if a new technology will mark the end of piracy, then the answer does not lie in the specific properties of this new technology. It does not lie in the extent to which the new technology prohibits certain activities or is capable of exerting a certain degree of control over the way content can be copied, edited or distributed by the consumer. The question that should be asked in these situations, is whether or not a new technology is able to change the dynamics within a complex network of expressions, influencing the players that condemn and designate certain activities so that they change their views and by doing that change the rhetorics on these activities. Piracy is a rhetorical problem and solving it can only happen through a change in rhetoric.

If the above statements are applied to streaming music, and when wondering if this technology can change the way music piracy is perceived, then one should not speculate whether streaming music will make people stop copying CDs, download songs from P2P

networks or post music online without permission. As shown in the foregoing chapters the practices that can be designated as piracy are existent throughout history, and speculating that these practices might just disappear suddenly is very unlikely and moreover an irrelevant forecast. The practices that can be charged with the term music piracy are not intrinsically piratical. Hence, instead of trying to make all these practices disappear, a change in rhetoric would also diminish the problem of music piracy. Therefore, the question that can and must be posed is whether streaming music can cause a drastic change within the discourse on music piracy.

Many of the assumptions that are used in this discourse surrounding music piracy can be considered socially constructed myths. These assumptions are very influential and have their roots in the seventeenth, eighteenth and nineteenth century print industry. The metaphor of tangible property for immaterial property, the author as a creating genius, and the need to protect the author against pirates who want to steal his work are persistent assumptions, that have often been used by the music industry and its representatives to justify their arguments to condemn the practices that they call music piracy. Even in today's latest political reports these assumptions keep on appearing. Many of these constructed myths have been and still are used in the recognizable good-guy bad-guy narratives and subsequently approach music piracy as a problem not only for the music industry but for music itself. This while in reality the music industry deploys these kind of narratives to protect their opportunities to exploit their copyrighted music.

Despite this strong narrative, the control of the music industry over the distribution of copyrighted products has been fluctuating since its advent. Indeed, full control over the distribution has never existed as was shown in chapter three. It is probable that a time with full control over the distribution of music will also never occur. What was also shown in chapter three is that there have been times in which music was placed in the market in such a way that there were less incentives to pirate music. In these times the structural problem of music piracy is less significant. The industry had no foresight of losing control or losing revenues and because of this, there was no need for anti-piracy campaigns. This resulted in a near disappearance of the structural problem of music piracy during these periods. In contrast with this are the periods when the music industry *had* lost control, or had the foresight of losing control over the possibility to exploit their copyrighted music. Losing control could mean a potential loss in revenues, and increased the need for

campaigning against music piracy. By using these anti-piracy campaigns, music piracy could be (re)established as a structural problem.

During the digital music piracy phase the music industry has found itself in a difficult situation. Control over exploiting copyrighted music is lost, and revenues have been decreasing. Marketing campaigns and strong lobbies have been used to stimulate certain ideologies to increase the chance of an enforcement or expansion of copyright legislation. This, with the hope to regain control, or at least to gain more time to find new value creating opportunities. The amount of anti-piracy campaigns and discussions about music piracy has been increasing and because of this the image of music piracy as a structural problem has only become more persistent. Again, piracy is a rhetorical problem, and solving it can only happen through a change in rhetoric.

As said in chapter four, the music industry, as well as political reports, and technology companies, are searching for new business models that serve the consumer, as well as the artist and the industry. Reports and various researches advise to look into new business models and to radically change the current business model: a business model that is based on controlling the access to music, which was possible and had its heyday in the discussed industrial and domestic music piracy phase. The music industry seems to respond to this advice by collaborating with a few new streaming services as shareholders. These new services drastically end with old ways of doing business in the music industry that have been existing for decades. Instead of exploiting music through the controlled sales of singles and albums, a business model that made sense in the industrial, domestic, and a part of the digital phase of music piracy, the business model of streaming music is different. It is based on providing (free) access to an enormous catalogue of music, a business model that obeys the desire of having free access to all music everywhere. Monetizing this access until now has been achieved through advertisements and subscription plans. Music is presented as a *service* instead of as a *product*. Can this new model of exploiting music trigger a change in the way we think about music piracy? It is this new model of exploiting music that is already triggering a change in the discourse on music piracy. It is very likely that it will continue to do so in the future.

Streaming music already changes the rhetoric that is expressed by the the music industry itself. It is presented as an *alternative* to music piracy. Hereby it seems as if the industry is competing directly with piracy by satisfying and incorporating desires that were introduced

by file sharing services. These desires are not only the usually mentioned free access to music. Other desires such as having access to a large library of music and having the opportunity to connect and share music with fellow music consumers are incorporated as well. In chapter four a representative of the Universal Music Group, the biggest record company in the world, was introduced who stated that the transition to a business model in which music is presented as a service instead of as a product, was (and probably still is) a big jump for the music industry.

This big jump is changing the dynamics within the music industry and also marks a big change for the music consumer. This affects the discourse on music piracy and will continue to do so in the near future. A change in the discourse on music piracy means that the way music piracy is understood is also shifting. The question that arises from this is how and to what extent this meaning will continue to change in the near future. However, the incredible speed at which the online (music) landscape evolves, makes it hard to predict what this change will look like exactly. Moreover, giving a detailed look on this current and possible future changes was never the outset of this thesis.

How this change and the next phase in music piracy will look like exactly has to be made clear in future empirical discourse research but one of the things that can already be expected to change, and that will have a big impact on the way music piracy is understood, is the often heard anti-piracy phrase “music piracy is theft”. As music moves away from being a commodity to being a service, this argument, an important cornerstone of the anti-piracy rhetoric, will no longer be a valid argument against music piracy. If music is no longer seen as a product, it becomes impossible to steal it. Depicting music piracy as theft will therefore soon become outdated and non-usable.

It is clear that a transition is taking place in music consumption and that music is entering a new phase with changing dynamics. The music industry is forced to play along with this transition, as it is one of the few options that the industry has for meeting the desires of the general public. Because of this transition the rhetoric on music piracy is changing too and will continue to do so in the future. As this rhetoric is one of the most influential elements in the discourse on music piracy, the way music piracy is understood is changing too. Finally, one might say: not copyright enforcement, but streaming music is able to kill music piracy. At least during the coming years.

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