

## My opinion regarding the MP3 “scare”

**Date:** June 27, 2005

**From:** Nick Temple, eCommerce Specialist

Dear Internet Business Owner,

Here’s the deal: I’ll be as factual and honest as I can on this subject ... But, If I screw up I’ll need a legal defense fund ... and you’ll help out, right?

**DISCLAIMER: I AM NOT A LAWYER.** I do not belong to the local BAR, and have never sat for the exam. Check everything I say (or anything else you may read or hear) with **your own competent** legal counsel. And I do stress those words: “your own” and “competent”.

Now on to business.

Last night I received “one of those letters”. You know, the ones from Jim Davis at Tiger Investigations threatening legal action for “slandering” his client in a “public forum” (if anything, what I *wrote* would have been libel, not slander – slander is **verbal**).

One of those letters someone gets whenever they question Joe Clayton’s business practices in a “public forum”. Of course, the few sentences in the “PS” in question was sent to my **private** email list, never mentioned Joe Clayton, and said nothing untrue.

Here’s the PS: In question:

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> PS: Don't be taken in by the recent MP3 FUD (Fear / Uncertainty
> / Doubt) some purported "expert engineers" are flinging around.
> Yes, there is a patent on the MP3 format, no, most Internet
> Marketers are NOT in violation of the licensing terms.
>
> Look for my special FREE report next week, when I reveal the
> facts about MP3 patents and what you need to do - if anything
> - to protect yourself. In the meantime, converting all your
> current audios to another format is most likely a waste of time
> and money - and can lose you market share to those "in the know"
> who will continue to use MP3's on their website, with great success.
>
> I can't say more, until I get my facts double-checked.
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If you want more information on the tactics I’m referring to, Google for:  
“Joe Clayton” Tiger Slander  
(all one query)

Then, do some of your own research, if you’d like.

Read on to find out why I claim ....

**MOST Internet Marketers are NOT in violation of the licensing terms ...  
and switching from MP3 – for the wrong reason – could be like slitting your own  
throat**

Before talking about the MP3 patent issues directly, I'd like to mention some background information about myself, to establish my biases and credibility so you can be the judge. Let's go ...

I've been working in software for over 20 years now - 15, professionally, and 10 online. I've published professional articles on Perl.com, PC Techniques, Visual Developer Magazine, and a few other journals as well.

By 1994 I was doing development on the leading edge of Internet startups, with companies like DigiCash (the developers of eCash), PaymentNet/Signio (purchased by Verisign for \$670 Million), and Virtualis (purchased by Hosting.com) and quite a few other companies you'd probably recognize. I've held management positions as well as technical ones, usually reporting directly to the CTO or VP of Technology of small startups (that usually "got big quick").

One tough time we had while I was Director of Integration Services with Signio, was with the Secure Sockets Layer code we used in the PayFlow Pro client application. We used the SSLeay open-source toolkit to handle encrypted credit card transactions.

There were two issues: first, RSA Data Securities owned a patent on a portion of the technology, and second, there were all kinds of regulations regarding export of strong encryption.

I worked closely with company legal council to help solve those problems. To better understand what follows, I'll tell you now that we **did** negotiate a patent license with RSA.

I also founded, as CEO, CommerceStore.com based on the code and customer base of the PayPortal service, originally run by PaymentNet/Signio before they were purchased by Verisign. PaymentNet couldn't run a shopping cart and payment gateway too – because they'd compete with their sales channel. So I took over.

Note: The domain, CommerceStore.com is now a private-label of 1ShoppingCart, and I am affiliated only as a part-owner of the private label site.

This has bearing only so that I can show that I have real life, corporate business and technical experience that directly relates to the critical MP3 patent issues facing Internet businesses today. And I'm not trying to sell you anything (related to MP3's, anyway).

Now, for my bias.

## ***On Patent Law***

Since about 1989, when I first became aware of software patents (and so called “business process” patents), I was against them. And, philosophically, I still am.

The thought that someone could patent the idea that you can use well-known mathematical construct called “exclusive-or” (XOR) to make a cursor flash on the screen was simply ludicrous in my mind.

I came up with that concept on a Commodore 64, independently, before I had entered puberty – but to use it, I had to pay a royalty? *Give me a break.*

That’s Patent #4,197,590 – you can find it online, and read it if you like.

From a business standpoint, I also believe that the patent system is outdated and actually stifles innovation, the opposite of what it was intended to do. I won’t debate that point here.

(Below quotes used, without permission deemed as “fair use”)

[http://www.softwarepatents.co.uk/past/how\\_the\\_us\\_got\\_there.html](http://www.softwarepatents.co.uk/past/how_the_us_got_there.html)

“So, in 1998, in black-and-white, the Courts acknowledged that patentable matter included everything under the sun. In one fell swoop, not only were software patents clearly patentable matter, but business methods, mathematical formula, everything. The previous worries about being hoodwinked by skilled draftsmen were long forgotten, there was no more loophole: the Courts now clearly stated that anything, and everything, was fair game.

Patents – and royalties –are now a fact of life, my opinion and anyone else’s be damned. Folks, that’s the way it is.

I won’t address the WTO and TRIPS issues, in this article, it’s already going to be much longer than I intended. Again, it’s our own government that is causing the problems.

## ***On Open Source***

I love open source, and have quite a few projects of my own, and many projects I’ve worked on, too. I believe the concept is incredible, and support open source efforts 100%. That does not, however, cloud my business judgment.

Open Source works in some cases. In other cases, it does not. Usually for **business** reasons rather than technical, as is in the case with most audio software.

## ***The MP3 Patent “Problem”***

In a nutshell, when someone uses the MP3 format to deliver audio, they are required to pay a royalty to the patent owners Thomson and Fraunhofer.

Most online business people aren't aware of this, and aren't paying the appropriate royalties, if they are due – these people could be in serious financial trouble, if action is not taken to correct the issue.

**The problem is real.** It is with the spin – marketing hype aside – which has been presented recently that has prompted this report.

I also take *serious* issue from a business standpoint to the proposed solution.

## ***The Claim – Entities making under \$100k do not need a MP3 License***

My claim is that MOST Internet Marketers are NOT making more than \$100k per year, and are NOT required to pay royalties. And for those that are, there are other, arguably better alternatives than jumping off the MP3 ship. Especially if you are already successful at what you are doing, today.

You can read the online press releases about the patent by Googleing (is that a word?) for: “Internet Marketing MP3 Patent”

While a certain amount of Internet Marketing hype is to be expected considering the source, please read the release closely ... I'm sure that you will find some things that just don't add up. At least, they don't for me.

From the Thomson website, there is a clear description of who must pay royalties:

- 1) Hardware vendors
- 2) Software Tool creators – those that embed MP3 encoding / decoding into their software. Two issues here: make sure the tools you used are licensed appropriately, and if you actually do create MP3 tools, seek legal advice.
- 3) People who distribute MP3's – that's most of the rest of us.

But, for case #3, there are a few exceptions:

***Note:*** *No license is needed for private, non-commercial activities (e.g., home-entertainment, receiving broadcasts and creating a personal music library), not generating revenue or other consideration of any kind or for entities with an annual gross revenue less than **US\$ 100 000.00.***

Please re-read that: *entities with an annual gross revenue less than US\$ 100 000.00 - No license is needed*

See: <http://www.mp3licensing.com/royalty/emd.html>

So, if your business entity is making less than \$100k per year, and my claim is that **most** of the 1.4 Million Internet Marketers, who generally do this part-time in their spare time are **NOT** making 100k or more annually, *no license is required.*

Let's get business legal – you *are* running your online business from an LLC or corporation, correct? If you are a sole proprietor, and your total gross revenue (including paychecks) is more than 100k, you may need to pay royalties – check with your attorney. I believe that legal theory is a little far fetched, myself. But, and I get tired of saying this, *check with your attorney.*

Or spend a couple hundred bucks to set yourself up an LLC, and get your ducks in a row. *This is an extremely good idea, anyway.*

Now, let's be more pragmatic: why doesn't Thomson collect royalties on the small change? Because it's not profitable to go after entities with few assets, and never will be. After a judgment is rendered, they still have to collect to actually get paid. Even attorneys can't squeeze water out of a rock.

Now, Thomson could bankrupt themselves going after people without assets just to prove they can, but chances of that, IMO, are pretty damn slim. This whole licensing deal is a *business venture*, after all.

*The WTO may change that equation slightly, hitting a few “high profile” cases, but there's a limit to the number of good lawyers that work for free.*

If you ARE making more than \$100k in your online business, then congratulations! You already have multiple business entities in place for protecting your ass-ets, right? The exact same “don't own anything, lease everything” strategies can apply, here. Check with your own attorney and asset protection specialist on how to protect all your intellectual property, and possibly reduce your MP3's royalties – very likely down to zilch.

## ***A Proposed Solution***

One solution bandied about the Internet recently has been to move to a new, open source format called Vorbis Ogg. Vorbis Ogg is really cool technology, but has some **business** problems to overcome:

First, MP3 is wide-spread and accepted, *today*. It plays in personal MP3 players, car CD players, and even on many DVD systems. MP3 can be streamed, or downloaded, or put on CD and mailed. It's small. It sounds really good.

As a consumer, I'm going to choose MP3's when I purchase over a product in Vorbis Ogg format every single time – at least, today.

Imagine “Great Marketing Course from Internet Expert A”.... in Vorbis Ogg format or, “Great Marketing Course from Internet Expert B”, in MP3 format.

Most other factors being equal, I'll go with “B” every single time. As I said before, my time is limited, and MP3 is just so damned convenient.

Is it worth 2-3% (or less, depending on how you've structured things), to lose your customers to the competition?

From a consumer perspective, I'm not going to be switching very soon – until all those devices I already own support the new format (which they may, eventually).

Are you really going to cut your throat in your niche markets like this?

Fees? If you setup your organization correctly, there may not be any. Sure it's going to cost a few hundred dollars to get your paperwork setup, and if you are extremely successful you'll have to pay up to 3% in royalties (but check with your asset protection specialist on that one, too).

That's today's business world, folks. And it's only going to get worse – patents are here to stay, and there are more headaches where this came from.

Here's the **real** problem though:

Thomson / Fraunhofer has stated in the past that they believe the Vorbis Ogg format infringes on their patents (and they have quite a portfolio):

<http://www.mp3licensing.com/patents/index.html>

More recently, Thomson executives stated that Vorbis Ogg is “not on their radar”. I read this as meaning “there's no big fish to fry, yet”. Though it could mean that they are backing down because Thomson has no case – it really *is* possible that the Vorbis Ogg technology is “patent free”.

Some analysts (and I tend to agree with them) believe that as soon as Vorbis Ogg is adopted by enough people, and it's a big enough threat to MP3, Thomson will attempt to find some patent that they can claim Vorbis Ogg infringes, and the lawsuits will begin in earnest.

Who knows if they'll win? But that's the climate you could be in if you jump on this proposed bandwagon today.

If you are going to attempt to evade the MP3 "tax", *why on earth* would you go with a solution that is likely to be fraught with more legal battles and patent claims than MP3 ever was?

### ***Other Solutions***

There are 10's of audio formats out there: solutions from Microsoft, RealMedia and many, many others. If you've been scared off of MP3 by this marketing campaign (which is a real shame, if so), do yourself a favor and research / license a technology that is proven, rather than jumping onto a ship only to end up in deeper water.

Or, stick with MP3.

Research your options, talk with your attorney, and make the sound business decision that is right for you – from a position of knowledge and power, not hype.

And, think about this. Patents are here to stay: *"As of March 2003 there were over 50 million published patents worldwide, with approximately 700,000 applications filed yearly (i.e., 20,000/week)."*

How you handle this business challenge will set the tone for how you handle all your patent issues in the future.

What precedent do you want to set for yourself? Jumping ship?  
Or finding legal solutions to legal problems?

### ***My Original Alternative***

When I first heard about this problem, I was excited. What if, I asked, I started a company that acted as an intellectual property holding company; let's call it "Audio Distributors Inc" (or some-such). Our customers would upload the audios and assign the distribution rights to us for consideration. Hell, we could even create tools to record the audio directly to our servers.

We would then convert them to MP3's (if needed), and license back the content either streamed, downloaded or on CD's that we produce on the customer's behalf.

We would pay the royalties due – 2-3% of the revenue of the intellectual property arm of the company for the right to distribute the MP3's..

Maybe we'd even create a "Legal MP3" logo people could use on their sites.

The charge would be minimal, about the same as a hosting account, I'd guess – maybe a little more to cover bandwidth and disk. That would alleviate many problems traditionally associated with audio files:

First, all audio formats consume an incredible amount of bandwidth. Since we would be distributing it, we'd handle all those pesky server issues, and let you concentrate on what you do best – making hot selling, valuable, info-products.

Second, we'd handle the technical aspects of converting audio to MP3, creating “streaming” and “downloadable” links for you to use on your website, in emails, etc but we'd be the distributor – the customer would be a licensee, just as Nike® licenses the name “Nike®” from a company that specializes in intellectual property protection.

There's a lot of upsell and back-end potential to this company, too.

I'm pretty sure this concept is on sound legal and business footing, but check with an attorney to be sure before moving forward with the project.

I do not plan to start this company – that would taint my credibility on this issue, and I'm damned if I'm going to let the current pervasive FUD throw “millions” of people into a tipsy without at least some voice of reason being spoken, if not heard (or should that be “witten”?)

If you do take this concept and go with it, I'd like to hear about it. I promise not to patent this “business process” just to collect the royalties.

### ***In Closing ...***

I have re-read this letter many times, and believe that everything I've stated is either my own opinion or factual and provable, and that there are no libelous statements herein. I am simply presenting an alternate view of reality that fits with my interpretation of “good business sense” regarding the real, MP3 issues as I understand them. (*waffle, waffle*)

Yet, based on past track record, I expect to hear back from Tiger, shortly ... May I have your support?

### ***The Pitch***

Here I was going to sell you an MP3 hosting account, but that's out ... let me spread some of my own FUD (Fear / Uncertainty / Doubt), instead.

Recently, I've been seeing more and more Internet Marketer's servers hacked, and I am currently writing a report on what you can do about it. The fee for this report is \$97.00, today. Please, read what I am saying in the sales letter, and if you agree that this is a solution to a real problem you face, go ahead and purchase the report.

<http://www.DontGetHacked.info>

## ***Resource Box***

Nick Temple is an e-commerce and security specialist that has been practicing online for over 10 years, since 1994. Some previous clients include Verisign, Sun Microsystems, and Coupons.com His new website, <http://www.DontGetHacked.info> reveals that Internet Marketers are prime targets for hackers, and what you can do to stop them cold.

## ***Distribution Rights***

You have my permission to publish this letter in any form, online or off. You may delete the sections “in closing” and “the pitch” if you must, but please leave the rest intact (or get written permission from me before publishing). I also ask that you not claim this work as your own – or you may get a “slander letter”, too. If only bits could speak ...

To your business success,

Nicholas L. Temple III  
(Nick Temple)  
[nickt@nicktemple.com](mailto:nickt@nicktemple.com)